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Divorce - Alimony - Support Money - Liability of Husband's Estate

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CASE NOTES

DIVORCE — ALIMONY — SUPPORT MONEY — LIABILITY OF HUSBAND'S ESTATE. A wife and husband were divorced. The husband was ordered to pay certain sums to the wife monthly for the support of the children "until further order of the court." Thereafter, the husband died testate, devising his real estate to one of the children and charging the real estate with thte just payment of his debts. The plaintiff, administrator of the estate, petitioned the court to remove any cloud on the title to the real estate. The wife, as guardian of the other children, interposed as defendant to establish a lien on the estate of the deceased husband for the future payments of support money to become due to the minor children and demurred to the petition. On appeal, it was *held*, that payments for support money which had accrued during the lifetime of the husband might be enforced as a lien on his estate, but payments to become due after his death could not be enforced against his estate, real or personal, and the demurrer was overruled. *Robinson v. Robinson*, 50 S.E. 2d 455 (W.Va. 1948).

At common law, alimony was decreed only *pendente lite* and in the case of a separation *a mensa et thoro*. It was not granted incident to a divorce *a vinculo* where the marriage was treated as having been void *ab initio*. This was on the theory that since there had never been a marriage relation, there could be no incidental duty of support.[1] Since the causes of absolute divorce have been enlarged, alimony has been extended to include the allowance decreed the wife in gross or periodical in the case of a divorce *a vinculo*.[2] The payment of alimony and the payment of support money to a child were viewed at common law as an obligation in lieu of the husband's duty of support arising out of the marital relation.[3] While it is clear that arrears of alimony[4] and support money for a child[5] will attach to the estate of a deceased husband, two contrary views are found in the cases as to whether payments of alimony and support money to become due after the death of the husband will attach to the estate. The common law view adopted by the court in the instant case, and by most courts, notwithstanding statutes which might permit a different result,[6] is that the husband's obligation to pay alimony and support money continues only in lieu of the husband's common law duty to support a wife and children and therefore terminates upon his death.[7] The most important reasons for not allowing future payments to the wife or child to attach to the estate of the deceased husband are: (1) the husband's obligation of support could

[1] Lynde v. Lynde, 67 N.J.L. 582, 52 Atl. 694 (1902).

[2] Pryor v. Pryor, 88 Ark. 302, 114 S.W. 700 (1908); *cf.* De Roche v. De Roche, 12 N.D. 17, 94 N.W. 767 (1903). *But cf. In re* Spencer, 83 Cal. 460, 23 Pac. 395 (1890).

[3] Blades v. Szatai, 151 Md. 644, 135 Atl. 841 (1927).

[4] Knapp v. Knapp, 134 Mass. 353 (1883).

[5] Lukowski v. Lukowski, 108 Mo. App. 204, 83 S.W. 274 (1904).

[6] Rice v. Andrews, 127 Misc. 826, 217 N.Y. Supp. 528 (1926).

[7] *E.g.*, Wilson v. Hinman, 182 N.Y. 408, 75 N.E. 236 (1905); *cf.* Barry v. Sparks, 306 Mass. 80, 27 N.E. 2d 728 (1940); *see* De Roche v. De Roche, 12 N.D. 17, 20, 94 N.W. 767, 769 (1903). *Contra*: Smith v. Smith, 200 Cal. 654, 254 Pac. 567 (1927).

not continue when the husband could not enjoy the reciprocal right to the child's society and services after death;[8] (2) a liability could not be created after the husband's death to defraud creditors and frustrate testamentary intent,[9] or upset statutory descent;[10] and (3) in the case of the wife, it would be unjust to base alimony on the estate of the husband when it is usually based on his income.[11]

The second view, in conflict with the common law rule, is that liability for future payments of alimony[12] and child support[13] to become due after the death of the husband may attach to the estate of the husband by the terms of the decree[14] where the statutes[15] are broad enough to permit a modification of the common law rule.[16] But usually before the second theory will apply there must be an agreement of the parties that payments are to continue after the death of the husband, and the court must specifically include the agreement as a part of the decree.[17] A few of the reasons for this rule are based on public policy: First, any dower right of the wife is cut off by divorce even though such divorce resulted from the wrongful act of the husband.[18] Secondly, in the case of the child of divorced parents, liability for the payment of support money should attach to the estate of the father since the marriage relation does not remain intact as it did at common law and, because of the fault of the father, the child is in effect being made a ward of the court by that divorce.[19] Lastly, there is a great possibility that the father will not provide for the children by will when the father and children are separated.[20] Assuming that there has been an agreement of the parties that payments are to continue after death, and that the court exhibits an intent to the same effect by the terms of the decree, courts that allow a broad construction of statutes in derogation of the common law will generally interpret decrees for alimony (1) during the joint lives of the parties,[21] (2) until further order of the court,[22]

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[8] Rice v. Andrews, 127 Misc. 826, 217 N.Y. Supp. 528 (1926).

[9] Robinson v. Robinson, 50 S. E. 2d 455 (W. Va. 1948); *cf.* Schultze v. Schultze, 66 S.W. 56 (Tex. Civ. App. 1901).

[10] Carey v. Carey, 163 Tenn. 486, 43 S.W. 2d 498 (1931). *See* Robinson v. Robinson, 50 S.E. 2d 455, 462 (W. Va. 1948). (Justice Haymond dissented, citing Fisher's Executor's v. Hartley, 48 W. Va. 339, 37 S.E. 578 (1900), a case which held that a claim is merged in the judgment when it is rendered and the origin of the claim is of no consequnce thereafter).

[11] Wilson v. Hinman, 182 N.Y. 408, 75 N.E. 236 (1905). *But cf.* Hale v. Hale, 108 W. Va. 337, 150 S.E. 748 (1929).

[12] Murphy v. Shelton, 83 Wash. 180, 48 P. 2d 247 (1935).

[13] Stone v. Bayley, 75 Wash. 184, 134 Pac. 820 (1913).

[14] *E.g.*, Edelman v. Edelman, 199 P.2d 840 (Wyo. 1948); *cf.* Fitzpatrick v. Fitzpatrick, 127 Minn. 96, 148 N.W. 1074 (1914).

[15] E. g., Wash. Rev. Stat. Ann. (Remington Supp. 1947) §988.

[16] E.g., Garber v. Robitshek, 226 Minn. 398, 33 N.W. 2d 30 (1948); see 19 Miss. L. J. 249 (1948). *But cf.* Blades v. Szatai, 151 Md. 644, 135 Atl. 841 (1927).

[17] Prime v. Prime, 172 Ore. 34, 139 P. 2d 929 (1940); *cf.* Brandon v. Brandon, 175 Tenn. 463, 135 S.W. 2d 929 (1940); *But cf. Ex parte* Harte, 94 Cal. 254, 29 Pac. 774 (1892).

[18] Murphy v. Shelton, 83 Wash. 180, 48 P. 2d 247 (1935); *cf.* Murphy v. Moyle, 17 Utah 113, 53 Pac. 1010 (1898).

[19] Miller v. Miller, 64 Me. 484 (1874).

[20] 62 Harv. L. Rev. 1079 (1949).

[21] Goff v. Goff, 60 W. Va. 9, 53 S.E. 769 (1906).

or (3) for the life of the wife[23] as creating a liability for future payments which will attach to the estate of the husband. A decree for alimony alone[24] or until remarriage[25] will not create a lien on the estate of the husband for future payments. In the case of a child, a decree for support money until further order of the court,[26] for a period of years[27] with a lien on the father's property as security,[28] or during the minority of the child will generally create a lien on the father's estate for payments after death.[29] A decree for the support of the child, without more, will not.[30]

The instant case illustrates a situation governed by nearly equal opposing authority. A more equitable result could be reached under the broad terms of the statutes[31] by making the decree explicit that payments of alimony and support money shall continue after the death of the husband and be a lien on the estate whether or not the original decree embodied an agreement of the parties.[32] This decree should be subject to modification on the basis of the size of the estate, the claims of creditors, and the needs of other beneficiaries.[33]

THOMAS W. BENSON
Second Year Law Student.

TAXATION — INCOME TAX — APPLICABILITY OF CAPITAL GAINS PROVISIONS TO SALES OF FARM ANIMALS. A farmer whose principal income was derived from the sale of dairy products and hogs maintained a herd of dairy cattle and a breeding herd of hogs. Dairy cows no longer desirable for milk production and the breeding herd of hogs were sold on the open market and replaced by younger stock each year, in order to maintain the efficiency of the herds. The farmer reported the proceeds received from such sales as capital gains, thereby receiving the benefit of a lower income tax rate. The commissioiner of internal revenue determined that the farmer had not paid enough taxes on the income so derived. On appeal, the United States Court of Appeals for the Eighth Circuit *held*, that such sales were not sales in the ordinary course of business but instead were sales of capital assets, and reversed the determination of the commissioner. *Albright v. United States.* 173 F. 2d 339 (8th Cir. 1949).

It is, of course, fundamental in tax law that income from the sale of capital assets is taxable at a lower rate than ordinary income. The

[22] Hale v. Hale, 108 W. Va. 337, 150 S. E. 748 (1929); *cf.* Miller v. Miller, 64 Me. 484 (1874).

[23] Farrington v. Boston Safe Deposit Co., 280 Mass. 121, 181 N.E. 779 (1932); *cf.* Murphy v. Shelton, 83 Wash. 180, 48 P. 2d 247 (1935).

[24] Brandon v. Brandon, 175 Tenn. 463, 135 S.W. 2d 929 (1940).

[25] Parson v. Parson's Estate, 70 Colo. 333, 201 Pac. 559 (1921).

[26] Newman v. Burwell, 216 Cal. 608, 15 P. 2d 511 (1932); *cf.* Creyts v. Creyts, 143 Mich. 475, 106 N.W. 1111 (1906).

[27] Gainsburg v. Garbarsky, 157 Wash. 537, 289 Pac. 1000 (1930).

[28] Garber v. Robitshek, 226 Minn. 398, 33 N.W. 2d 30 (1948).

[29] Murphy v. Moyle, 17 Utah 113, 53 Pac. 1010 (1898).

[30] Carey v. Carey, 163 Tenn. 486, 43 S.W. 2d 498 (1931).

[31] *E.g.*, N. D. REV. CODE (1943) §§14-0524, 14-0525, 14-0908, 14-0912.

[32] 62 Harv. L. Rev. 1079 (1949).

[33] See Guinto v. Lore, 159 Fla. 448, 31 So. 2d 704 (1947) (dissenting opinion.)

capital gains provision of the Internal Revenue Code provides that "property held by the taxpayer primarily for sale to his customers in the ordinary course of his trade or business"[1] is not to be considered a capital asset. The effect of the instant case is to broaden the interpretation of this provision to include animals sold from dairy and breeding herds when the stock has been held for a period exceeding six months and the profit realized from the sale is only incidental to the purpose of maintaining the operating efficiency of the herds. The fact that property is purchased for other purposes than that of resale, however, does not mean that it cannot become "property held by the taxpayer primarily for sale to his customers in the ordinary course of his trade or business." Thus, where a farmer purchased land with the original purpose of raising vegetables but subsequently conveyed the land to a bank for the purpose of having it subdivided and sold, it was held in *Richards v. Commissioner*[2] that resulting sales were in the ordinary course of business and therefore not taxable at capital gains rates. This decision should be compared with the decision in *Phipps v. Commissioner*,[3] which held that where a taxpayer subdivided land into some seventy lots which were offered for sale, proceeds obtained from the sale of the lots were capital gains where it could not be said that the taxpayer had actively engaged in the business of selling real estate, but had instead merely held the land with the expectation of selling it if a good price was offered. Where the taxpayer was a dealer in securities and held his personal investments apart from his business, the personal investments have been held to be capital assets on the theory that the securities were not "property held by him primarily for sale to his customers in the course of his trade or business."[4] Even standing timber on the land of a partnership engaged in the business of manufacturing lumber and selling it at wholesale has been held to be a capital asset, and not property held for sale in the ordinary course of trade.[5] The basic principle expressed in these cases appears to be that property will be treated as a capital asset where its sale does not constitute a primary economic activity of the taxpayer from which his livelihood is regularly derived.

The question in the instant case became of considerable importance in 1944 when I.T. 3666[6] was issued in response to requests for advice concerning the application of the Internal Revenue Code's capital gains provisions to gains and losses from the sale or exchange of livestock ac-

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[1] INT. REV. CODE §117 (j). In addition to the requirement that the taxpayer must not hold the animals primarily for sale to customers in the ordinary course of his trade or business, the taxpayer must also show: (1) that the animals sold were used in his trade or business; (2) that they were held for more than months; (3) that they were subject to allowance for depreciation; and (4) that they were not property of the kind includible in the inventory of the taxpayer at the close of the taxable year.

[2] 81 F.2d 369 (9th Cir. 1936).

[3] 54 F. 2d 469 (2d Cir. 1931). See, also, Pope v. Commissioner, 77 F. 2d 599 (6th Cir. 1935); Edward E. Trost, 34 B.T.A. 24 (1936); Peter A. Miller, 20 B.T.A. 230 (1930); John M. Welch, Sr., 19 B.T.A. 394 (1930).

[4] Clinton Gilbert, Jr., Executor, 20 B.T.A. 765 (1930). *Accord*, Edward E. Trost, 34 B.T.A. 24 (1936); Francis M. Weld, 31 B.T.A. 600 (1934); William W. Vaughan, 31 B.T.A. 548 (1934); Albert Raiss, 21 B.T.A. 593 (1930).

[5] Carroll v. Commissioner, 70 F. 2d 806 (5th Cir. 1934).

[6] 1944 CUM. BULL 176.

quired or raised and retained for draft, breeding, or dairy purposes. Such livestock is property used in the trade or business, subject to depreciation if it is held for more than six months. The Internal Revenue Bureau decided, however, that, "The sale of animals culled from the breeding herd as feeder or slaughter animals in the regular course of business is not to be treated as th sale of a capital asset."[7] In a subsequent statement, animals "culled from the breeding herd" were defined as those animals which, "due to injury, age, disease, or for any other reason . . . are no longer desired by the livestock raiser for breeding purposes . . . The primary factor is the normal practice in the case of the particular taxpayer involved."[8] It is significant to note that no reference was made to "culls" in the case of stock used for draft or dairy purposes. Literally, the rulings applied, with reference to sales of culls from breeding herds, only to livestock breeders regularly engaged in raising livestock for sale on the market as feeders or for slaughter. Thus, sales such as those in the principal case were not covered, because the animals in question were sold for the economical operation of the farmer's business and were not held as feeders or slaughter animals in the regular course of business. In 1947, however, the commissioner of internal revenue specifically ruled that sales of the type found in the principal case were also included in the scope of the two rulings referred to above.[9] The commissioner's interpretation of the law in holding that sales from dairy herds, made primarily to keep the herd at a high peak of efficiency, were similar in principle to sales of feeders or slaughter animals, seems contrary to the intent of congress expressed in the applicable section of the Internal Revenue Code.[10] The capital gains provision was intended as a relief measure applicable alike to all taxpayers within its provisions.[11] As the relief granted by this provision does not apply to property held by a taxpayer "primarily for sale to customers in the ordinary course of this trade or business", the words, "in the ordinary course of his trade or business" are important in that they make the application of the exception depend on the practice regularly followed by the farmer as to what animals he sells. This point is brought out in I.T. 3712[12] in the

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[7] *Id.* at 272.

[8] I.T. 3712, 1945 CUM. BULL. 176.

[9] Letter of Commissioner dated Aug. 4, 1947, see 1949 C.C.H. Fed. Tax Guide ¶261.

[10] The Revenue Act of 1924 provided that the term "capital assets" did not include ". . . property held by the taxpayer primarily for sale in the course of his trade or business." Revenue Act of 1924, §208 (8), 43 STAT. 263 (1924). The words "to his customers" and "ordinary" were inserted by the Revenue Act of 1934, so that capital assets did not include" . . . property held by the taxpayer primarily for sale *to his customers* in the *ordinary* course of his trade or business." Revenue Act of 1934, § 117 (b), 48 STAT. 714 (1934). (Italics added). The effect of these amendments was to restrict and more clearly define what sales constituted transfers of capital assets, in accordance with the interpretation the courts had placed on the Revenue Act of 1924. See cases cited note 4, *supra.*

[11] H. R. REP. No. 2333, 77th Cong., 2d Sess. 53-4 (1942), 1942-2 CUM. BULL. 372, 415; SEN. REP. No. 1631, 77th Cong., 2d Sess. 50 (1942), 1942-2 CUM. BULL. 504-45.

[12] 1945 CUM. BULL. 176.

statement that "the primary factor is the normal practice in the case of the particular taxpayer involved." The question is a matter of the taxpayer's purpose and intention in acquiring the property and during his term of ownership, to be determined from his testimony as to his intention, the circumstances surrounding the acquisition, use and disposal of the property, the character of the business involved and the character of the property.[13] Since the decision of the principal case several recent cases in the Tax Court have followed the precedent it set.[14] The effect of these decisions on the North Dakota farmer will be to grant him the benefits of the capital gains provisions in the sale of cows held by him for dairy purposes and in the sale of his breeding herd of hogs, so that the farmer will report only 50 per cent of the gains realized from the sales of such animals if they were held for more than six months.

AUREL L. EKVALL
Second Year Law Student

TORTS — NEGLIGENCE — PROXIMATE CAUSE — CAUSAL CONNECTION. The plaintiff was riding as a guest with her husband when the husband negligently ran into a cow which had strayed onto the road. The cow was knocked down and stunned. Plaintiff left the car to inform the cow's owner, but turned back and was returning to the automobile when the stunned cow got up and ran into her, causing severe personal injuries. Plaintiff brought an action against the insurer of her husband's car, contending that her husband's negligence had been the proximate cause of her injuries. The Wisconsin court, accepting testimony that a cow's natural instinct on regaining consciousness under such circumstances is to "leave the place where it was injured as soon as possible", *held*, that no superseding acts had broken the chain of causation between plaintiff's injuries and her husband's negligent act and sustained a judgment in favor of the plaintiff. *Brown v. Travelers Indemnity Co.*, 251 Wis. 188, 28 N.W. 2d 306 (1947).

Courts today will go far in holding the original actor responsible for subsequent injuries caused by his negligent acts.[1] The instant case is well supported by *Hatch v. Snail*[2] where the defendant, driver of an automobile, negligently overturned his car in rounding a curve. In normal response to the situation thus created, plaintiff, a guest in the automobile, and the other occupants of the overturned car tried to right it. Plaintiff was injured in the attempt and brought an action. It was held that an intervening act of this type was a normal response to the stimulus of the situation created by the driver's negligent conduct and was not a superseding cause of injury, and plaintiff was allowed recovery. In *Kramer v. Chicago, Milwaukee, St. Paul and Pacific R. Co.*,[3] the plaintiff, an employee of the defendant railroad, tried

[13] Ben L. Carroll, 21 B.T.A. 724 (1930).
[14] Isaac Emerson, 12 T.C. No. 115 (1949); Fawn Lake Ranch Co., 12 T.C. No. 153 (1949).

[1] See Eldredge, *Culpable Intervention as Superseding Cause*, 86 U. PA. L. REV. 121 (1937).
[2] 249 Wis. 183, 23 N.W. 2d 460 (1946).
[3] 226 Wis. 118, 276 N.W. 113 (1937).

to stop some rolling freight cars after noticing that a coupling had failed and that an accident was likely to occur if they were not halted. In attempting to apply the brakes, he was injured. It was held that the plaintiff's intervening act was a normal response and did not bar his recovery, though the case was reversed on other grounds. The length to which a court will go in holding an original actor liable is graphically illustrated by the decision in *Lynch v. Fisher*.[4] In that case, a truck-driver parked his truck on the highway in an unlawful and negligent manner and another automobile ran into it through the negligence of its driver, a man named Gunter. Plaintiff, witnessing the collision, ran to the scene and pulled Gunter and his injured wife from the car, which was on fire. While pulling a mat out as a cushion for Mrs. Gunter, plaintiff discovered a pistol on the floor of the car and handed it to Gunter to hold. Gunter, temporarily deranged from shock and the effect of the accident, thereupon shot the plaintiff. Plaintiff sued both Gunter and the trucking concern and won, the opinion stating that the concurrent negligence of Gunter and the truck-driver was sufficient to support a cause of action against them.

The instant case represents a liberalization of the law originally developed on this subject. Thus, in *South-Side Passenger Ry. Co. v. Trich*,[5] the plaintiff was injured after the driver of a streetcar on which she was riding whipped up his horse suddenly to avoid a collision with a runaway horse which was coming toward the car. The resulting bounce or jolt from the increased speed caused plaintiff to fall from the rear platform of the car, alighting on her feet in the street unhurt, where she was struck by the runaway horse, knocked down and injured. It was held that the negligence of the streetcar driver in urging his horses to a faster gait was not the proximate cause of the plaintiff's injury. The Pennsylvania court apparently applied the test of whether the accident which occurred was foreseeable. It has been stated that this case is probably no longer law.[6] The principal case appears to be a striking example of the rule given in RESTATEMENT, TORTS, § 443 (1943), which states that, "an intervening act of a human being or animal which is a normal response to the stimulus of a situation created by the actor's negligent conduct, is not a superseding cause of harm to another which the actor's conduct is a substantial factor in bringing about." In comparing the test used in the principal case and the "foreseeability test" which has generally been used to determine negligence in the first instance or negligence establishing proximate cause, the trend seems to be toward eliminating foreseeability as a test of proximate cause.[7] The general rule in determining proximate cause is that in order that an act or omission may be the proximate cause of an injury, the injury must be the natural and probable consequence of the act or omission

[4] 34 So. 2d 513 (La. App. 1947).

[5] 117 Pa. 390, 11 Atl. 627 (1887).

[6] Eldredge, *op. cit. supra* note 1, at 128, n.27.

[7] The problems involved in the foreseeability rule are discussed in PROSSER, TORTS §§ 48, 49 (1941). Prosser states that " . . . If the defendant can foresee neither any danger of direct injury, nor any risk from an intervening force, he is simply not negligent." PROSSER, TORTS 364. Logically, this statement should apply to the principal case.

and such as a reasonably prudent man might have foreseen, in the light of attendant circumstances, as likely to result therefrom.[8] To apply this test some courts have said that an injury is deemed the natural and probable result of a negligent act if after the event, viewed in retrospect the injury appears to be the reasonable rather than the extraordinary consequence of the wrong.[9] However, other courts have said that what a man may reasonably anticipate is important, and may be decisive, in determining whether an act is negligent, but is not at all decisive in determining whether that act is the proximate cause of an injury which ensues.[10] Numerous courts have held that for a negligent act to be the proximate cause of an injury, the particular consequence need not have been foreseen if some injury might have been anticipated. If the consequences which follow are in an unbroken sequence, without an intervening efficient cause from the original negligent act, they are natural and probable.[11]. The Minnesota court has held that a person is not liable for consequences which are merely possible, but only consequences which are probable.[12] In Nebraska, a tort-feasor is liable for all consequences which flow in the natural course of events from unlawful or negligent acts, although the results are brought about by the intervening agency of others, provided the intervening agents were set in motion by the original wrongdoer or were natural consequences of original wrongful acts.[13] The logical conclusion seems to be that in strict jurisdictions such as Minnesota, the plaintiff in the instant case could not have recovered, while recovery would probably be allowed under the more liberal Nebraska rule.

A case similar to the instant decision could not arise in North Dakota for the reason that North Dakota follows the nearly universal rule that it is error to bring before the jury the fact that a person guilty of a negligent act is insured.[14] In Wisconsin, where the instant case arose the rule is different. A policy of liability insurance is a contract made for the benefit of the injured party, upon which he may sue the insurance company directly to enforce.[15] However, the right to sue the insurance company is derived from the right to sue the person originally negligent.[16] In this respect, a peculiar situation has developed in Wisconsin

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[8] COOLEY, TORTS §53 (4th ed. 1932).

[9] Brown v. Rhoades, 126 Me. 186, 137 Atl. 58 (1927).

[10] Christianson v. Chicago, St. P., M.&O. Ry., 67 Minn. 94, 69 N.W. 640 (1896).

[11] Dalton Foundries v. Jefferies, 114 Ind. App. 271, 51 N.E. 2d 13 (1943); Dahna v. Clay County Fair Ass'n., 232 Iowa 298, 6 N.W. 2d 843 (1942); La Pointe v. Chevrette, 264 Mich. 482, 250 N.W. 272 (1933); Saturning v. Rosenblum, 217 Minn. 147, 14 N.W. 2d 108 (1944); Fjellman v. Weller, 213 Minn. 457, 7 N.W. 2d 521 (1942); Thomsen v. Reivel, 212 Minn. 83, 2 N.W. 2d 567 (1942); Zimmer v. Brandon, 134 Neb. 311, 278 N.W. 502 (1938); Great Atlantic & Pacific Tea Co. v. Evans, 142 Tex. 1, 175 S.W. 2d 249 (1943); Masek v. Bubenheimer, 229 Wis. 194, 281 N.W. 924 (1938).

[12] Ingerson v. Shattuck School, 185 Minn. 16, 239 N.W. 667 (1931).

[13] McClelland v. Interstate Transit Lines, 142 Neb. 439, 6 N.W. 2d 384 (1942).

[14] Stoskoff v. Wicklund, 49 N.D. 708, 193 N.W. 312 (1923); Bank v. Davidson, 48 N.D. 944, 188 N.W. 194 (1922); Beardsley v. Ewing, 40 N.D. 373, 168 N.W. 791 (1918).

[15] Elliott v. Indemnity Ins. Co., 201 Wis. 445, 230 N.W. 87 (1930).

[16] Fehr v. Gen. Acc., Fire & Life Assurance Co., 246 Wis. 228, 16 N.W. 2d 787 (1944).

and also in North Dakota. Because her right to sue the insurance company was derivative, the plaintiff in the instant case could not have maintained her action against the insurer if she had not also been able to sue her husband. The Wisconsin legislature has altered the common law rule that husband and wife are one in the eyes of the law and therefore cannot sue each other by providing that a wife may sue in all cases as if she were unmarried.[17] The Wisconsin courts have therefore held that a wife has a right to sue her husband for injuries sustained by reason of his negligence.[18] However, the statutes do not apply to the husband and he is therefore barred from maintaining such an action against his wife.[19] This anomalous situation is likely to develop in North Dakota, since the North Dakota court has held that the disability of the wife to sue has been removed by statute but has declined to decide whether a similar right exists in favor of the husband.[20]

EDWARD J. KIRSCHENMAN
Third Year Law Student

FRAUDULENT CONVEYANCES — UNIFORM FRAUDULENT CONVEYANCE ACT — RESTRAINT OF FRAUDULENT CONVEYANCE BY UNMATURED CREDITOR. A narowing of the remedies available to creditors seems to be indicated by a recent unusual Michigan decision which apparently overlooks the effect of the Uniform Fraudulent Conveyance Act. The plaintiff, who had a tort action pending, petitioned the court for an injunction to restrain the defendants from selling their house and lot to a bona fide purchaser. It was alleged that the defendants were attempting to sell the property so as to place it beyond the reach of attachment for the recovery of damages caused by the defendants' negligent removal of the lateral support from the plaintiff's property. The court denied the request for the injunction on the ground that equity was without jurisdiction where a creditor has not acquired judgment. *Irwin v. Meese*, 38 N. W. 2d 869 (Mich. 1949).

The general rule is that in absence of statute one who has not reduced a claim to judgment cannot bring suit in equity to restrain a debtor from disposing of his property.[1] The Uniform Fraudulent Conveyance Act provides for the protection of creditors whose claims have not matured by petitioning the court to restrain the debtor from disposing of his property fraudulently.[2] The Michigan court, however, did not mention the Uniform Act in its decision, in spite of the fact that Michigan was one of the first states to adopt the Act.[3] There are now twenty

[17] WIS. STAT. §§6.015, 246.07 (1947).

[18] Waite v. Pierce, 191 Wis. 202, 209 N.W. 475, 210 N.W. 822 (1926).

[19] See Fehr v. Gen. Acc. Fire & Life Assurance Co., 246 Wis. 228, 16 N.W. 2d 787 (1944).

[20] Fitzmaurice v. Fitzmaurice, 62 N.D. 191, 242 N.W. 526 (1932), construing §14-0705, N.D. REV. CODE (1943).

[1] Wannemacher v. Merrill, 22 N.D. 46, 132 N.W. 412 (1911); Flanders v. Carter, 183. 360, 188 S.E. 336 (1936); Broadfoot v. Mills, 106 Misc. 455, 174 N.Y. Supp. 497 (1919); 1 GLENN, FRAUDULENT CONVEYANCES & PREFERENCES §§84, 85 (rev. ed. 1940).

[2] UNIFORM FRAUDULENT CONVEYANCE ACT §10 (a).

[3] 9 U.L.A. 129 (Cum. Supp. 1948).

states which have the Act as part of their statutes.[4] There are a few statutes outside of the Uniform Act that provide for injunctions against a fraudulent conveyance by a debtor instituted by a creditor who has not reduced his claim to a judgment.[5] A section of the Federal Civil Procedures Act[6] has been construed to embrace the provisions of § 10 (a) of the Uniform Fraudulent Conveyance Act.[7] Tennessee is the only state which has a case interpreting and following § 10 (a) of the Act. The case of *Oliphant v. Moore*[8] held that the Act gives the chancery court power to grant an injunction restraining a fraudulent transfer of property in aid of an action at law to recover damages. It was stated that the purpose of that section of the statute was to prevent the rendering of a judgment from becoming a nullity. This case is directly in point with the principal case in that the plaintiff was a tort claimant (for malicious prosecution). New York has one case, *Greene v. East Side Omnibus Corp.*[9] which supports the Tennessee decision by interpreting that provision by interpreting that provision of the Uniform Law, but the statements of the court are only dicta because the conveyance in that case was not fraudulent since the debtor had both liability insurance and other property which would more than satisfy any possible recovery of the plaintiff. North Dakota has had no case in point since its adoption of the Act in 1943.

The question of why the Uniform Fraudulent Conveyance Act was not at least mentioned by the Michigan court in the principal case is one of mere speculation. The authorities would seem to point to the Act as the controlling factor. By the majority of cases and by statute, a tort claimant in a pending action is a creditor.[10] The only possible reason why the Act would not control in this instance would be that the conveyance attempted by the defendant was not fraudulent, in that it would not have left him devoid of property upon which the plaintiff could have levied.[11] However, it must be presumed that the conveyance would have been fraudulent, in that the facts as reported disclose no other reason why the plaintiff would have wanted the conveyance by the defendants of their home restrained if there had been other property to attach. The Michigan court cites cases referring to the general rule from jurisdictions which have not adopted the Uniform Fraudulent Conveyance Act.

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[4] Arizona, California, Delaware, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, South Dakota, Tennessee, Utah, Washington, Wisconsin, and Wyoming.

[5] GLENN, op. cit. *supra* note 1, §79.

[6] 48 Stat. 1064 (1934), Rule 18 (b), 28 U.S.C. following §723c (1940).

[7] Reconstruction Finance Corporation v. Central Republic Trust Co., 30 F. Supp. 933 (N.D. Ill. 1939); GLENN, op. cit. *supra* note 1, §§82, 83.

[8] 155 Tenn. 359, 293 S.W. 541 (1927).

[9] 274 App. Div. 986, 84 N.Y.S. 2d 484 (1948).

[10] Soly v. Aasen, 10 N.D. 108, 86 N.W. 108 (1901); Barkheimer v. Lockart, 139 Ark. 223, 213 S.W. 381 (1919); Withrow v. Nat'l Surety Co., 122 Cal. App. 242, 10 P. 2d 83 (1932); Dulcter v. Van Duine, 242 Mich. 477, 219 N.W. 651 (1928); Oliphant v. Moore, 155 Tenn. 359, 293 S.W. 541 (1927); N.D. Rev. Code §13-0101 (1943); Comp. Laws of Mich. §13392 (1929); UNIFORM FRAUDULENT CONVEYANCE ACT §1.

[11] Greene v. East Side Omnibus Corp., 274 App. Div. 986, 84 N.Y.S. 2d 484 (1948).

They quote an annotation which states, ". . . in absence of statute . . . a court of equity is without jurisdiction . . . upon a money demand that is not secured . . . and has not been reduced to judgement."[12] Since the Uniform Act has been adopted by the Michigan Legislature these authorities do not appear pertinent. However, the issue presented in this case comes up rarely and it is conceivable that the Supreme Court of Michigan could have easily overlooked the Act through neglect of counsel to cite the statute for court reference. The failure to apply the Act is unfortunate, not only in that the decision of this suit would have undoubtedly been reversed, but also because of the possible effect this case may have as precedent upon future actions.

DUANE R. NEDRUD
Third Year Law Student.

CONFLICT OF LAWS — WILLS — DECISION OF DOMICILIARY COURT THAT WILL HAD BEEN REVOKED WAS NOT BINDING ON COURT WHERE REAL PROPERTY WAS LOCATED. Testatrix, domiciled in Illinois, died owning personal property in Illinois, and real property in both Illinois and Iowa. She had written the word "void" across the face of her will in at least five places, including the attestation clause. The will was denied probate in the Illinois Supreme Court which held that the instrument had been revoked by cancellation. Subsequently the instrument was offered for probate in Iowa by one of the beneficiaries. The heirs at law of the decedent filed objections to the petition for probate based upon the judgment of the Illinois Supreme Court. They asserted that the Illinois judgment was conclusive upon the Iowa courts. The Iowa Code[1] provided that a will legally executed in the state of testator's domicile should be deemed legally executed under the laws of Iowa. The court *held*, that this section of the Code was not applicable in the instant case because the term "execution" in the statute did not include "revocation." The court also held that the acts deemed revocation in Illinois did not constitute a revocation in Iowa.[2] The will was admitted to probate. In re *Barrie's Estate*, 35 N. W. 2d 658 (Iowa 1949).

The general rule is that the validity, operation, and effect of a will by which real property is devised[3] is determined by the law of the place where the land is situated.[4] This is particularly true as to the validity of the will and the capacity of the testator,[5] the execution of a will,[6] and

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[12] 116 A.L.R. 270 (1938).

[1] Iowa Code (1946) §633.49.

[2] Blackett v. Ziegler, 153 Iowa 344, 133 N.W. 901 (1911).

[3] The validity of a will of movables is governed by the law of the testator's domicile at the time of his death. Von Overbeck v. Dahlgren, 28 F. 2d 936 (1928); 2 BEALE, CONFLICT OF LAWS §306.1 (1935).

[4] GOODRICH, CONFLICT OF LAWS §166 (3rd ed. 1949); 4 PAGE, WILLS §1633 (1941).

[5] Robertson v. Robertson, 144 Ark. 556, 223 S.W. 32 (1920); *In re* Kimberley's Estate, 32 S.D. 1, 141 N.W. 1081 (1913); Kirkland v. Calhoun, 147 Tenn. 388, 248 S.W. 302 (1923).

[6] Robertson v. Pickrell, 109 U.S. 608 (1883); Lynch v. Miller, 54 Iowa 516, 6 N.W. 740 (1880).

the validity and effect of testamentary devises.[7] In accordance with the general rule, it has been held that probate proceedings in the state of the testator's domicile are not binding on a foreign state in which real property of the testator is located.[8] Much confusion has resulted in realty titles and interpretations of wills where the testator has left real proptrey in several states. Many states have enacted statutes to clarify this situation. One such statute provides that a will legally executed in the state of testator's domicile shall be valid in the state in which realty of the testator is located.[9] Another type of statute reenacts the common law to the effect that a foreign will must be executed according to the law of the state in which the real property is located.[10] Still another type of statute permits a certified copy of the will and probate proceedings of the state of domicile to be filed and accepted as admissible to probate in ancillary proceedings in the state of the situs of the land.[11] There is little authority for holding that *revocation* in the state of the testator's domicile would be recognized in the state of the situs under the newer statutes which declare that a will legally *executed* in the domiciliary state will be valid in the state of situs of the realty. In re *Gailey's Will*,[12] testator was domiciled in Illinois and his marriage was held to revoke a prior will. The revocation was given effect in Wisconsin where the land was located even though the subsequent marriage would not have amounted to revocation under Wisconsin law.[13]

A vigorous dissent in the instant case points out that the Iowa law recognizes a will properly executed according to the laws in the state of the domicile, but that the statute remains silent as to revocation. The dissent would broaden the statutory term "executed" to include "revocation" so that a will which was revoked under the law of the domicile would also be revoked under the law of the situs, *i. e.*, Iowa. The view is advanced that because a will is ambulatory in nature and not effective until the death of the testator anything done by the voluntary acts of the testator affecting the instrument's status as a will should be considered in determining whether the testator has "executed" it. The better

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[7] Clarke v. Clarke, 178 U.S. 186 (1900); Jackman v. Herrick, 178 Iowa 1374, 161 N.W. 97 (1917).

[8] Selle v. Rapp, 143 Ark. 192, 220 S.W. 662 (1920); Evansville Ice & Cold Storage Co. v. Winsor, 148 Ind. 682, 48 N.E. 592 (1897); *In re* Kimberley's Estate, *supra*. *Contra*: Stull v. Veatch, 236 Ill. 207, 86 N.E. 227 (1908); Simpson v. Cornish, 196 Wis. 125, 218 N.W. 193 (1928).

[9] N.Y. Decedent Estate Law §§22-a, 23; *In re* Ellison's Will, 47 N.Y. Supp. 685 (1944).

[10] N. C. GEN. Stat. §31-27 (1943), Whitten v. Peace, 188 N.C. 298, 124 S.E. 571 (1924). As to personalty, the will shall be valid in the state of the situs of the property if executed in accordance with the law of the state of domicile.

[11] WIS. STAT. §238.19, Construed in *In re* Gailey's Will, 169 Wis. 444, 171 N.W. 945 (1919). However, the Wisconsin court subsequently held that the interpretation of a foreign will devising real property in the stat was a matter for the court of the county in which the land was located. Hebblewhite v. Scott, 228 Wis. 259, 280 N.W. 384 (1938).

[12] *In re* Gailey's Will, 169 Wis. 444, 171 N.W. 945 (1919).

[13] This view is supported in *In re* Traversi's Estate, 189 Misc. 251, 64 N.Y.S. 2d 453 (1946), although this case deals only with a will disposing of personalty. *Contra*: Sternberg v. St. Louis Union Trust Co., 394 Ill. 452, 68 N.E. 2d 892, 66 F. Supp. 16 (E.D. Mo. 1946), *aff'd*, 163 F. 2d 714 (8th Cir.) cert. denied, 332 U.S. 843 (1947); Evansville Ice & Cold Storage Co. v. Winsor, *supra*. Note 8.

view would seem to be the majority opinion in the instant case that "execution" and "revocation" indicate two distinct operations. The execution of a will involves the expressed affirmative desires of the testator in accordance with the statutory requirements.[14] Revocation of a will involves a combination of an intent to revoke and an overt act,[15] and is accomplished at the will of the testator. Revocation may become effective in many jurisdictions by operation of law, *i. e.*, subsequent marriage,[16] or birth of issue.[17] Thus to include such revocation by operation of law within the meaning of the term "executed" would broaden that term beyond its grammatical and legal connotations.[18]

A foreign will legally executed in the state of domicile is recognized as valid in North Dakota.[19] A foreign will legally revoked in the state of domicile is recognized as validly revoked in North Dakota.[20] If a foreign will has been proved and admitted to probate in any of the states of the United States and was executed according to the law of the domicile, or of the place where executed, or of North Dakota, then it must be admitted to probate in North Dakota.[21] Except as otherwise provided in the Code, the validity and interpretation of a will is governed, when relating to real property within this state, by the law of this state,[22] and when relating to personal property, by the law of the testator's domicile.[23] It would seem that the difficulty encountered in the instant case would not arise in North Dakota.

ROBERT L. BURKE
Second Year Law Student.

CONSTITUTIONAL LAW — FREEDOM OF SPEECH — CONFLICT WITH POLICE POWER. The defendant was convicted under a Chicago municipal ordinance on charges of breach of the peace arising from an address he delivered at a public meeting. His speech was characterized by violent

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[14] *In re* Taylor's Estate, 39 S.D. 608, 165 N.W. 1079 (1917).
[15] Blackford v. Anderson, 226 Iowa 1138, 286 N.W. 735 (1939).
[16] N. D. REV. CODE §56-0410 (1943).
[17] N. D. REV. CODE §56-0409 (1943).
[18] *But see, In re Traversi's* Estate, 189 Mics. 251, 64 N.Y.S. 2d 453 (1946).
[19] N. D. REV. CODE §56-0306 (1943).
[20] N. D. REV. CODE §56-0406 (1943).
[21] N. D. REV. CODE §30-0521 (1943).
[22] See also N. D. REV. CODE §§47-0401, 30-2132 (1943). It would seem in view of these code provisions that the interpretation of a devise of real property of a foreign will is determined by the laws of this state even though our statutes would recognize a valid execution or a valid revocation under the laws of the domicile. This view is further strengthened by Penfield v. Tower, 1 N.D. 216, 46 N.W. 413 (1890), which held that a will of real property is to be governed by the laws of this state as to the validity of the trust, so far as that trust affects land within this state. Clapp v. Tower, 11 N.D. 556, 93 N. W. 862 (1903) quotes the *Penfield* case with approval. In Lowery v. Hawker, 22 N.D. 318, 133 N.W. 918 (1911), it was held that the mere probating of a will is not final and conclusive as to the validity and construction of the instrument, but that questions as to the validity of the will and capacity of the testaor are the only issues before the court. Thus it is a logical inference that the admission to record of a foreign decree of probate is not conclusive on the North Dakota courts to questions as to the validity of devises. Thus it would seem that the rule of *lex loci rei sitae* is followed in this regard in North Dakota.
[23] N. D. REV. CODE §56-0214 (1943).

references to "Communistic Zionistic Jews," "Queen Eleanor," "Henry Adolph Wallace," and "fifty-seven varieties of pinks and reds and pastel shades in this country." The meeting was sponsored by Gerald L. K. Smith. The audience was moved to expressions of anger and unrest. Such statements as "Kill the Jews" were shouted from the floor. An angry mob outside, protesting the meeting, threw bricks and stench bombs and subjected members of the audience to some manhandling. As a result of the disorder, the defendant was arrested. The trial court charged the jury that breach of the peace included speech which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." No exception was taken. The defendant, however, contended that the ordinance as applied to his conduct violated his right of free speech under the Federal Constitution. The conviction was affirmed in the Illinois Appellate Court, 332 Ill. App. 17, 74 N. E. 2d 45 (1947), and the Illinois Supreme Court, 396 Ill. 41, 71 N. E. 2d 2 (1947), 400 Ill. 23, 79 N. E. 2d 39 (1948). Pointing out that one of the legitimate functions of free speech is to invite dispute and bring about conditions of unrest, the Supreme Court of the United States reversed the conviction, holding that inasmuch as part of the interpretation placed on the statute by the instruction was unconstitutional, a general verdict based on the statute could not be sustained. *Terminiello v. City of Chicago*, 69 Sup. Ct. 894 (1949).

The principle that a general attack on the constitutionality of a partially invalid statute is equally an attack on each of its constituent parts, so that a general verdict based on the statute cannot be sustained because it may rest on unconstitutional ground, was first laid down by the Supreme Court in the case of *Stromberg v. California*.[1] The *Stromberg* case appears to support the conclusion of the majority in the instant case. Yet, as the dissent points out, the offending charge had gone unnoticed and unargued through the Illinois courts and was ferreted out only by independent research on the part of the Supreme Court. The conclusion that it is unfortunate that the case was decided on this point, rather than on the broader issue of whether the defendant's speech was within the scope of legally protected utterance, seems bolstered by the Court's own rules. These provide that the parties shall designate before argument the points of law and the parts of the record on which they intend to rely. "The court will consider nothing but the point of law so stated and the parts of the record so designated."[2] This naturally leads to an examination of the case on the actual merits, *i. e.*, on the question of whether the defendant's address was outside the protection of the Constitution.

It is well-settled law that the right of free speech is not absolute but relative.[3] A famous dictum by Mr. Justice Holmes states that, "The

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[1] 283 U. S. 359 (1931); see FOSTER, *The* 1931 *Personal Liberties Cases*, 9 N.Y.U.L.Q. REV. 64 (1931); SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 797 (1943).

[2] Rule 13, Par. 9. RULES OF THE SUPREME COURT. See Robertson and Kirkham, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES §§84, 364 (1936). For a discussion of the Supreme Court's refusal to follow rules of self-limitation on First Amendment Cases, see Note, 33 Minn. L. Rev. 390 (1949).

[3] National Labor Relations Board v. Pick Manufacturing Co., 135 F. 2d 329 (7th Cir. 1943).

most stringent protection of free speech could not protect a man in falsely shouting fire in a theatre and causing a panic."[4] The Constitution does not protect one from punishment for the consequences of unlawful speech.[5] The answer to the precise question of what speech is unlawful has been settled with a fair degree of certainty in many situations. Unlawful speech definitely includes the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words, which, by intention or not, manifestly tend toward incitement of a breach of the peace.[6] Speech which has a tendency to impede a national war effort is unlawful,[7] as is speech which incites to riot.[8] Freedom of speech cannot exist unless it has the sanction of the law; it is not an independent right.[9] Freedom of speech and of press are two fundamental elements of liberty itself. The Supreme Court has said that there is an "instinctive and instant revolt" against limitations and "judgment must be summoned against the impulse that might condemn a limitation without consideration of its propriety."[10] Mr. Justice Holmes, writing the opinion in the famous *Schenck* case wherein the defendants were charged with discouraging enlistment and with obstructing recruiting said that words which ordinarily and in many places would be within the freedom of speech protected by the First Amendment may become subject to prohibition when of such a nature and used in such circumstances as to create a *"clear and present danger"* that they will bring about the substantive evils which Congress has a right to prevent. "But the character of every act depends upon the circumstances in which it is done."[11] The extent to which limitations on free speech have been extended may properly be illustrated by a recent case in which it was decided that Congress may abridge either the right of free speech or *the right to remain silent,* and may require an individual to make a statement specifically prescribed by Congress, or to make a statement essential to avert anticipated evil.[12]

The preceding illustrations of what free speech is not, lead to a consideration of what it is. Mr. Justice Holmes, after having written the opinion in the *Schenk* case, *supra,* qualified his previous conclusions in his dissent on the *Abrams* case, saying, "Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loath and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. . . . Only the emergency that makes it immediately dangerous to

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[4] *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

[5] People v. Doss, 382 Ill. 307, 46 N.E. 2d 984 (1943).

[6] Chaplinsky v. New Hampshire, 315 U. S. 568 (1942).

[7] Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U. S. 211 (1919).

[8] Cantwell v. Connecticut, 310 U.S. 296 (1940); Commonwealth v. Egan, 113 Pa. Super. 375, 173 Atl. 764 (1934).

[9] Cox v. New Hampshire, 312 U.S. 569 (1941); ROTTSCHAEFFER, CONSTITUTIONAL LAW §313 (1939); WEAVER, CONSTITUTIONAL LAW §§294, 295 (1946).

[10] *See* Schaefer v. United States, 251 U.S. 466, 474 (1920).

[11] *See* Schenck v. United States, 249 U.S. 47, 51 (1919).

[12] Lawson v. United States, 176 F. 2d 49 (D.C. Cir. 1949).

leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law . . . abridging the freedom of speech.' "[13] It has been stated that the greater the threat to our political, social, and economic institutions by force and violence, the greater must be our vigilance to preserve the right of free speech, free press, and free assembly in order that the public may remain aware of dangers which threaten, and may prepare to cope with such dangers.[14] Conflict of views, it is self evident, does not mean lack of devotion to the nation.[15] Even an alien may not be denied the privilege of free speech.[16] Peaceable opposition to organized government may not be denied any individual except in times of national emergency, and even in such instances broad discretion should be exercised in its restraint.[17] A great majority of the cases which come before the Supreme Court of the United States originate in the state courts and involve the question of how far the state may go in the exercise of its police power in the interest of maintaining peace and order, when such exercise of power stands as a challenge to the principles of free speech. It has been held that a state, in the exercise of its police power, may punish those who abuse this freedom by utterances inimical to public welfare, tending to corrupt public morals, or to incite to crime and criminal violence.[18] To deny the state the power to control violence and disturbance of the peace through its police power would not in any way assure the preservation of free speech, and as a matter of fact, it would spell the end of free speech.[19] And it has been held that those persons who incite others to riot, when such riot is the proximate result of their abuse of free speech, may be held responsible for such incitement if it is deliberate and wilful.[20] The state may not, however, employ the police power to prevent or restrain the individual from informative speech or publication upon some issue vital to the public knowledge, even if it imports a severe criticism of incumbent public officers. The due process clause of the Fourteenth Amendment safeguards liberty of the press and speech from infringement by state action.[21] The "clear and present danger test" has been employed in a great number of cases where the issue has been clouded by much legal uncertainty.[22] The foundation of the doctrine is laid upon the question of whether the words used in their particular circumstances create or portend a *substantial* interference with the orderly administration of justice.[23] It must be conceded, however, that this doctrine is not a complete answer to the problem. It leaves a question in its wake equally as difficult as that which it sought to answer:

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[13] Abrams v. United States, 250 U.S. 616, 630 (1919).

[14] *See* DeJonge v. Oregon, 299 U.S. 353, 365 (1937).

[15] *See* Baumgartner v. United States, 322 U.S. 665, 673 (1944).

[16] Bridges v. Wixon, 326 U.S. 135 (1945).

[17] *See Ex Parte* Hartman, 182 Cal. 147, 188 Pac. 548 (1920).

[18] Gitlow v. New York, 268 U.S. 652, 667 (1925).

[19] *See* Milk Wagon Drivers Union v. Meadowmoor Co., 312 U.S. 287, 299 (1941).

[20] People v. Burman, 154 Mich. 150, 117 N.W. 589 (1908).

[21] Near v. Minnesota, 283 U.S. 697 (1931); Gitlow v. New York, 268 U.S. 652 (1925).

[22] See, *e. g.*, Thornhill v. Alabama, 310 U.S. 88 (1940); Cantwell v. Connecticut, 310 U.S. 296 (1940); Herndon v. Lowry, 301 U.S. 242 (1937); Gitlow v. New York, 268 U.S. 652 (1925); Schaefer v. United States, 251 U.S. 466 (1920).

[23] Bridges v. California, 314 U.S. 252 (1941).

What legal area is covered by the word, *substantial?* The doctrine has, therefore, since its inception in the *Schenck* case, *supra*, been somewhat weakened, not by cases of outright abandonment of its principles, but by differences of opinion in how they should be interpreted. Strong dissents have been registered in seyeral outstanding cases where the doctrine has been applied.[24] And the tendency now seems to be to limit its use to the Espionage Act cases[25] or to qualify its use by requiring a positive showing of criminal intent sufficient to bring the case under the Criminal Anarchy statutes.[26] As a matter of fact, either the "clear and present danger test" or "due process" if unreasonably exploited, may result in an abandonment of the First Amendment and the atrophy of democratic process.[27] Between the two concepts lies a plain upon which the individual case must be focused. Undeniably there is sufficient room thereon for reasonable adjustment governed by the tenor of the times.[28]

The question inevitably arises whether the *Terminiello* case overruled the "clear and present danger test." The answer probably is that it did not. This much, however can be said: the *Terminiello* case apparently represents a refusal to apply the "clear and present danger test" in a situation which presented an immediate menace to public safety. Failure to invoke the test on the Terminiello speech has been excused on the grounds of an instruction, improperly given, but not objected to by the defendant's counsel. The practical effect of the case is to nullify in large measure the efforts of local authorities faced with situations similar to the one here presented to preserve and protect public safety and order. It is to be hoped that in subsequent decisions the Supreme Court either modifies or overrules the holding of the instant case.

ALFRED A. THOMPSON
Second Year Law Student.

SALES —SALE OF PROVISIONS OR DRUGS — LIABILITY OF RESTAURANTS ON IMPLIED WARRANTIES. The plaintiff was injured by glass contained in a helping of ice cream served her at a lunch counter which was operated as part of the defendant's general merchandising business. She sued, alleging both negligence and breach of implied warranty. The case was heard in federal district court because of diversity of citizenship. The defendant moved to strike the portion of the complaint charging breach of an implied warranty on the ground that the furnishing of food in a restaurant is a sale of services and not of food. Recognizing the difficulty presented by the fact that the court of Iowa—where the injury occurred —had never passed on the question, the district court nevertheless found that the Iowa court was more likely to adopt the rule that the service of

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[24] Abrams v. United States, 250 U.S. 616 (1919); Schaefer v. United States, 251 U.S. 466, 474 (1920); Pierce v. United States, 252 U.S. 239 (1920).

[25] WILLIS, CONSTITUTIONAL LAW 498.

[26] See Walsh, *Is the New Judicial and Legislative Interpretation of Freedom of Speech, and of the Freedom of the Press, Sound Constitutional Development?* 21 Geo. L. J. 161, 178 (1933).

[27] See Rosenwein, *The Supreme Court and Freedom of Speech—Terminiello v. City of Chicago*, 9 LAW GUILD REV. 70, 72 (1949).

[28] ROTTSCHAEFFER, op. cit. *supra* note 9, §313.

food in restaurants is accompanied by an implied warranty and accordingly overruled the motion to strike. *Amdal v. F. W. Woolworth Co.*, 84 F. Supp. 657 (N. D. Iowa 1949).

Until recent times it was well settled that the service of food by a restaurant was not a sale of goods and an implied warranty that the food was fit for human consumption was not associated with the transaction.[1] An early, and often cited case stating this proposition is *Parker v. Flint*,[2] in which Serjeant Wright noted that an innkeeper, ". . . does not sell but utters his provisions." Courts adhering to the rule that the service of food in a restaurant is a sale of services will permit recovery by a plaintiff only on the tort theory of negligence and not on the contractual theory of implied warranty.[3] The Uniform Sales Act has been construed by a number of courts in such a manner that the principle developed at common law remains undisturbed.[4] One of the first American cases applying the doctrine of implied warranty to the sale of food was *Van Bracklin v. Fonda*.[5] It was not, however, until the present century that many courts began to recognize an implied warranty in food supplied by a restaurateur.[6] The case of *Stanfield v. F. W. Woolworth Co.*[7] sets out three basic reasons for applying the doctrine of implied warranty as opposed to the older view: (1) in the sale of food there appears always to have been an implied warranty that the food was wholesome and fit for the use for which it was purchased; (2) many statutes regulating the sale of foods and beverages have been construed to imply a sale relationship; and (3) a question of policy is involved in the preservation of public life and health. Eminent textwriters on the law of sales are in accord with the modern view.[8] The California Supreme Court has held that there is an implied warranty under the provisions of the California Code[9] that food served by a restaurant is wholesome.[10] An analysis of the cases reveals that the doctrine of implied warranty as it relates to the purchase of food in restaurants, is being adopted quite generally by

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[1] F. W. Woolworth Co. v. Wilson, 74 F. 2d 439 (5th Cir. 1934); Valeri v. Pullman Co., 218 Fed. 519 (S.D.N.Y. 1914); Pappa v. F. W. Woolworth Co., 3 Terry 358, 33 A. 2d 310 (Del. Super. Ct. 1943).

[2] 12 Mod. 254, 88 Eng. Rep. 1303 (1701).

[3] Travis v. Louisville & N. R. Co., 183 Ala. 415, 62 So. 851 (1913); Pappa v. F. W. Woolworth Co., 3 Terry 358, 33 A. 2d 310 (Del. Super. Ct. 1943); Sheffer v. Willoughby, 163 Ill. 518, 45 N. E. 253 (1896); Bigelow v. Maine C. R. Co., 110 Me. 105, 85 Atl. 396 (1912).

[4] Merrill v. Hodson, 88 Conn. 314, 91 Atl. 533 (1914); Childs Dining Hall Co. v. Swingler, 173 Md. 490, 197 Atl. 105 (1938); Kenny v. Wong Len, 81 N.H. 427, 128 Atl. 343 (1925); Nisky v. Childs Co., 103 N.J.L. 464, 135 Atl. 805 (1927).

[5] 12 Johns 468 (N.Y. 1815) (defendant held liable for the sale of unwholesome beef for domestic use).

[6] Kenower v. Hotels Statler Co., 124 F. 2d 658 (6th Cir. 1942); Cushing v. Rodman, 82 F. 2d 864 (D.C. App. 1936); Friend v. Childs Dining Hall Co., 231 Mass. 65, 120 N.E. 407 (1918); Barker v. Dixon, 115 Minn. 172, 131 N.W. 1078 (1911); Temple v. Keeler, 238 N.Y. 344, 144 N.E. 635 (1924).

[7] 143 Kan. 117, 53 P. 2d 878 (1936).

[8] VOLD, SALES §153 (1931); I WILLISTON, SALES §242b (Rev. ed. 1948).

[9] California Civil Code §1735 (1937); Uniform Sales Act §15.

[10] Goetten v. Owl Drug Co., 6 Cal. 2d 683, 59 P.2d 142 (1936); Jensen v. Berris, 31 Cal. App. 2d 537, 88 P. 2d 220 (1939); Schuler v. Union News Co., 295 Mass. 350, 4 N.E. 2d 465 (1936); Ford v. Waldorf System, 57 R. I. 131, 188 Atl. 633 (1937).

the courts. The specific question presented by the instant case has not been decided in North Dakota, but the Supreme Court of North Dakota has given effect to the applicable section of the Sales Act[11] in a number of other situations.[12] In view of the result reached by the California court coupled with the same current trend in other jurisdictions, it seems quite possible that a North Dakota court ruling on this question would reach the result of the principal case.

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[11] N. D. Rev. Code (1943) §51-0116; Uniform Sales Act §15.

[12] Bakke v. Nelson, 68 N.D. 66, 276 N.W. 914 (1937); Cretors v. Troyer, 63 N. D. 231, 274 N. W. 558 (1933), Ward v. Valker, 44 N. D. 598, 176 N. W. 125 (1920).