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RECENT CASES

CONFLICT OF LAWS—FULL FAITH AND CREDIT—DOMESTIC SEPARATE MAINTENANCE DECREE SURVIVES FOREIGN DIVORCE

After a married woman had obtained a New York decree for separate maintenance, her husband secured a divorce *a vinculo* in Nevada. Service was by publication. Thereafter, this Nevada decree was pleaded as a defense in a New York action by the wife for arrears in maintenance installments. The New York courts held that the Nevada divorce did not terminate the divorced husband's liability under the separate maintenance decree. Held (7-2),[1] that the full-faith-and-credit clause of the Constitution[2] did not require New York to discharge the husband from an obligation to support his former wife. *Estin v. Estin,* 68 Sup. Ct. 1213 (1948).

The judicial determination of the personal liability of a husband for the support of his wife has been held to survive the termination of the marital status by an *ex parte* divorce granted by a sister state[3] or by the same state,[4] though there is equally strong authority reaching the other result.[5] Similarly, a personal liability for support not previously judicially determined has been

1. Opinion by Douglas, J.; separate dissents by Frankfurter and Jackson, JJ.

2. U. S. CONST. ART. IV, § 1. This clause directs that "Full Faith and Credit shall be given in each state to the public Acts, Records, and judicial Proceedings of every other State." The Act of Congress passed pursuant to this mandate provides that the "records and judicial proceedings" of the courts of any state "shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state" from which they are taken. 1 STAT. 122 (1790), 28 U. S. C. A. § 687 (1928).

3. Barber v. Barber, 21 How. 582, 16 L. Ed. 226 (U. S. 1858); Bassett v. Bassett, 141 F. 2d 954 (C. C. A. 9th 1944), *cert. denied,* 323 U. S. 718 (1944); Security Trust Co. v. Woodward, 73 F. Supp. 667 (S. D. N. Y. 1947); Watton v. Watton, 76 Cal. App. 2d 669, 173 P. 2d 867 (1946); Ballentine v. Superior Court of San Mateo County, 26 Cal. 2d 254, 158 P. 2d 14 (1945); Lednum v. Lednum, 85 Colo. 364, 276 Pac. 674 (1929); Simonton v. Simonton, 40 Idaho 751, 236 Pac. 863 (1925); Bennett v. Tomlinson, 206 Iowa 1075, 221 N. W. 837 (1928); Miller v. Miller, 200 Iowa 1193, 206 N. W. 262 (1925); Dorey v. Dorey, 248 Mass. 359, 142 N. E. 774 (1924); Kreiger v. Kreiger, 297 N. Y. 616, 75 N. E. 2d 629 (1947).

4. Wagster v. Wagster, 193 Ark. 902, 103 S. W. 2d 638 (1937); Robinson v. Robinson, 250 Ky. 488, 63 S. W. 2d 605 (1933); Williams v. Williams, 96 Ky. 397, 29 S. W. 132 (1895); Bowers v. Bowers, 132 N. J. Eq. 431, 28 A. 2d 515 (Ct. Err. & App. 1942); Lentz v. Lentz, 193 N. C. 742, 138 S. E. 12 (1927) (based on state statute).

5. The separate maintenance provision does not survive the divorce granted by a sister state: Gullet v. Gullet, 149 F. 2d 17 (App. D. C. 1945); Durlacher v. Durlacher, 123 F. 2d 70 (C. C. A. 9th 1941), *cert. denied,* 315 U. S. 805 (1942); Jones v. Jones, 31 So. 2d 314 (Ala. 1947); Harrison & Saunders v. Harrison, 20 Ala. 629 (1852); McCullough v. McCullough, 203 Mich. 288, 168 N. W. 929 (1918). The separate maintenance provision does not survive the divorce granted by the same state: Holmes v. Holmes, 155 F. 2d 737 (App. D. C. 1946); Atkinson v. Atkinson, 233 Ala. 125, 170 So. 198 (1936); Vollmer v. Vollmer, 47 Idaho 135, 273 Pac. 1 (1929); Calkins v. Calkins, 155 Kan. 43, 122 P. 2d 750 (1942); *cf.* Davis v. Davis, 305 U. S. 32, 59 Sup. Ct. 3, 83 L. Ed. 26 (1938); Glaston v. Glaston, 69 Cal. App. 2d 787, 160 P. 2d 45 (1945); Metzger v. Metzger, 32 Ohio App. 202, 167 N. E. 690 (1929).

held by some courts to survive divorce,[6] but again there is contrary authority.[7] Thus the husband's personal liability in some jurisdictions rests upon a continuation of the marital status, except where provision for alimony is incorporated in the divorce decree or the right to undetermined alimony is specifically reserved in the divorce decree. In other states the liability is held to be independent of a continuation of the status. There is nothing in the full-faith-and-credit clause of the Constitution which prohibits a state from resting a personal or property liability, arising out of a marriage, on a basis other than a continuation of the marital status.

The courts hold that the judicial power to determine personal liability, as separate maintenance or alimony, requires jurisdiction *in personam*,[8] while the power to dissolve the marital status is generally recognized to be vested in either state where one of the parties maintains a bona fide domicile.[9] Insofar as the question of interstate recognition of divorce is involved, the Supreme Court confirms these decisions.[10]

In the instant case the majority of the Court held that New York had not denied any constitutionally guaranteed recognition of the Nevada decree. Mr. Justice Jackson dissented on the ground that if a domestic divorce rather than one of a sister state had been obtained, New York would have held that the separate maintenance allowance was terminated.[11] No cases have been found to substantiate this interpretation of New York law. In the instances where New York courts have held that their separate maintenance

6. Alimony was granted by a sister state after a divorce *a vinculo:* Davis v. Davis, 70 Colo. 37, 197 Pac. 241 (1921); Darnell v. Darnell, 212 Ill. App. 601 (1st Dist. 1918); Searles v. Searles, 140 Minn. 385, 168 N. W. 133 (1918); Woods v. Waddle, 44 Ohio St. 449, 8 N. E. 297 (1886); Cox v. Cox, 19 Ohio St. 502 (1869); Spradling v. Spradling, 74 Okla. 276, 181 Pac. 148 (1919); Nelson v. Nelson, 24 N. W. 2d 327 (S. D. 1946); Toncray v. Toncray, 123 Tenn. 476, 131 S. W. 977 (1910); Adams v. Abbott, 21 Wash. 29, 56 Pac. 931 (1899). Alimony was granted by the same state after a divorce *a vinculo:* Karcher v. Karcher, 204 Ill. App. 210 (1st Dist. 1917); Parker v. Parker, 211 Mass. 139, 97 N. E. 988 (1912); Cochran v. Cochran, 42 Neb. 612, 60 N. W. 942 (1894) (prior divorce based upon fraud by husband); Hutton v. Dodge, 58 Utah 228, 198 Pac. 165 (1921).

7. Alimony was not granted by a sister state after a divorce *a vinculo:* Bowman v. Worthington, 24 Ark. 522 (1867) (holding based upon Arkansas statute); Brown v. Brown, 24 Ga. App. 512, 101 S. E. 315 (1919); Joyner v. Joyner, 131 Ga. 217, 62 S. E. 182 (1908); Knowlton v. Knowlton, 155 Ill. 158, 39 N. E. 595 (1895); McCoy v. McCoy, 191 Iowa 973, 183 N. W. 377 (1921); Shaw v. Shaw, 92 Iowa 722, 61 N. W. 368 (1894); *cf.* Buckley v. Buckley, 50 Wash. 213, 96 Pac. 1079 (1908). Alimony was not granted by the same state after a divorce *a vinculo:* Howell v. Howell, 104 Cal. 45, 37 Pac. 770 (1894); Hall v. Hall, 141 Ga. 361, 80 S. E. 992 (1914); Darby v. Darby, 152 Tenn. 287, 277 S. W. 894 (1925).

8. Esenwein v. Pennsylvania, 325 U. S. 279, 65 Sup. Ct. 1118, 89 L. Ed. 1608 (1945); Wilkes v. Wilkes, 245 Ala. 54, 16 So. 2d 15 (1943); Proctor v. Proctor, 215 Ill. 275, 74 N. E. 145 (1905); Williamson v. Williamson, 183 Ky. 435, 209 S. W. 503 (1919); Sheridan v. Sheridan, 213 Minn. 24, 4 N. W. 2d 785 (1942); Bray v. Landergren, 161 Va. 699, 172 S. E. 252 (1934).

9. Sherrer v. Sherrer, 68 Sup. Ct. 1087 (1948); Williams v. North Carolina, 317 U. S. 287, 63 Sup. Ct. 207, 87 L. Ed. 279 (1942); Esenwein v. Pennsylvania, 325 U. S. 279, 65 Sup. Ct. 1118, 89 L. Ed. 1608 (1945).

10. Williams v. North Carolina, 317 U. S. 287, 63 Sup. Ct. 207, 87 L. Ed. 279 (1942).

11. 68 Sup. Ct. at 1221.

decrees were terminated by a divorce *a vinculo,* the courts granting the divorce either had personal jurisdiction of both parties[12] or the wife was the party instituting the divorce proceeding,[13] in which case she could be held to have lost her rights under the prior maintenance decree.

The Court's decision seems one logically following the position taken in *Williams v. North Carolina.*[14] It, however, raises but does not decide the question whether discrimination[15] against judgments of sister states is necessarily a denial of full faith and credit.

CONSTITUTIONAL LAW—DUE PROCESS—USE OF PEREMPTORY CHALLENGE TO EXCLUDE ALL MEMBERS OF ACCUSED'S RACE FROM TRIAL JURY

Three Negro defendants were convicted in a federal district court of murder in the first degree. The government prosecutor had exercised 19 of his 20[1] peremptory challenges so as to exclude all Negroes on the jury panel from the jury. Two of the defendants contended that this use of the peremptory challenge deprived them of the due process of law guaranteed by the Fifth Amendment. *Held* (2-1), that the prosecutor's action was not unconstitutional. *Hall v. United States,* 168 F. 2d 161 (App. D. C. 1948), *cert. denied,* 334 U. S. 853 (1948).

Impartiality in jury trials has always been deemed an essential element of our democratic scheme of jurisprudence.[2] An important safeguard of that right has been the peremptory challenge.[3] It affords both the accused and prosecution[4] the opportunity arbitrarily to exclude from the jury any other-

12. Solotoff v. Solotoff, 269 App. Div. 677, 53 N. Y. S. 2d 510 (2d Dep't 1945); Richards v. Richards, 87 Misc. 134, 149 N. Y. Supp. 1028 (Sup. Ct. 1914).

13. Almquist v. Almquist, 182 Misc. 286, 43 N. Y. S. 2d 240 (Sup. Ct. 1943); Turkus v. Turkus, 180 Misc. 857, 45 N. Y. S. 2d 803 (Sup. Ct. 1943); Scheinwald v. Scheinwald, 231 App. Div. 757, 246 N. Y. Supp. 33 (2d Dep't 1930); Harris v. Harris, 197 App. Div. 646, 189 N. Y. Supp. 215 (1st Dep't 1921); Gibson v. Gibson, 81 Misc. 508, 143 N. Y. Supp. 37 (Sup. Ct. 1913).

14. 317 U. S. 287, 63 Sup. Ct. 207, 87 L. Ed. 279 (1942).

15. The discrimination, as suggested by Mr. Justice Jackson, would occur if a state by an *ex parte* divorce would terminate alimony previously granted by the same state but would not recognize such termination of its alimony decrees by subsequent sister state divorce proceedings.

1. "If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges . . ." FED. R. CRIM. P., 24(b).

2. See, *e.g.,* Thiel v. Southern Pacific Co., 328 U. S. 217, 66 Sup. Ct. 984, 90 L. Ed. 1181 (1946); Glasser v. United States, 315 U. S. 60, 62 Sup. Ct. 457, 86 L. Ed. 680 (1942); Smith v. Texas, 311 U. S. 128, 61 Sup. Ct. 164, 85 L. Ed. 84 (1940).

3. Hayes v. Missouri, 120 U. S. 68, 7 Sup. Ct. 350, 30 L. Ed. 578 (1887).

4. "[I]mpartiality requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held. . . . The public prosecutor may have the strongest reasons to distrust the character of a juror offered, from his habits and associations, and yet find it difficult to formulate and sustain a legal objection to him. In such cases the peremptory challenge is a protection against his being accepted." Hayes v. Missouri, 120 U. S. 68, 70, 7 Sup. Ct. 350, 30 L. Ed. 578 (1887).

wise qualified juror for suspected prejudice, even though there may not be sufficient cause to sustain a legal objection.[5] The limitations on peremptory challenges apparently exist only as to number and procedural requirements.

In 1875, Congress passed a statute prohibiting discrimination on racial grounds in state and federal courts in the selection of jury lists and panels.[6] The United States Supreme Court has held that such discrimination in state courts is a violation of this statute[7] as well as a denial to the defendant of the equal protection of the laws guaranteed by the Fourteenth Amendment.[8] The same protection is required in federal courts under the due process clause of the Fifth Amendment.[9]

It is pointed out in the principal case that the prohibition against racial discrimination in the selection of the jury panel has no application to the use of the peremptory challenge against members of the panel who have already been properly qualified and selected.[10] The peremptory challenge is a device for rejecting, not selecting, jurors.[11] The accused has no right to demand that the jury be composed, wholly or partially, of members of his own race.[12] If an impartial jury remains after all challenges have been made, the requirements of due process have been fulfilled.[13]

In view of the long accepted definition and usage of the peremptory challenge, it is difficult to see how any use of it within the prescribed statutory limits could be regarded as a violation of the prohibition against racial

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5. The peremptory challenge "is exercised upon qualified jurors as matter of favor to the challenger." O'Neil v. Lake Superior Iron Co., 67 Mich. 560, 35 N. W. 162, 163 (1887); Pointer v. United States, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208 (1894); Lewis v. United States, 146 U. S. 370, 13 Sup. Ct. 136, 36 L. Ed. 1011 (1892); United States v. Marchant, 12 Wheat. 480, 6 L. Ed. 700 (U. S. 1827); Whitney v. State, 43 Tex. Cr. R. 197, 63 S. W. 879 (1901); 4 BL. COMM. *353.

6. "No citizen possessing all other qualifications which are or may be, prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude. . . ." 18 STAT. 336 (1875), 8 U. S. C. A. § 44 (1942).

7. Hill v. Texas, 316 U. S. 400, 62 Sup. Ct. 1159, 86 L. Ed. 1559 (1942).

8. See, *e.g.*, Patton v. Mississippi, 332 U. S. 463, 68 Sup. Ct. 184, 92 L. Ed. 164 (1947); Norris v. Alabama, 294 U. S. 587, 55 Sup. Ct. 579, 79 L. Ed. 1074 (1935); Carter v. Texas, 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839 (1900); Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664 (1879).

9. Wong Yim v. United States, 118 F. 2d 667 (C. C. A. 9th 1941), *cert. denied*, 313 U. S. 589 (1941); United States v. Local 36 of International Fishermen & Allied Workers, 70 F. Supp. 782 (S. D. Cal. 1947).

10. 168 F. 2d at 164. *Cf.* People v. Roxborough, 307 Mich. 575, 12 N. W. 2d 466 (1943), *cert. denied*, 323 U. S. 749 (1944).

11. "The right of peremptory challenge is not of itself a right to select, but a right to reject jurors. . . . It enables the prisoner to say who shall not try him; but not to say who shall be the particular jurors to try him." United States v. Marchant, 12 Wheat. 480, 482, 6 L. Ed. 700 (U. S. 1827); People v. Roxborough, 307 Mich. 575, 12 N. W. 2d 466 (1943), *cert. denied*, 323 U. S. 749 (1944); Note, 21 NEB. L. REV. 174 (1942).

12. Akins v. Texas, 325 U. S. 398, 65 Sup. Ct. 1276, 89 L. Ed. 1692 (1945); United States *ex rel.* Jackson v. Brady, 47 F. Supp. 362 (D. C. Md. 1942), *aff'd* 133 F. 2d 476 (C. C. A. 4th 1943), *cert. denied*, 319 U. S. 746 (1943).

13. Hayes v. Missouri, 120 U. S. 68, 7 Sup. Ct. 350, 30 L. Ed. 578 (1887); Shettel v. United States, 113 F. 2d 34 (App. D. C. 1940); United States v. Parker, 103 F. 2d 857 (C. C. A. 3d 1939), *cert. denied*, 307 U. S. 642 (1939).

discrimination. But the question remains whether the peremptory challenge may not possibly be so abused as to amount to a violation of the constitutional and statutory protection against systematic exclusion from jury service. The view has been expressed that the concept of impartiality includes protection against systematic exclusion from the jury of qualified representatives of minority racial groups on account of race.[14] The fact that the accused is not prejudiced because his race is not represented on the jury may not necessarily mean that the prosecution has the right to exclude members of that race solely because of their race.[15] There is merit in the argument that the reasons and policies back of the law against exclusion from the panel on account of race can be nullified if those who get on the panel may be systematically excluded from the jury.[16]

The problem is difficult. To hold, on the one hand, that the privilege of peremptory challenge should be restricted as to manner of its use would seem to deprive it of its meaning and purpose. It would amount to a contradiction in terms; for by definition, no cause need be shown for its exercise, and the court is bound to abide by it. Furthermore, the practical difficulties that would be involved in administering any constitutional limitations on the exercise of the peremptory challenge are readily apparent. On the other hand, there is always the possibility, in cases where a member of a minority group or class is on trial, of use of the peremptory challenge so as systematically to exclude members of that group or class from the jury. Query: Would the United States Supreme Court continue its policy of non-interference if faced with frequent recurrence of such use of the peremptory challenge as was followed in the instant case, particularly in the federal courts?[17]

CONSTITUTIONAL LAW—FREEDOM OF SPEECH—USE OF AMPLIFICATION DEVICE IN PUBLIC PARK HELD WITHIN CONSTITUTIONAL GUARANTEE

A municipal ordinance prohibited the use of sound amplification equipment without the permission of the Chief of Police. A member of Jehovah's

14. Edgerton, J., dissenting in the instant case, 168 F. 2d at 165-66; 48 COL. L. REV. 953 (1948).

15. "But reversible error does not depend on a showing of prejudice in an individual case. The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. . . . The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." Ballard v. United States, 329 U. S. 187, 195, 67 Sup. Ct. 261, 91 L. Ed. 181 (1946).

16. Edgerton, J., dissenting in the instant case, 168 F. 2d at 166; 48 COL. L. REV. 953 (1948).

17. "Over federal proceedings we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in state courts." Fay v. New York, 332 U. S. 261, 287, 67 Sup. Ct. 1613, 91 L. Ed. 2043 (1947).

Witnesses was refused renewal of his permit due to numerous complaints of excessive noise. Continuing to use a loudspeaker in the small city park, defendant was arrested and convicted in police court. Upon affirmation in the state appellate courts, defendant appealed to the Supreme Court of the United States contending that his right of free speech had been violated. *Held* (5-4),[1] that the ordinance violated the Constitution as a previous restraint of free speech by not prescribing standards for exercise of licensing power and discretion. *Saia v. New York*, 68 Sup. Ct. 1148 (1948).

It is a well established principle of constitutional law that free speech is included among the "fundamental personal rights and 'liberties' protected . . . from impairment by the States" [2] by the Fourteenth Amendment to the Federal Constitution, but it is also well established that freedom of speech is not absolute. Such freedom may be restricted in time of war,[3] in the presence of clear and present danger,[4] and for the comfort and convenience of the general public.[5] Although reasonable regulation has been allowed along these lines, the Supreme Court has scrutinized closely the regulatory statutes, insisting that freedom of speech not be abridged or denied in "the guise of regulation," [6] by a statute that could be made "the instrument of arbitrary suppression of free expression." [7] In *Thomas v. Collins*,[8] after emphasizing the necessity of showing unusual situations where basic public interests were involved before any justification for restriction of free speech

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1. Majority Opinion by Douglas, J.; Frankfurter, J., dissenting (Burton & Reed, J. J., concurring); Jackson, J., dissenting in Separate Opinion.

2. Gitlow v. New York, 268 U. S. 652, 666, 45 Sup. Ct. 625, 69 L. Ed. 1138 (1925). See also Lovell v. Griffin, 303 U. S. 444, 450, 58 Sup. Ct. 666, 82 L. Ed. 949 (1938); De Jonge v. Oregon, 299 U. S. 353, 364, 57 Sup. Ct. 255, 81 L. Ed. 278 (1937); Stromberg v. California, 283 U. S. 359, 368, 51 Sup. Ct. 532, 75 L. Ed. 1117 (1931); Whitney v. California, 274 U. S. 357, 372, 47 Sup. Ct. 641, 71 L. Ed. 1095 (1927); Armstrong, *The Headstone of the Corner: The Federal Bill of Rights*, 13 MISS. L. J. 187 (1941); Green, *Liberty Under the Fourteenth Amendment*, 27 WASH. U. L. Q. 497 (1942); Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926).

3. For strict application of the Federal Espionage Act of 1917, see Schaefer v. United States, 251 U. S. 466, 40 Sup. Ct. 259, 64 L. Ed. 360 (1920); Abrams v. United States, 250 U. S. 616, 40 Sup. Ct. 17, 63 L. Ed. 1173 (1919). But World War II saw the Espionage Act more liberally construed in Hartzel v. United States, 322 U. S. 680, 64 Sup. Ct. 1233, 88 L. Ed. 1534 (1944). For full discussion, see CHAFEE, FREE SPEECH IN THE UNITED STATES 36-140 (1946).

4. Thomas v. Collins, 323 U. S. 516, 65 Sup. Ct. 315, 89 L. Ed. 430 (1945); Bridges v. California, 314 U. S. 252, 62 Sup. Ct. 190, 86 L. Ed. 192 (1941); Whitney v. California, 274 U. S. 357, 47 Sup. Ct. 641, 71 L. Ed. 1095 (1927); Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470 (1919). See Notes, 35 CALIF. L. REV. 120 (1947), 26 NEB. L. REV. 416 (1947); 61 HARV. L. REV. 537 (1948).

5. Cox v. New Hampshire, 312 U. S. 569, 61 Sup. Ct. 762, 85 L. Ed. 1049 (1941); Cantwell v. Connecticut, 310 U. S. 296, 60 Sup. Ct. 900, 84 L. Ed. 1213 (1940); Schneider v. Town of Irvington, 308 U. S. 147, 60 Sup. Ct. 146, 84 L. Ed. 155 (1939); Hague v. Committee for Industrial Organization, 307 U. S. 496, 59 Sup. Ct. 954, 83 L. Ed. 1423 (1939).

6. Hague v. Committee for Industrial Organization, 307 U. S. 496, 516, 59 Sup. Ct. 954, 83 L. Ed. 1423 (1939), 14 ST. JOHN'S L. REV. 157, 13 So. CALIF. L. REV. 127.

7. Hague v. Committee for Industrial Organization, 307 U. S. 496, 516, 59 Sup. Ct. 954, 83 L. Ed. 1423 (1939).

8. 323 U. S. 516, 65 Sup. Ct. 315, 89 L. Ed. 430 (1945), 33 CALIF. L. REV. 317.

would be allowed, the Court said: "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." [9] The fact that abuses of an arbitrary licensing ordinance are subject to judicial review does not validate previous restraint.[10] Restrictive statutes must be "narrowly drawn" [11] and contain standards to guide licensing officials.[12] Where a statute is silent as to such standards, it is said to give unlimited arbitrary discretion and is held unconstitutional.[13]

The holding in the instant case indicates that freedom to speak with the aid of amplification devices comes within the wide protection afforded freedom of speech by the Constitution. Confronted with this novel situation, the Court felt compelled to protect amplified speech as it had protected the other basic liberties.[14] Had the ordinance involved in the principal case authorized the chief of police to promulgate his own reasonable rules under which permits would be issued, and had he acted under previously prepared and published regulations, it is not unreasonable to suppose that it would have been upheld.[15] The decision in this case is probably not as important as it would appear at first blush. True, it enlarges the protected scope of free speech, but it also permits regulation. The protection here given to this modern technological phase of free speech probably will not approach the nearly complete immunity allowed normal speech and writing,[16] but the language of the Court suggests that complete statutory prohibition of sound equipment might be looked upon with disfavor.[17] Analytically, the problem presented here

9. Thomas v. Collins, 323 U. S. 516, 530, 65 Sup. Ct. 315, 89 L. Ed. 430 (1945).

10. Cantwell v. Connecticut, 310 U. S. 296, 306, 60 Sup. Ct. 900, 84 L. Ed. 1213 (1940), referred to in principal case at p. 1149.

11. Cantwell v. Connecticut, 310 U. S. 296, 307, 60 Sup. Ct. 900, 84 L. Ed. 1213 (1940), 40 COL. L. REV. 1067, 89 U. OF PA. L. REV. 515 (1941).

12. Cantwell v. Connecticut, 310 U. S. 296, 60 Sup. Ct. 900, 84 L. Ed. 1213 (1940); Hague v. Committee for Industrial Organization, 307 U. S. 496, 59 Sup. Ct. 954, 83 L. Ed. 1423 (1939); Lovell v. Griffin, 303 U. S. 444, 58 Sup. Ct. 666, 82 L. Ed. 949 (1938).

13. Cantwell v. Connecticut, 310 U. S. 296, 60 Sup. Ct. 900, 84 L. Ed. 1213 (1940); *cf.* Cox v. New Hampshire, 312 U. S. 569, 61 Sup. Ct. 762, 85 L. Ed. 1049 (1941). 21 B. U. L. REV. 540 (1941) discusses the *Cox* decision approvingly, but the discussion of the case in 9 DUKE B. A. J. 151 (1941) looks upon it as an example of judicial legislation.

14. "Unless we are to retreat from the firm positions we have taken in the past, we must give freedom of speech in this case the same preferred treatment that we gave freedom of religion . . . freedom of the press . . . and freedom of speech and assembly." 68 Sup. Ct. at 1150. The majority opinion does not accent the fact that appellant is a member of Jehovah's Witnesses, but it alludes to a line of cases involving that sect. For discussions of the influence this sect has had on constitutional law, see Barber, *Religious Liberty v. Police Power*, 41 AM. POL. SCI. REV. 226 (1947); Cushman, *Civil Liberties*, 42 AM. POL. SCI. REV. 42 (1948); Howerton, *Jehovah's Witnesses and the Federal Constitution*, 17 MISS. L. J. 347 (1946); Note, 34 VA. L. REV. 77 (1948).

15. The Court, in applying the Federal Constitution, is not here concerned with the problem of separation of powers, but leaves that problem for the state courts. It speaks of "uncontrolled discretion" exercised by the licensing official. 68 Sup. Ct. at 1150. If the legislative body, either municipal or state, had provided a general structure of standards or conditions to be complied with, the discretion probably would not be said to be "uncontrolled."

16. "Noise can be regulated by regulating decibels. The hours and place of public discussion can be controlled." 68 Sup. Ct. at 1150.

17. "Loud-speakers are today indispensable instruments of effective public speech. . . .

is one to be met by the legislative draftsman. Carefully worded statutes allowing reasonable restrictions based on announced general standards will protect both the precious right of privacy and the equally precious right of free speech.[18]

CONSTITUTIONAL LAW—SEARCHES AND SEIZURES—EVIDENCE OBTAINED WITHOUT SEARCH WARRANT INADMISSIBLE THOUGH SEIZED IN PROCESS OF LAWFUL ARREST

A federal agent, in disguise, was employed by petitioners to help build a barn, erect a still and to work as a mashman. He kept his superiors informed by radio as to petitioners' illegal activities. After several weeks of operation, a raid was planned and executed on the barn, with permission of the owner-lessor. One of the petitioners was observed through an open door of the barn operating the still and was arrested in the act. Thereupon the illicit distillery and products at hand were seized. The other petitioners were arrested shortly thereafter. The agents had neither arrest nor search warrants. From denial of a motion to order the return of the seized property and to exclude and suppress its use as evidence against them on the ground that it had been obtained illegally, petitioners bring certiorari. *Held* (5-4),[1] that the arrest of the petitioner discovered at the distillery was legal, but the seizure was unreasonable and therefore illegal, and the order denying petitioners' motion to suppress the use of the property so seized as evidence is reversed. *Trupiano v. United States,* 68 Sup. Ct. 1229 (1948).

This case raises again[2] the troublesome problem of what is included in

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It [the sound truck] is the way people are reached." 68 Sup. Ct. at 1150. See state courts that have upheld ordinances outlawing the use of sound equipment. Kovacs v. Cooper, 135 N. J. L. 64, 50 A. 2d 451 (1946); Hamilton v. City of Montrose, 109 Colo. 228, 124 P. 2d 757 (1942). *But see* Brachey v. Maupin, 277 Ky. 467, 126 S. W. 2d 881, 887 (1939).

18. An editorial in 34 A. B. A. J. 589 (1948) views with rather unfounded alarm the decision in the principal case and predicts a trying period to be endured while legislative bodies attempt to cope with this new task of revamping their regulatory statutes.

1. Opinion by Murphy, J.; dissent by Vinson, C. J., (Black, Reed and Burton, JJ., concurring).

2. For a period of approximately a century, articles taken by unreasonable searches and seizures were admissible in evidence in federal courts against the accused, leaving the party whose constitutional right had thereby been invaded to seek his remedy in an action of trespass against the person making the illegal search and seizure. In so holding the courts adopted the English rule that the unlawful manner in which evidence is procured is not a valid objection to its being admitted as evidence. *See, e.g.,* Calcraft v. Guest, [1898] 1 Q. B. 759; Lloyd v. Mostyn, 10 M. & W. 478, 152 Eng. Rep. 558 (Ex. 1842). The Fourth Amendment does not expressly prohibit such evidence, and it was not until 1886, in Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 46, that the Supreme Court indicated that such was the intended meaning of that Amendment. The Court considered the Fourth Amendment together with the Fifth ("No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."), and saw an interaction making the admission of such evidence have the effect of compelling a person to be a witness against himself. See Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause,* 29 MICH. L. REV.

the phrase "unreasonable searches and seizures," [3] as used in the Fourth Amendment [4] and what effect violation of the secured right has. The Court has construed the Amendment to imply that ordinarily searches conducted without authority of a search warrant are unreasonable,[5] and that in seizing goods and articles law enforcement officers must secure and use search warrants wherever reasonably practicable.[6] There has been, however, a most important exception to these rules—the right of search and seizure as incident to a lawful arrest. A long line of cases affirms the principle that an arresting officer may look around at the time of the arrest and seize fruits and evidence of the crime within his immediate and discernible presence [7]—and may, in fact, search for such articles.[8] Reasons for this exception are that it may be necessary to foil the escape of the criminal or to prevent the removal or destruction of evidence, or for other reasons it may be impracticable to obtain a search warrant.[9]

1, 191 (1930). The Court in 1904, Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575, repudiated conclusion in the *Boyd* case basing its opinion on authority upholding the common-law rule; but Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652 (1914), saw the Court establish the present-day federal rule whereby the accused may petition seasonably for suppression and restoration of the wrongfully acquired evidence. *E.g.*, United States v. Lefkowitz, 285 U. S. 452, 52 Sup. Ct. 420, 76 L. Ed. 877 (1932). Wingren, *A Short Review of the Law on Searches and Seizures and the Motion to Suppress the Evidence,* 18 ROCKY MT. L. REV. 345 (1946).

3. On the law of searches and seizures generally, see CORNELIUS, SEARCHES AND SEIZURES (2d ed. 1926); DAX, SEARCHES AND SEIZURES. (1926); Arnold, *Search and Seizure Problems,* 16 TENN. L. REV. 291 (1940); Fairchild, *Freedom from Unreasonable Search and Seizure,* 25 MARQ. L. REV. 13 (1940); Fraenkel, *Concerning Searches and Seizures,* 34 HARV. L. REV. 361 (1921); Hendrix, *Recent United States Supreme Court Interpretations of the Law of Searches and Seizures,* 37 J. CRIM. L. & CRIMINOLOGY 413 (1947); Waite, *Reasonable Search and Research,* 86 U. OF PA. L. REV. 623 (1938); Wingren, *supra* note 2.

4. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." U. S. CONST. AMEND. IV. For a study of the Fourth Amendment in its historical setting, see LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (55 Johns Hopkins University Studies in Historical and Political Science, 1937). Similar or identical provisions to the United States constitutional provision in Amendment IV are contained in the constitutions of each of the forty-eight states. CORNELIUS, SEARCHES AND SEIZURES § 2 n. 13 (2d ed. 1926).

5. Gouled v. United States, 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. 647 (1921); Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652 (1914).

6. Johnson v. United States, 333 U. S. 10, 14, 15, 68 Sup. Ct. 367, 92 L. Ed. 323 (1948); Taylor v. United States, 286 U. S. 1, 6, 52 Sup. Ct. 466, 76 L. Ed. 951 (1932); Go-Bart Importing Co. v. United States, 282 U. S. 344, 358, 51 Sup. Ct. 153, 75 L. Ed. 374 (1931); Carroll v. United States, 267 U. S. 132, 156, 45 Sup. Ct. 280, 69 L. Ed. 543 (1925). The basis for such requirement is the desirability of having judicial officers, rather than police officers, determine when searches and seizures are permissible and what limitations should be placed upon such activities. United States v. Lefkowitz, 285 U. S. 452, 464, 52 Sup. Ct. 420, 76 L. Ed. 877 (1932). For a historical survey of United States statutes authorizing the issuance of search warrants, see appendix to Davis v. United States, 328 U. S. 582, 603, 604, 66 Sup. Ct. 1256, 90 L. Ed. 1453 (1946).

7. These cases are cited in the opinion in the principal case. 68 Sup. Ct. at 1232.

8. *E.g.*, Harris v. United States, 331 U. S. 145, 67 Sup. Ct. 1098, 91 L. Ed. 1399 (1947); Johnson v. United States, 333 U. S. 10, 68 Sup. Ct. 367, 92 L. Ed. 323 (1948); Peru v. United States, 4 F. 2d 881 (C. C. A. 8th 1925). If arrest is not lawful, then any search following as an incident thereto is unlawful.

9. Carroll v. United States, 267 U. S. 132, 45 Sup. Ct. 280, 69 L. Ed. 543 (1925).

In the instant case, all the Justices agreed that the arrest without a warrant was lawful, even though there had been an opportunity to obtain one, inasmuch as the arrestee was committing a felony [10] in the discernible presence of the arresting officer.[11] The point on which they were not able to agree, however, was whether the exception permitting a seizure incidental to a lawful arrest should apply to the fact situation at hand. The majority declared that the "mere fact that there was a valid arrest does not ipso facto legalize a search or seizure without a warrant" [12] and added that there must be other factors making it unreasonable or impracticable to require the arresting officer to secure a warrant before seizure. They did not find such factors present here. In view of the circumstances that the planted agent could secure all the details necessary for making out the search warrant weeks ahead of the raid, and that "the property was not of a type that could have been dismantled and removed before the agents had time to secure a warrant . . . especially [13] . . . since one of them was on hand at all times to report and guard against such a move," [14] the majority held that the seizure under these circumstances was unreasonable.[15]

The Court is confronted with the need of weighing two conflicting policies. On the one side is the policy for preservation of the constitutional guaranties of individual civil rights, including the right to be secure from unreasonable searches and seizures; and, on the other, the public interest in effective

10. Petitioner's acts were in violation of INT. REV. CODE §§ 2803, 2810, 2812, 2814, 2831, 2833.

11. Carroll v. United States, 267 U. S. 132, 156, 157, 45 Sup. Ct. 280, 69 L. Ed. 543 (1925); Elk v. United States, 177 U. S. 529, 20 Sup. Ct. 729, 44 L. Ed. 874 (1900); Kurtz v. Moffitt, 115 U. S. 487, 498, 499, 6 Sup. Ct. 148, 29 L. Ed. 458 (1885). United States v. Bell, 48 F. Supp. 986 (S. D. Cal. 1943), discusses the law of arrest. See Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201 (1940), for a treatment of the general field of arrest and incidents thereto. Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 673 (1924), deals more specifically with the problem here involved.

12. 68 Sup. Ct. at 1234, citing Carroll v. United States, 267 U. S. 132, 158, 45 Sup. Ct. 280, 69 L. Ed. 543 (1925).

13. Might a later court take this language to imply that this court would have held this seizure to be unreasonable even if the property were of a portable character, an agent being on hand to guard against the moving? *See* United States v. Kaplan, 89 F. 2d 869, 871 (C. C. A. 2d 1937). The case cited, however, seems to lend little support to the text because (1) it did not involve a search and seizure incidental to an arrest, and because (2) the search and seizure were held to be valid.

14. 68 Sup. Ct. at 1233.

15. Mr. Chief Justice Vinson, dissenting, said, "Federal officers, following a lawful arrest, seized contraband materials which were being employed in open view in violation and defiance of the laws of the land. Today, the Court for the first time has branded such a seizure illegal. Nothing in the explicit language of the Fourth Amendment dictates that result. Nor is that holding supported by any decision of this Court. . . . The Court would now condition this right of seizure after a valid arrest upon an ex post facto judicial judgment of whether the arresting officers might have obtained a search warrant. At best, the operation of the rule which the Court today enunciates for the first time may be expected to confound confusion in a field already replete with complexities." 68 Sup. Ct. at 1235, 1238. Compare Taylor v. United States, 286 U. S. 1, 52 Sup. Ct. 466, 76 L. Ed. 951 (1932); Go-Bart Importing Co. v. United States, 282 U. S. 344, 51 Sup. Ct. 153, 75 L. Ed. 374 (1931); Carroll v. United States, 267 U. S. 132, 45 Sup. Ct. 280, 69 L. Ed. 543 (1925); United States v. Lefkowitz, 285 U. S. 452, 52 Sup. Ct. 420, 76 L. Ed. 877 (1932), and cases there cited.

criminal law enforcement in order to maintain a peaceful and orderly society and government.[16] The differing opinions of judges on the relative importance of these two policies accounts for seemingly inconsistent results in some cases, and for the vigorous dissents in many of them.[17]

The case of *Harris v. United States*[18] considerably broadened the scope of the search an arresting officer may make without a search warrant in certain situations as incident to a lawful arrest. Now, a few months later, those who dissented in that case are in the majority in the instant case and find new grounds on which to hold a seizure unreasonable. The case marks the first instance when ample time in which to get a search warrant has been used as the principal reason for holding a seizure incidental to a lawful arrest to be illegal.[19] Never before had a seizure by federal officers of contraband articles being used by the arrestee at the time and place of lawful arrest in violation of the laws of the land, been held to be illegal. The Court also hints that it may limit or overrule the *Harris* case, if the question involved there comes before it again.[20]

CONSTITUTIONAL LAW—RACIALLY RESTRICTIVE COVENANTS—JUDICIAL ENFORCEMENT AS STATE ACTION

Petitioners, Negroes, purchased a parcel of land, the occupancy and ownership of which was limited by a racially restrictive agreement to persons of the Caucasian race. Respondents, owners of other property subject to the terms of the agreement, instituted suit in equity to have the petitioners re-

16. "On the one side is the social need that crime be repressed. On the other, the social need that law shall not be flouted by the insolence of office." Cardozo, J., in People v. Defore, 242 N. Y. 13, 150 N. E. 585, 589 (1925).

17. As a solution, many would have the court rectify its "historical blunder"—the *Weeks* case, in which they established the exclusionary rule—and return to the English rule. (See note 2 *supra*). Criticism of the exclusionary rule: 8 WIGMORE, EVIDENCE §§ 2183, 2184, 2184a (3d ed. 1940); CORNELIUS, LAW OF SEARCH AND SEIZURE § 7 (2d ed. 1926); Harno, *Evidence Obtained by Illegal Search and Seizure*, 19 ILL. L. REV. 303 (1925); *cf.* Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1, 191 (1930). Others, however, assert that without the exclusionary rule, the Fourth Amendment would be an empty collection of words, quoting Justice Holmes in one of his famous dissents, "We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part." Olmstead v. United States, 277 U. S. 438, 470, 48 Sup. Ct. 564, 72 L. Ed. 944 (1928). For a strong criticism of this statement by Holmes, see Waite, *Reasonable Search and Seizure*, 86 U. OF PA. L. REV. 623 (1938). And some even warn of the possibility of political persecution without the rule. *See, e.g.*, Judge Learned Hand in United States v. Kirschenblatt, 16 F. 2d 202, 203 (C. C. A. 2d 1926).

18. 331 U. S. 145, 67 Sup. Ct. 1098, 91 L. Ed. 1399 (1947); Note, 1 VANDERBILT L. REV. 60 (1947).

19. There being ample time in which to procure an arrest warrant, would the court ever go so far as to hold such an arrest as here made illegal? It seems highly improbable that it would, but before this case no one supposed that a seizure of contraband articles in plain sight of the arresting officer, incidental to a lawful arrest, would be held to be illegal just because ample time was available beforehand in which to get a search warrant.

20. 68 Sup. Ct. at 1234.

strained from taking possession of the land in question. The Supreme Court of Missouri upheld the validity of the restrictive covenant, and directed its enforcement.[1] *Held,* that although such agreements based solely on race or color are not illegal and may be voluntarily adhered to, court enforcement of them is state action and a denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Federal Constitution. *Shelley v. Kraemer,* 68 Sup. Ct. 836 (1948).[2]

Prior to the instant case, restrictive agreements[3] directed toward the exclusion of persons of a designated race[4] from using or owning property in a particular area were attacked primarily on the theory that they were either (1) inhibited by the Fourteenth Amendment,[5] (2) contrary to public policy,[6] or (3) an improper restraint on the alienation of land.[7] These attacks on race covenants have been largely unsuccessful, the rationale pertaining to the con-

1. Kraemer v. Shelley, 355 Mo. 814, 198 S. W. 2d 679 (1946).

2. McGhee v. Sipes, 68 Sup. Ct. 836 (1948), which arose in Michigan, was decided with the instant case, since a similar fact situation and the same constitutional questions were involved.

3. As to the general nature of restrictive agreements, see Stone v. Jones, 66 Cal. App. 2d 264, 152 P. 2d 19, 22 (1944); Note, 33 CORN. L. Q. 293 n. 9 (1947); Note, 162 A. L. R. 180 (1946). "The restrictions may be created by reservation in the conveyance, or by a condition annexed to the grant, or by a covenant, or they may be independent of any conveyance of land, being merely by agreement between adjoining landowners as regards the use of their land." 3 TIFFANY, REAL PROPERTY 473-4 (3d ed., Jones, 1939). Note, 14 VA. L. REV. 646 (1928), makes a distinction between restrictive covenants and covenants running with the land.

4. The agreement in the instant case provided that "it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race." 68 Sup. Ct. at 838. The Negro race is not the only race against which discrimination is directed. See 68 Sup. Ct. at 846 n. 26; McGovney, *The Anti-Japanese Land Laws of California and Ten Other States,* 35 CALIF. L. REV. 7 (1947).

5. These covenants, including restrictions both as to transfer and occupancy, have uniformly been held not unconstitutional. Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 Pac. 596, 9 A. L. R. 115 (1919); Steward v. Cronan, 105 Colo. 393, 98 P. 2d 999 (1940); Dooley v. Savannah Bank & Trust Co., 199 Ga. 353, 34 S. E. 2d 522 (1945); Lion's Head Lake v. Brzezinski, 23 N. J. Misc. 290, 43 A. 2d 729 (Dist. Ct. 1945); Lyons v. Wallen, 191 Okla. 567, 133 P. 2d 555 (1942).

6. Allegations that racial restrictions are opposed to public policy have been ineffective. Mays v. Burgess, 147 F. 2d 869 (App. D. C. 1945); Porter v. Johnson, 232 Mo. App. 1150, 115 S. W. 2d 529 (1938). A Canadian case has, however, declared race covenants to be invalid as opposed to public policy. 59 HARV. L. REV. 803 (1946). *Cf.* Mr. Justice Frankfurter's concurring opinion in Hurd v. Hodge, 68 Sup. Ct. 847, 853 (1948). "Equity is rooted in conscience. In good conscience it cannot be 'the exercise of a sound judicial discretion' by a federal court" to uphold a race covenant when such authorization violates basic rights secured against state action by the Constitution.

7. It is usually conceded that racial restrictions on use or occupancy do not impose improper restraints on the alienation of land. Meade v. Dennistone, 173 Md. 295, 196 Atl. 330 (1938); Notes, 57 YALE L. J. 426, 447-48 (1948), 162 A. L. R. 180, 181 (1946). There is, however, a decided split of authority as to whether a restriction on transfer of title is an improper restraint. For a collection of cases in conflict on this point, see Notes, 162 A. L. R. 180 (1946), 114 A. L. R. 1237 (1938), 66 A. L. R. 531 (1930), 9 A. L. R. 120 (1920).

Other grounds upon which racially restrictive covenants have been resisted with varying success include failure to record, insufficient number of signatures to the agreement, change in character of occupancy in the neighborhood subsequent to the agreement, and repugnancy to the grant of a fee simple estate. Note, 13 U. OF CHI. L. REV. 477, 479 n. 9 (1946); Note, 162 A. L. R. 180 (1946).

stitutional question being that the enforcement of private contracts does not constitute state action. On the other hand, state statutes and local ordinances purporting to achieve the same type of exclusion have been declared unconstitutional by the United States Supreme Court, the rationale being that a pattern of racial discrimination limiting the occupancy, purchase, and sale of property set forth by state or municipal legislation is "in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law." [8] But in the present case where no legislation was involved, the particular pattern of discrimination was determined by the terms of a private agreement, and the participation by the state consisted only of enforcement of that agreement. This distinction was rejected by the Court in rendering the first decision[9] to the effect that state court enforcement of a racially restrictive agreement is unconstitutional, discriminatory state action.[10]

Although voluntary adherence to the terms of a racially restrictive covenant does not violate any rights guaranteed by the Constitution,[11] under the holding of the instant case that it becomes an agreement to which the law apparently attaches no legal or equitable obligations, the covenant loses its effectiveness; for it "is perfectly true that the covenants take life from court enforcement and that without it the discrimination they implement would wholly fail." [12]

It is probable that continuing consideration will be given to certain

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8. Buchanan v. Warley, 245 U. S. 60, 82, 38 Sup. Ct. 16, 62 L. Ed. 149 (1917). See also Harman v. Tyler, 273 U. S. 668, 47 Sup. Ct. 471, 71 L. Ed. 831 (1927). For various state declarations as to invalidity of similar statutes, see 68 Sup. Ct. at 842 n. 11.

9. 68 Sup. Ct. at 839. Corrigan v. Buckley, 271 U. S. 323, 46 Sup. Ct. 521, 70 L. Ed. 969 (1926), held that racially restrictive agreements as such were not unconstitutional; the question as to validity of judicial enforcement of these agreements was not before the court. See also Note, 45 MICH. L. REV. 733, 738 (1947).

10. In Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 680, 50 Sup. Ct. 451, 74 L. Ed. 1107 (1930), the Court held that "The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government." See also Raymond v. Chicago Union Traction Co., 207 U. S. 20, 28 Sup. Ct. 7, 52 L. Ed. 78 (1907); McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds Is Unconstitutional,* 33 CALIF. L. REV. 5 (1945).

11. 68 Sup. Ct. at 842. See also Hurd v. Hodge and Urciolo v. Hodge, 68 Sup. Ct. 847, 851 (1948), cases in the District of Columbia, in which REV. STAT. § 1978 (1875), 8 U. S. C. A. § 42 (1946), was held to invalidate judicial enforcement of racially restrictive covenants, but not voluntary adherence to their terms.

12. Note, 45 MICH. L. REV. 733, 741 (1947). "Race restrictive covenants are not self-enforcing but require court aid to force the recalcitrant owner to keep his original pledge not to sell to Negroes. If it can be established that it is illegal for courts to affirmatively support these covenants, or if these agreements are unenforceable on any other grounds, race covenants will lose their effectiveness as a means of restricting Negroes to their overcrowded Harlems." Note, 33 CORN. L. Q. 293, 294 (1947). "In the restrictive covenant cases, the 'private' discrimination is ineffectual, in every contested case, until the judicial agency of the government implements it by injunction." Kahen, *Validity of Anti-Negro Restrictive Covenants: A Reconsideration of the Problem,* 12 U. OF CHI. L. REV. 198, 212 (1945).

devices in the future in an effort to attain the result previously accomplished by race covenants. Possible methods[13] might include:

(1) The creation of estates on special limitation.[14] Original deeds to each parcel conveyed would create this type of estate by the use of words providing that the estate is to last only so long as no transfer or lease is made to persons of a specified race. The special limitation subjects the remote grantee to the same liability to termination of the estate as sustained by the original grantee.[15] In the event of a transfer or lease of the land to persons of this race, title would immediately revest in the grantor.[16] Under the instant case, however, would not court enforcement of the grantor's right to possession in an action of ejectment against the grantee be considered as unlawful state action in the same category with judicial enforcement of race covenants? Would self-help be available?[17]

(2) The use of penalty bonds.[18] Here the grantor might require a penalty bond from each grantee to secure performance of the condition that the land would not be transferred or leased to persons of a particular race. However, the bond would merely force the original grantee to pay the penalty and would be ineffective in preventing either the original or a remote grantee from conveying the land to persons of any race. And the enforcement of the penalty against the original grantee might be invalidated for deprivation of a property right by the state without due process of law.

(3) The use of personal deposits.[19] The grantor might obtain a personal money deposit from each grantee to be forfeited in case of transfer or lease

13. In each of the methods considered it may be assumed that the grantor is a corporation owning a tract of land to be redeveloped into a residential subdivision. This assumption is made not as a requirement for success of any particular method, but merely to present a stronger case and to eliminate some incidental problems which would otherwise be created.

14. The estate on special limitation is an interest in land which terminates automatically upon the occurrence of a specified event. See Brown v. Hobbs, 132 Md. 559, 104 Atl. 283, 285 (1918); 1 TIFFANY, REAL PROPERTY § 217 (3d ed., Jones, 1939). This estate may be created by the use of appropriate words in the deed of conveyance; *e.g.*, " 'until' a certain event takes place, or 'while' or 'so long as' an existing state of things shall endure." *Id.* § 218. In other words, the grantee or devisee of a parcel of land retains his interest therein only for so long as a specified event does not take place.

15. Riner v. Fallis, 176 Ky. 575, 195 S. W. 1102 (1917); 1 TIFFANY, REAL PROPERTY § 220 (3d ed., Jones, 1939).

16. In creating such a limitation, other than a constitutional question, there is a problem of its being an improper restraint on alienation. Porter v. Barrett, 233 Mich. 373, 206 N. W. 532 (1925); 5 TIFFANY, REAL PROPERTY § 1345 (3d ed., Jones, 1939).

17. For a discussion of the possibility of self-help in connection with a similar problem, see Wade, *Legal Status of Property Transferred Under an Illegal Transaction*, 41 ILL. L. REV. 487, 494-95 (1946).

18. A penalty bond is a sealed instrument by which a person promises to do a certain act or perform a certain condition, or, if in default, to pay a certain sum of money as a penalty for non-performance. For a general discussion of penalties in bonds, see 3 WILLISTON, CONTRACTS §§ 774-84 (Rev. ed. 1936).

19. This situation may be analogous to the money deposit as liquidated damages to secure the performance of an executory contract, and "If the deposit is unreasonable in amount and the actual damage will be negligible or capable of actual measurement the forfeiture of the deposit will not be permitted, even though this is expressly agreed." *Id.* § 790.

to persons considered undesirable by the grantor. This forfeiture would not seem to involve state action in any form, but the arrangement would be impractical. If the original grantee conveyed the land to a person considered desirable by the grantor, the deposit would be returned, leaving the remote grantee free to convey to any person. It is also doubtful that persons seeking to purchase real estate would be willing to "tie-up" any substantial sum of money in this manner.

(4) The reservation in deeds of an option to repurchase.[20] The option, which could be drafted without reference to race, could be exercised against the original or remote grantee,[21] the maximum period, however, during which time it may be exercised being limited by the rule against perpetuities.[22] Under this arrangement, in theory at least, the grantor would be in a position to reacquire the property from any grantee without discriminating against a particular race. This theory might become important in an action for specific enforcement of the option[23] as an argument against holding court enforcement to be unconstitutional, discriminatory state action. But even if the constitutional obstacle is surmounted, it is doubtful that a prospective grantee would accept a deed subjecting him to the possibility of a forced sale at any time within the life of the option.

Intentional discrimination by individuals in selecting purchasers of real estate is in no way mitigated or denied by the holding of the instant case,[24] but it is reasonable to assume that court enforcement of any device adopting a similar policy of racial exclusion will not be upheld.[25]

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20. An option to repurchase is a reservation in a deed of conveyance of a right in the grantor to repurchase the estate created, within a specified period, from the grantee or his successor in interest. RESTATEMENT, PROPERTY § 394 (1944). This option to repurchase is an interest that falls within the common law rule against perpetuities; for the maximum permissible period allowed under this rule, see RESTATEMENT, PROPERTY § 374 (1944). "The fact that an absolute conveyance is accompanied by a bond to reconvey, or by an agreement that the grantor may purchase within a given time, at the same or a different price, is not conclusive that the transaction is a mortgage. Such a transaction is perfectly valid and the right to repurchase is lost if not exercised within the stipulated time." 5 TIFFANY, REAL PROPERTY § 1397 (3d ed., Jones, 1939).

21. "A, owning Blackacre in fee simple absolute, makes an otherwise effective conveyance . . . 'to B and his heirs, reserving, however, to A and his heirs the privilege . . . to repurchase . . . upon repaying to B or to his successor in interest, the present purchase price . . . and reiumbursing . . . for the reasonable value of improvements. . . .'" RESTATEMENT, PROPERTY § 394, illustration 1 (1944).

22. RESTATEMENT, PROPERTY § 394 (1944).

23. "We are of the opinion that the repurchase clause is sufficient to support a suit for specific performance. . . ." School Board of Roanoke v. Payne, 151 Va. 240, 144 S. E. 444, 446 (1928).

24. "That [Fourteenth] Amendment erects no shield against merely private conduct, however discriminatory or wrongful." 68 Sup. Ct. at 842.

25. If these devices prove to be ineffective, it is possible that leasehold interests, as contrasted with transfer of title to property, may be utilized more extensively by persons desiring segregation of races. Suppose for the purpose of excluding certain races a private corporation secures a large tract of land, builds dwelling units thereon, and leases them to persons of the corporation's own choice, with each lease containing a provision against sub-lease. Is this any more than such private discrimination that falls outside the scope of the Fourteenth Amendment? See Murray v. LaGuardia, 291 N. Y. 320, 52 N. E. 2d 884 (1943); Note, 57 YALE L. J. 426, 437-44 (1948) (Stuyvesant Town project).

CONTRACTS—BROKER'S COMMISSIONS—RIGHT TO RECOVER UNDER DOCTRINE OF SUBSTITUTED PERFORMANCE

Plaintiff's assignor, a broker, procured a one-year charter party for defendant, the owner of a vessel. Defendant agreed by separate contract to pay the broker his commission on the monthly hire earned under the charter. The charterer subchartered the vessel at once for the year at an increased rate. After six months the charterer had partially defaulted in payment of hire, and defendant threatened to withdraw the vessel. The charterer at this time assigned to defendant the subcharter, guaranteeing full performance. Plaintiff claims brokerage commissions on the last six-months hire received by defendant under the subcharter. *Held* (4-1), for plaintiff. Defendant accepted a substituted performance, which allowed the defendant completely to realize all benefits due under the original charter. *Kane v. Neptune Shipping, Ltd.*, 274 App. Div. 28, 79 N. Y. S. 2d 396 (1st Dep't 1948).

A contract between a broker and his principal which provides that the broker's commission will be paid upon receipt of the purchase money is held by the majority of the courts to come within well recognized principles of contract law.[1] It is a legal maxim that a condition precedent precludes the promisor's liability unless the condition is performed or excused.[2] The condition is excused if the promisor accepts a modified performance or intentionally prevents the condition from taking place.[3] The leading case of *Haber v. Goldberg*[4] represents a line of decisions in which some courts have not adhered to these principles. In this case the vendee defaulted and the principal recovered legal damages, which, the court said, did not entitle the principal to repudiate his undertaking; and the broker was allowed recovery. The condition that the purchase money be received, however, was not performed or excused. Some courts have allowed the broker to recover under similar circumstances when the principal had obtained a decree for specific performance;[5] when he had received compensation in a compromise agreement;[6] or even when he had received no compensation or damages but had a cause of action against a solvent vendee but had not prosecuted his claim.[7] A few courts

1. Daly v. Chapman Mfg. Co., 246 Mass. 118, 140 N. E. 677 (1923); Leschziner v. Bauman, 83 N. J. L. 743, 85 Atl. 205 (1912); Hinds v. Henry, 36 N. J. L. 328 (Sup. Ct. 1873); B. W. Lougheed & Co., Ltd., v. Yone Suzuki, 216 App. Div. 487, 215 N. Y. Supp. 505 (1st Dep't 1926).

2. WILLISTON, CONTRACTS § 676 (Rev. ed. 1938).

3. *Ibid.* (seven grounds listed, not all particularly applicable in this situation).

4. 92 N. J. L. 367, 105 Atl. 874 (1918).

5. In the instant case, 79 N. Y. S. 2d at 399, this is stated as the holding of the memorandum decision in Hirschfeld v. Jamaica Savings Bank, 257 App. Div. 991, 13 N. Y. S. 2d 643 (2d Dep't 1939).

6. Kendrick v. Speck, 67 F. 2d 295 (C. C. A. 4th 1933); Dermody v. New Jersey Realties, 101 N. J. L. 334, 128 Atl. 265 (1925).

7. Chambers v. Estes, 159 Ark. 250, 251 S. W. 701 (1923); Tarbell v. Bomes, 48 R. I. 86, 135 Atl. 604 (1927). *Contra:* Amies v. Wesnofske, 255 N. Y. 156, 174 N. E. 436 (1931). Note, 31 COL. L. REV. 701 (1931).

have imposed a duty on the part of the principal to enforce his legal right,[8] but this view has generally been rejected.[9]

An attempt was made in the instant case to reconcile the decisions in line with the *Haber* case with decisions holding that the broker could not recover under seemingly similar circumstances. It was pointed out that in the cases where the broker was not allowed recovery, the principal had suffered a net loss notwithstanding the fact that he had accepted compensation in a compromise agreement; whereas in the cases holding the broker could recover, the principal had been made whole by having accepted a "substituted performance." The distinction is not borne out by the cases cited. The basis of the decisions denying the broker a right to his commission was that the condition precedent, not having been excused or performed, precluded the principal's liability.[10] However, the court in *Dermody v. New Jersey Realties,*[11] allowing the broker to recover the commission, based its decision on the fact that the principal had received damages in effecting a compromise on a contract procured by the broker. The question of whether or not the principal had been made whole was not discussed.

The doctrine of "substituted performance" is basically equitable, and the qualification added by this court—*i.e.*, the principal must be made whole—is itself equitable. As pointed out in the dissenting opinion, to attempt to reconcile these principles with the cases adhering strictly to legal principles is to invite confusion. In adopting the doctrine of "substituted performance," it is submitted that the majority should have clearly pointed out that the basis of the decision was equitable, not legal.

CONTRACTS—COMMERCIAL FRUSTRATION—REQUIREMENT THAT A BASIC PURPOSE OF THE CONTRACT BE FRUSTRATED

Plaintiff, having purchased land upon which he proposed to build a new home, entered into a contract on February 15, 1946, to sell his old home to defendant. A definite date for delivery of the premises was not set, as the parties recognized that unforseen building difficulties might arise in the construction of the new home and agreed that delivery would be made when the new home was constructed to the point where plaintiff could move in. On

8. Tarbell v. Bomes, 48 R. I. 86, 135 Atl. 604 (1927); see Glade v. Ford, 131 Mo. App. 164, 111 S. W. 135, 137 (1908).

9. Amies v. Wesnofske, 255 N. Y. 156, 174 N. E. 436 (1931); Cate v. Madden, 165 Tenn. 371, 55 S. W. 2d 262 (1932); Note, 31 Col. L. Rev. 701 (1931).

10. Daly v. Chapman Mfg. Co., 246 Mass. 118, 140 N. E. 677 (1923); Amies v. Wesnofske, 255 N. Y. 156, 174 N. E. 436 (1931); B. W. Lougheed & Co. v. Yone Suzuki, 216 App. Div. 487, 215 N. Y. Supp. 505 (1st Dep't 1926); MacDowell-Peterman Co. v. Independent Packing Co., 211 App. Div. 781, 208 N. Y. Supp. 341 (1st Dep't 1925).

11. 101 N. J. L. 334, 128 Atl. 265 (1925).

May 22, 1946, The Veterans' Emergency Housing Act of 1946 [1] was passed, and plaintiff was unable to get priority for building materials. Defendant, waving delays, demanded performance. Plaintiff brought suit for declaratory relief, insisting that the governmental regulations had frustrated his contractual purpose and that he was entitled to rescind. *Held,* the doctrine of commercial frustration was not applicable. *Dorn v. Goetz,* 193 P. 2d 121 (Cal. App. 1948).

Before the doctrine of commercial frustration [2] is deemed to apply so as to release a promisor from his contractual obligations, the courts generally require the presence of the following elements: (1) that the basic reason recognized by both parties for entering into the transaction has been destroyed by the frustrating event, (2) that this event was not reasonably foreseeable, (3) that it was not in the power or control of the promisor, (4) that the contingency was not taken care of in the contract, i.e., the promisor did not expressly assume the risk, and (5) that the strict terms of the contract are still possible of performance.[3]

The doctrine of frustration is not, strictly speaking, a part of the concept of impossibility as used in contract law, though some courts tend to confuse the two concepts.[4] The true distinction is that within the doctrine of frustration performance is still possible, but the expected value of the performance to the party seeking to be excused has been destroyed by the unforeseeable hap-

1. 60 STAT. 207 (1946), repealed 61 STAT. 193, 50 U. S. C. A. § 1821 (1947).

2. See generally: Kinzer Construction Co. v. State, 125 N. Y. Supp. 46 (Ct. Cl., 1910), *aff'd* 204 N. Y. 381, 97 N. E. 871 (1912) (historical approach); Morgan v. Manser, [1947] 2 All E. R. 666, 21 Aust. L. J. 472 (1948) (collection and history of English cases dealing with commercial frustration); 6 WILLISTON, CONTRACTS §§ 1935, 1954 (Rev. ed. 1938); Buckland, Casus *and Frustration in Roman and Common Law,* 46 HARV. L. REV. 1281 (1933); Conlen, *The Doctrine of Frustration as Applied to Contracts,* 70 U. OF PA. L. REV. 87 (1921); Page, *The Development of the Doctrine of Impossibility of Performance,* 18 MICH. L. REV. 589 (1920). As to the application of the doctrine of frustration to leases see: Lloyd v. Murphy, 25 Cal. 2d 48, 153 P. 2d 47 (1944), 43 MICH. L. REV. 985 (1945); Leonard v. Autocar Sales and Service Co., 392 Ill. 182, 64 N. E. 2d 477 (1945); Frazier v. Collins, 300 Ky. 18, 187 S. W. 2d 816 (1945); Raner v. Goldberg, 244 N. Y. 438, 155 N. E. 733 (1927); 6 WILLISTON, CONTRACTS §§ 1954, 1955 (Rev. ed. 1938); Notes, 17 So. CALIF. L. REV. 173 (1944); 33 VA. L. REV. 488 (1947). As to commercial frustration and war contracts see Notes, 137 A. L. R. 1199 (1942); 147 A. L. R. 1273 (1943); 148 A. L. R. 1382 (1944); 149 A. L. R. 1447 (1944); 150 A. L. R. 1413 (1944); 151 A. L. R. 1447 (1944); 152 A. L. R. 1447 (1944). As to recovery for money paid or services rendered under a frustrated contract see: 6 WILLISTON, CONTRACTS § 1974 (Rev. ed. 1938); RESTATEMENT, CONTRACTS § 468 (1932); 56 HARV. L. REV. 307 (1942); 21 AUST. L. J. 472 (1948) (statutory control).

3. The elements listed above will not be found in that order or stated in the same terms in all the cases. See, *e.g.,* Patch v. Solar Corp., 149 F. 2d 558 (C. C. A. 7th 1945); Johnson v. Atkins, 53 Cal. App. 2d 430, 127 P. 2d 1027 (1942); Autry v. Republic Productions, Inc., 30 Cal. 2d 144, 180 P. 2d 888 (1947); Berline v. Waldschmidt, 159 Kan. 585, 156 P. 2d 865 (1945); Henjes Marine, Inc. v. White Construction Co., 58 N. Y. S. 2d 384 (Sup. Ct. 1945); United Societies Committee v. Madison Square Garden Corp., 186 Misc. 516, 59 N. Y. S. 2d 475 (Sup. Ct. 1946); *In re* Bond and Mortgage Guarantee Co., 267 N. Y. 419, 196 N. E. 313 (1935); Chandler v. Webster, [1904] 1 K. B. 493; Morgan v. Manser, [1947] 2 All E. R. 666, 21 AUST. L. J. 472 (1948); 6 WILLISTON, CONTRACTS §§ 1935, 1954 (Rev. ed. 1938); RESTATEMENT, CONTRACTS § 288 (1932); Patterson, *Constructive Conditions in Contracts,* 42 COL. L. REV. 903, 943 (1942); see note, 148 A. L. R. 1382 (1944).

4. See note 3 *supra.*

pening,[5] which causes an actual but not a technical failure of consideration.[6] Some courts assimilate the concept of frustration to that of constructive condition,[7] i.e., the parties contracted with a certain state of facts in mind and when these facts are changed or fail to materialize due to fortuitous events, the intention of the parties has been frustrated and the promisor is excused.

The doctrine of commercial frustration is essentially an equitable one;[8] and the reasoning of the court in the instant case is clearly sound and logical. The desired object recognized by both parties in entering into the contract was the sale and purchase of the old home, not the construction of the new one. The true consideration for the promise to convey the premises was the purchase price the value of which had in no way been destroyed. In the contract the promisor (vendor) recognized the possibilities of building difficulties, and this contingency was, at least, partially provided for in the contract, in that a definite date for delivery of the premises was not set. The court thus properly refused to apply the doctrine of commerical frustration.

CRIMINAL LAW—CUMULATIVE SENTENCES—EFFECT OF STATE PAROLE UPON COMMENCEMENT OF FEDERAL SENTENCE

Petitioner, while serving a state sentence, was tried, convicted and sentenced by a federal court, the sentence to "begin to run at the expiration of the sentence now being served." Thereafter, the state paroled and delivered the petitioner to the federal authorities, by whom he has since been incarcerated. He petitioned for a writ of habeas corpus, contending that the federal sentence should not commence until the expiration of his parole. *Held,* petition denied. The state sentence had expired, at least insofar as it was an obstacle to service of the federal sentence. *Hunter v. Martin,* 68 Sup. Ct. 1030 (1948).

In the field of criminal law enforcement the federal and state governments, on the basis of comity, have worked out mutual agreements designed to facilitate the handling of prisoners. The cases agree that where both state and federal authorities have criminal charges against the same person, either government may surrender the custody of the prisoner to the other juris-

5. See note 2 *supra.*

6. 6 WILLISTON, CONTRACTS § 1935 (Rev. ed. 1938), in discussing the doctrine of frustration uses the descriptive term "failure of consideration." It has been suggested that this is an unfortunate confusion of terms. Patterson, *Constructive Conditions in Contracts,* 42 COL. L. REV. 903, 951 (1942).

7. These cases are discussed in Patterson, *Constructive Conditions in Contracts,* 42 COL. L. REV. 903, 943 (1942); McNair, *Frustration of Contracts by War,* 56 L. Q. REV. 173 (1940); Note, 40 ILL. L. REV. 290 (1945).

8. Johnson v. Atkins, 53 Cal. App. 2d 430, 127 P. 2d 1027 (1942); Berline v. Waldschmidt, 159 Kan. 585, 156 P. 2d 865 (1945); *In re* Bond and Mortgage Guarantee Co., 167 N. Y. 419, 196 N. E. 313 (1935); Farlou Realty Corp. v. Woodsom Associates, Inc., 49 N. Y. S. 2d 367 (Sup. Ct. 1944), *aff'd* 294 N. Y. 846, 62 N. E. 2d 396 (1945); Morgan v. Manser, [1947] 2 All E. R. 666.

diction without prejudicing his rights.[1] However, there is a conflict of authority on the issue presented by the principal case, that is: does a federal court sentence which is stated to commence upon the expiration of a currently running state sentence entitle a prisoner, who has obtained a state parole, to temporary freedom during the period of his parole?[2] The cases concede that no federal statute is involved in this question.[3] It is a matter of judicial interpretation of the term "expiration of sentence."[4]

Those cases which hold that a prisoner is entitled to his liberty rely upon legal technicalities.[5] These courts interpret the term "expiration of sentence" to mean the total legal termination of all physical and constructive control of the prisoner.[6] For a definition of "constructive control," they resort to a time honored principle of comity. This principle states that the court which first asserts jurisdiction over a person, be it federal or state, may continue its assertion without interference from the other sovereign.[7] If, therefore, a state court convicts and imprisons a criminal, and subsequently paroles him, these courts rationalize that the parolee remains constructively a prisoner in the legal custody of the state, and therefore, under the rules of comity, is immune from federal incarceration.[8]

Other cases, including the principal case, construe the term "expiration of sentence" to mean the termination of actual physical imprisonment.[9] These cases hold that after a state prisoner is released on parole, he may be im-

1. Ponzi v. Fessenden, 258 U. S. 254, 42 Sup. Ct. 309, 66 L. Ed. 607 (1922); Rosenthal v. Hunter, 164 F. 2d 949 (C. C. A. 10th 1947); United States *ex rel.* Lombardo v. McDonnell, 153 F. 2d 919 (C. C. A. 7th 1946), *cert. denied,* 328 U. S. 872 (1946); Johnston v. Wright, 137 F. 2d 914 (C. C. A. 9th 1943); Wall v. Hudspeth, 108 F. 2d 865 (C. C. A. 10th 1940); Cato v. Smith, 104 F. 2d 885 (C. C. A. 9th 1939), *cert. denied,* 308 U. S. 608 (1939); United States v. Robinson, 74 F. Supp. 427 (W. D. Ark. 1947); Ohrazada v. Turner, 164 Kan. 581, 190 P. 2d 413 (1948); People *ex rel.* McCarthy v. Ragen, 389 Ill. 172, 58 N. E. 2d 872 (1945); 8 HUGHES, FEDERAL PRACTICE § 6340 (1931).

2. Parolee is entitled to temporary freedom: Johnston v. Wright, 137 F. 2d 914 (C. C. A. 9th 1943); *cf.* Tippitt v. Squier, 145 F. 2d 211 (C. C. A. 9th 1944). *Contra:* Hunter v. Martin, 68 Sup. Ct. 1030 (1948); United States *ex rel.* Lombardo v. McDonnell, 153 F. 2d 919 (C. C. A. 7th 1946), *cert. denied,* 328 U. S. 872 (1946); Kirk v. Squier, 150 F. 2d 3 (C. C. A. 9th 1945), *cert. denied,* 326 U. S. 775 (1945); *cf.* Rosenthal v. Hunter, 164 F. 2d 949 (C. C. A. 10th 1947); United States v. Robinson, 74 F. Supp. 427 (W. D. Ark. 1947).

3. Ellerbrake v. King, 116 F. 2d 168, 170 (C. C. A. 8th 1940). See annotation to 18 U. S. C. A. § 709a (Supp. 1948).

4. Hunter v. Martin, 68 Sup. Ct. 1030 (1948). The trial court's ambiguous phraseology might have been avoided if the sentence had read "upon release from the state penitentiary" rather than "at the expiration of sentence." Under the former, it is clear that any release, absolute or conditional, would have allowed the federal authorities immediately to seize the petitioner.

5. Johnston v. Wright, 137 F. 2d 914 (C. C. A. 9th 1943); *cf.* Tippitt v. Squier, 145 F. 2d 211 (C. C. A. 9th 1944).

6. Johnston v. Wright, 137 F. 2d 914 (C. C. A. 9th 1943).

7. 8 HUGHES, FEDERAL PRACTICE § 6340 (1931).

8. Johnston v. Wright, 137 F. 2d 914 (C. C. A. 9th 1943); *see Ex parte* Taylor, 216 Cal. 113, 13 P. 2d 906, 907 (1932).

9. Hunter v. Martin, 68 Sup. Ct. 1030 (1948); United States *ex rel.* Lombardo v. McDonnell, 153 F. 2d 919 (C. C. A. 7th 1946), *cert. denied,* 328 U. S. 872 (1946); Kirk v. Squier, 150 F. 2d 3 (C. C. A. 9th 1945), *cert. denied,* 326 U. S. 775 (1945); *cf.* Rosenthal v. Hunter, 164 F. 2d 949 (C. C. A. 10th 1947); United States v. Robinson, 74 F. Supp. 427 (W. D. Ark. 1947).

mediately imprisoned by federal authorities pursuant to a sentence stated to commence at the expiration of the state sentence.[10] These courts admit that under the rules of comity a state might forbid any federal interference with its parolee if it should choose to do so. They hold, however, that silence and apparent acquiescence of the state authorities to federal incarceration of the parolee imputes a waiver of the state's jurisdiction.[11] These courts reason that there is even greater probability that a state intends to yield its custody of a criminal to the federal government when the state officials physically deliver him into the hands of federal authorities.[12] While these courts concede that a parolee's state sentence is not technically over,[13] they hold that so far as it might serve as a bar to federal imprisonment, the state sentence is terminated.[14]

Although most courts adopting the second view do not so state in their opinions, it appears that their underlying reason for refusing the prisoner temporary freedom is simply that they do not feel he has a standing to question proper state and federal negotiations concerning his custody.[15] Further, these courts are obviously concerned with the possible adverse effect such temporary freedom would have upon society.

This latter position is a demonstration of the tendency of courts to look through legalistic technicalities and do sensible justice where a question of the sentencing of criminals is involved. It even considers the deleterious and pronounced anti-social effects on a parolee himself who could look forward to nothing better than another term of imprisonment.[16] True, it brushes aside the niceties of "legal custody" [17] as contrasted with "physieal custody," but

10. Hunter v. Martin, 68 Sup. Ct. 1030 (1948); United States *ex rel.* Lombardo v. McDonnell, 153 F. 2d 919 (C. C. A. 7th 1946), *cert. denied,* 328 U. S. 872 (1946); Kirk v. Squier, 150 F. 2d 3 (C. C. A. 9th 1945), *cert. denied,* 326 U. S. 775 (1945).

11. Cases cited note 2 *supra.*

12. Hunter v. Martin, 68 Sup. Ct. 1030 (1948); Kirk v. Squier, 150 F. 2d 3 (C. C. A. 9th 1945), *cert. denied,* 326 U. S. 775 (1945); Wall v. Hudspeth, 108 F. 2d 865 (C. C. A. 10th 1940); *accord,* People *ex rel.* McCarthy v. Ragen, 389 Ill. 172, 58 N. E. 2d 872 (1945).

13. If such a prisoner is released by the federal government before the termination of his state parole, the state may elect to re-incarcerate him. *See* Kirk v. Squier, 150 F. 2d 3, 7 (C. C. A. 9th 1945), *cert. denied,* 326 U. S. 775 (1945).

14. Cases cited note 2 *supra.*

15. Ponzi v. Fessenden, 258 U. S. 254, 262, 42 Sup. Ct. 309, 66 L. Ed. 607 (1922); Wall v. Hudspeth, 108 F. 2d 865, 866 (C. C. A. 10th 1940); Ohrazada v. Turner, 164 Kan. 581, 190 P. 2d 413, 416 (1948). The *Wall* case expressly states: "[E]ither the federal or a state government may voluntarily surrender its prisoner to the other without the consent of the prisoner, and in such circumstances the question of jurisdiction and custody is purely one of comity between the two sovereigns, not a personal right of the prisoner which he can assert in a proceeding of this kind." *Id.* at 866.

16. *See* Tippitt v. Squier, 145 F. 2d 211, 212 (C. C. A. 9th 1944): The primary and basic purpose of parole statutes is to enable a prisoner "to find some 'honorable and useful employment while upon parole.' . . . Obviously such reform would be frustrated where during the parole period on a first sentence the parolee is looking forward to another term of imprisonment on a second sentence."

17. "In the case of a parolee, the judgment is a sentence and commitment. The legal position conferred upon the party by such judgment is the obligation to serve the designated term in prison. Until that sentence is terminated, the judgment committing him to the custody of the prison authorities is still in effect. The additional liberty con-

in so doing it adopts a realistic approach to an important problem in criminal law enforcement. As stated in the instant case, "To hold otherwise would mean that a man alrcady adjudged guilty of a serious federal crime would be left at large and free of all restraint for an interlude."[18] It appears that the courts which have adopted the second view have chosen the better approach, better for the practical exigencies of criminal law enforcement and, in the last analysis, better for society.

EVIDENCE—TESTIMONY OF SPOUSES—INADMISSIBLE IN DIVORCE ACTION FOR CRUELTY

A husband filed a bill for divorce on the ground of cruelty. Before the case was heard the wife was adjudged insane; consequently so much of the husband's deposition as related to "transactions and conversations with and statements by" the wife was exeluded under Tennessee Code Section 9779,[1] which renders inadmissable testimony as to transactions with an opposite party now incapacitated. On appeal, complainant contended that section 9777,[2] which abrogated the common law party-disqualification rule, should be construed *in pari materia* with section 9779 and would make the evidence admissible. *Held,* evidence properly excluded under section 9779. There is no basis for construction of the two sections *in pari materia.* In the second place the evidence would not be admissible under section 9777. *Jackson v. Jackson,* 210 S. W. 2d 332 (Tenn. 1948).

Although this seems to be the first reported case in which code section 9779 is applied, the real importance of the decision lies in the interpretation given to section 9777. The language of the court on this latter point may be dictum, for section 9779, standing alone, would clearly exclude the testimony. On the other hand the court's interpretation of section 9777 may be considered an alternate ground for the decision. At any rate the position taken by the court is at odds with previous decisions, and suggests an important change in Tennessee divorce law.

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ferred by the parole is a result of action by the Board of Pardons, an administrative body. The parolee is still in custodia legis, and under the control of the State Board, though outside prison walls." McCoy v. Harris, 108 Utah 407, 160 P. 2d 721, 723 (1945).

18. 68 Sup. Ct. at 1030 (1948).

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1. "It shall not be lawful for any party to any action, suit, or proceeding to testify as to any transaction or conversation with, or statement by, any opposite party in interest, if such opposite party is incapacitated or disqualified to testify thereto, by reason of idiocy, lunacy, or insanity, unless called by the opposite side, and then only in the discretion of the court." TENN. CODE ANN. § 9779 (Williams, 1934).

2. "In all civil actions, no person shall be incompetent to testify because he is a party to, or interested in, the issue tried, or because of the disabilities of coverture, but all persons including husband and wife, shall be competent witnesses, though neither husband nor wife shall testify as to any matter that occurred between them by virtue of or in consequence of the marital relation." TENN. CODE ANN. § 9777 (Williams, 1934).

In *E. W. M. v. J. C. M.*[3] the court of chancery appeals held the prohibition, contained in section 9777, against testimony by the spouses concerning their marital affairs did not apply in a suit for divorce on the ground of cruelty. Recognizing this prohibition to be based upon a public policy which would protect the sanctity of marriage by promoting confidence and trust between the spouses,[4] the court held that in a divorce proceeding the reason for the rule entirely fails.[5] Shortly thereafter, the supreme court in *Gardner v. Gardner*[6] reversed a lower court for refusing to allow a wife to testify to acts of cruelty, saying: "The practice is now settled by this Court that husband and wife are competent witnesses in divorce proceedings and may testify in respect of any acts of cruelty offered the one by the other." [7]

It is therefore surprising that in the present case the court treats the question as open. *Gardner v. Gardner* was apparently overlooked. The court did not follow *E. W. M. v. J. C. M.*, stating that the authority of that case was denied by the following quotation from *Hunt v. Hunt*:[8] "It has not been decided that a husband or wife is incompetent as a witness as to the matters proscribed [by section 9777] when the litigation is directly between themselves. . . . It is not necessary to determine the question here." This was dictum.[9] Furthermore, the suit was brought to impress a trust; it was not a divorce case, and the quotation must be read in the light of that fact. *Patton v. Wilson*,[10] decided before the passage of the statute, is also cited as reserving the question, but the question there reserved seems to be whether husband and wife, as adverse parties, are competent to testify at all—a question no longer in doubt.

The court, then, considering itself free of controlling authority, reexamined the statute, finding it clear and "containing no language that would justify an exception by construction." The court concluded that the statute, construed literally, would apply in divorce proceedings. But a contrary interpretation is possible without resorting to an exception by construction. The preservation of the marital disqualification in section 9777 is a restatement of the common law rule.[11] The common law marital disqualification did not

3. 2 Tenn. Ch. App. 463 (1897).
4. Patton v. Wilson, 70 Tenn. 101 (1878); Kimbrough v. Mitchell, 38 Tenn. 539 (1858); Brewer v. Ferguson, 30 Tenn. 565 (1857).
5. Wigmore agrees with this position. 8 WIGMORE, EVIDENCE §§ 2239, 2338 (3d ed. 1940). See Note, 70 A. L. R. 499-506 (1931).
6. 104 Tenn. 410, 58 S. W. 342 (1900). The court cites the unreported case of Malone v. Malone, Knoxville, September Term, 1898.
7. *Id.* at 413, 58 S. W. at 343.
8. 169 Tenn. 1, 14, 80 S. W. 2d 666, 671 (1935).
9. On trial the evidence had been admitted without objection. No objection was, therefore, available upon appeal.
10. 70 Tenn. 101 (1878).
11. Covert v. State, 158 Tenn. 531, 14 S. W. 2d 735 (1929); McCormick v. State, 135 Tenn. 218, 186 S. W. 95 (1916); Orr v. Cox, 71 Tenn. 617 (1879); Patton v. Wilson, 70 Tenn. 101 (1878).

prevent one spouse from testifying to physical mistreatment by the other.[12] Such testimony was admissible except in those cases where the testifying spouse was a party. It was there inadmissible only because of the rule disqualifying all parties. Where parties, including husband and wife, are competent witnesses by statute the injured spouse should logically be able to testify to maltreatment in a divorce suit, since this testimony is within the well-recognized exception to the marital disqualification.[13]

Exclusion of such testimony in divorce cases undermines the very policy that lies beneath the marital disqualification rule. The rule is designed to protect the sanctity of marriage. In this type of case it protects in a very real sense the spouse who has destroyed that sanctity.

For several reasons the present decision ought not to be regarded as settling the law: (1) The alternate holding was not necessary to the decision. (2) The contrary authority of the *Gardner* case was overlooked. (3) Well-established principles of common law would seem to require a contrary result. In any event, the legislature might well resolve all doubt by amending the statute expressly to allow either husband or wife to testify to any act of cruelty committed by one against the other.

JUDGMENTS—ESTOPPEL TO DENY VALIDITY OF FOREIGN DIVORCE VOID FOR WANT OF JURISDICTION

Petitioner, a domiciliary of South Carolina, obtained a divorce in Georgia by misrepresenting her residence. She then married the deceased, who had aided her in procuring the divorce. On the latter's death, respondent, his father and heir, sought to be appointed administrator of his estate. Petitioner, as the deceased's widow, claimed a preferred right to administer the estate. Respondent alleged that petitioner was not the widow of the deceased because the Georgia divorce from her previous husband was void for want of jurisdiction. Petitioner contended that respondent was estopped to challenge the validity of the divorce decree. *Held,* that the divorce was invalid and that petitioner's unclean hands barred her from invoking an estoppel against respondent. Ex parte *Nimmer,* 47 S. E. 2d 716 (S. C. 1948).

The question of whether a person should be estopped from challenging

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12. Soule's Case, 5 Greenl. 407 (Me. 1828); Bentley v. Cooke, 3 Doug. 422, 99 Eng. Rep. 729 (K. B. 1784); Lord Audley's Case, 3 How. St. Tr. 401, s.c. Hut. 115, 123 Eng. Rep. 1140 (1631); *cf.* Norman v. State, 127 Tenn. 340, 155 S. W. 135 (1912) (wife can testify in criminal case against husband as to injuries inflicted against her during marriage but not as to act of intercourse in violation of age of consent if she subsequently voluntarily married him).

13. 8 WIGMORE, EVIDENCE §§ 2239, 2338 (3d ed. 1940); Stebbins v. Anthony, 5 Colo. 348 (1880); People *ex rel.* Barry v. Mercein, 8 Paige 47 (N. Y. Ch. 1839).

the validity of a divorce decree arises in a multitude of fact situations.[1] A court's decision to bar such a challenge involves the resolution of a number of conflicting policies.[2] With the presence of these conflicting policies and of the wide variety of facts which may control the decisions a conflict of authority is to be expected. Much of this conflict arises, however, from the use of distinguishable precedents. A detailed analysis of the cases will indicate which of the various factors are controlling, and a comprehensive classification of these cases will point out which of the various policies and equitable principles are applicable in a particular case.[3]

Cases where a party to a divorce decree is attacking it as void for want of jurisdiction and where no new marriage relationship has been entered into may be grouped together. In this class a distinction has been made between those in which the continuation of the marital status is in issue and those in which property or pecuniary rights are involved.[4] In the former type the public policy favoring the final determination of such issues in order that the parties may be assured of their status is of paramount importance;[5] but in the latter type that policy is not controlling and the cases may be dealt with according to general equitable principles.[6]

Cases where a new marital relationship has been created in reliance on the void divorce decree form a second class. These cases may be divided into those in which the new relationship is still in existence and those in which that relationship has been dissolved by the death of one of the parties. Public policy in the former group favors the preservation of the new relationship as a going concern,[7] unless by so doing the rights of some innocent party would be injured.[8] This policy is recognized regardless of the character of the

1. See, *e.g.,* the cases collected in Notes, 109 A. L. R. 1018 (1937), 120 A. L. R. 815 (1939), 122 A. L. R. 1321 (1939), 140 A. L. R. 914 (1942), 153 A. L. R. 941 (1944).

2. For a general discussion of these policies see Note, 21 VA. L. REV. 797 (1935).

3. A comprehensive classification of the cases is made in Jacobs, *Attacks on Decrees of Divorce,* 34 MICH. L. REV. 749, 959 (1936).

4. Hamm v. Hamm, 204 S. W. 2d 113 (Tenn. App. 1947), 1 VANDERBILT L. REV. 161.

5. Smith v. Smith, 13 Gray 209 (Mass. 1859); Vose v. Vose, 280 N. Y. 779, 21 N. E. 2d 616 (1939); Shannon v. Shannon, 247 App. Div. 790, 286 N. Y. Supp. 27 (2d Dept. 1936); Hamm v. Hamm, 204 S. W. 2d 113 (Tenn. App. 1947). *Contra:* Smith v. Smith, 36 F. Supp. 412 (D. C. 1940); Stevens v. Stevens, 273 N. Y. 157, 7 N. E. 2d 26 (1937); *cf.* Lippincott v. Lippincott, 141 Neb. 186, 3 N. W. 2d 207 (1942).

6. Sammons v. Pike, 107 Minn. 430, 120 N. W. 540 (1909); Romanski's Estate, 354 Pa. 261, 47 A. 2d 233 (1946); Brown v. Brown, 242 App. Div. 33, 272 N. Y. Supp. 877 (4th Dept. 1934), *aff'd mem.,* 266 N. Y. 532, 195 N. E. 186 (1935); *In re* Feyh's Estate, 52 Hun. 102, 5 N. Y. Supp. 90 (Sup. Ct. 1889). The requisites of a true estoppel are not necessary to bar one from challenging a void divorce. Bledsoe v. Seaman, 77 Kan. 679, 95 Pac. 576 (1908); Krause v. Krause, 282 N. Y. 355, 26 N. E. 2d 290 (1940). However, the court may use the fact that the requisites are not met as a basis for denying the estoppel. Ainscow v. Alexander, 39 A. 2d 54 (Del. Super. Ct. 1944); Wampler v. Wampler, 25 Wash. 2d 258, 170 P. 2d 316 (1946). Some courts have refused the doctrine altogether. Cartwright v. McGown, 121 Ill. 388, 12 N. E. 737 (1887); *In re* Christiansen's Estate, 17 Utah 412, 53 Pac. 1003 (1898).

7. Goodloe v. Hawke, 113 F. 2d 753 (App. D. C. 1940), 9 GEO. WASH. L. REV. 356 (1941).

8. Situations in which the new relationship is still in existence may be grouped into

action in which the challenge is made. However, in cases in which the relationship no longer exists this policy may have less weight.[9] A further distinction should be made in this latter group between cases in which the surviving spouse is challenging the decree in order to set up some rights against his former spouse,[10] and those in which a representative of the deceased spouse raises the invalidity of the void decree in order to prevent the surviving second spouse from claiming any rights in the deceased's estate.[11]

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the following categories: First, where the petitioner in a divorce action has married one who aided him in obtaining it, the spouse who aided should ordinarily be estopped from challenging the validity of the decree. Goodloe v. Hawke, 113 F. 2d 753 (App. D. C. 1940); Harlan v. Harlan, 70 Cal. App. 2d 657, 161 P. 2d 490 (1945); Van Slyke v. Van Slyke, 186 Mich. 324, 152 N. W. 921 (1915); Margulles v. Margulles, 109 N. J. Eq. 391, 157 Atl. 676 (Ch. 1931); Oldham v. Oldham, 174 Misc. 22, 19 N. Y. S. 2d 667 (Sup. Ct. 1940); Kaufman v. Kaufman, 177 App. Div. 116, 163 N. Y. Supp. 566 (1st Dept. 1917). *Contra:* Christopher v. Christopher, 198 Ga. 361, 31 S. E. 2d 818 (1944); Brunel v. Brunel, 64 N. Y. S. 2d 295 (Sup. Ct. 1946); Hughey v. Ray, 207 S. C. 374, 36 S. E. 2d 33 (1945). The petitioner should be estopped. *See* Oldham v. Oldham, 174 Misc. 22, 19 N. Y. S. 2d 667, 668 (Sup. Ct. 1940). *But see* Campbell v. Campbell, 62 N. Y. S. 2d 245, 246 (Sup. Ct. 1946). The respondent in the divorce action should not be estopped unless she has in some way accepted the benefits of the decree or is guilty of laches. (No cases).

Second, where the petitioner in the divorce action has married an innocent spouse that spouse should not be estopped unless she has accepted the benefits of the decree. Lefferts v. Lefferts, 263 N. Y. 131, 188 N. E. 279 (1933). *But cf.* Farr v. Farr, 190 Iowa 1005, 181 N. W. 208 (1921); Deyette v. Deyette, 92 Vt. 305, 104 Atl. 232 (1918). The petitioner should be estopped, whether in an action against the first spouse or her representatives, Way v. Way, 132 S. C. 288, 128 S. E. 705 (1928); or against the second spouse, Krause v. Krause, 282 N. Y. 355, 26 N. E. 2d 290 (1940); McIntyre v. McIntyre, 211 N. C. 698, 191 S. E. 507 (1937). The respondent should not be estopped unless she is guilty of laches or has accepted the benefits of the decree, whether in an action against the petitioner, Bethune v. Bethune, 94 S. W. 2d 1043 (Ark. 1936); or against petitioner's representative or second spouse, Richardson's Estate, 132 Pa. 292, 19 Atl. 82 (1890) (estoppel—respondent accepted the benefits of the decree).

Third, where the respondent in the divorce action has remarried, the second spouse should not be estopped unless she can be said to have accepted the benefits of the decree or to be guilty of laches. (No cases). The respondent should be estopped, either in an action against the second spouse, Hansen v. Hansen, 185 Misc. 443, 57 N. Y. S. 2d 331 (Sup. Ct. 1945); *see* Loftis v. Dearing, 201 S. W. 2d 655 (Tenn. 1947); or in an action against the petitioner or his representative, *In re* Kyle, 176 P. 2d 96 (Cal. App. 1947); Arthur v. Israel, 15 Colo. 147, 25 Pac. 81 (1890); Mohler v. Shank, 93 Iowa 273, 61 N. W. 981 (1895); *In re* Bingham's Will, 265 App. Div. 48, 39 N. Y. S. 2d 756 (2d Dept. 1943); Cummings v. Huddleston, 99 Okla. 195, 226 Pac. 104 (1924). The petitioner in the divorce action should also be estopped to deny the validity of the divorce, either in an action against the respondent, Mirsky v. Mirsky, 35 N. Y. S. 2d 858 (Sup. Ct. 1942). *Contra:* Hollingshead v. Hollingshead, 91 N. J. Eq. 261, 110 Atl. 19 (Ch. 1920); Querze v. Querze, 290 N. Y. 13, 47 N. E. 2d 423 (1943); or against respondent's representative or second spouse, Marvin v. Foster, 61 Minn. 154, 63 N. W. 484 (1895); Starbuck v. Starbuck, 173 N. Y. 503, 66 N. E. 193 (1903); *In re* Robottom's Estate, 248 App. Div. 137, 288 N. Y. Supp. 397 (2d Dept. 1936). *But cf. In re* Hensgen's Estate, 181 P. 2d 69 (Cal. App. 1947).

9. It might be held to protect those incidents of the relationship which remain after the death of the spouse, *e.g.*, legitimacy of children, widow's rights, etc.

10. No cases could be found directly on the point, but since the surviving spouse has accepted the benefits of the divorce decree he should not be heard to challenge its validity, especially when his purpose is to obtain more property from his former spouse.

11. The representative of a decedent who married the petitioner in the divorce action could not challenge the validity of that divorce decree, where decedent aided in procuring the decree, *In re* Davis's Estate, 38 Cal. App. 2d 576, 101 P. 2d 761 (1940). *Contra:* Ainscow v. Alexander, 39 A. 2d 54 (Del. Super. Ct. 1944), *reversing* 34 A. 2d 593 (Del. Orphans' Ct. 1943); *In re* Ferry's Estate, 155 Misc. 198, 279 N. Y. Supp. 919 (Surr. Ct. 1935); or merely accepted the benefits of that decree, *In re* Blum's Estate, 185 Misc. 43, 55 N. Y. S. 2d 651 (Surr. Ct. 1945). *Contra:* Bell v. Little, 237 N. Y. 519,

The instant case is of the latter type. The fact that the heir or the administrator of the deceased is attacking the decree, rather that the deceased himself, should make no difference in the application of the controlling equitable principles, because where the deceased would be estopped, the heir or administrator should be estopped.[12]

In the instant case the deceased aided in the procurement of the void decree.[13] He accepted the benefits of that decree.[14] He should be estopped to deny its validity. The court, however, refused to allow the petitioner to raise the estoppel, on the ground that she came into court with unclean hands and hence should be denied equitable relief. In thus estopping the petitioner the court in effect granted equitable relief to one who stood in no better position. Petitioner should not have been estopped from questioning respondent's right to challenge the divorce decree. Her wrongdoing should merely have formed the basis for estopping her in case she sought to challenge that decree herself.[15] The deceased, his heir or administrator, and the petitioner each should have been denied the right to challenge the validity of the Georgia decree.

JUDGMENTS—RES JUDICATA—OPERATION AS COLLATERAL ESTOPPEL

In 1917 the United States seized property belonging to a German alien.[1] After returning it in 1924, the United States sued the alien's estate for the value of this property on the grounds that the return had been made under a mistake of law and because of fraudulent representations. The United States obtained a judgment based solely on the ground that there was a

142 N. E. 726 (1923). The representative of the petitioner in the divorce action could not challenge the validity of that divorce. *In re* Brandt's Estate, 190 P. 2d 497 (Ariz. 1948); Hynes v. Title Guarantee & Trust Co., 273 N. Y. 612, 7 N. E. 2d 719 (1937); Watson v. Watson, 172 S. C. 362, 174 S. E. 33 (1934). *Contra: In re* Lindgren's Estate, 293 N. Y. 18, 55 N. E. 2d 849 (1944); *In re* Grossman's Estate, 263 Pa. 139, 101 Atl. 86 (1919). The representative of a respondent in a divorce action was estopped to challenge the validity of the divorce decree because the respondent had accepted the benefits of the decree by remarrying. Loftis v. Dearing, 201 S. W. 2d 655 (Tenn. 1947).

12. 1 FREEMAN, JUDGMENTS 1059, 1061 (5th ed. 1925).

13. Such conduct ordinarily forms a basis for an estoppel. Harlan v. Harlan, 70 Cal. App. 2d 657, 161 P. 2d 490 (1945). *But cf.* Hughey v. Ray, 207 S. C. 374, 36 S. E. 2d 33 (1945) (decision based on policy in matrimonial actions and not on general equitable principles). See also Jacobs, *Attacks on Decrees of Divorce by Second Spouses,* 15 N. C. L. REV. 136 (1937).

14. Many cases have based an estoppel on acceptance of the benefits of the decree. *E.g.,* Arthur v. Israel, 15 Colo. 147, 25 Pac. 81 (1890); *In re* Bingham's Will, 265 App. Div. 48, 39 N. Y. S. 2d 756 (2d Dept. 1943); Loftis v. Dearing, 201 S. W. 2d 655 (Tenn. 1947).

15. A party cannot invoke the jurisdiction of a court and after obtaining the relief desired, repudiate the action on the ground that the court had no jurisdiction. Bledsoe v. Seaman, 77 Kan. 679, 95 Pac. 576 (1908); Krause v. Krause, 282 N. Y. 355, 26 N. E. 2d 290 (1940).

1. Seizure was made under the Trading with the Enemy Act, 40 STAT. 411 (1917), 50 U. S. C. A. APP. § 1 *et seq.* (Supp. 1947).

mistake of law. The issue of fraud was not determined.[2] While attempting to satisfy this judgment through a claim in the administration proceedings of the alien's estate in the New York Surrogate Court, the Government raised the issue of fraud on the part of the alien, his lawyer, and the administrator of the alien's estate. The Surrogate Court ruled that there had been no fraud, and the result was a partial satisfaction of the claim of the United States from the estate.[3] No appeal was ever taken. The present action was instituted by the United States against the alien's attorney to recover the remainder of its judgment, and the claim was based on the same issue of fraud that had been raised and determined in the New York Surrogate Court. *Held,* that the issue had been decided in the proceeding before the New York Surrogate Court and under the doctrine of collateral estoppel could not be raised in this different cause of action. *United States* v. *Silliman,* 167 F. 2d 607 (C. C. A. 3d 1948).

The doctrine of res judicata is that a valid final judgment rendered by a court having jurisdiction over the parties and the subject matter is conclusive as between the parties and their privies.[4] The result is that persons bound by a judgment may sometimes be prevented from showing the actual truth, but public policy is held to justify the application of res judicata.[5] Within this doctrine, a valid judgment[6] operates (1) as a *bar,* where a judgment for the defendant on the merits of a case extinguishes the cause of action and bars the parties and their privies from litigating a subsequent suit on the same cause of action,[7] (2) by way of *merger,* where a judgment for the plaintiff creates new rights, and the cause of action is merged into the judgment, or (3) by way of *collateral estoppel,*[8] where the same parties or their

2. United States v. Rodiek, 117 F. 2d 588, 594 (C. C. A. 2d 1941), *aff'd,* 315 U. S. 783 (1942) (equally divided court).

3. *In re* Hackfeld's Estate, 180 Misc. 406, 40 N. Y. S. 2d 60 (Surr. Ct. 1943).

4. Johnson Co. v. Wharton, 152 U. S. 252, 14 Sup. Ct. 608, 38 L. Ed. 429 (1894); 30 AM. JUR., Judgments § 161 (1940).

5. Bennett v. Comm'r, 113 F. 2d 837 (C. C. A. 5th 1940); Scott, *Collateral Estoppel by Judgment,* 56 HARV. L. REV. 1 (1942). See, however, Cleary, *Res Judicata Re-examined,* 57 YALE L. J. 339 (1948), where the author lists the public policy arguments commonly advanced to justify the rule of res judicata as (1) danger of double jeopardy, (2) desirability of stable judicial determination, (3) freedom from vexatious litigation, and (4) economy of court time. Cleary states that these arguments are unconvincing, and that the rules of res judicata are too strict and technical.

6. As to the effect of a void judgment, see McIntosh v. Wiggins, 356 Mo. 926, 204 S. W. 2d 770 (1947); 31 AM. JUR., Judgments § 430 (1940); 30 *id.* § 198 (1940).

7. Henderson v. United States Radiator Corp., 78 F. 2d 674 (C. C. A. 10th 1935).

8. The leading case on the distinction between a judgment operating as a bar or merger, and a judgment operating as a collateral estoppel is Cromwell v. County of Sac, 94 U. S. 351, 353, 24 L. Ed. 195 (1876), in which the court held that "where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action." See Scott, *Collateral Estoppel by Judgment,* 56 HARV. L. REV. 1 (1942). Collateral estoppel is the same as "estoppel by verdict." Town of Flora v. Indiana Serv-

privies bring a subsequent suit based upon a different cause of action, and the former judgment is conclusive between them only as to fact[9] issues raised and determined by that judgment.[10]

In order for the judgment of a prior action to take effect as a collateral estoppel, the minimum requirements[11] to be included in that action are (1) jurisdiction of the parties and the subject matter,[12] (2) a raising and determination of the fact issues now being presented,[13] (3) an ability to have appealed the judgment, if by a court other than one of final jurisdiction,[14] (4) the same parties or their privies as are in this action,[15] and (5) a cause of action different from the present one.[16]

The court in the instant case, although supporting the policy of giving

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ice Corp., 222 Ind. 253, 53 N. E. 2d 161 (1944); Holtz v. Beighley, 211 Minn. 153, 300 N. W. 445 (1941). For the distinction between bar, merger and collateral estoppel, see RESTATEMENT, JUDGMENTS § 68, comment *a* (1942); Note, *Judgments—Res Judicata as Between Co-Defendants,* 27 MINN. L. REV. 519 (1943); Note, *Res Judicata: The Requirement of Identity of Parties,* 91 U. OF PA. L. REV. 467 (1943); Note, 162 A. L. R. 1204 (1946).

9. For authority to the effect that only ultimate facts, as distinguished from evidentiary facts, are conclusive, see Oglesby v. Attrill, 20 Fed. 570 (C. C. S. D. N. Y. 1884); Christy v. Great Northern Life Ins. Co., 238 Mo. App. 525, 181 S. W. 2d 663 (1944); Notes, 142 A. L. R. 1243 (1943), 152 A. L. R. 1193 (1944). As to whether collateral estoppel applies to questions of law, see Treinies v. Sunshine Mining Co., 308 U. S. 66, 60 Sup. Ct. 44, 84 L. Ed. 85 (1939); Stoll v. Gottlieb, 305 U. S. 165, 59 Sup. Ct. 134, 83 L. Ed. 104 (1938); Davis v. Davis, 305 U. S. 32, 59 Sup. Ct. 3, 83 L. Ed. 26 (1938); RESTATEMENT, JUDGMENTS § 70 (1942); Scott, *Collateral Estoppel by Judgment,* 56 HARV. L. REV. 1, 7 (1942).

10. To describe the effect of a bar or merger, the phrase "estoppel by judgment" has been used; to describe the effect of collateral estoppel, the phrase "estoppel by verdict" has been used. Consolidation Coal Co. v. Hall, 296 Ky. 390, 177 S. W. 2d 150 (1944); Kimpton v. Spellman, 351 Mo. 674, 173 S. W. 2d 886 (1943); 2 FREEMAN, JUDGMENTS §§ 624 *et seq.* (5th ed. 1925).

11. See Scott, *Collateral Estoppel by Judgment,* 56 HARV. L. REV. 1 (1942). Though the point is not discussed in the instant case, many courts in speaking of the conclusiveness of a former judgment hold that a mutuality of estoppel must exist between the parties; in other words, that if a party is not bound by a former judgment, he will not be heard to assert that another is bound by it. Tobin v. McClellan, 73 N. E. 2d 679 (Ind. 1947); Sim v. Bishop, 177 Ky. 279, 197 S. W. 625 (1917); McIntosh v. Wiggins, 354 Mo. 747, 191 S. W. 2d 637 (1945), *cert. denied,* 328 U. S. 839 (1946).

12. There are some instances where, even though the court rendering the judgment in the prior action had jurisdiction of the parties and the subject matter, collateral estoppel will not be applied because the court in the prior action was not the type of tribunal whose fact findings should be held as conclusive. Sanderson v. Niemann, 17 Cal. 2d 563, 110 P. 2d 1025 (1941) (small claims court's determination held insufficient); Loomis v. Loomis, 288 N. Y. 222, 42 N. E. 2d 495 (1942) (determination by domestic relations court not conclusive). See also, the instant case, 167 F. 2d at 614 nn. 29, 30. See generally, RESTATEMENT, JUDGMENTS § 71 (1942); Note, 147 A. L. R. 196 (1943).

13. Cromwell v. County of Sac, 94 U. S. 351, 356, 24 L. Ed. 195 (1876); Oklahoma *ex rel.* Comm'rs v. United States, 155 F. 2d 496 (C. C. A. 10th 1946); Lorber v. Vista Irr. Dist., 127 F. 2d 628 (C. C. A. 9th 1942); Town of Flora v. Indiana Service Corp., 222 Ind. 253, 53 N. E. 2d 161 (1944).

14. Inability to appeal may arise (1) where the controversy has become moot, or (2) where there is a finding of one or more issues against the successful party. If a party has the right and ability to appeal, but fails to do so, collateral estoppel applies. See Scott, *Collateral Estoppel by Judgment,* 56 HARV. L. REV. 1, 15 (1942); RESTATEMENT, JUDGMENTS § 69 (1942).

15. See note 21 *infra.*

16. Cromwell v. County of Sac, 94 U. S. 351, 352, 24 L. Ed. 125 (1876). As to identity of causes of action in general, see Woodbury v. Porter, 158 F. 2d 194 (C. C. A. 8th 1946); Note, 64 A. L. R. 663 (1929).

every litigant a full and fair day in court, held that the New York Surrogate Court had jurisdiction to make a finding on the issue of fraud conclusive in a federal court.[17] The court also held that the Government had raised the issue of fraud in the Surrogate Court, that the fact that no evidence in support of the allegation was presented was immaterial,[18] and that since the order of the Surrogate Court recited the objections made by the United States and concluded by overruling them, there was a determination of the fraud issue.[19] Apparently, the Government could have appealed to have errors in the judgment corrected, but failed to do so.[20] There was no question but that the parties in the instant case were parties in the Surrogate Court proceeding, bringing the case within the general rule that collateral estoppel affects only the parties to the action and those who are in such relation to the parties as to be considered in privity with them.[21] And clearly the former cause of action was different from the present one. Thus, the necessary conditions having been satisfied, the court properly applied the doctrine of collateral estoppel.

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17. For additional authority pertaining to the jurisdiction of the New York Surrogate Court, see Griffith v. Bank of New York, 147 F. 2d 899 (C. C. A. 2d 1945), *cert. denied*, 325 U. S. 874 (1945); *In re* Winslow's Estate, 151 Misc. 298, 272 N. Y. Supp. 829 (Surr. Ct. 1934); Raymond v. Davis' Estate, 248 N. Y. 67, 161 N. E. 421 (1928).

18. Other cases holding that a party may not raise issues for determination and avoid the effect of an estoppel merely by refusing to present proof are O'Brien v. Manwaring, 79 Minn. 86, 81 N. W. 746 (1900); Slater v. Skirving, 51 Neb. 108, 70 N. W. 493 (1897). As to the effect of a judgment rendered on default, see Riehle v. Margolies, 279 U. S. 218, 49 Sup. Ct. 310, 73 L. Ed. 669 (1929); Note, 128 A. L. R. 472 (1940). As to the effect of a judgment rendered on demurrer, see Liken v. Shaffer, 64 F. Supp. 432 (N. D. Iowa 1946); Note, 13 A. L. R. 1104 (1921).

19. 167 F. 2d at 617 n. 38.

20. *Id.* at 618 n. 40.

21. Miller v. Public Service Coordinated Transport, 140 F. 2d 668 (C. C. A. 3d 1944); Hornstein v. Kramer Bros. Freight Lines, Inc., 133 F. 2d 143 (C. C. A. 3d 1943); Conold v. Stern, 138 Ohio St. 352, 35 N. E. 2d 133 (1941); RESTATEMENT, JUDGMENTS § 93, comment *d* (1942); 2 BLACK, JUDGMENTS § 534 (1891). *But cf.* Coca-Cola Co. v. Pepsi-Cola Co., 36 Del. 124, 172 Atl. 260 (1934). For a trend under certain circumstances to dispense with the strict requirement of identical parties or their privies, see 61 HARV. L. REV. 370 (1948), 57 HARV. L. REV. 98 (1943). Cases revealing who may be considered as privies are E. I. Du Pont De Nemours & Co., v. Sylvania Industrial Corp., 122 F. 2d 400 (C. C. A. 4th 1941); Caterpillar Tractor Co. v. International Harvester Co., 120 F. 2d 82 (C. C. A. 3d 1941) (persons controlling the litigation); Kind v. Stuart Motor Co., 52 F. Supp. 727 (N. D. Ga. 1943) (employer-employee relationship); Yrisarri v. Clifford, 32 N. M. 1, 249 Pac. 1011 (1926); Fletcher v. Perry, 104 Vt. 229, 158 Atl. 679 (1932) (bailor-bailee relationship); Shipley v. Pittsburgh & L. E. R. Co., 70 F. Supp. 870 (W. D. Pa. 1947) (class action); Pineville Steam Laundry v. Phillips, 254 Ky. 391, 71 S. W. 2d 980 (1934) (successors to a property interest). As to privies in general, see Note, 57 HARV. L. REV. 98 (1943). A person may be a party to an action, however, and neither be bound nor benefitted by collateral estoppel. Liken v. Shaffer, 64 F. Supp. 432 (N. D. Iowa 1946) (representative party); RESTATEMENT, JUDGMENTS §§ 81, 82 (1942) (formal or non-adversary parties).

JUDGMENTS—RES JUDICATA AND JURISDICTION—HABEAS CORPUS TO ATTACK CONTEMPT CITATION FOR FAILURE TO COMPLY WITH ORDER OF DISTRICT COURT

Overruling a motion by petitioner that it lacked jurisdiction over the subject matter, a federal district court appointed an ancillary receiver in a partnership accounting. For refusal to testify before a special master appointed by the court to take testimony for such receiver, petitioner was adjudged in civil contempt and was committed to jail until he should pay a fine of $22,000. By writ of habeas corpus, petitioner seeks release on the grounds that the district court lacked jurisdiction over the receivership proceedings and that therefore violation of its orders was not civil contempt. *Held* (2-1), writ denied. Petitioner had an opportunity to appeal the jurisdictional issue; he may not collaterally attack the decision as to jurisdiction, even though the time for appeal has elapsed. *United States* ex rel. *Sutton v. Mulcahy,* 169 F. 2d 94 (C. C. A. 2d 1948).

Twenty-five or thirty years ago, the petitioner in the instant case would have been released on a writ of habeas corpus. If, as the circuit court of appeals indicated, the district court did lack jurisdiction of the subject matter then the older authorities would have deemed it axiomatic that its orders were utterly void and without effect upon the parties.[1] Further, as pointed out in the dissenting opinion,[2] it was formerly a settled principle that jurisdiction over the subject matter could in no way be "conferred" upon a court by acts of the parties.[3] At any point in the proceedings, upon appeal, or in collateral attack, the issue of jurisdiction might be raised;[4] in the absence of jurisdiction it was not civil contempt to ignore a court order, and perhaps it was not even criminal contempt.[5] During the last two or three decades,

1. "One of our oldest dogmas is that if a court has no jurisdiction of the subject matter of an action its pretended judgment is a nullity." Gavit, *Jurisdiction of the Subject Matter and Res Judicata,* 80 U. OF PA. L. REV. 386 (1932); *In re* Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402 (1888); *In re* Ayers, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216 (1887); *Ex parte* Fisk, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117 (1885); *Ex parte* Rowland, 104 U. S. 604, 26 L. Ed. 861 (1882); 2 BLACK, JUDGMENTS § 513 (1891); BROWN, JURISDICTION § 115 (1891); 1 FREEMAN, JUDGMENTS § 333 (5th ed. 1925).

2. 169 F. 2d at 98.

3. Note, 46 YALE L. J. 159 (1936).

4. Thompson v. Whitman, 85 U. S. 457, 21 L. Ed. 897 (1873).

5. The distinction between "civil" and "criminal" contempt has never been definitely settled. A much-cited test to distinguish the two types is that stated by the United States Supreme Court in Gompers v. Buck Stove and Range Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797 (1911), where it was said that civil contempt proceedings are remedial in nature, designed to preserve and enforce rights of private parties to suits and to compel obedience to orders made for the benefit of such parties, while criminal contempt proceedings are punitive in character and are designed to uphold the dignity of the courts. For a critical discussion of the distinctions drawn between the two types, see Moskovitz, *Contempt of Injunctions, Civil and Criminal,* 43 COL. L. REV. 780 (1943); *cf.* Beale, *Contempt of Court, Criminal and Civil,* 21 HARV. L. REV. 161 (1908); Note, *Criminal vs. Civil Contempt,* 23 IND. L. J. 114 (1948). Following the doctrine that orders given by a court without jurisdiction are void for all purposes, many of the earlier cases held that violation of such orders could not even be criminal contempt: *see, e.g., In re* Sawyer

however, there has been a very sharp break from the older views upon collateral attack of jurisdictional findings.[6] Increasingly the courts have held, in the words of Mr. Justice Brandeis, that "The principles of res judicata apply to questions of jurisdiction as well as to other issues." [7] Accordingly it has been repeatedly held that where a court decides that it has jurisdiction over the subject matter, its ruling may be res judicata and binding upon the parties unless and until reversed in direct attack upon appeal.[8] This new doctrine very definitely modifies the older maxims as to judgments rendered without jurisdiction.

The earlier position was based upon a strong public policy against usurpation of power by a court,[9] while the later view emphasizes the policy of terminating litigation between the parties and giving stability to judgments.[10]

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124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402 (1888); *Ex parte* Fisk, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117 (1885). That this is not the law today is clearly laid down in United States v. United Mine Workers, 330 U. S. 258, 67 Sup. Ct. 677, 91 L. Ed. 884 (1947), where it was held that one is not guilty of civil contempt for violation of the order of a court which is subsequently, on direct appeal, found to lack jurisdiction, but that it is criminal contempt to violate such an order where the court had ruled that it had jurisdiction to issue the order. Since that case did not involve the problem of collateral attack, it may be distinguished from the principal case in so far as the issue of civil contempt is concerned. In the light of that case, however, there seems to be little doubt that the petitioner in the principal case could have been cited for criminal contempt as well as for civil contempt.

6. For a discussion of the trend of modern decisions applying the doctrine of res judicata to jurisdictional questions, see Cox, *The Void Order and the Duty to Obey*, 16 U. OF CHI. L. REV. 86 (1948); treatments of the subject will also be found in Note, *Jurisdiction and Collateral Attack*, 40 COL. L. REV. 1006 (1940) and Rashid, *The Full Faith and Credit Clause: Collateral Attack of Jurisdictional Issues*, 36 GEO. L. J. 154 (1948).

7. American Surety Co. v. Baldwin, 287 U. S. 156, 166, 53 Sup. Ct. 98, 77 L. Ed. 231 (1932).

8. *See, e.g.*, Sunal v. Large, 332 U. S. 174, 178, 180, 67 Sup. Ct. 1588, 91 L. Ed. 1982 (1946); Jackson v. Irving Trust Co., 311 U. S. 494, 499, 503, 61 Sup. Ct. 326, 85 L. Ed. 297 (1941); Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381, 403, 60 Sup. Ct. 907, 84 L. Ed. 1263 (1940); Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371, 376, 378, 60 Sup. Ct. 317, 84 L. Ed. 329 (1940); Stoll v. Gottlieb, 305 U. S. 165, 171, 172, 59 Sup. Ct. 134, 83 L. Ed. 104 (1938); Davis v. Davis, 305 U. S. 32, 40, 59 Sup. Ct. 3, 83 L. Ed. 26 (1938). Earlier cases were concerned with the application of res judicata to rulings on jurisdiction over the person. Not until the decision in Stoll v. Gottlieb, 305 U. S. 165, 59 Sup. Ct. 134, 83 L. Ed. 104 (1938), was it apparent that the doctrine applied to rulings on jurisdiction over the subject matter as well. Prior to that case it was believed that the doctrine could not be extended to cases where a court had ruled that it had jurisdiction over the subject matter, because of the settled principle that such jurisdiction could not in any way be "conferred" upon a court. *See* GOODRICH, CONFLICT OF LAWS § 20 (2d ed. 1938); RESTATEMENT, CONFLICT OF LAWS § 451 (1934). For discussions of the extension of res judicata to rulings on jurisdiction of the subject matter, see Note, *Res Judicata and Jurisdiction: The Bootstrap Doctrine*, 53 HARV. L. REV. 652 (1940); 49 YALE L. J. 959 (1940).

9. RESTATEMENT, JUDGMENTS § 10 (1942).

10. Medina, *Conclusiveness of Rulings on Jurisdiction*, 31 COL. L. REV. 238 (1931). *See* the dictum of Mr. Justice Reed in Stoll v. Gottlieb, 305 U. S. 165, 167, 59 Sup. Ct. 134, 83 L. Ed. 104 (1938). That the new view has not been accepted without vigorous and able dissent in high places, however, is evidenced by the opinion of Judge Frank in the instant case. For other criticisms of the doctrine of res judicata as applied to jurisdictional issues, see the dissenting opinions of Mr. Justice Rutledge in Sunal v. Large, 332 U. S. 174, 187, 67 Sup. Ct. 1588, 91 L. Ed. 1982 (1946); and in United States v. United Mine Workers, 330 U. S. 258, 342, 67 Sup. Ct. 677, 91 L. Ed. 884 (1947); *cf.* dissent by Mr. Justice Frankfurter in Sunal v. Large, *supra* at 184. In Bowen v. Johnston,

Once a court of general jurisdiction has decided that it has jurisdiction, the new view is that that determination may be collaterally attacked only in "exceptional circumstances." [11] Although the courts have given few criteria for determining just when jurisdictional rulings may be collaterally attacked when there has been an opportunity to appeal, it is suggested that the cases may be explained upon the basis of delegation of authority. All judicial power lies in the State. The courts are agencies of the State with authority to act within constitutional and statutory limitations. Where those limits have been made narrow, as in a magistrate's court or other minor court, then clearly that court, like a special agent, will not be allowed to exceed the boundaries of authority; close scrutiny will be given to its actions to determine that they fall within the prescribed scope, and collateral attack will be available if they do not,[12] Here the policy against usurpation of power is particularly strong. But where wide powers have been conferred upon a court by the State, then in cases of doubt as to jurisdiction, that court should be allowed to decide, as indeed it must do, if anyone is to decide; its decisions should be given immunity from collateral attack, even though erroneous, unless there has been "plain usurpation" of authority.[13] If a court decides in favor of its jurisdiction contrary to a well-defined constitutional guaranty,[14] or an unambiguous statutory provision,[15] or a clear rule of law,[16] then collateral attack should and will be allowed even though there has been an opportunity to appeal. These situations are the ones which have been deemed by the courts to present "exceptional circumstances." But where there is substantial doubt as to the factual or legal basis for jurisdiction, the decision of a court of general

306 U. S. 19, 59 Sup. Ct. 442, 83 L. Ed. 455 (1939), Chief Justice Hughes also sounded a warning against the extension of the new doctrine.

11. Sunal v. Large, 332 U. S. 174, 178, 67 Sup. Ct. 1588, 91 L. Ed. 1982 (1946); *cf.* United States *ex rel.* Rogalski v. Jackson, 146 F. 2d 251 (C. C. A. 2d 1944). Indicative of the modern policy of reducing the instances in which habeas corpus may be used to attack jurisdictional rulings is the statement of Judge A. Hand in Loubriel v. United States, 9 F. 2d 807, 808 (C. C. A. 2d 1926): "We understand the case of Craig v. Hecht . . . to have established that the writ does not lie to review an order adjudging relator in contempt of court. Cases like Ex parte Hudgings . . . are confessedly exceptional. We read the last declaration of the Supreme Court as indicating a disposition substantially, if not altogether, to eliminate the exception, where a direct review of the order is possible."

12. RESTATEMENT, JUDGMENTS § 10, comment *b* (1942).

13. Carter v. United States, 135 F. 2d 858, 861 (C. C. A. 5th 1943); *cf.* Swan, J., in Ripperger v. A. C. Allyn & Co., 113 F. 2d 332, 333 (C. C. A. 2d 1940), stating that "a decision in favor of jurisdiction is res judicata and invulnerable to collateral attack, even though the ground on which the decision was rested has subsequently been overruled." *Cf.* United States *ex rel.* Emanuel v. Jaeger, 117 F. 2d 483 (C. C. A. 2d 1941).

14. *See* Sunal v. Large, 332 U. S. 174, 178, 67 Sup. Ct. 1588, 91 L. Ed. 1982 (1946) and cases there cited.

15. United States *ex rel.* Volpe v. Jordan, 161 F. 2d 390 (C. C. A. 7th 1947) (order issued by a court in violation of a statute requiring notice of sixty days before proceedings should be held); *cf.* Tennessee v. Taylor, 169 F. 2d 626 (C. C. A. 6th 1948) (order to show cause issued to district judge for clear violation of a statute and for issuing injunction against the state).

16. United States *ex rel.* Stabler v. Watkins, 168 F. 2d 883 (C. C. A. 2d 1948) (district court assumed jurisdiction upon hearsay evidence only; habeas corpus allowed, though with doubt, since there had been opportunity for appeal).

jurisdiction should ordinarily be binding on the parties.[17] This theory of delegation of power rationalizes the case law and the "factors" mentioned by the American Law Institute in its *Restatement of Judgments* in considering when collateral attack should be allowed.[18]

The instant case, in its application of res judicata to the ruling on jurisdiction and in its denial of habeas corpus in contempt proceedings, is fully in accord with the modern authorities.[19] The "factors" suggested in the *Restatement of Judgments* were present in the case and tended to favor the result which was reached—that is, there was room for substantial doubt as to the existence of the jurisdiction of the district court; a question of fact was involved in the determination; the court was one of general jurisdiction; and the question of jurisdiction was actually litigated. In this situation, and in view of the policy of giving support to the rulings of a court which has been clothed with general jurisdiction, the decision is correct. The case is significant in its illustration of the questions of policy to be considered and in showing the trend away from the older authorities.

LIBEL AND SLANDER—LIMITATION OF ACTIONS—APPLICATION OF "SINGLE PUBLICATION DOCTRINE" TO BOOKS

In 1944 defendant publisher began to market the seventh and final printing of a book which allegedly libeled the plaintiff. During the year preceding July, 1946, when this suit was brought, defendant sold sixty copies of the book from stock. *Held* (4-3), the "single publication rule," previously adopted as to newspapers and magazines, applies also to books; and plaintiff's cause of action was barred by the statute of limitations[1] one year after the final

17. By analogy to the field of agency, if the scope of the agent's authority is clear, then acts done beyond that scope are unauthorized; but where reasonable doubt exists, a general agent may have discretion to determine whether he is authorized to do an act, and even though he is mistaken, his principal may be bound. *See* RESTATEMENT, AGENCY §§ 44, 45 (1933). As to the amount of discretion allowed a general agent as compared with a special agent, *see id.* § 3, comment *d;* § 34, comment *b* (1933). The president of a corporation, clothed with authority to conduct a business, will be allowed much more freedom in interpreting his authority to act in doubtful cases than will a subordinate officer whose authority is closely defined.

18. § 10, comment *b* (1942).

19. The dissenting opinion insists that this case goes further than any previous case has gone in denying habeas corpus in refusing to allow the writ even though the order violated may not be appealable. The majority, pointing out that there had been ample opportunity to appeal from other orders in the proceedings, refused to see any distinction between this case and United States *ex rel.* Emanuel v. Jaeger, 117 F. 2d 483 (C. C. A. 2d 1941). In that case petitioner was adjudged in civil contempt for violating an order of a bankruptcy court which probably was without jurisdiction to issue the order. Nevertheless he neglected to take an appeal from a jurisdictional ruling, although he had opportunity to do so. Habeas corpus was denied. Although the particular order violated in that case was appealable, while the violated order in the principal case probably was not, the majority did not think the distinction important enough to allow collateral attack as a substitute for appeal.

1. N. Y. CIV. PRAC. ACT § 51, subd. 3.

printing had been released for wholesale distribution. *Gregoire v. G. P. Putnam's Sons,* 81 N. E. 2d 45 (N. Y. 1948).[2]

At common law every intentional or negligent sale, delivery, or exhibition of libelous matter to a third party constituted a separate and distinct publication; and each publication, if false and unprivileged, would support a separate action without proof of special damages.[3] Since the person defamed acquired a new cause of action wherever[4] and whenever a new publication occurred, the litigation arising from one printing operation might theoretically continue so long as a single copy of the libel was retained by the publisher and made available for sale or inspection.[5] To avoid this result, a few American courts have developed what is known as the single-publication rule, holding that the whole process of distribution for a single issue of a magazine or newspaper amounts in law to one publication,[6] and that subsequent exhibition of a few copies of that issue, if properly incidental to the original publication, will not support a separate action for damages.[7]

In extending this single-publication exception to books the court relies upon the same arguments which have supported its application to newspapers

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2. *Reversing* 272 App. Div. 591, 74 N. Y. S. 2d 238 (1st Dep't 1947).

3. Staub v. Benthuysen, 36 La. Ann. 467 (1884); Duke of Brunswick v. Harmer, 14 Q. B. 185, 117 Eng. Rep. 75 (1849); GATLEY, LIBEL AND SLANDER 418 (3d ed., O'Sullivan, 1938); NEWELL, SLANDER AND LIBEL § 192 (4th ed. 1924); ODGERS, LIBEL AND SLANDER 132, 139, 493 (6th ed. 1929); RESTATEMENT, TORTS § 578, comment *b* (1938); *see* Holden v. American News Co., 52 F. Supp. 24, 32 (E. D. Wash. 1943). *But cf.* Murray v. Galbraith, 86 Ark. 50, 109 S. W. 1011 (1908); Fried, Mendelson & Co. v. Edmund Halstead, Ltd., 203 App. Div. 113, 196 N. Y. Supp. 285 (1st Dep't 1922); Galligan v. Sun Printing and Publishing Ass'n, 25 Misc. 355, 54 N. Y. Supp. 471 (Sup. Ct. 1898). There are numerous cases which support this general proposition, but few of them deal with facts analogous to those in the principal case. RESTATEMENT, TORTS, EXPLANATORY NOTES § 1021 (Tent. Draft No. 12, 1935).

4. *E.g.,* Hartmann v. American News Co., 69 F. Supp. 736 (W. D. Wis. 1947); O'Reilly v. Curtis Publishing Co., 31 F. Supp. 364 (D. Mass. 1940). On the problem of venue in libel actions against newspapers see Notes, 37 A. L. R. 908 (1925), 148 A. L. R. 477 (1944).

5. Winrod v. McFadden Publications, Inc., 62 F. Supp. 249 (N. D. Ill. 1945); Duke of Brunswick v. Harmer, 14 Q. B. 185, 117 Eng. Rep. 75 (1849); *see* Wolfson v. Syracuse Newspapers, Inc., 254 App. Div. 211, 4 N. Y. S. 2d 640 (4th Dep't 1938), *aff'd mem.,* 279 N. Y. 716, 18 N. E. 2d 676 (1939).

6. *Cf.* United States v. Smith, 173 Fed. 227 (D. Ind. 1909); Forman v. Mississippi Publishers Corp., 195 Miss. 90, 14 So. 2d 344 (1943); Julian v. Kansas City Star Co., 209 Mo. 35, 107 S. W. 496 (1907).

7. Wolfson v. Syracuse Newspapers, Inc., 254 App. Div. 211, 4 N. Y. S. 2d 640 (4th Dep't 1938), *aff'd mem.,* 279 N. Y. 716, 18 N. E. 2d 676 (1939) (leading case); Polchlopek v. American News Co., 73 F. Supp. 309 (D. Mass. 1947); Hartmann v. Time, Inc., 64 F. Supp. 671 (E. D. Pa. 1946), *aff'd,* 166 F. 2d 127 (C. C. A. 3d 1947); McGlue v. Weekly Publications, Inc., 63 F. Supp. 744 (D. Mass. 1946); Backus v. Look, Inc., 39 F. Supp. 662 (S. D. N. Y. 1941); Cannon v. Time, Inc., 39 F. Supp. 660 (S. D. N. Y. 1939); Means v. McFadden Publications, Inc., 25 F. Supp. 993 (S. D. N. Y. 1939); Winrod v. Time, Inc., 334 Ill. App. 59, 78 N. E. 2d 708 (1st Dist. 1948); Campbell-Johnston v. Liberty Magazine, Inc., 64 N. Y. S. 2d 659 (Sup. Ct. 1945), *aff'd mem.,* 270 App. Div. 894, 62 N. Y. S. 2d 581 (1st Dep't 1946); Hartmann v. Time, Inc., 60 N. Y. S. 2d 209 (Sup. Ct. 1945), *aff'd mem.,* 271 App. Div. 781, 66 N. Y. S. 2d 151 (1st Dep't 1946); see also 59 HARV. L. REV. 136 (1945); 26 MINN. L. REV. 131 (1941). *Contra:* Winrod v. McFadden Publications, Inc., 62 F. Supp. 249 (N. D. Ill. 1945); *cf.* O'Reilly v. Curtis Publishing Co., 31 F. Supp. 364 (D. Mass. 1940); *see* Holden v. American News Co., 52 F. Supp. 24, 32 (E. D. Wash. 1943).

and periodicals. The simultaneous release of thousands of copies of a libelous book, as of a magazine or newspaper, is factually one assault on the plaintiff's reputation, it is said, and only one action should arise from it.[8] And, since this cause of action accrues when the book goes into circulation,[9] the court feels that the legislative intention to outlaw stale claims can only be given effect by holding that the suit is barred by the statute of limitations one year later.[10] The dissenting judges, however, point out that the statute of limitations should begin to run when the defendant ceases to wrong the plaintiff, not when he starts,[11] and they find no basis for assuming that the intent of the legislature was otherwise.[12] Although the "dated" quality of a newspaper or magazine provides assurance that isolated sales long after the date of issue are necessarily inconsequential,[13] relative permanence of form and content makes it far more difficult to regard sales of a book on any one date as incidental or subordinate to those on any other.[14] There is no one point at which the court can logically say that publication is substantially complete, for sales may continue almost indefinitely. Thus, while recognizing that the single-publication rule may achieve desirable results in the newspaper and periodical cases by eliminating certain obviously frivolous suits, the minority contends that its extension into fields where the actual process of distribution is not concentrated within a very short period of time is unwarranted and theoretically unsound.[15]

Under the holding in the principal case, it would seem that a publisher may reduce his liability for libelous books wherever economically feasible by a large initial printing and relatively modest distribution during the first year of sales. The plaintiff, forced to bring suit before he can ascertain or prove the full extent of his damages, is nevertheless denied legal protection against the subsequent release of any copies remaining in stock at the year's end.[16] The reasoning of the majority, however, suggests two possible approaches to such a situation. The court might require that the defendant refrain from actively promoting the book in order to avail himself of the

8. 81 N. E. 2d at 49; *see* 59 HARV. L. REV. 136 (1945).
9. Brian v. Harper, 144 La. 585, 80 So. 885 (1919).
10. 81 N. E. 2d at 48.
11. *Id.* at 50; *cf.* Montgomery v. Crum, 199 Ind. 660, 161 N. E. 251, 259 (1928). The lower court, holding for plaintiff in the instant case, indicated that he could only recover damages for those sales which occurred during the year preceding the action. Gregoire v. G. P. Putnam's Sons, 272 App. Div. 591, 74 N. Y. S. 2d 238, 241 (1st Dep't 1947).
12. 81 N. E. 2d at 49; *see* Age-Herald Publishing Co. v. Huddleston, 207 Ala. 40, 92 So. 193, 199 (1921) (dissenting opinion).
13. As Judge Desmond, dissenting, expressed it, "nothing is so dead as last week's newspapers." 81 N. E. 2d at 50; cases cited note 7 *supra;* 94 U. OF PA. L. REV. 335 (1946).
14. 81 N. E. 2d at 50 (dissenting opinion); *see* 23 N. Y. U. L. Q. REV. 345 (1948).
15. 81 N. E. 2d at 50; *see* 48 COL. L. REV. 475, 477 (1948).
16. These consequences have been argued by courts which defend the common-law rule. Hartmann v. American News Co., 69 F. Supp. 736, 738 (W. D. Wis. 1947); Winrod v. McFadden Publications, Inc., 62 F. Supp. 249, 252 (N. D. Ill. 1945); see also 94 U. OF PA. L. REV. 335 (1946).

statute.[17] Or, if that approach fails to avoid palpable injustice, the question of publication might be regarded as one of fact in each individual case, the court inquiring whether the "bulk," or "substantially all," or some other proportion of the publication took place more than a year before the action.[18] Although an increasing number of courts seem to consider that the practical advantages of the single-publication rule justify its application to newspapers and magazines,[19] it is unlikely that many states will follow the instant case by extending the rule to books; for there, where the social interests are more evenly balanced, most courts may well feel that a change in the substantive law of libel should be left to the legislature.

REAL PROPERTY—TENANCY BY THE ENTIRETY—MURDER OF TENANT BY COTENANT

A husband, having been convicted of the murder of his wife, claimed sole and complete ownership of certain real property which they had held as tenants by the entirety. Petitioners, as only heirs of the deceased wife, seek to be declared the equitable owners of one-half interest in this realty. *Held,* petition granted; the husband did not become a survivor in contemplation of law, and such a ruling will not work a forfeiture in contravention of constitution and statute. *Grose v. Holland,* 211 S. W. 2d 464 (Mo. 1948).

In legal contemplation, where property is conveyed to husband and wife as "tenants by the entirety" [1] they take but one estate. Each is the owner of the entire estate; neither has any separate or joint interest but a unity or entirety of the whole. If one spouse dies the survivor is said to be sole owner of the estate, not by reason of having taken anything from the deceased but because he has had ownership of the whole from the beginning. This explanation is generally accepted in all cases where the death of one party to the marriage is the result of natural causes.[2] When, however, the death of one

17. *See* Wolfson v. Syracuse Newspapers, Inc., 254 App. Div. 211, 4 N. Y. S. 2d 640, 642 (4th Dep't 1938), *aff'd mem.,* 279 N. Y. 716, 18 N. E. 2d 676 (1939); see also 38 MICH. L. REV. 552 (1940). A new printing will provide a fresh cause of action. Mack, Miller Candle Co. v. Macmillan Co., 239 App. Div. 738, 269 N. Y. Supp. 33 (4th Dep't 1934), *aff'd mem.,* 266 N. Y. 489, 195 N. E. 167 (1934).

18. 48 COL. L. REV. 475, 477 (1948).

19. Hartmann v. Time, Inc., 166 F. 2d 127, 134 (C. C. A. 3d 1947) (discussion of previous decisions); cases cited note 7 *supra.*

1. "A tenancy by the entirety . . . is essentially a form of joint tenancy, modified by the common-law theory that husband and wife are one person." 2 TIFFANY, REAL PROPERTY § 430 at 217 (3d ed. Jones 1939). See also 4 THOMPSON, REAL PROPERTY §§ 1803-26 (Perm. ed. 1940). This estate has been destroyed in the greater number of states through legislation. 4 *id.* § 1806. But tenancy by the entirety still exists in Tennessee with all its common-law attributes. TENN. CODE ANN. § 8461 (Williams 1934); Connecticut Fire Insurance Co. v. McNeil, 35 F. 2d 675 (C. C. A. 6th 1929); 1 VANDERBILT L. REV. 666 (1948).

2. *E.g.,* Schwind v. O'Halloran, 346 Mo. 486, 142 S. W. 2d 55 (1940); Newson v. Shackleford, 163 Tenn. 358, 43 S. W. 2d 384 (1931).

tenant by the entirety is the result of murder by the other, there arises a conflict between this principle and the well settled equitable maxim that no one shall be permitted to take advantage of his own wrong or to acquire property by his own crime.[3] Theory to the contrary, the courts have appreciated that the survivor does, in practical effect, acquire a substantial benefit by the death of the cotenant,[4] and they have sought means whereby this benefit might be denied the wrongdoer without running counter to the constitutional and statutory provisions that "no conviction can work corruption of blood or forfeiture of estate." [5]

This specific problem has arisen in a number of cases, resulting in varying solutions. In an early Tennessee case [6] the court ruled that the murderer took sole and complete ownership of the property,[7] while in a later New York case [8] exactly the opposite result was reached. The more recent case of *Barnett v. Couey* [9] held that the murderer could not qualify as a survivor in contemplation of law, and therefore the property descends as if it had been held by tenants in common, one-half to each estate. Two cases have made the result depend upon the court's finding as to which party, slayer or victim, had the greater life expectancy, but in view of the fact that the matter of life expectancy involves, of necessity, a large degree of uncertainty, the more equi-

3. BROOM, LEGAL MAXIMS 227 (7th ed. 1900). This general maxim is applied in many types of situations. It has been expressly applied by some courts, but by no means all, in cases involving the acquisition of property by murder where the claim is under the statutes of descent and distribution, under the terms of a will, as survivor under a joint tenancy, and as beneficiary of an insurance policy. *E. g.*, Perry v. Strawbridge, 209 Mo. 621, 108 S. W. 641 (1908) (intestacy); Box v. Lanier, 112 Tenn. 393, 79 S. W. 1045 (1903) (insurance and intestacy). See in general, Reppy, *The Slayer's Bounty—History of the Problem in Anglo-American Law*, 19 N. Y. U. L. Q. REV. 229 (1942); Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715 (1936).

4. As the court says in the instant case: "The husband does acquire an additional interest through the death of his wife. When her death occurs, he then becomes the sole owner of the estate. Prior to the wife's death the husband must share the current profits with his wife. But after her death the husband does not share these profits and has no possibility of loss of his interest impending over him." 211 S. W. 2d at 467 (1948); *cf.* 3 BOGERT, TRUSTS AND TRUSTEES § 478, at 56, 57 (1946).

5. MO. CONST. Art. 2, § 13; MO. REV. STAT. ANN. § 4858 (1942); TENN. CONST. Art. I, § 12.

6. Beddingfield v. Estill & Newman, 118 Tenn. 39, 100 S. W. 108 (1906). This case is somewhat strange in view of Box v. Lanier, 112 Tenn. 393, 79 S. W. 1045 (1903), which held that a murderer could not inherit from his victim despite the fact that there was no exception in the statutes of descent and distribution.

7. This position was approved and accepted in Wenker v. Landon, 161 Ore. 265, 88 P. 2d 971 (1939), 24 MINN. L. REV. 430 (1940); and Hamer v. Kinnan, 16 Pa. D. & C. 395 (1931). In the *Wenker* case the court refused to qualify or alter the common-law precepts, stating that "if any change in the established rules relating to tenancy by the entirety is to be made with respect to the rights of the surviving spouse, such change lies within the province of the legislature, and not the courts." 88 P. 2d at 975. *Cf. In re* Eckardt's Estate, 184 Misc. 748, 54 N. Y. S. 2d 484, 491 (Surr. Ct. 1945) (slayer insane).

8. Van Alstyne v. Tuffy, 103 Misc. 455, 169 N. Y. Supp. 173 (Sup. Ct. 1918), 16 MICH. L. REV. 561, 27 YALE L. J. 964.

9. 224 Mo. App. 913, 27 S. W. 2d 757 (1930), 11 B. U. L. REV. 129 (1931), 44 HARV. L. REV. 125 (1930), 79 U. OF PA. L. REV. 100 (1930) (this case involved the ownership of a bank deposit belonging to husband and wife as an estate by the entirety).

table approach would seem to be to resolve all doubt in favor of the innocent party and allow his heirs to take half of the property immediately and the other half on the death of the slayer.[10]

It has been suggested that the more logical solution to this problem lies in the employment of the constructive trust theory.[11] Such a trust arises "where a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it." [12] This procedure is particularly adaptable to cases involving tenancies by the entirety and has been employed in at least two cases [13] dealing with such estates. By use of this doctrine the murderer is not deprived of any property in contravention of the aforementioned constitutional provision, yet at the same time he is not permitted to acquire any additional interest as a result of his wrongful act.

In the instant case the court has elected to follow the decision announced in the *Barnett* case,[14] basing its holding upon the idea that the title is vested in the union created by the marriage with the whole estate being in the legal survivor, but since the murderer cannot qualify as a survivor in legal contemplation he never acquired the whole estate and, consequently, the property descends as if it were held by tenants in common.[15] The court here did not discuss the application of a constructive trust, apparently deeming it unnecessary by reason of the fact that petitioner's demand was limited to one-

10. Bryant v. Bryant, 193 N. C. 372, 137 S. E. 188 (1927), 5 N. C. L. REV. 373; Sherman v. Weber, 113 N. J. Eq. 451, 167 Atl. 517 (1933), 82 U. OF PA. L. REV. 183. In the former case the court found that the deceased wife's life expectancy was the greater, and therefore the murderer was declared to hold the estate as trustee for the wife's heirs, subject to a life interest in the whole of the property in the slayer. This life interest was given due to the fact that under the North Carolina law governing tenancies by the entirety the husband was entitled to the whole of the income and use during the joint lives of the husband and wife. In the New Jersey case, where the court found that the husband would have outlived his wife, the ruling was to the effect that the title vested in the husband as survivor, subject to a trust in favor of the wife's heirs to the extent of the value of her interest in the net income of the estate for her normal life expectancy.

The problem has also arisen in connection with joint tenancy cases, where the courts have also differed in reaching solutions. Bierbrauer v. Moran, 244 App. Div. 87, 279 N. Y. Supp. 176 (4th Dept. 1935) (total property to decedent's estate); Oleff v. Hodapp, 129 Ohio St. 432, 195 N. E. 838 (1935) (total property to murder).

11. AMES, *Can A Murderer Acquire Title by His Crime and Keep It*, in LECTURES IN LEGAL HISTORY 310, 312 (1913); 3 BOGERT, TRUSTS AND TRUSTEES § 478 (1946); 1 PERRY, TRUSTS AND TRUSTEES § 183a (7th ed. 1929); 3 SCOTT, TRUSTS § 492 (1939); RESTATEMENT, RESTITUTION §§ 187-89 (1937).

12. 3 SCOTT, TRUSTS 2315 (1939).

13. Bryant v. Bryant, 193 N. C. 372, 137 S. E. 188 (1927); Sherman v. Weber, 113 N. J. Eq. 451, 167 Atl. 517 (1933). See note 10 *supra*.

14. 224 Mo. App. 913, 27 S. W. 2d 757 (1930). It should be noted that the claim in this case, as in the principal case, was limited to one-half of the estate. The court intimated that the plaintiff might have been granted greater relief, if the demand had not been so limited. However, there was no such suggestion advanced in the instant case.

15. In cases of absolute divorce it has been held that the legal fiction of unity of husband and wife is destroyed and that the estate by the entirety becomes an estate in common. State *ex rel.* Roll v. Ellison, 290 Mo. 28, 233 S. W. 1065 (1921); Russell v. Russell, 122 Mo. 235, 26 S. W. 677 (1894); Whitley v. Meador, 137 Tenn. 163, 192 S. W. 718 (1916).

half of the estate. It has been forcibly suggested that the general problem can best be handled by legislation directed toward that end.[16]

REAL PROPERTY—TENANCY FROM YEAR TO YEAR CREATED BY INOPERATIVE LEASE—NOTICE REQUIRED FOR TERMINATION

A lease for ten years reserving an annual rent was signed and delivered, but because of failure to meet statutory conditions it did not create a ten-year term. The lessee, however, took possession and paid rent as prescribed in the inoperative lease. He was given ten-weeks notice that on the date of termination stated in the lease the tenancy would end. Defendant did not vacate the premises on that date, and plaintiff brought summary proceedings to regain possession. Plaintiff contended that the last year of the ten-year period should be considered as a valid term for one year so that only 30-days statutory notice was needed to take advantage of the summary remedy. at the end of the tenth year. *Held,* that by taking possession and paying his He also contended that no notice was necessary to terminate the tenancy yearly rent the defendant became a tenant from year to year. This tenancy required a six-month notice to terminate, and a statutory three-months notice as a condition to summary relief. *Darling Shops Delaware Corp. v. Baltimore Center Corp.*, 60 A. 2d 669 (Md. 1948).

The tenancy in the instant case, under a lease inoperative because it failed to meet requirements of the recording statute,[1] became a tenancy from year to year upon entry and payment of yearly rent; the same result would have followed if the lease had been inoperative for not meeting the requirements of the Statute of Frauds.[2] There is a dearth of authority on the question of what notice is necessary to terminate a tenancy at the end of the period stated in the inoperative lease. The English cases in point agree with the contention of the plaintiff that no notice is necessary. The basis for these decisions in the early cases is that the invalid lease itself gives the tenant

16. See Wade, *supra* note 3, recommending a model statute covering all methods of acquiring property by killing another. This statute has recently been adopted in two jurisdictions. PA. STAT. ANN., tit. 20, §§ 3441-56 (Purdon, Supp. 1946); S. D. CODE, c. 56.05 (1939). Many states have enacted statutes covering restricted aspects of the problem. *E.g.,* MISS. CODE ANN. §§ 479, 672 (1942); TENN. CODE ANN. §§ 8388, 8395 (Williams 1934).

1. MD. ANN. CODE GEN. LAWS, art. 21, § 1 (1939) "No estate . . . above seven years, shall pass or take effect unless the deed conveying the same shall be executed, acknowledged, and recorded as herein provided. . ."

2. "[W]hat would otherwise be a tenancy at will is ordinarily regarded, by reason of the payment of a periodic rent, as a periodic tenancy." 1 TIFFANY, REAL PROPERTY 123 (3d ed., Jones, 1939). Some states hold that a tenancy at will cannot be changed into a periodic tenancy by payment of periodic rent. Parham v. Kennedy, 60 Ga. App. 52, 2 S. E. 2d 765 (1939); Withers v. Larrabee, 49 Me. 570 (1861); Lyon v. Cunningham, 136 Mass. 532, 540 (1884); Hagan v. Bowers, 182 Minn. 136, 233 N. W. 822 (1930); Tuttle v. Langley, 68 N. H. 464, 39 Atl. 488 (1896).

sufficient notice.[3] Before the passage of the Judicature Act (1873), in cases such as the instant one the courts held there were two estates created: (1) the tenancy from year to year, created at common law by entry and payment of yearly rent, and (2) another enforced in equity under the unexecuted agreement.[4] This Act combined the common law and equity courts,[5] with the result that a person occupying premises under a specifically performable agreement holds under the same terms in equity as if the lease had been granted.[6] The date of termination, therefore, was controlled by the lease. The Missouri and New York cases concur with the English decisions, apparently basing their decisions on the reasoning of the earlier English cases.[7] The Illinois Court also has reached a decision in agreement with the English cases, based, however, on statutory construction.[8] The Minnesota court, by dictum, has refused to recognize the English rule, asserting that the statute which renders the agreement to lease invalid would be, in effect, disregarded if the lease controlled the duration of the term.[9]

The court in the instant case refuses to follow the English rule, and bases its decision on what it considers to be the logic of the situation. It reasons that the only logical conclusion is that the tenancy is one from year to year, and remains such for its entire duration unaffected by the inoperative lease. Therefore if six-months notice is necessary to terminate the tenancy during the first years,[10] it is equally necessary during the last year of the period stated in the inoperative lease.

3. Tress v. Savage, 4 E. & B. 36, 119 Eng. Rep. 15 (Q. B. 1854); Berrey v. Lindley, 3 Man. & G. 498, 133 Eng. Rep. 1240 (C. P. 1841); Doe *dem.* Tilt v. Stratton, 4 Bing. 466, 130 Eng. Rep. 839 (C. P. 1828); *cf.* Doe *dem.* Davenish v. Moffatt, 15 Q. B. 257, 117 Eng. Rep. 455 (1850).

4. Walsh v. Lansdale, 21 Ch. D. 9 (1882).

5. 36 & 37 VICT. c. 66, § 24 (1873).

6. WOODFALL, LANDLORD AND TENANT, c. 4, § 8 (24th ed., Blundell, 1929); Walsh v. Lonsdale, 21 Ch. D. 9 (1882).

7. Vanderhaff v. Lawrence, 201 S. W. 2d 509 (Mo. App. 1947); Ray v. Blackman, 120 Mo. App. 497, 97 S. W. 212 (1906); Reeder v. Sayre, 70 N. Y. 180, 26 Am. Rep. 567 (1877); *see* Coudert v. Cohn, 118 N. Y. 309, 313, 23 N. E. 298, 7 L. R. A. 69, 16 Am. St. Rep. 761 (1890).

8. Knecht v. Mitchall, 67 Ill. 86 (1873).

9. Goodwin v. Clover, 91 Minn. 438, 98 N. W. 322, 323, 103 Am. St. Rep. 517 (1904); Johnson v. Albertson, 51 Minn. 333, 53 N. W. 642, 643 (1892).

10. MD. ANN. CODE GEN. LAWS, art. 53, § 7 (1939).