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DISCUSSION OF RECENT DECISIONS

AUTOMOBILES—OFFENSES AND PROSECUTIONS—WHETHER A PERSON WHO DRIVES AN AUTOMOBILE WITH KNOWLEDGE OF POSSIBILITY OF SEIZURE LIKELY TO CAUSE LOSS OF CONSCIOUSNESS MAY BE CONVICTED FOR STATUTORY OFFENSE OF RECKLESS HOMICIDE BECAUSE HE CAUSES DEATH OF ANOTHER DURING A PERIOD OF UNCONSCIOUS DRIVING—In the recent New Jersey case of *State* v. *Gooze*,[1] the defendant was tried and convicted on a charge of violating a state statute which penalizes the conduct of a person who causes the death of another while driving a vehicle carelessly

[1] 14 N. J. Super. 277, 81 A. (2d) 811 (1951). Bigelow, J., wrote a dissenting opinion.

or heedlessly or in wilful and wanton disregard for the rights and safety of others.[2] Approximately one year prior to the accident in question, defendant had an attack of a disease characterized as Meniere's Syndrome which, for all practical purposes, possesses the same characteristics as that of epilepsy.[3] Following that attack, the defendant visited a physician, was advised that he might suffer a recurrence of the disease, and was told that, if he continued to drive an automobile, he should not drive alone. The evidence in the case also tended to show that just prior to the collision between the defendant's car and the automobile of the deceased, defendant's car was approaching from the opposite direction on the wrong side of the road, with defendant slumped beneath the steering wheel suffering from a recurrence of the earlier disease. It also appeared that, prior to the collision, defendant had had only the one attack of the malady, being the one a year earlier, and had resumed his regular work as foreman in a trucking office. On appeal by the defendant to the Superior Court of New Jersey, Appellate Division, that court affirmed the conviction, basing the decision on the interpretation it gave to the state statute as applied to the defendant's conduct.

At first glance, it might be supposed that the factual situation thus presented would be one which the courts would have thoroughly covered, for literally thousands of criminal prosecutions have been predicated upon the negligent or reckless acts of automobile drivers. Search through the statutes of the American jurisdictions does reveal that at least twenty-five of them have enacted some form of "negligent or reckless homicide" statute in order to deal with the increasing number of deaths arising from negligent or reckless operation of automobiles.[4] More revealing, however, is the fact that, while many cases have been decided under these statutes,

[2] N. J. Stat. Ann., 1949 Supp., Ch. 138, § 2:138—9.

[3] Both conditions cause dizziness to such a degree that persons afflicted frequently "black out" for varying periods of time.

[4] Ark. Stat. Ann. 1947, Ch. 10, § 75—1001; Cal. Deering Pen. Code Ann. 1949, Ch. 1, § 192; Colo. Stat. Ann. 1935, Vol. 2, Ch. 48, § 39; Conn. Rev. Stat. 1949, Tit. 17, Ch. 110, § 2415; D. C. Code 1949, Tit. 40, Ch. 6, § 40—606; Fla. Stats. 1941, Tit. 44, Ch. 860, § 860.01; Ida. Code 1949, § 18—4006; Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, § 364a; Burns' Ind. Stat. Ann., 1949 Supp., Vol. 8, Ch. 2, § 47—200; Kan. Stat. Ann., 1947 Supp., Ch. 8, Art. 5, § 8—529; La. Dart Crim. Code 1943, Tit. 2, Ch. 1, Art. 740—32; Flack Md. Code Ann., 1947 Supp., Art. 27, § 436a; Mich. Stat. Ann., 1949 Supp., Ch. 286a, § 28.556; Minn. Stat. 1945, § 169.11; N. H. Rev. Laws 1942, Ch. 118, § 12; N. J. Stat. Ann., 1949 Supp., Ch. 138, § 2:138—9; McKinney's N. Y. Cons. Laws Ann. 1943, Penal Law, Art. 94, § 1053a; Page's Ohio Gen. Code Ann., 1949 Supp., § 12404; Ore. Comp. Laws 1943, Ch. 4, § 23—410a; S. C. Code 1942, Ch. 78, Art. 1616, § 29; Vernon's Tex. Penal Code 1936, Arts. 1230—43; Vt. Stats. 1947, Tit. 47, Ch. 435, § 10,286; Remington's Wash. Rev. Stat. Ann., 1941 Supp., Tit. 4, Ch. 9, § 6360—120; Wis. Stats. 1947, Ch. 340, § 340.271; Wyo. Comp. Stats. Ann. 1945, Ch. 60, § 60—413.

none up to the present time has directly dealt with the point here under discussion,[5] *i.e.* whether the defendant must be conscious at the time he drives negligently or recklessly.

Statutes of the kind in question are of a criminal nature,[6] so it is necessary, in order to convict an accused person of criminal negligence, that the negligence must be something more than, or greater in degree than, the negligence which would be sufficient to impose civil liability.[7] As stated in the New Jersey statute, it is customarily necessary to make a showing that the defendant drove his automobile "carelessly and heedlessly in a wilful and wanton disregard of the rights or safety of others" at the time he causes the death of another. The sole question, then, in a case like the instant one, is whether the conduct of the defendant, driving a car under the facts previously stated, could be said to constitute a wilful or wanton disregard of the rights or safety of others.

Courts are, practically speaking, in unanimous agreement that there is a distinction between wilful conduct on the one hand and wanton negligence on the other. To constitute wilfulness there must be design, purpose, or intent to do wrong and inflict injury; to constitute wanton negligence, the party acting, or failing to act when he should, must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally and probably result in injury.[8] Admitting that the evidence in the instant case failed to disclose wilfulness, the court expressed the belief that the defendant, in undertaking to drive his car at the time he did, was acting wantonly. It reached that conclusion on the basis that defendant knew, from his knowledge of the sur-

5 No decisions based on Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, § 364a, appear in the appellate reports of the state, perhaps because the statute is too recent. It was enacted in 1949: Laws 1949, p. 716. The Illinois statute provides: "Any person who drives a vehicle *with reckless disregard* for the safety of others and thereby causes the death of another person shall be guilty of the offense of reckless homicide." Italics added. It should be compared closely with the New Jersey statute set out in note 6, post.

6 N. J. Stat. Ann., 1949 Supp., Ch. 138, § 2:138—9, declares: "Any person who shall cause the death of another by driving any vehicle carelessly and heedlessly in wilful or wanton disregard of the rights or safety of others shall be guilty of a misdemeanor; but it shall be unlawful to use or offer in evidence the record of any judgment obtained hereunder in any civil action brought to recover damages arising out of the accident in which such death occurred."

7 State v. Allison, 122 Mont. 120, 199 P. (2d) 279 (1948); State v. Powell, 114 Mont. 571, 138 P. (2d) 949 (1943); Hiller v. State, 164 Tenn. 388, 50 S. W. (2d) 225, 99 A. L. R. 829 (1932); Copeland v. State, 154 Tenn. 7, 285 S. W. 565, 49 A. L. R. 605 (1926); State v. Whatley, 210 Wis. 157, 245 N. W. 93, 99 A. L. R. 749 (1932); State v. McComb, 33 Wyo. 346, 230 P. 526, 41 A. L. R. 717 (1925).

8 Birmingham Ry., Light & Power Co. v. Norton, 7 Ala. App. 571, 61 So. 459 (1913); Rogers v. Doody, 119 Conn. 532, 178 A. 51 (1935); Richardson v. Pollard, 57 Ga. App. 777, 196 S. E. 199 (1938); Jefferson v. King, 12 La. App. 249, 124 So. 589 (1929); Crossman v. Southern Pac. Co., 44 Nev. 286, 194 P. 839 (1921); Barkley v. State, 165 Tenn. 309, 54 S. W. (2d) 944 (1932).

rounding circumstances and existing conditions, that his conduct would naturally or probably result in injury.[9] It is submitted that such a conclusion seems to have been achieved without logical foundation. Taking into consideration the fact that the defendant had had a seizure about a year prior to the accident, it was reasonably foreseeable that (1) if he drove his car subsequently, and (2) if he had another seizure while so driving, the probable consequence might well be injury or death to others, but in order to find that the defendant's conduct was wanton it would be necessary to demonstrate that he could have foreseen the possibility of another seizure as well as the resultant injury or death of another.

Lacking cases directly in point on which to base a decision, the New Jersey court relied heavily on the analogy which it drew from cases involving drivers who fell asleep while driving. Cases of that character support the conclusion that an automobile driver who has driven while asleep and has killed another is not guilty of negligent homicide unless it could be said that he had such warning of the possibility of falling asleep that, under all the circumstances, he could be said to drive recklessly or in marked disregard of the safety of others when not heeding the warning he had received.[10] Therein lies an important distinction. The defendant in each such case knew, or should have known, that he might fall asleep by reason of the premonitory symptoms which had become apparent to the defendant shortly before the accident. In the instant case, the defendant had, at one time, been put on notice that he might suffer a recurrence of the malady but that had been almost a year prior to the accident. The interval of time was much greater than in the sleep cases and, during that interval, the defendant had (1) suffered no subsequent attacks, (2) had resumed his normal occupation, and (3) had no warning, when he drove his car as he did, that another attack was in the offing. Can it be said, then, that he had the same type of present knowledge or notice that has been required in the sleep cases?

If the court was looking for analogies, it should have considered either the somnambulism cases, wherein sleep-walkers have been held not guilty of crime for acts done while in that unconscious state,[11] or treated the subject on the same basis as would be applied to insane persons. The reckless homicide statutes contemplate a degree of mental intent of a kind or character such as would be required in the case of most crimes. Other offenses would not be satisfied by acts alone. Is it not true, then,

[9] The court stated that "it was reasonably foreseeable that if he 'blacked out' or became dizzy without warning, its probable consequences might well be injury or death to others." 14 N. J. Super. 277 at 286, 81 A. (2d) 811 at 816.

[10] People v. Robinson, 253 Mich. 507, 235 N. W. 236 (1931); State v. Olsen, 108 Utah 377, 160 P. (2d) 427, 160 A. L. R. 515 (1945).

[11] See, for example, Fain v. Commonwealth, 78 Ky. 183, 39 Am. Rep. 213 (1879).

that the unconscious person, for lack of presence of mind, could hardly be said to be acting wittingly at the moment of doing the act which causes the harm? Only if it could be shown, by reason of prior warnings, that his fault lay anterior to the moment of unconsciousness, could it then be said that he was acting negligently or wantonly. If the element of prior warning is removed, the case should collapse.

It would be rank speculation to attempt to predict what an Illinois court would decide on a similar set of facts. Aside from a slight difference in the statute, if analogy could prove useful, for lack of actual precedent, reference might be made to the so-called "guest" statute[12] and the cases decided thereunder wherein Illinois courts have given a concise statement as to what they will consider to be wanton conduct. In *Bartolucci* v. *Falleti*,[13] for example, the court said: "Plaintiff's right to recover is, consequently, dependent upon proof that the accident causing the injuries was occasioned by defendant's wilful and wanton misconduct. Ill will is not a necessary element of a wanton act. To constitute an act wanton, the party doing the act or failing to act must be *conscious* of his conduct, and . . . must be *conscious,* from his knowledge of the surrounding circumstances and existing conditions, that his conduct will naturally and probably result in injury."[14] In another non-guest case, that of *Walldren Express & Van Company* v. *Krug*,[15] the court defined wantonness as implying an act "*intentionally* done in disregard of another's rights, designed and intentional mischief, and not a mere negligent omission of duty."[16] It would, then, seem only remotely possible that an Illinois court would reach the result that conduct of the type found in the instant case would be classed as wanton.

Granted that courts cannot readily categorize various types of conduct to be within the meaning of the word wanton while treating other types as being beyond the meaning of that word, they should be guided by standards of reasonableness. It hardly seems reasonable that a defendant who has driven his car for a year subsequent to the time when he had had but one fit, with no indication that he is still suffering from the malady, should be regarded as being legally responsible for a wanton act occurring in a moment of unconsciousness. Other persons, such as diabetics or heart patients, may be suddenly stricken unconscious. Would

12 Ill. Rev. Stat. 1951, Vol. 2, Ch. 95½, § 58a. Civil Liability is imposed only if the driver has been guilty of "wilful and wanton misconduct." The phrase is similar to the one used in the New Jersey statute set out in note 6, ante, but differs from the wording of the Illinois "reckless homicide" statute set out in note 5, ante.

13 382 Ill. 168, 46 N. E. (2d) 980 (1947).

14 382 Ill. 168 at 174, 46 N. E. (2d) 980 at 983.

15 291 Ill. 472, 126 N. E. 97 (1920).

16 291 Ill. 472 at 479, 126 N. E. 97 at 99.

a court find such persons guilty, if they were to suffer a heart attack or a diabetic coma and kill while driving a car, upon a showing that only one such attack had been suffered over a year prior to the accident? While the instant case, by implication, would seem to sanction an affirmative answer, it is submitted that such a conclusion would obviously be an unreasonable one. If society needs protection from events of that character, it should forbid such persons from driving at all, with suitable penalties simply for engaging in the forbidden act. It should not, for the sake of conviction, warp existing law to postulate a required state of mind in a person known to be unconscious.

D. J. AHERN

BAIL—RIGHT TO BE RELEASED ON BAIL—WHETHER OR NOT A PARTY DETAINED PURSUANT TO A STATUTE PROVIDING FOR THE APPREHENSION AND DETENTION OF SEXUAL PSYCHOPATHS IS ENTITLED TO BAIL PENDING A HEARING TO DETERMINE HIS MENTAL STATUS—In a recent habeas corpus proceeding entitled *Application of Keddy,*[1] a California District Court of Appeals was faced with an issue as to whether or not a person held under a statute providing for the apprehension and detention of sexual psychopaths would be entitled to bail pending a hearing on his mental status. The petitioner had previously been convicted in a California municipal court for several sexual misdemeanors. His motion for a new trial therein had been denied but further proceedings were suspended as the trial court had certified the matter to the Superior Court pursuant to the procedure outlined in the sexual psychopath statute.[2] The petitioner appeared in that tribunal, two psychiatrists were appointed to examine him, and a date was set for a hearing but petitioner's application for release on bail was denied. He then filed the present application for a writ of habeas corpus, contending that the statute was unconstitutional or, if not, that he was entitled to bail pending a hearing on his mental status. The California District Court of Appeals, while upholding the statute, held that the petitioner was entitled to be at liberty on bail.[3]

The respondent had argued that, inasmuch as insane persons may be held without bail, the petitioner, being charged as a sexual psychopath,

1 105 Cal. App. (2d) 215, 233 P. (2d) 159 (1951). Wilson, J., wrote a dissenting opinion. The decision was followed in Application of Rice, 105 Cal. App. (2d) 493, 234 P. (2d) 180 (1951). Wilson, J., again wrote a dissenting opinion.

2 Cal. Welfare and Institutions Code, § 5501.

3 Cal. Const. 1879, Art. 1, § 6, states: "all persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great." Cal. Penal Code, § 1272, declares: "After an offense not punishable with death, a defendant who has appealed may be admitted to bail . . . as a matter of right, when the appeal is from a judgment imposing imprisonment in cases of misdemeanors."

was in the same category, hence could be held without bail pending the final determination as to whether or not he was a sexual psychopath. The court refused to follow the suggested analogy on the ground that it had previously been decided in California that a sexual psychopath was not an insane person.[4] It did, however, draw an analogy between the situation before it and statutory proceedings for the apprehension and detention of persons addicted to the use of stimulants[5] by relying on a case which involved an issue as to the right to bail under that statute. The case of *In re Henley,*[6] so relied on, had granted bail to one who was being held to determine if he was a drug addict. It was there indicated, however, that bail might be denied if the public safety so demanded, an aspect which the majority of the court in the instant case failed to take into consideration.

While the issue determined in the case at hand has not previously been decided anywhere in the country, many analogous situations exist despite the fact that the California court would have nothing to do with them. The majority based the refusal to use the analogy provided by the insane person situation on the ground that a sexual psychopath was not insane. This would provide a poor reason at best, for an analogy is to be utilized not because two things are exactly alike but rather because they are similar. Proceedings for the apprehension and detention of sexual psychopaths and proceedings for the investigation and commitment of insane persons are similar.[7] They have the same general purpose, namely to protect the afflicted individual and to protect the health and safety of the public in general. They are both proceedings of a kind separate and distinct from a criminal trial, hence the constitutional guarantees which attach to criminal trials are not applicable thereto.[8]

The Illinois Supreme Court, for example, through the medium of the case of *People* v. *Sims,*[9] has stated that the so-called "sexual psychopath" statutes,[10] in operation, are not unlike the proceedings relating to an inquiry into the sanity of one charged with a crime before trial,[11] and it

4 People v. Tipton, 90 Cal. App. (2d) 103, 202 P. (2d) 330 (1949).

5 Cal. Political Code, § 2185C.

6 18 Cal. App. 1, 121 P. 933 (1912).

7 People v. Redlich, 402 Ill. 270, 83 N. E. (2d) 736 (1949), noted in 28 CHICAGO-KENT LAW REVIEW 53. See also People v. Sims, 382 Ill. 472, 47 N. E. (2d) 703 (1943); People v. Chapman, 301 Mich. 584, 4 N. W. (2d) 18 (1942).

8 Kemmerer v. Benson, 165 F. (2d) 702 (1948); Rowan v. People, 147 F. (2d) 138 (1945); People v. Redlich, 402 Ill. 270, 83 N. E. (2d) 736 (1949); People v. Sims, 382 Ill. 472, 47 N. E. (2d) 703 (1943); In re Kemmerer, 309 Mich. 313, 15 N. W. (2d) 652 (1944); People v. Chapman, 301 Mich. 584, 4 N. W. (2d) 18 (1942); State ex rel. Sweetzer v. Green, 360 Mo. 1249, 232 S. W. (2d) 897 (1950).

9 382 Ill. 472, 47 N. E. (2d) 703 (1943).

10 Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, §§ 802—25, and Vol. 2, Ch. 108, § 112.

11 Ibid., Vol. 1, Ch. 38, §§ 592-3.

has been consistent when applying this analogy.[12] It has also held, in *People* v. *Ross*,[13] that there is no right, by way of appeal, to secure review after a hearing under the statute for the proceeding is not criminal but statutory and civil in nature. Any right of appeal, therefore, would depend on the statute and, as no right of appeal has been provided for therein, none exists. In that connection, reference has been made to the case of *People* v. *Cornelius*,[14] one involving similar issues in an insanity proceeding, wherein the right to appeal has been denied on similar grounds. The Supreme Court of Michigan, in *People* v. *Chapman*,[15] has also stated that proceedings under the sexual psychopath statute of that state are analogous to proceedings for the commitment of persons alleged to be insane. While cases involving the several sexual psychopath statutes are not numerous, they nevertheless do indicate a willingness to draw the analogy rejected in the instant case. If the analogy is appropriate, there is no question but what it is a well established rule that insane persons may be summarily detained without legal process pending a hearing into their mental status, particularly if their being at large would constitute a threat to themselves and to the public.[16] It is also beyond question that such persons may be denied bail pending a hearing, if public safety so demands.[17]

Preventive measures of the kind in question are not new to the law. An Illinois statute providing for the detention of parties suspected of

[12] In People v. Redlich, 402 Ill. 270, 83 N. E. (2d) 736 (1946), for example, the court considered a refusal to submit to a psychiatric examination of the type intended by Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, § 823, to be a form of civil contempt warranting detention until the defendant complied with the order for examination. It did, however, void the order because the defendant, without the examination, had been tried and convicted on the primary charge which had produced the sexual psychopath proceeding against him. That conviction was said to render moot all other action in the case.

[13] Cause transferred for lack of jurisdiction: 407 Ill. 199, 95 N. E. (2d) 61 (1950). The Appellate Court likewise dismissed the appeal: 344 Ill. App. 407, 101 N. E. (2d) 112 (1951).

[14] 332 Ill. App. 271, 74 N. E. (2d) 900 (1947). Direct appeal to the Illinois Supreme Court had been rejected for lack of jurisdiction: 392 Ill. 599, 65 N. E. (2d) 439 (1946). The cause was then transferred to the appropriate Appellate Court.

[15] 301 Mich. 584, 4 N. W. (2d) 18 (1942).

[16] Porter v. Ritch, 70 Conn. 235, 39 A. 169 (1898); People v. Niesman, 356 Ill. 322, 190 N. E. 668 (1934); Crawford v. Brown, 321 Ill. 305, 151 N. E. 911, 45 A. L. R. 1457 (1926); Maxwell v. Maxwell, 189 Iowa 7, 177 N. W. 541, 10 A. L. R. 489 (1920); Babb v. Carlson, 116 Kan. 690, 229 P. 76 (1924); In re Dowell, 169 Mass. 387, 47 N. E. 1033 (1897); In re Moynihan, 332 Mo. 1022, 62 S. W. (2d) 410 (1933); Keleher v. Putnam, 60 N. H. 30, 49 Am. Rep. 304 (1880); In re Cornell, 111 Vt. 525, 18 A. (2d) 304 (1941).

[17] Ex Parte Frailey, 146 Tex. Crim. 557, 177 S. W. (2d) 72 (1944); Ex parte Crawford, 134 Tex. Crim. 508, 116 S. W. (2d) 748 (1938); Ex parte Roark, 124 Tex. Crim. 374, 61 S. W. (2d) 833 (1933); Wilson v. State, 67 Tex. Crim. 369, 149 S. W. 117 (1912).

being afflicted with communicable venereal diseases[18] and a California statute, mentioned by the majority in the principal case, providing for the detention of persons addicted to the use of stimulants,[19] are classic examples of preventive rather than punitive legislation. These statutes, like the sexual psychopath laws, have in mind the prevention, not the punishment, of crime and display a most important concern for the protection of society. Bail has been denied under the Illinois statute mentioned,[20] and the California court has indicated that bail might be denied in the narcotics cases if the public safety so demands.[21]

During the past fifteen years, sixteen jurisdictions have passed special provisions for the control of sexual psychopaths.[22] They are, as one work on the subject says, "an interesting development of the law in that they extend the concept of mental disorder beyond the ordinary confines of classical insanity or mental defect."[23] While proceedings authorized thereunder may be unique in character, it is clear that such proceedings are not of a criminal but rather of a civil statutory nature.[24]. It was on that basis that the California court upheld the constitutionality of the statute involved in the instant case. When confronted with the issue of bail, however, it failed to follow the prior holding, treated the case as being one of criminal character, and turned to provisions of the California Constitution and Penal Code pertaining to bail in criminal cases to find support for its ultimate decision. This represents, to say the least, a marked inconsistency in the treatment accorded to the subject. Authority will bear out the first conclusion reached. The court is treading on lonely ground as to the second.

K. CARNAHAN

[18] Ill. Rev. Stat. 1951, Vol. 1, Ch. 23, § 392.

[19] Cal. Political Code, § 2185C.

[20] People ex rel. Baker v. Strautz, 386 Ill. 360, 54 N. E. (2d) 441 (1944), noted in 23 CHICAGO-KENT LAW REVIEW 162.

[21] In re Henley, 18 Cal. App. 1, 121 P. 933 (1912).

[22] Statutes may now be found in California, District of Columbia, Illinois, Indiana, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, Ohio, Vermont, Washington and Wisconsin.

[23] See Weihoffen and Overholser, "Commitment of the Mentally Ill," 24 Tex. L. Rev. 307 (1946), at p. 330.

[24] Malone v. Overholzer, 93 F. Supp. 647 (1950); Kemmerer v. Benson, 165 F. (2d) 702 (1948); Rowan v. People, 147 F. (2d) 138 (1945); People v. Redlich, 402 Ill. 270, 83 N. E. (2d) 736 (1949); People v. Sims, 382 Ill. 472, 47 N. E. (2d) 703 (1943); People v. Ross, 344 Ill. App. 407, 101 N. E. (2d) 112 (1951); In re Kemmerer, 309 Mich. 313, 15 N. W. (2d) 652 (1944); People v. Chapman, 301 Mich. 584, 4 N. W. (2d) 18 (1942); State ex rel. Sweetzer v. Green, 360 Mo. 1249, 232 S. W. (2d) 897 (1950); In re Moulton, 96 N. H. 370, 77 A. (2d) 26 (1950). Confusion may have been generated by use of the term "criminal sexual psychopath" in relation to these statutes or by the inclusion thereof in criminal codes. They should, more nearly, be classified with laws relating to mental health.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—WHETHER OR NOT AN ORDINANCE FORBIDDING UNINVITED HOUSE-TO-HOUSE CANVASSING CONTRAVENES CONSTITUTIONAL GUARANTEES OF FREE SPEECH AND FREE PRESS—The Supreme Court of the United States, through the medium of the recent case of *Breard* v. *City of Alexandria*,[1] had occasion to consider for the first time the contention that guarantees of freedom of speech and of the press would be abridged by ordinances which declare it to be a punishable nuisance for solicitors, peddlers, hawkers, itinerant merchants, and transient vendors of merchandise to go in or upon private residences, without prior request or invitation, for the purpose of soliciting orders for the sale of goods, wares and the like. Breard, representing a firm engaged in soliciting subscriptions for nationally known magazines and in charge of a crew of solicitors who spent a few days in each city going from house to house, had been convicted in a city court of Louisiana for the violation of such an ordinance.[2] On appeal to it, the Louisiana Supreme Court had affirmed that conviction.[3] On further appeal, the Supreme Court of the United States also affirmed by holding, among other issues,[4] that ordinances of the kind in question did not interfere with freedom of speech or of the press because, as the Supreme Court pointed out, only "'the press or oral advocates of ideas could urge this point.'"[5] The decision serves to establish a line at which the commercial publisher's constitutionally guaranteed freedoms must yield to his status as a businessman, in which capacity he is subject to all reasonable restraints relating to business conduct.[6]

[1] 341 U. S. 622, 71 S. Ct. 920, 95 L. Ed. 1233 (1951), affirming 217 La. 820, 47 So. (2d) 553 (1950). Chief Justice Vinson wrote a dissenting opinion as did Mr. Justice Black. Mr. Justice Douglas concurred in both dissents.

[2] The material portion of the ordinance read: ". . . the practice of going in and upon private residences . . . by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise not having been requested or invited so to do by the owner or owners, occupant or occupants of said private residences for the purpose of soliciting orders for the sale of goods, wares and merchandise and/or disposing of and/or peddling or hawking the same is declared to be a nuisance and punishable as such nuisance as a misdemeanor." 341 U. S. 622 at 624-5, 71 S. Ct. 920, 95 L. Ed. 1233 at 1238.

[3] 217 La. 820, 47 So. (2d) 553 (1950).

[4] The other issues had included a claim of a denial of due process and a violation of the commerce clause. The court rejected both contentions.

[5] 341 U. S. 622 at 641, 71 S. Ct. 920, 95 L. Ed. 1233 at 1247.

[6] The contrast will appear more sharply defined if consideration be given to the fact that, on the one hand stood Breard and his employer, doing an annual business of $5,000,000 in subscriptions, aligned with the represented magazines whose even larger income from advertising sources was based, at least partly, on the circulation obtained by such efforts. On the other hand stand those decisions referring to freedom of the press, such as Ex parte Jackson, 96 U. S. 727 at 733, 24 L. Ed. 877 at 879 (1878), wherein it was said that liberty of "circulating is as essential to that freedom as liberty of publishing; indeed without the circulation, the publication would be of little value."

The problem of the instant case must be distinguished from several which have been generated under somewhat similar situations. Among these are cases involving regulations adopted by owners of business property designed to restrict or to forbid peddling within the premises;[7] cases concerning solicitation or distribution of literature, either of a commercial or a religious nature, on the public streets;[8] cases wherein free distribution of literature, frequently of a religious nature, has occurred on private property;[9] and cases dealing with the distribution of printed matter, more religious than commercial, on private property but where permissive use has been granted to the public.[10] None of these reach the precise issue here involved, that of the right to engage in commercial solicitation on private property without prior request or invitation.

The case in question revives an interest in those decisions which had upheld convictions based on an ordinance, adopted in 1931, by the Town of Green River, Wyoming,[11] for while those cases had involved the activities of salesmen of a well known brush company the conduct prohibited was essentially no different than the acts performed by Breard and his crew in the instant case.[12] The net result of the instant holding, therefore, has been to validate the Green River type of ordinance provided each such ordinance (1) does not tend to make illegal all methods of circulation or solicitation, (2) does not vest arbitrary discretion to permit solicitation in some municipal official, (3) keeps license fees within reasonable bounds, and (4) imposes only such restrictions as are consistent with the maintenance of public order. That conclusion has been attained, however, only as the result of a series of steps.

7 Saxton v. Peoria, 75 Ill. App. 397 (1898).

8 Valentine v. Chrestenden, 316 U. S. 52, 62 S. Ct. 920, 86 L. Ed. 1262 (1942); Stephenson v. Binford, 287 U. S. 251, 53 S. Ct. 181, 77 L. Ed. 288, 87 A. L. R. 721 (1932); Packard v. Banton, 264 U. S. 140, 44 S. Ct. 257, 68 L. Ed. 596 (1924); Ex parte Mares, 75 Cal. App. (2d) 798, 171 P. (2d) 762 (1946); Pittsford v. City of Los Angeles, 50 Cal. App. (2d) 25, 122 P. (2d) 535 (1942); City of Chicago v. Rhine, 363 Ill. 719, 2 N. E. (2d) 905, 105 A. L. R. 1045 (1936); Slater v. Salt Lake City, — Utah —, 206 P. (2d) 153, 9 A. L. R. (2d) 712 (1949); Robert v. Norfolk, 188 Va. 413, 49 S. E. (2d) 697 (1948).

9 Martin v. Struthers, 319 U. S. 141, 63 S. Ct. 862, 87 L. Ed. 1313 (1943).

10 Marsh v. Alabama, 326 U. S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946); Tucker v. Texas, 326 U. S. 517, 66 S. Ct. 274, 90 L. Ed. 274 (1946).

11 See Green River v. Fuller Brush Co., 65 F. (2d) 112 (1933), and Green River v. Bunger, 50 Wyo. 52, 58 P. (2d) 456 (1936), appeal dismissed 300 U. S. 638, 57 S. Ct. 510, 81 L. Ed. 854 (1937).

12 In Breard v. City of Alexandria, 69 F. Supp. 722 (1947), the present appellant, plaintiff there, unsuccessfully sought to enjoin the city from enforcing the ordinance, quoted in note 2 ante. The district court, pointing to the similarity to be found in the Green River cases, said: "The solicitor in the former visits the private home and has specimens of the articles he seeks to sell and may even give an illustration of their practical use to the housewife. In the latter case, the solicitor exhibits one of the issues of his magazine and seeks to sell a yearly subscription or more, based on its exhibit." 69 F. Supp. 722 at 725. It should be noted that the issue of freedom of the press was not raised therein.

The first step is illustrated by the case of *Lowell* v. *Griffin*.[13] The United States Supreme Court there held an ordinance to be invalid on its face which forbade the practice of distributing circulars, handbooks, advertising, or literature of any kind, whether being freely delivered or for sale, without first obtaining written permission, because it pointed out that such an ordinance could be invoked to produce a total prohibition on the distribution of literature of any kind at any time anywhere without a permit.

The second stage, one concerning the amount of discretion which may be left to municipal authorities, proved fatal to the ordinance involved in *Schneider* v. *Irvington*.[14] Under that ordinance, a permit could be obtained only after an involved registration procedure but which permit was required of all who would canvass, solicit, distribute circulars or other matter, or call from house to house. The court pointed out that the ordinance was not limited to those who canvassed for private profit nor was it the common type of ordinance requiring some form of registration or license of hawkers and peddlers. Because it banned unlicensed communication of any views or the advocacy of any cause from door to door, permitting canvassing only subject to the power of a police officer to determine, as censor, what literature might be distributed, it was deemed to abridge rights concerning freedom of speech and of the press. While the Schneider case actually involved the distribution of literature of a religious nature, the element of undue discretion would probably have invalidated the ordinance as applied to a solicitor of subscriptions since the mere fact that money is made out of the distribution does not serve to bar publications from the protection of the First Amendment.[15] Certainly, if issuance of a license becomes a mandatory obligation after registration has occurred, there could be no doubt as to the validity of an ordinance on this score.[16]

On the third and fourth points, those dealing with the reasonableness of the license fee and the exercise of the police power, notice should be taken of the Pennsylvania case of *Commonwealth* v. *Boehmer*.[17] The court there held that an ordinance prohibiting house to house canvassing without a license had a reasonable purpose in that it provided protec-

[13] 303 U. S. 444, 52 S. Ct. 666, 82 L. Ed. 949 (1938).

[14] 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155 (1939). The case operated to reverse convictions obtained under ordinances adopted in California, Massachusetts, New Jersey and Wisconsin.

[15] See Thomas v. Collins, 323 U. S. 516, 65 S. Ct. 315, 89 L. Ed. 430 (1945).

[16] In Washburne v. Ellquist, 242 Wis. 609, 9 N. W. (2d) 121 (1943), an ordinance was held valid, even as to solicitations of a religious character, inasmuch as it vested no controlling or discretionary power in any public official, demanded no tax or fee, and involved no religious test.

[17] 88 Pitts. Leg. J. 178 (1939).

tion against fraud and imposition and did not unlawfully interfere with the rights of free press, speech or religion, but found it invalid, nevertheless, because it called for an unreasonably high license fee, converting the ordinance into a tax rather than a license measure.

While freedom of press, freedom of speech, and freedom of religion occupy the same preferred position under the constitution,[18] courts have tended to grant more freedom to publications of a religious nature, even when sold, than to commercial publications.[19] This should occasion no surprise as the profit arising from the sale of religious publications is usually used for other religious purposes. It does, however, make necessary a careful distinction between the cases. In *Donley* v. *Colorado Springs*,[20] for instance, the court enjoined enforcement of an ordinance prohibiting uninvited canvassing, as applied to a minister selling religious material, because it said the ordinance in question was intended for the protection of local merchants and other business interests as against itinerant salesmen and solicitors who, not being members of the community or permanent residents, paid no taxes, had no interest in the local government, and contributed nothing to its support. The court considered it to be a forced and strained construction to attempt to include ministers of a duly recognized religious sect, sincerely engaged in the exercise of their faith in the manner thought best by them, within the scope of the ordinance.[21] It cited the Illinois case of *Village of South Holland* v. *Stein*[22] in support of this argument but, while that case involved both the sale of subscriptions to a religious periodical and the free distribution of pamphlets, it was only the limitation on the free distribution which was held unconstitutional.

Turning to the question as to whether or not it would be possible to enact the Green River type of ordinance in Illinois, it should first be noticed that the municipalities of the state clearly lack authority to regulate the solicitation of subscriptions to periodicals. The applicable section of the Cities and Villages Act grants corporate authorities the power to "license, tax, regulate or prohibit hawkers, peddlers . . . itinerant mer-

18 Robert v. Norfolk, 188 Va. 413, 49 S. E. (2d) 697 (1948).

19 Jones v. City of Opelika, 241 Ala. 279, 3 So. (2d) 76 (1941), cert. dis. 315 U. S. 782, 62 S. Ct. 630, 86 L. Ed. 1189, rehear. granted and judgment reversed 316 U. S. 649, 62 S. Ct. 1312, 86 L. Ed. 1691 (1942).

20 40 F. Supp. 15 (1941).

21 Breard had argued, in the instant case, that for local interests to protect themselves against out of state competition by an ordinance of this nature would amount to an unconstitutional interference with interstate commerce. He cited Hood & Sons v. DuMond, 336 U. S. 525, 69 S. Ct. 657, 93 L. Ed. 865 (1949), and Dean Milk Co. v. City of Madison, 340 U. S. 349, 71 S. Ct. 295, 95 L. Ed. 329 (1951), but did not prevail.

22 373 Ill. 472, 26 N. E. (2d) 868, 127 A. L. R. 957 (1940).

chants, [and] transient vendors of merchandise."[23] A "peddler," in the ordinary, customary and usual meaning of that term, is one who travels about selling small wares which he carries with him, while a "hawker" differs from a peddler only in that he cries his wares or exhibits them for sale.[24] Itinerant merchants and transient vendors of merchandise were said, in *Twining* v. *City of Elgin,*[25] to be those persons who "for a short space of time locate in a city and make sale and delivery of their goods, as other merchants do, or those who carry or transport their goods from house to house or place to place and make sale and delivery of their goods in like manner as other merchants or salesmen do."[26] In each case, the definition would require that the vendor make delivery of the merchandise himself, a situation which would not be applicable to the case of the solicitor of magazine subscriptions. Any doubt on that score has been resolved by two other cases. In *Emmons* v. *City of Lewiston,*[27] the Illinois Supreme Court held that a city lacked authority to require book canvassers who solicited orders for books for future delivery to obtain a license since such canvassers were neither hawkers nor peddlers.[28] In much the same way, in *Rawlings* v. *Village of Cerro Gordo,*[29] the court held that an ordinance declaring that persons "taking orders for books, pictures, publications or other articles" should be deemed to be peddlers was invalid because such persons, in fact, were not peddlers.

If Illinois municipalities are to be validly empowered to enact ordinances of the Green River type, now that such ordinances have survived constitutional tests, amendment of the Cities and Villages Act becomes clearly necessary as the first step toward that end. Thereafter, attention would have to be given to the details herein discussed if any ordinance so enacted is to survive.

W. F. WALSH

NEGLIGENCE — ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE — WHETHER OR NOT A MANUFACTURER IS LIABLE FOR INJURIES SUSTAINED BY THIRD PERSON WHO, ON SECOND-HAND PURCHASE OF REFRIGERATOR, SUFFERS PHYSICAL HARM BY REASON OF DEFECTS THEREIN—Recently, in the case of *Beadles* v. *Servel, Inc.*[1] the Illinois Appellate Court for the Third

[23] Ill. Rev. Stat. 1951, Vol. 1, Ch. 24, § 23—54.

[24] City of Joliet v. O'Sullivan, 303 Ill. App. 108, 24 N. E. (2d) 751 (1940).

[25] 38 Ill. App. 356 (1890).

[26] 38 Ill. App. 356 at 361.

[27] 132 Ill. 380, 24 N. E. 58, 8 L. R. A. 328, 22 Am. St. Rep. 540 (1890).

[28] In Village of South Holland v. Stein, 373 Ill. 472 at 480, 26 N. E. (2d) 868 at 871, the court said "If the conviction was based on soliciting the subscriptions of a publication without a permit it was error under the decisions of this court."

[29] 135 Ill. 36, 25 N. E. 1006 (1890).

[1] 344 Ill. App. 133, 100 N. E. (2d) 405 (1951).

District found it necessary to pass on a unique aspect of the problem of a manufacturer's tort liability for a defective instrumentality. The plaintiffs there brought suit to recover for injuries sustained as the result of the production of carbon monoxide gas by a gas refrigerator manufactured by the defendant. The complaint alleged that the refrigerator had been constructed in such a manner as to allow carbon particles to be deposited near the burner flame thereby restricting the supply of air needed to burn off the gas, making necessary a frequent cleaning of the burner if it was to operate safely and efficiently, all of which defendant well knew or, in the exercise of ordinary care, could have known. By reason of this fact, plaintiffs charged the machine was inherently dangerous to life when put to the ordinary use for which it was intended unless a purchaser, and those who would come in contact with the machine, were warned of the inherent danger. The complaint charged a duty to so warn and that the defendant failed to provide such warning. Plaintiffs further alleged that they had purchased the refrigerator at second hand, an event which the defendant could have reasonably foreseen, and for lack of warning of the danger had suffered personal injury. A motion to strike the complaint for failure to state a cause of action was allowed and, when plaintiffs elected to stand by the complaint, the suit was dismissed. The Appellate Court, however, reversed the judgment on the ground that the complaint stated a cause of action.[2]

The court, in order to reach this decision, had to determine three things, to-wit: (1) whether or not the refrigerator, assuming it to have been defectively constructed, was an inherently or an imminently dangerous object; (2) whether the plaintiffs, as second hand purchasers, came within the class of persons entitled to claim a duty on the manufacturer's part; and (3) whether the length of time intervening between the manufacture and first sale of the refrigerator and the occurrence of the injury was such as to indicate that the refrigerator was of proper design and construction. It answered the first question in the affirmative on the basis of a test as to whether or not an appliance, when so defectively made, would be inherently dangerous when put to the intended, rather than to an extraordinary, use.[3] On the second point, the court held that a second hand purchaser would come within the class of persons to whom

[2] A motion to dismiss the appeal as to a co-defendant was sustained on the ground of lack of jurisdiction to entertain the appeal by reason of the absence of a final order. It appeared that such defendant had also moved to strike the complaint but the record failed to show that any action had been taken on such motion. If, in fact, the motion to strike had been sustained, the issue might then have approximated the one to be found in the case of Anderson v. Samuelson, 340 Ill. App. 528, 92 N. E. (2d) 343 (1950), noted in 29 CHICAGO-KENT LAW REVIEW 59-60.

[3] 344 Ill. App. 133 at 142, 100 N. E. (2d) 405 at 410.

the manufacturer would owe a duty to provide protection against an inherently or an imminently dangerous object. With regard to the third question, the court decided that, under the facts of the case before it, the interval of time that had elapsed between the original sale and the discovery of the defect, instead of tending to show that the refrigerator was not originally defective, more nearly disclosed that the defect was of an insidious or treacherous nature rather than one possessed of a capacity to cause sudden harm.

The problem of whether or not a manufacturer owes a duty to a remote vendee or to a third person who has been injured by an article he has manufactured has confronted the courts of both the United States and England for over one hundred years. When first presented, in the celebrated English case of *Winterbottom* v. *Wright*,[4] the rule was laid down that a manufacturer would not be liable to those injured by defectively manufactured instrumentalities unless there was privity of contract between the injured person and the manufacturer. It is something of a tribute to the doctrine of *stare decisis*, although not to logic, that a rule established over one hundred years ago, at a time when the modern manufacturing process was receiving its first breath of life and the distribution of goods was localized, should have persisted, although not without the development of many exceptions, to the present day of mass production and world-wide distribution.

The first exception made to the so-called "privity" rule was one relating to inherently dangerous objects.[5] Under it, a manufacturer would be held liable for his negligence in the manufacture of goods which were, by their very nature, inherently dangerous to life or limb. In that category would clearly fall such items as explosives[6] and poisons,[7] but it has been suggested that even dangerous activities would be included.[8]

The next great exception was the one formulated by the late Judge Cardozo through the medium of the case of *MacPherson* v. *Buick Motors Company*.[9] As stated by him, the exception was one wherein, if the nature of the thing was such that it would be reasonably certain to place life and limb in peril when negligently made, it was to be treated as a

4 10 M. & W. 109, 152 Eng. Rep. 402 (1842). An excellent restatement of the English rule appears in Christensen v. Bremer, 263 Mass. 129, 160 N. E. 410 (1928).

5 Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455 (1852). See also Stolle v. Anheuser-Busch Inc., 307 Mo. 502, 271 S. W. 497 (1925), and Crane v. Sears, 168 Okla. 603, 35 P. (2d) 916 (1934).

6 Catlin v. Union Oil Co., 31 Cal. App. 597, 161 P. 29 (1916).

7 Kolberg v. Sherwin-Williams Co., 93 Cal. App. 609 (1928); Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455 (1852).

8 Restatement, Torts, Vol. IV, § 835.

9 217 N. Y. 382, 111 N. E. 1050 (1916).

thing of danger. "Its nature," he said, "gives warning of the consequence to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully . . . There must be knowledge of danger, not merely possible, but probable."[10] Pointing to the fact that it is possible for a person to use almost anything in a way that would make it dangerous, he warned that such fact alone was not enough to charge the manufacturer with a duty, certainly not one independent of his contract, but that knowledge was an important factor.

The case opened the door of the courts to a host of cases seeking to establish liability on a manufacturer for goods which had been defectively constructed. A wide variety of products, ranging from an elevator,[11] soap,[12] a faucet,[13] an electric stove,[14] shoe polish,[15] a cigarette,[16] a grand stand,[17] a hair-waving solution,[18] a washing machine,[19] a sofa bed,[20] a balance wheel,[21] to an inner-door bed,[22] have been treated as being imminently dangerous within the meaning of the exception developed in the MacPherson case. There is, however, a degree of inconsistency in the decisions. That inconsistency can best be displayed by the fact that items of the character of a drop press,[23] a bed,[24] a flat iron,[25] a refrigerator,[26] and an electric body-reducing machine,[27] by contrast, have all been said not to be imminently dangerous hence not within the exception. It is not novel, therefore, that the court concerned with the instant case should lose sight of the distinction between an object which is inherently dangerous and one that is but imminently so. Although that distinction may amount to no more than a verbal nicety in most cases, it possesses im-

10 217 N. Y. 382 at 385, 111 N. E. 1050 at 1053.
11 Berg v. Otis Elevator Co., 64 Utah 518, 231 P. 832 (1924).
12 Hasbrouck v. Armour & Co., 139 Wis. 357, 121 N. W. 157 (1909).
13 Clark v. Standard Sanitary Mfg. Co., 8 N. J. Misc. 284, 149 A. 828 (1930).
14 Roettig v. Westinghouse Electric Co., 53 F. Supp. 588 (1944).
15 Steber v. Kohn, 149 F. (2d) 4 (1945).
16 Liggett & Myers Tobacco Co. v. DeLape, 109 F. (2d) 598 (1940).
17 McCloud v. Leavitt Corp., 79 F. Supp. 286 (1948).
18 Briggs v. National Industries, 92 Cal. App. (2d) 542, 207 P. (2d) 110 (1949).
19 Altorfer Bros. v. Green, 236 Ala. 427, 183 So. 415 (1938).
20 Simmons Company v. Hardin, 75 Ga. App. 420, 43 S. E. (2d) 553 (1947).
21 Davidson v. Montgomery Ward & Co., 171 Ill. App. 355 (1912).
22 Lill v. Murphy Door Bed Co., 290 Ill. App. 328, 8 N. E. (2d) 714 (1937).
23 McCaffey v. Mossberg & Granville Mfg. Co., 23 R. I. 381, 50 A. 651 (1901).
24 Isbell v. Biederman Furniture Co., 115 S. W. (2d) 46 (Mo. App., 1938).
25 Pitman v. Lynn Gas & Electric Co., 241 Mass. 322, 135 N. E. 223 (1922).
26 Borg-Warner Corp. v. Heine, 128 F. (2d) 657 (1942).
27 Robbins v. Georgia Power Co., 47 Ga. App. 517, 171 S. E. 218 (1933).

portance, as will be shown later, when the question of a lapse of time between sale and injury enters into the case.[28]

The present case is more important, however, because it represents the first case in Illinois which has extended the liability of a manufacturer so as to protect the second-hand purchaser. Earlier cases from other jurisdictions have operated to define the class of persons who come within the exceptions to the rule to the point where it may be said to be a general proposition that the manufacturer, whether of an inherently dangerous or an imminently dangerous object, is liable to all those who would reasonably be expected to come in contact with the instrumentality in the normal course of events.[29] Such persons as an employee of the purchaser,[30] a member of the purchaser's family,[31] a borrower of the article from the purchaser,[32] customers of the purchaser,[33] an insurance company by right of subrogation,[34] and a donee of the purchaser[35] have been held entitled to the benefit provided by these exceptions.

On the specific issue of the right of a second hand purchaser to sue, two cases are worthy of note. In the first, that of *Gorman* v. *Murphy Diesel Company,*[36] the plaintiff was an employee of a second hand purchaser of a diesel engine who had been injured when the machine exploded. The court held the plaintiff was within that class of persons to whom the manufacturer owed a duty but it refused judgment in his favor on other grounds. In the second, that of *Lynch* v. *International Harvester Company of America,*[37] the defendant manufacturer had delivered the machine to a second hand dealer who in turn sold it to plaintiff. When plaintiff was injured by stepping on a part of the machine which gave way, he sued the manufacturer charging a defect in construction and design. Although the court found that plaintiff was a "contemplated

28 The "inherently dangerous" and the "imminently dangerous" exceptions are the ones most widely utilized where privity is lacking but liability has been imposed in other ways. See, for example, Lewis v. Terry, 111 Cal. 39, 43 P. 398, 2 L. R. A. (N. S.) 303 (1896), to the effect that if a manufacturer conceals known defects he may be liable because of his deceit.

29 Johnson v. Cadillac Motor Car Co., 194 F. 497 (1912); Roettig v. Westinghouse Electric Co., 53 F. Supp. 588 (1944); MacPherson v. Buick Motors Co., 217 N. Y. 382, 111 N. E. 1050 (1916).

30 Schindly v. Allen-Sherman-Hoff Co., 157 F. (2d) 102 (1946); Sieracki v. Seas Shipping Co., 149 F. (2d) 98 (1945); Farmers State Bank of New Port v. Lamon, 132 Wash. 369, 231 P. (2d) 952 (1925).

31 Simmons Company v. Hardin, 75 Ga. App. 420, 43 S. E. (2d) 553 (1947).

32 Reed & Barton Corporation v. Mass, 73 F. (2d) 359 (1924).

33 McCloud v. Leavitt Corp., 79 F. Supp. 286 (1948).

34 General Accident Ins. Co. v. Goodyear Tire & Rubber Co., 132 F. (2d) 122 (1942).

35 Liggett & Myers Tobacco Co. v. DeLape, 109 F. (2d) 598 (1940).

36 3 Ter. 149, 29 A. (2d) 145 (Dela., 1942).

37 60 F. (2d) 223 (1932).

user'' within the meaning of the MacPherson case, it decided for the defendant because of the lapse of five years between the original sale and the discovery of the defect. It might be said, therefore, that once it has been established that the article is either inherently or imminently dangerous the class of persons in whose favor the manufacturer's duty will run is virtually unlimited in scope.[38]

The duration of the interval of time between the original sale and the discovery of the defect or the infliction of the injury has been considered, by most courts, as having a direct bearing on the question of whether or not the instrument was imminently dangerous at the time it was originally sold. In the Gorman case just noticed, use of a diesel engine for sixteen months prior to injury was held enough to show that the equipment was not imminently dangerous when sold by the defendant. In much the same way, in the Lynch case, user of the threshing machine there involved for five years was regarded as a conclusive rebuttal of the allegation that the machine had been imminently dangerous when first sold. Other time intervals have been regarded as long enough for this purpose. Thus, a one-year use of an ordinary bed,[39] seven months of use of a porch swing,[40] or a two-year use of an automobile[41] have been considered adequate enough to defeat recovery on this theory. In the case under discussion, the facts disclosed that the plaintiff had used the refrigerator for seven months after he had purchased it from the original vendee but there was no showing as to how long the original purchaser had used the machine prior to the sale thereof to plaintiff. The court refused to enter into any discussion on the point as it regarded the time interval to be immaterial, saying the refrigerator was intended to be a durable product. There could be little room for argument that a refrigerator is normally intended to be a product of lasting character but, for that matter, the same thing is true of the majority of items involved in those cases where the time interval has been held important. From the evident approval of the holding in the case of *Lill* v. *Murphy Door Bed Company of Chicago*,[42] wherein the time interval was deemed to be immaterial on the question of the manufacturer's negligence, the court has not only emphasized its predilection for the minority rule[43] but has extended the manufacturer's liability to the point where he is almost an

38 See Steber v. Kohn, 149 F. (2d) 4 (1945), and Liggett & Myers Tobacco Co. v. DeLape, 109 F. (2d) 598 (1940), for far-reaching applications of this rule.

39 Field v. Empire Case Goods Co., 166 N. Y. S. 509, 179 App. Div. 253 (1917).

40 Osheroff v. Rhodes-Burford Co., 203 Ky. 408, 262 S. W. 583 (1924).

41 Ford Motor Co. v. Wolber, 32 F. (2d) 21 (1929).

42 290 Ill. App. 328, 8 N. E. (2d) 714 (1937).

43 In Reed & Barton Corporation v. Maas, 73 F. (2d) 359 (1924), use of a coffee urn for seven years was held not too long to prevent it being considered to be an imminently dangerous object.

insurer of the quality of his goods not only to the immediate purchaser but to others as well, regardless of the time that has elapsed or the number of hands through which the goods may have passed before producing an injury.

The fundamental policy for a rule requiring privity of contract between the injured person and the manufacturer, namely one designed to encourage manufacturing and to protect infant industry until it could protect itself, has long since disappeared. Instead of extending exceptions to that rule, or providing for the creation of new ones, courts should, as in the instant case, follow a lead that has already been marked out[44] in recognition of the fact that the exceptions have long since swallowed up the rule.

D. J. DONOVAN

STATES—POLITICAL STATUS AND RELATIONS—WHETHER OR NOT A STATE STATUTE WHICH PROHIBITS ACTION THEREIN ON A FOREIGN WRONGFUL DEATH CLAIM IS CONSTITUTIONAL—The case of *Hughes* v. *Fetter*[1] presented the Supreme Court of the United States with a question as to whether or not a Wisconsin statute,[2] one forbidding the courts of that state from entertaining actions based on foreign wrongful death claims, amounted to a denial of that degree of full faith and credit required by the federal constitution[3] so as to be unconstitutional. The question arose when the plaintiff, an administrator appointed by a Wisconsin court, brought a wrongful death action in a Wisconsin court, based on the Illinois Injuries Act,[4] to recover for fatal injuries inflicted on his intestate in Illinois. The allegedly negligent driver together with his insurance carrier, both residents of Wisconsin, were named as defendants. These defendants, acting on the basis of the prohibition in the local statute, moved for and procured a summary judgment dismissing the complaint. The Supreme Court of Wisconsin affirmed this disposition of the case notwithstanding the reiteration before it of the contention that the proviso of the Wisconsin statute amounted to a violation of the full faith and

44 See Todd Shipyards Corporation v. United States, 69 F. Supp. 609 (1947), and Carter v. Yardley & Co., 319 Mass. 92, 64 N. E. (2d) 693, 164 A. L. R. 559 (1946).

1 341 U. S. 609, 71 S. Ct. 980, 95 L. Ed. 1212 (1951), reversing 257 Wis. 35, 42 N. W. (2d) 452 (1950). Associate Justice Frankfurter wrote a dissenting opinion which was concurred in by Associate Justices Jackson, Reed and Minton.

2 Wis. Stat. 1949, § 331.03. The statute contains language typical of that found in wrongful death acts but concludes with a proviso that "such action shall be brought for a death *caused in this state.*" Italics added.

3 U. S. Const., Art. IV, § 1.

4 Ill. Rev. Stat. 1951, Vol. 1, Ch. 70, § 1 et seq.

credit clause.[5] On further appeal,[6] the Supreme Court of the United States, by a divided vote, reversed the state court decision and directed that the cause be reinstated. In achieving that result, the majority of the court held that a strong federal policy looking toward a unification of the states, enunciated in the full faith and credit clause, overrode any local policy of the forum, particularly since Wisconsin had no real antagonism against wrongful death actions in general.

Heretofore, in matters involving foreign wrongful death statutes, the general rules of conflict of laws have been applied. It has, for example, been held that the foreign statute will be enforced through comity unless it violates the public policy of the forum, is penal in nature, or where local procedure is inadequate to support enforcement.[7] A few jurisdictions have refined this rule so as to require that the statutes of the forum and of the place of the wrong must be substantially similar before recognition is possible,[8] a refinement which apparently represents a modification of the English attitude toward foreign torts[9] but one which has been sharply criticized.[10]

The injection of the full faith and credit clause as a basis for compelling the forum to recognize the foreign wrongful death claim is new to this branch of tort law although, in relatively recent years, its importance to private international law has grown.[11] The primary responsibility for this growing concept has been a recognition by the Supreme Court that a statute is a "public act" within the meaning of the full faith and credit clause[12] so that states cannot escape their constitutional

5 257 Wis. 35, 42 N. W. (2d) 452 (1950), noted in 49 Mich. L. Rev. 756.

6 28 U. S. C. A. § 1257 authorizes review by appeal where a state statute has been declared valid over an objection that it was repugnant to some provision of the federal constitution.

7 The case of Lauria v. E. I. DuPont de Nemours Co., 241 F. 687 (1917), contains a full discussion of the comity doctrine and cites many cases on the point. It also treats with the limitations thereon.

8 London Guarantee & Accident Co. v. Balgowan S. S. Co., 161 Md. 145, 155 A. 334, 77 A. L. R. 1302 (1931). The annotation thereto, beginning at 77 A. L. R. 1311, cites more cases as well as serves to point out whether a given dissimilarity is to be deemed fatal or not.

9 English courts will refuse to enforce a claim based on a foreign tort unless a similar claim would be actionable in England according to English law: Morris, Dicey's Conflict of Laws (Stevens & Sons, Sweet & Maxwell, London, 1949), 6th Ed., p. 800, Rule 174.

10 Loucks v. Standard Oil Co., 224 N. Y. 99, 120 N. E. 198 (1918).

11 The majority of the cases in which the full faith and credit clause has been invoked concern workmen's compensation claims or certain phases of commercial law.

12 McKnett v. St. Louis & S. F. R. Co., 292 U. S. 230, 54 S. Ct. 690, 78 L. Ed. 1227 (1934); Kenny v. Supreme Lodge, L. O. M., 252 U. S. 411, 40 S. Ct. 371, 64 L. Ed. 638, 10 A. L. R. 716 (1920). Contra: Bullington v. Angel, 220 N. C. 18, 16 S. E. (2d) 411, 136 A. L. R. 1054 (1941). But see Angel v. Bullington, 330 U. S. 183, 67 S. Ct. 657, 91 L. Ed. 832 (1947).

obligation by the simple device of denying jurisdiction to courts which would otherwise be competent.[13] In view of these pronouncements, there has been a gradual realization of the fact that the full faith and credit clause operates as a restriction upon the freedom courts would otherwise enjoy under the rules of international comity.[14] As a consequence, the public policy of the forum and the character of the foreign law no longer form a conclusive bar to the enforceability of the foreign statute.

The question which naturally follows from the foregoing observation concerns the extent to which recognition of foreign enactments is restricted by anything in the full faith and credit clause itself. It is clear that the forum will not be compelled to recognize foreign law in every case since a compulsion that broad could lead to the absurd result that a state would have to administer certain laws for the benefit of foreigners when they would be foreclosed from doing the same thing for their own citizens.[15] It is also clear, by the wording used, that the clause was intended to possess a restrictive effect on the privilege of comity. In order to solve the problems which arise when a case falls between these extremes, the Supreme Court has evolved a test intended to balance the governmental interest of the forum with that of the state whose statute is sought to be enforced.[16] In the administration of this test, the court is asked to make a qualitative analysis of all the elements of the case while attempting to weigh the interests of each competing state. If it should appear that the forum has a greater interest, full faith and credit may constitutionally be denied to the foreign statute.[17] Conversely, if the interest of the forum is but slight, the foreign statute should be recognized.[18] However, since

13 Bradford Elec. Light Co. v. Clapper, 286 U. S. 145, 52 S. Ct. 571, 76 L. Ed. 1026 (1932); Biddy v. Blue Bird Air Service, 374 Ill. 506, 30 N. E. (2d) 14 (1940).

14 See annotation in 134 A. L. R. 1472.

15 Alaska Packers Association v. Industrial Accident Comm., 294 U. S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935).

16 Pacific Employers Insurance Co. v. Industrial Accident Comm., 306 U. S. 493, 59 S. Ct. 629, 83 L. Ed. 940 (1939); Broderick v. Rosner, 294 U. S. 629, 55 S. Ct. 589, 79 L. Ed. 1100, 100 A. L. R. 1133 (1935); Alaska Packers Ass'n v. Industrial Accident Comm., 294 U. S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935); Bradford Elec. Light Co. v. Clapper, 286 U. S. 145, 52 S. Ct. 571, 76 L. Ed. 1026, 82 A. L. R. 696 (1932); Olmstead v. Olmstead, 216 U. S. 386, 30 S. Ct. 292, 54 L. Ed. 530, 25 L. R. A. (N. S.) 1292 (1910). See also annotation in 134 A. L. R. 1472.

17 Alaska Packers Ass'n v. Industrial Accident Comm., 294 U. S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935); Olmstead v. Olmstead, 216 U. S. 386, 30 S. Ct. 292, 54 L. Ed. 530, 25 L. R. A. (N. S.) 1292 (1910). Once a judgment is entered in the foreign state in a suit based on the foreign statute, however, the forum wherein the judgment is sought to be enforced must, if it is otherwise valid, give full faith and credit thereto even though the forum had the greater governmental interest: Hunt v. Magnolia Petroleum Co., 320 U. S. 430, 64 S. Ct. 208, 88 L. Ed. 149 (1943).

18 John Hancock Mutual Life Ins. Co. v. Yates, 299 U. S. 178, 57 S. Ct. 127, 81 L. Ed. 106 (1936); Broderick v. Rosner, 294 U. S. 629, 55 S. Ct. 589, 79 L. Ed. 1100, 100 A. L. R. 1133 (1935); Bradford Elec. Light Co. v. Clapper, 286 U. S. 145, 52 S. Ct. 571, 76 L. Ed. 1026, 82 A. L. R. 696 (1932). Where the governmental interests

each state is *prima facie* entitled to enforce its own statutes in its own courts, the burden lies on the proponent of the foreign statute to show rationally why local law should be subordinated to it.[19]

The distinctive feature of the instant case lies in its departure from the foregoing test. Instead of analyzing the degree of conflict existing between the governmental interests of Illinois and Wisconsin, the Supreme Court said that the conflict was one between the local policy of Wisconsin on the one hand and the federal policy of unification, as exemplified by the full faith and credit clause, on the other. It is to be noted that a new element has thereby been introduced into an already unsettled picture.[20] The meaning to be given to the concept of "unification," as used by the court, is not altogether clear. However, the most logical interpretation to be given to the case is that a federal policy of unification, as there employed, amounts to one under which the local policy of one state should not be permitted to operate so as to defeat a substantive remedy created by a sister state unless the local policy is grounded on a well found and impelling reason. This thought takes on significance when it is remembered that difficulties in the service of process might well become a practical bar to the enforcement of the remedy when the defendant cannot be reached in the state where the wrong was committed. If the state of the defendant's residence should refuse to recognize the foreign action, the plaintiff would then, in fact, be without a remedy so long as the defendant continued to maintain the asylum provided by the place of his residence.[21] It is important, therefore, to limit the instant case in this manner. To give it a broad construction so as to have it call for absolute certainty and ultimate extra-territorial effect of all law between the sister states would be a most radical view and one certainly not warranted by the holding of the case.

The principal case should be of particular interest to the Illinois practitioner as the Illinois Injuries Act[22] also contains a proviso pro-

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of the two states appear to be equally balanced, the forum is free to apply its own law: Pacific Employers Ins. Co. v. Industrial Accident Comm., 306 U. S. 493, 59 S. Ct. 629, 83 L. Ed. 940 (1939). It must, of course, be remembered that if the foreign statute is merely procedural in character the full faith and credit clause does not require its recognition: Vitaphone Corp. Electrical Research Products, 19 Del. Ch. 247, 166 A. 255 (1933).

19 Alaska Packers Ass'n v. Industrial Accident Comm., 294 U. S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935).

20 As heretofore used, the test was primarily factual in character but, for lack of a sufficient number of cases calling for its application, it had not become definite in its nature.

21 Courts and legislatures, in recent years, have become more and more aware of the practical difficulties posed in the job of obtaining jurisdiction. Notes in 28 CHICAGO-KENT LAW REVIEW 347 and in 34 Ky. L. J. 139 discuss cases wherein a more functional approach to jurisdiction has been employed.

22 Ill. Rev. Stat. 1951, Vol. 1, Ch. 70, § 2.

hibiting the bringing of actions in Illinois for deaths caused or occurring outside of the state if the law of the place of the wrongdoing recognizes a cause of action for the fatality and service of process may be had in such place.[23] It was urged, in the early Illinois case of *Dougherty* v. *American McKenna Process Company,*[24] that this statutory provision was unconstitutional as it amounted to a denial of full faith and credit. However, even though the factual situation was similar to the one found in the instant case, the court felt that it could not depart from the traditional comity theory and, therefore, it cast the argument aside. This attitude was typical of the times.[25]

A much later case dealing with the operative effect of the Illinois proviso is the recent federal court holding in *First National Bank of Chicago* v. *United Air Lines.*[26] The plaintiff's intestate there, an Illinois resident, had been fatally injured in an airplane crash in Utah. A wrongful death action, based on the Utah statute,[27] was commenced in a federal court sitting in Illinois. Jurisdiction over the cause was based on diversity of citizenship. The defendant obtained a summary judgment in its favor by virtue of the proviso contained in the Illinois Injuries Act.[28] The plaintiff, relying on the holding of the principal case, contended that the Illinois statute was likewise unconstitutional. The Court of Appeals for the Seventh Circuit, however, on review of the lower court decision, rejected this argument. It pointed out that a distinction existed between the Wisconsin and the Illinois statutes as the former purported to pronounce an absolute bar against the foreign wrongful death action while the latter was qualified in that it allowed the maintenance of a local suit where service of process was not possible in the foreign jurisdiction. As the Illinois statute was said not to operate so as to deny all remedy,[29] the case lends support to the fundamental theory

23 Trust Co. of Chicago v. Pennsylvania R. R. Co., 183 F. (2d) 640 (1950); Wall v. Chesapeake & Ohio Ry. Co., 290 Ill. 227, 125 N. E. 20 (1919). The prohibition does not apply to an action based on the Federal Employers' Liability Act when brought in a federal court sitting in Illinois, Waltz v. Chesapeake & Ohio Ry. Co., 65 F. Supp. 913 (1946), nor where the death has occurred in Illinois even though caused without the state, Carroll v. Rogers, 330 Ill. App. 114, 70 N. E. (2d) 218 (1946).

24 255 Ill. 369, 99 N. E. 619, L. R. A. 1915F 955, Ann. Cas. 1913D 568 (1912).

25 In Carey v. Schmeltz, 221 Mo. 132, 119 S. W. 946 (1909), for example, the court, speaking of the enforceability of foreign statutes, said: "But this we do in respect to the settled rules of public and international law . . . It is not done in obedience to [the] full faith and credit clause of the constitution."

26 190 F. (2d) 493 (1951). It is understood that certiorari has been granted.

27 Utah Code Anno. 1943, § 104-3-11.

28 Ill. Rev. Stat. 1951, Vol. 1, Ch. 70, § 2.

29 The court made no mention of the earlier holding in the comparable case of Martineau v. Eastern Air Lines, 64 F. Supp. 235 (1946), wherein a federal district court sitting in Illinois had refused to be bound by the proviso of the Illinois Injuries Act on the ground the same was procedural in character and could not

of the Hughes case that the purpose of the full faith and credit clause is to prevent one state from denying a remedy created by a sister state where no real antagonism exists between the law of the sister state and that followed in the forum.

When the scope of the instant case is properly limited, the correctness of the outcome cannot be challenged for it takes a realistic approach toward the problems involved. The real criticism, rather, should be directed at the seeming wisdom of the particular Illinois statute. A recognition of the increasing multitude of accidents occurring to citizens of different states because of increased interstate travel makes the problem more than an academic one. The Illinois statute does not really serve to protect the citizens of Illinois from suit in foreign death cases for, if they are not amenable to service of process at the *locus delicti,* the action can then be brought in this state. The true effect of the statute is to impose inconvenience, with its consequent hardship, on the representatives of Illinois residents killed in foreign states by forcing them to go out of the state to seek redress even though personal jurisdiction could be acquired over the defendants in Illinois. The purported reason for the Illinois proviso has been said to rest on the idea that the case load of the Illinois courts would be unbearably increased if such actions were permitted.[30] Such a reason, if reason it be, loses much of its effectiveness when it is weighed against the hardship that the Illinois citizen is forced to suffer in being deprived of the right to use his own courts. Repeal of the objectionable provision would seem to be clearly called for.[31]

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operate to limit the jurisdiction of a federal court. The court there relied on the case of Stephenson v. Grand Trunk Western R. R. Co., 110 F. (2d) 401, 132 A. L. R. 455 (1940), which also involved a suit in a federal court sitting in Illinois based on a fatal accident occurring in Michigan, wherein it was held that nothing in the Illinois statute could oust the federal court of its jurisdiction to award damages in a case where diversity of citizenship existed. While this theory was rejected in the later case of Trust Co. of Chicago v. Pennsylvania R. Co., 183 F. (2d) 640 (1950), there is reason to suppose, even accepting the Illinois provision as being constitutional, that it may still be inapplicable in suits brought in federal courts despite its controlling character as to Illinois state court actions falling within the language of the proviso.

30 First National Bank of Chicago v. United Air Lines, 190 F. (2d) 493 (1951).

31 At the time the case of Hughes v. Fetter, cited in note 1 ante, was decided only Illinois and Wisconsin possessed statutes limiting suit on foreign death claims. Now that the Wisconsin statute has been declared unconstitutional, Illinois stands alone. The absence of similar limitations, or even the demand therefor, in other states would seem to belie the vaunted fear concerning the overwhelming burden which would be added to judicial labor if suits based on foreign claims were to be permitted. While it is desirable to be in the vanguard of every progressive step taken in law, the converse thereof is not cause for congratulation.

WILLS—REQUISITES AND VALIDITY—WHETHER OR NOT THE USE OF EXTRINSIC EVIDENCE OPERATING TO MODIFY AN INSTRUMENT WHICH IS INCORPORATED INTO A WILL BY REFERENCE RESULTS IN A PERMISSIBLE ALTERATION OF THE WILL—In the recent case of *Continental Illinois National Bank & Trust Company* v. *Art Institute of Chicago,*[1] an inter vivos trust had been created by written agreement naming the trust company as trustee thereunder. The settlor, pursuant to the agreement, subsequently perfected seven different amendments to this document. The third amendment, one executed in 1936, was designed to eliminate one Homer Chatmon and the Shriner's Hospital of Chicago as beneficiaries under the trust. The office practice of the trustee had been to keep a copy of each amendment in its open files but to retain the original, with the basic agreement, in its vault. Through some oversight, the office copy of the third amendment became lost or mislaid so, at the time of the making of later amendments to the trust agreement, no reference was made to the amendment of 1936, although the same was actually in existence in the locked file. Reference was made from time to time, however, as to each of the other amendments. The settlor had also made a will, with a codicil thereto, which gave the residue of his estate to the trustee to be distributed in accordance with the trust agreement and certain of its enumerated amendments, but here again he failed to make reference to the 1936 amendment.[2] On the death of the settlor-testator, the trustee-executor found it necessary to sue for a construction of the trust agreement, as amended, and the will. Both Chatmon and the Shriner's Hospital, named in that proceeding, claimed that the 1936 revocatory amendment did not operate to control either the inter vivos trust or the disposition of the residuary estate. The trial court, however, determined that it was controlling as to both. The Appellate Court for the First District affirmed that decision and, on leave to appeal, the Illinois Supreme Court likewise affirmed despite a strong minority opinion refuting that part of the decision which held that the 1936 amendment regulated the disposition of the residuary estate.

It is obviously the law that a properly executed and unrevoked amendment to a trust agreement must, by the very terms of that agreement, operate to control the disposition of the trust res. There is occasion to

[1] 409 Ill. 481, 100 N. E. (2d) 625 (1951), affirming 341 Ill. App. 624, 94 N. E. (2d) 602 (1950). Gunn, J., wrote a dissenting opinion concurred in by Simpson, Ch. J., and Daily, J.

[2] The oversight appears to have been produced by the fact that the attorney who was engaged to draft the will, the codicil, and the several amendments to the trust agreement, worked from the open office file of the trustee, rather than on the basis of the original instruments locked in the trustee's vault, and did not know of, nor was his attention called to, the 1936 amendment.

doubt the correctness of the decision in the instant case, however, as it applies to the residuary estate passing under the will. The rule is well settled that the only intention to be established in the construction of a will is that expressed in the instrument, and not one which may have existed in the mind of the testator but which was left unexpressed.[3] Extrinsic evidence may be introduced to aid in the interpretation of an intent expressed, but cannot be allowed to supply a completely new intent.[4] It was with that primary rule in mind that the minority of the court objected strenuously to the construction given to the will and codicil by the majority. On a review of the facts and law applicable, the dissent seems to be entirely justified in the ultimate conclusion reached, to-wit: that a simple mistake had occurred which could not, by the aid of extrinsic evidence, be rectified.

That conclusion was reached by following a logical and elemental course. The testator, it was pointed out, had incorporated the original trust agreement and six of the seven amendments, listed by description, into the will and codicil by reference. In this way, the manner pursuant to which the residuary estate was to be distributed was made known. One of the basic elements generally needed for a successful incorporation of an extrinsic document into a will by reference is one which requires that the document be reasonably described.[5] In other words, that which is to be incorporated into a will must meet the description set forth in that will. In the instant case, only the trust agreement and six of its amendments, minus the 1936 correction, met that description. As introduction of the 1936 amendment would require the bringing in of a new intent, rather than to serve to explain an intent already expressed, the only conclusion to be deduced would be one calling for its rejection in connection with the construction to be given to the will and codicil.

How the majority of the court came to the final determination as to the residuary estate that it did is not too clearly explained. It stated that the gift under the codicil, in relation to the trust instrument and its amendments, presented "the same ambiguity and requires the same conclusion as was reached in the foregoing consideration of the trust agreement and its amendments."[6] This could mean only that the majority believed that

[3] Gowling v. Gowling, 405 Ill. 165, 90 N. E. (2d) 188 (1950); Lenzen v. Miller, 378 Ill. 170, 37 N. E. (2d) 833 (1941); Wickizer v. Wickizer, 364 Ill. 125, 4 N. E. (2d) 46 (1936); Robinson v. Von Spreckleson, 287 Ky. 705, 155 S. W. (2d) 30 (1941); Perkins v. Eglehart, 187 Md. 520, 39 A. (2d) 672 (1944); Boston Safe Deposit & Trust Co. v. Park, 307 Mass. 255, 29 N. E. (2d) 977 (1940).

[4] Wagner v. Clauson, 399 Ill. 403, 78 N. E. (2d) 203 (1948); Caruthers v. Fisk University, 394 Ill. 151, 68 N. E. (2d) 296 (1946); Northern Trust Co. v. Cudahy, 339 Ill. App. 603, 91 N. E. (2d) 607 (1950).

[5] Bottrell v. Sprengler, 343 Ill. 476, 175 N. E. 781 (1931).

[6] 409 Ill. 481 at 491, 100 N. E. (2d) 625 at 630.

the testator's intention to incorporate the 1936 amendment, as well as the others, into his codicil was apparent on the face of the codicil, so as to make it possible to receive extrinsic proof to explain and to identify the objects of his bounty. It is generally agreed that, when seeking to ascertain the testator's intention, the words of a will are to be read in the light of the circumstances under which the will was made. To that end, a court may put itself in the place of the testator for the purpose of determining the objects of the testator's bounty or the property which is to be the subject of disposition.[7] It is proper, in such an inquiry, to take into consideration all the circumstances under which the will was executed, including the nature, extent, and condition of the testator's property, as well as his relation to his family and to the beneficiaries named in the will. The rule is inflexible, however, both in Illinois and in a majority of the jurisdictions in this country, that, for the purpose of importing into the will an intention which is not there expressed, proof of surrounding circumstances will be inadmissible no matter how clearly such different intention may be made to appear.[8] Certainly, a new and different intent was being inserted into the will and codicil in the instant case by reading into it the terms of the 1936 amendment. It is quite likely that it was the testator's true desire to include that amendment in his codicil, but the cases are quite positive on the point that only that intent which is expressed upon the face of the will should control as to all matters of construction.

The majority, as well as the minority, reached a unanimous conclu-

[7] Thomas v. Reynolds, 234 Ala. 212, 174 So. 753 (1937); Dyer v. Lane, 202 Ark. 571, 151 S. W. (2d) 678 (1941); Hoops v. Stephan, 131 Conn. 138, 38 A. (2d) 588 (1944); Bird v. Wilmington Soc. of Fine Arts, 28 Del. Ch. 449, 43 A. (2d) 476 (1945); Gridly v. Gridly, 399 Ill. 215, 77 N. E. (2d) 146 (1948); Jackman v. Kasper, 393 Ill. 496, 66 N. E. (2d) 678 (1946); Quigley v. Quigley, 370 Ill. 151, 18 N. E. (2d) 186 (1938); Moffet v. Cash, 346 Ill. 287, 178 N. E. 658 (1931); LaRocque v. Martin, 344 Ill. 522, 176 N. E. 734 (1931); Boys v. Boys, 328 Ill. 47, 159 N. E. 217 (1927); Dollander v. Dhaemers, 297 Ill. 274, 130 N. E. 705, 16 A. L. R. 8 (1921); Himmel v. Himmel, 294 Ill. 557, 128 N. E. 641 (1920); Walker v. Walker, 283 Ill. 11, 118 N. E. 1014 (1918); DesBouef v. DesBouef, 274 Ill. 594, 113 N. E. 900 (1916); Peet v. Peet, 229 Ill. 341, 82 N. E. 376 (1907); Andrews v. Applegate, 223 Ill. 535, 79 N. E. 176 (1906); Fetty v. Easterling, 286 Ky. 34, 149 S. W. (2d) 760 (1941); In re Holmes' Estate, 233 Wis. 274, 289 N. W. 638 (1940).

[8] Murphy v. Morris, 200 Ark. 932, 141 S. W. (2d) 518 (1940); Ellsworth v. Arkansas Nat. Bank, 194 Ark. 1032, 109 S. W. (2d) 1258 (1937); Mitchell v. Snyder, 402 Ill. 379, 83 N. E. (2d) 680 (1949); Jackman v. Kasper, 393 Ill. 496, 66 N. E. (2d) 678 (1946); Ickes v. Ickes, 386 Ill. 19, 53 N. E. (2d) 585 (1944); Lenzen v. Miller, 378 Ill. 170, 37 N. E. (2d) 833 (1941); Robinson v. Von Spreckleson, 287 Ky. 705, 155 S. W. (2d) 30 (1941); In re Stuart's Estate, 274 Mich. 282, 264 N. W. 372 (1936). In Lenzen v. Miller, 378 Ill. 170 at 177, 37 N. E. (2d) 833 at 837, the court said: "The intention of the testator which the courts will carry into effect is that expressed only by language of the will which must be interpreted in view of all the circumstances surrounding the testator, and evidence will be received to show those circumstances, but it will not be permitted to import into the will an intention different from that expressed by its language, however clearly such different intention may be made to appear."

sion when they established, at the time of construing the trust agreement, that the 1936 amendment operated to control the disposition of the property held pursuant to the inter vivos trust. It is conceived that the majority erred, however, when they clung to this decision as being conclusive on the point of the construction to be given to the codicil, where it had no logical or related significance. Simply because it had been determined that the disposition of the property given in trust before the testator's death was to be controlled by the 1936 amendment should provide no logical ground upon which to base an opinion that property passing after death via a codicil should also be similarly controlled.

It is at this point that it appears as though the majority by-passed the real issue. On the issue of construing the trust agreement, the important question was whether the existence of the 1936 amendment could or could not be proven. In the aspect of the case relating to the will, the only issue was whether, existence of the amendment being admitted, the amendment could then be brought in to control the distribution of the residuary estate. Under the rule promulgated by the majority, if a testator has omitted a given intent from a document which has been incorporated into a will by reference, that omission may be rectified by the free use of extrinsic evidence. Such an amendment, it has said in effect, would amount only to an alteration of the document incorporated in the will but would not work a change in the will itself. The apt reply of the minority was to the effect that no amount of legal sophistry could displace the conclusion that the process of amending an instrument incorporated in a will by reference would also be productive of an amendment to the will.[9]

To observe further how the majority must have felt that a construction of the codicil would have to be controlled by the previous interpretation it had given to the trust agreement, when in fact the two were separate and distinct problems, one merely need pay regard to certain of their other statements. It was said, for example, in holding that the residuary estate was to be controlled by an amendment not mentioned in the codicil, that "to hold otherwise [would be] to change the duties of the trustee and amend the trust by a method other than that prescribed in the trust instrument."[10] It was also said, in answer to a contention that the 1936 amendment did not control the distribution of the residuary estate, that

[9] Wagner v. Clauson, 399 Ill. 403, 78 N. E. (2d) 203 (1948); Bottrell v. Sprengler, 343 Ill. 476, 175 N. E. 781 (1931); Marshall v. Kent, 210 Ky. 654, 276 S. W. 563 (1925). In the case of In re Hopper's Estate, 90 Neb. 622, 134 N. W. 237 (1912), the decedent purported to incorporate six deeds into his will by reference. It was held that parol evidence could not be accepted to vary the intent expressed in the deeds.

[10] 409 Ill. 481 at 491, 100 N. E. (2d) 625 at 630.

"the trouble with this contention is that the trust instrument and the trust are governed by all the amendments."[11] For some reason, the majority appear to have felt that if the trust agreement was to be controlled by the 1936 amendment then nothing was left to do but to attach it to the construction of the codicil also.

Final analysis of the issue presented in the instant case affords no substantial justification for the stand taken by the majority. The most that could be said in favor of the holding is that the majority may have felt that an intent to include the 1936 amendment could be implied from language appearing on the face of the codicil. But not even that conclusion would appear to have been an accepted basis for the decision. Instead, as has been pointed out, the main emphasis to substantiate the majority holding was placed upon unrelated law and a general side-stepping of the real issues involved. Instead of accepting the clear fact that the 1936 amendment had not been mentioned in the will or codicil, and that no inference could be drawn from this fact, the majority engaged in casuistic argument resulting in an unsound decision.

H. FAWELL

[11] Ibid.