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## Recent Decisions

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This conflict is perhaps irreconcilable; but both judiciaries are merely seeking a just disposition of the appointive property which is at least consistent with, if not in strict obedience to, the testator's intent.

### *Conclusion*

A liberal trend in construing the execution of powers of appointment by means of a residuary clause is noticeable, both in the jurisdictions still adhering to the strict common law rule and in those which have legislated this rule away.

Blending of the appointive property with that belonging to the testator is still largely governed by the apparent intent. Blending merits judicial approval for various reasons; for instance, because of the similarity between a general power and fee simple ownership and because of the desirability of allowing the creditors of the testator to reach this property to satisfy the testator's debts.

It is the prediction of the writer that, although blending will remain important, the methods of manifesting an intent to exercise a power discussed above will gradually fall into disuse. Few people, who have been apprised of the importance of precise phrasing in order to take advantage of the various deductions under the federal estate tax,<sup>51</sup> will rely upon a mere residuary clause to exercise a power of appointment. But, since there will always be the exception, the testator who ignored the warnings, the rules enunciated above will continue to have limited application.

*James F. O'Rieley*

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## RECENT DECISIONS

CONSTITUTIONAL LAW — ELECTIONS — REQUIREMENT OF PARTY LOYALTY OATH FOR NOMINATION IN PRIMARY ELECTION. — *Mairs v. Peters*, ....Fla....., 52 So. (2d) 793 (1951). The plaintiff was a resident of Florida and a registered Republican there. She voted for candidates of both political parties in the 1948 general election and stated that she intended to vote for candidates of both parties in the 1950 election. In 1950 the plaintiff sought nomination in the Republican primary but was refused eligibility by the Board of Elections, defendant, because of her inability to execute the statutory requirement, FLA. STAT.

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<sup>51</sup> *E.g.*, INT. REV. CODE § 812. For a discussion of the technical drafting problems arising out of the Powers of Appointment Act of 1951, Pub. L. No. 58, 82d Cong., 1st Sess. (June 28, 1951), see Craven, *Powers of Appointment Act of 1951*, 65 HARV. L. REV. 55 (1951).

c. 102 § 29 (1949), that all persons seeking nominations in the primaries take an oath to the effect that: (1) he did not vote at the last general election for any nominee, national, state or county, of any party other than that party in which he aspires to be nominated; and (2) that he pledges himself to vote for all nominees of such party, national, state and county, at the next general election. She contested the constitutionality of the statute and contended that it is repugnant to the Constitution and deprives her of rights under the Fourteenth Amendment, as implemented by the Civil Rights Act, REV. STAT. § 1979 (1875); 8 U.S.C. § 43 (1946).

The court, quoting from the decision of the court below, stated that the right of suffrage is not one of the necessary privileges of a citizen and that it is within the police power of the state to regulate nominations by the adoption of a primary election law. The statute was held to be a valid exercise of the police power enacted to restrain the destruction of political parties by those who utilized them "to advance their political fortunes." 52 So. (2d) at 795.

The decision is of political significance in that it extends the legislative requirements which a person seeking office must satisfy in order to exercise his elective franchise, possibly unduly restricting his right to vote as he pleases and possibly excluding certain persons or groups of persons from nomination. The essential question for consideration is whether such a statutory requirement unreasonably or arbitrarily deprives a person of his privilege of franchise or of his constitutional rights as secured by the Fourteenth Amendment.

Although primaries are not elections in the strict sense, as are the general elections, the courts have always realized their importance in maintaining the valuable party system in our method of government. *Kelso v. Cook*, 184 Ind. 173, 110 N.E. 987, 994-5 (1916). These statutory requirements stand in recognition of the theory that party unity is necessary and that to secure party unity, oaths are necessary. "Otherwise the party holding the primary would be at the mercy of its enemies, who could participate for the sole purpose of its destruction . . ." *State v. Michel*, 121 La. 374, 46 So. 430, 435 (1908). Whether they exist in statutes or arise from the permission given in statutes to a state election board to impose them, oath requirements are generally upheld as valid. *Ex parte Pollard*, 251 Ala. 309, 37 So. (2d) 178 (1948); *Smith v. McQueen*, 232 Ala. 90, 166 So. 788 (1936); *Roberts v. Cleveland*, 48 N.M. 226, 149 P. (2d) 120 (1944); *Riter v. Douglass*, 32 Nev. 400, 109 Pac. 444 (1910); *State v. Flaherty*, 23 N.D. 313, 136 N.W. 76 (1912); *State v. Felton*, 77 Ohio St. 554, 84 N.E. 85 (1908).

In upholding the oaths the courts distinguish between privileges given by a state and those given by the Federal Government. The right to become a candidate, like the right to vote, flows from state

citizenship and the state may deprive a person of that right without contravening the Equal Protection Clause of the Federal Constitution unless there is shown an intentional or purposeful discrimination — with respect to a particular person or class. *Snowden v. Hughes*, 321 U.S. 1, 64 S. Ct. 397, 88 L. Ed. 497 (1944); *McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 36 S. Ct. 498, 60 L. Ed. 899 (1916). *Healey v. Wipf*, 22 S.D. 343, 117 N.W. 521, 522 (1908), clearly sets out the principle on which the courts rely:

The elective franchise is not a natural right. It is a privilege which may be taken away by the power which conferred it; and the only limitations upon the power of the Legislature to regulate its exercise and enjoyment are the express and implied limitations found in the federal and state Constitutions.

It is then on the basis of the public concern for the integrity of the elective system that these primary elections are regulated by direct legislative enactments or by powers of control granted to an election board. *Lane v. Wilson*, 307 U.S. 268, 59 S. Ct. 872, 83 L. Ed. 1281 (1939); *Kenneweg v. Allegany County Com'rs*, 102 Md. 119, 62 Atl. 249 (1905); *Hopper v. Stack*, 69 N.J.L. 562, 56 Atl. 1 (1903); In re *Callagan*, 200 N.Y. 59, 93 N.E. 262 (1910); *Ladd v. Holmes*, 40 Ore. 167, 66 Pac. 714 (1901).

Although early decisions held that membership in political organizations was voluntary and that the parties were completely regulated by their party by-laws and constitutions, *People v. Democratic Committee*, 164 N.Y. 335, 58 N.E. 124, 126 (1900), throughout the years there has been a marked change in the attitude of the courts toward political parties and their primaries. Today special interest must be taken in the primaries because they may very well be as final as the general elections. *United States v. Classic*, 313 U.S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941); *Smith v. Allwright*, 321 U.S. 649, 64 S. Ct. 757, 88 L. Ed. 701 (1944); *Newberry v. United States*, 256 U.S. 232, 41 S. Ct. 469, 65 L. Ed. 913 (1921). In *Rice v. Elmore*, 165 F. (2d) 387 (4th Cir. 1947), invalidating a party regulation which excluded Negroes from primaries, the court said, 165 F. (2d) at 389:

The party may, indeed, have been a mere private aggregation of individuals in the early days of the Republic, but with the passage of the years, political parties have become in effect state institutions, governmental agencies through which the sovereign power is exercised by the people.

An Indiana case, *Kelso v. Cook*, *supra*, 110 N.E. at 994, exemplifies the reluctance of the courts to impose such a restrictive requirement as is necessary in the interpretation of the Florida statute in regard to party affiliation of nominees. There the court upheld a requirement for an affidavit because it required only that the candidate show he voted for a majority of the party candidates at the general election, and not for all of them.

In other states where party loyalty oaths exist, there also has been a persistent refusal to go so far in interpretation as was necessary under the instant statute. In *State v. Schmahl*, 140 Minn. 220, 167 N.W. 797 (1918), that the candidate had been elected on a different party ticket in the last election was no basis for showing that he had been "affiliated" with that party so as to disqualify him in a subsequent election on another ticket. Texas has underscored this trend by passing a statute forbidding the exclusion of persons from candidacy because of former political affiliations. VERNON'S ANN. TEX. STAT. ART. 3107 (1948).

In some states where there are no statutory qualifications as to eligibility of persons for nomination in the primary, the courts have held that there can be no additional requirements, other than those necessary to fit one for office, and that the test of party loyalty is the vote of the people. *Spier v. Baker*, 120 Cal. 370, 52 Pac. 659 (1898); *State v. State Board of Canvassers*, 78 S.C. 451, 59 S.E. 145 (1907). Others find restrictions imposed in the form of an oath violative of provisions of the local state constitution. *Harrington v. Vaughan, supra*; *Swindall v. State Election Board*, 168 Okla. 97, 32 P. (2d) 691 (1934). As stated in the latter case, 32 P. (2d) at 693:

The effect of these provisions is to confer upon the individual voter the right to vote as he pleases. He cannot be deprived of the exercise of this privilege and right by a pledge previously taken.

In *Dove v. Oglesby*, 114 Okla. 144, 244 Pac. 798, 800 (1926), the court stated that while the right to suffrage does not inhere in the mere right to live and exist, yet it does inhere in the right of self-government and the free exercise of such right is essential to the maintenance of free government. Clearly expressed in these Oklahoma cases is the proposition that a person cannot be deprived of his right to vote as he pleases by a pledge previously taken. It is also held that such a pledge, should it exist, is a mere statement of intent and binds only as a moral obligation and that to hold otherwise would raise "grave doubts" as to the validity of the statute. *Westerman v. Mims*, 111 Tex. 29, 227 S.W. 178, 180 (1921). Other courts, reasoning along similar lines, have held that although an oath may be required, it in no way barred a person from supporting another candidate, notwithstanding the fact that he took an oath to the contrary. *Graham v. Alliston*, 180 Ky. 687, 203 S.W. 563, 565 (1918). When a nominee stated that he was going to vote for the candidates of another party, he reserved to himself a right and privilege which, under the constitution and laws of the state, is guaranteed to him as an elector. *Swindall v. State Election Board, supra*; *State v. Michel, supra*. These decisions differ markedly from the instant case which holds that a person seeking nomination must surrender by oath his entire freedom of franchise. He must swear to vote for an undetermined candidate who perhaps held political views con-

trary to his in the past, and who has completely undetermined political and economic views for the future.

Justice Cardozo, in *Nixon v. Condon*, 286 U.S. 73, 88, 52 S. Ct. 484, 76 L. Ed. 984 (1932), refuted the argument that political parties are mere voluntary organizations and held them to be a type of "governmental instrument." His position was that because a Negro properly could not be excluded from a governmental instrumentality, he could not be barred from a political primary. And there is no more logic in the exclusion of a person from participation in such a "governmental instrument" because of his inability to be the unconditional adherent of one political party than there is in his exclusion because of color.

In the opinion of the writer, a man should participate without restriction in the governmental instrument or agency which ultimately determines the governing body to which he is subject. The degree of his participation should vary principally because of his personal qualities and secondarily because of his political affiliations. If restrictions there must be, it would be better to exclude from office a person who blindly follows a political party than one who exercises independent judgment in voting for public officials.

Thomas D. Logan

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CONSTITUTIONAL LAW — RELATIONSHIP BETWEEN UNITED STATES SUPREME COURT AND STATE COURTS IN APPLYING THE EQUAL PROTECTION CLAUSE. — *Rice v. Arnold*, ....Fla....., 54 So. (2d) 114 (1951). The relator, a Negro, brought an action in mandamus against the respondent, a city official, who made certain rules regulating the use of a golf course owned by the City of Miami. Under the rules, the course was open exclusively to members of the white race on certain days and exclusively to members of the colored race on other days. The relator sought to compel the respondent to allow him the privilege of using the facilities of the club at all hours and on all days that it was open to the public. The Florida Supreme Court affirmed the denial of mandamus. The United States Supreme Court, 340 U.S. 848, 71 S. Ct. 77, 95 L. Ed. 621 (1950), vacated the judgment against the relator and remanded the case to be considered in the light of *Sweatt v. Painter*, 339 U.S. 629, 70 S. Ct. 848, 94 L. Ed. 1114 (1950), and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 70 S. Ct. 851, 94 L. Ed. 1149 (1950). Both of these cases were decided after the relator's appeal to the Supreme Court of Florida.

The court in the instant case first considered the effect of an order by the Supreme Court vacating its judgment. It recognized the paramount authority of that Court in construing the Constitution, *March-*

*man v. Marchman*, 198 Ga. 739, 32 S.E. (2d) 790, 792 (1945); In re *Opinion of the Justices*, 86 N.H. 597, 166 Atl. 640, 644 (1933); *Great Atlantic & Pacific Tea Co. v. Doughton*, 196 N.C. 145, 144 S.E. 701, 704 (1928), but reasoned that to vacate a judgment is not to reverse it or to preclude an affirmation. The Supreme Court itself set forth its power to vacate and outlined the effect of vacation in *Patterson v. Alabama*, 294 U.S. 600, 607, 55 S. Ct. 575, 79 L. Ed. 1082 (1935), where it pointed out:

We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered. We may recognize such a change, which may affect the result, by setting aside the judgment and remanding the case so that the state court may be free to act. We have said that to do this is not to review, in any proper sense of the term, the decision of the state court . . . but only to deal appropriately with a matter arising since its judgment and having a bearing upon the right disposition of the case.

This interpretation of the Supreme Court's appellate powers has been reiterated in *Minnesota v. National Tea Co.*, 309 U.S. 551, 555, 60 S. Ct. 676, 84 L. Ed. 920 (1940); *State Tax Commission of Utah v. Van Cott*, 306 U.S. 511, 515, 59 S. Ct. 605, 83 L. Ed. 950 (1939), and has been embodied in 28 U.S.C. § 2106 (Supp. 1951). It has been held that unless the Supreme Court reaches a contrary conclusion the state court is not precluded from exercising its own judgment. *Brown v. Palmer Clay Products Co.*, 290 Mass. 108, 195 N.E. 122 (1935). Since the Supreme Court rendered no opinion, but merely designated two cases to be considered, it did not reach a contrary conclusion and the Florida court was left free to exercise its own judgment.

The court then turned to a consideration of the referred decisions and proceeded to distinguish the facts in each from those in the instant case. In *Sweatt v. Painter*, *supra*, the appellant, a Negro student, had been denied entrance into the University of Texas Law School, but had been offered the opportunity to enroll in another school provided by the state. The Court held that this did not afford him equality of educational opportunity because he was denied the valuable benefit of commingling with the students of the University, the use of its facilities and school prestige. The court in the instant case held that *Sweatt* was not applicable since the facts before it presented no question of equal facilities.

The *McLaurin* situation, *supra*, presented a less tangible denial of equal rights. In essence the complainant was allowed all the facilities afforded white students, but was required to sit in a designated section when in the classroom, cafeteria or library. Here the Supreme Court ruled that to deprive him of complete freedom to intermingle with his fellow students was in effect to deny him a valuable source of his

education, the interchange of thoughts with his fellow students. The Florida court pointed out, once more, that the decision was based upon a denial of an equal opportunity to learn, a "denial of equal facilities."

Having distinguished these cases from the instant case on the basis of equal facilities, the court observed that in *Sweatt v. Painter*, the Supreme Court declined to disturb the rule of *Plessy v. Ferguson*, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), one of the early decisions used as a guide in substantiating "Jim Crow" laws which do not affect interstate commerce. In considering the Equal Protection Clause of the Fourteenth Amendment, that Court held, 16 S. Ct. at 1140:

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.

The relator, however, had not questioned the right of the state to segregate the races in the use of public facilities. He relied solely upon the ground that any allocation of certain times for the use of his race was an unjust discrimination. This contention the court found to be inconsistent with the police powers of the state to effect racial segregation. *Plessy v. Ferguson, supra; Patterson v. Taylor*, 51 Fla. 275, 40 So. 493 (1906). Had the relator brought this action to secure more hours during which he would be allowed the use of the course, and had proved that the present hours were disproportionate, his action probably would have met with greater success. His action was without basis in that he sought relief which would necessarily overthrow the right to segregate the races; yet he did not deny, and in fact recognized, that right. The writ he was seeking would have required the respondent to allow Negroes to use the course every day that it was open to the public. Its net effect would thus have been to overrule a long line of decisions supporting the "Jim Crow" laws.

Whether the Florida court correctly distinguished the relator's appeal from the *Sweatt* and *McLaurin* decisions would seem to turn upon that court's view of the nature of the game of golf. Here, clearly, there were equal physical facilities offered to the relator. The crux of the problem which might have brought this case within those decisions depends upon the value, to participants in the game of golf, of commingling with the other patrons of the course. The Florida court, in exercising its power of judicial notice, took the view that there was no substantial benefit to a player resulting from association with other



golfers who are not in his immediate foursome. Under this view the instant case can be distinguished from the *Sweatt* and *McLaurin* factual situations. However, even though no ruling is given by the Supreme Court when it vacates a judgment under the rule announced in *Patterson v. Alabama*, *supra*, the Court here must have seen a similarity of abuse in the relator's appeal. The value of social and business contacts should not be denied or discounted as insignificant.

*McLaurin*, *supra*, narrowed the permissibility of segregation laws, but it did not completely abolish their legality. There is yet much room for distinguishing cases, such as the instant one, from the rule set forth in that case. Until a forceful decision appears overruling *Plessy v. Ferguson*, *supra*, the laws stand and the states, as in this case, may seek out distinctions to substantiate their decisions. While the "Jim Crow" laws are allowed to remain unchallenged, the state courts are free to condone the segregation of the races in the use of public facilities.

*Bernard James McGraw*

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CONSTITUTIONAL LAW — SEARCHES AND SEIZURES — REQUIREMENT OF A PERSONAL INTEREST IN EITHER THE PREMISES SEARCHED OR THE PROPERTY SEIZED. — *United States v. Jeffers*, ....U.S....., 72 S. Ct. 93 96 L. Ed. \*53 (1951). Jeffers was convicted of dealing in unstamped narcotics. Several bottles of cocaine bearing no federal stamps were admitted in evidence over his objection. These drugs had been stored by Jeffers in his aunts' apartment without their knowledge. Though he did not live with the aunts, he was given free access to their flat. While no one was in the apartment, federal detectives entered by means of the hotel manager's key and searched the premises thoroughly, eventually uncovering the contraband drugs. Upon conviction, Jeffers appealed to the Circuit Court of Appeals for the District of Columbia, where the judgment was reversed. *Jeffers v. United States*, 187 F. (2d) 498 (D.C. Cir. 1950). The Government then took the case to the United States Supreme Court which affirmed the ruling of the circuit court. Justice Clark, speaking for the Court, refused to engage shadowy distinctions between illegal searches of premises not belonging to the defendant and illegal seizures of *contraband* property, stating, 72 S. Ct. at 95-6, that:

The search and seizure are, therefore, incapable of being untied. To hold that this search and seizure were lawful as to the respondent would permit a quibbling distinction to overturn a principle which was designed to protect a fundamental right.

The Government had argued strenuously, both before the court of appeals and the Supreme Court, that since Jeffers had no personal pos-

sessory or proprietary interest in either the premises searched or the contraband narcotics seized, *his* rights under the Fourth Amendment were not violated. The dissenting judge in the circuit court agreed with this contention, saying, *Jeffers v. United States, supra* at 510, that "since *prima facie* these narcotics existed in violation of law, *prima facie*, property rights did not exist in them." The Supreme Court summarily dismissed this argument by ruling, 72 S. Ct. at 96, that the evidence, because it was contraband, could not be returned to the defendant, but that "It being his property, for the purposes of the exclusionary rule, he was entitled on motion to have it suppressed as evidence on his trial."

This difference of opinion entertained by the Supreme Court and by a member of the circuit court points up the basic issue exemplified by the cited case: whether personal interests, merely possessory or actually proprietary, in the premises and/or in the evidence seized must be shown in order to suppress it in the federal courts under the search and seizure provision of the Fourth Amendment.

The Fourth Amendment provides in part that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." To secure efficient protection under this Amendment the Supreme Court formulated the rule that evidence obtained as a result of an illegal search and seizure is inadmissible in a federal court. *Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914). This rule of evidence has since been recorded in FED. R. CRIM. P. 41(e). Any hope that this rule would be carried over into state law by the Fourteenth Amendment was removed by *Wolf v. Colorado*, 338 U.S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949). The lower federal courts have developed the "personal interest exception," Comment, 58 YALE L.J. 144, 154 (1948), an exception or limitation upon the application of the rule of exclusion. It requires the defendant seeking to suppress the illegally obtained evidence to show that he had a personal interest in either the premises searched or the property seized. *Casey v. United States*, 191 F. (2d) 1, 3 (9th Cir. 1951); *Grainger v. United States*, 158 F. (2d) 236, 237 (4th Cir. 1946). For an analogous state rule see *Delnegro v. State, ...Md....*, 81 A. (2d) 241, 244 (1951). In the circuit courts of appeals this exception has been quite strictly applied, so as to deny exclusion of the seized evidence where the searched premises did not belong to the person seeking the exclusion, *Gibson v. United States*, 149 F. (2d) 381 (D.C. Cir.), *cert. denied sub nom. O'Kelley v. United States*, 326 U.S. 724, 66 S. Ct. 29, 90 L. Ed. 429 (1945); *Ingram v. United States*, 113 F. (2d) 966 (9th Cir. 1940). Exclusion has also been denied where the searched premises belonged to a corporation of which the defendant seeking exclusion was merely a stockholder, *Lagow v. United States*, 159 F. (2d) 245 (2d Cir. 1946), *cert. denied*, 331 U.S. 858, 67 S. Ct.

1750, 91 L. Ed. 1865 (1947). *But cf. United States v. Blok*, 188 F. (2d) 1019 (D.C. Cir. 1951). While this "personal interest exception" has been popular in the federal circuit courts, it has not been applied by the Supreme Court, Comment, 58 YALE L.J. 144, 155 n. 48 (1948), unless the instant case, which ostensibly rejects the exception, can be deemed an "application" of it.

Of course, even under this exception as applied in the circuit courts, a personal interest in both the premises searched and the property seized is unnecessary, *Gibson v. United States*, *supra* at 384. Apparently a personal interest in either one or the other is sufficient. To an ideal point for examining the instant decision we thus proceed: did the defendant have a sufficient personal interest in either the premises searched or the evidence seized so as to qualify him under the circuit courts' exception, or if this exception is unimportant in the Supreme Court, what must a defendant show in order to suppress illegally obtained evidence. At least two opposing views in this regard are apparent in the history of the cited case alone. One view, presented by the dissenting judge in the circuit court, *Jeffers v. United States*, *supra* at 505-12, emphasizes the need for actual bona fide ownership interests in either the premises searched or the property seized as a prerequisite to Fourth Amendment protection. The second school represented by the majority and concurring opinions in the circuit court, *Jeffers v. United States*, *supra* at 499-505, espouses the view that mere defeasible rights in the property seized are sufficient even without interests in the premises searched. The Supreme Court opinion in the cited case is actually a corollary of the second view differing only in that it finds no merit in drawing distinctions between the elements of search and the elements of seizure.

The dissenting judge in the circuit court pointed to an impressive series of circuit court decisions which strengthen his position that bona fide rights in the premises or property are indispensable. *Jeffers v. United States*, *supra* at 506-7. He also found dicta of the Supreme Court supporting him in *Wolf v. Colorado*, *supra*, 338 U.S. at 30-1; *Goldstein v. United States*, 316 U.S. 114, 121, 62 S. Ct. 1000, 86 L. Ed. 1312 (1942); and in *Agnello v. United States*, 269 U.S. 20, 35, 46 S. Ct. 4, 70 L. Ed. 145 (1925). After establishing, to his own satisfaction at least, that the defendant Jeffers had no interest in the premises, the dissenting judge argued that Jeffers also had no interest in the contraband narcotics on which he could rely for suppression purposes. This was true, he contended, because the unstamped narcotics were instrumentalities of crime, *United States v. Rabinowitz*, 339 U.S. 56, 64 n.6, 70 S. Ct. 430, 94 L. Ed. 653 (1950), and subject to forfeiture. 38 STAT. 785 (1914), as amended, 44 STAT. 98 (1926), 26 U.S.C. § 2558(a) (1946).

The second view, illustrated by the majority and concurring opinions of the circuit court when the cited case was in that court, places great emphasis upon the salutary purposes of the Amendment and regards any strict limitation upon the rule excluding illegally obtained evidence as destructive of those purposes. Under this theory either mere limited rights of dominion over the premises or defeasible rights in the property seized are enough to warrant suppression. A fine example of this view is provided in *United States v. Blok, supra* at 1021, where the court said:

The Fourth Amendment promises security against unreasonable searches. We think a person who has enough interest in a place to make a search unreasonable has enough to object to the search. Possession is a complicated and artificial concept. It is often hard to say whether or not a particular interest amounts to possession. We know of no reason why standing to object to a search should turn upon that question.

In that case a search of a Government employee's desk located in a federal building was unlawful since the employee had an exclusive right to use the desk.

The Supreme Court in the instant case substantially agreed with this second view but apparently went one step further when it eliminated discussion of the search and the seizure as separate elements. The basis for this position is difficult to ascertain for it aids naught in the orderly analysis of the problem. To say that the search and seizure are "incapable of being untied," 72 S. Ct. at 95, does not answer all of the questions arising in cases where the person seeking the suppression of the seized evidence had absolutely no interest in the searched premises, or where he had interests in the premises but none in the property seized. If the rule still exists that an "objection to evidence obtained in violation . . . of that [Fourth] Amendment may be raised only by one who claims ownership in or right to possession of the premises searched or the property seized," *Gibson v. United States, supra* at 384, (Emphasis supplied), then the Supreme Court should have presented discussion of each element, both the search and the seizure as the rule in the *Gibson* case necessitates, or it should have expressly rejected that rule. By doing neither the Supreme Court added only confusion to this specific problem.

*Robert A. Stewart*

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CONSTITUTIONAL LAW — TERRITORIES — VALIDITY OF DISCRIMINATORY TAX IMPOSED BY TERRITORIAL LEGISLATURE ON NONRESIDENTS. — *Anderson v. Mullaney*, 191 F. (2d) 123 (9th Cir.), cert. granted, . . . U. S. . . ., 72 S. Ct. 111, 96 L. Ed. \*49 (1951). The Alaska Fishermen's Union, by Anderson, its secretary-treasurer, requested an injunction restraining the defendant, the Commissioner of Taxation for

Alaska, from enforcing a tax on its members for participating in commercial fishing off the shores of Alaska. The tax complained of was enacted by the territorial legislature of Alaska and placed a fee of \$5 on residents and \$50 on nonresidents for the right to fish. It was shown that the nonresidents numbered approximately 3200 and came generally from the west coast states, annually making the trip to Alaska either as self-employers or as employees of large cannery operators.

The complaint was dismissed in the district court on the ground that the tax was not discriminatory, as alleged by the plaintiff, because it was based on differences bearing a fair and reasonable relation to the object of the legislation. 91 F. Supp. 907, 908 (D. Alaska 1950). The lower court further held that the tax did not burden interstate commerce in violation of the Constitution. U.S. CONST. Art. I, § 8.

On appeal the plaintiff contended that the tax violated the Commerce Clause because it favored residents over nonresidents in an enterprise having interstate ramifications. The circuit court approved the plaintiff's contentions, and reversed the judgment of the district court. The basis of the majority opinion was that a territory has no greater power of taxation than it would have as a state.

One judge dissented and stated that the holding in the instant case was in direct conflict with *Haavik v. Alaska Packers Association*, 263 U.S. 510, 44 S. Ct. 177, 68 L. Ed. 414 (1924), which, according to the judge, held that a territory has the same power of taxation that Congress possesses.

The issue presented is whether a territorial legislature has the power to favor residents over nonresidents in an enterprise that has interstate ramifications.

In *Inter-Island Steam Nav. Co. v. Territory of Hawaii*, 96 F. (2d) 412, 416-7 (9th Cir. 1938), the court mentioned that because commerce among states is a practical conception, it must be governed by practical limitations and a territory must be considered as a state in applying the Commerce Clause. Geographical problems presented another practical aspect which was discussed in *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 377, 69 S. Ct. 606, 93 L. Ed. 741 (1949), and 28 U.S.C. §§ 2281, 2284 (Supp. 1951), where a statute designed to protect state sovereignty was held not applicable to Hawaii. The Court stated, 336 U.S. at 378-9, that where the intent of Congress would be frustrated if the statute involved was not extended to include territories, then territories would be included in the term "states," but where the purpose of the act is not furthered, it will not be extended to include territories.

The dissenting judge cited the *Haavik* case, *supra*, for the proposition that a territory has the same power of taxation enjoyed by Congress.

In the *Haavik* case, the Court upheld a tax discriminating against non-residents, stating, 263 U.S. at 514: “. . . the Territorial Legislature had authority under the terms of the Organic Act to impose both the head and the license tax unless, for want of power, Congress itself could not have laid them by direct action.” However, in *Auk Bay Salmon Canning Co. v. United States*, 300 Fed. 907, 909 (9th Cir. 1924), the view was propounded that the *Haavik* case is authority only for the proposition that an annual poll tax and an annual license imposed on nonresident fishermen in Alaska are within the power delegated to the Alaska legislature by the Organic Act.

It has been said that Congress may favor a territory, casting the resulting burden on the states. *Neuss, Hesslein & Co. v. Edwards, Collector of Internal Revenue*, 30 F. (2d) 620, 622 (2d Cir. 1929). This could be construed to allow Congress to aid the development of a territory by favoring residents over nonresidents. However, that proposition is not authority for the view that a territorial legislature, a mere instrumentality of Congress, may so discriminate against non-residents. As far as Alaska is concerned, the Constitution and general laws of the United States are applicable to it by express enactment of Congress. 37 STAT. 512 (1912), 48 U.S.C. § 23 (1946). The territory is further restricted by an Act of Congress prohibiting the territorial legislature from legislating in certain fields as set forth in 37 STAT. 512 (1912), 48 U.S.C. § 24 (1946). As an aid in interpreting the above statutes, reference may be made to *Downes v. Bidwell*, 182 U.S. 244, 21 S. Ct. 770, 776, 45 L. Ed. 1088 (1901), where the Supreme Court said:

. . . too much weight must not be given to general expressions . . . that the power of Congress over territories is complete and supreme, because these words may be interpreted as meaning only *supremé* under the Constitution; nor . . . to general statements that the Constitution covers the territories as well as the states, since in such cases it will be found that acts of Congress had already extended the Constitution to such territories. . . .

To uphold the view entertained by the dissenting judge, it would be necessary to hold that a territory has greater power to burden its intercourse with states than it would have as a state. The weakness of this position is borne out by the many recent cases dealing with the territories. These decisions, while not necessarily identical with the cited case, were concerned primarily with the validity of the territory's legislative acts as being either within its rightful area of legislation or as contravening the general laws of the United States. In *Freeman v. Smith*, 44 F. (2d) 703 (9th Cir. 1930), the court considered the reasonableness of a license fee of \$1.00 on residents of Alaska and \$250.00 on nonresidents and held that this difference was unreasonable

and in conflict with an Act of Congress, 43 STAT. 464 (1924), 48 U.S.C. §§ 221, 222 (1946), granting fishing rights to citizens of the United States. And in *Anderson v. Smith*, 71 F. (2d) 493 (9th Cir. 1934), a fee of \$1.00 for residents and \$25.00 for nonresidents was found to be a reasonable interference with the statute above allowing fishing in Alaskan waters, for the fee was not prohibitive. *Martinsen v. Mullaney*, 85 F. Supp. 76 (D. Alaska 1949), presented a similar problem, for the court, in discussing the validity of a \$50.00 tax on nonresidents and \$5.00 on residents, held the tax invalid, since there was no showing of facts justifying the discrimination. In *P. E. Harris & Co. v. Mullaney*, 87 F. Supp. 248 (D. Alaska 1949), a tax by the territorial legislature was deemed excessive and violative of a right granted by Congress. The result of these cases is that a territory is strictly limited in its power to legislate and thus does not have the same power of legislation that Congress has. As pointed out by Shipman, *Webster on the Territories*, 9 YALE L. J. 185, 200 (1900):

. . . under the Constitution a Territory, when qualified for self-government, is entitled to the rights of Statehood, which, during the Territorial condition, Congress holds in trust for the Territory, and exercises on its behalf, surrendering them intact on admitting it as a State. A Territory is constitutionally an infant State.

As a conclusion, the same author goes on to say, Shipman, *supra* at 205, that a territory cannot have any greater rights than it would have as a state. This view is further substantiated in *Stainback v. Mo Hock Ke Lok Po*, *supra*, 336 U.S. at 378, where it was said that in our form of government the sovereignty of a state requires that greater weight be given state legislation than that accorded the laws of a territory over matters not ruled by the Constitution.

Certiorari has been granted in the instant case. ....U.S....., 72 S. Ct. 111, 96 L. Ed. \*49 (1951). The decision should prove enlightening for the authority on both sides is rather meager. Other than the *Haavik* case, based on facts similar to the principal decision, there have been no other Supreme Court decisions discussing the power of a territorial legislature to favor residents over nonresidents in an enterprise having interstate ramifications. Consequently, it is submitted that the Supreme Court will of necessity distinguish the *Haavik* case, as the circuit court did, or it will reject the interpretation of that case as set forth by the dissenting judge.

*Anthony V. Amodio*

The Supreme Court affirmed the judgment of the circuit court. 20 U.S.L. WEEK 4155 (U. S. March 3, 1952). [Editor's note.]

CRIMINAL LAW — JURISDICTION — FEDERAL ANTI-KIDNAPPING ACT AS A BAR TO STATE COURT JURISDICTION OVER DEFENDANT FORCIBLY COMPELLED TO ENTER THE STATE. — *Collins v. Frisbie*, 189 F. (2d) 464 (6th Cir.), *cert. granted*, ....U.S....., 72 S. Ct. 112, 96 L. Ed. \*49 (1951). The petitioner was arrested in Chicago, Illinois by two Michigan police officers who forcibly brought him into Michigan where he was tried and convicted of a crime committed in that state. No extradition proceedings were instituted and petitioner did not sign a waiver of extradition. The United States District Court for the Eastern District of Michigan denied the petition for habeas corpus. This decision was reversed by the court of appeals and cause was remanded.

The basic issue involved here was whether jurisdiction over the person of one charged with a crime is impaired by the fact that he was kidnapped and brought into the state by the arresting officers.

The general rule has always been that the personal presence of a defendant before a court gives that court complete jurisdiction over him regardless of the method by which his presence was secured, whether by kidnapping, *Mahon v. Justice*, 127 U.S. 700, 8 S. Ct. 1204, 32 L. Ed. 283 (1888); *Ker v. Illinois*, 119 U.S. 436, 7 S. Ct. 225, 30 L. Ed. 421 (1886), premature arrest, *Malone v. United States*, 67 F. (2d) 339 (9th Cir. 1933), connivance, conspiracy and fraud on the part of executive officers, *Pettibone v. Nichols*, 203 U.S. 192, 27 S. Ct. 111, 51 L. Ed. 148 (1906), trick or device, *Ex parte Johnson*, 167 U.S. 120, 17 S. Ct. 735, 42 L. Ed. 103 (1897), false arrest, *Albrecht v. United States*, 273 U.S. 1, 47 S. Ct. 250, 71 L. Ed. 505 (1927), or extradition for an entirely different crime than that upon which conviction was based, *Lascelles v. Georgia*, 148 U.S. 537, 13 S. Ct. 687, 37 L. Ed. 549 (1893).

In the instant case, the court of appeals justified its departure from the general rule laid down in *Ker v. Illinois*, *supra*, and *Mahon v. Justice*, *supra*, relying upon the federal statute against kidnapping, 18 U.S.C. § 1201 (1946), and ruling that when state officers violate the statute, the petitioner will be released on habeas corpus. The court pointed out, 189 F. (2d) at 466, that the powerful, sweeping terms of the Act did not specifically exclude state police officers and therefore necessarily included them. The court then decided that if the Michigan police had kidnapped the petitioner in violation of the statute as the petitioner alleged, the assumption of jurisdiction by the trial court would be a sanctification of a vicious act condemned by this policy-laden enactment.

This line of reasoning is a complete deviation from other reported federal cases on the point which have continued to follow the general rule noted above even after the enactment of the Federal Kidnapping Act. *McMahan v. Hunter*, 150 F. (2d) 498 (10th Cir. 1945), *cert.*



denied *sub nom. McMahan v. Johnston*, 326 U.S. 783, 66 S. Ct. 332, 90 L. Ed. 475 (1946); *Sheehan v. Huff*, 142 F. (2d) 81 (D.C. Cir.), *cert. denied*, 322 U.S. 764, 64 S. Ct. 1287, 88 L. Ed. 1591 (1944). The petitioner in *McMahan v. Hunter*, *supra*, claimed he was a subject of Canada and was kidnapped and brought within the jurisdiction of the sentencing court. The circuit court affirmed the district court in holding that the manner in which jurisdiction over the petitioner was acquired was not open to review on habeas corpus. That the generally recognized validity of the prevailing rule often compels a court to summarily dismiss arguments raised against it is clearly shown in *Sheehan v. Huff*, *supra* at 81, where the court stated:

Counsel for petitioner, appointed by this court to represent him on appeal, has filed a persuasive brief. It admits that the Supreme Court has decided that jurisdiction in a criminal case is not impaired by the fact that the accused was brought before the court in an unlawful manner, but urges these decisions should not be followed. We believe, however, that the question is so well settled that it cannot be reopened here.

State decisions favor the rule that jurisdiction cannot be questioned on the ground that defendant's presence was secured by kidnapping. *People v. Dileo*, 194 App. Div. 793, 186 N.Y. Supp. 156 (4th Dep't 1920); *Commonwealth ex rel. Master v. Baldi*, 166 Pa. Super. 413, 72 A. (2d) 150, *cert. denied*, 340 U.S. 866, 71 S. Ct. 88, 95 L. Ed. 632 (1950). Kansas is the lone jurisdiction entertaining a contrary view. In *Kansas v. Simmons*, 39 Kan. 262, 18 Pac. 177 (1888), the defendants had been arrested in Nebraska by Kansas officers and forcibly transported to Kansas. The Supreme Court of Kansas released the defendants, ruling that Kansas courts should not sustain the service of judicial process where the service was procured by a breach of the peace committed by Kansas officers in a sister state or was obtained in violation of some well-recognized rule of honesty or fair dealings or by the infraction of some law. The court further stated, 39 Kan. at 264-5:

Such a service would not only be a special wrong against the individual upon whom the service was made, but it would also be a general wrong against society itself — a violation of those fundamental principles of mutual trust and confidence which lie at the very foundation of all organized society, and which are necessary in the very nature of things to hold society together.

Although this decision has never been overruled in Kansas, its force was lessened in *Kansas v. Wellman*, 102 Kan. 503, 170 Pac. 1052 (1918), which held that when the defendant was surrendered by the authorities of another state under color of a federal statute which in fact was not applicable, the trial court nevertheless had jurisdiction. In the opinion, 170 Pac. at 1055, the court stated:

The jurisdiction of a district court to try a person on a charge of having committed a public offense does not depend upon how he came

to be in this state. There might, however, in a particular case be such oppression and want of fair dealing in the matter as to justify a dismissal of the case.

Nebraska until recently followed a rule similar to the *Simmons* case, *supra*, being governed by *In re Robinson*, 29 Neb. 135, 45 N.W. 267 (1890). There the defendant was released on habeas corpus after being kidnapped from a neighboring state by Nebraska officers. But this decision was expressly overruled in *Jackson v. Olson*, 146 Neb. 885, 22 N.W. (2d) 124 (1946), where the court reiterated the rule that jurisdiction is not impaired by the manner in which the accused is brought before the court.

Because the Supreme Court has not ruled on this precise point since the passage of the Federal Kidnapping Act, its grant of certiorari in the instant case, ....U.S....., 72 S. Ct. 112, 96 L. Ed. \*49 (1951), makes possible a clarification which should prove most interesting. Although the arresting officers are criminally wrong, this wrong will not be imputed to the sovereign. *United States ex rel. Voigt v. Toombs*, 67 F. (2d) 744 (5th Cir. 1933). Without question this abuse of legal authority should be curbed, but the courts have not resorted to denying jurisdiction as did the instant court of appeals. The prevailing opinion has been that only the arresting officer is at fault and that adequate protection can be obtained through the institution of proper proceedings against him.

Frank A. Howard

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DAMAGES — APPEAL AND ERROR — APPELLATE INQUIRY INTO EXCESSIVENESS. — *Wetherbee v. Elgin, Joliet & Eastern Ry.*, 191 F. (2d) 302 (7th Cir. 1951). Wetherbee, plaintiff's decedent, received fatal injuries during switching operations while in the employ of defendant railroad company. In a reverse movement he was rear brakeman charged with the duty of keeping a "sharp lookout ahead." As he was riding the stirrup of the rear car, it was derailed by a large block of wood. The car veered toward the loading dock and crushed Wetherbee before the brakes were applied. Plaintiff brought an action under the Federal Employers' Liability Act, 35 STAT. 65 (1908); as amended, 45 U.S.C. § 51 *et seq.* (1946), and was awarded an \$80,000 verdict.

The main issue presented on appeal was whether the circuit court possessed the right to inquire into the excessiveness of the damages.

While admitting that the commonly-accepted rule bars inquiry into mere excessiveness of damages, the appellate court granted a new trial on the ground that there was, as a matter of law, some contributory negligence for which no deduction in the amount of the damages was

made, and that the jury had been misled by the figures of the actuary. The actuary's figures, correct mathematically but erroneous as a measure of damages, were almost identical to those of the jury.

The problem of inquiry into excessiveness of damages on appeal involves the review of two discretions: the discretionary power of the jury and of the trial judge. The discretion of the jury is predicated on U.S. CONST. AMEND. VII which precludes a re-examination of any fact tried by a jury except in accordance with the rules of the common law. The discretion of the trial judge is based on the premise that he, having heard and observed the witnesses at the trial, is in the more favorable position to judge the reasonableness of the damages and can insist on a remittitur as an alternative to a new trial if he deems them unreasonable. Therefore, the appellate court cannot intervene unless the jury have transcended their discretionary powers and the trial judge has subsequently abused his discretion by allowing the verdict to stand. *Virginian Ry. v. Armentrout*, 166 F. (2d) 400 (4th Cir. 1948); *Carter Coal Co., v. Nelson*, 91 F. (2d) 651 (4th Cir. 1937); *Cobb v. Lepisto*, 6 F. (2d) 128 (9th Cir. 1925); *United Press Ass'n's v. National Newspapers Ass'n.*, 254 Fed. 284 (8th Cir. 1918); *Jensen v. Denver & R. G. R.R.*, 44 Utah 100, 138 Pac. 1185 (1914).

In order not to transgress the Seventh Amendment and FED. R. Civ. P. 52 (a), a trial judge's exercise of discretion must be found to have been abusive as a matter of law. A jury's assessment which is clearly without support in the evidence and which has not been the subject of the trial judge's remittitur is not an error of fact, but by its exorbitance, an error of law, reviewable on appeal. Several decisions have explicitly so held. *Virginian Ry. v. Armentrout*, *supra*, 166 F. (2d) at 408; *Jennings v. McCowan*, 215 S.C. 404, 55 S.E. (2d) 522, 532 (1949); *Jensen v. Denver & R. G. R. R.*, *supra*, 138 Pac. at 1192.

What constitutes an abuse of discretion? In the instant case the abuse was indicated mathematically by the absence of any deduction for contributory negligence, which was a compelling inference from the evidence and by the extremely close correspondence between the de-luding figures of the actuary and those of the jury.

It should be emphasized that, in the great number of cases, the appellate courts wince at the thought of reversal for excessive damages out of respect for the province of the jury and the prerogatives of the trial court concerning the particular action. *E.g.*, *Bissonette v. National Biscuit Co.*, 100 F. (2d) 1003 (2d Cir. 1939). A review of the close questions of excessiveness will be helpful here in analyzing the soundness of the instant decision.

The problem is not intricate in the situations where the damages are certain. An appellate court does not supplant the jury's discretion when it modifies a verdict which is contrary to the undisputed evidence,

*Lannon v. Alex*, 339 Ill. App. 645, 90 N.E. (2d) 800 (1950), or which was made without regard to the charge of the court, *United Press Ass'ns v. National Newspapers Ass'n.*, *supra*, or where damages are easily computable, *Cobb v. Lepisto*, *supra*. This certainly can be had when the injury lends itself to a definite measure of damages, as in most contract actions. *E.g.*, *Cobb v. Lepisto*, *supra*, 6 F. (2d) at 129.

The perplexity arises with the uncertainty of damages. It is best exemplified by death actions, as the case at bar, and personal injury suits.

Although the often vague terminology in these cases tends to blend them, there are essentially two tests applied by appellate courts in reviewing excessive damages. The first is the "flagrantly excessive" test, which controls the extreme case and suggests immoderateness by virtue of the enormous amount alone. The second is the "unreasonably excessive" test, which usually controls the marginal case and which requires closer scrutiny of the trial record. The latter test was used in the instant case where the court was energetic in its search for error in the record because of an indication of excessiveness.

Under the "flagrantly excessive" test, flagrancy actually becomes a requirement which must be satisfied before the court will reverse for excessive damages. The passion and prejudice of the jury must appear at first blush; but, in the "unreasonably excessive" test, the basis used is the insufficiency of the evidence, determined only by an exacting search of the entire record. Thus, the courts using the "flagrantly excessive" test take cognizance of a narrower field of inquiry than do courts using the "unreasonably excessive" test. It is a safe surmise that a court applying the "flagrantly excessive" test would not have reversed the trial court in the principal case because the error was apparent only after a thorough search of the record. In line with the first test stands *Duffy v. Union Pac. R. R.*, ....Utah...., 218 P. (2d) 1080, 1084 (1950), which held that the verdict was exorbitant as to indicate passion and prejudice. There, the verdict was five times greater than the stipulated loss of wages, the only substantiated item of damages present. In *Billups Petroleum Co. v. Entrekkin*, 209 Miss. 302, 46 So. (2d) 781, 786 (1950), the court declared the \$35,000 verdict in favor of a 23 year old man for fracture of leg and pelvis excessive because it evinced passion and prejudice. On the other hand, the courts in *Southern Pac. Co. v. Zehnle*, 163 F. (2d) 453 (9th Cir. 1947), and *De Toskey v. Ruan Transport Corporation*, 241 Iowa 45, 40 N.W. (2d) 4 (1949), allowed the verdicts to stand because they were not so "flagrantly excessive" as to raise the presumption of passion and prejudice.

In the second class of cases which present closer questions and use the "unreasonably excessive" test, the courts are found to be more analytical in that they examine the entire record before sustaining

or overthrowing the jury's assessment. The rationale for the reversal in these suits centers around the insufficiency of the evidence.

This is inversely shown in *Home Ins. Co. of New York v. Tydal Co.*, 157 F. (2d) 851, 852 (5th Cir. 1946), where the court recognized the rule that there could be no reversal for error of fact, but said:

. . . it is our duty to scrutinize more closely the evidence and reconsider our suggestions as to how the jury might *reasonably* have reached the amount in the verdict they made. [Emphasis supplied.]

Thus, where the verdict is found to be without a sound and sufficient basis, the award is held to be "unreasonably excessive." In *Buchanan v. Chicago & N. W. Ry.*, 159 F. (2d) 576, 578 (7th Cir. 1947), the court, citing the *Home Ins. Co.* case, stated that the trial judge alone had the right to upset a verdict, but that "the reviewing court can, if it thinks the verdict is not according to the weight of the evidence, scan the trial more closely for error." This seems to convey the idea that excessiveness damages must be parasitic to some other error of law to warrant reversal. The Supreme Court in *Union Pac. R. R. v. Hadley*, 246 U.S. 330, 38 S. Ct. 318, 62 L. Ed. 751 (1918), refused to reverse where the verdict appeared excessive and no deduction had been made for contributory negligence. The verdict was not "unreasonably excessive" because there was a reasonable basis for the jury's findings. This case was factually similar to the principal case. In *Ripley v. C. I. Whitten Transfer Co.*, ....W. Va....., 63 S.E. (2d) 626, 628 (1951), the court held, in overturning the verdict, that mathematical precision and absolute certainty are not required, but that the existence and quantum of damages must be reasonably certain.

When the courts using the test of "unreasonably excessive" arrive, by means of an inference, at the conclusion that the verdict manifests an error of law, they approach the outer perimeter of the permissible bounds of appellate inquiry. The mathematical figure representing the amount of the damages must clearly appear to be erroneous as a matter of law. *Southern Railway-Carolina Division v. Bennett*, 233 U.S. 80, 34 S. Ct. 566, 58 L. Ed. 860 (1914); *Glenwood Irr. Co. v. Vallery*, 248 Fed. 483 (8th Cir. 1918); *F. A. Bartlett Tree Expert Co. v. Stamper*, 306 Ky. 311, 207 S.W. (2d) 752 (1948).

The principal case approaches the sanctioned borders where an error of fact ceases to be reviewable as an abuse of discretion. The court can almost be heard to say: Under the circumstances \$85,000 is, as a matter of *fact*, excessive. We cannot reverse or remit on appearances alone; but where, as here, excessiveness is indicated, we can scan the record more closely for errors of *law*. This the court did and found that no deduction had been made for contributory negligence when, as a matter of law, it was present.

*Richard R. Murphy*

DOMESTIC RELATIONS — DIVORCE A VINCULO — WHETHER LIVING UNDER SAME ROOF PRECLUDES SEPARATION FROM BED AND BOARD. — *Hawkins v. Hawkins*, 191 F. (2d) 344 (D.C. Cir. 1951). The plaintiff brought suit for divorce *a vinculo* from her husband, the defendant, in the District Court for the District of Columbia. The facts of the case, established by the plaintiff's undisputed, corroborated testimony, were that the parties, though living in the same house, had no marital relations for twenty years prior to the suit. They did not visit friends or go out together socially and had no common social life. There were two daughters to the marriage, now grown and married. The whole family sometimes, though not usually, ate together, but even on these occasions the husband and wife did not speak to each other. The plaintiff had based her action on D.C. CODE tit. 16, § 403 (1940):

A divorce from the bond of marriage or a legal separation from the bed and board may be granted for adultery, desertion for two years, voluntary separation from bed and board for five consecutive years without cohabitation. . . .

The district court denied the divorce. The court of appeals reversed and granted the divorce holding that the required separation was present even though the parties were living in the same house. This determination seems an unwarrantable interpretation of the statute and directly conflicts with interpretations applied in other jurisdictions where similar statutes allow divorce on grounds of "separation."

The majority rule in the states which have similar statutes is to the effect that a divorce will be denied where it appears that during the period relied upon the parties have lived in the same house. *See*, 17 AM. JUR., *Divorce and Separation* § 162 (1938). In *McDaniel v. McDaniel*, 292 Ky. 56, 165 S.W. (2d) 966, 967 (1942), the court in construing the Kentucky statute, KY. REV. STAT. ANN. c. 403, § 020 (Baldwin 1943), pointed out that "The accepted meaning of the term 'living apart' is to live in a separate abode." This definition was accepted later in *Ratliff v. Ratliff*, 312 Ky. 450, 227 S.W. (2d) 989 (1950), as the law of the jurisdiction in denying a divorce based on the same grounds where the parties had shared the same house.

In *McNary v. McNary*, 8 Wash. (2d) 250, 111 P. (2d) 760 (1941), the husband failed to prove his allegation that the five-year period of separation had been established. He urged that the divorce be granted on proof that he had been denied his conjugal rights for more than five years, but the court insisted on the strict "separation" set out in the statute. The Washington court was again presented with this question in *Neff v. Neff*, 30 Wash. (2d) 593, 192 P. (2d) 344 (1948), where the parties lived in the same house, but both testified that there had been no marital relations for several years. The divorce was refused on the ground that the parties had failed to make out the requisite "separation" since they occupied the same house, though the court admitted there was little to be gained by keeping them yoked together.

The Rhode Island court, in *Stewart v. Stewart*, 45 R. I. 375, 122 Atl. 778 (1923), stated that separate roofs were not essential for allowing divorce to parties who occupied separate apartments in a multiple unit building. The reason why separate dwellings are so widely insisted upon was well stated in *Hava v. Chavigny*, 147 La. 330, 84 So. 892 (1920), where the court stated that the "separation" referred to in the statute is the separation which is manifest in the community in which the spouses live and that the evidence is not to be sought "behind the closed doors of the matrimonial domicile." This was the basis for the denial of a divorce in *Young v. Young*, 225 N.C. 340, 34 S.E. (2d) 154, 157 (1945), and was accepted by the court in *Dudley v. Dudley*, *supra*.

The circuit court of appeals in the instant case did not look outside its own jurisdiction for aid in resolving the question. As authority for its determination that the phrase "separation for five consecutive years from bed and board without cohabitation" does not require separate domiciles, the court cited *Boyce v. Boyce*, 153 F. (2d) 229 (D.C. Cir. 1946), a case differing from the cited case only as to facts, in that in *Boyce*, the parties never ate at the same table. The only substantiating authority in *Boyce v. Boyce*, *supra*, is a footnote reference to *Pederson v. Pederson*, 107 F. (2d) 227 (D.C. Cir. 1939). However, in *Hurd v. Hurd*, 179 F. (2d) 68 (D.C. Cir. 1949), the instant court found authority for its position. There it is stated, 179 F. (2d) at 69:

... a wife seeking a divorce under the District of Columbia Code is not required to live separate and apart from her husband further than so to segregate herself from him as to avoid condoning acts which she charges as the basis for divorce.

In the instant case the court indicated that it was attempting to fulfill the purpose of the statute and cited *Parks v. Parks*, 116 F. (2d) 556 (D.C. Cir. 1940), as illustrative of a congressional intent to liberalize the divorce law in the District of Columbia and thus permit termination in law of marriages which had ceased to exist in fact. But in the *Parks* case the parties had completely separated for the statutory period, the only question being whether a privately drawn separation agreement signed by the parties during the running of the statutory period could be said to vitiate the voluntary nature of the separation. The holding was that the agreement so executed could not constitute a reconciliation necessary to change the character of the separation.

The courts are peculiarly silent about the legislative history of the statute in these cases, especially so in this latest case which demands an interpretation directly opposed to the weight of authority in other jurisdictions having similar statutes.

The legislative history of the statute, D. C. CODE tit. 16, § 403 (1940), does not expressly or implicitly support the holding in this case. The bill was prepared as a request to Congress to liberalize the

divorce laws of the District of Columbia which at the time allowed divorce *a vinculo* on the grounds of adultery only. The bill so presented did not suggest as one of the grounds for divorce *a vinculo* "separation" of the parties, H. R. REP. No. 1532, 74th Cong., 1st Sess. 4 (1935). The Senate Committee for the District of Columbia amended the pertinent section of the bill by adding additional grounds for absolute divorce, namely separation "for five consecutive years without cohabitation," SEN. REP. No. 720, 74th Cong., 1st Sess. 2 (1935). The House amended this phrase, H. R. REP. No. 1532, 74th Cong., 1st Sess. 4 (1935), as follows: "The '5 year separation' clause is amended by inserting the word 'voluntary' and 'from bed and board for 5 consecutive years without cohabitation.'" The bill was discussed at length on the floor of the House. In support of the House Committee's change of the bill to read "voluntary" and "from bed and board for 5 consecutive years without cohabitation," Mr. Palmisano, a Representative from Maryland, and a member of the Committee, said, 79 CONG. REC. 11592 (1935):

We included voluntary separation and made it from bed and board in order to be certain the parties would not be living under the same roof and cohabitating. This is a provision that is more liberal than the Maryland and Virginia statutes.

The bill was subsequently passed with the amendment as stated, 79 CONG. REC. 11597 (1935). The Senate concurred in the House Amendments and, without further incident, the bill became law. Thus the legislative history of the statute in question shows that the intent of Congress was that the statute should conform in meaning to the generally accepted use of the words, "voluntary separation from bed and board."

The Court of Appeals for the District of Columbia has in the past considered legislative history when it has been in doubt as to statutory interpretation. The writer of the opinion in the instant case clearly pointed up the anomaly which is implicit in a disregard for legislative history when he dissented in *Beach v. United States*, 144 F. (2d) 533, 538 (D.C. Cir. 1944):

I submit this dissent not in defense of the Mann Act but in defense of the authority of Congress. Courts have often construed statutes in novel and questionable ways, but they have not often read an entire phrase completely out of a statute. They did not do so in any of the cases which this court cites. No euphemism can obscure the fact that this court does so when it imposes upon clear and simple words a construction which allows them no effect. It thereby substitutes for a constitutional and relatively democratic legislative process one that is neither democratic nor constitutional.

The Supreme Court added weight to this dissenting opinion by reversing the majority, *United States v. Beach*, 324 U.S. 193, 65 S. Ct. 602, 89 L. Ed. 865 (1945), and by holding that the plain meaning as evidenced by the legislative history should be given effect.



In the present case the court's struggle to clear away the doubt it found in the question is not only something less than objective, but clearly against policies that it has formerly enunciated as guides in interpreting the law when doubt exists.

Howard V. Burke

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LABOR LAW — TAFT-HARTLEY ACT — NON-COMMUNIST AFFIDAVITS OF PARENT UNION OFFICERS AS JURISDICTIONAL PREREQUISITES TO RELIEF BY SUBSIDIARY UNIONS. — *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322, 71 S. Ct. 758, 95 L. Ed. 969 (1951). Highland Park Manufacturing Company refused to obey an order of the National Labor Relations Board requiring it to bargain with the Textile Workers Union of America. The United States Court of Appeals, 184 F. (2d) 98 (4th Cir. 1950), denied the petition of the Board for enforcement of its order and the Board brought certiorari. The Highland Park Manufacturing Company contended that it was not required to bargain with the Union because the officers of the CIO, of which the Textile Workers Union was an affiliate, had not filed non-communist affidavits as required by the Taft-Hartley Act, 61 STAT. 143 (1947), 29 U.S.C. § 159(h) (Supp. 1951), though the officers of the Textile Workers Union had done so. It was argued that because the failure of the officers of the parent union to file the affidavits disabled the affiliate, the Board should not entertain the complaint. The Supreme Court, with two justices dissenting, held that the affiliate could not avail itself of the facilities provided by the Act until the officers of the parent union had filed the affidavits. The Court ruled the CIO was a "labor organization" within the meaning of the statute.

The non-communist affidavit required by the Act has been the subject of stormy controversy. Its constitutionality was upheld against objections that it resulted in a denial of free speech, constituted an ex post facto law and was in effect a bill of attainder. *American Communications Assn., CIO v. Douds*, 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925 (1950).

In Section 159(h) the Taft-Hartley Act provides that the Board shall give no relief to a labor organization

. . . unless there is on file with the Board an affidavit executed . . . by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party. . . .

The instant case raises the interesting question whether the CIO is a "national or international labor organization" within the meaning of the statute. Specifically, should non-compliance on the part of officers

of the CIO, or the AFL, be imputed to labor unions which remain practically autonomous though allied to one of these parent federations?

In *Northern Virginia Broadcasters, Inc.*, 75 N.L.R.B. 11 (1947), the Board ruled that it could entertain the complaint even though the national officers of the AFL had not filed the required affidavits. The Board concluded that it was not the congressional intent to include either AFL or CIO within the non-communist provision of the Act. The rationale was that the constitution of the AFL and the CIO showed them to be federations rather than labor organizations and that affiliates of such federations were self-governing units subject to little direct control. The Board further stated that if complying unions within the federation were to be denied the benefits of the Board's machinery for settling disputes merely because one officer of the AFL or CIO failed to comply, then the complying unions would have no incentive to rid themselves of Communists and employers would be unable to effect peaceful settlements through the Board. In the opinion, 75 N.L.R.B. at 16, it is stated: "Nothing . . . could play more readily into the hands of the dissension-seeking Communist leadership. We cannot believe that Congress intended any such paradoxical result." The same conclusion was reached in *S. W. Evans & Son*, 75 N.L.R.B. 811 (1948), and later in *American Fruit Growers, Inc.*, 75 N.L.R.B. 1157 (1948).

The decision in the instant case resolves the conflicting interpretations in the lower federal courts. In *Oil Workers International Union v. Elliott*, 73 F. Supp. 942 (N.D. Tex. 1947), the court held that the Board could not entertain the complaint of a union so long as the parent organization had not filed the necessary affidavits. There the court reasoned that constituent unions of the CIO influence and shape CIO policy. If the affiliate is denied the right to avail itself of the machinery of the Board because officers of the parent federation refuse to file non-communist oaths, then the affiliate might seek to influence a change in the policy of the parent. The same question was presented to the United States Court of Appeals for the Fifth Circuit in *NLRB v. Postex Cotton Mills, Inc.*, 181 F. (2d) 919 (5th Cir. 1950). There the Board contended that the CIO was a federation having no direct control over its affiliates. The court answered this by stating, 181 F. (2d) at 920:

We think the language of the statute, considered in the light of Congressional purpose, the evil to be remedied, and the means provided to effectuate that purpose, evidences Congressional intent to wholly eradicate and bar from leadership in the American labor movement, at each and every level, adherents to the Communist party and believers in the unconstitutional overthrow of our Government.

The court held the CIO to be a "national labor organization" within the meaning of the Act.

However, in *West Texas Utilities Co. v. NLRB*, 184 F. (2d) 233 (D.C. Cir. 1950), the court held the AFL did not come within the provi-

sions of Section 159(h). The court relied on a report by the Joint Committee on Labor-Management Relations wherein the committee members analyzed and tacitly approved the holding of the Board in *Northern Virginia Broadcasters, supra*, as being consistent with the congressional intent. See SEN. REP. No. 986, 80th Cong., 2d Sess. 11-2 (1948).

It would seem the Supreme Court decided the instant case in accord with the congressional intent. Opponents of the provision pointed out in congressional debate that by including officers of the parent federations in the section requiring the non-communist affidavit, Congress was making it possible for one recusant official to cause a break-down in peaceful negotiating throughout the country. 93 CONG. REC. 6385, 7439 (1947). However, the provision was passed over these objections and a sound conclusion is that Congress intended to include CIO and AFL officials and to preclude any action by the Board concerning unions affiliated with either until all officials had submitted the affidavit.

The purpose of Section 159(h) is to rid the labor unions of Communist influences. *Oil Workers International Union v. Elliott, supra*. It is doubtful whether legislation alone can accomplish this purpose, but it is, at least, a step in the right direction. When the Board refuses to give redress to unions affiliated with the CIO or AFL, it is probable that the affiliates will bring pressure to bear on the parent federations and cause all officials to submit affidavits.

Robert D. Lightfoot

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OIL AND GAS — RIGHTS OF PARTIES AFTER SUBSURFACE SEVERANCE OF MINERAL ESTATE. — *Carter Oil Co. v. McCasland*, 190 F. (2d) 887 (10th Cir. 1951). Carter Oil Co., lessee of the mineral rights in certain land in Oklahoma, assigned to McCasland its rights in the leases to all producing horizons above 4000 feet. It reserved all its interests in the horizons below that depth. A producing horizon was encountered by McCasland slightly above 4000 feet; later, the same sand was encountered by Carter at 4300 feet. Although it was unknown to the parties at the time of the assignment, the formation was an unorthodox one; instead of being comparatively level, it was slanting, dipping at an angle of from 58 to 60 degrees. McCasland sued for a declaratory judgment to determine both parties' rights under the assignment. The trial court made findings of fact concerning the formation and determined that an active water drive in the structure would continue, permitting all the recoverable oil to be extracted through McCasland's wells. Carter claimed a right to drill and produce oil from this formation where it is encountered at a depth of more than 4000 feet. McCasland

claimed a similar right. The decision in the lower court in favor of McCasland was affirmed by the Circuit Court of Appeals for the Tenth Circuit.

The circuit court based its decision on the construction of the instrument and held that Carter intended to grant to McCasland the exclusive right to drill into all producing horizons encountered above 4000 feet and the exclusive right to remove all recoverable oil and gas.

The majority affirmed the trial court's finding that the term "producing horizon" means the point at which a reservoir is encountered and from which the oil and gas may be recovered. Since the assignment conveyed the right to all producing horizons above 4000 feet, and since that term means, according to the court, the point of encounter, it concluded that the entire horizon was conveyed. This construction of the instrument is open to questions which were well answered by the dissenting judge. He doubted the definition of a producing horizon adopted by the trial court and defined it as a producing oil or gas sand. More telling was the assertion that the words of grant and the words of reservation were the same, since it indicates that Carter intended the 4000 foot level to be definite and inflexible. Using the same construction of the assignment applied by the majority, the dissenting judge maintained that Carter reserved the exclusive right to drill and produce all the recoverable oil encountered in producing horizons below 4000 feet. The conclusion of the dissent was that each party had a right in the producing sand, the rights being separated at 4000 feet.

Undoubtedly, the rights in oil and gas may be severed at some depth below the surface, *Palmer Oil Corp. v. Phillips Petroleum Co.*, ...Okla. ..., 231 P. (2d) 997, 1012 (1951), as may interests in other precious minerals. 2 SNYDER, MINES § 998 (1902). The court in the instant case made no attempt to follow general rules of mining law, although the decision has some slight similarity to decisions reached under the "extra-lateral rights" rule. By that rule the owners of land containing the apex of a mining claim may follow the vein under the surface, although it extends outside the vertical sidelines of the surface location. REV. STAT. § 2322 (1875), 30 U.S.C. § 26 (1946); *Grant v. Pilgrim*, 95 F. (2d) 562, 565 (9th Cir. 1938). If this were applied to oil and gas claims, it would seem to give effect to a rule of discovery, which is not the law in Oklahoma. Instead, the rule of capture is applied, *Gruger et ux. v. Phillips Petroleum Co.*, 192 Okla. 259, 135 P. (2d) 485 (1943), except where it has been modified or abrogated in particular instances by the state. *Patterson v. Stanolind Oil & Gas Co.*, 182 Okla. 155, 77 P. (2d) 83 (1938); *H. F. Wilcox Oil & Gas Co. v. Bond*, 173 Okla. 348, 48 P. (2d) 820 (1935).

Under the Oklahoma Unitization Act, OKLA. STAT. tit. 52, § 286. (Cum. Supp. 1949), oil and gas can be extracted from a common

source of supply as though the source were covered by a single lease. This Act was enacted to achieve the greatest possible recovery of oil and gas and it recognized that as a practical matter, the rule of capture often results in economic waste. Under the wording of the Act, it could not be applied in the instant case, but the court, without expressly stating it, possibly arrived at its decision for reasons of conservation. It mentioned the fact that maximum production of recoverable oil and gas could be made through the wells of McCasland.

The formation of the producing horizon in the instant case, as found by the trial court, consisted of a gas cap at the top, oil below, some gas in solution, and considerable water below the oil. It would have as sources of natural energy, solution-gas expansion, gas-cap expansion and water drive. It has been estimated that recovery of oil in place from water-drive reservoirs, under ideal reservoir conditions, might be as high as 85%, although the usual estimate is from 40 to 70%. OIL AND GAS PRODUCTION 46-7 (Engineering Committee, Interstate Oil Compact Commission 1951). See also CONSERVATION OF OIL AND GAS 12 (Murphy ed. 1949) (60-70%); FANNING, OUR OIL RESOURCES 126-30 (2d ed. 1950). If the rule of capture had been applied in this case, Carter would be allowed to drill offset wells into the producing sand at depths below 4000 feet. Even though production would be restricted by the state, OKLA. STAT. tit. 52, § 87.1 (Cum. Supp. 1949), the ultimate recovery of oil would be diminished. It was estimated in a similar structure where offset wells were drilled, again under favorable reservoir conditions, that recovery would be from 20 to 30%. OIL AND GAS PRODUCTION, *supra* at 49.

It is quite possible that Carter would soon be producing only water from its offset wells and much of the oil in place might be coned-off or by-passed. Predictions are, of course, hazardous and the ultimate percentage of oil recovered from the formation would depend on many factors, but unquestionably, maximum utilization of the water-drive energy would be best effected by restricted production and advantageous location of wells. It is doubted that this would be possible if Carter also produced from the horizon. Its wells would necessarily be placed between McCasland's wells and the water, and possibly the water would encroach only to these wells, rather than move all the way up the structure. However, this could be prevented by limiting the production from the Carter wells and capping them at the proper time.

The court did not question the right to sever interests in minerals at depths below the surface. Recognizing that, it apparently found a boundary line at 4000 feet dividing the interests of the parties similar to a boundary line on the surface. In that light the decision is difficult to understand. It perhaps was reached on the cumulative effect of the following considerations. Since Oklahoma is a non-ownership state, *Melton et ux. v. Sneed*, 188 Okla. 388, 109 P. (2d) 509 (1940), the

grant conveyed an exclusive right to drill and produce. McCasland was to drill a test well. The horizon was unknown to the parties at the time of the assignment, but the discovery of some horizon could have been anticipated and provided for by the assignor. The instrument should be construed most strongly against the party who drafted it. 4 TIFFANY, REAL PROPERTY § 978 (3d ed. 1939). This last point should be qualified because leases of oil and gas interests are construed to promote production and prevent delay. *Superior Oil & Gas Co. v. Mehlin*, 25 Okla. 809, 108 Pac. 545 (1910). They are construed, then, against the lessee who is to conduct development. This is still the view of the Oklahoma courts, *Anderson v. Talley*, 199 Okla. 491, 187 P. (2d) 206 (1947), although the reasons for it are no longer thought to be applicable. Veasey, *The Law of Oil and Gas*, 18 MICH. L. REV. 652, 666-7 (1920). The aggregate of these considerations might be said to place the equities on the side of McCasland. These, and the ever-present, most important policy of conservation, are probably the real bases of the decision.

A severance of a producing horizon by a surface boundary has created little difficulty. Each party has an exclusive right to drill and produce from wells on his own tract. The oil or gas becomes the property of the parties as they reduce it to possession. Since a producing horizon may be severed horizontally in the earth as well as vertically by a surface division of land, in strict justice the same rules should apply in both cases. The court in the instant case is holding that the assignor conveyed his interest in oil and gas at all depths above and below 4000 feet if the oil or gas is first encountered above 4000 feet. Principally, the controversy arises because of the holding that "producing horizon" refers to the *point of encounter* of oil or gas sand. This could be avoided by phrasing the assignment so as to convey all rights to oil and gas below a certain depth.

*Robert A. Layden*

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SURETYSHIP — COMPENSATED SURETY — LIABILITY ON BOND. — *Morley v. McGuire*, ....Ark....., 242 S.W. (2d) 112 (1951). McGuire, a partner in Ark-La-Tex Cigarette Service, was appointed stamp deputy by the plaintiff, Commissioner of Revenues of the state of Arkansas, to handle the required cigarette tax stamps used in the partnership business. Pursuant to the provisions of ARK. STAT. ANN. tit. 84, § 2314 (Supp. 1951), McGuire executed and posted a bond with the plaintiff. The defendant, National Surety Company of New York, was surety on the bond. Under the terms of the bond defendant agreed to pay the state the amount of any loss of taxes occasioned by any "fraudulent, neglectful, or dishonest act" of the deputy. Shortly thereafter

McGuire had a disagreement with his partner, Nielson, over business losses and the latter threatened to initiate default on McGuire's bond in order to "cover up" a part of the loss. The deputy notified the defendant of Nielson's plan and his lawyer notified the State Revenue Department. He then locked the doors of the business in order to preserve the records for an examination. However, a few days later, Nielson broke the lock on the doors of the business and took possession. The sole issue presented in the case was whether the surety was liable on the bond in question for the loss sustained by the state. The court, with one judge dissenting, considered McGuire negligent in locking the doors of the business and abandoning it to a hostile partner, and held the surety liable, on the principle that the bond of the surety company, like any other insurance policy, was to be construed most strongly against the "insurer."

The decision emphasizes the disparity in treatment accorded the compensated surety from that which prevails in favor of the voluntary or accommodation surety—the rule of *strictissimi juris*. The case is a classic example of the extent to which a court will go in stretching the liability of a compensated surety.

Under the Law Merchant, an individual "voluntary" or "accommodation" surety was regarded as a favorite of the law. See Loyd, *The Surety*, 66 U. OF PA. L. REV. 40 (1917). This surety did not prepare the contract and often did not even read it. Rarely did he understand its full scope and legal significance. Under these circumstances, courts felt constrained to apply the doctrine of *strictissimi juris*, *State v. Churchill*, 48 Ark. 426, 3 S.W. 352 (1887), entitling the surety to invoke the most tenuous technicalities in order to secure release from the contract. *Crane v. Buckley*, 203 U.S. 441, 27 S. Ct. 56, 51 L. Ed. 260 (1906).

An inspection of the decisions involving the compensated sureties will disclose a judicial approach of an entirely different character. See Arnold, *The Compensated Surety*, 26 COL. L. REV. 171, 172-82 (1926). The courts have reasoned that since the surety companies write their own contracts, insert their own provisions, charge a premium and make a profit, the contract should be construed most strongly against the surety. *National Surety Co. v. Rochester Bridge Co.*, 83 Ind. App. 195, 146 N.E. 415 (1925); *Bryant v. American Bonding Co.*, 77 Ohio St. 90, 82 N.E. 960 (1907). In making this change, many courts have swung so far the other way that they have created a rule of *strictissimi juris* in favor of the obligee to the prejudice of the surety.

In distinguishing the two types of sureties, courts have expressed themselves in varying language. See STEARNS, *THE LAW OF SURETYSHIP* § 5.1 n. 4, 5, 6 (5th ed., Elder, 1951). Often the decisions state simply that the corporate compensated surety is not entitled to the benefit of the rule of *strictissimi juris*. *Feutz v. Massachusetts Bonding*

& Ins. Co., 85 F. Supp. 418, 424 (E.D. Mo. 1949); *Wilmington Housing Authority v. Fidelity & Deposit Co. of Maryland*, 43 Del. 381, 47 A. (2d) 524, 525 (Sup. Ct. 1946); *Fiumara v. American Surety Co. of New York*, 346 Pa. 584, 31 A. (2d) 283, 287 (1943). Other courts have said that the contract will be construed strictly against the surety, *Myers v. Alta Const. Co.*, ...Cal., 235 P. (2d) 1, 3 (1951) (statutory rule of construction); *Barry Finance Co. v. Lanier*, 79 Ga. App. 344, 53 S.E. (2d) 694, 696 (1949); *Bessinger v. National Surety Corp.*, 207 S.C. 365, 35 S.E. (2d) 658, 660 (1945). Many judges have declared that the contract is essentially a contract of insurance and have applied the rule that such contracts are to be construed most strongly against the insurer. *Jack v. Craighead Rice Milling Co.*, 167 F. (2d) 96, 100 (8th Cir.), cert. denied sub nom. *New Amsterdam Casualty Co. v. Craighead Milling Co.*, 334 U.S. 829, 68 S. Ct. 1340, 92 L. Ed. 1756 (1948); *Northwestern Jobbers Credit Bureau v. National Surety Corp.*, 54 F. Supp. 716, 718 (D. Minn. 1944); *Town of City of Peoria v. Rauschkolb*, 333 Ill. App. 411, 78 N.E. (2d) 123, 124 (1948).

On the other hand, many tribunals have presented the view that a contract of suretyship is governed by rules of interpretation applicable to other contracts in general. *Standard Oil Co. of California v. Houser*, 101 Cal. App. (2d) 480, 225 P. (2d) 539, 543 (1950) (statutory rule); *Galesburg Sanitary Dist. v. American Surety Co. of New York*, 308 Ill. App. 457, 32 N.E. (2d) 407, 409 (1941); *Lange v. Board of Education of Cecil County*, 183 Md. 255, 37 A. (2d) 317, 320 (1944); *John McShain, Inc. v. Eagle Indemnity Co.*, 180 Md. 202, 23 A. (2d) 669, 670 (1942); *General Phoenix Corp. v. Cabot*, 300 N.Y. 87, 89 N.E. (2d) 238, 241 (1949); See RESTATEMENT, SECURITY § 90, comment a (1941).

The liability of the corporate surety is often based upon the element of compensation, *Community Bldg. Co. v. Maryland Casualty Co.*, 8 F. (2d) 678, 679 (9th Cir. 1925); *Maryland Casualty Co. v. Eagle River Union Free High School*, 188 Wis. 520, 205 N.W. 926 (1925), and also on the business motive of this surety. *United States v. Hartford Accident & Indemnity Co.*, 117 F. (2d) 503, 505 (2d Cir. 1941); *Atlantic Trust & Deposit Co. v. Town of Laurinburg*, 163 Fed. 690, 695 (4th Cir. 1908). The presence or absence of a premium, however, should not be the determining influence on the court or jury. In *Bench Canal Drainage Dist. v. Maryland Casualty Co.*, 278 Fed. 67, 80 (8th Cir. 1921), the court said:

The enforcement of the express terms of the contract of suretyship cannot be made to depend upon whether the surety is compensated or not. It cannot be one contract when the surety is compensated, and another contract when the surety is not compensated.

Nevertheless, the majority of authorities, with the exception of Texas, *Standard Acc. Ins. Co. v. Knox*, 144 Tex. 296, 184 S.W. (2d) 612



(1944), does not place the contract of a gratuitous surety and that of the compensated surety on the same footing.

There is merit in the contention that the principles of construction should be determined with reference to the draftsman of the contract. Therefore, some courts have held that the strict construction against the surety company does not apply when the wording is not that of the company, but is taken from some other source for which the assured rather than the company is responsible. *Rose v. Ramm*, 254 Mich. 259, 237 N.W. 60 (1931); *Sturgis National Bank v. Maryland Casualty Co.*, 252 Mich. 426, 233 N.W. 367 (1930).

Perhaps the most common legislative and judicial analogy for determining the liability of the compensated surety is that of insurance, as was used in the present case. See VANCE, *INSURANCE* §§ 23-5 (2d ed. 1930). In *Tebbets v. Mercantile Credit Guarantee Co. of New York*, 73 Fed. 95, 97 (2d Cir. 1896), one of the earlier federal opinions interpreting the contract of a corporate surety, this language was used:

Corporations entering into contracts like the one at bar may call themselves "guarantee" or "surety" companies, but their business is in all essential particulars that of insurers, who, upon careful calculation of the risks of such business, and with such restrictions of their liability as may seem to them sufficient to make it safe, undertake to assure persons against loss, in return for premiums sufficiently high to make such business commercially profitable. Their contracts are, in fact, policies of insurance, and should be treated as such.

The efficacy of this analogy has been questioned on the ground that it is merely the application of the general rule that ambiguous language in a contract is construed most strongly against the party employing the language. See Weichelt, *The Contract of the Corporate Surety and its Distinction from One of Insurance*, 9 CHI-KENT REV. 69, 75 (1931). However, it must be remembered that unless there is an ambiguity, there is no reason for construction for or against either party. As the court said in *Leshner v. United States Fidelity & Guaranty Co.*, 239 Ill. 502, 88 N.E. 208, 210 (1909): "Here, however, there is no ambiguity. . . . No room is left for construction." And as the Supreme Court emphasized in *Guarantee Co. of North America v. Mechanics' Savings Bank & Trust Co.*, 183 U.S. 402, 22 S. Ct. 124, 131, 46 L. Ed. 253 (1902): "But this rule cannot be availed of to refine away terms of a contract expressed with sufficient clearness to convey the plain meaning of the parties. . . ." Nor is the liability of a corporate surety to be extended beyond the terms of the contract. *State ex rel. Lawson v. Warren Bros. Roads Co.*, 115 Ind. App. 452, 59 N.E. (2d) 912, 916 (1945); *Art Plate Glass & Mirror Corp. v. Fidelity Construction Corp.*, . . . Md. . . ., 69 A. (2d) 808, 810 (Ct. of App. 1949).

Yet, under guise of construction, courts, as in the present case, have gone to extraordinary lengths to hold the compensated surety liable

on its bond. As pointed out in the dissent to the instant case, 242 S.W. (2d) at 115, "The question of construing the bond against the interest of the bonding company has no place in the opinion as there is no question about what the bond means — the only question involved is that of *carelessness*." For a proper adjudication of the immediate case, the only question which had to be decided was a simple question of fact, whether or not the principal debtor was "neglectful." In the opinion of the writer, the law promulgated by the court was not germane to the issue involved.

Contrary to this case, there appears to be a return to the idea that, while not entitled to the rule of *strictissimi juris*, the compensated surety will not be subjected to a greater liability than the ordinary promisor who draws a contract. *Lange v. Board of Education of Cecil County, supra*; See STEARNS, *supra*, § 5.1. The corporate surety is an institution that is of inestimable benefit to modern business transactions. Its contracts should, like other contracts, be construed according to their terms.

James J. Haranzo

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TAXATION — FEDERAL INCOME TAXES — BONA FIDE RESIDENCE IN FOREIGN COUNTRY REQUIRED FOR EXCLUSION OF INCOME EARNED OUTSIDE UNITED STATES BY AMERICAN CITIZEN. — *Jones v. Kyle*, 190 F. (2d) 353 (10th Cir. 1951). Appellee Kyle went to Saudi Arabia in December, 1944, to work as a pipe fitter in the construction of an oil refinery there. His plans were to stay there for eighteen months but it was understood that he could, if he so desired, remain for a longer time with his employer or other companies in the area. Kyle returned to the United States in May, 1946, and purchased a farm in Oklahoma. A tax return he filed for the year 1945 included income received from the work performed abroad. At a later date he filed a claim for refund of the taxes on the 1945 income and pursued this claim to the federal district court where a judgment was entered in his favor, *Kyle v. Jones*, 92 F. Supp. 600 (W. D. Okla. 1950). From this judgment the Collector of Internal Revenue appealed. With Chief Judge Phillips dissenting, the judgment was reversed and the cause remanded for dismissal.

The taxpayer based his claim for refund on Section 116 (a) of the Internal Revenue Code which, during the taxable period involved, provided that income earned by an individual from sources without the United States shall be excluded from gross income when the individual establishes to the satisfaction of the Commissioner of Internal Revenue that he was a bona fide resident of a foreign country during the entire taxable year. No exclusion was allowed for income earned while in the employ of the United States or its agencies.

To implement this statute the Commissioner promulgated U. S. Treas. Reg. 111, § 29.116-1 (1942), and adopted as a general test of the residence requirement the rules followed in determining the taxable status of resident aliens. Residence, it is declared, is a mixed question of law and fact, and intention is considered to be of primary importance. A mere indefinite intention or an intention ultimately to return to his native land may not cloak an alien with immunity from taxation as a resident, though if he be truly a transient, for instance, if he is in the United States for a short time on a limited undertaking, he may escape taxation. U. S. Treas. Reg. 111, §§ 29.211-2, 29.211-3, 29.211-4, 29.211-5 (1942). By analogy, therefore, an American citizen abroad without a definite intention to remain away, but having a mere floating intention indefinite as to time of return (though intending ultimately to return), could not, before October 20, 1951, escape taxation of income earned from sources outside of the United States.

Section 116 (a) of the Internal Revenue Code was amended by Pub. L. No. 183, 82d Cong., 1st Sess. § 321 (a) (Oct. 20, 1951), so as to exempt income of a citizen of the United States which he earned while living 17 out of 18 consecutive months in a foreign country, whether he was a bona fide resident of the foreign country or not and whether or not he intended to stay longer than the 18 months. Thus, this statute changes the law announced in the instant case for if the appellee had spent his 18 months in Arabia after October 20, 1951, his income earned there would be exempt. But, under the new law, if the stay is for less than 18 months, the old rule requiring proof of bona fide residence in the foreign country in order to win exemption still obtains. And for this reason, the following discussion of the rules governing bona fide foreign residence is appropriate.

The generally accepted reason for exclusion from taxation of income earned from non-Government sources by an American citizen abroad is to stimulate foreign trade and commerce. *Price v. United States*, 87 F. Supp. 901, 903 (N. D. Ill. 1949). After the adoption of the Sixteenth Amendment to the United States Constitution, the first act to make specific provision for income of non-resident citizens was the Revenue Act of 1926, § 213 (b) (14), 44 STAT. 26 (1926). Under this Act, income earned outside of the United States was excluded so long as the individual citizen was a bona fide non-resident of the United States for more than six months during the taxable year. The requirement of bona fide non-residence was retained until the Revenue Act of 1942, § 148 (a), 56 STAT. 841 (1942), which changed the residence requirement to bona fide residence in a foreign country for the entire taxable year.

Litigation which arises generally revolves about a question of the nature and duration of the residence along with any other factors that may reveal the taxpayer's intention. On the basis of the doctrine that

exemptions from taxability are matters of legislative grace, the statutes usually are strictly construed in favor of the Government. *Helvering v. Northwest Steel Rolling Mills, Inc.*, 311 U. S. 46, 49, 61 S. Ct. 109, 85 L. Ed. 29 (1940). Thus, with respect to workers living abroad whose activities were associated with, or even incidental to, the war effort, one court said that they were practically, except for geography, on American soil even though in a foreign country and under a limited consent of a foreign power. *Downs v. Commissioner*, 166 F. (2d) 504, 509 (9th Cir.), *cert. denied*, 334 U. S. 832, 68 S. Ct. 1346, 92 L. Ed. 1759 (1948).

It is difficult to formulate a clear-cut rule as to the test to be applied to establish the right to exclusion. The district court in the cited case noted that "residence" and "domicile" are slippery terms. It is generally conceded in the cases that residence means living in a particular locality, that is, a mere bodily presence in a certain place, while domicile means living in a locality with intention to make it a fixed and permanent home. In re *Newcomb's Estate*, 192 N. Y. 238, 84 N. E. 950, 954 (1908). "Intention" makes the difference, and along with the element of permanence, it is made a factor in the determination of bona fide residence, albeit not an exclusive one. For this reason decisions have required more than mere physical presence in a foreign country, which was the basis found sufficient in the original hearing of the cited case.

In the "war workers" cases, consideration is given to whether the individuals live in temporary quarters, such as barracks furnished by the employer, whether they are subject to limitation on movement by the military or the company, as well as to their intention to return ultimately to the States. *Carl H. Thorsell*, 13 T. C. 909 (1949); *William B. Cruise*, 12 T. C. 1059 (1949); *Dudley A. Chapin*, 9 T. C. 142 (1947); *Ralph Love*, 8 T. C. 400 (1947); *Michael Downs*, 7 T. C. 1053 (1946), *aff'd*, *Downs v. Commissioner*, *supra*; *Arthur J. H. Johnson*, 7 T. C. 1040 (1946). On the other hand, when confronted with the geophysicists participating in a world-wide search for oil, whose residence was where they hung their hat, the mode of living faded in significance and "continuous and unbroken living there for four years was 'residence.'" *Swenson v. Thomas*, 164 F. (2d) 783, 784 (5th Cir. 1947), *reversing* 68 F. Supp. 390 (N. D. Tex. 1946). To the same effect is *Audio Gray Harvey*, 10 T. C. 183 (1948). That the "war workers" often did not engage in the life of the community in which they lived was raised against them, but that the exploring engineers did not partake in community life and that they were forbidden by employment contracts to engage in local politics received little attention. That the citizen abroad may pay taxes to the country in which he resided was a factor in the taxpayer's favor in the *Swenson* and *Harvey* cases, *supra*, but that he did not was not controlling against him in

*White v. Hofferbert*, 88 F. Supp. 457 (D. Md. 1950); *David E. Rose*, 16 T. C. 30 (1951). Nor does the fact that his wife remained in the United States bar a finding in his favor, *Seeley v. Commissioner*, 186 F. (2d) 541, 544 (2d Cir. 1950), reversing in part and affirming in part, 14 T. C. 175 (1950).

The cases involving foreign service careerists are found far easier to deal with since exemption of their income, earned from sources without the United States, can be justified as falling within the general purpose of the statute offering inducements to foreign trade and commerce. In these cases the individual often works for an overseas branch of an American company, pursuing his employment in one or several different countries with a more or less indefinite intention of remaining in foreign employment for a lengthy period. Often he establishes and maintains a home for his family abroad, although the fact that he does not, whether due to war-time restrictions on travel, illness, or other causes, is not necessarily controlling, *White v. Hofferbert, supra, David E. Rose, supra*; but that the taxpayer did move his family abroad is given consideration in his favor, *Myers v. Commissioner*, 180 F. (2d) 969, 970 (4th Cir. 1950). Under pre-1943 law when the requirement was for bona fide non-residence in the United States, the location of the taxpayer's family carried weight in the determination of the right to exclusion, *Commissioner v. Fiske's Estate*, 128 F. (2d) 487 (7th Cir. 1942), *Commissioner v. Swent et ux.*, 155 F. (2d) 513 (4th Cir. 1946). Nor do vacations or business trips back to the States cut the individual off from the statutory exemption, for the legislative history of the various acts, as brought out in some of the decisions, embraced consideration of both vacations and business trips, *Myers v. Commissioner, supra; White v. Hofferbert, supra, David E. Rose, supra*.

There has been no comprehensive congressional action to clarify the nebulous status of the bona fide residence requirement. And only recently has Congress followed the suggestion by President Truman in his tax message of January 1950, [1950] U. S. C. Cong. Serv. 1349, 1354, that the foreign residence requirement for exemption of income earned abroad be liberalized in an effort to support financial and technical assistance to under-developed regions of the world.

The citizen about to engage in foreign service should consciously plan his actions with a view to the tax consequences. One author has outlined six recommendations to be followed by the individual: (1) execution of a contract with the employer consistent with an intention to become a resident of the foreign country; (2) declarations required for visas and passports to show an intention to remain away as long as consistent with the contract, with an intention to become a resident of the foreign country; (3) establishment of a "home" abroad, and participation in community life; (4) moving his family abroad; (5) compliance with local laws, particularly the local tax laws, and; (6)

non-withholding by the employer of taxes from the employee's wages earned abroad and no payment of estimated taxes on such salary. Halstead, *Tax Planning for Americans Working in Foreign Lands*, 28 TAXES 861 (1950).

In any case it is clear that the grasp of the tax gatherer is ubiquitous as well as certain, and like death, it may reach around the world to exact his toll.

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TORTS — NEGLIGENCE — RIGHT OF CHILD TO RECOVER FOR PRENATAL INJURIES. — *Woods v. Lancet*, 303 N. Y. 349, 102 N. E. (2d) 691 (1951). Plaintiff, an infant suing through his guardian ad litem, alleged that while he was in his mother's womb in the ninth month of her pregnancy, he suffered, by reason of the defendant's negligence, injuries that caused him to be born permanently disabled. The trial court dismissed the complaint on the ground that it failed to state a cause of action and the New York Supreme Court affirmed. 278 App. Div. 913, 105 N. Y. S. (2d) 417 (1st Dep't 1951). The Court of Appeals reversed and held the action maintainable, overruling *Drobner v. Peters*, 232 N. Y. 220, 133 N. E. 567 (1921), which denied that there could be an action in the name of a child to redress injuries incurred while viable in the womb. The instant court stated, 102 N. E. (2d) at 694, that it was bringing its case law on the subject into harmony with modern scientific knowledge and that a court acts in the finest common law tradition when it alters "decisional law to produce common-sense justice."

The troublesome issue illustrated by the instant case is whether a viable fetus has such a legal existence as will give rise to an action in tort for injuries inflicted negligently.

Until recently an overwhelming majority of cases in both England and in the United States denied the right of a child to sue for an injury incurred prior to birth. *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 56 N. E. 638 (1900); *Smith v. Luckhardt*, 299 Ill. App. 100, 19 N. E. (2d) 446 (1939); *Walker v. Great Northern Railroad of Ireland*, 28 L. R. Ir. 69 (1890). The same rule has been applied in actions for wrongful death or under survival statutes. *Stanford v. St. Louis-San Francisco Ry.*, 214 Ala. 611, 108 So. 566 (1926); *Bliss v. Passanesi*, 326 Mass. 461, 95 N. E. (2d) 206 (1950); *Newman v. Detroit*, 281 Mich. 60, 274 N. W. 710 (1937); *Buel et ux. v. United Rys. of St. Louis*, 248 Mo. 126, 154 S. W. 71 (1913); *Drabbels v. Skelly Oil Co.*, ....Neb....., 50 N. W. (2d) 229 (1951); *Magnolia Coca Cola Bottling*

*Co. v. Jordan et ux.*, 124 Tex. 347, 78 S. W. (2d) 944 (1935). These courts justified their decisions by arguing that the unborn child was a part of the mother when the injury occurred and that any damage to it, if recoverable at all, should be recovered by the mother. This was a principal reason relied upon by Justice Holmes in the leading case of *Dietrich v. Northampton*, 138 Mass. 14, 17 (1884). In that case the child was nonviable, yet many American courts have cited it as a precedent for denying relief in actions similar to the cited case. Other arguments used by these courts were that proximate cause would be extremely difficult to prove and that courts would face a burdensome task in dealing with fraudulent claims.

Within the past two decades several states have allowed recovery for prenatal injuries to the viable fetus. The California court, in *Scott v. McPheeters*, 33 Cal. App. (2d) 629, 92 P. (2d) 678, 682 (1939), allowed a recovery by upholding the California Code, CAL. CIV. CODE § 29 (1949), which includes, as a person, one yet unborn. The Ohio Supreme Court, in *Williams v. Marion Rapid Transit, Inc.*, 152 Ohio St. 114, 87 N. E. (2d) 334 (1949), held that a viable child is a person within its state constitution and entitled to all the rights guaranteed thereunder. The child, when born, was allowed a cause of action against a party committing an injury to it while viable in its mother's womb. To deny recovery would "deprive the infant of the right conferred by the Constitution. . . ." 87 N. E. (2d) at 340.

In a recent Minnesota case, *Verkennes v. Corniea*, 229 Minn. 365, 38 N. W. (2d) 838 (1949), it was held that a cause of action was maintainable by the personal representative of an unborn child if the child was capable of a separate and independent existence at the time of injury. In *Tucker v. Howard L. Carmichael & Sons, Inc.*, 208 Ga. 201, 65 S. E. (2d) 909 (1951), the Supreme Court of Georgia upheld the right of an infant to sue for prenatal injuries even in the absence of a statute authorizing the action. The court stated, 65 S. E. (2d) at 912:

We are content to say that for the reasons set forth in this opinion we are satisfied that, without any legislative action, courts of Georgia have the authority now, based upon the common law, to grant such relief. . . .

A federal court, in *Bonbrest v. Kotz*, 65 F. Supp. 138 (D. D. C. 1946), discussed the majority view which refused to allow such causes of action, but adopted the minority view. The court applied the same test — viability — which the minority courts use in determining whether a cause of action will lie for damages to a child *en ventre sa mere*, stating, 65 F. Supp. at 141:

It has, if viable, its own bodily form and members, manifests all of the anatomical characteristics of individuality, possesses its own circulatory, vascular and excretory systems and is capable *now* of being ushered into the visible world.

The law in New York prior to the principal case is well illustrated by *Drobner v. Peters, supra*, wherein Justice Pound stated, 133 N. E. at 568:

. . . I cannot bring myself to the conclusion that plaintiff has a cause of action at common law. The injuries were, when inflicted, injuries to the mother. No liability can arise therefrom except out of a duty disregarded, and defendant owed no duty of care to the unborn child in the present case apart from the duty to avoid injuring the mother.

However, in the instant case the Court of Appeals of New York agreed with the modern trend. The court discussed the law of the jurisdiction and the legal thought that had developed in the intervening thirty years since *Drobner v. Peters, supra*. The court noted the trend of the decisions permitting recovery in cases of this type, pointing out that a lack of precedents no longer existed. 102 N. E. (2d) at 694.

Behind this immediate decision stands a question of conflicting legal philosophies. The question involved is whether the cause of action for prenatal injuries should be created by judicial decisions rather than by legislative action. An able dissent in the case under discussion noted, 102 N. E. (2d) at 695, that the legislature could devise statutes denoting the stage at which a fetus is viable, setting time limitations for bringing the action and providing adequate preventive measures against fraudulent claims far better than could the court in deciding a single case before it. The majority adhered to the judicial prerogative of advancing the common law where necessary to conform to the needs of justice. Judge Desmond, author of the majority opinion, refuted the argument for legislative action advanced by the dissenting justice when he stated, 102 N. E. (2d) at 694, that "we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule." This view was reiterated in *Bonbrest v. Kotz, supra*, where the court cited POUND, *THE SPIRIT OF THE COMMON LAW* 181 (1921), quoting, 65 F. Supp. at 142:

Anglo-American law is fortunate indeed in entering upon a new period of growth with a well-established doctrine of lawmaking by judicial decision.

*Daily v. Parker*, 152 F. (2d) 174 (7th Cir. 1945), exemplifies the view that courts can create new causes of action, without the aid of a statute, when the justice of the case so demands. In that case the court permitted a recovery by minor children against a woman who had enticed their father away. Admitting lack of precedents for the action the court said, 152 F. (2d) at 177:

They [the judiciary] are ever looking for precedents, as they should be. If none be found, however, they may not give up, — lost in darkness. The situation is not hopeless. In a society as complex as ours, rare is the situation where precedents cannot be found. And even in the common law, in 1945, if no precedents be found, courts can hardly be advisedly called radical if they indulge in lawmaking by decisions, or in a word, engage in judicial empiricism.