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RECENT DECISIONS

CHARITABLE USES — CY PRES — DOCTRINE APPLIED TO DELETE RESTRICTIVE TERMS "PROTESTANT," "GENTILE" FROM BEQUEST TO NON-SECTARIAN COLLEGE — Decedent made a testamentary bequest of $50,000 and the residue of his estate to Amherst College. The fund was to be held in trust as a scholarship loan fund for "deserving American born, Protestant, Gentile, boys of good moral repute." Amherst College, a non-sectarian college, adopted a resolution refusing the bequest if the fund must be used only in accordance with the religious restriction of the words "Protestant" and "Gentile." Executor, as plaintiff, filed a complaint for construction of certain paragraphs of the will and for instructions directing administration of the estate. Amherst College sought adjudication to apply the cy pres doctrine to accept the fund without the religious restrictions. Testator's heirs claimed a failure of the fund with the result that the plaintiff's testator died intestate. The Superior Court *held*: By the application of the doctrine of cy pres the words "Protestant" and "Gentile" were deleted from the will and the executor ordered to turn over to Amherst College the fund to operate in compliance with all other conditions of the will. *Howard Savings Inst. v. Amherst College*, 66 N.J. Sup. 119, 160 A.2d 177 (1960).

A frequently used definition of the cy pres power is that formulated in the *Restatement of Trusts*:

> If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impractical or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.[1]

This doctrine is generally accepted in the United States, either judicially or by statutory enactment.[2] Five states have, however, expressly rejected the doctrine.[3] Fear of arbitrary power or recurrence of decisions which clearly defeat or are contrary to the testator's intent[4] have made these courts wary of accepting or sanctioning the use of this doctrine;[5] but the trend has been toward acceptance.[6]

The limits of the doctrine are ill-defined and its application to charitable trusts has not been accomplished without some difficulty. The generally recognized requirements for application are: (1) a valid charitable trust; (2) that it be impossible or impractical to carry out the specific intention of the testator; (3) that the testator have a general charitable intention.[7] Since the cy pres doctrine originated in equity, however, these requirements are not followed rigidly. Courts, when recognizing a charitable purpose, will imply a trust even if the testator did not specifically set up one.[8] The courts have been equally liberal in applying cy

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1 RESTATEMENT, TRUSTS § 399 (1935).

2 See FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES 92-112 (1950).

3 *In re* Hayward's Estate, 65 Ariz. 228, 178 P.2d 547 (1947); Henshaw v. Flenniken, 183 Tenn. 232, 191 S.W.2d 541 (1946); National Bank of Greece v. Savarika, 167 Miss. 571, 148 So. 649 (1933); Mars v. Gilbert, 93 S.C. 455, 77 S.E. 131 (1913); McAuley v. Wilson, 1 Dev. Eq. 276 (N.C. 1828).

4 DaCosta v. De Pas, Amb. 228, 27 Eng. Rep. 631 (Ch. 1754); R. v. Lady Portington, 1 Salk. 163, 91 Eng. Rep. 151 (K.B. 1693).

5 FISCH, *op. cit. supra* note 2, at 991.

6 Fisch, *The Cy Pres Doctrine and Changing Philosophies*, 51 MICH. L. REV. 375, 388 (1952); Fisch, *Judicial Attitude Toward the Application of the Cy Pres Doctrine*, 25 TEMP. L.Q. 177 (1951).

7 FISCH, *op. cit. supra* note 2, at 128.

8 *In re* Waller's Estate, 150 Misc. 521 269 N.Y. Supp. 402 (Surr. Ct. 1933).

pres to difficulties which make administration of a charitable trust impossible or impractical.[9]

The greatest amount of inconsistency and confusion has arisen from the disparate results reached by courts attempting to interpret the requirement that the testator have a general charitable intent. Considerable ingenuity has been exercised in finding a general charitable intent in a specific grant. In *Wilber v. Owens*,[10] relied on in the present case, the testator bequeathed to Princeton University his random notes and a fund to finance further research on his unfinished manuscript, the completed product to be published. When the trust, being conditioned on publication of the notes, was refused by the trustee, the court found that the testator had a more general intent. Words used by the testator expressing a desire to benefit mankind were interpreted by the court to be an expression of a more general secondary intent by the testator.

In another New Jersey case,[11] the bequest was made "for the *Glory of God* and support of *All Saints Church.*" This was found to be impossible to administer because the named church had relocated. The court then allowed the fund to be applied to a nearby church of a different denomination. A general charitable intent was imputed to the testator because of her use of the words "for the *Glory of God,*" even though her bequest was to a specific institution. Judicial reasoning of this character has been criticized by some writers as a resort to fiction[12]—*i.e.*, the courts impute to the testator a latent secondary intent when in fact the testator has no secondary intent, not having considered the possibility that the trust would fail.

In applying the three commonly recognized requirements in the *Amherst* case the court found little difficulty in establishing the creation of a valid charitable trust. It is commonly recognized in New Jersey that gifts for the furtherance of education are for a charitable purpose;[13] such bequests generally do not lose their charitable character because of the motive of the settlor.[14] The objection that the bequest must necessarily fail because contrary to New Jersey's Anti-Discrimination Statute,[15] or to public policy, was dismissed because the private character of Amherst College put it under a specific exclusion in the statute.[16]

The court in *Amherst* did not bestir itself to discuss the possibility of administering the fund with a substitute trustee in accordance with the exact language of the deceased. The impossibility of administering the fund as the testator directed arose because of the refusal of Amherst College to accept it under the explicit conditions that it contained. The usual application of the doctrine of cy pres when the trustee refuses the grant, and when a more general intention is indicated by the testator, is to appoint a substitute trustee to apply the fund to a similar char-

9 Ramsey v. City of Brookfield, 361 Mo. 857, 237 S.W.2d 143 (1951) (funds insufficient for end desired); Wilber v. Owens, 2 N.J. 167, 65 A.2d 843 (1949) (charity to publish notes which were irrational); Morristown Trust Co. v. Protestant Episcopal Church of Diocese of Florida, 1 N.J. Super. 418, 61 A.2d 762 (1948) (charity moved to another location); St. Louis v. McAllister, 335 Mo. 1130, 76 S.W.2d 677 (1932) (diminishing number of beneficiaries). *But see* Connecticut College v. United States, 276 F.2d 491 (1960); Lutheran Hospital of Manhattan v. Goldstein, 182 Misc. 913, 46 N.Y.S.2d 705 (1944); President and Fellows of Harvard College v. Jewett, 11 F.2d 119 (1925).

10 2 N.J. 167, 65 A.2d 843 (1949).

11 Morristown Trust Co. v. Protestant Episcopal Church of Diocese of Florida, 1 N.J. Super. 418, 61 A.2d 762 (1948).

12 2A BOGART, TRUSTS AND TRUSTEES 343 (1953); Note, 49 YALE L.J. 303, 323 (1939): In deciding whether a particular gift manifests a general charitable intent and whether it becomes impossible or impractical to effectuate a donor's specific intent, the determining factors should be expressly recognized.

13 Wilber v. Owens, 2 N.J. 167, 65 A.2d 843 (1949).

14 Noel v. Olds, 138 F.2d 581 (D.C. Cir. 1943).

15 N.J. REV. STAT. § 18:25 (1959).

16 *Ibid.*

itable purpose.[17] The issue of whether Amherst College could benefit from the doctrine of cy pres after it had brought about failure of the gift is not discussed by the court. The New Jersey court, rather than substitute a new trustee because of the original trustee's refusal, allowed a broader classification of beneficiaries than had been indicated by the testator. It has apparently become the law in New Jersey that a charitable institution can accept a trust fund on its own terms rather than on the terms of the testator. This is illustrated in *Amherst* by the fact that it was only those terms of the trust to which the trustee objected which were deleted. The requirement that the beneficiaries of the trust be American-born was not deleted because it was not a classification objected to by Amherst College.

In other cases, trustees have been precluded from resort to the benefit of cy pres when the impossibility of administering the fund was brought about by the trustees' conduct.[18] In *Connecticut College v. United States,*[19] the trustee was not allowed to have cy pres applied for its benefit because of its refusal to carry out the administration of the fund in exact compliance with the terms of the testator. The situation in the *Connecticut* case is similar to that in the present case, but a different solution was reached. The federal court held that the testator's intention was paramount and the trustee's deviation from the terms of the trust would be an improper application of cy pres. The testator's intention would be violated if the trust were accepted solely on terms set by the trustee. In the *Amherst* case, on the other hand, the court respected the wishes of the trustee rather than the express intention of the testator.

The element of cy pres on which the court in the *Amherst* case places most emphasis is that of general intention. The etymology of "cy pres" gives some idea of the court's concern for the *intention* aspect of this doctrine[20] in cases involving racial and religious restrictions.[21] Cy pres has generally been considered as an intention-enforcing device. However, in cy pres cases there often is a conflict between the policies of effectuating the testator's intent and attempting to preserve the public benefit of a charitable trust. Often the testator's intent must be violated so that the trust will not be lost to charitable purposes.

Furthermore, the construction of the will and the surrounding circumstances in *Amherst* were such as to force the court to violate the testator's intent no matter what course it chose. The fact that the deceased left nearly his entire estate for charitable purposes was evidence of his desire not to benefit his heirs; but, if the charitable bequest were defeated, the $50,000 destined for Amherst College would pass to the heirs (distant cousins with whom the testator had no contact and for whom, the court said, he had no affection). Indeed, his intention would also be defeated if the court applied cy pres so as to substitute another institution as recipient of the fund. In emphasizing the testator's dedication to, and affection for, Amherst College, it was inferred that the college was the one whom the testator most intended to benefit by the fund.

The solution arrived at by the court, while it constitutes a straining of the traditional doctrine of cy pres, was a fair and workable one. The court avoided discussing the discriminatory aspect of the restrictions which the testator included in his bequest, but its conclusion points up a disapproval of religious restrictions on the

17 *In re* Faulknew's Estate, 128 Cal. App. 2d 575, 275 P.2d 818 (1954).

18 See, *e.g.,* Connecticut College v. United States, 276 F.2d 491 (D.C. Cir. 1960); President and Fellows of Harvard College v. Jewett, 11 F.2d 491 (1925).

19 276 F.2d 491 (D.C. Cir. 1960).

20 Wilber v. Owens, 2 N.J. 167, 65 A.2d 843 (1949). The judicial power of cy pres is invocable to effectuate the more general intention to devote the property to charitable uses. The words "cy pres" are Norman French, meaning "so near" or "as near"; the term itself suggests the limitations of the principle.

21 LaFond v. City of Detroit, 357 Mich. 362, 98 N.W. 2d 530 (1959); *In re* Girard's Estate, 386 Pa.548, 127 A.2d 287, 353 U.S. 230, 391 Pa. 434, 138 A.2d 844 *cert. denied,* 359 U.S. 570 (1958); see 35 NOTRE DAME LAWYER 277 (1959).

distribution of funds for charitable purposes. While these restrictions would probably be observed in the case of a private trust, the public interest in charitable trusts takes precedence over the peculiar predilections of the donor. Because of the nature of charities, the usual rule against perpetuities is not applied to the donor's right to distribute his property; the price the donor must pay for this greater latitude in perpetuating his estate is the likelihood that the terms of the trust will be modified. Professor Scott, in justifying judicial modification of the wishes of a testator creating a charitable trust, writes:

> Some vain and obstinate donors indeed might prefer to have their own way forever, whether that way should ultimately prove beneficial or not. But why should effect be given to such an unreasonable desire? A man is not allowed to control the disposition of property for private purposes beyond the period of perpetuities. The Rule against Perpetuities is inapplicable to charities only because the public interest is supposed to be promoted by the creation of charities. The public interest is not promoted by the creation of a charity which by the lapse of time ceases to be useful. The founder of a charity should understand therefore that he cannot create a charity which shall be forever exempt from modification.[22]

Somewhat the same reasoning permeates the *Amherst* opinion. The result was the defeat of an intention to perpetuate indefinitely the use of property for a discriminatory use, through the unlikely application of a doctrine which purports to be an intention-enforcing device.

Cornelius F. Collins

CONSTITUTIONAL LAW — FREEDOM OF THE PRESS — COURT ORDER FORBIDDING PHOTOGRAPHY, TELEVISION, AND RADIO FACILITIES ON STREETS AND SIDEWALKS SURROUNDING COURTHOUSE IS CONSTITUTIONAL. — Early in October, 1958, a Georgia church was bombed. Five men were jailed on suspicion of the crime and petitioned for habeas corpus; a hearing was set for October 17. On October 16, counsel for the five suspects addressed a large crowd from the courthouse steps. The addresses were recorded for radio and television, and a large number of "still" photographs were taken. The day of the hearing, the five suspects were brought to the courthouse in a bus. As they alighted, shackled to a chain, they were photographed. The corridor outside the courtroom was crowded with people, including several photographers who again took pictures of the five men, both inside and outside the courtroom.

After the hearing was over, counsel for the men again addressed a crowd from the courthouse steps. This time, there were two or three hundred people present, and traffic was completely blocked in the street. Television, radio, and "still" photographers covered the event. The five men, having been indicted for capital offenses arising out of the bombing, were assigned for trial before a judge of the Superior Court of Fulton County. On November 3, the judge issued the following order:

> No photograph of any party to any trial, or of any defendant, prosecutor, attorney, witness, juror, spectator, or other participant in or at any trial, shall be taken at any place in the courthouse building, on the courthouse steps, or on the adjacent sidewalks and public streets. Nothing said or done by any such person at any such place shall be recorded by any television instrument, moving-picture camera . . . or other recording device or equipment.

Plaintiff brought suit below to have the order vacated as unduly abridging plaintiff's rights under the First and Fourteenth Amendments, and under the Georgia Constitution, to freedom of speech and of the press. On appeal to the Supreme Court of Georgia, plaintiff excepted only to that part of the order which related to the streets and sidewalks surrounding the courthouse. *Held*: The order was valid. Judges of lower courts have a wide discretion in the management of business before them, and this discretion will not be controlled unless manifestly

22 SCOTT, SELECTED ESSAYS ON THE LAW OF TRUSTS 14 (1940).

abused. The duty and disposition of a court to accord ample scope to the liberty of the press should not be carried to the point of an undue abridgment of the court's own freedom. *Atlanta Newspapers Inc. v. Grimes,* 114 S.E.2d 421, (Ga. 1960), *appeal dismissed and certiorari denied,* 29 U.S.L. WEEK 3101.

Recent decisions have stated that there is no constitutionally protected right of access to news sources, as distinguished from the right to publish what news has been found.[1] As Judge Goodrich said, in *Tribune Review Pub. v. Thomas,*[2]

> Can it be argued that there is some constitutional right for everybody not to be interfered with in finding things out about everybody else? . . . Could an interested observer insist on the constitutional right to take moving pictures of a private family in and about its household contrary to that family's wishes? We think that this question of getting at what one wants to know is a far cry from the type of freedom of expression, comment, and criticism so fully protected by the first and fourteenth amendments to the Constitution.[3]

Clearly any suggestion that a newsman — or anyone else — has an unrestricted constitutional right to find out what he wants to know is untenable, whether viewed from the viewpoint of the citizen who wishes to be left alone or of those charged with maintaining national security. On the other hand, it is a truism that there are no unrestricted constitutional rights. Opposed to the view that there is no right of access to news is the argument made by Judge Musmanno, dissenting in *In re Mack:*[4] "Freedom of the press means freedom to gather news, write it, publish it, and circulate it. When any one of these integral operations is interdicted, freedom of the press becomes a river without water."[5]

In this view, if every agency of government and every private news source acted as though the press had no right of access to news, freedom of the press would become an empty guarantee.

One solution of this dilemma of opposing interests, at least for present purposes, may lie in making certain relevant distinctions. The fact that photographic media are now protected by the First and Fourteenth Amendments[6] should not obscure the fact that there *are* differences between these media and the written news media, especially with reference to press coverage of court proceedings. The presence of a photographer, whether he is taking still pictures, movies, or television tapes, tends to make of every man an actor. This phenomenon can be a great distraction to anyone participating in the photographed event.[7] He may "play to the galleries" and conduct himself in a fundamentally dishonest manner in an effort to make the proper "image" in the mind of the unseen viewer.[8] The presence of newspaper reporters unaccompanied by photographers possibly does not produce this reaction.

Secondly, the effect of photographic media upon the public at large is more immediate than the effect of written communications. No verbal description can so effectively convey the plight of a criminal — nor, given adverse public opinion, damn him so completely — as a picture of him in chains.

Judges have expressed some doubt whether photography serves the social interest represented by a free press as well as the written media. Some judges feel that photography ". . . does not inform the public as to any material fact, and serves no purpose except to pander to the lower tastes of some individuals."[9] (This statement was made with regard to the contention of a group of newspapermen that they ought to have the right to photograph an accused murderer during his trial.)

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1 Tribune Review Pub. Co. v. Thomas, 254 F.2d 883, (3d Cir. 1958); United Press v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954).
2 Tribune Review Pub. Co. v. Thomas, 254 F.2d 883 (3d Cir. 1958).
3 *Id.* at 885.
4 386 Pa. 251, 126 A.2d 679 (1956).
5 *Id.* at 689.
6 Burstyn v. Wilson, 343 U.S. 495 (1951).
7 DOUGLAS, THE PUBLIC TRIAL AND THE FREE PRESS, 46 A.B.A.J. 840, 843 (1960).
8 *Ibid.*
9 *In re* Mack, 386 Pa. 251, 126 A.2d 679, 682 (1956).

Finally, allowing photographers to take pictures at will in and about courts might tend to subvert one of the ends which freedom of speech supposedly serves — the right to a fair trial. As Justice Douglas has stated:

> The public trial exists because of the aversion which liberty-loving people had toward secret trials . . . not because the Framers wanted to provide the public with recreation or with instruction in the ways of government.[10]

On the other hand, unrestricted picture-taking at trials might well cause a circus atmosphere to prevail, and resulting publicity might make a just verdict impossible, especially if the case has aroused public anger. Of course it might be said that the same objection can be made to allowing the written coverage of trials. The prevailing attitude is apparently that the advantages to be gained through allowing reporters at trials outweigh the disadvantages.[11] When these considerations are laid beside those weighed in the recent "no right of access" decisions, it is justifiable to assume that photographers, at least, do not have a constitutionally protected right of access to news sources.

Grimes raises questions other than the immediate constitutional issue. The Georgia court has sanctioned an extensive exercise of the judical power over court proceedings. In forbidding photography in the streets, the order covers a greater physical area than is usually the subject of judicial scrutiny; in forbidding photography of spectators and witnesses, it covers an unusually large number of people.

It is universally admitted that courts have power to prohibit photography *in the courtroom.* Where photography is not expressly forbidden by a standing rule of court,[12] judges have inherent power to prohibit it by *ad hoc* orders and contempt proceedings.[13]

This power has been held to extend to the corridors about the courtroom,[14] but no case has been found which covers a wider area, except in the case of criminal defendants. Specific prohibitions against photographing these defendants between court and jail have been upheld.[15]

The reasons given by the courts fall naturally into three categories, whatever the verbal formulation may be: (1) protecting criminal defendants against excessive publicity; (2) keeping order in and around the court; and (3) maintaining dignity and decorum in court proceedings.

Protecting the defendant

The first reported case dealing with a court's right to forbid photography within its precincts is *Ex parte Sturm.*[16] There, a judge detected a photographer taking pictures of a criminal defendant. The judge informed the photographer that he intended to forbid such pictures for the duration of the trial and requested the plate of the picture he had just taken. The photographer gave the judge a blank plate. Later, after the judge had published an anti-picture order, another photographer used a secret camera to take pictures of the trial. The judge cited both for contempt; and their convictions were upheld, the appellate court stating that the court below had power to protect the helpless defendant from excessive publicity. Undoubtedly, a major element in the decision was the deceit practiced by the photographer in giving the judge below a blank plate. This fits the layman's

10 DOUGLAS, *op. cit. supra* note 7 at 842.

11 See, *e.g.*, People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769, 774 (1954). The British courts do not feel this way, and severely restrict press comment on pending litigation. DOUGLAS, *op. cit. supra* note 7, 840.

12 *E.g.*, FED. R. CRIM. P. 53.

13 State v. Clifford, 162 Ohio St. 370, 123 N.E.2d 8 (1954), *cert. denied,* 349 U.S. 429 (1955); *Ex parte* Sturm, 152 Md. 114, 136 A. 312 (1927). See *In re* Jameson, 340 P.2d 423 (Colo. 1959, and Comment, 35 NOTRE DAME LAWYER 165 (1959).

14 Tribune Review Pub. Co. v. Thomas, 254 F.2d 883 (3d Cir. 1958); *In re* Mack, 386 Pa. 251, 126 A.2d 679 (1956).

15 *In re* Mack, 386 Pa. 251, 126 A.2d 679 (1956).

16 152 Md. 114, 136 A. 312 (1927).

definition of "contempt"; dishonest conduct, concededly, is subject to the strongest disapproval.

Protection of the defendant was also a material ground of decision in *In re Mack*,[17] where the challenged rule forbade taking pictures of any criminal defendant between court and jail, and forbade taking any pictures at all within 40 feet of the courtroom. The Supreme Court of Pennsylvania stated that courts have the power — and the duty — to protect the "right of privacy" of the prisoner.[18] While the use of the term "right of privacy" is unfortunate, since ordinarily this protection is less extensive for one who attracts substantial public attention,[19] the court in effect recognized the reasonableness of protecting prisoners from the extra-legal punishment of photographic publicity.

In *Brumfield v. State*[20] the court below had forbidden taking pictures of a man accused of rape. The Supreme Court of Florida found another social interest to protect in upholding the order — the right to a fair trial.

Keeping order in and around the court

The desire to keep order is the rationale behind *In re Seed*,[21] in which it was found that a photographer who had taken pictures with a flashpowder outfit outside the courtroom door had violated an anti-disturbance statute because of the attendant fire and smoke. The judge also said that taking pictures of defendants might precipitate disturbance because of the attempts of the individuals photographed to protect themselves. Here, the grounds for decision are connected with the desire to avoid physical disruption of court proceedings.

In *State v. Clifford*,[22] the photographer violated a specific court order against photography, and took pictures in the courtroom, using a flash camera. In upholding a contempt citation, the court said, "It is enough that the defendant's acts . . . caused a distraction or had the potential possibility of doing so."[23]

Maintaining the dignity of the court

A constant theme in all the decisions is that the courts have power to forbid photography to maintain "dignity" and "decorum" in court proceedings. Canon 35 of the Canons of Judicial Ethics of the American Bar Association (which prohibits courtroom photography) cites the maintenance of dignity and decorum as the chief reason for its prohibition.

The words connote lack of tension, absence of a "circus" atmosphere and a public image of calm, just deliberation — all qualities which photography is likely to impair. However, one state has apparently endorsed courtroom photography;[24] most jurisdictions which have considered the problem regard photography as injurious to dignity and decorum.

None of the decisions above cited involves an order forbidding photography more than 40 feet from the courtroom door, except those which involve criminal defendants. Even in those cases, regardless of the distance from courtroom to jail, only one subject has been judicially barred from the cameras. The opinion in *Grimes* contains none of the three conventional justifications of an anti-photography rule. The reasoning that the defendants must be protected from adverse publicity which might injure the fairness of their trial seems obviated by the fact that the church bombers' counsel twice gathered a crowd and addressed them for the benefit of radio and television. Counsel made no objection apparent on the

17 386 Pa. 251, 126 A.2d 679 (1956).
18 *Id.* at 683.
19 PROSSER, TORTS 643 (2d ed. 1955).
20 108 So. 2d 33 (Fla. 1959).
21 140 Misc. 681, 251 N.Y.S. 615 (Sup. Ct. 1931).
22 164 Ohio St. 370, 123 N.E.2d 8 (1954), *cert. denied*, 349 U.S. 429 (1955).
23 *Id.* at 123 N.E.2d 11.
24 *In re* Canon 35, 132 Colo. 591, 296 P.2d 465 (1956).

record against any photography of the bombers; in fact, the inference could well be drawn from the record that the church bombers were *seeking* publicity.

As to keeping order in the court, it is difficult to see how taking pictures in the street could possibly cause disorder in courtrooms which ranged from two to six floors above the street.[25] If the crowds caused disorder, it would seem more reasonable to disperse the crowd. Finally, it is unlikely that photography in the street reflects in any way upon the dignity of court proceedings, or impairs in any way courtroom decorum. The milling crowd below would have had a more adverse effect; yet the crowd was allowed to gather two days running without dispersal.

The *Grimes* court did not adopt any of the traditional reasons for banning photography. It chose, in effect, to ratify the action of the trial judge by stating that he had not abused his discretion. It has apparently become the law in Georgia that a judge, for any reason, or for no reason, can forbid the taking of pictures in the street outside his courtroom.

Joseph P. Summers

PRICES — RESTRAINT OF TRADE — COOPERATION TO MAINTAIN PRICE LEVELS ILLEGAL UNDER SHERMAN ACT. — In 1956, Parke, Davis & Co. instituted a special program to enforce a resale price maintenance policy on its drug products in the Baltimore-Washington-Richmond area. No "fair trade" statutes[1] were in effect in those jurisdictions. The enforcement policy included the cooperation of wholesalers by their refusals to deal with price-cutting retailers. On complaint of Dart Drug, a large retail drug chain, the Justice Department sought an injunction on the ground that Parke Davis had combined and conspired, in violation of Sections 1 and 3 of the Sherman Act,[2] to maintain resale prices.

The Federal District Court for the District of Columbia dismissed the action holding that the government had shown no right to relief.[3] The Justice Department made a direct appeal to the Supreme Court under Section 2 of the Expediting Act.[4] *Held*: reversed. The inclusion of wholesalers in a program to gain retailers' adherence to a resale price policy created a combination with the wholesalers and retailers in violation of the Sherman Act. *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).[5]

The key feature of the special enforcement program was the cooperation of the five drug wholesalers in the area. Although each was individually approached by Parke Davis, each knew that the others had been similarly informed of the new program. Specifically, the wholesalers were informed that Parke Davis would refuse to sell to them if they cut the schedule prices on Parke Davis products. In addition, they were warned that they would be cut off if they sold to any price-cutters at the retail level. The wholesalers cooperated with Parke Davis and did,

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25 Atlanta Newspapers Inc. v. Grimes, 114 S.E.2d 421, 426 (1960).

1 Congress has provided that agreements regulating resale prices made in states with so-called "fair trade" statutes shall not be held illegal under the Sherman Act.

2 26 Stat. 209 (1890), 15 U.S.C. § 1 (1958). The relevant wording of § 1 provides: "Every contract, combination . . . or conspiracy in restraint of trade or commerce among the several states . . . is declared to be illegal."

3 United States v. Parke, Davis & Co., 164 F. Supp. 827 (D.C. 1958).

4 32 Stat. 823 (1903), 15 U.S.C. § 29 (1958).

5 The Court said at 45:

> In thus involving the wholesalers to stop the flow of Parke Davis products to the retailers, thereby inducing retailers' adherence to its suggested retail prices, Parke Davis created a combination with the retailers and the wholesalers to maintain resale prices and violated the Sherman Act . . . that entire policy was tainted with the "vice of . . . illegality" . . . when Parke Davis used it as the vehicle to gain wholesalers' participation in the program to effectuate the retailers' adherence to the suggested retail prices.

in fact, refuse to sell to "known" price-cutters and to others whose names were supplied to them by Parke Davis.

The District Court decision was based primarily on the principles set forth in *United States v. Colgate & Co.*,[6] which has long been considered to have established what a manufacturer or seller may do to enforce resale price policies. On the other hand, *Dr. Miles Medical Co. v. Park & Sons Co.*,[7] the earlier of the two cases, showed what was clearly prohibited in the area of resale price maintenance.

Dr. Miles involved a series of agreements between Miles and wholesalers and retailers engaged in the sale of Miles' products. While purporting to be "agency" contracts, the primary effect of the agreements was regulation of resale prices. The Court held that the contracts were violations of the Sherman Act and that the entire enforcement system was a restraint of trade at common law; a manufacturer or seller may not make *contracts* with wholesalers or retailers to regulate resale prices.

The enforcement program in *Colgate* was more subtle. Its key features included: 1) announcement of the policy against price-cutting; 2) a refusal to sell to price-cutters; 3) sales to price-cutters, subject to *promises* and *assurances* that the policy would be complied with in the future. There were no written contracts. The case turned on the interpretation that the trial court placed on the indictment. The government argued that the indictment fairly charged a Sherman Act violation within the doctrine of *Dr. Miles*. The Court disagreed and held that the Colgate policy was not within the *Dr. Miles* rule.[8]

If the government, in *Colgate,* had simply neglected any reference to agreements in the indictment, the Court would have been without grounds to disagree with the trial court. But the indictment charged that Colgate had requested *promises* and *assurances* of compliance and had received the same from dealers who, because of earlier price-cutting, had been cut off by Colgate.[9] That the promises, although not written contracts, were conditions of sale is clear from the fact that Colgate would not sell to price-cutters unless such promises were given in advance; the indictment did not fail to specify those promises. Nevertheless, the Court held that there were no agreements within the *Dr. Miles* doctrine.

Had the agreements in *Miles* been upheld, it would appear that Miles would have been able to enforce the agreements in court against price-cutting dealers, for those agreements clearly restricted the rights of dealers when the products were in their control. Not so, however, in *Colgate;* the agreements—*i.e.,* that the dealers would comply as a condition of sale — did not contemplate judicial enforcement. Colgate's only remedy was a refusal to deal with them in the future. But the language of the *Colgate* Court, in discussing the interpretation of the indictment, implies that the offensive feature of the Miles contracts was their "restraining" effect on dealers. Moreover, the *Colgate* Court went on to say, "In *Dr. Miles* . . . the unlawful combination was effected through contracts which undertook to prevent dealers from freely exercising the right to sell." [10] Indeed, the holding of the *Miles* Court, that the entire enforcement system was a common law restraint of trade, leads to the same conclusion. Apparently, the Court in *Colgate* felt that the promises which were conditions of sale were not "restraining."

6 250 U.S. 300 (1919).

7 220 U.S. 373 (1911).

8 "[W]e must conclude that . . . the indictment does not charge Colgate & Company with selling its products to dealers under agreements which obligated the latter not to resell except at prices fixed by the company." United States v. Colgate Co., 250 U.S. at 306.

9 *Id.* at 303. The indictment listed a summary of the actions taken to enforce the price policy. Included were the following: "requests to offending dealers for *assurances* and *promises* of future adherence to prices, which were often given; . . . [s]imilar *assurances* and *promises* required of, and given by, other dealers followed by sales of them." (Emphasis added.)

10 United States v. Colgate & Co., 250 U.S. at 307.

But *Colgate* is remembered, not for its apparent inconsistencies, but for the positive assurances it gave to manufacturers or sellers desiring to maintain a resale price policy without running afoul of the Sherman Act.

> In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.[11]

In 1920, the same problem was presented to the Supreme Court in *United States v. Shrader's Son, Inc.*[12] The Court added to *Dr. Miles,* in dicta, the stipulation that the agreement need not be written. It might be implied from ". . . a course of dealing or other circumstances." [13] *Shrader* lends weight to the position that, in 1920, the thinking of the Court was that some kind of *legally enforceable agreement* was necessary in order to establish a Sherman Act violation in resale price maintenance. The most significant element of *Shrader* is the District Court opinion of Judge Westenhauer.[14] Although he was reversed by the Supreme Court, he very ably argued that the Court's "enforceable agreements" standard was insufficient. He pointed out that other methods of cooperative price-fixing were every bit as restraining as a written agreement.[15] The net effect of the Westenhauer opinion is that it portended the position that the Supreme Court would ultimately take.

The "enforceable agreements" standard was again confirmed in 1921,[16] but a significant departure took place the next year. In *Federal Trade Comm'n v. Beech-Nut Packing Co.*,[17] the Court, for the first time, struck down a price maintenance policy that did not involve enforceable agreements and went beyond the limits established by *Colgate.* The key elements of Beech-Nut's intricate policy included: 1) involvement of wholesalers and jobbers in the enforcement policy by refusing to sell to them if they in turn sold to price-cutters; 2) jobbers, wholesalers and retailers previously cut off by Beech-Nut were reinstated through "declarations, assurances, statements, promises and similar expressions" that they would thereafter comply with the policy. Of all the factors in *Beech-Nut,*[18] the Court made it impressively clear that the objectionable features were those that involved the *cooperation* of Beech-Nut and its wholesalers to maintain the policy at the retail level, features that made the entire policy an "unfair method of competition" within the meaning of the Federal Trade Commission Act.[19]

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11 *Id.* at 307.
12 252 U.S. 85 (1920).
13 *Id.* at 99.
14 United States v. Shrader's Son, 264 Fed. 175 (N.D. Ohio, 1919).
15 *Id.* at 183.
16 Frey & Son v. Cudahy Packing Co., 256 U.S. 208 (1921).
17 257 U.S. 441 (1922). The Court said, at 455:

> The specific facts found show suppression of the freedom of competition by methods in which the company secures the *cooperation* of its distributors and customers, which are quite as effectual as agreements, express or implied intended to accomplish the same purpose. (Emphasis added.)

18 The Court at no time indicated which element of the Beech-Nut policy was the one that made the sum total of all the features illegal. Indeed, the impression is given that the Court considered all the factors as a single, illegal policy. However, the wording noted makes it apparent that it was the *cooperation* with wholesalers that was most offensive and led the Court to look on the entire policy as an "unfair method of competition."
19 38 Stat. 717 (1914), 15 U.S.C. §§ 41-77 (1958). Section 45, as originally enacted, provided in part, "The Commission is empowered and directed to prevent . . . unfair methods of competition in commerce. . . ." Referring to the injunction that the Commission sought, the *Beech-Nut* Court stated:

> The order should have required the company to cease and desist from carrying into effect its so-called Beech-Nut Policy by cooperative methods in which the respondent and its distributors, customers and agents undertake to prevent others from obtaining the company's products at less than the prices designated by it. 257 U.S. 441, at 455.

Beech-Nut was initiated by the Commission under Section 5 of the Federal Trade Commission Act. *Parke Davis,* on the other hand, is a Sherman Act case. But the distinction is academic when, in the words of the Court in *Beech-Nut,* the Sherman Act is relevant because "it shows a declaration of policy to be considered in determining what are unfair methods of competition. . . ." [20]

From the point of view of policy, *Beech-Nut* condemns methods of resale price maintenance which involve the cooperation of wholesalers in the maintenance system; it is the last significant case in the body of law which led up to the decision in *Parke Davis.*[21]

Justice Harlan, in dissent,[22] has condemned the *Parke Davis* decision; it is his opinion that the Court overruled *Colgate,* while expressing judicial respect for it. However, while not expressly stating so, it seems clear that the majority intended to keep the positive assurances of *Colgate* intact.[23] Had it been content with the two steps sanctioned in *Colgate* — the policy announcement and the refusal to deal — the Court seems to infer that Parke Davis would not have violated the Sherman Act.

But there was more to *Colgate* than these two steps. Price-cutters were dealt with because they gave assurances and promises that they would comply with the price policy in the future. Significantly, the Court in *Parke Davis* does not refer to that element of *Colgate.* On the contrary, the opinion infers that mandatory promises and assurances from retailers go beyond the allowable limits of price policy enforcement.

The fact is that *Colgate* turned on an interpretation of an indictment which charged more than (1) announcement of a policy and (2) refusals to deal. Now, however, the *Parke Davis* Court holds that those two methods alone are all that may be employed to enforce a price policy. The holding in *Colgate* did not say that; the dicta in the opinion may be fairly interpreted to mean that. Perhaps the more accurate statement is that, while *Colgate* itself is dead, the ramifications of the Court's dicta in that decision are still very much alive.[24]

As a practical matter, it is difficult to comprehend the present utility of *Colgate* to the corporation desiring to enforce a price policy. To argue that a price policy can be effectively administered and maintained by announcement of the policy and simple refusals to deal with price-cutters is to blind oneself to the realities of modern business practices.

The second point of the Harlan dissent is that the business community, as Justice Harlan puts it, is left "wholly in the dark" [25] as to what the purported new standard is for the establishment of a combination or conspiracy in restraint of trade.

The Court does not dwell at any length on meeting the requirements of Section 1 of the Sherman Act, though it is apparent that, in the Court's opinion, the government overcame that statutory hurdle. The majority notes that the voluntary acquiescence of dealers in a seller's price policy has the same economic effect

20 Federal Trade Comm'n v. Beech-Nut Packing Co., 257 U.S. 441, at 453.

21 See United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944). Though the case adds little to *Beech-Nut,* it is helpful in seeing the Supreme Court view, in 1944, of the law leading to *Parke Davis.*

22 Justices Frankfurter and Whittaker joined in the dissent.

23 "Parke Davis did not content itself with announcing its policy regarding retail prices and following with a simple refusal to have business relations with any retailers who disregarded the policy." United States v. Parke, Davis & Co., 362 U.S. 29, at 45.

24 In George W. Warner & Co. v. Black & Decker Mfg. Co., 277 F.2d 787 (2d Cir. 1960), the court commented on the remaining life left in *Colgate* as a result of the Supreme Court's ruling in *Parke Davis* (at 790):

> The Supreme Court has left a narrow channel through which a manufacturer may pass even though the facts would have to be of such Doric simplicity as to be somewhat rare in this day of complex business enterprise.

25 United States v. Parke, Davis & Co., 362 U.S. 29, at 53.

as a prohibited combination would have. But the Court adds that this is tolerated as long as *Colgate* is not overruled.

> When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, this countervailing consideration (toleration) is not present and therefore he has put together a combination in violation of the Sherman Act.[26]

This, apparently, is the "purported new standard" that Justice Harlan refers to in the dissent.

For corporate counsel engaged in advising clients on the limits of permissible resale price maintenance, the rule seems to raise more questions than it answers. Admittedly, the abstract standard for price maintenance enforcement is clearer, but the perennial problem of how to handle a price-cutter who wants to get back on the list of approved customers is aggravated by the decision. He must, it would seem, give an assurance of his intention to comply with the price policy. In *Colgate*, promises and assurances of future compliance were sustained; but *Parke Davis* holds that the seller may not go beyond announcement and refusals to deal. The corporate litigant will find it difficult to show that the promises and assurances of future compliance given by previously "cut-off" dealers — which seem necessary if there is to be reason for putting the price-cutter back on the list of acceptable retailers — are neither agreements nor cooperative methods. Such assurances and promises go beyond the narrow limits of *Colgate*, as the Court now interprets that case, and, on that basis alone, would appear to be condemned.

The more significant problem raised by *Parke Davis* is how to avoid the suspect *cooperation* in maintaining a price policy. Inevitably, there are complaint letters written by customers of the price-maintaining seller; complaints of violations of the policy by competitors. The desirable answer to the complainant is an assurance from the manufacturer that the violator will be cut off, or, at the very least, warned. A letter that says less is unsatisfying to the complaining customer who, in good faith, is abiding by the established price policy. It seems logical on the basis of *Parke Davis*, however, to argue that such cooperation of seller and customer is enforcing a price policy on another customer is a combination or conspiracy in restraint of trade. Given the attitude of the Supreme Court as seen in *Parke Davis* — a tendency to find a "combination" without concern for any clear standard — and the apparent dislike of price maintenance policies by the Justice Department, *Parke Davis* is a warning to counsel of the dangers inherent in what appears to be an involuntary combination. For good or ill, *Parke Davis* reduces available methods of enforcing minimum price policies. In addition, the opinion reveals a liberal attitude toward what is required to find a combination or conspiracy in restraint of trade. The latter ramification of the decision raises questions that go far beyond price policies, into a broader area of antitrust law. It is precisely this implication which promises to be the mischief of *Parke Davis*.[27]

Michael E. Phenner

REAL PROPERTY — EASEMENTS — CESSATION OF NECESSITY HELD NOT TO EXTINGUISH EASEMENT CREATED BY "IMPLIED GRANT" — Plaintiffs, landowners, brought suit to extinguish defendant's claim of easement of ingress and egress over plaintiffs' land, which adjoined that of the defendant; both lots were at one

26 *Id.* at 44. It is interesting here to note the use given by the Court to its interpretation of *Colgate*. In effect, that interpretation becomes the standard for determining a Sherman Act combination in the area of resale price maintenance. But that interpretation is taken from the dicta, *not* the holding, of *Colgate*.

27 On July 5, 1960, the Federal District Court for the District of Columbia again denied the injunction sought by the government in *Parke Davis*. A trade service for the drug and cosmetic industry noted that Judge Joseph R. Jackson, in an oral opinion, denied the injunction on the grounds that the Parke Davis price policy had long been discontinued. See, F-D-C REPORTS, Vol. 22, No. 28 (July, 1960).

time part of a large tract under the ownership of one Darke, who, in 1869, subdivided his land and sold the individual lots. That same year a map was filed showing the tract as subdivided into numbered lots, together with perpendicular and horizontal areas running north to south and east to west. These areas were designated "lanes" and were not numbered. Plaintiffs' land was originally a segment of one of these lanes. At the time of the subdivision, the land presently owned by the plaintiffs was the only possible access to a public street from the land presently owned by the defendant. In 1912, a new public street was opened, giving direct access to the land presently owned by the defendant and thereby making unnecessary the use of plaintiffs' lot as a means of ingress and egress to a public street. Defendant acquired title to her lot in 1923; plaintiffs acquired title to their property in 1955. The Supreme Court, Special Term,[1] gave judgment for the plaintiffs and was unanimously affirmed by the Appellate Division.[2] On appeal to the Court of Appeals, *held*: reversed and new trial granted. An easement had arisen by an "implied grant" and therefore could not be extinguished by the mere cessation of the necessity for its existence. *Gerbig v. Zumpano*, 7 N.Y.2d 327, 165 N.E.2d 178 (1960).

The plaintiffs urged the court to find that an easement of necessity or "way of necessity" had originally arisen in favor of the land owned by the defendant. A way of necessity exists where the land conveyed is completely surrounded by land of the grantor, or by his land and that of a stranger. The law implies from these facts that a right of way exists for the benefit of the grantee's estate.[3] Such an implication is not made as a mere matter of convenience to the grantee and does not exist when the grantee may reach a public highway over his own land.[4] Such an easement is never implied over the land of a stranger and, for this reason, the dominant and servient estates must have both been owned at one time by the same person.[5]

The trial court found that the easement in *Gerbig* was created by means of an "implied grant." It then stated:

> Are such easements, once found to have existed as a matter of presumed intention, to be forever inviolate and permanently to remain a clog on land titles? I have reached the conclusion that where the reason for the original implication ceases, the easement should, in the absence of compelling circumstances, itself expire. . . .
>
> [L]and titles should not be subject to implied, as distinguished from express, encumbrances unless such burdens are reasonably necessary for the enjoyment of neighboring properties. . . . Since the easement was implied so that purchasers of interior lots may have access to and from their land, the implication ceases when a public highway has been built affording both parties free and untrammeled approach to and from that highway.[6]

The Appellate Division affirmed without opinion. It seems clear that the trial court and the Appellate division agreed (1) that the easement originally arose by "implied grant," and (2) that such an easement terminates when the reason for the original implication ceases.

The Court of Appeals, agreeing as to point (1) above, took issue with the lower court's theory on the manner of extinguishing an easement by "implied grant." The Court held that such an easement could not be extinguished by the mere cessation of the necessity which originally gave rise to its implication.

> [W]hile aware of the legal distinction, the court equated this easement *by grant* with an easement *by necessity*. . . .

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1 Gerbig v. Zumpano, 13 Misc. 2d 357, 177 N.Y.S.2d 969 (Sup. Ct. 1958).
2 Gerbig v. Zumpano, 7 (App. Div. 2d) 904, 182 N.Y.S.2d 1016 (1959).
3 Violet v. Martin, 62 Mont. 335, 205 Pac. 221 (1922).
4 Backhausen v. Mayer, 204 Wis. 286, 234 N.W. 904 (1931); *accord*, Carey v. Rae, 58 Cal. 159 (1881).
5 Bowles v. Chapman, 180 Tenn. 232, 175 S.W.2d 313 (1943).
6 Gerbig v. Zumpano, 13 Misc. 2d 904, 177 N.Y.S.2d 969, 973 (Sup. Ct. 1958).

> We reach a different conclusion. It is the law of this state that an easement created *by grant,* express or *implied,* can only be extinguished by abandonment, conveyance, condemnation, or adverse possession.
>
> The mere fact that this easement might originally have been created out of necessity does not alter the means by which it was created, i.e., *by grant,* and as such it remains as inviolate as the fee favored by the grant. . . .[7]

A new trial was granted to allow plaintiff to prove defendant's abandonment of the easement.

Thus, *Gerbig* seems to have turned on a matter of classification. The lower courts held that an easement by "implied grant" should be extinguished when the reason for the original implication ceases. The lower courts, therefore, thought of an easement by "implied grant" as a type of easement arising by *implication* from the presumed intent of the original grantor, subject to termination when the reason for its implication ceases. The Court of Appeals, however, thought that such an easement was essentially one arising by *grant,* and therefore "as inviolate as the fee favored by the grant," subject to extinguishment only by abandonment, conveyance, condemnation, or adverse possession and not by the mere cessation of the necessity for its existence.

It is submitted that the trial court, in ruling that there was an easement by "implied grant," opened the door to reversal; the Court of Appeals seized upon the word "grant" as a justification for treating the easement as though it had been created by an express grant in the conveyance. It seems clear, however, that, since the original grantee of the land could not have used his land unless allowed an easement to the public highway from the land, a way of necessity arose.[8] This

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7 Gerbig v. Zumpano, 7 N.Y.2d 327, 165 N.E.2d 178, 180 (1960). In *Kux v. Chandler,* (action by landowners to determine whether or not an easement existed on the plaintiffs' land in favor of defendants) the court said:

> Ways of necessity cannot be founded upon an express grant but are dependent upon an implied grant or reservation. These statements are based in pure logic, for in a grant or prescriptive right not growing out of necessity, a perpetual estate is created. However, if the necessity creates an implied grant, or, as in this case, a reservation, there is, as above indicated, no authority to the effect that such . . . [implied] grant is perpetual and survives the existence of a necessity. 112 N.Y.S.2d 141, 144 (Sup. Ct. 1952).

8 2 WALSH COMMENTARIES ON THE LAW OF REAL PROPERTY § 234 (1947):

> By far the most usual instance of an easement of necessity is a way of necessity. Such an easement ordinarily arises when one conveys to another land entirely surrounded by his, the grantor's land, or which is accessible only across either the grantor's land or the land of a stranger. In such a case, unless the conveyance is regarded as giving, as appurtenant to the land conveyed, a right of way over the land retained by the grantor, the grantee can make but a limited use, if any, of the land conveyed to him, and the courts, in pursuance of considerations of public policy favorable to the full utilization of the land, and in accordance with the presumable intention of the parties that the land shall not be without any means of access thereto, have established this rule of construction that, in the absence of indications to a contrary intention, the conveyance of the land shall in such case be regarded as vesting in the grantee a right of way across the grantor's land.

3 TIFFANY, REAL PROPERTY § 793 (3d ed. 1939).

> When the owner of land conveys the inner portion thereof, retaining the outer portion abutting on the highway, the inner parcels being surrounded on every other side by other lands of the grantor or of strangers, a way of necessity arises as an implicated term of the deed conveying the inner parcel, giving to the grantee of the inner parcel a right of way over the outer parcel to and from the highway. This easement is implied because of the evident necessity of such a way for the beneficial enjoyment of the land so conveyed. Without it the grantee could not get to or from his property without becoming a trespasser. The easement arises, therefore, by necessary implication as an implied term of the deed. . . .

difference in terminology between "implied grant" and "way of necessity" becomes crucial.

It seems probable that there would have been no reversal had the easement in question been classified as an easement by necessity. The overwhelming weight of authority is to the effect that an easement of necessity will cease to exist when the necessity which occasioned it ceases.[9] The reasoning of the courts in reaching this result was set forth in the early case of *Oliver v. Hook*:

> It is true, as contended by the appellant, that where one party deeds to another a parcel of land surrounded by other lands, and there is no access to the land thus conveyed, except over the lands of the grantor, the latter gives the grantee a right of way by implication, over his own land to that conveyed by him. But this way of necessity is a way of new creation by operation of law, and is only provisional; for it is only brought into existence from the necessities of the estate granted, and continues to exist only so long as there may be a necessity for its use. If, therefore, the grantee acquires a new way to the estate previously reached by the way of necessity, the way of necessity is thereby extinguished.[10]

Termination of necessity, however, will not extinguish an easement created by prescription[11] or by express grant.[12] Therefore, whether an easement is called "way of necessity," "easement of necessity," "implied grant," or some other term, it is of the utmost importance to determine whether it is essentially an easement of implication, grant, or prescription.[13] The answer to this question will determine whether or not the cessation of necessity will extinguish the easement. *Gerbig* furnishes an example of the divergent results which can hinge on which of the three alternatives is decided upon.[14] Had the court decided that the easement was essentially one implied from necessity, then the cessation of the necessity (when the new street was opened in 1912) would probably have been held to have terminated it; the plaintiff would have prevailed. Instead, the court held that the easement was essentially one created by grant,[15] and therefore did not terminate by reason of the opening of the new street.

It is submitted that the classification of easements made use of by the trial court and the Court of Appeals in the instant case is a faulty one. According to this classification, easements may arise or be created as follows:

I. By grant { express / implied

9 *E.g.*, Whitfield v. Whittington, 99 A.2d 196 (Del. Ch. 1953); Kux v. Chandler, 112 N.Y.S.2d 141 (Sup. Ct. 1952); Irvin v. Petitfils. 44 Cal. App. 2d 496, 112 P.2d 688 (1941); Cassin v. Cole, 153 Cal. 611, 96 Pac. 277 (1908).

10 47 Md. 301 (1877).

11 Hendrickson v. Cruse, 22 Ky. 190, 298 S.W. 710 (1927).

12 Bagley v. Petermeier, 233 Ia. 505, 10 N.W.2d 1 (1943); Flener v. Lawrence, 187 Ky. 384, 220 S.W. 1041 (1920).

13 The same judge who wrote the Court of Appeals decision in *Gerbig* held, under similar circumstances, that an easement by *implication* arose. A sale of land was made by reference to maps (Nos. 500 and 630 in the opinion below). A strip of land in the map, representing a boardwalk, was not given a lot number, nor was it subdivided into plots like the rest of the areas for sale.

> In the disposition made of this case below, it was properly held that an easement by *implication* in and to the boardwalk exists in favor of the property owners whose deeds refer to Maps Nos. 500 and 630 and to their grantees and that an easement by *implication* exists in favor of the property owners in and to Suffold Blvd. (Emphasis added). Weil v. Atlantic Beach Holding Corp., 1 N.Y.2d 20, 150 N.Y.S.2d 13, 18, 133 N.E.2d 505, 508 (1956).

14 According to the *Restatement,* necessity is one of the factors giving rise to an easement by implication. RESTATEMENT, PROPERTY § 476(e) (1944).

15 Easements by implied grant were abolished in a Montana decision, one of the grounds being that such an easement is inconsistent with the Statute of Frauds requirement that an easement in real property should be in writing. Simonson v. McDonald, 131 Mont. 494, 311 P.2d 982 (1957), criticized in 19 MONT. L. REV. 73 (1957). The contrary conclusion was drawn in Mattes v. Frankel, 157 N.Y. 603, 52 N.E. 585 (1899), and in Owsley v. Hamner, 36 Cal. 2d 710, 227 P.2d 263 (1951).

II. By prescription
III. By necessity[16]

This is not the view of the *Restatement of Property*, which does not distinguish between easements by necessity and easements by implication.[17] According to the *Restatement* view easements may arise or be created:

I. By grant
II. By prescription
III. By implication[18]

This method of classifying easements is more logical since it groups together easements created by the acts of the grantor (created by grant), by acts of the grantee (created by prescription, or adverse possession), and by the courts (implication).[19] The ambiguous term "implied grant" is thus eliminated. Since all implications in the field of easements are acts of the courts, not the grantor, the inconsistency of treating such court-made rights as though they were expressly conferred by the grantor is apparent. The *Restatement* suggests that the courts should try to effectuate the intention of the parties,[20] or what the parties' intention would probably have been had they considered the matter.[21]

The "implied grant" easement, as conceived of by the New York Court of Appeals, springs into existence through a judicial interpretation of the circumstances and the presumed intention of the parties existing at the time the dominant estate is severed from the servient estate. Once held to exist, however, it cannot be extinguished in the same manner as it was created (*i.e.*, by judicial interpretation of the original parties), but assumes all the inviolability and indestructability of an easement appurtenant created by express grant. This rationale, it would seem, militates against the public policy which discourages the unnecessary burdening of land titles and tying up the use of land.

It is submitted that the New York Court of Appeals, in reversing the lower courts because they equated an easement by grant with an easement by necessity, has itself failed to distinguish between an easement by grant and an easement by implication.

Daniel J. Manelli

SCHOOLS AND SCHOOL DISTRICTS — MARRIAGE — REFUSAL TO ALLOW MARRIED STUDENTS TO PARTICIPATE IN EXTRACURRICULAR ACTIVITIES IS REASONABLE EXERCISE OF LEGISLATIVE POWER — Defendant school district adopted a resolution providing that "married students or previously married students" be restricted wholly to classroom work, that they be barred from participating in school athletics or other extracurricular activities; academic honors, such as valedictorian, excepted. Appellant sought to enjoin the enforcement of this resolution against his 16-year-old son, a returning monogram winner who, after his first season of high school

16 Gerbig v. Zumpano, 13 Misc. 2d 357, 177 N.Y.S.2d 969 (Sup. Ct. 1958).

17 POWELL, REAL PROPERTY § 411 (1952); RESTATEMENT, PROPERTY ch. 38 (1944).

18 This is also the classification used in CORPUS JURIS SECONDUM. 28 C.J.S. *Easements* §§ 6-44 (1941).

19 This organization of the subject has been criticized by Professor Powell, who served as a reporter on the *Restatement of Property*. He would leave easements by necessity as a separate classification and not merge them into easements created by other forms of implication. 3 POWELL, REAL PROPERTY § 411 (1952).

20 Reis v. Mahony, 258 N.Y. 136, 179 N.E. 321, 323 (1932) (Cardozo, J.):

> We have no thought to impair the authority of the principle repeatedly declared that the owner of a tract, who lays out streets upon a map and sells the subdivided lots with reference thereto, may be found by implication to have created private easements in favor of the lot owners upon the streets thus declared to be created for their use. . . . Even so, the question is one of intention, to be answered, like questions of intention generally, in the light of all the circumstances.

21 See generally, Note, 57 MICH. L. REV. 724 (1959).

football and prior to the adoption of this resolution by the school board, had married a 15-year-old girl. The lower court's denial of the injunction was affirmed by the Texas Court of Civil Appeals. *Held:* The resolution is within the rule-making powers of the school authorities, and is not arbitrary or unreasonable since it had a definite relation to lawful objectives sought by the board — the maintenance of school discipline and the promotion of an efficient system of free public education. *Kissick v. Garland Independent School District,* 330 S.W.2d 708 (Tex. Civ. App. 1959), Texas writ of error refused or dismissed.*

Children of school age are subject to both parental and school authority; they intimately feel the effect of both every day. The basis of parental authority need not be traced in this article. The authority of school administrators is a more recent concept, grounded in the constitutions of the several states, which uniformly cast upon the respective legislatures the duty of establishing and administering a system of free public education.[1] State legislatures devise a system and place the responsibility for its operation in the hands of a school authority, independent school district, county school board, or school trustee.[2] These administrative bodies are instructed to maintain the order and efficiency of the system by adopting rules and regulations for the government of the system.[3]

Resolutions of the school boards pertaining to school work or to events occurring within the school building seldom clash with the sphere of parental authority, although such conflicts have occurred. The Illinois Supreme Court announced that the expulsion from school of a child who refused to study grammar as required by the school regulations was unreasonable and arbitrary since the boy was only obeying his father's wishes in the matter, and the school authority could not usurp the recognized "right of the parent to determine to what extent his child should be educated. . . ." [4]

For the most part, however, the real conflict exists when a home activity, or an action occurring after school, has been made the basis for disciplinary action by the school authority. Few cases involving penalties applied to students because of marriage have been litigated. The Mississippi Supreme Court ruled that the school trustees could not refuse to admit married students to the free public school system, saying that it could not believe that the grounds for the resolution were valid, *i.e.,* that the admission of married students would have a detrimental effect on the welfare of the unmarried students.[5] Other courts, acknowledging the experience of educators in dealing with matters affecting school discipline, have permitted them to determine whether a married teenager is a refining and elevating influence in the classroom.[6] Apparently the consensus is that educators now approach the problem more intelligently.

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* A similar resolution was adopted by the Bloomfield, Indiana, School Board in October, 1960. The rule bars married students from all extracurricular activities—including "commencement, baccalaureate and class day." South Bend Tribune, Oct. 4, 1960, p. 2, col. 3. (Ed.)

1 See *e.g.,* ILL. CONST. art VIII, § 1.

2 See *e.g.,* MD. ANN. CODE art. 77, § 54.

3 TEX. REV. CIV. STAT. art. 2780 (1951).

4 Trustees of Schools v. People, 87 Ill. 303 (1877). *Contra,* State v. Weber, 108 Ind. 31, 8 N.E. 708 (1886).

5 McLeod v. State, 154 Miss. 464, 465, 122 So. 737, 738 (1929):

> We fail to appreciate the force of the argument. Marriage is a domestic relation highly favored by the laws. When the relation is entered into with correct motives, the effect on the husband and wife is refining and elevating, rather than demoralizing. Pupils associating in school with a child occupying such a relation, it seems, would be benefited instead of harmed, and, furthermore, it is commendable in married persons of school age to further pursue their education, and thus become better fitted for the duties of life.

6 State v. Marion County Board of Education, 202 Tenn. 29, 32, 302 S.W.2d 57, 59 (1957):

> We are accustomed to accept the testimony of experts in the various fields of human activity as to what is reasonably necessary for the welfare of the

A resolution which provided for the expulsion of students who married during the school term, allowing them to return to school the following year, was approved by the Tennessee Supreme Court.[7] The resolution was the fruit of a study which indicated to school authorities that married teenagers had a significant effect on school atmosphere only during the first few months of the marriage, but that apparently the novelty wore off after that time, and a normal environment could be maintained with them in the classroom.

In *Kissick,* the Texas court faced the compelling argument that this resolution defied an acknowledged public policy in favor of marriage by applying penalties to persons who marry. The court dealt with this contention by declaring that public policy in regard to marriage is a two-headed coin in Texas — on the one side viewing with favor the marriages of persons of "lawful age" (male 21, female 18),[8] but on the other side taking a view unfavorable to and in frank discouragement of "under-age marriages." As a basis for this determination, the court referred to Texas statutes which require the parents or guardians of under-age applicants for marriage to present, in person, their consent to the clerk issuing marriage licenses, and which require the applicants to delay the marriage for a three-day waiting period after filing the application.[9] The court also noted a statute which places criminal sanctions on the actions of a clerk who issues a license to under-age applicants without requiring them to satisfy these conditions.[10] Thus the objective which the court found the school board to be seeking in applying the resolution under attack — that of discouraging under-age marriages — was identified as consistent with the public policy of the state. The resolution, therefore, could not be termed arbitrary or unreasonable.

Considering the impulsive character of teenage behavior, an alternative interpretation of the cited Texas statutes is fairly suggested — the legislature intended a public policy in favor of all marriages by persons of lawful age.[11] For the youngest group of possible applicants, however, the legislature provided a period of deliberation (the three-day waiting period), during which presumably mature minds would be assured an opportunity to join in the consideration of the contemplated marriage (the condition of parental consent). Attributing to the legislature a deep concern for the results of what might be more an act of juvenile exuberance than the culmination of a deep, mature emotion is not inconsistent with the proposition that it favors all lawful marriages.

Conceding that there are two possible interpretations of the public policy in Texas in regard to teenage marriages, there is adequate support for the *Kissick* decision on broader grounds. Courts have consistently held that the exercise of authority by school boards has an essentially political character. In *McLeod v. State,*[12] the basis of attendance in free public schools is said to be a right subject to such reasonable rules for the government of the school as the trustees see fit to adopt.[13]

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particular activity as to which this expert therein is testifying. No reason is suggested as to why this practice should not be followed when the witness is an expert in the field of operating public high schools.

7 *Ibid.*

8 Kissick v. Garland Independent School District, 330 S.W.2d 708, 711 (Tex. Civ. App. 1959).

9 Tex. Rev. Civ. Stat. art. 4605 (1959).

10 Tex. Pen. Code art. 404 (1952).

11 Tex. Rev. Civ. Stat. art. 4605 (1959).

12 154 Miss. 464, 122 So. 737 (1929).

13 See Wilson v. Board of Education, 233 Ill. 464, 465, 84 N.E. 697, 698 (1908):

> It was the judgment of the superintendent of schools of the city of Chicago, as well as of the board of education, that [effect of secret societies] was detrimental to the best interest of the schools. Whether this judgment is sound and well founded is not subject to review by the courts. The only question for determination is whether the rule adopted to prevent or remedy the supposed evil was a reasonable exercise of the power and discretion of the board.

The question for judicial review then becomes a determination of whether the school board has the power to regulate the particular activity, and not a consideration of the aptness of the plan conceived.[14] It was once the view that the limit on the kinds of activity which could be regulated by school authorities was a geographic concept — one which restricted their power to the control of acts performed within the school grounds.[15] This distinction has much of the savor of that made between production and distribution in decisions regarding the exercise of federal power under the Commerce Clause,[16] a distinction since rejected as without support.[17] Although a few states cling to this geographic concept, the majority apparently agree that the scope of school authority is broader.[18] The Tennessee Supreme Court has defined the limit as:

> Any activity of a student which can be said to have a reasonable bearing on his or her influence upon the students or school is within the bounds of reasonable regulation by the board in the exercise of the statutory duty vested in it to suspend pupils when the progress and efficiency of the school makes it necessary.[19]

It is not novel to find that the presence of married teenagers in the public schools tends to create a disciplinary problem.[20] The evidence adduced in *Kissick* included the testimony of many officials of the local P.T.A. which was, in summary, that married students had a direct effect on the discipline of the school and the efficiency of the system, and that a direct and negative effect on the moral tone of the school was generated by married students who participated in over-night athletic and band trips. The court pointed out that the resolution under attack was a directly related solution to this problem, a controlling fact in the conclusion reached by other courts that a resolution found to be within the governmental powers of school authorities was reasonable and not arbitrary.[21]

There seems to be no practical necessity for attempting to formulate new concepts to answer new arguments when the force of familiar principles is adequate. Nor is there wisdom in stigmatizing one of two competing interests when the interest to be protected can be vindicated without recourse to the policy of calling the encroaching interest "undesirable."[22] The proper course of judicial decision

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14 McLeod v. State, 154 Miss. 464, 465, 122 So. 737, 738 (1929):
> The court will not interfere with the exercise of discretion of school trustees in matters confided by law to their discretion, unless there is a clear abuse of discretion or a violation of law. The court will not consider whether such rules and regulations are *wise* or *expedient,* but merely whether they are a reasonable exercise of the authority conferred upon the trustees by law. It is peculiarly within the province of the trustees to determine what things are detrimental to the successful management, good order, and discipline of the schools in their charge, and the rules required to produce those conditions. (Emphasis added.)

15 Dritt v. Snodgrass, 66 Mo. 286, 27 Am. Rep. 343 (1877):
> While [the child is] in the teacher's charge, the parent would have no right to invade the school room and interfere with him in its management. On the other hand, when the pupil is released and sent back home, neither the teachers nor director have the authority to follow him thither, and govern his conduct while under the parental eye.

16 See Hammer v. Dagenhart, 247 U.S. 251 (1918).

17 U.S. v. Darby, 312 U.S. 100 (1941).

18 See, *e.g.,* Hobbs v. Germany, 94 Miss. 469, 49 So. 515 (1877):
> It may be that the school authorities would have a right to make certain regulations and rules for the good government of the school which would extend and control the child even when it has reached its home — but if that power exists, it could only be done in matters which per se have a direct and pernicious effect on the moral tone of the school, or have a tendency to subvert and destroy the proper administration of school affairs.

19 State v. Marion County Board of Education, 202 Tenn. 29, 302 S.W.2d 57 (1957). An even greater range of school authority was recognized in Burdick v. Babcock, 31 Iowa 562 (1871).

20 State v. Marion, 202 Tenn. 29, 302 S.W.2d 57 (1957).

21 See, *e.g.,* State *ex rel.,* Bowe v. Board of Education, 63 Wis. 234, 23 N.W. 102 (1885).

22 See, for example, the apparent conflict created in *Kissick* with Williams v. White,

would seem to be the determination of which interest is more important and the approval of reasonable methods of insuring its promotion, restricting the value comparisons to the conflict under review. By identifying marriage as another purely domestic act which has a demonstrable influence on the interest in efficient and orderly educational systems, the power of regulation can be recognized in the school authorities without placing the questionable general label of "undesirable" on young adult marriages.

Ralph H. Witt

TORTS — CHARITABLE IMMUNITY — CURRENT STATUS OF THE CHARITABLE IMMUNITY DOCTRINE — In its fall term this year, the Michigan Supreme Court repudiated a long-standing rule holding charities immune from tort liability*. This is in accord with the present trend of judicial rejection of the doctrine.

The purpose of this article is not to elaborate on the theories or to disparage the doctrine. The doctrine's inconsistencies and illogic are thoroughly demonstrated in the now famous 1942 opinion by Judge Rutledge in the Court of Appeals for the District of Columbia.[1] This discussion will concern itself with the gradual erosion of the doctrine, especially during the last 10 years.

The doctrine of charitable immunity is based primarily on four theories: 1) beneficiaries "waive" their right to recovery when they accept the charitable services; 2) recovery against the charitable trust will frustrate the intention of the donors; 3) public policy requires the encouragement of charitable endeavors; and 4) the doctrine of respondeat superior is inapplicable to the non-profit operations of a charity.[2]

When Judge Rutledge delivered his 1942 opinion, very few states had held charities liable for their torts.[3] After a thorough discussion, he concluded that the doctrine was about to fade from the law. The decision has had a persuasive effect in undermining charitable immunity.[4]

The territory of Puerto Rico, in 1948, was the next jurisdiction to repudiate charitable immunity.[5] In 1950 Iowa overruled previous decisions holding a charitable institution liable only for the proximate results of negligently selecting personnel, and to strangers.[6] Subsequently, the Iowa court said: "[A]n incorporated charity should

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263 S.W.2d 666 (Tex. Civ. App. 1954), where it was said, at 668:

> In keeping with this policy our courts have held that statutes regulating the mode of entering into the marriage relation, including the consent of the parents and provisions requiring that a license be obtained before performance of the ceremony, are merely directory.

And, later in the opinion:

> Art. 4605, V.A.C.S., upon which appellee so heavily relies, provides that no County Clerk shall issue a license to marry without the consent of the parent or guardian, if any, unless as to the male applicant that he is twenty-one years of age and as to the female applicant that she is eighteen years of age. There is no prohibition in this statute that those under the stated ages shall not marry.

It would appear from a fair reading of these two cases that public policy in Texas with regard to "underage marriages," is, at the very least, ambivalent.

*Parker v. Port Huron Hosp., Civil No. 47619, Sept. 14, 1960.

1 President and Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942).

2 For a full analysis of the historical development and theories supporting the doctrine, see President and Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942); Landgraver v. Emmanuel Lutheran Charity Board, 280 P.2d 301 (Ore. 1955) (dissent), 25 A.L.R.2d 29.

3 New Hampshire [Welsh v. Frisbie Memorial Hospital, 90 N.H. 357, 9 A.2d 761 (1939)], Minnesota [Mulliner v. Evangelischer Diakonniessenverein, 144 Minn. 392, 175 N.W. 699 (1920)], Oklahoma [Gable v. Salvation Army, 186 Okl. 687, 100 P.2d 244 (1940)], Utah [Brigham Young University v. Lillywhite, 118 F.2d 836 (10 Cir. 1941)].

4 The decision has been cited in 117 different cases to date.

5 Tavarez v. San Juan Lodge, 68 P.R.R. 681 (1948).

6 Mikota v. Sisters of Mercy, 183 Iowa 1378, 168 N.W. 219 (1918); Andrews v. Y.M.C.A., 226 Iowa 374, 284 N.W. 186 (1939).

respond as do private individuals, business corporations and others, when it does good in the wrong way."[7] Vermont decided against immunity when first called upon to pass on the question in 1950.[8]

In 1951, Delaware declared charities to be liable for the negligent selection of servants, and subject to the doctrine of respondeat superior, even when the servants were chosen with proper care.[9] The same year Mississippi overruled an earlier decision[10] holding charities liable only for negligent selection or retention of servants. The case involved the death of a paying patient through negligence of a laboratory technician.[11] The court rejected theories for exempting the charity, and observed the availability of liability insurance. The case involved a paying patient; it is still possible that Mississippi will invoke immunity where a gratuitous beneficiary is involved.

California became the third state to revoke the doctrine, in 1951, when it held a Presbyterian church liable to children injured in an accident while begin driven home from Bible school by seminary students.[12] The rule holding charities liable only for negligent selection of servants[13] had been eroded by decisions permitting a paying beneficiary[14] and a stranger[15] to recover. Arizona also repudiated the doctrine in 1951.[16] Holding a hospital liable for the negligent handling of a cart by a nurse's aide, the Arizona court rejected the notion that respondeat superior does not apply when the master supplies charitable services to a third party. In declaring the paying status of the plaintiff to have no effect on liability, the Arizona court abrogated its previous rule[17] holding charities liable only for negligent selection of servants. The new holding was applied again in 1952.[18]

In 1952 Alaska declared charities liable for their torts by rejecting the four reasons most often used in other jurisdictions to justify immunity.[19] The same rule was applied in a 1954 case.[20] In 1953 Washington overruled decisions giving charities qualified immunity.[21] Kansas' immunity rule was extended to strangers,[22] and even to a charity as a negligent lessee,[23] before being entirely repudiated in a 1954 decision.[24]

An Idaho decision granting charities immunity on the "waiver" theory[25] was overruled in 1956.[26] In refusing to grant immunity, the Idaho court noted that its earlier decision had discredited the public policy and trust fund theories, with two judges dissenting, when the "waiver" theory was adopted. The 1956 decision involved a paying patient; it is possible that a future court may grant immunity in an action brought by a gratuitous beneficiary.

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7 Haynes v. Presbyterian Hospital Ass'n., 241 Iowa 1269, 45 N.W.2d 151, 154 (1950).
8 Foster v. Roman Catholic Diocese of Vermont, 116 Vt. 124, 70 A.2d 230 (1950).
9 Durney v. St. Francis Hospital, 7 Terry 350, 83 A.2d 753 (Del. 1951).
10 Mississippi Baptist Hospital v. Moore, 156 Miss. 676, 126 So. 465 (1930).
11 Mississippi Baptist Hospital v. Holmes, 214 Miss. 906, 55 So. 2d 142 (1951).
12 Malloy v. Fong, 37 Cal. 2d 356, 232 P.2d 241 (1950).
13 Islom v. California Junior Republic, 33 Cal. App. 2d 299, 91 P.2d 121 (1939).
14 Silva v. Providence Hospital, 97 P.2d 798 (Cal. 1939).
15 Edwards v. Hollywood Canteen, 167 P.2d 729 (Cal. 1946).
16 Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P.2d 220 (1951).
17 Southern Methodist Hospital and Sanitarium v. Wilson, 51 Ariz. 424, 77 P.2d 458 (1938).
18 Roman Catholic Church v. Keenan, 74 Ariz. 20, 243 P.2d 455 (1952), *aff'd. on rehearing* 74 Ariz. 76, 244 P.2d 351 (1952).
19 Moats v. Sisters of Charity of Providence, 13 Alaska 546 (1952).
20 Tuengel v. City of Sitka, 118 F. Supp. 399 (D.C. Alaska 1954).
21 Pierce v. Yakima Valley Municipal Hospital Ass'n, 43 Wash. 2d 162, 260 P.2d 765 (1953).
22 Davin v. Kansas Medical Missionary and Benevolent Association, 103 Kan. 48, 172 Pac. 1002 (1918).
23 Webb v. Wright, 127 Kan. 799, 275 Pac. 170 (1929); see also Leeper v. Salvation Army, 158 Kan. 396, 147 P.2d 702 (1944).
24 Noel v. Menninger Foundation, 175 Kan. 751, 267 P.2d 934 (1954).
25 Wilcox v. Idaho Falls Latter Day Saints Hospital, 59 Idaho 350, 82 P.2d 849 (1938).
26 Wheat v. Idaho Falls Latter Day Saints Hospital, 78 Idaho 63, 297 P.2d 1042 (1956).

New York was thought to have rejected the immunity doctrine,[27] until its Court of Appeals introduced the artificial distinction between administrative and professional duties in considering the applicability of respondeat superior to charitable institutions.[28] However, in 1957 the doctrine of charitable immunity was completely rejected in New York.[29]

A 1950 decision in Illinois held that a charity is liable to suit, but judgment can not be levied against charitable trust property.[30] There is some dispute as to whether a cause of action is stated where it is not alleged that there are non-charitable assets.[31] However, a 1959 decision abolished tort immunity as regards school districts.[32] The court analogized charitable immunity to governmental immunity, and criticized *Moore v. Moyle*[33] for allowing a charitable institution to determine its own liability. This indicates the doctrine may soon be overruled in Illinois.

Kentucky's long-standing rule of full immunity[34] was seriously impaired in a 1957 decision.[35] The charity neglected to comply with a statute requiring a fire escape on its income-producing property. The plaintiff was injured when she jumped from the burning building. The court criticized the theoretical support for the doctrine, while mentioning the availability of liability insurance to meet a growing sense of social responsibility. Although the decision was limited to the facts involving a statutory violation on income-producing property, in cases involving a stranger, the indication is that Kentucky will abolish the doctrine at the first opportunity.

In Nevada immunity, limited to beneficiaries, was based on the waiver theory,[36] and on New York and Michigan cases. In a 1955 case[37] the court gave indications that it might overrule immunity; the opinion spoke of modern concepts and the availability of insurance. However, it declared any repudiation should be prospective rather than retroactive, and should come from the legislature. New York repudiated charitable immunity in 1957,[38] and Michigan adopted prospective repudiation this year. If Nevada continues to follow its eastern and midwestern sister states, the possibilities of repudiation are apparent.

The doctrine of full immunity has not been passively received in Pennsylvania of late.[39] In 1951 three dissenting justices, although agreeing with the majority that any change should come from the legislature, sought to make an exception where the injury resulted from a statutory violation. A federal court,[40] six years later, speculated that Pennsylvania, often influenced by New York decisions, might adopt the *Bing* case[41]; this conjecture was shared by a persuasive minority in a 1958 Pennsylvania case.[42] The majority opinion mentioned the availability of liability insurance but said immunity should be abrogated only by a prospective statute, if at all. In an extensive dissenting opinion, Mr. Justice Musmanno pointed out the inconsistencies of the rule. He charged that the majority was avoiding action by a request to the legislature to remove a court-made rule; the opinion indicates that the majority shared his dislike of the doctrine. In view of opinions of the two dissenting justices, and the recent

27 Sheehan v. North Country Community Hospital, 273 N.Y. 163, 7 N.E.2d 28 (1937).
28 Cadicamo v. Long Island College Hospital, 308 N.Y. 196, 124 N.E.2d 279 (1954).
29 Bing v. Thunig, 2 N.Y.2d 656, 163 N.Y.S.2d 312, 143 N.E.2d 3 (1957).
30 Moore v. Moyle, 405 Ill. 555, 92 N.E.2d 81 (1950).
31 Molitor v. Kaneland Community Unit District No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *aff'd* 362 U.S. 968 (1959).
32 Slinker v. Gordon, 344 Ill. App. 1, 100 N.E.2d 354 (1951).
33 405 Ill. 555, 92 N.E.2d 81 (1950).
34 Emery v. Jewish Hospital Ass'n, 193 Ky. 400, 236 S.W. 577 (1921).
35 Roland v. Catholic Archdiocese of Louisville, 301 S.W.2d 574 (Ky. 1957).
36 Bruce v. Y.M.C.A., 51 Nev. 372, 277 Pac. 798 (1929).
37 Springer v. Federated Church of Reno, 71 Nev. 177, 283 P.2d 1071 (1955).
38 Bing v. Thunig, 2 N.Y.2d 656, 163 N.Y.S.2d 312, 143 N.E.2d 3 (1957).
39 See, e.g., Bond v. City of Pittsburgh, 368 Pa. 404, 84 A.2d 328 (1951).
40 Brown v. Moore, 247 F.2d 718 (2d Cir. 1957).
41 Bing v. Thunig, 2 N.Y.2d 656, 163 N.Y.S.2d 312, 143 N.E.2d 3 (1957).
42 Knecht v. St. Mary's Hospital, 392 Pa. 75, 140 A.2d 30 (1958).

prospective repudiation by the Michigan court, it is possible Pennsylvania will overrule previous decisions.

The Oregon doctrine of full immunity came under close scrutiny in 1955.[43] The majority indicated its doubts by saying "what a divided court decides today may be changed tomorrow. . . ." The majority reason for not agreeing with the comprehensive, convincing dissent was stated to be that the legislature should declare public policy, an insubstantial consideration in view of the fact that the court apparently declared the immunity in the first place. The reason for the decision was probably the court's expressed concern for charities which have relied on the law. Considering the effective dissent and the prospective ruling by the Michigan Supreme Court, it is possible one judge may change his mind in the next test.

Arkansas has echoed the courts of Oregon, Nevada, and Pennsylvania in declaring that any change in the doctrine of full immunity should come from the legislature.[44] This ruling followed criticism and disapproval of an earlier case invoking the doctrine.[45]

In at least two instances in which charitable immunity was nullified, subsequent action has revived it. An Ohio decision relied upon the availability of liability insurance in holding a charitable hospital liable in 1956.[46] Subsequent lower court decisions have held this rule applied only to hospitals, and not to religious institutions.[47] The earlier doctrine of qualified immunity was applied;[48] one decision[49] indicated the availabilty of liability insurance to charities was a poor reason for making them liable. In a practical vein, it suggested that each individual recipient insure himself against the negligence of the charity. Since the Ohio Supreme Court has not ruled on the immunity of a religious charitable institution since the 1956 decision, there is a fair inference that the court will decide the issue in favor of charitable liability when next faced with the question.

In three 1958 cases New Jersey overruled its earlier doctrine of qualified immunity.[50] The legislature subsequently passed a statute absolving charities in general from liability, but making hospitals liable up to $10,000.[51] This law expired by its own terms on June 30, 1959. On June 11, 1959 the legislature passed substantially the same statute without a terminating provision.[52]

Other states with legislation affecting immunity are Rhode Island and Maryland. A 1938 statute[53] gives charitable hospitals in Rhode Island full immunity. Maryland passed a statute in 1951[54] limiting the full immunity enjoyed by charities.[55] Maryland courts interpret it as estopping eleemosynary institutions from pleading immunity, at least up to the amount they are covered by insurance.[56]

The immunity doctrine continues to find support. A 1960 Florida decision[57] limited an earlier opinion that might have served to repudiate the doctrine.[58] It is

43 Landgraver v. Emmanuel Lutheran Charity Board, 203 Ore. 489, 280 P.2d 301 (1955).
44 Cabbiness v. City of North Little Rock, 228 Ark. 356, 307 S.W.2d 529 (1957).
45 Arkansas Valley Cooperative Rural Electric v. Elkins, 200 Ark. 883, 14 S.W.2d 538 (1940).
46 Avellone v. St. Johns Hospital, 165 Ohio St. 467, 135 N.E.2d 410 (1956).
47 Tomasello v. Hovan, 6 Ohio App. 2d 508, 155 N.E.2d 82 (1958).
48 Taylor v. Protestant Hospital Association, 85 Ohio St. 90, 96 N.E. 1089 (1911).
49 Rosen v. Concordia Evangelical Lutheran Church, 167 N.E.2d 671 (C.A. Ohio 1960).
50 Dalton v. St. Luke's Catholic Church, 27 N.J. 22, 141 A.2d 273 (1958); Callopsy v. Newark Eye and Ear Infirmary, 27 N.J. 29, 141 A.2d 276 (1958); Benton v. Y.M.C.A., 27 N.J. 67, 141 A.2d 298 (1958).
51 N.J. STAT. ANN. § 16:1-53 (1958).
52 N.J. STAT. ANN. § 2A:53A-78 (1959).
53 R.I. GEN. LAWS ANN. § 95 (1938).
54 MD. ANN. CODE art. 48A § 85 (1951).
55 See Howard v. South Baltimore General Hospital, 191 Md. 617, 62 A.2d 574 (1948).
56 Gorman v. St. Paul Fire and Marine Insurance Co., 20 Md. 1, 121 A.2d 812 (1956).
57 Smith v. Duval City Welfare Board, 118 So. 2d 98 (Fla. 1960).
58 Suwanee County Hospital Corp. v. Golden, 56 So.2d 911 (Fla. 1952).

found or suggested in varying form in 17 other states.[59] In some instances there have been no recent test cases.[60]

The changing nature of social thought will probably curtail the immunity doctrine further. Many people are covered by hospitalization insurance today; charities are often extremely large and wealthy; the need to encourage charities diminishes as government moves into formerly charitable enterprises; most charitable budgets could with ease allocate funds for insurance, as compared to the often large individual loss from tort. These reasons, and others, will persuade more courts, as they have persuaded the Michigan court, to decide for injured individual plaintiffs—regardless of the ideological motives behind the enterprise which is tortfeasor.

Richard C. Wilbur

TORTS — PRENATAL INJURY — CHILD BORN ALIVE MAY RECOVER FOR INJURIES SUSTAINED WHILE EN VENTRE SA MERE IF VIABLE AT TIME OF INJURY. — Plaintiff, as administratrix of deceased child's estate, appealed from an order of the Superior Court sustaining the defendant's demurrer to her amended declaration in which it is alleged that, while her intestate was an existing, viable[1] child in his mother's womb, he received bodily injury in a collision of automobiles, "causing him to be born prematurely, and which said bodily injuries resulted in his death." The Supreme Judicial Court *held*: remanded. Plaintiff should have had an opportunity to amend her declaration to allege with sufficient certainty the fact that the child was born alive. A child or his legal representative may recover for injuries sustained during gestation if viable at the time of injury and if born alive. *Keyes v. Construction Service*, 165 N.E.2d 912 (Mass. 1960).

The immediate significance of this case lies in the strict limitation which it places upon *Dietrich v. Inhabitants of Northampton*,[2] a bedrock Massachusetts case which made a profound impact upon the early American development of the law of prenatal injury. Handed down by the Massachusetts Supreme Judicial Court through Justice Holmes in 1884, *Dietrich* evidently was the first American or English case on the question and it was quickly adopted by the majority of American courts deciding liability for prenatal injury.

Two basic reasons for denying recovery were advanced in *Dietrich*: (1) that

59 *E.g., Indiana:* St. Vincent's Hospital v. Stine, 195 Ind. 350, 144 N.E. 537 (1924); *Missouri:* Kruger v. Schmiechen, 364 Mo. 568, 264 S.W.2d 311 (1954), although some progress is indicated in Blatt v. George H. Nettleton Home for Aged Women, 365 Mo. 30, 275 S.W.2d 344 (1955); *Nebraska:* Wright v. Salvation Army, 125 Neb. 216, 249 N.W. 549 (1933), and Parks v. Holy Angels Church, 160 Neb. 299, 70 N.W.2d 97 (1955); *Georgia:* Morton v. Savannah Hospital, 143 Ga. 438, 96 S.E. 887 (1918), and Hospital Authority of Marietta v. Misfeldt, 99 Ga. App. 702, 109 S.E.2d 816 (1959); *Louisiana:* Lusk v. U.S. F.&G. Co., 199 So. 666 (La. App. 1941); *Massachusetts:* Carpenter v. Y.M.C.A., 324 Mass. 365, 86 N.E.2d 634 (1949); *North Carolina:* Williams v. Union County Hospital, 234 N.C. 536, 67 N.E.2d 662 (1951); *South Carolina:* Caughman v. Columbia Y.M.C.A., 212 S.C. 327, 47 S.E.2d 788 (1949); *Tennessee:* Anderson v. Armstrong, 180 Tenn. 56, 171 S.W.2d 401 (1943); *Texas:* Baptist Memorial Hospital v. Marrable, 244 S.W.2d 567 (Tex. 1951); *Virginia:* Norfolk Protestant Hospital v. Plunkett, 162 S.E. 363 (1934); *West Virginia:* Meade v. St. Francis Hospital of Charleston, 137 W.Va. 834, 74 S.E.2d 405 (1953); *Wisconsin:* Shan v. Morgan, 241 Wis. 334, 6 N.W.2d 212 (1942); *Connecticut:* Durant v. Grace New Haven Community Hospital, 20 Conn. Supp. 19, 119 A.2d 743 (1955); *Colorado:* St. Luke's Hospital Ass'n v. Long, 125 Colo. 25, 240 P.2d 917 (1952).

60 *E.g.*, Jensen v. Maine Eye and Ear Infirmary, 107 Me. 408, 78 Atl. 898 (1910); Bishop Randall Hospital v. Hartley, 24 Wyo. 408, 160 Pac. 385 (1916).

1 "Capable of living, said of a foetus that can live outside of the uterus." MALOY, MEDICAL DICTIONARY FOR LAWYERS 567 (2d ed. 1951).

2 138 Mass. 14, 52 Am. Rep. 242 (1884). In this case, a woman slipped on a defect in a highway when she was between four and five months advanced in pregnancy. The fall brought on a miscarriage. There was testimony that there had been motion in the child's limbs for ten or fifteen minutes.

there was a lack of authority for allowing such an action and (2) that an unborn child is merely a part of its mother and, therefore, has no distinct juridical existence. Early cases following the *Dietrich* rule added reasons. These actions arose either as personal injury actions, whether the infant had been injured *in utero,* had been born alive, and survived bearing permanent injuries as a result of the tortious act, or as wrongful death actions. It was asserted that proof of a causal relation between prenatal injury and the death or resulting condition of the child depends upon speculation and conjecture and that a flood of fictitious claims would be the consequence of recovery.[3] Other cases relied on stare decisis[4] and maintained that, since there was no common law right of action, the establishment of such a cause of action was a function of the legislature.[5] A famous Irish case approached the question under a theory of contract, holding that a common carrier owes no duty to an unborn child since it has not contracted to carry him as a passenger.[6] It was also asserted that, if such an action were allowed, it would follow that the child might bring suit against its mother for negligence while carrying him during pregnancy.[7]

Although this attitude prevailed until 1949, it was a development which had not taken place without objection. In *Allaire v. St. Luke's Hospital,*[8] a foetus in its ninth month of uterine development was injured and had survived; the "viability theory" was set forth in a dissenting opinion now regarded as the classic exposition on this approach. Justice Boggs there rejected the fundamental theoretical argument for denying recovery, that the unborn child was a part of the mother, had no distinct existence or being, and, therefore, was not a person recognized by the law as capable of having standing in court. He maintained that, if the foetus has reached the viable stage, the law should take cognizance of the fact that the injury was incurred by a *distinct* human entity.[9] His opinion prompted legal writers to criticize the injustice of the prevailing rule.[10]

3 Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935); Stanford v. St. Louis-San Francisco R. Co., 214 Ala. 611, 108 So. 566 (1926).

4 Berlin v. J. C. Penney Co., 339 Pa. 547, 16 A.2d 28 (1940); Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921) (in which Cardozo, J., dissented, but without opinion); Lipps v. Milwaukee Electric Ry. & Light Co., 164 Wis. 272, 159 N.W. 916 (1916); Gorman v. Budlong, 23 R.I. 169, 49 A. 704 (1901).

5 Berlin v. J. C. Penney Co., 339 Pa. 547, 16 A.2d 28 (1940); Newman v. City of Detroit, 281 Mich. 60, 274 N.W. 710 (1937); Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900).

6 Walker v. Great Northern Ry. Co., 28 L.R. Ir. 69 (Q.B. 1891). See also, Nugent v. Brooklyn Heights R.R. Co., 154 App. Div. 667, 139 N.Y.S. 367 (1913), *appeal dismissed,* 209 N.Y. 515, 102 N.E. 1107 (1913).

7 Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900).

8 184 Ill. 359, 56 N.E. 638 (1900).

9 *Id.* at 56 N.E. 641:

> [B]ut if, while in the womb, it (the unborn child) reaches the prenatal age of viability when the destruction of the mother does not necessarily end its existence also, and when, if separated prematurely, and by artificial means, from the mother, it would be so far a matured human being as that it would live and grow, mentally and physically, as other children generally, it is but to deny a palpable fact to argue there is but one life, and that the life of the mother. Medical science and skill and experience have demonstrated that at a period of gestation in advance of the period of parturition the foetus is *capable of independent and separate life,* and that, though within the body of the mother, it is not merely a part of her body, for her body may die in all of its parts and the child remain alive, and capable of maintaining life, when separated from the dead body of the mother. If at that period a child so advanced is injured in its limbs or members, and is born into the living world suffering from the effects of the injury, is it not sacrificing truth to a mere theoretical abstraction to say the injury was not to the child, but wholly to the mother? (Emphasis added).

See also, Brogan, C.J. dissenting in Stemmer v. Kline, 128 N.J.L. 455, 26 A.2d 489 (1942).

10 See 4 TORONTO L.J. 278 (1942); 12 ST. LOUIS L. REV. 85 (1927); 61 CENT. L.J. 364 (1905); 58 CENT. L.J. 143 (1904).

The right to bring an action for prenatal injuries was granted for the first time by an American court of ultimate appeal, without the aid of a statute expressly recognizing the unborn child as a "person," [11] in a 1949 Ohio decision,[12] though recovery had been allowed earlier under the Louisiana civil law and by statute.[13] This marked the beginning of a trend.[14] The viability theory so forcefully submitted by the minority opinion of Justice Boggs became the majority rule. Many courts, in adopting the new approach, sought to justify it by showing it to be in accord with the accepted medical view,[15] by analogizing to other areas of the law where the child is recognized as being in existence,[16] and by distinguishing *Dietrich,* the long-time thorn in their side, on its facts.[17] This overcame the argument that there was but one person or being in existence — that of the mother. If a child is born bearing physical defects which can be proved to have been caused by another's negligence while the child is in its mother's womb, it is not realistic to assert that the injury was incurred by the mother alone and not by the child.

With regard to one of the original arguments that there was a lack of precedent for allowing recovery for an injury to a child *in utero,* it has been pointed out that such a right should be recognized as part of the broad, fundamental common law principle that there should be a remedy for every wrong.[18] A broader basis for compensating a child for injuries sustained while *in utero* has been that natural justice requires it since, if the right of action were denied, "it (the child) will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor." [19]

The most troublesome practical consideration is the inherent difficulty of proof of a causal connection between the negligent act and the injury. Justice Desmond in *Woods v. Lancet* answered this by saying:

> But such difficulty of proof of finding is not special to this particular

11 Recovery had been previously allowed, however, in Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946). See also an earlier opinion by the Canadian Supreme Court: Montreal Tramways v. Leveille, 4 Dom. L.R. 337 (1933).

12 Williams v. Marion Rapid Transit, 152 Ohio St. 114, 87 N.E.2d 334 (1949).

13 Cooper v. Blanck, 39 So. 2d 352 (La. 1923) (civil law); Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P.2d 678 (1939); *rehearing denied,* 33 Cal. App. 2d 629, 94 P.2d 562 (1939) (statutory provision).

14 Professor Prosser comments: "The reversal is so definite and marked as to leave no doubt that this will be the law of the future in the United States." PROSSER, TORTS 176 (2d ed. 1955). It is significant that some of the cases most heavily relied upon by the courts, which in the past denied recovery, have been overruled. Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960) (overruling Stemmer v. Kline, 128 N.J.L. 455, 26 A.2d 489 [1942]); Tursi v. New England Windsor Co., 19 Conn. Sup. 242, 111 A.2d 14 (1955) (refusing to follow Squillo v. City of New Haven, 14 Conn. Sup. 500 [1947]); Steggall v. Morris, 363 Mo. 1224, 358 S.W.2d 577 (1953) (overruling Buel v. United Rys. Co. of St. Louis, 248 Mo. 126, 154 S.W. 71 [1913]); Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953) (overruling Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 [1900]); Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951) [overruling Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921)]. In La Blue v. Specker, 358 Mich. 558, 100 N.W.2d 445 (1960) and Puhl v. Milwaukee Automobile Ins. Co., 8 Wis.2d 243, 99 N.W.2d 163 (1959), the Supreme Courts of Michigan and Wisconsin have both apparently abandoned their previous holdings denying recovery in Newman v. City of Detroit, 281 Mich. 60, 274 N.W. 710 (1937), and Lipps v. Milwaukee Electric Ry. & Light Co., 164 Wis. 272, 159 N.W. 916 (1916).

15 Mallison v. Pomeroy, 205 Ore. 690, 291 P.2d 225 (1955); Demasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550 (1951); Williams v. Marion Rapid Transit, 152 Ohio St. 114, 87 N.E. 2d 334 (1949); Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946).

16 See Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550 (1951), for an extensive review of authority taken from the fields of criminal, property, civil, and admiralty law which consider an unborn child as being a "person."

17 "A distinction frequently drawn is that the unborn child in the *Dietrich* case had not attained a state of viability, whereas the unborn children in recent cases sustaining a right of action were viable when injured." Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412, 417 (1953).

18 Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960).

19 Montreal Tramways v. Leveille, 4 Dom. L.R. 337 (1933).

> kind of lawsuit. . . . Every day in all our trial courts (and before administrative tribunals, particularly the Workmen's Compensation Board), such issues are disposed of, and it is an inadmissible concept that uncertainty of proof can destroy a legal right. The questions of causation, reasonable certainty, etc., which will arise in these cases are no different, in kind, from the ones which have arisen in thousands of other negligence cases decided in this State in the past.[20]

It is to be recognized that the cases present an imposing safeguard against fraudulent claims. The burden of proving the *fact* of causation rests with the plaintiff and he must establish it to the satisfaction of the jury in order to be recompensed. Furthermore, courts constantly have to deal with the problem of exposing and dismissing fraudulent claims, and, assisted by the advancements in medical science, are able to overcome much of the difficulty. But the right to bring an action is something quite apart from the ability to sustain it.[21]

In subsequent cases in Massachusetts involving injuries to viable foetuses born alive, despite the cases in other jurisdictions finding a determinant factual distinction in *Dietrich*, the Massachusetts court felt obliged to follow its own holding, particularly while the *Dietrich* rule was still supported by the majority of other jurisdictions.[22] In *Keyes v. Construction Service*, the court has re-examined the question, acceding to the preponderance of decisions allowing recovery in the past decade and the progress in medical knowledge. The court stated all of the reasons both for denying as well as for allowing recovery, which have been explored above. It concluded that it is more important that its ruling "be right, in light of later examination of authorities, wider and more thorough discussion and reflection upon the policy of the law," than that it merely bow to precedent. It has, by its decision, brought Massachusetts in line with what is now the majority view in the United States.

The court in *Keyes* found no need to overrule the *Dietrich* decision, but merely limited its application to cases factually similar, *i.e.*, where the foetus was injured while non-viable or where it was stillborn. The effect, therefore, seems to be that the death-blow has been rendered to the general rule that there is no cause of action by or for an infant for prenatal injuries.

While it may now be stated safely that, in cases involving viable infants born alive, the right of recovery for prenatal injuries is firmly established, there are other important aspects of this problem which warrant consideration. One of these aspects is the limitation of the viability theory and the adoption of a rule by which a cause of action is vested in a child injured while non-viable and subsequently born alive. It is urged that the viability distinction, though neither logically nor medically justified, is historically explainable by the well-known and "understandable conservatism" of the courts which initially repudiated the *Dietrich* rule by adopting the approach of Justice Boggs.[23] It is highly significant to note that all of the cases mentioned above which allowed recovery involved injury to the child when it had reached viability and the courts had no reason for extending their holdings beyond the case before them. However, it must be conceded that some expressly limited their holding to the viability situation.

The viability rule is not capable of practical application in many instances since there is no arbitrary moment of time at which it may be said that all foetuses

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20 303 N.Y. 349, 102 N.E.2d 691, 695 (1953).

21 *E.g.*, Puhl v. Milwaukee Automobile Ins. Co., 8 Wis.2d 243, 99 N.W.2d 163 (1959) (insufficient evidence).

22 Cavanaugh v. First Natl. Stores, 329 Mass. 179, 107 N.E.2d 307 (1952); Bliss v. Passanesi, 326 Mass. 461, 95 N.E.2d 206 (1950). In *Bliss*, that the Massachusetts court was weakening in its feeling on this question can be seen by the following statement (at 207):

> We readily concede the strength of these grounds (urging recovery), but there is also strength in the arguments to the contrary. . . . *We do not intimate what our decision would be if the question were presented for the first time.* (Emphasis added).

23 Smith v. Brennan, *supra* note 18.

become viable.[24] Unless the child is born prematurely and, in fact, does survive, it cannot be determined at what point it attained viability. According to the "biological theory," legal separability begins when there is biological separability; and it is now recognized by medical authority that there is a separate living human organism *from the moment of conception.*[25] This view that the distinction between non-viability and viability is not warranted has been advanced by a growing number of legal writers.[26]

Reference to other areas of the law where the child is recognized legally to be in existence while *in utero* has been extensively used by courts going no further than the viability theory. However, this argument is equally applicable to cases of non-viability, since civil law, admiralty law, criminal law, and the law of property consider the unborn child a distinct entity from the moment of conception.[27] If these courts have seen fit to rely on this reasoning, it seems to follow necessarily that they will be required to accept the biological theory as the logical extension of this argument. If the child is born with serious impairment, which can be shown to have been directly caused by the defendant's negligence, it is not valid to make the distinction between viability and non-viability the test of a right to recover — the *end result* is the same in either instance and that is what must be recognized as the controlling factor. Though the problem of proof increases as injury occurs earlier in gestation, this is relevant only insofar as it affects the plaintiff's ability to establish his case.

The remaining aspect of the problem concerns the child injured during gestation, as a result of which he is born dead. The action is brought under a wrongful death statute; the issue is whether the unborn child is a "person" within the meaning of the statute.[28] Logically, since most courts now recognize that the unborn child is a living human being, it would follow that there is a cause of action if its death is caused by the tortious act of another. If it is living, the cessation of that state is death, and such statutes were designed to allow recovery by the deceased's personal representative for wrongful death.

Of those courts allowing recovery for the loss of a stillborn, all involved injuries to foetuses which had reached the viable stage and so were deemed to be "persons" because of their capacity to exist, at that time, independently of the mother.[29] An equal number of cases, however, have refused to recognize a right

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24 Viability is a relative matter and is not solely determined in each instance by age alone. *Greenhill,* PRINCIPLES AND PRACTICE OF OBSTETRICS 391, 794 (10th ed. 1951).

25 Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (1953). The court pointed out at 697:

> The mother's biological contribution from conception on is nourishment and protection; but the foetus has become a separate organism and remains so throughout its life. That it may not live if its protection and nourishment are cut off earlier than the viable stage of its development is not to destroy its separability; it is rather to describe the *conditions under which life will not continue.* Succeeding conditions exist, of course, that have the result at every stage of its life, post-natal as well as pre-natal. (Emphasis added.)

Other cases allowing recovery for injury while foetus was non-viable are: Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960); Bennet v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958); Von Elbe v. Studebaker-Packard Corp., 15 Pa. D. & C. 2d 635 (1958); Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956); Sinkler v. Knele, 29 U.S.L. WEEK 2159 (Pa. Sup. Ct. 1960).

26 PROSSER, TORTS 175 (2d ed. 1955); 26 FORD. L. REV. 684 (1958); 17 MD. L. REV. 90 (1957); 29 N.Y.U. L. REV. 1154 (1954); 50 MICH. L. REV. 166 (1952).

27 See, Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550 (1951).

28 Steggall v. Morris, 363 Mo. 1224, 358 S.W.2d 577 (1953); Rainey v. Horn, 221 Miss. 269, 72 So.2d 434 (1950).

29 Wendt v. Lillo, 182 F. Supp. 56 (N.D. Iowa 1960); Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957); Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1951); Rainey v. Horn, 221 Miss. 269, 72 So.2d 434 (1950); Verkennes v. Corniea, 299 Minn. 365, 38 N.W.2d 838 (1949). But see, Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955) (recovery allowed when child is "quick").

of action where a stillbirth is involved.[30] A New York court held that, though there are at least some facts available to aid in estimating damages as to the value of the life of a child who died in infancy, there are "no elements whatever upon which a jury could base any conclusion that a pecuniary injury had been suffered by the plaintiff from the loss of an unborn child." [31] A section of the California statute[32] expressly defining an unborn child as an existing person was qualified to be applicable only "in the event of its (the child conceived) subsequent birth" and led to a denial of recovery to a stillborn's representative.[33]

One is hard pressed to accept recovery on behalf of a child under a wrongful death action where the injury and death of the foetus come early in the pregnancy. Yet, it must be admitted that, in pursuing the logical extension of the biological theory, recovery would be appropriate. In any event, it appears that courts will continue to go beyond the viability theory in the near future, possibly limiting the right of action by adopting the rule that a "conditional prospective liability is created" when a foetus is wrongfully harmed by the act or omission of another and that "liability attaches on fulfillment of an *implied condition* that the child be *born alive.*" [34] In this way, the status of an unborn child as a "legal person" may be properly qualified.*

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30 Hogan v. McDaniel 319 S.W.2d 221 (Tenn. 1958); West v. McCoy, 233 S.C. 369, 105 S.E.2d 88 (1958); Howell v. Rushing, 261 P.2d 217 (Okla. 1953); Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951). It should be noted that the courts in the latter three cases left the question open where the child was born alive and subsequently died.

31 In re Logan's Estate, 156 N.Y.S.2d 49, 51 (Surr. Ct. 1956); *aff'd.*, 166 N.Y.S.2d 3, 144 N.E.2d 644 (1957).

32 CAL. CIV. CODE § 29:

> A child conceived but not yet born, is to be deemed an existing person, so far as may be necessary for its interest in the event of its subsequent birth.

33 Norman v. Murphy, 124 Cal. App.2d 95, 268 P.2d 178 (1954).

34 Keyes v. Construction Service, 165 N.E.2d 912, 915 (1960).

* A Federal court in South Carolina awarded a three-year-old child $260,000 damages Oct. 8, 1960, for brain injuries arising from an automobile accident which occurred three months before the child was born. The United States was defendant in the action. The South Bend Tribune, Oct. 9, 1960, p. 2, col. 1. (Ed.)