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Civil Practice Act Cases

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DISCUSSION OF RECENT DECISIONS

AUTOMOBILES—INJURIES FROM OPERATION, OR USE OF HIGHWAY—
WHETHER OR NOT OWNER OF PARKED AUTOMOBILE WHO LEAVES KEY IN
IGNITION IS RESPONSIBLE FOR INJURIES INFLICTED BY THIEF WHO STEALS
CAR—Judicial speculation on the purpose and intent of the legislature
when enacting Section 189(a) of the Motor Vehicle Act became apparent
in the case of *Ostergard v. Frisch*,¹ a case of far-reaching importance to
car owners in Illinois. The defendant automobile owner there concerned

¹ 333 Ill. App. 359, 77 N. E. (2d) 537 (1948). Niemeyer, P. J., wrote a dissenting
opinion.

left his car standing unattended on a Chicago street with the motor off but with the key left in the ignition, thereby violating the statute aforementioned.² A thief drove off with the car, collided with and damaged plaintiff's parked automobile, and the Municipal Court of Chicago, sitting without a jury, rendered judgment against the defendant for the damage done. That judgment was affirmed by the Appellate Court for the First District, despite a dissenting opinion, on the ground that, in determining whether the negligence involved in a violation of the statute was the proximate cause of the resulting injury, the statute might, by its obvious intent, "enlarge upon the general definition of proximate cause."³

Through the years, the courts have been called upon to decide the broad general question of whether a violation of a statute should serve to impose civil liability,⁴ but the law on this subject is in a state of uncertainty and the decisions are no models either of logic or consistency. One group of cases holds that every violation of a statute is negligence *per se* but that whether or not such negligence is the proximate cause of the injury should be a jury question.⁵ Another group of cases, agreeing that a violation of a statute is negligence *per se*, nevertheless holds that, as a matter of law, the intervening act of an intermeddler, not the original negligence of the party violating the statute, is to be regarded as the proximate cause of any subsequent injury.⁶ On the specific point, the increase in recent years of statutes and ordinances requiring that cars left standing unattended on public streets should be locked has come to be an important factor. Several states have statutes identical with or

² Ill. Rev. Stat. 1947, Ch. 95½, §§ 189(a) and 118.

³ 333 Ill. App. 359 at 369, 77 N. E. (2d) 537 at 541. The minority opinion adhered to the time-honored rule of law that the causal connection between a person's negligence and an injury is broken by the intervention of a willful, malicious and criminal act of a third person, unless there are special circumstances which will render the defendant liable on the theory that the intervening cause was reasonably foreseeable.

⁴ *Atkinson v. The Newcastle and Gateshead Waterworks Co.*, L. R. 2 Exch. Div. 441 (1877) and L. R. 6 Ex. 404 (1878); *Couch v. Steel*, 3 El. & Bl. 402, 118 Eng. Rep. 1193 (1854).

⁵ *Moran v. Borden Co.*, 309 Ill. App. 391, 33 N. E. (2d) 166 (1941); *Malloy v. Newman*, 310 Mass. 269, 37 N. E. (2d) 1001 (1941); *Garis v. Eberling*, 18 Tenn. App. 1, 71 S. W. (2d) 215 (1934). But see *contra*, *Galbraith v. Levin*, — Mass. —, 81 N. E. (2d) 560 (1948).

⁶ *Squires v. Brooks*, 44 App. D. C. 320 (1916), overruled by *Ross v. Hartman*, 78 App. D. C. 217, 139 F. (2d) 14 (1943); *Galbraith v. Levin*, — Mass. —, 81 N. E. (2d) 560 (1948); *Sullivan v. Griffin*, 318 Mass. 359, 61 N. E. (2d) 330 (1945); *Slater v. T. C. Baker Co.*, 261 Mass. 424, 158 N. E. 778 (1927); *Roberts v. Lundy*, 301 Mich. 726, 4 N. W. (2d) 74 (1942); *Kennedy v. Hedberg*, 159 Minn. 76, 198 N. W. 302 (1924); *Rhad v. Duquesne Light Co.*, 255 Pa. 409, 100 A. 262 (1917).

very similar to the Illinois provision construed in the instant case⁷ and, where these statutes have been involved, some decisions to date line up with the minority holding therein⁸ but there has been a strong tendency to hold as did the majority of the court.⁹

In situations of this kind, three fundamental inquiries immediately arise, namely: (1) did the defendant violate the statute; (2) what were the facts concerning the plaintiff's injury; and (3) was plaintiff's injury of the type which the statute was intended to prevent? The first two are fact questions, but the third generates a question of law which embraces and, in effect, actually eliminates the troublesome and confusing consideration of proximate causation.¹⁰ It necessarily requires a construction of the statute, which may be construed as if it were intended to protect all persons or as if designed to protect a particular class of persons against a more or less narrowly restricted type of hazard. If the former, the violator is more or less automatically liable upon a showing of violation. Under the latter view, the offender cannot be civilly liable unless the injury which results to the other is caused by his exposure to the particular hazard from which it was the design of the statute to protect him.¹¹ Canons of construction require that a statute should be interpreted with reference to the principles of common law in force at the time of its passage and, to arrive at sound interpretation, the search should be guided by four cardinal points of orientation, to-wit: (1) what was the common law before the passage of the act; (2) what was the hazard against which the common law did not provide; (3) what remedy did the legislature intend to provide to cure the hazard; and (4) what was the true purpose of the law?¹²

As to the first of these, it was not unlawful at common law to park a car unattended, to leave the key in the ignition, to keep the motor running, or to fail to set the brakes and turn the wheels to the curb when on a

⁷ Colo. Stats. 1935, Ch. 16, § 232; Burns' Ind. Stats. Ann., Vol. 8, p. 879, § 47-2124; Kans. Rev. Stats. 1942, § 189.430; Md. Code 1943, Art. 66½, § 192; Mass. Gen. Laws 1932, Ch. 90, §§ 7 and 13; Miss. Stats., § 8219; N. H. Rev. Laws 1942, Ch. 119, § 24; R. I. Gen. Laws, Ch. 88, § 15; Utah Code Ann. 1942, Tit. 57, Ch. 7, § 169; Wyo. Rev. Stats. 1945, Ch. 60, § 530. See also D. of C. Traffic Reg., § 58.

⁸ Sullivan v. Griffin, 318 Mass. 359, 61 N. E. (2d) 330 (1945); Slater v. T. C. Baker Co., 261 Mass. 424, 158 N. E. 778 (1927).

⁹ Ross v. Hartman, 78 App. D. C. 217, 139 F. (2d) 14 (1943), cert. den. 321 U. S. 790, 64 S. Ct. 790, 88 L. Ed. 1080 (1943), reversing Squires v. Brooks, 44 App. D. C. 320 (1916). See also Bullock v. Dahlstrom, 46 A. (2d) 370 (D. C., 1946).

¹⁰ Venable, "Proximate Causes and Effects," 19 Miss. L. J. 183 (1948); Lowndes, "Civil Liability Created by Criminal Legislation," 16 Minn. L. Rev. 361 (1932).

¹¹ Restatement, Torts, § 286(h).

¹² Potter's Dwaris on Statutes (1871), p. 184.

perceptible grade. Any of these things might or might not have been regarded as actionable negligence, depending upon how a jury decided the question of proximate causation, but they were not negligent acts as a matter of law nor were they offenses against the state. A motor vehicle was not regarded as a dangerous instrumentality but more nearly analogous to a horse and wagon,¹³ so the operator was under a duty to exercise only such care as a person of ordinary prudence would exercise under the circumstances.¹⁴ Leaving a car or horse unattended, unlocked or unfastened on a public street was not *ipso facto* negligence¹⁵ although, with added circumstances, it might be so considered¹⁶ particularly if a prudent man would have reasonably foreseen that injury might result.

What, then, was the hazard against which the common law did not provide? Clearly it failed to provide adequate measures to lessen the danger to the public from runaway horses or runaway cars in those cases where no fault attended upon the leaving thereof unguarded. By declaring it to be a misdemeanor to park a car with the motor running, or with the key in the ignition, or without bracing the wheels on a hill, the state could, under its police power, materially lessen the hazard to the public from runaway cars, without at the same time increasing the car owner's civil responsibilities on common law principles.¹⁷ The common law already provided sufficient protection against the hazard of having a parked car set in motion by the intervention of children, for the courts were ready to hold the car owner liable where the intervening efficient cause of the injury was such as he could reasonably have anticipated.¹⁸ But, to be reasonably foreseeable, the act of the intermeddler should be a normal response to the situation created by the defendant's negligence. Theft of a parked automobile, made easy because the key is in the ignition, is not a normal response but is, rather, the willful, malicious or criminal act of

¹³ *Maloney v. Kaplan*, 233 N. Y. 426, 135 N. E. 838 (1922); *Vincent v. Crandall & Godley Co.*, 115 N. Y. S. 600 (1909).

¹⁴ 5 Am. Jur., *Automobiles*, § 338.

¹⁵ *Castay v. Katz & Bestoff*, 148 So. 76 (La. App. 1933); *Roberts v. Lundy*, 301 Mich. 726, 4 N. W. (2d) 74 (1942); *Jackson v. Mills-Fox Baking Co.*, 221 Mich. 64, 190 N. W. 740, 26 A. L. R. 906 (1922); *Wilson v. Harrington*, 269 App. Div. 891, 56 N. Y. S. (2d) 157 (1945), affirmed in 295 N. Y. 667, 65 N. E. (2d) 101 (1946); *Walter v. Bond*, 267 App. Div. 779, 45 N. Y. S. (2d) 379 (1943); *Kaplan v. Shults Bread Co.*, 208 N. Y. S. 118 (1925); *Maloney v. Kaplan*, 233 N. Y. 426, 135 N. E. 838 (1922); *Frashella v. Taylor*, 157 N. Y. S. 881 (1916); *Rapczynski v. W. T. Cowan, Inc.*, 138 Pa. Super. 392, 10 A. (2d) 810 (1940).

¹⁶ *Tomano v. Ideal Towel Supply Co.*, — N. J. —, 51 A. (2d) 888 (1947); *Connell v. Berland*, 223 App. Div. 234, 228 N. Y. S. 20 (1928); *Gumbrell v. Clausen Flanagan Brewery*, 199 App. Div. 778, 192 N. Y. S. 451 (1922); *Campbell v. Model Steam Laundry*, 190 N. C. 649, 130 S. E. 638 (1925).

¹⁷ Thayer, "Public Wrong and Private Action," 27 Harv. L. Rev. 317 (1914).

¹⁸ *Neering v. Illinois Cent. R. Co.*, 383 Ill. 381, 50 N. E. (2d) 497 (1943). The case of *Moran v. Borden Co.*, 309 Ill. App. 391, 33 N. E. (2d) 166 (1941), could well be said to rest on common law doctrines.

another for which the common law relieved the party guilty of mere passive negligence from liability. That fact, then, might have been within the cognizance of the legislature when it acted. But is it not more reasonable to suppose it was the first defect at which the statute was aimed rather than the second, *i.e.* the hazard of a parked car being stolen and driven negligently by the thief? To read into the statute a presumption that the owner impliedly consented to the use of his car by a thief or other unauthorized person would be clearly unconstitutional, even if the courts should be permitted to so liberally construe a statute in derogation of the common law when no such intent is to be found in its language.

What remedy did the legislature provide designed to cure the hazard? The provision in question is part of the Uniform Act Regulating Traffic on Highways.¹⁹ The whole act was designed to regulate traffic and the language thereof is free from ambiguity. Under the general purpose of regulating traffic in the interest of public safety, and for the obvious specific purpose of lessening the danger that parked cars might be set in motion without the intervention of human agency, the legislature, pursuant to its police power, set out such precautions as would guard against runaway cars. The engine should be stopped because a shove from some direction might start the vehicle up under its own power. The ignition should be locked and the key removed because a shove might move the key, unlock the ignition and start the car. The brakes should be set and the wheels turned to the curb when parking on a grade, because the force of gravity or a shove might start the driverless car on a terror-laden frolic of its own. To lessen these dangers, the legislature ordered that drivers should abide by the regulations set forth, under penalty of being guilty of a misdemeanor. Just that, and nothing more, can be found in the words of the legislative command.

What, then, was the true purpose of the statute? Simply stated, it was to regulate traffic. If the purpose had been to prevent theft, the statute would have required, in addition, that the car doors be locked and all windows be shut tight. Provision for the setting of brakes would then have been entirely out of place. It therefore seems clear, without the need for unnecessary speculation, that the purpose of Section 189(a) was merely to prevent injuries apt to be caused by runaway cars. If the statute had been construed and applied as it would seem to have been intended, that is to protect the public against a narrowly restricted type of hazard, the defendant in the instant case would not have been held civilly liable for his violation thereof. To hold otherwise exposes the majority of the court to the charge of making an unjust enlargement upon both the legislative language and purpose.

GRACE THOMAS STRIPLING

¹⁹ Ill. Rev. Stat. 1947, Ch. 95½, § 98 et seq.

AUTOMOBILES—INJURIES FROM OPERATION, OR USE OF HIGHWAYS—WHETHER SUBSTITUTED SERVICE OF PROCESS AGAINST NONRESIDENT AUTOIST SHOULD BE LIMITED TO ACTIONS BASED ON ACCIDENTS OCCURRING ON PUBLIC HIGHWAYS—In the recent case of *O'Sullivan v. Brown*,¹ the United States Court of Appeals for the Fifth Circuit was confronted with the problem of determining whether or not the nonresident motorist statute of Texas² was applicable to an accident which occurred on a road within premises owned by the United States Government but leased by it to a manufacturing corporation to be used as an airplane plant. The defendant was a resident of Illinois and service of process was had upon him in the statutory fashion. Defendant moved to quash the service and to dismiss the action on the ground of want of jurisdiction, contending that the road upon which the accident occurred was not a public highway within the meaning of that term as used in the statute. It was shown that the premises were entirely surrounded by a fence, that ingress and egress to and from the premises could be had only through gates provided for that purpose, and that admission to the premises could be had only upon securing a proper permit from the company's representative or from United States Army personnel in charge. Once inside the premises, the individual came under the control and jurisdiction of the United States Army. The trial court overruled the motion and, after trial, judgment was rendered in favor of the plaintiff. On appeal, the Court of Appeals reversed on the ground that the locus of the accident did not fall within the statute. The court indicated that the controlling factor, in determining the meaning of the term "public highway," was whether the public had the right, generally, to use the road. If, as of right, the use of the road was open to the public, then it was a "public highway." If, on the other hand, the use of the road could be inhibited by any private person, then the road was not public, no matter what the facts were regarding its prior use by the public, the volume of that usage, the state of maintenance or of police jurisdiction. The court was not unaware of the fact that the result reached was not entirely satisfactory for it said, after noting that other courts which have dealt with the problem have strictly construed statutes of the kind in question, that a "strict construction seems unfortunate, for it

¹ 177 F. (2d) 199 (1948).

² Vernon's Tex. Civ. Stats. Ann., Vol. 5, Tit. 42, Art. 2039a, §1. The pertinent parts thereof are as follows: "The acceptance by a nonresident . . . of the rights, privileges and benefits of the *public highways or public streets* of this state . . . shall be deemed equivalent to an appointment by such nonresident . . . of the Chairman of the State Highway Commission . . . to be his true and lawful attorney and agent upon whom may be served all lawful process in any civil action . . . growing out of any accident or collision in which said nonresident . . . may be involved while operating a motor vehicle or motorcycle on such *public highway or public street*. . . ." Italics added.

may disregard the true intent of the lawmakers as well as the public policy which prompted the enactments and may operate to defeat the purpose for which the statutes were enacted."³

The seeming inequity in the result and the cogency of the observation made by the judge raises a problem of legislative intent and makes appropriate an inquiry into the language used in the various nonresident motorist statutes to ascertain if a distinction between accidents occurring on public property in contrast to those occurring on private property is warranted. The principal factors motivating the enactment of statutes of this nature lie in a recognition of the capability of the negligently operated vehicle to inflict harm; the ease with which the nonresident tortfeasor may remove himself from the state in which the harm was inflicted, thereby escaping personal service of process with its consequent judicial accountability in that state; as well as the burden and handicap thrust on the resident whose only redress is to pursue the nonresident to the state of his domicile and there institute action.⁴ At the outset, then, it would seem arbitrary, capricious and unreasonable to distinguish between accidents occurring on private property and those occurring on public land. To do so is to lose sight of evils sought, in the first instance, to be rectified. Certainly, the danger of the vehicle is not mitigated by virtue of its operation on private property. The resident is no less harmed, while the disadvantage to which he is put, if he would have redress, is the same.

The answer, then, lies in the language of the statutes themselves. All of the forty-eight states and the District of Columbia have nonresident motorist statutes. Common to all of them, are the so-called "agency" clause and the "coverage" clause. The former is, of course, that part of the statute under which some designated state officer becomes the agent of the nonresident; the latter denotes the *loci* which are intended to be covered. Twenty-five states and the District of Columbia create the agency by virtue of the nonresident's use and operation of a motor vehicle on a public highway and would, seemingly, limit the agency to accidents occurring on the "public highway" for the limiting term "public highway" appears in both clauses.⁵ A second group of statutes, found in

³ 177 F. (2d) 199 at 202.

⁴ See Scott, "Jurisdiction over Nonresident Motorists," 39 Harv. L. Rev. 563-86 (1926); Culp, "Process in Actions Against Non-resident Motorists," 32 Mich. L. Rev. 325-50 (1934); Culp, "Recent Developments in Actions Against Non-resident Motorists," 37 Mich. L. Rev. 58-77 (1938).

⁵ D. C. Code 1940, Tit. 40, § 403; Ala. Code 1940, Tit. 7, § 199; Ariz. Code Ann. 1939, Ch. 66, § 227; Ark. Stat. Ann. 1947, Vol. 3, Ch. 27, § 341; Colo. Stat. Ann. 1935, Vol. 2, Ch. 16, § 48(1); Conn. Stat. 1930, Tit. 58, Ch. 288, § 5475; Del. Laws 1935, Ch. 225, § 1; Ga. Laws 1937, Part 1, Tit. 6, No. 444, at p. 732; Iowa Code 1946, Vol. 1, Ch. 321, § 321.498; Burns Ind. Stat. 1933, Vol. 8, Ch. 10 § 47-1043; La Dart

thirteen states, while in other respects not dissimilar from the first group, are distinguishable because of the omission of the word "public" in both the agency and coverage clauses.⁶ The basic situation would seem to be broadened under these statutes unless the term "highway" is given a narrow definition.

The statutes of Kansas⁷ and of New Mexico⁸ are also generally similar but with one important distinction. The agency is there created by the use of the "public highway" but thereafter the nonresident becomes amenable to service of process under the statute for "any accident or collision in which said motor vehicle may be involved" while it is being operated in the state. The coverage clause is there clearly intended to be far broader. The statutes of Tennessee⁹ and of New Hampshire¹⁰ also present variations for in these two instances the agency is created by the use of "highways" and "ways" respectively, but thereafter coverage is extended to any accident "in this state," in the words of the Tennessee statute, or to any accident occurring "on such ways, or elsewhere," in the words of the New Hampshire statute. The latter, by the insertion of the words "or elsewhere," seems pointedly to have provided against any strict construction based on distinctions between public or private property. The fifth and last group of statutes would appear to be best suited to cure the evils at which these statutes were aimed for, in seven states,¹¹ the mere operation of a motor vehicle in the state creates the agency and

Civ. Code 1939, Vol. 4, Ch. 4, § 5296; Me. Rev. Stat. 1944, Vol. 1, Ch. 19, § 59; Flack Md. Ann. Code, 1947 cumm. supp., Art. 56, § 106; Mass. Ann. Laws 1933, Vol. 3, Ch. 90, § 3a; Mich. Stat. Ann., Vol. 8, Tit. 9, Ch. 74, § 9.1701; Mo. Rev. Stat. Ann. 1939, Vol. 18, Ch. 45, Art. 1, § 8410.1; Miss. Code Ann. 1942, Tit. 37, Ch. 4, § 9363; Nev. Comp. Laws, 1941 supp., Vol. 1, § 4441.01; N. C. Gen. Stats. 1943, Vol. 1, Ch. 1, § 1-105; Okla. Stat. Ann. (perm. ed.) Tit. 47, Ch. 11, § 391; R. I. Gen. Laws 1938, Ch. 103, § 1; S. C. Code 1942, Vol. 1, Tit. 7, Ch. 16, § 437; Vernon's Tex. Civ. Stat. Ann., Vol. 5, Tit. 42, Art. 2039a; Remington's Wash. Rev. Stat. Ann. 1937, Vol. 7a, Tit. 41, § 6360-129; W. Va. Code Ann. 1943, Ch. 56, § 5555(1).

⁶ Cal. Deering Vehicle Code Ann. 1944, Ch. 1, § 404; Ida. Code 1947, Vol. 9, Tit. 49, Ch. 12, § 1202; Ill. Rev. Stat. 1947, Ch. 95½, § 23; Minn. Stat. Ann. 1945, Vol. 12, Ch. 170, § 170.55; Mont. Rev. Code 1935, Vol. 1, Ch. 152, § 1760.12; Neb. Rev. Stat. 1943, Vol. 2, Ch. 25, § 530; N. D. Rev. Code 1943, Vol. 3, Ch. 28, § 0611; Ore. Comp. Laws Ann. 1940, Vol. 8, Tit. 115, Ch. 1, Art. 5, § 128B; S. D. Code 1939, Vol. 2, Ch. 33, § 33.0809; Utah Code Ann. 1943, Vol. 3, Tit. 37, Ch. 13, § 12; Va. Code Ann. 1942, Tit. 18, Ch. 90b, Art. 1, § 2154(70)(1); Wis. Stats. 1945, Ch. 85, § 85.05(3); Wyo. Comp. Stat. Ann. 1945, Vol. 4, Ch. 60, § 60-1101.

⁷ Kan. Gen. Stat. Ann. 1935, Ch. 8, Art. 4, § 8-401.

⁸ N. M. Stat. Ann. 1941, Vol. 5, Ch. 68, Art 10, § 68-1003.

⁹ Williams' Tenn. Code Ann. 1934, Vol. 6, Tit. 1, Ch. 5, Art. 4, § 8671.

¹⁰ N. H. Rev. Laws 1942, Vol. 1, Tit. IX, Ch. 116, § 42.

¹¹ Fla. Stat. 1941, Tit. 6, Ch. 47, §§ 47.29-47.30; Ky. Rev. Stat. 1948, Ch. 188, § 188.030; N. J. Stat. Ann., Tit. 2, Ch. 32, § 2:32-34.1; McKinney's New York Consol. Laws Ann., Vol. 62A, Vehicle and Traffic Law, § 52; Page, Ohio Gen. Code Ann., Vol. 4a, Ch. 21, § 6308-1; Purdon's Penn. Stat. Ann. (perm. ed.), Tit. 75, Ch. 4, § 1201; Vt. Stats., 1947 revision, Tit. 46, Ch. 428, § 10062.

thereafter the nonresident becomes amenable to the process of that state for "any accidents" in which such nonresident is involved while operating the motor vehicle "within the state." No attempt is there made to restrict the locus, so any distinction based on public or private property would seem to be unwarranted.

The question of locus of the accident, within the meaning of these statutes, has arisen but few times. For the most part, the courts have felt themselves bound by the principle that the statutes, being in derogation of the common law, must be strictly construed.¹² In three cases,¹³ the courts have even felt that the statutes could not constitutionally apply to accidents, the causative force of which did not arise from the use of the highways. The result has been harshness and seeming inequity to the injured plaintiff, but in most instances the result has been proper in the light of the statute which the court had to construe. Thus, in those states which require both the use of the public highway and the occurrence of an accident thereon to enable the resident to avail himself of the statutory benefit, the fact that the accident has occurred on a private driveway,¹⁴ on the grounds of a filling station,¹⁵ on the grounds of a World's Fair,¹⁶ in a privately owned public garage,¹⁷ and on the parking lot of a night club,¹⁸ has been held to bar the resident from obtaining service of process on the nonresident through the statute. The Supreme Court of Louisiana, however, interpreting a statute similar in language to those under which the results just noted were obtained, reached a different conclusion in the case of *Galloway v. Wyatt Metal & Boiler Works*.¹⁹ The court there held that a road which was privately owned but was publicly used constituted a "public" highway within the meaning of the Louisiana statute. While the result is admirable and in accord with the fundamental purpose of these statutes, the reasoning therein, in the light of the statute, is not beyond reproach.

¹² *Kelley v. Koetting*, 164 Kan. 542, 190 P. (2d) 361 (1948); *Jermaine v. Graf*, 235 Iowa 1063, 283 N. W. 428 (1939); *Kerr v. Greenstein*, 213 Ark. 447, 212 S. W. (2d) 1 (1948); *Mull v. Taylor*, 68 Ga. App. 663, 23 S. E. (2d) 595 (1943); *Kornfield v. Hurwitz*, 178 Misc. 216, 32 N. Y. S. (2d) 820 (1942); *Flynn v. Kramer*, 271 Mich. 500, 261 N. W. 77 (1935).

¹³ *Finn v. Schreiber*, 35 F. Supp. (1940); *Brauer Machine & Supply Co. v. Parkhill Truck Co.*, 383 Ill. 569, 50 N. E. (2d) 836 (1943); *Kelley v. Koetting*, 164 Kan. 542, 190 P. (2d) 361 (1948).

¹⁴ *Dworkin v. Spector Motor Service, Inc.*, 3 F. R. D. 340 (1944); *Zielinski v. Lyford*, 175 Misc. 517, 23 N. Y. S. (2d) 489 (1940).

¹⁵ *Finn v. Schreiber*, 35 F. Supp. 638 (1940).

¹⁶ *Catalano v. Maddox*, 175 Misc. 24, 22 N. Y. S. (2d) 149 (1940).

¹⁷ *Haughey v. Minneola Garage, Inc.*, 174 Misc. 332, 20 N. Y. S. (2d) 857 (1940).

¹⁸ *Harris v. Hanson*, 75 F. Supp. 481 (1948).

¹⁹ 189 La. 837, 181 So. 187 (1938).

It is interesting to note that New York, which at one time belonged in the category of states first mentioned, amended its statute in 1942 so as to eliminate any reference to "public" highways. The mere operation of a motor vehicle in that state now serves to create the agency, and the nonresident is thereafter amenable to service of process for any accident in which he may be involved while so operating the motor vehicle. The New York cases noted above²⁰ all stemmed from causes of action arising prior to the effective date of the amendment and may have been the cause of the same. No case bearing on the precise point has been decided in that state since then²¹ but it would seem that, by the amendment, the legislature intended to destroy the arbitrary distinction theretofore existing between public and private property which produced the results already observed.

Illinois has likewise had occasion to consider the question. In the case of *Brauer Machine & Supply Company v. Parkhill Truck Company*,²² the decision turned on a question of proximate cause, but the court did indicate by way of dictum that, as long as the causal force of the accident originated in the use of the highway, it would make no difference where the harm was inflicted so the statute could apply. Conversely, the court indicated that if the nonresident statute was intended to apply to accidents occurring on private property, both as to cause and effect, it would then be constitutionally objectionable as violative of the Fourteenth Amendment. It was reasoning of that character which induced Kansas, a state with a statute which places no restriction on the locus of the accident so long as the proper agency is created, to reach a result seemingly dissonant with the language of its statute. In *Kelley v. Koetting*,²³ the nonresident combine operator negligently destroyed a resident's wheat while working on plaintiff's field with his machine. Despite the all-inclusive language of the statute, the court, one judge dissenting, held that the statute was

²⁰ See notes 14 to 18 inclusive, ante.

²¹ More recent cases, such as *Cooper v. Amehler*, 178 Misc. 844, 35 N. Y. S. (2d) 917 (1942); *LaPlaca v. Hutcheson*, 191 Misc. 27, 79 N. Y. S. (2d) 355 (1948); *Lowe v. Western Express Co.*, 189 Misc. 177, 68 N. Y. S. (2d) 873 (1947); and the like, all deal with other aspects of the law.

²² 383 Ill. 569, 50 N. E. (2d) 836, 148 A. L. R. 1208 (1943). The accident occurred while the nonresident defendant's truck was being unloaded on private property after traversing the public highways of the state in order to reach the place of unloading. The truck was at rest at the time and had been so for some time prior to the accident. The court held there was no connection between the use and operation of a motor vehicle on the highways and the accident, the use of the highway not being the causal force of the accident. For that reason, it was decided that the court had no jurisdiction over defendant by virtue of service had pursuant to Ill. Rev. Stat. 1947, Ch. 95½, § 23.

²³ 164 Kan. 542, 190 P. (2d) 361 (1948).

applicable only where the harm resulted from the negligent operation of a motor vehicle on the state highway.

The point has not arisen for decision in the courts of New Hampshire and Tennessee, comprising the fourth group in this statutory classification, but in a decision entirely consistent with the language of the Pennsylvania statute, falling in the fifth class, the Supreme Court of that state has decided that accidents occurring on private property clearly fall within the compass of the statute.²⁴ Just as in the instant case, the accident there involved occurred on private property. Considering the constitutional issue, the court noted that to hold that state police power in this regard could not "constitutionally be exercised beyond the highway itself and encompass within its scope instances where the nonresident, after having entered the state over state highways, proceeds onto private property and there causes injury to another, would [be to] create an unreasonable distinction."²⁵

If the result in the instant case is unsatisfactory, the fault would seem to lie in the language of the statute which necessitated the result rather than in the reasoning of the court. Logically, no other result could be justified for the inherent limitations of the language employed admit of no other construction. The choice of language in the Texas statute, and those similar to it, is unfortunate. To create a distinction between public and private property insofar as the locus of the accident is concerned, is to lose sight of the harm to be righted, and the capability of the negligently operated motor vehicle to inflict harm, no matter where it is driven. New York, where the question has most frequently arisen, has recognized the invalidity and basic injustice in such a distinction and has rectified the situation by an appropriate amendment. It is to be hoped that other states with limited statutes will take cognizance of the situation.

F. J. LYNCH

²⁴ *Sipe v. Moyer*, 353 Pa. 75, 44 A. (2d) 263 (1945).

²⁵ 353 Pa. 75 at 78, 44 A. (2d) 263 at 264. The constitutional issue raised in *Hess v. Pawloski*, 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1927), dealt principally with the issue as to whether the mere use of the highways of a state by a nonresident could be sufficient, by implication, to constitute his appointment of the designated state officer as his agent for service of process. The court therein did not unequivocally state that such agency would be limited to accidents occurring on a public highway, although it did say that, under the statute before it, the "implied consent is limited to proceedings growing out of accidents or collisions on a highway in which the nonresident may be involved." It should be recognized that this language was spoken of a statute from Massachusetts, then under consideration, which did in fact limit the agency created. The quoted language is aptly descriptive of the Massachusetts statute, but it is by no means a generalization on the point. To contend, as has been suggested, that this language was intended to limit the applicability of statutes of the kind in question to accidents occurring only on the highways, and to no others, seems unwarranted.

DECLARATORY JUDGMENT—PLEADING—WHETHER OR NOT COERCIVE COUNTERCLAIM MAY BE INTERPOSED IN DECLARATORY JUDGMENT ACTION—When Professor Sunderland wrote in 1917 about that modern evolution in remedial rights designated as the declaratory judgment, he visualized it as a friendly suit which would put less strain on the business and personal relations of the parties and lead to less animosities than a suit for coercive relief.¹ He saw, in the action, a cooperative proceeding in which the courts would operate as “diplomatic” instead of “belligerent” agencies. When a plaintiff approaches a court acting as such a diplomatic agency, seeking its advice, a problem may arise as to whether it would be proper for the court to permit the defendant to change the character of the litigation and demand a coercive countersuit. In the recent case of *Metropolitan Casualty Insurance Company of New York v. Friedley*,² a federal district court sitting in Iowa decided, for the first time, the question whether reformation of a contract might be obtained under a counterclaim to an action for a declaratory judgment. An agent of the insurance company there concerned had written a policy of automobile insurance on the car of the defendant. Since the latter was a minor, the agent caused the policy to be issued in the name of his mother, representing this to be a standard practice in the business. When the minor became involved in an accident, the plaintiff sought a declaration of non-liability under the policy because of breach of the sole ownership clause. The defendants unsuccessfully tried to establish that the clause had been waived by the misrepresentation of the agent. The judge found that there had been a mutual mistake but likewise held there was no valid reason why reformation could not be pleaded defensively in a declaratory judgment action and granted such relief even though the defendants had not specifically requested the same.³

The decision is in harmony with the policy of liberality under which the federal courts have permitted counterclaims in declaratory actions whether based on the former⁴ or the present federal Declaratory Judgment

¹ Sunderland, “A Modern Evolution in Remedial Rights—The Declaratory Judgment,” 16 Mich. L. Rev. 69 at 76 (1917).

² 79 F. Supp. 978 (1948).

³ Rule 54(c) of the Fed. Rules of Civ. Pro., 28 U. S. C. A. foll. § 723c, directs that every final judgment shall grant the relief to which the party is entitled even though no demand therefor appears in the pleadings. Reformation was prayed for in counterclaims to declaratory actions in *Aralac Inc. v. Hat Corp. of America*, 166 F. (2d) 286 (1948), and in *Tolle v. Struve*, 124 Cal. App. 263, 12 P. (2d) 61 (1932), but in each case the court found no ground for reformation hence did not pass on the procedural question of the propriety of the counterclaim. In the California case mentioned, one involving the validity of certain leases, it was held proper, however, to render judgment against the plaintiff for rent which had accrued.

⁴ 28 U. S. C. § 400 was repealed in 1948.

Act.⁵ In common actions begun by insurers seeking a declaration as to their rights and liabilities under policies, counterclaims for the amount due thereon to the insured or to the beneficiary have been considered proper.⁶ Where a life insurance company, for example, sought a declaratory judgment to determine whether a policy was in force at the time of the death of the insured, it was held proper to set aside a purported release executed under a mutual mistake of law and fact, although the defendant did not ask for rescission or cancellation of the release.⁷ In actions brought to have the defendant's patent declared invalid, it is common to find counterclaims therein for infringement, not only of the patent sought to be declared invalid⁸ but also of other patents held by the counter-plaintiff.⁹ Such counterclaims in patent suits have even included requests for further relief such as for an injunction and an accounting.¹⁰ Similarly, in actions for judgments to declare trade-marks invalid, counterclaims have been upheld for infringement and injunction¹¹ or for unfair competition.¹²

In view of this weight of precedent, an objection to coercive counterclaims in declaratory judgment proceedings is now rarely heard under the federal rules. A litigant bringing a declaratory judgment action in a

⁵ 28 U. S. C. §§ 2201-2.

⁶ See *Merchants Indemnity Corp. of America v. Dana*, 8 F. R. D. 32 (1948); *State Farm Mut. Automobile Ins. Co. v. Brooks*, 43 F. Supp. 870 (1942), reversed on other grounds in 136 F. (2d) 807 (1943), cert. den. 320 U. S. 768, 64 S. Ct. 80, 88 L. Ed. 459 (1943); *Home Ins. Co. v. Trotter*, 130 F. (2d) 800 (1942).

⁷ *Penn Mut. L. Ins. Co. v. Forcier*, 103 F. (2d) 166 (1939), cert. den. 308 U. S. 571, 60 S. Ct. 86, 84 L. Ed. 479 (1939).

⁸ *General Electric Co. v. Refrigeration Patents Corp.*, 65 F. Supp. 75 (1946); *National Aluminate Corporation v. Permutit Co.*, 53 F. Supp. 501 (1943), affirmed in 145 F. (2d) 175 (1944), cert. den. 324 U. S. 864, 65 S. Ct. 912, 89 L. Ed. 1420 (1945); *Ryan Distributing Corporation v. Caley*, 51 F. Supp. 377 (1943), affirmed in 147 F. (2d) 138 (1945), cert. den. 325 U. S. 859, 65 S. Ct. 1199, 89 L. Ed. 1979 (1945), but counterclaim denied on merits non obstante veredicto; *Petersime Incubator Co. v. Bundy Incubator Co.*, 135 F. (2d) 580 (1943), cert. den. 320 U. S. 805, 64 S. Ct. 24, 88 L. Ed. 487 (1943); *Crosley Corp. v. Hazeltine Corp.*, 122 F. (2d) 925 (1941), cert. den. 315 U. S. 813, 62 S. Ct. 798, 86 L. Ed. 1211 (1941), rehear. den. 315 U. S. 831, 62 S. Ct. 913, 86 L. Ed. 1224 (1941); *Myers v. Beckman*, 1 F. R. D. 99 (1940).

⁹ *Randolph Laboratories v. Specialties Development Corp.*, 82 F. Supp. 316 (1949); *White v. E. L. Bruce Co.*, 62 F. Supp. 577 (1945); *Refractolite Corp. v. Prismo Holding Corp.*, 117 F. (2d) 806 (1941); *Farris-Dunn Corporation v. Fales*, 36 F. Supp. 51 (1940).

¹⁰ *National Aluminate Corporation v. Permutit Co.*, 53 F. Supp. 501 (1943), affirmed in 145 F. (2d) 175 (1944), cert. den. 324 U. S. 864, 65 S. Ct. 912, 89 L. Ed. 1420 (1945); *Petersime Incubator Co. v. Bundy Incubator Co.*, 135 F. (2d) 580 (1943), cert. den. 320 U. S. 805, 64 S. Ct. 24, 88 L. Ed. 487 (1943); *Refractolite Corp. v. Prismo Holding Corp.*, 117 F. (2d) 806 (1941).

¹¹ *Swarthmore Classics v. Swarthmore Junior*, 81 F. Supp. 917 (1949). In *Quaker Oats Co. v. General Mills*, 134 F. (2d) 429 (1943), the counterclaim was dismissed on the merits.

¹² *House of Westmore v. Denney*, 151 F. (2d) 261 (1945).

federal court should realize that he may be placed in a difficult situation. In a recent case, that of *Merchants Indemnity Corporation of New York v. Dana*,¹³ a liability insurer instituted an action against an employee of its insured to determine whether he drove an automobile with the permission of his employer at the time when he became involved in an accident. Cross-claims were filed therein to recover for injuries and death due to the negligence of the defendant. The counsel for the plaintiff found himself in the anomalous position of opposing the employee of the insured on the complaint but also forced to defend him against the cross-claimants. A request for an extension of time as to the cross-claims, until a determination had been had on the issues of the complaint, was denied in order to avoid a delay in the expeditious disposal of all the issues.

Turning to the decisions of the state courts, there is a paucity of specific decisions on the propriety of the use of coercive counterclaims. The most detailed discussion may be found in the Utah case of *Gray v. Defa*.¹⁴ The Utah statute made no provision for the use of a counterclaim nor did it anyway prescribe the procedure to be followed in seeking relief under the act.¹⁵ The trial court's refusal to take evidence on the counterclaim was held to be error by the Supreme Court of that state which decided there was no reason to give a narrow construction to the statute so as to prevent a court from entering the usual legal or equitable coercive judgment customary on a counterclaim. The Oregon case of *Lowe v. Harmon*¹⁶ is similar in its facts.

In both cases, the cross-defendants based their arguments on the doctrine of *Brindley v. Meara*,¹⁷ an Indiana case in which the Supreme Court of that state had held that supplementary relief available under a declaratory judgment act¹⁸ was limited to declaratory relief and did not authorize the grant of a coercive judgment. Both reasoned that if the relief available to a plaintiff is limited, the counterclaimant should be in no better position, but the Utah and Oregon courts rejected the Indiana doctrine and adopted instead the more liberal view expressed by two of the leading text writers on the subject.¹⁹ The Utah court even went so far as to deny

¹³ 8 F. R. D. 32 (1948).

¹⁴ 103 Utah 339, 135 P. (2d) 251, 155 A. L. R. 395 (1943). The plaintiff there sought a declaration that he owned the land in question free from all adverse claims of the defendants. Defendants counterclaimed for a complete adjudication of their rights under a contract of sale and leasehold agreement and for damages.

¹⁵ Utah Code 1943, Tit. 104, Ch. 64.

¹⁶ 167 Ore. 128, 115 P. (2d) 297 (1941).

¹⁷ 209 Ind. 144, 198 N. E. 301, 101 A. L. R. 682 (1935).

¹⁸ Ind. Acts 1927, Ch. 81, p. 209.

¹⁹ Borchard, *Declaratory Judgments* (Banks-Baldwin Pub. Co., Cleveland, 1941), 2d Ed., p. 441; Anderson, *Actions for Declaratory Judgments* (West Pub. Co., St. Paul, 1940), p. 573. See also Borchard, "An Indiana Declaratory Judgment,"

that the declaratory judgment statute set up a new form of action entitled to special treatment, considering it to be merely a "new form of relief."²⁰ A declaratory judgment proceeding is usually described as *sui generis*, being deemed neither strictly legal or equitable.²¹ In *Liberty Mutual Insurance Company v. Jones*,²² however, the Missouri Supreme Court emphasized that the historical affinity of the action is equitable,²³ hence it could see no procedural reason to refuse a cross-action for affirmative relief. The court admitted that, by interposition of a demand for an injunction, the suit was converted into a suit in equity.

Difficulty may be expected where special state statutes regulate the use of counterclaims in particular types of actions. A New York statute, for example, once permitted counterclaims in matrimonial actions only "where an action for divorce, separation or annulment is brought by husband and wife."²⁴ In *Kiebler v. Kiebler*,²⁵ where a husband asked for a declaration that he was validly divorced, it was held to be proper for his wife to counterclaim for a divorce. But in *Zawadsky v. Zawadsky*,²⁶ where a husband sought a decision that no valid marriage had been contracted, a counterclaim for separation was held improper as barred by statute, although the court stated that the declaratory judgment act of the state²⁷ was "broad enough to permit matrimonial counterclaims in actions which are not matrimonial in character."²⁸ Justice Pecora, in *Antrones v. Antrones*,²⁹ refused to follow this decision. He admitted that a declaratory action to have a marriage declared void was matrimonial in nature but permitted the counterclaim to stand on the ground that the "provisions for the interposition of counterclaims should be liberally construed so that related issues may be determined in one action."³⁰ Emphasis on the point that the issues should be related is probably without

11 Ind. L. J. 376 (1936). An express repudiation of the holding in *Brindley v. Meara* also appears in the case of *Morris v. Ellis*, 221 Wis. 307, 266 N. W. 921 (1936).

²⁰ The court was probably concerned with the fact that any other holding would be inconsistent with a constitutional requirement to the effect that there should be but one form of civil action.

²¹ See *Great Northern Life Ins. Co. v. Vince*, 118 F. (2d) 232 (1941), cert. den. 314 U. S. 637, 62 S. Ct. 71, 86 L. Ed. 511 (1941); *United States Fidelity & Guaranty Co. v. Koch*, 102 F. (2d) 288, 123 A. L. R. 279 (1939); *Progressive Party v. Flynn*, 400 Ill. 102, 79 N. E. (2d) 516 (1948).

²² 344 Mo. 932, 130 S. W. (2d) 945, 125 A. L. R. 1149 (1939).

²³ Such is also the view of Borchard, *op. cit.*, pp. 237-40 and 439.

²⁴ *New York Civil Practice Act*, § 1168. The statute was repealed in 1948.

²⁵ 170 Misc. 81, 9 N. Y. S. (2d) 909 (1939).

²⁶ 169 Misc. 404, 7 N. Y. S. (2d) 966 (1938).

²⁷ *New York Civil Practice Act*, § 266.

²⁸ 169 Misc. 404 at 406, 7 N. Y. S. (2d) 966 at 968.

²⁹ 58 N. Y. S. (2d) 241 (1945).

³⁰ 58 N. Y. S. (2d) 241 at 243.

significance in the more modern code states³¹ but, since the older codes still require that the subject of the counterclaim be connected with the subject of the action or arise out of the same transaction,³² it is not surprising to find a counterclaim in a declaratory judgment action failing for non-compliance with these rules.³³

Neither the Illinois Civil Practice Act nor the rules of the Supreme Court contain any express provision indicating the propriety of the interposition of a coercive counterclaim in a declaratory judgment proceeding. The section of declaratory judgments,³⁴ adopted in 1945, is quite liberal and was based primarily on the Michigan act³⁵ with significant additions such as the one which authorizes the declaration of rights as an incident to a counterclaim.³⁶ Subsection 3 thereof, providing for further relief, is similar to a Kentucky statute³⁷ as well as to the Uniform Declaratory Judgment Act,³⁸ but there has been no precise interpretation of the statute on this point as yet.³⁹

Most courts will permit a defendant, unwilling to have a declaratory proceeding conducted as a friendly suit at the diplomatic level, to convert the litigation into a regular legal battle with full belligerent status and consequences. Under codes as liberal as the federal, the court may even decide so to convert the character of the suit on its own motion in order to assure a final adjudication of all the issues. The processes of change, leading to uniformity in all types of actions, legal, equitable, or special in origin, appear to be irreversible. It is regrettable that such should be the case when the worthy objectives proposed by Professor Sunderland are sacrificed along the way.

H. A. WEGNER

³¹ Compare *Danziger v. Peebler*, 88 Cal. App. (2d) 314, 198 P. (2d) 719 (1948), with *Robertson v. Marceovich*, 42 Cal. App. (2d) 610, 109 P. (2d) 708 (1941).

³² In general, see 47 Am. Jur., *Set-off and Counterclaim*, §§ 44 and 46.

³³ *Montgomery v. City and County of Denver*, 102 Colo. 427, 80 P. (2d) 434 (1938).

³⁴ Ill. Rev. Stat. 1947, Ch. 110, § 181.1.

³⁵ Mich. Comp. Laws 1929, § 13903 et seq.

³⁶ A counterclaim for declaratory relief was filed to a declaratory action in the case of *Progressive Party v. Flynn*, 400 Ill. 102, 79 N. E. (2d) 516 (1948).

³⁷ *Carrol's Ky. Code* 1948, § 639(a)(1) et seq. Under this statute, in *George v. George*, 238 Ky. 381, 141 S. W. (2d) 558 (1940), injunctive relief was granted under a counterclaim to a declaratory action.

³⁸ 9 Unif. Laws Anno., *Declaratory Judgment Act*, pp. 213 and 252.

³⁹ *Western Foundry Co. v. Wicker*, 335 Ill. App. 106, 80 N. E. (2d) 548 (1948), reversed on other grounds in 403 Ill. 260, 85 N. E. (2d) 722 (1949), comes closest to the point but the issue was not argued therein. The case proceeded as a suit for a declaration that an amendment to a corporate charter was valid. The defendant, by counterclaim, sought payment of dividends allegedly due. There may be a hint of criticism in the remark of the Appellate Court to the effect that the record did not show "that the propriety of the summary judgment procedure was questioned."

MINES AND MINERALS—TERMINATION OF RIGHTS GRANTED—WHETHER ABANDONMENT TERMINATES RIGHTS ACQUIRED UNDER MINING GRANT CONTAINING PROVISION THAT GRANTEE SHALL HAVE MINE IN OPERATION IN ONE YEAR OR DEED WILL BE VOID—In the recent case of *Midwest-Radiant Corporation v. Hentze*,¹ the United States Court of Appeals for the Seventh Circuit was required to construe the effect of an instrument by which the grantor conveyed and quit-claimed all her interest in the coal underlying her farm in a down-state Illinois county in consideration for one dollar and certain specified royalty payments. The instrument provided that the grantee was to commence the sinking of a mine in six months and to have it in operation in one year, or the deed would be void. The grantee never entered upon or developed the property. Seven years after the execution of the instrument, without taking action of any kind, the grantor conveyed the farm to a third person and warranted title to the entire fee. Thirty-five years later, the present owner of the farm leased the same to the plaintiff under a mineral lease for the purpose of mining coal thereon. Thereafter, the defendant procured a quit-claim deed from the grantee in the initial mineral instrument and laid claim to the coal. Plaintiff sought a declaratory judgment to the effect that the defendant had no right, title or interest in the coal, thereby raising an issue as to whether the rights acquired by the grantee in the original instrument were terminated by abandonment evidenced by his failure, for forty years, to sink a mine or enter upon and develop the property. The trial court entered judgment for the defendant, holding that the material instrument was effective to convey an estate upon condition subsequent which could not be lost merely by nonfulfillment of the condition subsequent or by reason of abandonment. Plaintiff appealed, contending that the instrument should have been construed as a mining lease or, even if treated as a grant, the abandonment clause therein should have been given effect. The Court of Appeals reversed in plaintiff's favor, holding that, whether the instrument be construed as a mining lease or a grant, the necessity for giving such a construction as would carry out the manifest intention of the parties required that the instrument be treated as one designed to convey an estate on condition precedent which had never materialized by reason of abandonment.

No Illinois reviewing court has, as yet, passed upon the precise question presented by the instant case, *i.e.* whether an instrument, similar to the one in question and executed under like circumstances, is a deed or merely a lease, together with the subsidiary question as to whether, if construed as a grant, it should be held to create an estate on condition

¹ 171 F. (2d) 635 (1948).

precedent or on condition subsequent. Lacking state precedent, the federal court was compelled to turn to a decision from another jurisdiction² in order to reach the result above set forth. It must be noted, however, that such result is only persuasive authority so far as Illinois courts are concerned,³ the decision being no more than an indication of what the federal court thinks the Illinois law on the subject should be. A review of the decisions of courts of other jurisdictions upon the question, as well as those Illinois decisions bearing upon related questions, is appropriate, therefore, in order to determine the probable effect of the instant decision upon Illinois law.

It has long been established that rights acquired under a mining lease proper, given in consideration of royalties or a percentage of the profits to be derived from development, may be lost by nonuser or abandonment.⁴ In the instant case, however, the defendant relied on the presence in the instrument of the words "convey and quit-claim," sufficient under Illinois law to convey a title,⁵ which title, according to *Uphoff v. Trustees of Tufts College*⁶ and *Jilek v. Chicago, Wilmington & Franklin Coal Company*,⁷ is ordinarily not lost by abandonment. In those cases, it was held that where there has been a severance, by deed, of title between the surface and the underlying minerals, mere nonuser or abandonment by the grantee is not sufficient in and of itself to terminate the mineral estate. However, as the court properly pointed out, those cases are distinguishable from the instant case. Each involved an absolute and present conveyance, completely closed at the time of the transaction, without condition and based on a present consideration, whereas the instrument before the court recited a nominal consideration of one dollar, called for specified royalty payments, and contained an express condition that development should be commenced within a specified time. It shall be shown that the presence of these features, viewed in the light of prevailing principles and precedents, made inevitable the result achieved in the instant case.

The decisions in the Uphoff and Jilek cases are logical extensions of the principle that, according to the common law, there can be no divestiture of a vested legal title by abandonment unless the same results

² *Vandenbark v. Busiek*, 126 F. (2d) 893 (1942).

³ See *Rothschild & Co. v. Steger & Sons Piano Mfg. Co.*, 256 Ill. 196, 99 N. E. 920 (1912).

⁴ *Brown v. Wilmore Coal Co.*, 153 F. 143 (1907) cert. den. 209 U. S. 546, 28 S. Ct. 758, 52 L. Ed. 920 (1908); *McCull v. Bear Creek Coal Min. Co.*, 162 Iowa 491, 143 N. W. 532 (1913); *Chandler v. French*, 73 W. Va. 658, 81 S. E. 825 (1914).

⁵ Ill. Rev. Stat. 1947, Ch. 30, § 9.

⁶ 351 Ill. 146, 184 N. E. 213 (1933).

⁷ 382 Ill. 241, 47 N. E. (2d) 96 (1943).

from some form of estoppel or because of sufficient adverse possession under a statute of limitation.⁸ In the application of that principle, it has been held that a conveyance by deed of mineral rights or surface rights alone creates two distinct estates in land⁹ and, where there has been such a severance of the surface and the underlying minerals, mere possession of the surface is not possession of the minerals, hence occupancy of the surface by the original owner, or those claiming under him, does not cause the statute of limitation to run against the mineral owner.¹⁰ It has also been held that deeds by the original owner, even those purporting to convey the entire title, do not operate as adverse possession or notice of an adverse claim.¹¹

The aforementioned principle is applicable, however, only in cases where title has actually vested in the mineral owner. The result in the instant case is grounded upon the determination of the court that title never vested in the grantee under the instrument involved. The sinking and operation of a mine within one year was held to be a condition precedent, a condition which has been defined as one which must happen before an estate can vest or be enlarged.¹² The condition precedent being unfulfilled, no title vested in the grantee. As a result, there was no basis for the application of the doctrine of the Uphoff and Jilek cases.

Undoubtedly, if the condition had been construed as a condition subsequent, the rights acquired under the deed would not have been terminated by the mere nonperformance thereof. Conditions subsequent are such that, by their failure or nonperformance, an estate already vested may be defeated,¹³ but the breach thereof does not *per se* produce a reversion of the title. The estate continues in the grantee until some proper step has been taken to consummate a forfeiture, such as a re-entry or some other act that may be considered a lawful substitute therefor.¹⁴ There must be some affirmative, positive act manifesting the intention to this end,¹⁵ and it has been held that the mere execution and recording of a deed to a third person is not such an act.¹⁶

⁸ *Tennessee Oil, Gas & Mineral Co. v. Brown*, 131 F. 696 (1904), cert. den. 197 U. S. 621, 25 S. Ct. 798, 49 L. Ed. 910 (1905); *Eastern Kentucky Mineral & T. Co. v. Swann-Day L. Co.*, 148 Ky. 82, 146 S. W. 438 (1912).

⁹ *Catlin Coal Co. v. Lloyd*, 176 Ill. 275, 52 N. E. 144 (1898).

¹⁰ *Brooke v. Dellinger*, 193 Ga. 66, 17 S. E. (2d) 178 (1941); *Franklin Fluorspar Co. v. Hosick*, 239 Ky. 454, 39 S. W. (2d) 665 (1931).

¹¹ *Renfro v. Hanon*, 297 Ill. 353, 130 N. E. 740 (1921); *Gill v. Fletcher*, 74 Ohio 295, 78 N. E. 433 (1906).

¹² *Maguire v. City of Macomb*, 293 Ill. 441, 127 N. E. 682 (1920).

¹³ *Nowak v. Dombrowski*, 267 Ill. 103, 107 N. E. 807 (1915).

¹⁴ *Hart v. Lake*, 273 Ill. 60, 112 N. E. 286 (1916).

¹⁵ *Mercer-Lincoln Pine Knob Oil Co. v. Pruitt*, 191 Ky. 207, 229, S. W. 374 (1921).

¹⁶ *Rannels v. Rowe*, 145 F. 296 (1906), cert. den. 207 U. S. 591, 28 S. Ct. 257, 52 L. Ed. 355 (1907).

It is often difficult to determine whether a condition is precedent or subsequent for the same words may be employed to create each according to the intention of the person creating the condition.¹⁷ Consequently, it has been affirmed as a general proposition that a decision on the question of the nature of a condition depends not so much on artificial rules of construction as it does on the application of good sense and sound equity to the spirit of the instrument.¹⁸ The instant decision, in holding that the provision involved was a condition precedent, is a good illustration of the application of that principle.

The court is not without support in its holding in the instant case that, despite the presence in the instrument of words of conveyance, title did not vest in the grantee. It has been held that the presence of words of conveyance in a mineral deed is not sufficient to require a holding that the effect thereof is to vest in the grantee title to the mineral interests in the land.¹⁹ The courts strive to give effect to the ruling intention of the parties, and in ascertaining that intention they closely scrutinize the real consideration flowing to the grantor to determine whether he has retained such a continuing interest in the premises as would be prejudiced by the failure of the grantee to develop the mineral estate. Typical of the prevailing view are the decisions in the cases of *Tennessee Oil, Gas & Mineral Company v. Brown*²⁰ and *Eastern Kentucky Mineral & Timber Company v. Swann-Day Lumber Company*.²¹ In those cases, the instruments involved recited nominal considerations plus reservations of continuing interests; in the form of royalties in the Brown case, but a percentage of the profits that the grantee might realize in the Swann-Day case. Both cases culminated in holdings that the rights of the grantees were terminated by abandonment, the presence in the instruments of words of conveyance to the contrary notwithstanding. In each case it was decided that the nature of the real consideration moving to the grantor required a holding that the instrument did not result in an out and out conveyance *in praesenti*. The courts were of the opinion that to hold otherwise would be to place upon the instruments highly unreasonable constructions, directly opposed to the manifest intention of the parties.

Admittedly, the owner of land has a right to dispose of his interest

¹⁷ *Burdis v. Burdis*, 96 Va. 81, 30 S. E. 462 (1898).

¹⁸ *Phillips v. Gannon*, 246 Ill. 98, 92 N. E. 616 (1910).

¹⁹ *Crain v. Pure Oil Co.*, 25 F. (2d) 824 (1928).

²⁰ 131 F. 696 (1904), cert. den. 197 U. S. 621, 25 S. Ct. 798, 49 L. Ed. 910 (1905).

²¹ 148 Ky. 82, 146 S. W. 438 (1912).

therein for any valuable consideration he may choose to accept,²² but the prevailing view appears to be that the recital of a nominal consideration coupled with the reservation of royalties or a percentage of profits indicates that the real consideration inducing the conveyance is the development of the property,²³ and, in the absence of any showing that the true consideration is other than that appearing on the face of the instrument, courts are reluctant to give such a construction to the instrument as would place it absolutely in the power of the grantee to hold the property for an indefinite period of time, or forever, without ever attempting to pursue the essential purposes and objects of the conveyance.²⁴

It would appear that this attitude serves to safeguard both public and private interests in the development of minerals, to the extent that it discourages inactivity on the part of holders of mineral interests under instruments similar to the one under consideration. The instant decision is to be commended, therefore, not only because it is in harmony with sound principles and precedents but also because of its salutary effect upon the development of the state's natural resources.

A. N. HAMILTON

SEARCHES AND SEIZURES—UNREASONABLE SEARCHES AND SEIZURES—WHETHER MEMBERS OF A PARTNERSHIP MAY CLAIM BENEFIT OF FOURTH AMENDMENT AGAINST SUBPOENA TO PRODUCE PARTNERSHIP BOOKS AND RECORD—A recent ruling of a federal district court sitting in California dealt with the question as to whether the protection of the Fourth Amendment could be invoked by a partner against an alleged unreasonable search of partnership papers.¹ The Anti-Trust Division of the Department of Justice had there caused a subpoena duces tecum to be issued to one of the partners of a California partnership directing him to produce certain specified records and communications for use as evidence in a criminal prosecution against other members of the partnership. The other partners appeared and moved to quash the subpoena as being in violation of their

²² See *Franklin Fluorspar Co. v. Hosick*, 239 Ky. 454, 39 S. W. (2d) 665 (1931), holding that a mineral deed vested title in the grantee where the instrument recited a consideration of "one dollar in hand paid" and no royalty or percentage of profits was reserved.

²³ See *Paine v. Griffiths*, 86 F. 452 (1898); *Kentucky Rock Asphalt Co. v. Milliner*, 234 Ky. 217; 27 S. W. (2d) 937 (1930); *Munsey v. Marnet Oil & Gas Co.*, 113 Tex. 212, 254 S. W. 311 (1923).

²⁴ See *Crain v. Pure Oil Co.*, 25 F. (2d) 824 (1928); *Hawkins v. Pepper*, 117 N. C. 407, 23 S. E. 434 (1895).

¹ In re Subpoena Duces Tecum, 81 F. Supp. 418 (1949).

rights. The court granted the motion, holding that the subpoena was violative of the movants' rights against unreasonable searches and seizures.

The ruling necessarily revolved around the nature and extent of the protection afforded by the constitutional guaranty as interpreted by the courts. It has been well established that compulsory production by an individual of his private papers, under force of a subpoena duces tecum, whether to be used against him in criminal proceedings or to effect a forfeiture of his property, is an unreasonable search and seizure.² The doctrine has been also invoked for the protection of a corporation,³ although in a much more limited sense than is true of the absolute protection afforded the individual. A corporation may be required to produce its papers and records under a proper subpoena⁴ because of a difference in the nature of the relationship existing between an individual and the state on the one hand and that of a corporation and the state on the other. The corporation, being a creature of the state, is subject to visitorial powers for, being limited to the specific powers granted, it owes a duty to the state to open its doors to an investigation by the state designed to determine whether the power conferred has been used or abused. The human being owes no such duty to the state for he has received nothing from it insofar as his powers to act are concerned, albeit he does get protection in the exercise thereof. The right to require a corporation to bring in its records is, nevertheless, subject to limitations based upon reasonableness in the exercise thereof, so the subpoena must be definite, must specify particular papers, and must be motivated by more than a mere desire to find some violation of the law from a general perusal of all corporate records and papers.⁵ In this limited sense, therefore, corporations enjoy a measure of protection under the Fourth Amendment but such protection is afforded to the corporation alone. It may not be invoked by either an officer⁶ or a stockholder,⁷ when ordered to produce corporate papers, so as to serve as a personal privilege, for the right is a

² *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 24 S. Ct. 563, 48 L. Ed. 860 (1903); *Boyd v. United States*, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1885).

³ *Hale v. Henkel*, 201 U. S. 43, 26 S. Ct. 370, 50 L. Ed. 652 (1905).

⁴ *Coastwise Lumber & Supply Co. v. United States*, 259 F. 849 (1919).

⁵ *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 44 S. Ct. 336, 68 L. Ed. 696 (1923); *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319 (1919); *Wilson v. United States*, 221 U. S. 361, 31 S. Ct. 538, 53 L. Ed. 771 (1910); *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 28 S. Ct. 178, 52 L. Ed. 327 (1907).

⁶ *Wheeler v. United States*, 226 U. S. 478, 33 S. Ct. 158, 57 L. Ed. 309 (1912); *American Lithographic Co. v. Werckmeister*, 221 U. S. 603, 31 S. Ct. 676, 55 L. Ed. 873 (1910); *Wilson v. United States*, 221 U. S. 361, 31 S. Ct. 538, 55 L. Ed. 771 (1910); *Hale v. Henkel*, 201 U. S. 43, 26 S. Ct. 370, 50 L. Ed. 652 (1905).

⁷ *Grant v. United States*, 227 U. S. 74, 33 S. Ct. 190, 57 L. Ed. 423 (1912).

personal one and may be relied upon only by the person who is the owner of the documents in question.⁸

A fairly logical extension of these doctrines has led to the conclusion that a member of a labor union,⁹ or of any other voluntary association,¹⁰ stands in the same relative position as would an officer or a stockholder of a corporation. Neither may refuse to produce the papers or records of his organization under the direction of a lawful subpoena duces tecum for organizations of this nature cannot be said to embody or represent the purely private or personal interests of the individual members. Because corporations¹¹ and other associations such as labor unions¹² and fraternal organizations¹³ have been regarded as entities, distinct and separate from the officers, members, or stockholders thereof, it is quite apparent that the former and not the latter are the only ones privileged with respect to the papers and records of the organization.

The ruling in the instant case, considering the personal aspects of the constitutional privilege in issue, necessarily demands an investigation into the true nature of the status of a partnership, to ascertain whether it should be regarded as a distinct entity or, as was the case at common law, a contractual relationship incapable of existence independent of the individuals composing it.¹⁴ As California disclaims the entity theory of partnership, it was inevitable that the result reached in the instant case should be to quash the subpoena as a violation of the rights of the individual partner for ownership and possession of partnership property, in California, is in the partners as co-owners and not in any entity.¹⁵

Considering the impact of this decision, however, while noting that it is the first recorded case wherein the question of the applicability of the Fourth Amendment to partnership papers has been taken up, it should not be concluded that the case establishes a general rule that the individual members of all partnerships will be entitled to protection. Rather, it extends a general test, in use since *Hale v. Henkel*,¹⁶ to a partnership, *i. e.* is the organization such that it may be regarded as an entity or not? A

⁸ *United States v. Hoyt*, 53 F. (2d) 881 (1931); *United States v. Goss*, 14 F. (2d) 229 (1926).

⁹ *United States v. White*, 322 U. S. 694, 64 S. Ct. 1248, 88 L. Ed. 1542 (1943).

¹⁰ *Haywood v. United States*, 268 F. 795 (1920).

¹¹ *Guckenheimer v. United States*, 3 F. (2d) 786 (1925).

¹² *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, 42 S. Ct. 570, 66 L. Ed. 975 (1921).

¹³ *United States v. Wainer*, 49 F. (2d) 789 (1931).

¹⁴ 47 C. J., Partnership, § 172, p. 747.

¹⁵ Cal. Civ. Code, § 2419. See also *Park v. Union Mfg. Co.*, 159 Cal. 260, 114 P. (2d) 373 (1941); *People v. Maljan*, 34 Cal. App. 384, 167 P. 547 (1917).

¹⁶ 201 U. S. 43, 26 S. Ct. 370, 50 L. Ed. 652 (1905).

number of states have adopted the civil law concept of a *societas* under which a juristic person is created separate and distinct from the membership.¹⁷ In these states,¹⁸ it would logically follow that the entity would be the only one entitled to claim protection against an unreasonable search and seizure of partnership papers. The majority of states, however, including Illinois,¹⁹ still adhere to the common law concept so, if the instant case is followed, in such jurisdictions the individual partner might bring partnership papers under the shield of the Fourth Amendment.

F. Wood

¹⁷ 40 C. J., Modern Civil Law, § 196, p. 1407.

¹⁸ The states involved are Georgia, Iowa, Louisiana, Michigan, Nebraska, New Jersey, Oklahoma, Oregon, and South Carolina, as indicated by judicial decisions therefrom as follows: *Floyd & Lee v. Boyd*, 16 Ga. 34, 84 S. E. 494 (1915); *Fenner & Beane v. Nelson*, 64 Ga. App. 600, 13 S. E. (2d) 694 (1941); *Soursos v. Mason City*, 230 Iowa 157, 296 N. W. 807 (1941); *Toelke v. Toelke*, 153 La. 697, 96 So. 536 (1923); *Lebato v. Paulino*, 304 Mich. 668, 8 N. W. (2d) 873 (1943); *In re Zent's Estate*, 148 Neb. 104, 26 N. W. (2d) 793 (1947); *Finston v. Unemployment Compensation Commission*, 132 N. J. L. 276, 39 A. (2d) 697 (1944); *Anderson v. Dukes*, 193 Okla. 395, 143 P. (2d) 800 (1943); *Leadbetter v. Price*, 102 Ore. 47, 201 P. 428 (1921); *Chitwood v. McMillan*, 189 S. C. 262, 1 S. E. (2d) 162 (1939).

¹⁹ Ill. Rev. Stat. 1947, Ch. 106½, § 25. As to co-ownership of partnership property, see *Lindley v. Murphy*, 387 Ill. 506, 56 N. E. (2d) 71 (1944); *Lueh v. Goodknecht*, 345 Ill. 197, 177 N. E. 690 (1931). The case of *Abbott v. Anderson*, 265 Ill. 285, 106 N. E. 782 (1914), denies the existence of a separate partnership entity so far as the Illinois partnership is concerned.