

THE LOYOLA DIGEST



Foreign Government Involvement in the Extra territorial
Application of Antitrust Law.

Criminal Law and Criminology a Bibliography
of Periodicals.

Vol. II

May 1967

Number I

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In 1959 Ed Masry (Class of 1960) concluded that Loyola Law School needed a student publication. With his usual persuasiveness he pressed Mario Roberti, John Bambrick and others into service and the Loyola Digest was born.

At first it was essentially a quarterly newspaper, which included a few short articles. Gradually, as longer articles began to appear, it became apparent that the Digest was undergoing an evolutionary process, giving rise to the frequently expressed hope that it might someday become a legal journal. Last year its development was accentuated by a substantial change in physical appearance. The change was so notable that the Editors, in the great tradition of law book publishers, numbered their first issue Vol. 1, No. 1 (New Series).

This year the editorial staff is hopeful that this current issue will prove to be a very significant step in the evolution of the Digest from student newspaper to legal periodical.

Now the question will be asked more insistently: "When will Loyola have a Law Review?" In an effort to find an answer to this question, a committee, composed of faculty members and students under the chairmanship of Professor Martha Yerkes, has been appointed to investigate and make recommendations. Should the Committee's report be favorable, a great deal of planning will need to be done since a law review is a major undertaking both in terms of personnel and money. Thus we must look forward to the continued sponsorship of the Loyola Digest by the Student Bar Association for at least the immediate future. I am confident that the next editorial staff will build well on the fine work of their predecessors.

LLOYD TEVIS, *Dean*

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FOREIGN GOVERNMENT 'INVOLVEMENT' IN THE EXTRATERRITORIAL APPLICATION OF ANTITRUST LAW*

Shortly after Congress passed the Trade Expansion Act of 1962,¹ Attorney General Robert F. Kennedy announced the formation of the Foreign Commerce Section of the Justice Department's Antitrust Division. Although the antitrust laws have always been applied extra-territorially, the recent appearance of a special section to deal with foreign commerce underlines the growing significance of antitrust problems in this area.²

The scope of extraterritorial application of antitrust law is necessarily limited by the requirement for jurisdiction over the person,³ and for jurisdiction over subject matter.⁴ But jurisdictional requirements have proved to be no stumbling block to vigorous enforcement of antitrust law⁵ as is evidenced by foreign criticism of its application.⁶

The standards applied by courts to determine domestic antitrust violations are also applied to foreign commerce, although perhaps less rigorously.⁷ For example, restraints that are normally considered illegal *per se*⁸ may require proof of intent to affect, together with actual effect on American commerce,⁹ and the cases decided by "rule of reason" might turn on the defense of foreign business compulsion.¹⁰

In addition to the remoteness of foreign business activity as an element that will affect questions of jurisdiction and may affect the application of traditional antitrust standards, there is an important influence on extraterritorial application of antitrust law created by foreign government involvement in commerce through (i) public ownership of business enterprises (ii) acts of state affecting commerce and (iii) laws compelling behavior proscribed

by American antitrust law. The three kinds of government involvement are often treated without distinction by courts¹¹ and commentators.¹² The purpose of this paper is to examine separately the influence of the different kinds of foreign government involvement on court decisions in antitrust situations.

SOVEREIGN IMMUNITY

"The immunity of a foreign state (sometimes called 'sovereign immunity') is a defense available to a state when a claim is brought against it in a court of another state . . . The defense bars consideration of the merits of the claim, including examination of the act which gave rise to the claim."¹³

The already considerable and increasing involvement of foreign governments in the economic affairs of their countries through public ownership of business enterprises suggests that a defense of sovereign immunity has potentially wide application in the antitrust field.¹⁴ However, in 1952 the State Department indicated that it would follow the restrictive theory in deciding whether to support pleas for sovereign immunity.¹⁵ Since the courts normally defer to the wishes of the State Department in these matters,¹⁶ and apparently will apply the restrictive theory without prodding by the executive,¹⁷ sovereign immunity should not furnish a convenient vehicle for escape from antitrust laws by foreign public corporations.¹⁸

The distinction necessary to application of the restrictive theory may be readily expressed in conceptual terms,¹⁹ but it is difficult to anticipate in any given case whether the State Department or a court will characterize activity as "governmental" or "commercial." One antitrust case²⁰ held that the Anglo-Iranian Oil Company, in which the British Government had slightly more than one-third of the capital investment, was "indistinguishable from the Government of Great Britain."²¹ Accordingly, the court extended sovereign immunity al-

though the State Department had made no comment on the oil company's status. The court noted that the British Government had acquired its interest in Anglo-Iranian in order "to insure a proper supply of petroleum, crude oil and other products for the British Fleet."²² and that the supplying of oil to insure the maintenance of a naval force "is certainly a fundamental function serving a public purpose."²³

In an earlier antitrust case, *United States v. Deutsches Kalisyndicat Gessellschaft*,²⁴ a New York district court denied a plea for sovereign immunity entered by the French ambassador on behalf of the largely government-owned defendants who comprised a syndicate for purposes of mining and selling potash. The French ambassador addressed a statement to the court which certified that eleven-fifteenths of defendants' capital stock was owned by the French Government, and that the government's share of the proceeds from the sale of potash went into the public treasury and was applied to governmental purposes.²⁵ The ambassador communicated his plea to the State Department, but the latter did not transmit a suggestion of immunity to the court.

Judge Kirkland, in *World Arrangements*, distinguished *Gesellschaft* with the comment that "there is a vast distinction between a seafaring island-nation maintaining a consistent supply of maritime fuel and a government seeking additional revenue in the American markets . . ."²⁶ At least one commentator has suggested that this is a distinction without a difference.²⁷ After all, what is the difference between an oil cartel and a potash syndicate when both are profitable commercial ventures that include private investors?²⁸ The result in *World Arrangements* may well have been occasioned by the unique circumstances under which that case was decided. Judge Kirkland commented at the outset of his opinion that the court was "keenly aware of present world conditions."²⁹ He noted counsel's emphasis of the "delicate and sensitive" position occupied by the oil industry in many coun-

tries in which it was "under attack,"³⁰ and concluded that the "United States has a present vital interest in the Middle East and because of this *the court will proceed forward in an extremely cautious manner.*"³¹ These were the days (1951-1954) during which the British Government was hotly disputing Iran's nationalization of Anglo-Iranian interests in that country. No circumstances suggesting a need for judicial caution were evident in *Gesellschaft*.

It is unfortunate that *World Arrangements*, decided as it was under such extraordinary circumstances, should be regarded as a guidepost in applying the restrictive theory of immunity. The case should be confined to its facts, but it is often contrasted with *Gesellschaft*, as in *In Re Grand Jury Investigation of the Shipping Industry*,³² an antitrust case also decided by the District Court for the District of Columbia. In *Shipping Industry*, a plea of sovereign immunity was entered on behalf of Philippine National Lines, one of the defendant shipping companies. The Philippine embassy transmitted a note to the State Department claiming that defendant was an instrumentality of the Philippine Government. In its reply the State Department cited the restrictive theory of sovereign immunity, expressed its view that defendant was a commercial enterprise, and refused to support the embassy's claim. The district court, however, did not feel compelled to decide the issue on the basis of the State Department's views. Rather, it noted one case in which the Supreme Court equated government-operated merchant ships with ships of war³³ and concluded that "the present case seems to fall somewhere in between the *World Arrangements* and *Gesellschaft* cases."³⁴ What the court was really after was more information about the nature of Philippine National Lines' activities before reaching a decision on the claim of immunity.³⁵ It may be suggested that no amount of additional information could rescue this issue from the area "somewhere in between" opposite conclusions based on similar facts. In any event, *Shipping Industry* contributes little to a solution of the prob-

blems of judicial application of the restrictive theory. Unfortunately, it is the most recent treatment of that theory in an antitrust situation.

Proposed solutions to the confusion surrounding the restrictive theory are to ignore the governmental-commercial distinction in antitrust cases,³⁶ return to a theory of absolute sovereignty for all types of cases,³⁷ and to develop the restrictive theory in the courts without deference to the executive.³⁸

Ignoring the governmental-commercial distinction would extend the scope of sovereign immunity and seems unwise in view of likely increases in the commercial activities of public corporations engaged in international trade. Even though the original purpose in adopting the restrictive theory was to permit individual recoveries in tort and contract situations, the theory is no less appropriate to antitrust cases,³⁹ particularly since § 4 of the Clayton Act⁴⁰ permits treble damage recoveries by injured private parties. Although the State Department would probably prefer to be relieved of the diplomatic pressures attendant upon regularly making determinations about the character of foreign enterprises, it is likely too that the Department would wish to continue to exercise its influence in certain cases.⁴¹ Moreover, there appears to be little reason why courts cannot fashion governmental-commercial distinctions even while they defer to executive suggestions in individual cases.

Despite the somewhat equivocal status of the restrictive theory, its influence should be expected to increase in proportion to any increase in the activity of foreign public corporations affecting American commerce.

ACTS OF STATE

The act of state doctrine may be stated as a rule that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."⁴² The doctrine is apparently the

offspring of the separate defense of sovereign immunity, with which it is often confused.⁴³ Although the doctrine may not apply where the executive has indicated a desire that a court accept jurisdiction,⁴⁴ no such exception should affect antitrust cases since acts of government are generally outside the scope of the antitrust laws.⁴⁵

The doctrine is applicable in antitrust cases where incidents complained of are actually those of a foreign state and are not acts of a defendant who may have benefitted by them. Thus in *American Banana Co. v. United Fruit Co.*,⁴⁶ an early and often cited case involving the act of state doctrine in an antitrust situation, the Supreme Court held that the seizure of plaintiff's business property in Costa Rica by the Costa Rican Government, although instigated by the defendant, an American Corporation, could not be complained of as a violation of antitrust law.

Where a foreign sovereign is defendant the act of state doctrine, as well as sovereign immunity, may be relied on by a court as grounds for refusing to consider a claim on its merits.⁴⁷ In cases where either of these objections to jurisdiction would apply, distinction between them may be of little consequence, but in cases where the restrictive theory would strip a foreign public corporation of sovereign immunity the other doctrine could apply if the corporation, pursuant to law, is acting as an agent of its sovereign. Such a possibility is suggested by *Continental Ore Co. v. Union Carbide & Carbon Corp.*,⁴⁸ an antitrust case in which plaintiff sought treble damages under § 4 of the Clayton Act⁴⁹ for competitive harm suffered as a result of, among other things, defendants' alleged conspiracy to monopolize exports of ferrovanadium⁵⁰ to the Canadian market. The Canadian Government had established a regulation that no ferrovanadium could be imported into Canada by anyone other than its agent, and Electro Metallurgical Company of Canada, Ltd. (Electro Met), a wholly-owned subsidiary of defendant Union Carbide and Carbon Corp., had been designated by that

Government to act as its agent. Electro Met refused to purchase ferrovanadium from plaintiffs. Electro Met was named as a defendant but was not served. As a result, Electro Met's liability was not in question. The district court excluded all evidence relating to Electro Met's actions on the grounds that the sale of material in Canada was a matter wholly within the control of the Canadian Government. In affirming the district court's action in this respect, the Court of Appeals for the Ninth Circuit stated:

Thus, even if we assume that Electro Metallurgical Company of Canada, Ltd., acted for the purpose of entrenching the monopoly position of the defendants in the United States, it was acting as an arm of the Canadian Government, and we do not see how such efforts as appellants claim defendants took to persuade and influence the Canadian Government through its agent are within the purview of the Sherman Act.⁵¹

The Supreme Court reversed and remanded for a new trial, holding that the excluded offer of proof presented a question for the jury as to whether loss of the Canadian business was attributable to the activities of Union Carbide and the other American co-conspirators.⁵² Since Electro Met itself was not a party to the case the act of state doctrine was never brought sharply into focus; but it is apparent that Electro Met's most appropriate objection to jurisdiction would be the act of state doctrine rather than sovereign immunity which should not be offered to purely commercial enterprises under the restrictive theory.

Although the act of state doctrine protected the American conspirators in *American Banana*, it afforded no protection in *Continental Ore* for the reason that plaintiffs in the latter case alleged specific acts of a conspiracy which were said to have occurred in the United States, and for the further reason that the available evidence did not show that Electro Met was *compelled* by the Canadian Government to make all its purchases from defendants.⁵³ It is not at all clear whether acts in furtherance

of a conspiracy to instigate government action necessarily resulting in restraint of free trade would be within the scope of the antitrust laws. One case, *Eastern R. R. President's Conf. v. Noerr Motor Freight, Inc.*,⁵⁴ held that a publicity campaign encouraging adoption and enforcement of laws harmful to plaintiff's business was not within the Sherman Act. *Noerr* involved a feud between the railroad and trucking interests. The Court was especially concerned with the constitutional implications of any attempt to regulate political activity and held defendant's activities to be outside the Act "at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws."⁵⁵ An earlier case, *U.S. v. Rock Royal Co-op.*, had established that enacted legislation would be immune from any antitrust attack grounded on the motives of its supporters.⁵⁶ But *Noerr* and *Rock Royal* may be distinguished from *Continental Ore* since they deal with legislation rather than administrative action. There are no cases, other than *American Banana*, involving attempts to secure executive action that would itself amount to a restraint of trade.

FOREIGN LEGAL COMPULSION

Foreign legal compulsion is a factor in the extraterritorial application of antitrust law that is not always distinguished from the act of state doctrine.

Unlike sovereign immunity and the act of state doctrine which operate to restrain a court from exercising jurisdiction, a plea of foreign legal compulsion may serve both as an objection to jurisdiction in the conflict of laws sense⁵⁷ and as a defense on the merits.⁵⁸ Also, a plea of foreign legal compulsion would be available to all defendants in a compulsory case, while sovereign immunity and, to a great extent, the act of state doctrine are useful only to the party able to assert its public character. As a result, it seems most likely that legal compulsion would be the most significant kind

of foreign government involvement in American antitrust law.

A determination of the effect foreign obligations have in antitrust litigation should consider the extent to which interference with those obligations would create friction abroad, or place defendants in jeopardy of specific sanction by the foreign government. Where the obligation is in the nature of a private agreement enforceable in foreign courts, an American court would be less reluctant to require its termination⁵⁹ than it would be to insist that a defendant violate a foreign criminal statute.⁶⁰ An additional consideration is the nationality of the defendant.⁶¹ Proposed solutions to the entanglements caused by conflicting state policies are to resort to a strict territorial rule, to apply conflicts rules for determination of jurisdiction, and to use a "precatory" approach which would recognize potential conflicts at the remedial stage of litigation.⁶²

In *United States v. The Watchmakers of Switzerland Information Center, Inc.*,⁶³ the District Court for the Southern District of New York held that American and Swiss watch manufacturers, together with a Swiss trade association and a Swiss holding company, all of whom were "found" within the district, violated antitrust law although their private activities originating in Switzerland were approved and encouraged by the Swiss Government. The case is especially interesting for its consideration of the role of the Swiss Government in supervising the watch industry.

Trade practices in Switzerland's watch industry are governed by a hierarchy of voluntary associates which at the lowest level includes regional groups of manufacturers and assemblers of watches. These regional groups together comprise *Swiss Watch* defendant Federation Suisse des Associations de Fabricants d'Horlogerie (FH), which promulgates trade rules for its members. Any rule is subject to review, first by a board composed of one professional judge and two members of the watch

industry, next by an arbitral tribunal composed of three professional judges and two members of the watch industry, and finally by the courts of the Canton of Bern. Defendant Ebauches S.A. (Ebauches) is a holding company which owns or controls stock of other Swiss corporations engaged in the manufacture of a watch part known as an ebauche, or chassis of the movement. FH and Ebauches, together with others not named as defendants but named as co-conspirators, are members of La Chambre Suisse de L'Horlogerie (Swiss Watch Chamber), which performs "advisory and administrative functions under the Swiss Government's various regulatory statutes concerning the watch industry."⁶⁴ The Swiss Watch Chamber serves as the "link between industry and federal authorities."⁶⁵ Above the Watch Chamber in the hierarchy is the Department of Public Economy, an arm of the Swiss executive.

FH, Ebauches and other named co-conspirators entered into a series of agreements beginning in 1931. Those agreements were replaced in 1936 by a single detailed joint agreement known as the Collective Convention of the Swiss Watch Industry. The Collective Convention was renewed from time to time, and the Convention executed in 1949 was the basis of the complaint in the case. Signatories of the Convention, who comprised virtually all of the Swiss watch industry, agreed that: they would not manufacture or encourage the manufacture of watch products outside Switzerland; they would not sell or export watch making machinery except under certain circumstances; they would use their manufactured watch parts solely for manufacture and repair of their own finished products (except that those whose businesses were not fully integrated could sell parts to other signatories); and they would not deal with or give aid of any kind to companies outside Switzerland that dealt in watches or parts produced by persons not parties to the Convention. The Convention provided for no criminal sanctions.

The terms of the Convention are admin-

istered and enforced by the Delegations Reuins whose decisions may be appealed to a panel of the Arbitral Tribunal, a judicial organ created by the Convention and composed of three professional judges selected by the courts of three of the watch-making cantons, together with two judges from the industry selected by the professional judges. The decisions of the Tribunal have the same legal effect as judgments of the Swiss cantonal courts, and are reviewable by the Supreme Court of the Canton of Bern. Swiss legislation complements the Convention by prohibiting export of parts and machinery without a permit. Permits may be obtained through the Department of Public Economy, which is authorized to delegate its authority, subject to review, to the Swiss Watch Chamber.

The American defendants, which are subsidiaries or parent corporations of certain Swiss defendants, were reluctant to submit to the requirements of the Convention because they preferred to develop the American watch industry. However, these American manufacturers depend on access to Swiss parts and machinery which cannot be exported to nonsignatories except under penalty of the private sanctions imposed by the Convention. Moreover, a nonsignatory would have to obtain an export permit by appealing directly to the Department of Public Economy since the Swiss Watch Chamber could hardly be expected to encourage export by those who violated the Convention. Judge Cashin remarked of defendants' plea of foreign legal compulsion that:

[T]he defendants' activities were not required by the laws of Switzerland. They were agreements formulated privately without compulsion on the part of the Swiss Government. It is clear that these private agreements were then recognized as facts of economic and industrial life by that nation's government. Nonetheless the fact that the Swiss Government may, as a practical matter, approve of the effects of this private activity cannot convert what is essentially a vulnerable private conspiracy into an unassailable system resulting from foreign governmental man-

date. In the absence of direct foreign governmental action compelling the defendants' activities, a United States court may exercise its jurisdiction as to acts and contracts abroad, if, as in the case at bar, such acts and contracts have a substantial and material effect upon our foreign and domestic commerce.⁶⁶

The distinction between permissive and mandatory legislation noted by Judge Cashin is appropriate to analysis of a plea of foreign legal compulsion,⁶⁷ and appears to have been correctly applied in *Swiss Watch*. But it may be argued that the distinction should not apply to circumstances, such as those in *Swiss Watch*, where cooperation between foreign industry and government makes mandatory legislation completely unnecessary.⁶⁸

Judge Cashin was aware that a decree, though aimed at the private agreements themselves, might offend Swiss law. In commenting on defendants' argument that a judgment in the case would violate the United States constitutional rights of Swiss citizens, the treaty obligations of the United States, and the sovereignty of the Swiss Confederation, Judge Cashin stated:

All these claims are entirely premature, and presuppose that this court intends to permit the issuance of a decree of wide scope which would have such a drastic effect.⁶⁹

A final judgment entered in January 1964 was modified by the court a year later on motion of the plaintiff. The modifications, which related to "peripheral areas of the judgment which might have long been construed to have a bearing upon the sovereignty of the Swiss Confederation,"⁷⁰ were conditioned on one of the defendants entering an order dismissing their joint appeal.⁷¹

Judge Cashin's approach seems very much like the precatory approach, suggested by Brewster,⁷² which is more concerned with the scope of a decree than with legislative jurisdiction to determine liability. In cases where it may be inap-

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propriate to apply the permissive-mandatory distinction to legislation affecting industry, and in cases where it may be impossible to crystalize, for purposes of analysis, the relationship between government and industry, the precatory approach seems desirable.

CONCLUSION

The defense of sovereign immunity and the act of state doctrine are available to defendants who are affected with a public character through public ownership and function, or, in the case of the act of state doctrine, because of the nature of a public authority delegated to them. In addition, the act of state doctrine may be available to private parties who have benefited by an act which they claim has Governmental status, although it is none too clear when a defendant should be held liable for private solicitation of governmental action. The defense of foreign legal compulsion is available to private parties who may suffer public sanction for noncompliance with activity prohibited by American antitrust law, although here too it is unclear whether a private party should be held liable for solicitation of the legislation that compels his anticompetitive behavior.

Sovereign immunity and the act of state doctrine are well known and widely applied doctrines. They may be held good objections to jurisdiction over person and subject matter respectively, without regard to any special analytical requirements occasioned by the nature of antitrust law. The defense of foreign legal compulsion is more difficult to apply. A strict territorial view of legislative jurisdiction would preclude any conflict of laws problems, but such a view would sacrifice much of the effectiveness of antitrust law in an increasingly interdependent world economy. A jurisdictional approach in the conflict of laws sense would be most in keeping with traditional legal analysis of conflicting state policies; but until such time as other nations assert control over industrial power comparable to American antitrust law, this approach

would also run a heavy risk of damaging American antitrust policies. On the other hand, the precatory approach suggested by Brewster, and apparently utilized by the court in *Swiss Watch*, seems most useful. Although a vigorous extraterritorial application of the antitrust law may occasionally offend foreign states whose contrary policies are involved, no serious or lasting grievance should be occasioned unless a court permits a decree of wide scope.

FOOTNOTES

*M. L. Murray, A.B. Harvard College 1960; L. L. B. University of Virginia 1963; IBM World Trade Corp.

1. 76 Stat. 872 (1962), 19 U.S.C.A. § § 1801-1991 (supp. 1962).

2. Antitrust laws with extraterritorial application are the Sherman Anti-Trust Act, 26 Stat. 209 (1890), as amended 15 U.S.C. § § 1-7 (1958); Wilson Tariff Act, 28 Stat. 509 (1894), as amended, 15 U.S.C. § § 8-11 (1958); Clayton Act, 38 Stat. 730 (1914), as amended, 15 U.S.C. § § 12-17; Federal Trade Commission Act, 38 Stat. 717 (1914), as amended, 15 U.S.C. § § 41-58 (1958); Webb-Pomerene Act, 40 Stat. 516 (1918), 15 U.S.C. § § 61-65 (1958) (exempts from antitrust laws certain combinations of American companies in United States export trade). The relationship of § 7 of the Clayton Act to foreign trade has not yet been determined but apparently it does have extraterritorial application. See FUGATE, FOREIGN COMMERCE AND THE ANTI-TRUST LAWS 249-251 (1958).

3. Section 12 of the Clayton Act governs venue and service in antitrust suits.

Sec. 12. That any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district where it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

38 Stat. 736 (1914), 15 U.S.C. § 22 (1958). For the leading decision on in personam jurisdiction over foreign corporations see *United States v. Scophony Corp. of America*, 333 U.S. 795 (1948). *United States v. The Watchmakers of Switzerland Information Center Inc.*, 133 F. Supp. 40 (S.D.N.Y. 1955), is a more recent application of the *Scophony* rationale.

4. Early cases took a restrictive view of legislative jurisdiction. See, e. g., *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) (act of a foreign sovereign not affecting United States commerce). Subsequent cases have distinguished *American Banana* by finding either "acts" or "effects" within the United States. E. g., *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927) (act furnishing basis for jurisdiction was conspiracy entered into in United States); *United States v. Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945) (contract made in Switzerland affected potential imports into the United States). See also, Note, *Extraterritorial Application of the Antitrust Laws: A Conflict of Laws Approach*, 70 YALE L. J. 259, 264-265 (1960), for the view that an introduction of foreign aspects requires separate examination of the choice of

laws problems as an element of subject matter jurisdiction. For an espousal of the strict territorial view of subject matter jurisdiction see generally *Baggett, The Gloss on American Banana*, A.B.A. SECTION ON INTERNATIONAL AND COMPARATIVE LAW BULLETIN 14 (Dec. 1961); Haight, *International Law and Extraterritorial Application of the Antitrust Laws*, 63 YALE L.J. 639 (1954).

5. But see *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212 (1945), for an example of an unsuccessful attempt to obtain jurisdiction over the person by means of an injunction forbidding removal of assets. The Government also failed to obtain jurisdiction in a later attempt by service upon American affiliates. *United States v. De Beers Consolidated Mines, Ltd.*, TRADE REG. REP. (1948 Trade Cas.) Para. 62248 (S.D.N.Y. 1948).

6. See the testimony of the American Chamber of Commerce Abroad in *Hearings Before The Antitrust and Monopoly Subcommittee of the Senate Committee on the Judiciary*, 84th Cong., 1st Sess., pt. 4 (Foreign Trade) 1849-1904 (1955); Shawcross, *English Restrictive Practice Legislation: Extraterritorial Effect of U.S. Antitrust Laws* in A.B.A. SECTION ON ANTITRUST LAW REPORT 111, 113-115 (1957). See generally BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD ch. 3 (1958) (hereinafter cited as BREWSTER).

7. See generally BREWSTER 76-92.

8. I.e., price fixing, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); division of markets, *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); group boycotts, *Fashion Originators Guild of America Inc. v. Federal Trade Comm'n*, 312 U.S. 457 (1941); tying contracts, *International Salt Co. v. United States*, 332 U.S. 392 (1947).

9. BREWSTER 84.

10. *Id.* 89, 92. Although, as Brewster notes, this defense has met with little or no success in litigation to date, it apparently has had some influence on proceedings settled by consent decree. Cf. the consent decrees of Esso, Gulf and Texaco in the oil cartel case. Those decrees exclude combinations "pursuant to request or official pronouncement of policy of the foreign nation or nations within which the transactions which are the subject of such . . . [combination] take place . . . where failure to comply with which request or policy would expose . . . [defendant] to the risk of the present or future loss of the particular business in such foreign nation or nations which is the subject of such request or policy." *United States v. Standard Oil Co. (N.J.)*, TRADE REG. REP. (1960 Trade Cas.) Para. 69,849 at 77, 340 (S.D.N.Y. 1960); *United States v. Gulf Oil Corp.*, TRADE REG. REP. (1960 Trade Cas.) Para. 69,851 at 77,349 (S.D.N.Y. 1960); *United States v. Standard Oil Co. (N.J.)*, (Texaco, Inc.), TRADE REG. REP. (1963 Trade Cas.) Para. 70,819 at 78,317 (S.D.N.Y. 1963).

11. E.g., *In Re Investigation of World Arrangements*, 13 F.R.D. 280 (D.D.C. 1952), where counsel argued legal compulsion and supported this argument by introducing British Government directives addressed to defendant forbidding compliance with a subpoena duces tecum. The court quashed the subpoena on the grounds that defendant was entitled to sovereign immunity, *Id.* at 288-291.

12. E.g., *Fugate, Antitrust Jurisdiction and Foreign Sovereignty*, 49 VA. L. REV. 925 (1963); Fukuda, *Jurisdiction in International Application of United States Antitrust Laws*, 12 CLEV-MAR. L. REV. 125, 135-138 (1963); Celler, *A Congressman's View of Foreign Commerce Aspects of the Sherman Act*, 27 A.B.A. ANTI-TRUST SECTION 3, 8 (1965).

13. RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES § 41, comment e at 132

(OFF. DRAFT, 1965). The distinction between sovereign immunity and act of state is emphasized in comment e.

When a proceeding against a state or against a thing in its possession is dismissed on the ground of foreign state immunity, it is unnecessary for the court to consider whether the suit could also be dismissed on the separate ground that the act giving rise to the claim against the state is an act not subject to examination under the act of state doctrine. But both grounds of dismissal may be present, however, and may be relied on by a court in refusing to examine the merits of a claim.

When a claim involving an act of state is brought against a person whose rights are based on the act of a foreign state but who is not entitled to that state's immunity or against a thing in its possession, it is the act of state doctrine alone that is invoked. *Ibid.*

14. See generally the following symposium for the extent of this kind of foreign government involvement, *Public Authorities*, 26 LAW & CONTEMP. PROB. 589 (1961).

15. See Letter From the State Department To The Attorney General, May 19, 1952, reprinted in 26 DEP'T. STATE BULL. 984 (1952). The restrictive theory distinguishes between acts which are of a purely governmental character (*jure imperii*), and acts which are of a commercial nature capable of being carried out by private parties (*jure gestionis*). Only activities which are *jure imperii* would be entitled to sovereign immunity. See *ibid.*

16. See, e.g., *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35-36 (1945).

17. "In the absence of recognition of the claimed immunity by the political branch of the government, the courts may decide for themselves whether all the requisites of immunity exist." *Ibid.* See Comment, *The First Decade of the Tate Letter Policy*, 60 MICH. L. REV. 1142, 1145 (1962), for the view that the courts seem willing to apply the restrictive theory independent of a suggestion by the State Department.

18. But see Timberg, *Sovereign Immunity, State Trading, Socialism and Self-Deception*, 56 N.W. U. L. REV. 109, 113-119 (1961), for the view that the restrictive theory which was hopefully endorsed in 1952 is receding in influences; Comment, *The First Decade of the Tate Letter Policy*, supra note 17, at 1142-1144, suggesting, on the basis of admittedly meager evidence, that the State Department has not pursued the restrictive theory as effectively as it might have.

19. See note 15 *supra*.

20. *In Re Investigation of World Arrangements*, 13 F.R.D. 280 (D.D.C. 1952).

21. *Id.* at 291.

22. *Id.* at 290.

23. *Ibid.*

24. 31 F. 2d 199 (S.D.N.Y. 1929).

25. *Id.* at 200.

26. *In Re Investigation of World Arrangements*, 13 F.R.D. 280, 291 (D.D.C. 1952).

27. Note, *Extraterritorial Application of the Antitrust Laws: A Conflict of Laws Approach*, supra note 4, at 272.

28. Reference to the amount of stock held by a government will not always be helpful as is shown by the following quotations:

Neither principle nor precedent requires that this immunity . . . should be extended though merely because some of . . . [defendant's] stock is held by a foreign state . . .

United States v. Deutsches Kalisyndicat Gesellschaft, 31 F. 2d 199, 203 (S.D.N.Y. 1929).

In determining whether or not a given corporation

- is an instrumentality of its government it is not material whether the government owns all the stock. *In Re Investigation of World Arrangements*, 13 F.R.D. 280, 290 (D.D.C. 1952).
29. 13 F.R.D. at 283.
30. *Ibid.*
31. *Ibid.* (Emphasis added.)
32. 186 F. Supp. 298 (D.D.C. 1960).
33. *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562 (1926).
34. 186 F. Supp. at 319.
35. *Id.* at 319-320.
36. Note, *Extraterritorial Application of the Antitrust Laws*, *supra* note 4, at 272.
37. A short discussion of current justifications for what one commentator recognizes as a "Resurgence of the Absolute Immunity Doctrine" appears in Timberg, *supra* note 18, at 124-127.
38. *Id.* at 114-124, 128.
39. One commentator suggests otherwise. Note, *Extraterritorial Application of the Antitrust Laws*, *supra* note 4, at 272.
40. 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958).
41. An example of the exceptional case, which of course might very well disturb the consistent application of judicial distinctions, would be one involving a public corporation engaged in a single kind of commercial activity upon which the economic stability of a country depends. In such a circumstance the State Department might wish a court to "proceed with caution."
42. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).
43. Learned Hand described the doctrine in the following terms which allude both to its origin and its age: We have repeatedly declared, for over a period of at least thirty years, that a court of the forum will not undertake to pass upon the validity under the municipal law of another state of the acts of officials of that state, purporting to act as such. (citing authority) We have held that this was a necessary corollary of decisions of the Supreme Court [citing *Underhill v. Hernandez*, 168 U.S. 250 (1897); and *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918)], and if we have been mistaken, the Supreme Court must correct it.
- Bernstein v. Van Heyghen Freres, S.A.*, 163 F. 2d 246, 249 (2d Cir. 1947). For a discussion tracing the roots of the doctrine to sovereign immunity see Comment, "Act of State" Immunity, 57 YALE L.J. 108, 111 (1947).
44. See *Bernstein v. Van Heyghen Freres, S.A.*, *supra*, at 250, 251; *Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F. 2d 375 (2d Cir. 1954).
45. See, *e.g.*, *Parker v. Brown*, 317 U.S. 341, 350-351 (1943).
46. 213 U.S. 347 (1909).
47. See note 13 *supra*.
48. 370 U.S. 690 (1962), *reversing* 289 F. 2d 86 (9th Cir. 1961).
49. 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958).
50. "Vanadium is a metal obtained from certain ores which, in this country, are mined principally on the Colorado Plateau. The ore is processed at mills near the mines into a substance primarily known as vanadium oxide. The oxide is then transported to the East and converted into ferrovanadium, which is purchased chiefly by steel companies for use as an alloy in hardening steels." 370 U.S. at 692.
51. 289 F. 2d at 94.
52. 370 U.S. at 706.
53. *Id.* at 704-706. The Court relied on United States v. *Sisal Sales Corp.*, 274 U.S. 268 (1927), which held American defendants liable for their deliberate acts within the United States notwithstanding the fact that their overall conspiracy involved some acts by a foreign state. In *Sisal* the Court distinguished *American Banana* on the ground that there the act complained of took place outside of the United States.
54. 365 U.S. 127 (1961).
55. *Id.* at 138.
56. "If ulterior motives of corporate aggrandizement stimulated their activities [publicity to secure favorable results in a referendum], their efforts were not thereby rendered unlawful. (citing authority) If the Act and Order are otherwise valid, the fact that their effect would be to give cooperatives a monopoly of the market would not violate the Sherman Act . . ." *U.S. v. Rock Royal Co-operative, Inc.*, 307 U.S. 533, 560 (1939) (upholding an order issued under the Agricultural Marketing Agreement Act of 1937).
57. See Note, *Extraterritorial Application of the Antitrust Laws*, *supra* note 4, at 264-265.
58. See BREWSTER 92-96; FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS, 50 (1948).
59. See, *e.g.*, *United States v. Timken Roller Bearing Co.*, 341 U.S. 593 (1951) (enjoining repetition of territorial and price fixing agreements).
60. *E.g.*, *United States v. General Elec. Co.*, 115 F. Supp. 835, 878 (D.N.J. 1953), in which the decree stated:
- Philips shall not be in contempt of this judgment for doing anything outside of the United States which is required or for not doing anything outside of the United States which is unlawful under the laws of the government, province, country or state in which Philips or any other subsidiaries may be incorporated, chartered or organized or in the territory of which Philips or any such subsidiaries may be doing Business.
61. *Compare Bulova Watch Co. v. Steele*, 194 F. 2d 587 (5th Cir. *aff'd*, 344 U.S. 280 (1952)) (United States citizen doing business in Mexico not allowed to use a Mexican trademark), *with* *Vanity Fair Mills Inc. v. The T. Eaton Co.*, 133 F. Supp. 522 (S.D.N.Y. 1955) (courts refused to prohibit use of trademark where defendants were citizens of the country where it was registered). These are both trademark cases. Where the Sherman Act is applied, however, less consideration is given to the nationality of defendants. See *United States v. Imperial Chemical Industries, Ltd.*, 105 F. Supp. 215 (S.D.N.Y. 1952) (decree directing British national to refrain from asserting rights which it had in Britain).
62. BREWSTER ch. 11.
63. TRADE REG. REP. (1963 Trade Cas.) Para. 70600 (S.D.N.Y. 1962).
64. *Id.* at 77,422.
65. *Ibid.*
66. *Id.* at 77,456-77,457.
67. See *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704-706 (1962); BREWSTER 89-94; *cf.* note 60 *supra*.
68. *Cf.* note 10 *supra*.
69. TRADE REG. REP. (1963 Trade Cas.) Para. 70600 at 77,467.
70. TRADE REG. REP. (1965 Trade Cas.) Para. 71352 at 80,468.
71. *Ibid.*
72. BREWSTER 306-307.

CRIMINAL LAW AND CRIMINOLOGY A BIBLIOGRAPHY OF PERIODICALS

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Crime in the United States is a growing menace. In fact, it has reached such proportions as to cause serious concern for our entire society. Recognizing the urgency of this problem, President Johnson appointed,¹ on July 23, 1965, a Commission on Law Enforcement and Administration of Justice, to examine all aspects of crime and to recommend ways in which America might meet its challenge.² This Committee, in a recently published study, *"The Challenge of Crime in a Free Society,"*³ emphasizes the seriousness of the problem in the following terms:

"There is much crime in America, more than ever is reported, far more than ever is solved, far too much for the health of the Nation. Every American knows that. Every American is, in a sense, a victim of crime. Violence and theft have not only injured, often irreparably, hundreds of thousands of citizens, but have directly affected everyone. Some people have been impelled to uproot themselves and find new homes. Some have been made afraid to use public streets and parks. Some have come to doubt the worth of a society in which so many people behave so badly." (p. 1)

It is no wonder, therefore, that the battle against crime has become a major concern not only for federal law enforcement officials, but also for the various civic and religious organizations, businesses, schools, and even individual citizens.

On the state level there is also evidence of serious effort in fighting crime. Thus, in California, e.g., a Special Governor's Commission headed by Dean Lloyd Tevis, School of Law, Loyola University, Los Angeles was appointed in the Fall of 1966 to study crime laws in California.⁴

In addition, some private Foundations have made grants to various universities for the purpose of expanding their study and training programs in criminal law and criminology.⁵ Also, professional organizations are concerned with this problem. The Federal Bar Association, e.g., has announced its plan to study another aspect of the problem, the effect of crime on its victims.⁶

In view of all this increased effort in the control of crime, it would seem that a bibliography of periodicals in criminal law and criminology might further this effort by bringing to the attention of those concerned with the problem the multitude of materials in periodical literature. Periodical literature may be considered one of the most useful sources for legal researchers, in view of the fact that periodicals almost always cover new and interesting areas which have not yet been adequately dealt with in textbooks, encyclopedias, or other types of legal materials.

Since the crime problem is not confined to our part of the world, foreign experiences in fighting crime should be considered valuable. For this reason, the major foreign periodicals in criminal law and criminology have been included in this bibliography.

The bibliography is arranged in an alphabetical list by title. Entries are under the latest title, with information of previous titles whenever available.

It is my hope that the material presented in this bibliography might be helpful in opening up new vistas for those working to curb the menace of crime to our society.

PART I. ALPHABETICAL LIST OF PERIODICALS BY TITLE

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1. Through Executive Order No. 11236, 30 *Fed. Reg.* 9349 (1945).

2. Section 2 of the Executive Order provides as follows: "The Commission shall: (1) Inquire into the causes of crime and delinquency, measures for their prevention, the adequacy of law enforcement and administration of justice, and the factors encouraging respect or disrespect for law, at the national, State, and local levels, and make such studies, conduct such hearings, and request such information as it deems appropriate for this purpose. (2) Develop standards and make recommendations . . . to prevent, reduce, and control crime . . ."

3. Washington, D. C., United States Government Printing Office, February 1967.

4. *Los Angeles Times*, October 7, 1966, Part I, p. 28.

5. Thus, e.g., Ford Foundation granted \$600,000 to the Georgetown University Law Center to expand graduate legal internship program in criminal law; \$320,000 to Columbia University School of Law, for joint program in criminal justice with Cambridge University, Institute of Criminology; \$250,000 to University of Montreal, Department of Criminology, to expand research and training program; \$150,000 to University of Toronto, Centre of Criminology, for study of crime in Canada. See 8 *Foundation News* 37 and 44 (March 1967).

6. See *Los Angeles Daily Journal*, March 22, 1967, at p. 1.

**Part II, *A List of Criminal Law Periodicals Arranged by Country*, will be published in the next issue of the LOYOLA DIGEST. In this listing, only the titles will be shown, referring to Part I for full bibliographic information.

CALIFORNIA PRODUCTS LIABILITY LAW:¹ A REVIEW AND PROSPECTUS

The doctrine of products liability is perhaps one of the most outstanding developments in California tort law in recent years. Yet the doctrine, contrary to popular belief, is not a static concept, but rather one which is influencing California tort law to a significant degree today, an influence which will be overshadowed only by the developments of tomorrow.

In order to examine properly the present and future roles of products liability law in California, it is first necessary to review briefly the formation of that law in California. Two sources of such formation are detectable. The first is the liberalization or elimination of traditional requirements, such as privity of contract, for consumer recovery on the theory of negligence. This development may be seen in the landmark case of *MacPherson v. Buick Motor Co.*,² accepted as California law in *Kalish v. Los Angeles Ladder Co.*³

The second source, and the one with which we will be presently concerned, is a similar liberalization in the field of implied warranty. The *Macpherson*-type development will not be discussed, because products liability is primarily concerned with recovery regardless of fault, and it was early established in the field of implied warranty that the liability imposed was "an absolute liability regardless of negligence."⁴

The basis for this imposition of liability in the field of implied warranty was, until recently, Civil Code Section 1735, enacted in 1931.⁵ The pertinent parts of that section, effective through January 1, 1965 (for transactions after that date see Commercial Code §§2314-2317), read as follows:

Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

(1) Where the buyer, expressly or by implication makes known to the seller the

particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.

It will be noted that subsection (1) of Civil Code Section 1735 speaks only of a warranty in favor of the buyer, and that subsection (2) reaches the same result indirectly. Thus, it would seem that a major prerequisite to recovery under Civil Code Section 1735 is privity of contract. Indeed, this requirement was explicitly stated both before and after the enactment of Section 1735, in the cases of *Lewis v. Terry*,⁶ *Cliff v. California Spray Chemical Co.*,⁷ and *Burr v. Sherwin Williams Co.*⁸

LIBERALIZATION IN THE AREA OF IMPLIED WARRANTY

Yet this seemingly impregnable fortress of privity of contract was breached early and often in favor of consumers seeking recovery under Section 1735, thus preparing the way for the entrance of the current products liability theory. The first case to eliminate the privity requirement of Section 1735 was *Klein v. Duchess Sandwich Co., Ltd.*⁹ There a husband and wife went to a restaurant, and the husband purchased a ham and cheese sandwich which was wrapped in waxed paper and sealed by two metal clamps which had been placed thereon by the manufacturer of the sandwich, Duchess Sandwich Company. The sandwich had been delivered to the restaurant by Duchess approximately one hour before the purchase in question. The husband took the sandwich to his wife who thereupon removed the wrapper and began to consume the sandwich. At that point, the wife discovered the sandwich was full of worms and maggots, and she became violently ill for a period of six months. In the subsequent action brought against

Duchess by the husband and wife, and upon these facts, the trial court directed a verdict for the defendant, but on appeal the judgment for defendant was reversed.

In reviewing the case the California Supreme Court first noted that the plaintiffs had alleged, *inter alia*, that Duchess had breached an implied warranty under Civil Code Section 1735(1) that the sandwich was fit for human consumption. Duchess contended, however, that this statutory implied warranty ran only from an immediate seller to an immediate buyer, and that here no such relationship existed; i.e., that privity of contract was absent. In answering this contention, the Supreme Court first stated that the question concerning a manufacturer's liability to an ultimate purchaser or consumer on a warranty as to the fitness of food manufactured by it was one of the first instance in California. After reviewing the decisions of other jurisdictions the Court then announced the California rule as follows:

In adopting the statute here concerned as a part of the Uniform Sales Act, it was the clear intent of the legislature that, with respect to foodstuffs, the implied warranty provisions therein contained should inure to the benefit of any ultimate purchaser or consumer of food; and that it was not intended that a strict "privity of contract" would be essential for the bringing of an action by such ultimate consumer for an asserted breach of the implied warranty.

Although authorities to the contrary of the conclusion herein reached have imposed a strict privity of contract on a purchaser or consumer of assertedly unwholesome food as an essential requisite for the bringing of an action on the implied warranty theory, nevertheless, the rulings made in the authorities herein cited are based on sound principles, affording as they do an adequate remedy for injuries which may result from the eating of unwholesome food by an ultimate consumer who, under modern economic conditions, almost of necessity, must purchase many items of food prepared in original packages by the manufacturer and intended for the consuming public, although marketed through an intermediate dealer.¹⁰

The first product expansion of the new

doctrine eliminating privity as a requirement for recovery under Civil Code Section 1735 came in *Free v. Sluss*.¹¹ There it was held that a printed guarantee as to the quality of soap would enable a retailer as well as a wholesaler to recover against the manufacturer for breach of an implied warranty of merchantability. The rationale of the court was that the manufacturer had both the knowledge and the intention that the soap should move through the usual channels of trade and reach persons in the position of plaintiff.

Still other cases applied the rule of the *Klein* case to vaccine,¹² soft-drink bottles,¹³ and dangerous instrumentalities.¹⁴ In the last-cited case, *Peterson v. Lamb Rubber Co.*, the court took note of the fact that in the then most recent case stating the general rule that privity of contract was required to recover under Civil Code Section 1735, *Burr v. Sherwin Williams Co.*,¹⁵ the court had noted that an exception existed to the general privity requirement in the area of foodstuffs. And, stated the *Peterson* court, "The court's reference [in *Burr v. Sherwin Williams Co.*] to 'some exception' was clearly intended to guard against closing the door to the development of other exceptions as law and justice and changing economic conditions might require."¹⁶

Applying this language, the *Peterson* court then proceeded to hold that in the case of a dangerous instrumentality which caused injury to an employee, "in view of modern industrial usage, employees should be considered a member of the industrial 'family' of the employer . . . and to thus stand in such a privity to the manufacturer as to permit the employees to be covered by [implied] warranties made to the purchaser-employer."¹⁷

The expansion of liability under Civil Code Section 1735 beyond the limits of privity was again noted in the case of *Hayman v. Shoemaker*,¹⁸ where the court stated as follows:

In recent years the extension of the rule of liability, particularly as to implied warranties in the entire absence of privity, has

been one of the notable features of the enlargement and adjustment of our law to meet the needs of business and human relationships under modern conditions. The foreseeability of harm, the degree of certainty that a plaintiff suffered injury, the closeness of the connection between a defendant's conduct and the injury suffered, the moral blame attached to defendant's conduct and prevention of future harm have become the general tests of liability, rather than a strict adherence to a theory of privity.¹⁹

Privity of contract is not only the requirement of Civil Code Section 1735 which was liberalized prior to the first statement of the California products liability rule. Civil Code Section 1735(3) provided that "if the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed." At first glance, this requirement appears absolute. Yet the California courts lost little time in applying this rule strictly against the seller. Thus, in one case where the plaintiff sued for breach of implied warranty as to the quality of potatoes, the defendant argued to no avail when he stated that since the potatoes "bore some evidence of heat necrosis and rot, he [the plaintiff] was charged with knowledge of their condition before he planted them."²⁰ For, as the court replied, "inspection does not necessarily waive all defects. A buyer still might claim a breach of implied warranty as to defects which a reasonable examination would not have revealed."²¹

Again, in 1959, when a buyer sued for breach of an implied warranty that an aircraft was reasonably fit for sustained flight, there being a latent defect in the craft, the court, after quoting Civil Code Section 1735(3), stated: "This [section] negates warranty only as to defects that could be discovered by reasonable inspection."²² To the same effect is *Intrastate Credit Service, Inc. v. Pervo Paint Co.*,²³ although in that case the appellate court stated that plaintiff's evidence was insufficient to support the contention that the defect in certain signs "would have eluded a reasonable examination of same."²⁴

STATEMENT OF THE CALIFORNIA PRODUCTS LIABILITY RULE

The culmination of this development in the area of implied warranty came in the case of *Greenman v. Yuba Power Products, Inc.*²⁵ There, plaintiff was injured when a piece of wood flew out of a "Shopsmith" machine and struck him on the forehead. The machine had been bought by plaintiff's wife from a local retailer and given to plaintiff. Thus, plaintiff was not in privity of contract with the manufacturer, against whom the jury returned a verdict of \$65,000. In addition, the manufacturer raised the defense that plaintiff had failed to give timely notice of breach of warranty, as required by Civil Code Section 1764.

The case was appealed to the California Supreme Court, which affirmed judgment for plaintiff. Justice Traynor, who had urged the adoption of a products liability rule nineteen years earlier in the case of *Escola v. Coca Cola Bottling Co.*,²⁶ wrote the majority opinion in *Greenman*. He stated as follows:

A manufacturer is **strictly liable in tort** when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. Recognized first in the case of unwholesome food products, such liability has now been extended to a variety of other products that create as great or greater hazards if defective [citations].

Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law [citations of sister-state decisions], and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products [citations of sister-state decisions] make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort. Accordingly, rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to gov-

ern the manufacturer's liability to those injured by its defective products unless those rules also serve the purposes for which such liability is imposed.

We need not recanvass the reasons for imposing strict liability on the manufacturer. They have been fully articulated in the cases cited above . . . The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves. Sales warranties serve this purpose fitfully at best . . . "The remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales." (*Ketterer v. Armour & Co.*, 200 F. 322, 323, *Klein v. Duchess Sandwich Co., Ltd.* 14 Cal. 2d 272, 282 [93 P. 2d 799].) To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used, as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use.²⁷

CALIFORNIA DEVELOPMENTS IN THE AREA OF PRODUCTS LIABILITY SINCE GREENMAN

Since this original statement of the California products liability rule, several interesting and rather extensive modifications of the rule have been formulated by the California courts. The first of these modifications relates to the persons against whom liability inures under the rule. Following the policy statement of the *Greenman* court, the California Supreme Court in *Vandermark v. Ford Motor Co.*²⁸ applied the strict liability rule of *Greenman* to retailers. The reason for the extension was that "retailers, like manufacturers, are engaged in the business of distributing goods to the public . . . Strict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff . . ."²⁹

In a still more recent case, the California District Court of Appeal extended the rule to "one who sells any product in a defective condition unreasonably dangerous to the user or consumer . . . if (a) the

seller is engaged in the business of selling such a product and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold . . ."³⁰ It should be noted that in this latter case, the defendant merely took the order for the defective product (dynamite fuse), it being shipped directly from the manufacturer to the consumer. At the same time it should be noted that a retailer is only liable under the doctrine of products liability to the original consumer from that retailer, and not to a third party to whom the original consumer sells the manufactured product.³¹

Since *Greenman* the California courts have indicated, as a second modification of the products liability rule, that neither the nature nor the source of the defect in the product will affect the application of the products liability rule. Thus, in *Vandermark v. Ford Motor Co.*,³² the court, although taking as established for purposes of reviewing a nonsuit the fact of defect in the master braking cylinder of the automobile involved in the case, noted that the strict liability rules "focus responsibility for defects, *whether negligently or non-negligently caused* . . ."³³ In addition, the court made it clear that the source of the defect was immaterial. As the court stated, "since the liability is strict, it encompasses defects regardless of their source, and therefore a manufacturer of a completed product cannot escape liability by tracing the defect to a component part supplied by another."³⁴ The court also noted that "plaintiffs were entitled to establish the existence of a defect and defendants' responsibility for same by circumstantial evidence . . ."³⁵

The trend toward a broad definition of what constitutes a defective product was given further impetus most recently in *Canifax v. Hercules Powder Co.*,³⁶ where the allegedly defective product was dynamite fuse. The court stated, in adopting the Restatement (2d) Torts Section 402A (1965), "we think . . . that a product, although faultlessly made, may nevertheless be deemed 'defective' under the [products liability] rule and subject the supplier thereof

to strict liability if it is unreasonably dangerous to place the product in the hands of a user without a suitable warning and the product is supplied and no warning is given."³⁷

A third modification in the rule relates to the requirement in *Greenman v. Yuba Power Products, Inc.*³⁸ that to establish strict liability in cases of defective products, the plaintiff must show that "he was injured while using the [product] . . . in a way it was intended to be used . . ."³⁹ This requirement was very strictly applied in *Erickson v. Sears, Roebuck & Co.*⁴⁰ There, plaintiff brought an action against Sears and against a manufacturer for personal injuries received when a wooden step-ladder, purchased by plaintiff from Sears, broke and threw him to the ground. The trial court ordered a directed verdict for defendant Sears, judgment being entered in its favor. At the time the ladder broke, plaintiff was using it to inspect a water trough which he had just installed on the edge of his roof, using the same ladder. At the time of the inspection, the ladder's front or step legs were, according to plaintiff's own testimony, on grass and slightly lower in elevation than the back legs of the ladder, the back legs being on semi-soft ground. Plaintiff had nailed wooden cleats to the bottom of the legs to stabilize the ladder. The accident occurred when both rear legs broke.

On the ladder's side were directions regarding its use, which read in part: "Place ladder on a firm level foundation. Do not use on boxes or [on] other unstable, slippery, or soft surfaces." Upon these facts, the District Court of Appeal affirmed the trial court's judgment in favor of defendant. In speaking of the application of the doctrine of strict liability in tort on the part of a manufacturer or retailer, the court stated, "the trial court could properly conclude, as a matter of law, that at the time of the accident the plaintiff was not using the ladder in a way it was intended to be used, and that he had not established a prima facie case of strict liability in tort on the part of defendants."⁴¹

Finally, until recently, the doctrine of products liability in California was applied only in case of personal injury. Thus, in *Greenman v. Yuba Power Products, Inc.*⁴² the court stated the strict liability rule in terms of a product which "proves to have a defect that causes injury to a human being."⁴³ This requirement was affirmed in *Vandermark v. Ford Motor Co.*⁴⁴ where the court, extending the *Greenman* rule to retailers, stated, "Maywood Bell [the retailer] is strictly liable in tort for personal injuries caused by defects in cars sold by it."⁴⁵

However, this requirement of personal injuries was clearly abandoned by the California Supreme Court in *Seely v. White Motor Co.*⁴⁶ where the plaintiff brought action for damages to his truck incurred as a result of an accident allegedly caused by a defect in the truck. The court noted that had plaintiff not failed in his proof that the alleged defect caused the accident, such damages could have been recovered on a products liability theory. As the court stated, "Plaintiff contends that . . . the doctrine of strict liability in tort should be extended to govern physical injury to plaintiff's property, as well as personal injury. We agree with this contention. Physical injury to property is so akin to personal injury that there is no reason to distinguish them."⁴⁷

At the same time, however, the court refused to extend the strict liability doctrine to commercial losses which plaintiff had attempted to recover, viz., lost profits and the money he had paid on the truck. The court stated: White [the manufacturer] is responsible for these losses only because it warranted the truck to be 'free from defects in material and workmanship under normal use and service'.⁴⁸ And the court left no doubt that its position on commercial losses was firm. Speaking through Chief Justice Traynor, the architect of products liability law in California, the court stated:

The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss

is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone. (*Wyatt v. Cadillac Motor Car Divison*, 145 Cal. App. 2d 423, 426 [302 P. 2d 665], disapproved on other grounds in *Sabella v. Wisler*, 59 Cal. 2d 21, 31 [27 Cal. Repr. 689, 377 P. 2d 889]; *Trans World Airlines v. Curtiss-Wright Corp.*, 1 Misc. 2d 477 [148 N.Y.S. 2d 284, 290].) The Restatement of Torts similarly limits strict liability to physical harm to person or property. (Rest. 2d Torts [Tent. Draft No. 10], § 402A.)

The law of warranty is not limited to parties in a somewhat equal bargaining position. Such a limitation is not supported by the language and history of the sales act and is unworkable. Moreover, it finds no support in *Greenman*. The rationale of that case does not rest on the analysis of the financial strength or bargaining power of the parties to the particular action. It rests, rather, on the proposition that "The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." (*Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462] [150 P. 2d 436] [concurring opinion].) That rationale in no way justifies requiring the consuming public to pay more for their products so

that a manufacturer can insure against the possibility that some of his products will not meet the business needs of his customers.⁴⁹

A LOOK INTO THE FUTURE

In gazing into the future of products liability in California, some four areas of possible extension, limitation, or definitive application of the strict-liability rule appear to deserve exploration. Perhaps the most fascinating of these areas deals with the nature of what constitutes a defective produce. We saw earlier⁵⁰ that a product although not defective in its manufacture, is considered to be defective for the purposes of products liability if it is supplied to the consumer without adequate direction as to its proper use. A related question now arises. *Will a product, the design of which results in injury to the consumer, result in strict liability against the manufacturer or seller under the products liability rule?*

In order to properly answer this question, we must carefully distinguish the concept of defective design from the concept of a product defectively manufactured. The latter concept involves no defect in the design of the product itself, but rather in the manner of manufacture or—in the situation closest to defective design—in the manufacturer's choice of parts and materials to be used in constructing the product. Thus, in *Greenman v. Yuba Power Products, Inc.*,⁵¹ the defect consisted of inadequately set screws used to hold parts of the Shopsmith together, "so that normal vibration caused the tailstock of the lathe to move away from the piece of wood being turned permitting it to fly out of the lathe."⁵²

In the case of defective design, however, the product is manufactured according to the design given and in the manner in which the product is intended to be manufactured, with no inadequacy of parts or materials. Further, the product reaches the consumer in the state in which both the manufacturer and designer intended it should. Then, in that state, the product causes injury to the consumer. As thus defined, the question of whether defective design constitutes a

defect for the purposes of products liability has not been faced or answered by the California appellate courts.

The question has, however, been answered by the Supreme Court of New Jersey. That New Jersey has so spoken is significant, since that state is authoritatively regarded as the founder of the products liability rule.⁵³ The defective-design case which both faced and answered the question is *Schipper v. Levitt & Sons, Inc.*⁵⁴ This was an action against a builder and vendor of a mass-produced house in a project, for injuries sustained by a child of the purchasers' lessee due to excessively hot water drawn from a bathroom faucet. The action was based in part upon the theory that the hot water distribution system, found in every home in the project, was defectively designed in that the system, i.e. the specifications given the manufacturers by the builder vendor, did not provide for a mixing valve which would have prevented excessively hot water from issuing from a house's various taps, including those found in the bathroom. At the close of plaintiff's case, the trial court, upon motion by the defendant, dismissed the case. In reversing for plaintiff, the court stated:

The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its law principles abreast of the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected as they were step by step in *Henningsen* and *Santor* [the two leading New Jersey products liability cases] . . . That being so, the . . . strict liability principles of *Henningsen* and *Santor* should be carried over into the realty field, at least in the aspect dealt with here.⁵⁵

Turning to the specific facts of the case, the court then stated: "We are satisfied that, in the particular situation here, the plaintiffs may rely not only on the principles of negligence set forth in their first point but also on the . . . strict liability principles set forth under their second point."⁵⁶ In so stating, however, the court cautioned that in order for the design to be considered defective for the purposes of the products li-

bility rule, it had to be shown "that the design was unreasonably dangerous . . ."⁵⁷ The court did not define the phrase "unreasonably dangerous." But the decision clearly answered the question. A product defectively designed is, at least under certain circumstances, defective for the purposes of products liability.

Two questions now arise: (1) Will California follow this New Jersey view? (2) Is such a view consistent with the principles of California products liability? As to the first question, a recent Los Angeles Superior Court case indicated that the New Jersey rule would indeed be followed, but that heavy emphasis would be given to the "unreasonably dangerous" requirement enunciated by the New Jersey court. (The "unreasonably dangerous" language, it should be noted, is also contained in *Canifax v. Hercules Powder Co.*⁵⁸) The case is *Drummond v. General Motors Corp.*⁵⁹ In that case, the parents of a teen-age driver brought a wrongful death action for their son's death, which occurred when the automobile he was driving, his parents' 1960 Chevrolet Corvair, failed to negotiate a curve, with the result that the Corvair collided with another vehicle.

The primary theory upon which the cause of action was predicated was products liability, specifically, defective design. As Judge Jefferson stated in his opinion (this being a non-jury trial):

It is the position of plaintiffs that the 1960 Corvair was defective in its design as the result of the specifications of a 2,600 pound automobile with the engine in the rear, with the consequent concentration of weight distributed in the rear, the height and rearward location of the center of gravity, the rear suspension with its swing axles permitting the rear wheels to develop excessive positive camber, the roll couple distribution and the differential tire pressures between front and rear.

Plaintiffs assert that this design of the 1960 Corvair created an oversteering automobile with dangerous handling characteristics and difficulties for the average driver which was a proximate cause of the accident of May 16, 1960 and the death of Don Wells Lyford [the decedent].

In discussing this theory of strict liabil-

ity, the court first noted the problem inherent in product liability defective design cases, namely, the definition of the term "defect." As the court stated,

One of the questions which remains to be answered by our courts is the meaning to be given to the word "defect" in design or manufacture as used in **Greenman** and **Vandermark**, and the meaning to be given to the phrase "defective condition" used in Section 402A of the Restatement of Torts (2d). It would appear that no single definition of "defect" or "defective" will cover all types of cases.

The meaning of these words will have to be developed by our courts on a case by case basis. An ordinary meaning of the word "defect" or "defective" would imply that something is faulty or imperfect. This plain meaning would cover a case in which some portion of a product failed to meet the specifications of the manufacturer. Thus, a cracked bolt used in a product would be an obvious case of a defective product. We get into a more difficult problem of definition when a product is made exactly to specifications. This is the situation involved in the case at bench.

A hint of one meaning to be ascribed to the word "defect," where the product is made according to specifications, is found in language used by the court in **Seely v. White Motor Company**, 63 Cal 2d 9, 18, in which the court said in part: "... he (the manufacturer) can appropriately be held liable for physical injuries caused by defects requiring his goods to match a standard of safety defined in terms of conditions that (do not) create unreasonable risks of harm . . ."

What is meant by a "standard of safety" which does not create an unreasonable risk of harm? It could mean using similar products as a standard of comparison and, if the specific product doesn't come up to that standard, it is defective. Thus in **Yuba**, the lathe was defective because it did not have a proper fastening device as other lathes have. In **Vandermark**, the automobile was defective because the brakes went on without the driver pushing the brake pedal and normal brakes don't go on this way.

But such a meaning has difficulties. One major difficulty is that of determining what products shall constitute the standard.

Another problem with the use of similar products as a standard of comparison re-

lates to how far or how much of a deviation from the standard is required to constitute a defect.

Another meaning to be given to "standard of safety" would be simply that of drawing a line between relative degrees of a risk of danger, of a risk of harm, of a risk of injury. This kind of standard for determining a defective product recognizes that products may be dangerous but liability follows only if it can be said that the product is unreasonably dangerous. This doesn't try to define a defect in terms of a standard of quality of similar products as much as it does in terms of how strong is the likelihood of injury from the product. This is the approach of Section 402A of the Restatement of Torts (2d).

The emphasis upon the likelihood of injury takes into account the consumer's or user's knowledge of danger. This approach seeks to protect the consumer or user who is unaware of the danger involved in the use of a product in a way it was intended to be used or in using the product in a normal manner. This approach does not protect the consumer or user when he uses a product in a way in which he knows requires certain precautions be taken to make the product safe in such a use.⁶¹

Specifically discussing the social philosophy behind such a limited definition, the court then stated:

It is apparent that the use of the phrases "unreasonable risk of harm," . . . and "unreasonably dangerous to the user or consumer" is a recognition of the fact that many products cannot possibly be made entirely safe to all consumption or all uses and that many products are dangerous for some uses and not others.

In comment "h" of Section 402A of the Restatement of Torts (2d) it is said in part that "a product is not in a defective condition when it is safe for normal handling and consumption."

Thus, tobacco is not unreasonably dangerous simply because the effects of smoking may be harmful. [See, in this connection, **Lartique v. R. J. Reynolds Tobacco Co.**, 317 Fed. 2d 19 (5th Cir., 1963).] Candy is not unreasonably dangerous because overconsumption of it will make one ill. Many dangerous drugs fall in the category of being reasonably safe if taken in moderation but exceedingly harmful if taken in excessive doses. The automobile is somewhat similar to dangerous drugs. Every automobile, no matter how constructed or designed, presents more dan-

gerous characteristics in certain uses than in others.

The questions which have to be answered in this case in light of [these] . . . principles of liability for defective design are twofold: (1) Is the design of the 1960 Corvair automobile defective so that it creates an unreasonable risk of harm to the driver or is unreasonably dangerous to the driver when it is being used in the way it was intended to be used or is being handled in a normal manner? If the answer to this question remains in the affirmative, there remains the question: (2) Did the May 16, 1960 accident result from the 1960 Corvair being so used or so handled by the driver?⁶²

Upon the evidence presented, the court answered both these questions in the negative, stating that the Corvair was not defective, and that the sole cause of the accident was the actions of the deceased. The court also opined that "there is no law today imposing upon the automobile manufacturers the obligation to design the safest car that they know how to design . . ."⁶³

At this point, the New Jersey and Drummond defective design decision should be critically examined. (The following criticism is also applicable to the "unreasonably dangerous" language of *Canifax v. Hercules Powder Co.*⁶⁴) And if, in looking at those decisions, one sees no clear extension of the products liability rule, he is but observing the obvious. For the type of approach is not one of products liability at all, but negligence. That is, the court, although carefully excluding questions of fault, is using language more properly applicable to the field of negligence than to the field of products liability, since probability of injury bears upon the standard of care expected of the actor. Compare and contrast, for example, the following two quotations, the first taken from *Drummond*, the second from *Greenman*:

Is the design of the 1960 Corvair defective so that it creates an **unreasonable** risk of harm to the driver or is **unreasonably** dangerous to the driver when it is being used in the way it was intended to be used . . .?⁶⁵

"A manufacturer is *strictly* liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, *proves to have a defect* that causes injury to a human being."⁶⁶

In the first of these statements the Los Angeles Superior Court is concerned with unreasonable danger. In the second statement, the California Supreme Court is concerned with actual injury to the consumer caused by defective products, irrespective of the reasonable probability of injury occurring from such products. Indeed, if there had ever been any doubt as to whether reasonableness had a legitimate place in products liability, the California Supreme Court itself answered the question when it noted that the strict liability rules "focus responsibility for defects, *whether negligently or non-negligently caused* . . ."⁶⁷ From the point of view of California products liability, then, the approach of the above New Jersey and California defective design cases is not only disappointing, but wrong.

Fortunately, the impact of *Drummond* may be limited. Consider the more recent case of *Cantos v. General Motors Corp.*⁶⁸ There, one Joseph Cantos was employed by a Chevrolet agency as a lot boy. As part of his duties, Joseph was to deliver Chevrolets to other dealers and return with Chevrolets from those dealers (car-trading). On the day in question, Joseph, with his wife and their minor daughter, drove an Impala Chevrolet to the second dealer, and there traded the car for a 1960 Corvair, to be returned to Joseph's employer. On the return trip Joseph felt the Corvair begin to drift to the left while negotiating a slight curve on the highway. The Corvair then suddenly skidded to the left, leaving a single skid mark of several hundred feet. The automobile then skidded to the right, hit a culvert, and rolled from one to three times. Joseph's wife, who was pregnant, and his daughter were injured. They sued General Motors and the dealer who had supplied the Corvair, alleging (*inter alia*) negligence and products liability. Specifically, as to products liability, plaintiffs alleged that the Corvair was defectively de-

signed and engineered. Defendants alleged that the accident was solely due to the action of the driver, who was allegedly speeding and intoxicated. While the case was being tried, the *Drummond* decision was written and given wide publicity. The *Cantos* case was submitted to the jury on both negligence and products liability theories. The products liability instruction was as follows:

"The manufacturer of an article who places it on the market for use under circumstances where he knows or should know that such article will be used without inspection for defects, is liable for injuries proximately caused by defects in the manufacture or design of the article of which the user was not aware, provided the article was being used in a manner which was reasonably foreseeable by the manufacturer at the time the product was placed on the market."

On this instruction (which admittedly is ambiguous insofar as it uses the phrase "reasonably foreseeable by the manufacturer") the jury returned a general verdict in plaintiffs' favor in an amount exceeding \$50,000. At first glance, such a general verdict appears to have little significance as to defective design and product liability theories. Upon being interviewed following the trial, however, the jurors stated that prior to discussing the question of negligence, they had taken among themselves a poll to determine if they were of the opinion that the 1960 Corvair was, as alleged by plaintiffs, defective. The result of this poll was that nine of the twelve jurors were of the opinion that the 1960 Corvair in question had been defectively designed and engineered, and that, therefore, the defendants were liable on a products liability basis.

However, *Cantos* leaves open the question, as does *Drummond*, as to precisely how the term "defect" should be defined. For example, should the term "defect" be defined in terms of unreasonable danger to the average consumer, or unreasonable danger to anyone, including supersensitive consumers, or in terms of unreasonableness at all. Should the term "defect" include reasonable foreseeability on the part

of the manufacturer? If nothing else, the defective design cases serve to point out the difficulties and the unanswered questions from the failure of the California Supreme Court to formulate a definition of the term "defect" which can be used throughout the products liability field.

If one now looks at the *Greenman* case, including the language of the court as to the policy reasons necessitating a products liability doctrine, perhaps such a definition can be formulated. Such a definition should first take into account that products liability is an application of strict liability in tort to a particular field. Such a definition should also take into account that the purpose of such liability is to protect the consumer against injury resulting from characteristics in manufacturing products, the presence of which characteristics is both unknown to the consumer and not subject to his control. At the same time the level of risk of such defect is under the control of the manufacturer.

Given these considerations, the following definition of the term "defect" is proposed. A defect is any characteristic of a product which proximately causes personal or physical injury⁶⁹ to a consumer (or bystander⁷⁰). It is believed that this definition, when read in context with the other requirements of products liability (such as lack of knowledge of the defect on the part of the consumer, and use of the product in a predictable manner⁷¹) satisfies the previously-mentioned policy considerations of *Greenman*, though, of course, many readers may draw a contrary conclusion. It is hoped, however, that at least one sees that a working definition of the term "defect" is needed if products liability is to fulfill the truly vital role outlined in *Greenman* in providing recovery to the consumer for injuries resulting from products, the risk of which injuries the consumer should not be made to bear.

The second area of future California products liability law to be explored is concerned with the rise of special defenses to liability under the law. We saw earlier that in order for a consumer to recover on a products liability theory, he must show

(*inter alia*) that at the time the injury occurred, he was using the product in question in the manner in which it was intended to be used, and that the injury was proximately caused by a defect of which the consumer was not aware.⁷² It appears, however, that California may add to these requirements the requirement that at the time the injury occurred, the consumer was exercising reasonable care for his own safety.

The appellate case in point is *Martinez v. Nichols Conveyor & Engineering Co., Inc.*⁷³ There, an employee brought action against the manufacturer and bailor of a paper baler operated by plaintiff during the course of his employment. The plaintiff was injured while using this machine when a certain metal bolt sheared off, allowing an 800-pound platen on the baler to fall on his arm. Trial judgment was for the defendants and plaintiff appealed. Among other errors, the plaintiff alleged that it was error to fail to instruct the jury on products liability, which was one of the theories upon which plaintiff sought recovery. In affirming judgment for defendants, and holding that the failure to instruct was not error, the District Court of Appeal, Third Appellate District, stated as follows:

Plaintiff contends it was error to fail to instruct on Independent's (one of the defendants) strict liability. Plaintiff's proposed instruction No. 17 omits the condition that the chattel, at the time of the injury, must have been used in its intended manner. This element is present in the *Greenman* holding . . . Moreover, the proposed instruction states: "Contributory negligence of the plaintiff, if any there was, is not a defense to the action, based on strict liability." **It is a defense to show that the injured party knew of the defect and failed to exercise reasonable care for his own safety . . .** There was evidence that Martinez knew of the prior failure of a bolt and the falling of the platen.⁷⁴

Illustrating the possible confusion inherent in this District Court of Appeal language is the earlier-decided case of *Drummond v. General Motors Corp.*⁷⁵ where it was stated that,

Crane and Kassouf [two warranty cases]

would justify a holding that contributory negligence is not a defense to an action based upon strict liability in tort. Section 402A of the Restatement of Torts (2d) takes this view. [This is a fascinating statement in view of the District Court of Appeal's later citation of Section 402A for its conclusion that failure to exercise reasonable care for one's own safety constitutes a defense to a products liability cause of action.] However, something akin to contributory negligence appears to be involved in the doctrine of strict liability in tort inasmuch as liability requires that the consumer handle the product in a **normal manner** or use the product in the way it was intended to be used.⁷⁶

It is submitted, in critically examining these above two cases and statements, that both are confusing the *Greenman* requirements of lack of knowledge of the presently existing defect and use of the product in the manner in which it was intended to be used, with the exercise by the consumer of reasonable care for his own safety. The first two requirements obviously do not include the third. A consumer could exercise reasonable care for his own safety and still fail, through excusable lack of knowledge, to use the product in the manner in which it was intended to be used. By the same token, a consumer could use a product in the manner in which it was intended to be used and have no knowledge of a *presently-existing* defect, but still fail to exercise reasonable care for his own safety. In fact, this was the factual situation in *Martinez v. Nicholas Conveyor & Engineering Co., Inc.*⁷⁷ where the failure to exercise reasonable care, according to the court, consisted of use of the product with knowledge of a *prior-existing* defect which had been, at least to plaintiff's knowledge, corrected.

The foregoing distinction between the two *Greenman* requirements noted above and failure by the consumer to exercise reasonable care for his own safety was expressly recognized in *Preston v. Upright, Inc.*⁷⁸ decided only one month before *Martinez*, but by the Second (as opposed to the Third) Appellate District. There, the court first noted that "contributory negligence is not an issue in a case governed

by the law of strict liability in tort . . . ”⁷⁹ The court then refused to find as error an instruction to the effect that the product’s use must have been reasonable only because, by virtue of other instructions, it was made clear that use of the product in its intended manner, rather than the consumer’s reasonable care for his own safety, was at issue.

It is clear, then, that *Martinez* seeks to interject a requirement, and thus a defense, which is inappropriate to the field of products liability. In view of the conflicts between Appellate Districts, and the resultant confusion, it is to be hoped that the California Supreme Court will clearly resolve this issue and reaffirm the strict liability character of California products liability.

The third area of exploration in future California products liability law is concerned with the persons against whom liability may inure under the rule. We saw previously that the rule first applied only to manufacturers.⁸⁰ It was then extended, as also seen previously, to retailers⁸¹ and to sellers other than occasional sellers, even though such seller neither manufactured the product nor ever had possession of the product.⁸² The question now arises: Will the rule apply to any person who merely furnishes, directly or indirectly, the defective product to the consumer who is personally or physically injured thereby?

The answer appears to be a qualified “yes.” In the recent case of *Martinez v. Nichols Conveyor & Engineering Co., Inc.*⁸³ one of the defendants was a bailor of the defective product to the plaintiff’s employer. The court refused to apply the rule of products liability to the case because of special defenses.⁸⁴ However, the court, after reviewing the persons against whom liability currently inured under the rule (manufacturers, retailers, sellers), stated: “We shall assume for the purpose of this opinion that the rule of strict liability in tort applies also to lessors and bailors.”⁸⁵ The court cited as basis for this statement the case of *Cintrone v. Hertz Truck Leasing & Rental Service*,⁸⁶ where the Supreme Court of New Jersey had applied that state’s prod-

ucts liability rule to a commercial bailor of the product to plaintiff’s employer.

The trend thus appears to be toward holding liable a supplier of the product, no matter what his title is. But does this mean that *any* supplier, including a non-commercial supplier, such as a gratuitous bailor, or a donor, will be liable under the California products liability rule? Although no cases have answered this question, the answer appears to be “no.” For in both *Vandermark v. Ford Motor Co.*, and *Canifax v. Hercules Powder Co.*, the extension in the types of defendants liable was made in terms of this type of defendant being better able than the consumer (1) to prevent the defective product from reaching the consumer and causing injury (risk control), and (2) to bear the risk. Thus, in *Vandermark*, the court stated with respect to these two considerations:

The retailer himself may play a substantial part in insuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end; the retailer’s strict liability thus serves as an added incentive to safety. Strict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants, for they can adjust the costs of such protection between them in the course of their continuing business relationship.⁸⁷ [Compare: One who sells any product in a defective condition . . . to the user or consumer . . . if (a) the seller is engaged in the **business** of selling such a product . . .⁸⁸]

But, in the case of the non-commercial supplier, such as a gratuitous bailor, the supplier is ordinarily not better able than the consumer to prevent the defective product from reaching the consumer. This is true because the non-commercial furnisher is ordinarily not in the business of supplying the product in question to consumers. Accordingly, such a supplier has not the means (such as inspecting machinery and processes) to detect defective products. Moreover, such a supplier is ordinarily not in a better position than the consumer to bear the risk of injury occurring from such a defective product. Not being in the business of supplying the product in question,

and the supplier-consumer transaction being gratuitous, there is no way by which such supplier can "adjust his costs" of supplying protection to the consumer, even if the supplier can obtain such protection.

It thus appears that under the considerations which have heretofore guided the expansion of the types of defendants liable under California products liability law, considerations which do not appear likely to be repudiated in the foreseeable future, non-commercial suppliers of products will not be held liable upon a products liability theory (strict liability).

The fourth and final area of future California products liability law to be explored concerns the bystander who is injured by a defective product. We have previously seen that any user or consumer of the product, in the broadest sense of the terms, is protected by the strict liability rule. Thus, not only the purchaser or lessee of the product, but his employee, members of his family, his donees, and in general those closely related in some way to the actual purchaser or lessee of the product, are considered consumers for purposes of the *Greenman* rule. But will protection extend to the bystander, the person who is not using the defective product but who suffers injury thereby nevertheless?

In commenting on this question, which has not been faced by the California courts,⁸⁹ Prosser, the recognized expert in the field of products liability, has recently stated as follows:

Bystanders, and other non-users in the vicinity of the expected use, present a fundamental question of policy. If the philosophy of the strict liability is that all injured plaintiffs are to be compensated by holding the suppliers of products to strict liability for all the harm they do in the world, and expecting them to insure against the liability and pass the cost on to society by adding it to the price, then there is no reason whatever to distinguish the pedestrian hit by an automobile with bad brakes from the injured driver of the car. If the supplier is to be held liable because of his representation of safety in marketing the goods, then the pedestrian

stands on quite a different footing. He is not the man the supplier has sought to reach, and no implied representation has been made to him that the product is safe for use; nor has he relied upon any assurance of safety whatever. He has only been there when the accident happened; and in this he differs from no other plaintiff.⁹⁰

If one accepts this definition of the policy considerations inherent in protecting the bystander under the strict liability rule, it is apparent that California courts should provide such protection. For, as noted earlier in this article, and as noted by Prosser himself, California has adopted the risk-distributing theory of products liability, that is "the supplier should be held liable, because he is in a position to insure against liability and add the cost to the price of his product."⁹¹

Nor would California be the first to so protect the bystander. In *Piercefield v. Remington Arms Co.*⁹² the Michigan Supreme Court allowed a bystander who was injured when a shotgun barrel exploded due to a defective shell to recover against the manufacturer, wholesaler and retailer of the shell. Although the court spoke in terms of implied warranty of fitness, it is clear from the court's disregard of traditional warranty requirements, such as privity and notice, that a strict liability theory such as we know in California products liability was actually being applied.⁹³ Accordingly, this case can and should be used to support the proposition that the recovery under a strict liability theory for injury caused by defective products may properly be extended to bystanders as well as to users of those products.

Another case supporting such a proposition is *Mitchell v. Miller*.⁹⁴ There, plaintiff's decedent was killed while playing golf when struck by another player's automobile. The automobile had been parked, but because of a defective transmission the automobile became a runaway (unoccupied) vehicle, rolled down a hill, and then struck decedent.

The action was brought by plaintiff against, *inter alia*, General Motors, manufacturer of the automobile, on a theory which sounded in strict liability, although framed in terms of "breach of implied warranty of reasonable fitness for use."⁹⁵ General Motors demurred on the ground of lack of privity. In overruling this demurrer, the Connecticut Superior Court stated as follows:

The second Restatement of the Law of Torts adopts the basis of strict liability, in the case of the seller of [defective] products, for occasioning physical harm to a user or consumer The rule is one of strict liability, making the seller subject to liability to the user or consumer even though the seller has exercised all possible care in the preparation and sale of the product

The question . . . is whether strict liability ought to be extended to one who is not in the category of one who is a user or consumer of the product

A defective automobile manufactured as alleged in this complaint by the defendant General Motors, constitutes a real hazard upon the highway. See *Greely v. Cunningham*, 116 Conn. 515, 518, 105 A. 678. The likelihood of injury from its use exists not merely for the passengers therein but for the pedestrian upon the highway. **The public policy which protects the user and consumer should also protect the innocent bystander.**⁹⁶

In view of the above discussion, it appears certain that California, which already expressly includes within the protective ambit of its strict-liability products liability law virtually every type of user and consumer, will also include within that ambit the bystander who is injured by a defective product.

CONCLUSION

In conclusion, it should be noted that there are several areas of future development in California products liability law where no indication may be found as to the direction in which the law will develop. Yet that direction will finally determine how effectively the present strict-liability

concept will provide recovery to the consumer (which term hereinafter includes bystanders as above discussed) for injuries resulting from product, the risk of which injuries the consumer should not be made to bear.

For example, the so-called "supersensitive" consumer presents a fundamental question of policy. The primary basis for products liability in California appears to be the activity-risk theory, that is, that the manufacturer and retailer or other commercial supplier of the product in question by conducting his business has created a risk of injury which he should bear as a part of the costs of that activity. It is clear that as between him and the injured party, he is also better able to bear such risks because he can distribute the cost through the pricing mechanism. But supersensitive persons are consumers, too. Therefore, unless one is to say that only other than supersensitive consumers (apart from any question of individually wealthy consumers) are less able to bear the risk of loss from injury than the supplier of the product, indemnity under California products liability law should extend to such supersensitive persons. The definition of the term "defect" proposed earlier in this article would make such indemnity possible.

A closely related question concerns the recovery requirement of "using the product in the manner in which it was intended to be used." Intended by whom? If the manufacturer or other supplier, then the phrase is inadequate in terms of the activity-risk basis of California products liability. For a use unintended by the supplier may, nevertheless, be within the risk created by the supplier of the product in his activity of supplying the product. Certainly, at the least the courts should insist upon some causal relationship between the "unintended" use and the resultant injury, as was not done in *Erickson v. Sears, Roebuck & Co.*,⁹⁷ the leading California case on the application of the "intended-use" requirement. And the requirement should not be applied on an *ad hoc* basis, as has been done, but rather defined so as to be

connected with the activity-risk basis of California products liability. Such a definition would not be concerned with the supplier's expectations of the product's use, but rather whether the use was such as to render the consumer's injury essentially self-inflicted rather than product-inflicted.

Another fundamental question of policy concerns whether assumption of the risk should be a defense to products liability in California. Logically, the answer to this question appears to be "no," since the risk with which the California products liability law is concerned is not that of the plaintiff consumer, but rather that created by the defendant manufacturer, retailer, or other commercial supplier in conducting his business. But one District Court of Appeal case⁹⁸ has at least indicated that such a defense may be successful, so that an authoritative pronouncement by the California Supreme Court in this area is clearly needed.

Finally, the injured consumer today (as a general proposition) has no guaranty that the particular supplier he chooses to sue will be financially responsible. Properly speaking, the consumer is seeking indemnity for his injury, much as a workman injured during the course and scope of his employment while performing an activity arising out of that employment. However, the employer, under State laws, is required to carry workmen's compensation insurance or be self-insured. No insurance is presently required of the supplier of products. Nor is there any alternative provision to guaranty recovery, such as some type of consumer's fund. While an answer to this disparity must be found in commercial law, not the law of products liability, an answer must be found, so that consumer indemnity is an actuality, not a possibility.

Indeed, it should be remembered that without men who are willing to find answers as to how to best protect the consumer against the risk of loss resulting from product injury, California products liability law will be reduced to an interesting academic exercise without practical application.

T. A. R.

FOOTNOTES

1. Unless otherwise stated, the terms "products liability" [or "products liability law" (or rule, theory, or doctrine)], as used throughout this article, in whatever context, refer to strict liability in tort to the consumer.

2. 217 N.Y. 382, 111 N.E. 1050 (1916).

3. 1 Cal. 2d 229, 34 P. 2d 481 (1934).

4. *Vaccarezza v. Sanguinetti*, 71 Cal. App. 2d 687, 689, 163 P. 2d 470, 472 (1945).

5. Stats. 1931, c. 1070, p. 2239 § 1.

6. 111 Cal. 39, 43 Pac. 398 (1896).

7. 83 Cal. App. 424, 257 Pac. 99 (1927).

8. 42 Cal. 2d 682, 268 P. 2d 1041 (1954).

9. 14 Cal. 2d 272, 93 P. 2d 799 (1939).

10. *Id.* at 283, 93 P. 2d at 804.

11. 87 Cal. App. 2d 933, 197 P. 2d 854 (1948).

12. *Gottsdanker v. Cutter Laboratories*, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960).

13. *Vallis v. Canada Dry Ginger Ale, Inc.*, 190 Cal. App. 2d 35, 11 Cal. Rptr. 823 (1961).

14. *Peterson v. Lamb Rubber Co.*, 54 Cal. 2d 339, 5 Cal. Rptr. 863, 353 P. 2d 575 (1960). This was an action to recover for personal injuries suffered by plaintiff as a result of an explosion of a grinding wheel purchased from defendant by plaintiff's employer. The action was predicated on negligence, and breach of implied warranty of fitness for use and of merchantable quality. Only the warranty cause of action is here discussed. Since the action was brought against the seller of the wheel, not the plaintiff's employer, workmen's compensation would not afford a basis for recovery. (Nor would it bar recovery against the third party on a products liability theory.)

15. *Supra* note 8.

16. 54 Cal. 2d 339, 344, 5 Cal. Rptr. 863, 867, 353 P. 2d 575, 579.

17. *Id.* at 347, 5 Cal. Rptr. at 869, 353 P. 2d at 581.

18. 203 Cal. App. 2d 140, 21 Cal. Rptr. 519 (1962).

19. *Id.* at 153, 21 Cal. Rptr. at 528.

20. *Webster v. Klassen*, 109 Cal. App. 2d 583, 591-92, 241 P. 2d 302, 307 (1952).

21. *Id.* at 592, 241 P. 2d at 307.

22. *Lindberg v. Couthes*, 167 Cal. App. 2d 828, 832, 334 P. 2d 701, 705 (1959). It should be noted that both the *Webster* and *Lindberg* cases dealt with commercial losses, an area where the courts often appear less inclined to grant recovery than in the area of personal injury. The liberalization of traditional warranty requirements announced by these cases was thus especially significant.

23. 236 Cal. App. 2d 547, 46 Cal. Rptr. 182 (1965).

24. *Id.* at 552, 46 Cal. Rptr. at 185.

25. 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P. 2d 897 (1963).

26. 24 Cal. 2d 453, 461, 150 P. 2d 436, 440 (1944) (concurring opinion).

27. 59 Cal. 2d 57, 62-64, 27 Cal. Rptr. 697, 700-01, 377 P. 2d 897, 900-01. (Emphasis added.)

28. 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P. 2d 168 (1964).

29. *Id.* at 262, 37 Cal. Rptr. at 899-900, 391 P. 2d at 171-172.
30. *Canifax v. Hercules Powder Co.*, 237 Cal. App. 2d 44, 52, 46 Cal. Rptr. 552, 557 (1965).
31. *Brewer v. Reliable Automotive Co.*, 240 Cal. App. 2d 173, 49 Cal. Rptr. 498 (1966). As to whether the results of this case are consistent with the development of California's products liability law, see discussion of injury to a bystander, text accompanying note 90 *infra*.
32. *Supra* note 28.
33. 61 Cal. 2d 256, 261, 37 Cal. Rptr. 896, 898, 391 P. 2d 168, 170. (Emphasis added.)
34. *Ibid.*
35. *Ibid.*
36. 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965).
37. *Id.* at 53, 46 Cal. Rptr. at 558.
38. *Supra* note 25.
39. 59 Cal. 2d 57, 64, 27 Cal. Rptr. 697, 701, 377 P. 2d 897, 901.
40. 240 Cal. App. 2d 793, 50 Cal. Rptr. 143 (1966). See text accompanying note 64 *infra*, criticizing this case.
41. *Id.* at 800, 50 Cal. Rptr. at 147. *Accord*, *Preston v. Up-Right, Inc.*, 243 A.C.A. 797, 52 Cal. Rptr. 679 (1966).
42. *Supra* note 25.
43. 59 Cal. 2d 57, 62, 27 Cal. Rptr. 697, 700, 377 P. 2d 897, 900.
44. *Supra* note 28.
45. 61 Cal. 2d 256, 263, 37 Cal. Rptr. 896, 900, 391 P. 2d 168, 172. (Emphasis added.)
46. 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P. 2d 145 (1965).
47. *Id.* at 19, 45 Cal. Rptr. at 24, 403 P. 2d at 152.
48. *Id.* at 16, 45 Cal. Rptr. at 22, 403 P. 2d at 150.
49. *Id.* at 18-19, 45 Cal. Rptr. at 23, 403 P. 2d at 151.
50. *Canifax v. Hercules Powder Co.*, *supra* note 36 and accompanying text.
51. *Supra* note 25.
52. 59 Cal. 2d 57, 60, 27 Cal. Rptr. 697, 699, 377 P. 2d 897, 899.
53. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 Minn. L. Rev. 791 (1966).
54. 44 N.J. 70, 207 A. 2d 314 (1965).
55. *Id.* at 90, 207 A. 2d at 325. (Emphasis added.)
56. *Id.* at 95-96, 207 A. 2d at 328.
57. *Ibid.*
58. *Supra* note 30.
59. No. 771, 098, LASC, July 29, 1966.
60. *Ibid.*
61. *Ibid.*
62. *Ibid.*
63. *Ibid.* As of the date of this decision, no federally-imposed automobile safety standards had been enacted.
64. *Supra* note 30.
65. *Drummond v. General Motors Corp.*, *supra* note 59. (Emphasis added.)
66. *Greenman v. Yuba Power Products, Inc.*, *supra* note 43. (Emphasis added.)
67. *Vandermark v. Ford Motor Co.*, *supra* note 33. (Emphasis added.)
68. No. 770, 510, LASC, September 2, 1966 (new trial granted November 14, 1966). The cooperation of the firm of Harney, Ford & Schlottman in obtaining information regarding this case is gratefully acknowledged.
69. See *Seely v. White Motor Co.*, *supra* note 46.
70. See text accompanying note 90 *infra*.
71. This latter requirement is now contained in the phrase, "in the manner in which it [the product] was intended to be used."
72. For a critical analysis of the concept of using the product "in the manner in which it was intended to be used," see conclusion of this article.
73. 243 A.C.A. 1002, 52 Cal. Rptr. 842 (1966).
74. *Id.* at 1006, 52 Cal. Rptr. at 845. (Emphasis added.) The defense suggested by the court may involve elements of assumption of the risk as well as contributory negligence. As to assumption of the risk as a defense to products liability, see conclusion of this article.
75. *Supra* note 59.
76. *Ibid.* (Emphasis added.)
77. *Supra* note 73.
78. *Supra* note 41.
79. 243 A.C.A. 797, 801, 52 Cal. Rptr. 679, 682.
80. *Greenman v. Yuba Power Products, Inc.*, *supra* note 43.
81. *Vandermark v. Ford Motor Co.*, *supra* note 29.
82. *Canifax v. Hercules Powder Co.*, *supra* note 36.
83. *Supra* note 73.
84. See text accompanying note 74 *supra*.
85. 243 A.C.A. 1002, 1005, 52 Cal. Rptr. 842, 844.
86. 45 N.J. 434, 212 A. 2d 769 (1965).
87. 61 Cal. 2d 256, 263, 37 Cal. Rptr. 896, 899-900, 391 P. 2d 168, 171-72.
88. *Canifax v. Hercules Powder Co.*, *supra* note 30. (Emphasis added.)
89. But see *Brewer v. Reliable Automotive Co.*, *supra* note 31 and accompanying text.
90. Prosser, *supra* note 53, at 819.
91. *Id.* at 800. See *Seely v. White Motor Co.*, *supra* note 46; *Vandermark v. Ford Motor Co.*, *supra* note 28.
92. 375 Mich. 85, 133 N.W. 2d 129 (1965).
93. See *Rex Paper Co. v. Reichhold Chemicals, Inc.*, 252 Fed. Supp. 314 (W.D. Mich. S.D. 1966).
94. 26 Conn. Supp. 142, 214 A. 2d 694 (1965).
95. *Id.* at _____, 214 A. 2d at 695.
96. *Id.* at _____, 214 A. 2d 698-99. (Emphasis added.)
97. *Supra* note 40.
98. *Martinez v. Nicholas Conveyor & Engineering Co., Inc.*, *supra* note 73.

CONGRESSIONAL POWER UNDER THE FOURTEENTH AMENDMENT TO PREVENT PRIVATE DISCRIMINATION IN HOUSING

Recently Congress attempted to enact a statute,¹ based partly on the Fourteenth Amendment, which sought to "prevent discrimination on account of race, color, religion, or natural origin in the purchase, rental, lease, financing, use and occupancy of housing throughout the nation."² That statute was Title IV of the Civil Rights Bill of 1966, the so called fair housing provision.

Title IV was an ambitious attempt to promote human rights. It was a comprehensive statute designed to prevent both state and private discrimination. It provided broad sanction and enforcement procedures and represented federal intervention into areas where traditionally it has been thought to be precluded.

The bill was the subject of much controversy. The most controversial provision was Title IV.³ Nevertheless, the bill, in amended form, passed the House on August 9, 1966, but it died in the Senate after two unsuccessful attempts to invoke cloture to cut off filibuster and begin debate.

Although Congress failed last session to enact the first effective federal law against discrimination in housing, the political climate is right for such legislation. In fact a similar bill is before Congress at the time of this writing. It is thus not unlikely that such a statute will be enacted in the near future and its constitutionality challenged before the United States Supreme shortly thereafter. Therefore, the purpose of this comment is to discuss the constitutionality of a fair housing provision based upon the Fourteenth Amendment as a source of congressional power.

Historically, Congress and the courts have been plagued by the question of whether the rights secured by the Fourteenth Amendment are protected against private interference.

In 1868, the Fourteenth Amendment was adopted. It provides, in part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . .⁴ The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."⁵

Much has been written and discussed about the circumstances surrounding the adoption of the Fourteenth Amendment, the debates, ratification by the states, and the views of the proponents and opponents of the Amendments. The literature on the matter is voluminous, yet it is inconclusive on the issue of the intent of the framers regarding private interference.⁶

The language of the final draft of the Amendment was a compromise between the two extreme positions taken in the Congress which proposed the Amendment. There were those whose position was to make certain civil rights would be truly national and that Congress would have the power to enact laws dealing directly with private interference with civil rights. The other extreme position was to confine the Amendment to dealing with the states and to prevent the federal government from injecting itself into a realm that had, prior to the Civil War, been exclusively reserved to the states, namely protection of fundamental individual rights.

One school of thought on the post Civil War Amendments (13th, 14th, and 15th) and the civil rights legislation enacted under those Amendments between 1866 and 1875 is that they were intended to substantially change the balance between state and federal power.⁷ Accordingly, civil rights were conceived of as inherent ingredients of national citizenship and as such were entitled to federal protection.

In any event, the judiciary gave a far stricter construction to the Fourteenth Amendment, whatever the intent of its framers.

One of the most far-reaching decisions came in the *Slaughterhouse Cases*.⁸ The

Supreme Court⁸ upheld a Louisiana law creating a monopoly in a single corporation for the slaughtering of animals. They were met with the argument that the Fourteenth Amendment had given primary national citizenship to Louisiana citizens and had provided that no state could abridge their privileges and immunities, among which was the privilege of engaging in the business of slaughtering animals. The majority refused to accept the argument. The Court said that only national citizenship received protection from the privileges and immunities clause and that such national citizenship did not encompass any of the fundamental rights of the individual. Those rights attended only to state citizenship.

The Court construed national citizenship as including only rights arising out of the relationship between the citizen and the national government, such as the right to travel to the national capital. These rights were already protected by the supremacy clause.

The decision of the *Slaughterhouse Cases* has never been overruled. For all practical purposes the privileges and immunities clause became ineffective as a means to protect individual rights.

Shortly after that decision came *United States v. Cruikshank*.⁹ The decision in that case was that the right to assemble peaceably is not attributable to national citizenship unless it is directly related in some way with the functions of the federal government, such as petitioning Congress for a redress of grievances.

The Court invalidated civil rights legislation enacted under the Fourteenth Amendment. In so doing, the Court stated that the provisions of the Fourteenth Amendment were restrictions upon state action exclusively and not to any actions of private individuals. If the Amendment's framers had any hopes of reaching private action by federal legislation, they were now destroyed.

The high water mark in the early construction of the Fourteenth Amendment came in the *Civil Rights Cases*.¹⁰ Two sections of the Civil Rights Act of 1875 relating to public accommodations were declared unconstitutional.

It was again pointed out that the Amendment affected only action by the states and their agents and instrumentalities. Individuals were free to discriminate so long as their discriminatory action was not affirmatively authorized or permitted by state law. The Fifth Section of the Fourteenth Amendment was held to only give Congress the power "To adopt appropriate legislation for correcting the effects" of the state action prohibited in the first section, "and thus to render them effectually null, void, and innocuous."¹¹

The effect of these decisions was to frustrate the attempts of the legislators of 1866 to 1875 to nationalize civil rights protection. The main responsibility was given to the states.

A few remnants of the early civil rights statutes remained after these decisions. However, they were separated under unrelated chapters of the Revised Statutes and lost their distinctive, coherent character. It was over eighty years before Congress again enacted any comprehensive civil rights legislation, beginning with the Civil Rights Act of 1957.

During the interim, the chief responsibility for individual human rights ultimately fell upon the Supreme Court. Committed as they were to the construction of the Fourteenth Amendment established in the early cases, the Court performed its function by preventing abuses of state power. Nevertheless, the Court afforded a measure of protection for individual rights far greater than the strict construction seemed to allow by easing the criteria for determining when there is enough state involvement to bring Section 1 of the Fourteenth Amendment into play.

A prime example of this easing is *Shelley v. Kraemer*,¹² in which the Supreme Court held racially restrictive covenants on the sale of private housing to come under the prohibitory provisions of the Fourteenth Amendment. There, the discriminatory action originated in agreements among private individuals. Participation by the state consisted in judicial enforcement of the private discriminatory agreements. It was found that in so doing, the state had denied

the discriminatees equal protection of the laws.

Likewise, in *Barrows v. Jackson*,¹³ the requisite state action was found in awarding damages for breach of racially restrictive covenants.

Of course, there is obvious state action where the state passes a law affecting the purchase of property.¹⁴ There is no basic difference where an official acts under authority granted by the state¹⁵ or where the official acts contrary to the authority from the state.¹⁶ It is still state action.

State action has been found where a private person has a quasi-official status and is thus technically not part of the state. This is best illustrated by *Burton v. Wilmington Parking Authority*.¹⁷ There, a state agency owned a parking building but leased a restaurant located with to a private company. There was not a clear transfer, and the Court held there was sufficient retention of control by the state to make it a joint venture. Thus there was state action.

Finally, where the state authorizes or permits a private person to act, there has been found to be state action in such combined action. This situation is best illustrated by *Evans v. Newton*.¹⁸ A park was devised to the city in trust. The will specified that Negroes were not permitted in the park. The city resigned as trustee, and the court appointed private trustees. The genesis of the discrimination was in a private individual and there were now private trustees, but the Supreme Court held that many years of operation by the city had endowed the park with a public character. Merely changing from public to private trustees did not transfer the park from the public to the private sector.

The preventing - abuses - of - state - governmental - power approach, though workable, has its obvious limitations. The most obvious is where a private person acts without connection with the state, as for example an individual simply refuses to sell his house to a Negro because of the latter's race. He does not go into the courts nor involve the state in any way.

A very important opinion raising this problem is the dissenting opinion of Justice

Black in *Bell v. Maryland* [The 1964 Sit-In Decisions].²⁰ That opinion states:

"Section 1 of the Fourteenth Amendment . . . unlike other sections²¹ is a prohibition against certain conduct only when done by a State . . . [T]his section of the Amendment does not of itself, standing alone, in the absence of some cooperative state action or compulsion, forbid property holders, including restaurant owners, to ban people from entering or remaining upon their premises, even if the owners act out of racial prejudices . . ."²²

This statement is even more applicable to the case supposed of the private individual refusing to sell his house to a Negro. Since the homeowner does not open his home to the public, the public access theory²³— that there is a constitutional right to accommodations at a public facility—to which Justice Black's words were directed cannot extend to such a case. Indeed, no concept of state action can reasonably stretch this far.

Justice Black continues:

"Once a person has become a property owner then he acquires all the rights that go with ownership . . . [T]he property owner may in the absence of a valid statute forbidding it, sell his property to whom he pleases . . ."²⁴

As this opinion indicates, the difference between cases like *Shelley v. Kraemer* and *Buchanan v. Warley*²⁵ and the supposed situation is that in the former there is a willing buyer and a willing seller, but in the latter one party is unwilling. In such a situation,

" . . . he is entitled to rely on the guarantee of due process of law, that is, 'law of the land,' to protect his free use and enjoyment of property and to know that only by valid legislation, passed pursuant to some constitutional grant of power, can anyone disturb his free use."²⁶

In the supposed situation, there is only non-governmental action. As stated above, no amount of stretching can validly extend the state action concept far enough to cover the situation.

Despite the statements of a few of the Justices,²⁷ that the Fourteenth Amendment applies *per se* to prevent discrimination by

certain private businesses serving the public, it is unlikely that the Court will bring any nongovernmental action under the prohibition of Section 1 without legislation by Congress.

Thus, with the Court committed to the requirement of state action under Section 1 of the Fourteenth Amendment, the problem becomes one of how to, in the words of Justice Black, enact "a valid statute prohibiting" private discrimination.

Perhaps a preview of the answer is seen in Justice Black's opinion itself, where he refers to other sections of the Fourteenth Amendment as not being subject to the limitation of Section 1. He was referring specifically to Section 5, the enforcement clause.²⁸

The answer lies in two recent developments. One is "the strong declaration of congressional power under Section 5 of the Fourteenth Amendment"²⁹ under the 1965 Term's opinions interpreting that section. The Court also emphasized the responsibility of Congress for human rights under the enforcement section. The other development is the change in emphasis in the decisions of the Warren Court under the equal protection clause. Earlier cases concentrated on the prohibition theme and typically directed the states to refrain from a particular form of regulation. Now the emphasis is upon affirmative obligations imposed upon the states.³⁰

There are four principal decisions which lay the foundation for sweeping away the private barriers to the enjoyment of fundamental human rights. These cases are *United States v. Price*,³¹ *United States v. Guest*,³² *South Carolina v. Katzenbach*,³³ and *Katzenbach v. Morgan*.³⁴

The principal criminal sanctions available today against crimes of racial violence are Section 241³⁵ and 242³⁶ of the Federal Criminal Code. The source of power for the enactment of these statutes is Section 5 of the Fourteenth Amendment. The *Price* and *Guest* cases involved the construction of these statutes as they were applied in indictments for conspiracies involving civil rights killings.

The *Price* decision upheld the validity of

indictments charging three police officers and fifteen private citizens with violations of Sections 241 and 242 for their alleged part in the murders of three northern civil rights workers near Philadelphia, Mississippi in 1964.

In discussing one of the indictments under Section 242, it was held that the district court erred in dismissing the indictment as to the fifteen private individuals. In an opinion by Justice Fortas, the Court said that the color of law requirement of the statute is met where private persons are jointly engaged with state officials in the prohibited action.³⁷ In such situations the Court has had no difficulty in finding a valid exercise of a congressional power. Since Section 242 requires state action, it is not significant in reaching solely private action. However, Section 241 has no such requirement.

As to one of the indictments under Section 241, the Court rejected the contention that the Section applies only to "conduct which interferes with rights arising from the substantive powers of the Federal Government." The Court said that,

"The language of § 241 is plain and unlimited . . . [and] . . . embraces all of the rights and privileges secured to citizens by all of the Constitution and all of the laws of the United States."³⁸

The *Price* case establishes that when public officials or private individuals acting in concert with public officials interfere with the exercise of the Fourteenth Amendment rights, Section 241 is violated.

Although the decision did not concern solely private action, it establishes a construction of Section 241 as not applying only to a narrow and relatively unimportant category of rights but as also covering rights under the Fourteenth Amendment. It recognizes the power of Congress, acting under Section 5, to legislate to protect Fourteenth Amendment rights. Furthermore, the decision suggests that those who granted Congress the power to require equal protection might well have supposed that they were establishing the authority to provide *all* necessary protection in the enjoyment of the benefit.

The *Guest* case is the far more important of the two; only private individuals had been indicted. Although the court opinion assumes the necessity of finding state action, the concurring opinions face the question of private action.

In this case, the Court reversed dismissal of an indictment under Section 241 charging conspiracy to deprive Negroes of their civil rights in Athens, Georgia. The Court opinion reversed and remanded.

The Court agreed with the district court that the first paragraph of the indictment was defective as a matter of pleading, due to the specific intent requirement read into Section 241, because it failed to allege that the acts of the defendants were motivated by racial discrimination.

The second paragraph of the indictment alleged a conspiracy to deprive Negroes of the right to equal utilization of public facilities. The defendants argued that this paragraph stated no cause of action, because no one was alleged to have acted under color of state law and there is no equal protection clause against wholly private action. The Court held that there was sufficient allegation of official involvement to prevent dismissal, because it was alleged that one of the means of accomplishing the object of the conspiracy was "by causing the arrest of Negroes by means of false reports that such Negroes have committed criminal acts."

The fourth paragraph alleged a conspiracy to interfere with the right of interstate travel. The Court sustained this paragraph on the ground that, while there is no specific provision of the Constitution guaranteeing such right, it is thoroughly established.³⁹

Justice Clark wrote a concurring opinion in which Justices Black and Fortas joined. This opinion said that the Court had avoided the question of whether Congress has the power to punish private conspiracies that interfere with Fourteenth Amendment rights. The opinion states:

"... it is, I believe, both appropriate and necessary ... to say that there can be no doubt that specific language of § 5 empowers the Congress to enact laws pun-

ishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment right."⁴⁰

Justice Brennan, joined by Chief Justice Warren and Justice Douglas, also wrote an opinion concurring in part and dissenting in part. This opinion read the Court as accepting the defendants' contention that, because there exist no equal protection rights against wholly private action,, a conspiracy of private persons to interfere with such rights is not a conspiracy to interfere with a right secured by the Constitution within the meaning of Section 241. Justice Brennan disputed that point, and he also spoke more generally of congressional power. He spoke of congressional power "to enact laws punishing all conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under color of state law are implicated in the conspiracy."⁴¹

He also spoke of Section 5 as "a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens."⁴²

Although this last statement by Justice Brennan is rather broad and difficult to support, the importance of the *Guest* case is that six Justices agreed that Congress had the power to protect Fourteenth Amendment rights against wholly private interference. This is nonetheless true even though it is not clear from this case just how far they are willing to acknowledge the power of Congress to define the substantive scope of the Fourteenth Amendment.

This case goes a long way toward furnishing support for Title IV in authorizing injunctive relief against a mob seeking to prevent a minority group family from moving into a home by considering such action as a conspiracy.

In *South Carolina v. Katzenbach*, South Carolina challenged the constitutionality of certain provisions of the Voting Rights Act of 1965. These sections provided for suspension of literacy tests used for racial discrimination. The provisions were challenged on the ground that Congress had

exceeded its powers under the Fifteenth Amendment.

South Carolina argued that Congress is empowered only to forbid violations of the Fifteenth Amendment and cannot enact specific remedies or apply them to specific localities.

The Court rejected that interpretation and accepted the broad interpretation urged by the United States, that Section 2 gives Congress the same broad discretion under the Amendment as the necessary and proper clause⁴⁴ does to regulate local activities to protect interstate commerce.

In the Court opinion, the Chief Justice stated:

"The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States."⁴⁵

He then quoted Marshall as laying down the classic formulation:

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution are constitutional."⁴⁶

As support for this holding and to demonstrate that Marshall's formula was not limited to the necessary and proper clause, the Chief Justice cited cases where similar language was used by the Court in describing the Civil War Amendments⁴⁷ and the Eighteenth Amendment.⁴⁸

The significance of this decision is in the implication that, under the parallel enforcement clause of the Fourteenth Amendment,⁴⁹ Congress may regulate activities which in themselves do not violate the Amendment's prohibitions, if the regulation is a rational means to effectuate one of its prohibitions.

Carried to its logical limit, this implication could overcome the objection that Congress cannot regulate private action because the prohibitions of Section 1 of the Fourteenth Amendment are directed only to the states and not to private persons. The answer would be, by analogy to the above

opinion, that Congress' power to enact legislation to effectuate those prohibitions may include regulation of purely private action where that is an appropriate means of effectuating them.

The *Katzenbach v. Morgan* case illustrates the full sweep of the implication of the *South Carolina v. Katzenbach* opinion and the Court's willingness to embrace it.

This decision upheld the validity of Section 4(e) of the Voting Rights Act of 1965.⁵⁰ The statute provides that no person who has successfully completed the sixth grade in a Puerto Rican school where the language of instruction was other than English shall be denied the right to vote because of his inability to read or write English. The practical effect of the holding was to prohibit enforcement of New York's English literacy test which had barred from voting thousands of New York City residents who had migrated from Puerto Rico.

The opinion by Justice Brennan extended the proposition stated in *South Carolina v. Katzenbach* regarding Section 2 of the Fifteenth Amendment. It stated that the draftsmen of the Fourteenth Amendment intended to give Congress by means of Section 5 the same broad powers expressed in the necessary and proper clause.

Section 5 was viewed as,

"a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."⁵¹

The Court viewed Section 4(e) as plainly adapted to furthering the aims of the equal protection clause. It was stated that Congress has thus prohibited the state from denying the right that is preservative of all rights, the vote.

"This enhanced political power will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community. Section 4(e) thereby enables the Puerto Rican minority better to obtain 'perfect equality of civil rights and equal protection of the laws'."⁵²

It is significant to note that the Court stated that the issue was, without regard to whether the equal protection clause nulli-

fies New York's English literacy requirement, whether Congress could prohibit its enforcement by legislating under Section 5.⁵³ The opinion in effect says, assuming the state law is valid and also assuming Puerto Ricans are being discriminated against in obtaining public services because they lack the vote, which is seen as enabling them to secure these services, then Section 5 authorizes Congress to enact legislation which will remove such obstacles.

Note that the state may not be discriminating where it is willfully or directly denying equality of public services. It has taken no action, because the state law is assumed valid. However, if the lack of the vote is an obstacle to the state's performance of its constitutional duty not to discriminate in providing public services, then Section 5 authorizes Congress to remove that obstacle.

Thus if, as is highly probable, urban ghettos are found to be obstacles to the state's constitutional duty not to discriminate in the quality of public services, Congress would be authorized to enact a law prohibiting discrimination in the sale and rental of housing so as to break up the ghettos and remove the obstacle. This is so because, on the basis of *Morgan*, although the prohibitions of Section 1 of the Fourteenth Amendment are directed only at the states and not to private individuals, the power of Congress to enact legislation to effectuate those prohibitions may include the regulation of private activities where such is a means of securing the prohibition against the state.

Although in *Morgan* it appears that the state itself might have been guilty of denying equality in public service, the opinion did not emphasize this factor. The tone of the opinion indicates that it would be the same if private action impedes or results in the ineffectiveness of the state to provide equality of services.

This position receives support from the *Price, Guest, South Carolina v. Katzenbach* and *Morgan* cases taken together. *Price* and *Guest* establish the power of Congress to legislate under Section 5 to protect Four-

teenth Amendment rights and show a willingness by the Court to find congressional power to reach private as well as state discrimination. *South Carolina v. Katzenbach* and *Morgan*, by viewing Section 5 as broader than Section 1 and equating it to the necessary and proper clause, potentially give it the same broad reach as the commerce power. Thus, by analogy, where private action has a substantial effect on Section 1 rights, Congress has the discretion to regulate it.

There is a theoretical difficulty in equating Section 5 to the necessary and proper clause. It is well established that the necessary and proper clause is not an independent source of power.⁵⁴ It has only been used where it is tied to another grant of power. Yet the Court has described Section 5 almost as an independent source of power by saying it is much broader than Section 1. Whatever the theoretical difficulties, the Court has found apparent authority for such a construction of Section 5.

The second significant aspect of the *Morgan* case is an indication of the Court's willingness to defer to congressional judgment in reviewing legislation enacted under Section 5. The opinion stated that it was for Congress to assess and weigh the various conflicting considerations involved in making the judgment.

"It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did."⁵⁶

It is to be noted that qualifying phrases such as "rational basis" and "reasonable relation," found in previous opinions,⁵⁷ are absent. The implication of this fact and of the language quoted above is that it is exclusively a legislative function to find the facts and appraise their significance, and that the basis for Congress' determination need not be supported by a legislative record.⁵⁸

This criticism is brought out in the dissenting opinion by Justice Harlan, joined by Justice Stewart.⁵⁹ Justice Harlan is concerned that the Court reads Section 5 as giving Congress the power to define the substantive scope of the Fourteenth Amend-

ment. He warns that, "I see no reason why [Congress] could not also substitute its judgment for that of the States in other fields of their exclusive primary competence as well."⁶⁰

The basis of Justice Harlan's argument is that before Congress' power under Section 5 can be exerted, there must be a court finding that the state has violated one of the first four sections. A rationale for his position might be that, although Section 5 does not say there must be a violation, the first four sections have language to the effect, "no state shall." On this rationale, it would seem to logically follow that Congress could not legislate if there were no violation.

However, there is sound authority for the Court's opinion in the entire line of cases discussed above imposing an affirmative duty upon the states and supporting the enforcement clause as a positive grant of legislative power like the necessary and proper clause.

The matter can best be summed up in the words of Archibald Cox:

"In any event, the *Morgan* case left no doubt that Section 5 of the Fourteenth Amendment gives Congress power to deal with conduct outside the scope of section 1 and within the reserved powers of the states where the measurement is a means of securing the state's performance of its Fourteenth Amendment duties, regardless of its past compliance or violations.

The scope of the principle will naturally depend upon the extent to which the judicial branch reviews legislative judgments concerning the relation between the statutory measures and the Constitutional objective."⁶¹

CONCLUSION

Thus, this paper has attempted to establish that there is sufficient constitutional authority for the Supreme Court to sustain fair housing legislation prohibiting all discrimination, including that of private individuals, should Congress enact it.

It has attempted to show that fair housing is sustainable under either the commerce power or the Fourteenth Amendment.

The discussion, in seeking to establish

the premise that Congress has the power to reach private discrimination, has raised as critical and evasive a question as it sought to resolve. That question is how far does this congressional power reach. Ultimately, the limits will depend upon the extent to which the Supreme Court reviews the legislative judgment.

Signs of a possible overwillingness to defer to the discretion of Congress have been noted. Perhaps, in reality, these signs reflect an invitation to and urging of Congress to legislate in this area. Hopefully, the Court has no intention of avoiding its proper duty by allowing Congress full discretion in defining the substantive scope of the Fourteenth Amendment.

The Court has had the primary responsibility for protecting civil rights for over eighty years. During that time it has often had to act as a superconscience. Sensing that the political climate is right for congressional action, the Court may be endeavoring to shift the primary responsibility for civil rights to Congress, where it properly belongs.

Among the advantages of legislative over court action are: preventive rather than remedial relief, greater fact finding ability, more certainty in the law, and greater public acceptance of a doctrine rooted in a law passed by Congress than adjudicated under the Fourteenth Amendment.

FOOTNOTES

1. S. 3296 and H.R. 14765, 89th Cong. 2d Sess. (1965). Identical bills were introduced in both houses. (Hereafter, all references will be to the version that was amended and passed by the House, which will be cited simply as H.R. 14765).

2. H.R. 14765 § 401.

3. E.g., see 112 Cong. Rec. 16323 (daily ed. July 26, 1966) (remarks of Congressman Cahill); *Id* at 16390-91 (July 27, 1966) (remarks of Congressman Dowdy). For a comprehensive airing of the criticisms, see Additional and Minority Views [To accompany H.R. 14765], H.R. Rep. No. 1678 89th Cong., 2d Sess. (1966).

4. Section 1.

5. Section 5.

6. Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich.L.Rev. 1323, 1330-31 (1952); Cox at 111.

For an opinion expressing the view that exhausting investigation and discussion indicates that the Fourteenth Amendment history is also inconclusive with respect to racial segregation in education, see *Brown v. Board of Education*, 347 U.S. 483 (1954).

7. E.g., see Gressman article, *supra* note 6.

8. 16 Wall. 36 (1873).

9. 2 Otto 542 (1876).
10. 109 U.S. 3 (1883).
11. *Id.* at 11.
12. 334 U.S. 1 (1948).
13. 346 U.S. 249 (1953).
14. *Buchanan v. Warley*, 245 U.S. 60 (1917), held unconstitutional a city ordinance making it unlawful for any Negro to move in and occupy a house where the majority of residents were white.
15. E.g., *Griffin v. Maryland*, 378 U.S. 130 (1964); *Terry v. Adams*, 345 U.S. 461 (1953) (state delegated an aspect of the elective process to private groups); *Marsh v. Alabama*, 326 U.S. 501 (1946) (privately owned and managed town on which the state conferred many aspects of a public town).
16. *Screws v. United States*, 325 U.S. 91 (1945).
17. 365 U.S. 715 (1961).
18. 382 U.S. 296 (1966).

19. Shortly after the *Evans* case was decided, the California Court heard further argument on the "state action" cases before deciding the Proposition 14 Case—*Mulkey v. Reitman*, 64 A.C. 557, 413 P.2d 825 (1966). Then it held that Article I, Section 26 of the California Constitution (a constitutional amendment adopted by the voters as an initiative (Proposition 14) at the 1964 election) violated the equal protection clause of the Fourteenth Amendment of the United States Constitution.

The new constitutional provision added by Proposition 14 prohibited the state from interfering with the right of any person to sell or lease or not to sell or lease his real property to any person as he, in his absolute discretion, chooses. The 1959 Unruh Civil Rights Act prohibited discrimination by business establishments. It had been held applicable to real estate brokers and all business selling or leasing residential housing. In 1963 the Rumford Fair Housing Act prohibited discrimination in the sale or rental of any private dwelling containing more than four units.

In *Mulkey*, Negro plaintiffs had brought an action under the Unruh Act. The trial court dismissed the action stating that Proposition 14 rendered the Unruh Act null and void. The California Supreme Court reversed stating that Proposition 14 was a denial of equal protection guaranteed by the federal Fourteenth Amendment.

This case would appear to be either decided upon or, in any event, sustainable upon the rationale of *Evans*, that California, having had for so long legislation prohibiting discrimination, to have a constitutional amendment which not only wiped out such legislation but also prohibited any such future legislation was not for the state to become neutral but to authorize discrimination. Thus, there is a joint venture between the state and private individuals and sufficient state action to violate the prohibitions of Section 1 of the Fourteenth Amendment.

20. 378 U.S. 226, 318 (1964) (dissent).
21. E.g., §5: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." (Footnote by Justice Black).
22. *Supra*, note 20 at 326.
23. *Id.* at 286 (concurring opinion of Justice Goldberg joined by Chief Justice Warren and Justice Black).
24. *Id.* at 331.
25. *Supra*, note 14.
26. *Supra*, note 20 at 331.
27. See, e.g., the concurring opinions of Justice Douglas and Justice Goldberg in *Bell v. Maryland*, *supra*, note 20 at 242, 286 and concurring and dissenting opinions of Justice Douglas in *Black v. Cutter Laboratories*, 351 U.S. 292, 300 (1956); *Garner v. Louisiana*, 368 U.S. 157, 176 (1961); *Lobard v. Louisiana*, 373 U.S. 276, 274 (1963). These opinions were sometimes with the concurrence of other Justices.
28. See note 21, *supra*.

29. Cox, *The Supreme Court, 1965 Term—Towards Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 91 (1966) (hereinafter cited as Cox).

31. 383 U.S. 787, 86 S.Ct. 1152 (1966) (hereinafter cited to the unofficial report).
32. 383 U.S. 745, 86 S.Ct. 1170 (1966) (hereinafter cited to the unofficial report).
33. 383 U.S. 301, 86 S.Ct. 803 (1966) (hereinafter cited to the unofficial report).
34. 284 U.S. 641, 86 S.Ct. 1717 (1966) (hereinafter cited to the unofficial report).
35. 18 U.S.C. §241. This section provides penalties "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same . . ." The civil counterpart is 42 U.S.C. §1958.
36. 18 U.S.C. §242. This section makes it a federal offense to deprive "under color of law [state action] . . . any inhabitant of any State . . . of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States . . ." The civil counterpart is 42 U.S.C. 1983.
37. See pp. 7-9, *supra*.
38. *Supra*, note 31 at 1160 (S.Ct.).
39. Justice Harlan wrote an opinion concurring in part and dissenting in part in which he concluded that there is no right to be free from private, as contrasted with state, interference with interstate travel. The opinion accused the Court of fashioning a federal common law of crimes.
40. *Supra*, note 32 at 1180.
41. *Id.* at 1191.
42. *Id.* at 1192.
43. H. R. 14765 §406(c) authorizes the court to grant such relief as it deems appropriate.
44. U.S. Const. art 1, §.
45. *Supra*, note 33 at 818.
46. *McCulloch v. Maryland*, 4 Wheat. 316, 321 (1819).
47. *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879).
48. *James Everard's Breweries v. Day*, 265 U.S. 545, 558-59 (1924).
49. See *United States v. Guest*, *supra*, note 32 at 1191 on the language of Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment as being virtually the same (concurring opinion by Justice Brennan).
50. 42 U.S.C. §1973b(e) (1964 ed. Supp. I).
51. 107. *Supra*, note 34 at 1723-24.
52. *Id.* at 1724.
53. In *Lassiter v. Northampton Election Bd.*, 360 U.S. (1959), the Court held that literacy in the English language is a legitimate restriction by the state. Thus, the Court either did not want to overrule the *Lassiter* case or wanted to expand Section 5.
54. *McCulloch v. Maryland*, 4 Wheat. 316 (1819).
55. *Ex parte Virginia*, *supra*, note 47 and *James Everard's Breweries v. Day*, *supra*, note 48. See also p. 19.
56. *Supra*, note 34 at 1725.
57. E.g., *Katzenbach v. McClung*, 379, U.S. 294 (1964).
58. E.g., *supra*, note 34 at 1724, "It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interest served by the English literacy requirement."
59. *Id.* at 1731.
60. *Id.* at 1738.
61. Cox at 103.

DAMAGES: PAIN AND SUFFERING: USE OF A PER DIEM ARGUMENT

Beagle v. Vasold:¹ Plaintiff brought an action against defendants for personal injuries suffered by him as the result of an automobile accident. Plaintiff's counsel, in his prayer, asked for general and special damages, encompassing pain and suffering and medical expenses.

After a trial upon the merits before a jury, the Superior Court of San Diego County awarded the plaintiff damages in the sum of \$1,719.48, \$342 more than the medical expenses incurred prior to trial. At the trial, plaintiff's counsel, in his argument to the jury on the issue of general damages, was not permitted to mention the total amount of damages he sought nor was he permitted to suggest a per diem figure. The trial court had informed plaintiff's attorney in chambers that these restrictions were necessary because such argumentation, as a matter of law, was not evidence. Plaintiff then appealed to the Supreme Court of California contending that the trial court's action in restricting the argument of counsel on the issue of general damages constituted prejudicial error.

The Supreme Court of California unanimously reversed, holding that in an action to recover damages for personal injury involving pain and suffering, counsel may read the complaint, including the prayer, to the jury and may argue for a per diem allowance for such pain and suffering.

I. Evidentiary Requirements

The per diem argument refers to argument by counsel which suggests a segmentation of the damages to be allowed for pain and suffering into a stated amount of money representing a certain period of time, such as \$1 a day.²

The per diem approach by counsel is neither novel nor extraordinary in Cali-

fornia.³ The propriety of the approach was the subject of a vigorous dissent by Justice Traynor in the 1961 case of *Seffert v. Los Angeles Transit Lines*.⁴ The majority of the court, however, held that the issue had been waived because of defendant's failure to object at trial. Nevertheless Justice Traynor took the opportunity to condemn its use as "an artifice of sophistry."⁵

In other jurisdictions, the use of the per diem argument has evoked divergent responses. At one end of the spectrum, the per diem formula approach has been clearly prohibited.⁶ Several jurisdictions hold that the matter rests in the sound discretion of the trial judge.⁷ At least two jurisdictions have reached a compromise position and permit counsel's use of the formula for "illustrative purposes."⁸ At the other end of the spectrum are those jurisdictions which unequivocally permit an attorney to make the per diem argument.⁹

The chief opposition to the per diem argument stems from the 1958 case of *Botta v. Brunner*.¹⁰ In that case, the Supreme Court of New Jersey upheld the trial court's refusal to permit plaintiff's counsel to use the per diem formula. It was held that to allow counsel to suggest the amount of the award was to permit him to transcend the evidence. The court's reasoning proceeded on the assumption that since there is no evidentiary basis for converting pain and suffering into monetary terms, argument by counsel of a fixed amount for a specified segment of time could have no foundation in the evidence.

However, as one critic of *Botta v. Brunner* has noted, there is a logical inconsistency in prohibiting counsel from making a monetary deduction from the evidence.¹¹ Plaintiff is suing for money. Defendant is defending against an award of money. The jury is limited to expressing its findings in terms of money. Yet the jury must be precluded from hearing any reference whatever to money.

Proponents of the formula approach con-

tend that the very fact that pain and suffering is recompensed in money furnishes a basis for argument that pain and suffering have a monetary value. As pointed out by the court in *Louisville and N.R.R. v. Mattingly*,¹² "since the jury itself must arrive at a specific figure we see no logical reason why counsel shall not be permitted to speak in terms of specific figures."¹³

Opponents are quick to counter that no evaluation of pain and suffering can be made on a per diem basis because no "market value" can be set for human suffering, and because there are many individual variations concerning pain.¹⁴ In addition, it is pointed out that there is no satisfactory means of objectively measuring pain and suffering.¹⁵

Advocates of the formula nevertheless maintain that the use of a per diem figure is necessarily based on whatever evidence of pain and suffering has been introduced. Therefore, they argue that such a figure is neither mere conjecture nor the introduction of evidence not already before the court.¹⁶ As pointed out by one writer on the subject:

Those who contend that there can be no reasonable relation between pain and suffering and any mathematical computation are unconvincing in a society where people are constantly choosing between bearing pain or spending more to assuage it.¹⁷

Argument is not evidence and a jury should not be deemed to lack sufficient mentality to distinguish between the two.¹⁸ Furthermore, it is the duty and practice of trial judges, when necessary, to point out to the jury that counsel is not introducing evidence.¹⁹

It should also be noted that a verdict must be consistent with the evidence. If there is no evidentiary basis for the amount of a verdict, it is the duty of the trial court to reduce it. There remains also the control exercised by the appellate courts. The appellate courts have authority to review a

verdict and will upset it if it is so excessive as to shock the conscience of the court.²⁰

II. The Need For Guidance

A second principle on which the opposition is predicated is that suggestions of a per diem allowance constitute an unwarranted intrusion into the domain of the jury.²¹ The court, in the *Botta* case, states that "the law has provided no better yardstick for their guidance than their enlightened conscience."²²

On the contrary, supporters of the formula approach contend that the very absence of a yardstick to measure pain and suffering, the very absence of a standard relative to pain and suffering argue loudly in favor of sanctioning the per diem argument. It is their position that it is not an intrusion into the domain of the jury when that domain comprises the weighing of arguments of counsel. They argue that it is necessarily within the domain of the jury to accept, reject or modify arguments by counsel.²³

The amount awarded by a jury for pain and suffering is usually the most speculative portion of the aggregate award and is often determinative of the gross size of the final award. The prime importance that this figure plays in the final verdict prompted one court to remark:

In determining the amount of an award for pain and suffering a juror or judge should necessarily be guided by some reasonable and practical considerations. It should not be a blind guess or the pulling of a figure out of the air.²⁴

Indeed, one court has remarked that the "enlightened conscience" of the jurors could not hope to do more than pull a figure out of the air without additional guidance by counsel.²⁵ This utter necessity of the jury making nothing more than a stab in the dark at "just compensation" evoked the following comment from the well-known trial strategist, Melvil Belli:

It is unfair to give an absolute figure to a trial judge or a trial jury, saying '\$50,000 should be given this man for pain and suffering' or '\$60,000 should be given this man for pain and suffering.' It is plaintiff's lawyer's duty to tell why and how an absolute figure in dollars and cents should be given for general damages, why it is fair, why it is factual.²⁶

Such calculations, kept within reasonable bounds by the trial judge, would remove to a great extent the sheer confusion resulting from jury instructions couched in terms of "reasonableness" or "just compensation."²⁷

III. The Fear of the Credulous Jury

Opponents of the per diem approach argue that its use results in higher verdicts.²⁸ They attribute such higher verdicts to the readiness of some juries to believe that the figures used in counsel's mathematical computations are necessarily the correct figures. Its advocates counter that the whole thrust of tort law is to afford adequate compensation to injured plaintiffs and therefore, it is of no consequence that higher verdicts are returned if they meet the test of reasonableness and do, in fact, afford adequate compensation.²⁹ Furthermore, they point out that there have been cases where the use of the per diem approach has resulted in greatly reduced verdicts. One such case, *Arnold v. Ellis*,³⁰ \$57,860 was suggested as compensation for pain and suffering alone, and yet the jury returned a total verdict of only \$15,000.

Adversaries of the formula approach nevertheless express the fear that a credulous jury may be moved to passion, emotion, prejudice, or unreasonableness when faced with the catastrophe of personal injury. They therefore maintain that the use of the approach may lead to excessive and even monstrous verdicts.³¹ Supporters of the approach emphatically deny that there is any evidence of any correlation, other than in isolated instances, between the use of the per diem formula and excessive verdicts. In fact, it is pointed out that there

are many examples of excessive verdicts where no formulation at all was used.³²

Courts which permit the use of the per diem argument do not share this fear of excessive verdicts. Higher verdicts may indeed result from the use of the formula but not excessive verdicts.³³ At any rate, as one commentator points out, one principle emerges clearly in the squabble over jury price tags:

The underlying fear that juries will be too liberal in an area of compensation which has no definable limit will not be dispelled by denying counsel the use of methods which cause the jury to think in terms of true compensation rather than to guess at an arbitrary figure.³⁴

There is also the fear that juries may return verdicts which exactly correspond to the figures used by counsel. It is true that this has happened in isolated instances. In *Ratner v. Arrington*,³⁵ counsel asked for damages in the total sum of \$248,439 and the jury duly returned a verdict in that amount. Also, in *Serffert v. Los Angeles Transit Lines*,³⁶ a verdict of \$187,903 coincided with the aggregate demands made by counsel. Proponents of the argument are quick to reply that these amounts, though suggested by counsel, could still be based on the evidence and meet the test of reasonableness. In this respect, it is worthy of note that both of these cases were affirmed on appeal. Surely, it is argued, such verdicts should not have been reversed simply because they correspond to what counsel demanded.

Here again, proponents would stress the discretion lodged in the trial judge to limit per diem argument if it is leading to prejudice. The court may also do this in the form of instructions to the jury. He may instruct them, if necessary, that counsel's calculations are not evidence and that they are not bound by any method of calculation.³⁷

Opponents contend that if the per diem argument were permitted, defense counsel would be placed in the dilemma of either

(a) utilizing some other method of computing damages on a unit of time basis in order to reach a lower or different figure, thereby tacitly approving of this type of argument, or (b) criticizing his adversary's argument as being without any evidentiary basis and yet remain without any substitutionary theory himself.³⁸

Its adherents, on the other hand, contend that the use of such a trial technique has its own built-in safeguards. First, because the use of the *per diem* argument places the risk of "over persuasion" on plaintiff's counsel. If counsel's calculations are not consistent with the evidence, the jury may choose to disregard them altogether. That this can and does happen has already been illustrated.³⁹ Secondly, the formula approach is a double-edged sword.⁴⁰ It may be used by defendant's counsel to point out how exaggerated or ludicrous plaintiff's claims are.

Opponents nevertheless maintain that any speculation on this matter should be left entirely with the jury and should not be compounded by more conjecture on the part of one or both attorneys.⁴¹ One somewhat cynical commentator on the subject has remarked that in permitting the use of a formula approach, the court has abrogated the jury's privilege of basing an award upon its own knowledge and experience in favor of speculation on the part of one having a definite pecuniary interest in the size of plaintiff's recovery.⁴²

In any event, defense counsel, as well as that of plaintiff, should not desire a verdict which reflects caprice and confusion. Mr. Belli summed the matter up as follows:

A personal injury suit is not a contest of misrepresentations, or abstractions but a method of computing compensation for ascertained injuries.⁴³

He concludes:

I believe the jury wants to know both from plaintiff's lawyer and defendant's counsel

what they, as trained evaluators, believe the award should be, and in dollars and cents.⁴⁴

IV. Conclusion

With commendable forthrightness the California Supreme Court has chosen to take a stand on an issue of considerable controversy: the use of a mathematical formula in counsel's argument to the jury. In doing so, it has aligned this jurisdiction with the majority of other jurisdictions that have considered the question.

The *per diem* argument can be of great assistance to both counsel and the jury. Counsel, like the jury, often needs help in making a tangible argument in reference to the intangible elements of pain and suffering. Neither strict adherence to evidentiary requirements nor the remote possibility of disproportionate verdicts call for its prohibition. It is an effective tool of analysis, with equal availability and utility in argument to both counsel. It is a suggestion as to one method of reaching "just compensation," not a substitute for it. The minimal risks of misuse and prejudice are problems of the sort which trial judges, and eventually courts of review, are asked to cope with every day.

A serious personal injury case is only once before a jury for one lump sum. The jury cannot return years later to re-evaluate. It is for this reason that effective trial techniques which aid the jury in arriving at their goal of adequate compensation should not fall prey to "judicial straight-jacketing of the advocate's role."⁴⁵

R.F.L.S.

FOOTNOTES

1. 65 A.C. 161, 53 Cal. Rptr. 129, 417 P. 2d 673 (1966).

2. *Beagle v. Vasold*, 65 A.C. 161, Cal. Rptr. 129, 417 P. 2d 673 (1966).

3. *Gluckstein v. Lipsett*, 93 Cal. App. 2d 391, 209 P. 2d 98 (1949); *Sullivan v. City and County of San Francisco*, 95 Cal. App. 2d 745, 214 P. 2d 82 (1950).

4. 56 Cal. 2d 498, 15 Cal. Rptr. 161, 364 P. 2d 337 (1961).

5. *Id.* at 510, 364 P. 2d at 347.

6. *Botta v. Brunner*, 26 N.J. 82, 138 A. 2d 713 (1958); *Henne v. Balick*, 51 Del. 369, 146 A. 2d 394 (1958).
7. *Olsen v. Preferred Risk Mutual Ins. Co.*, 11 Utah 2d 23, 354 P. 2d 575 (1960); *Wyant v. Dunn*, 140 Mont. 181, 368 P. 2d 917 (1962); *Jones v. Hogan*, 56 Wn. 2d 23, 351 P. 153 (1960).
8. *Wuth v. United States*, 161 F. Supp. 661 (E.D. Va. 1958); *Boutanq v. Twin City Motor Bus Co.*, 248 Minn. 240, 80 N.W. 2d 30 (1956).
9. *Yates v. Wenk*, 363 Mich. 311, 109 N.W. 2d 828 (1961); *Ratner v. Arrington*, 111 So. 2d 82 (Fla. App. 1959); *Newbury v. Vogel*, 151 Colo. 520, 379 P. 2d 811 (1963); *Corkery v. Greenberg*, 253 Iowa 846, 114 N.W. 2d 327 (1962); *Edwards v. Laughton*, 244 S.C. 276, 136 S.E. 2d 708 (1964); *Eouthern Indiana Gas & Elec. Co. v. Bone*, 135 Ind. App. 531, 180 N.E. 2d 375, aff'd. 195 N.E. 2d 388 (1962); *Eastern Shore Public Service Co. v. Corbett*, 227 Md. 411, 177 A. 2d 701, aff'd. 180 A. 2d 681 (1962); *Grossnickle v. Village of Germantown*, 3 Ohio St. 2d 96, 209 N.E. 2d 442 (1965); *Johnson v. Brown*, 345 P. 2d 754 (Nev. 1959).
10. 26 N.J. 82, 138 A. 2d 713 (1958).
11. "Damages—Pain and Suffering," 12 *Rutgers L. Rev.* 522 (1958).
12. 339 S.W. 2d 155 (Ky. 1960).
13. *Id.* at 161.
14. *Olender, "Proof and Evaluation of Pain and Suffering in Personal Injury Cases,"* 11 *Duke L.J.* 344 (1962).
15. "The Per Diem Approach to Damages for Pain and Suffering," 14 *U. Fla. L. Rev.* 189 (1961).
16. *Arnold v. Ellis*, 231 Miss. 757, 97 So. 2d 744 (1957).
17. "Damages—Pain and Suffering—Per Dief Argument," 41 *B.U.L. Rev.* 432, 435 (1962).
18. *Olsen v. Preferred Risk Mut. Ins. Co.*, 11 Utah 2d 23, 354 P. 2d 575 (1960).
19. *Jones v. Hogan*, 56 Wn. 2d 23, 351 P. 2d 153 (1960).
20. *Hall v. Booth*, 178 N.E. 2d 619 (Ohio Ct. App. 1961); *Seffert v. Los Angeles Transit Lines*, 56 Cal. 2d 498, 15 Cal. Rptr. 161, 364 P. 2d 337 (1961).
21. *King v. Railway Express Agency, Inc.*, 107 N.W. 2d 509 (N.D. 1961); *Certified T.V. & Appliance Co. v. Harrington*, 201 Va. 109, 109 S.E. 2d 126 (1959).
22. *Botta v. Brunner*, 26 N.J. 82, 138 A. 2d 713, 725 (1958).
23. 12 *Rutgers L. Rev.* 522 (1958).
24. *Imperial Oil, Ltd. v. Drlik*, 234 F. 2d 4, 11 (6th Cir. 1956), cert. denied 352 U.S. 941 (1956).
25. *J. D. Wright & Son Truckline v. Chandler*, 231 S.W. 2d 785 (Tex. Civ. App. 1950).
26. 1 *Belli, Modern Trials* 870 (1959).
27. 12 *Rutgers L. Rev.* 522 (1958).
28. *Kalven, "The Jury, The Law, and The Personal Injury Damage Award,"* 19 *Ohio St. L.J.* 158 (1958); *Morris, "Liability for Pain and Suffering,"* 59 *Colum. L. Rev.* 476 (1959).
29. *Belli, "The Adequate Award,"* 39 *Calif. L. Rev.* 1 (1959).
30. 231 Miss. 757, 97 So. 2d 744 (1957).
31. "Per Diem Evaluation of Pain and Suffering: Its Propriety in the Courtroom," 15 *Vand. L. Rev.* 1303 (1962).
32. *Darnold v. Voges*, 143 Cal. App. 2d 230, 300 P. 2d 255 (1956); *Loftin v. Wilson*, 67 So. 2d 185 (Fla. 1953).
33. *Yates v. Wenk*, 363 Mich. 311, 109 N.W. 2d 828 (1961).
34. "Per Diem Damages Argument for Pain and Suffering Approved in Personal Injury Case," 33 *So. Cal. L. Rev.* 214, 219 (1960).
35. 111 So. 2d 82 (Fla. App. 1959).
36. 56 Cal. 2d 498, 15 Cal. Rptr. 161, 364 P. 2d 337 (1961).
37. *Jones v. Hogan*, 56 Wn. 2d 23, 351 P. 2d 153 (1960).
38. 15 *Vand. L. Rev.* 1303 (1962).
39. *Arnold v. Ellis*, 231 Miss. 757, 97 So. 2d 744 (1957).
40. *Yates v. Wenk*, 363 Mich. 311, 109 N.W. 2d 828 (1961).
41. *Caley v. Manicke*, 24 Ill. 2d 390, 182 N.E. 2d 206 (1962).
42. "Damages—Propriety of Per Diem Valuation of Pain and Suffering by Counsel in Closing Argument," 49 *Ky. L. J.* 592 (1961).
43. 1 *Belli, Modern Trials* 862 (1959).
44. *Ibid.*
45. 12 *Rutgers L. Rev.* 522, 524 (1958).

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HABEAS CORPUS; EVIDENCE:

Coercion and Adequacy of Representation of Counsel affecting Plea: *In re Poe*.¹

On habeas corpus petition to the California Supreme Court, facts were alleged which, if true, would have warranted petitioner's release from custody. Petitioner pleaded guilty at his arraignment to a charge of kidnapping for the purpose of robbery and was convicted. In his petition, he alleged that his confession and plea were elicited from him by means of police coercion. In support of his allegation he made the following charges: (1) that he was beaten when apprehended in his apartment; (2) that he heard a police order given to hold him incommunicado; (3) that he was continually interrogated for long periods; (4) that he was not fed regularly; and (5) that he was alternately threatened with the gas chamber and the arrest of his friends if he did not confess and then refrain from repeating these incidents in court. These charges were denied by the arresting and interrogating officers. The only corroboration of petitioner's allegations was his co-defendant's sketchy testimony.

Petitioner further alleged that he was denied his constitutional right to counsel because of the inadequacy of his court-appointed counsel.² He charged that he had intended to question the voluntariness of his confession and to plead not guilty but was advised by counsel that to do so would be futile. The witnesses for the people testified that the advice of counsel was consistent with sound legal procedure.

An order to show cause was issued by the Supreme Court, counsel was appointed for petitioner and a referee³ was appointed to make factual findings.

After a full evidentiary hearing, the referee made the following findings: (1) that petitioner's confession was freely and voluntarily made after confrontation with the evidence against him;⁴ (2) that pe-

tioner's guilty plea was not induced by police coercion; and (3) that the representation afforded by his court-appointed counsel at the trial level was not so inadequate as to amount to a denial of his constitutional right to counsel.

The Supreme Court adopted the findings of the referee, holding that the findings were supported by the weight of the evidence. The court stated that there was ample evidence from which a proper motivation for the confession could be inferred. Thus, they found that no marks of violence were found on petitioner, that he was not in fact held incommunicado,⁵ and that the officers made no threats of reprisal. Both the interrogation officers and the deputy public defenders testified that petitioner was anxious to plead guilty, to waive any probationary hearing, and to commence serving his sentence.⁶ This, coupled with the foregoing evidence, strongly supported the finding of a voluntary confession.

Petitioner's counsel vigorously cross-examined the prosecution's witness at the preliminary hearing. He advised petitioner not to deny that his confession was voluntary in view of the nature of the proceeding, and most important, obtained a dismissal of one of the two counts against petitioner.⁷ The court stated that these efforts were as favorable as could be expected by petitioner in view of the evidence against him. Therefore, the court held that petitioner was adequately represented.

The first issue faced by the court was how much weight was to be given to the referee's findings and what degree of proof was needed to overcome those findings.

The court held that the referee's findings, though not binding on the court, were entitled to great weight. This holding conforms with previous decisions on this point. Thus, it has been held that a reference hearing may be ordered in habeas corpus proceedings when disputed questions of fact exist.⁸ Where reference is ordered in habeas corpus proceedings, the findings of fact

made by the referee are entitled to important consideration, since the referee had the opportunity to observe the demeanor of those who appeared before him and to weigh what was said in connection with their manner on the witness stand.⁹ However, they are not binding on the reviewing court.¹⁰ On the contrary, the court is required to exercise independent judgment on the facts.¹¹ Only then may a referee's findings on conflicting evidence be approved and affirmed by the court.¹² The burden of proof is upon the petitioner in a habeas corpus proceeding,¹³ and petitioner did not meet his burden in the case at bar. Thus, the findings of the referee were adopted.

The second issue presented for discussion was whether the petitioner's confession and guilty plea were involuntarily obtained by police coercion. Where the conflict in evidence as to the voluntariness of a confession is insubstantial, inquiry into the issue of voluntariness may not even be justified.¹⁴ In the case at bar, a prima facie case was established by the petitioner so that an inquiry was justified but the court found that there was ample evidence to support the finding that the confession and plea were voluntary. At the trial the burden is on the prosecution to show that the confession sought to be proved was the voluntary act of a defendant, not induced by promise or threat.¹⁵ But, in a habeas corpus proceeding where a petitioner contends that his confession has been coerced, the burden rests with the petitioner and the preponderance of the evidence may be sufficient to warrant a finding that a confession was voluntarily made,¹⁶ as was true in the instant case.

The third significant issue raised involved the degree of adequacy required of counsel in defending the petitioner in order to assure that he has not been deprived of effective assistance of counsel. Petitioner maintained that the Public Defender's office had been negligent in their advice and in their handling of his case. In a trial on a serious charge, if an appointed attorney or even one chosen by the defendant ne-

glects his preparation of the case, the effect is to deny defendant to his right to counsel.¹⁷ Therefore, defense counsel has a duty to pursue fully all defenses of fact and law available to the defendant, and a defendant has not had the assistance to which he is entitled if defense counsel's failure to do so results in withdrawing a crucial defense.¹⁸ But, an extreme case must be disclosed before defense counsel's lack of knowledge of law will constitute a denial of defendant's constitutional right to effective aid in preparation and trial of his case. It must appear that counsel's lack of diligence or competence reduced the trial to a farce or sham, whether counsel be chosen¹⁹ or appointed by the court.²⁰ As to alleged incompetence of counsel, the burden of proof is on the defendant to sustain charges of denial of his constitutional right.²¹ Thus, the California Supreme Court has held that a court-appointed counsel was not guilty of incompetence in advising his client to enter a plea of guilty to first degree murder, when the evidence of defendant's guilt was overwhelming and the attorney knew at the time the advice was given that the psychiatrist for the prosecution would testify to defendant's sanity.²² Finally, it is largely within the province of the trial court to decide whether a defendant was given proper representation by counsel and before a reviewing court can override that decision the record must show beyond a doubt that the trial court was in grievous error in such respect.²³

Collateral issues raised by the court were: whether the failure of the police to advise the petitioner of his right to counsel and his right to remain silent, and whether the presence of policemen in the room when the accused conferred with his counsel were themselves grounds for releasing the petitioner from custody.

Regarding the former issue, the court reaffirmed its ruling in *In re Lopez*.²⁴ In that case they held that the United States Supreme Court decision, extending the right to counsel and the right to be informed of the privilege of remaining silent, to the

preindictment accusatory interrogation stage,²⁵ may not be applied to cases which have become final prior to the date the decision was rendered.²⁶

On the latter issue, the court specifically disapproved of such procedure but noted that none of the policemen actually overheard petitioner's conversation with his attorney.

This case shows that an appellate court, in a habeas corpus proceeding, will give great weight to the referee's findings. Therefore, where these findings are supported by the weight of evidence, the court will adopt them.

The actual operation of the voluntary-involuntary test, as pertains to confessions, where the only testimony is by the accused rebutted by that of the interrogator, continues to trouble the courts. That the petition in the instant case was not summarily dismissed, shows the court is inclined to grant a full evidentiary hearing on issues raised in this area. Even with the admonitions as to right of counsel and right to remain silent, now required by *Miranda v. Arizona*,²⁷ we may continue to see judicial distaste for pretrial confessions obtained during custodial interrogation.

No fixed standard has emerged from this case by which a defense counsel may measure the degree of diligence required of him. Nor may we expect such a standard in the future. Further, it would appear that a flexible standard will be maintained by which error in judgment on the part of a defense counsel will be tolerated unless the error has resulted in a miscarriage of justice. Both the interests of the public and the bar are well served by permitting exposition of this question on collateral attack.

A.F.

FOOTNOTES

1. 65 AC. 13, 51 Cal. Rptr. 896, 415 P. 2d. 784 (1966).

2. Petitioner was interviewed prior to the preliminary hearing by a Deputy Public Defender. A different Public Defender was present at the first arraignment

hearing at which time a continuance was obtained. A third Public Defender actually represented petitioner at the second arraignment hearing at which time he pleaded guilty.

3. The Honorable Thomas P. White, retired Associate Justice of the California Supreme Court.

4. A footlocker found in the trunk of petitioner's car contained guns, stocking masks, stolen license plates, and a bag with money in it. Also, a positive identification was made by the victim.

5. He was able to speak to his fiancée after the first period of interrogation, which lasted several hours. He also spoke with an attorney called by his fiancée, but the attorney declined to take the case. He was then interrogated further.

6. Petitioner had two previous convictions, one of which was for violation of probation. The interrogating officers testified that petitioner wanted to "get going" because "they didn't want to do a lot of dead time in the County Jail" since they knew they were going to State Prison anyway.

7. Petitioner pleaded not guilty to a charge of robbery. This charge was dismissed "in the interest of justice".

8. In re Mooney, 10 Cal. 2d 1, 73 P. 2d 554, *cert. denied*, Mooney v. Smith, 305 U.S. 598 (1937).

9. In re Mitchell, 35 Cal. 2d 849, 221 P. 2d 689 (1950); In re Lessard, 62 Cal. 2d 497, 42 Cal. Rptr. 583, 399 P. 2d. 39 (1965); In re Rose, 62 Cal. 2d 384, 42 Cal. Rptr. 236, 398 P. 2d. 428 (1965).

10. In re Wallace, 24 Cal. 2d 933, 152 P. 2d 1 (1944).

11. In re Swindall, 90 Cal. App. 2d 177, 202 P. 2d 845 (1949).

12. In re Matusow, 129 Cal. App. 76, 18 P. 2d 72 (1933); In re De Leon, 59 Cal. App. 2d 510, 139 P. 2d 109 (1943).

13. In re Riddle, 57 Cal. 2d 848, 22 Cal. Rptr. 472, 372 P. 2d 304 (1962).

14. In re Schlette, 232 Cal. App. 2d 407, 42 Cal. Rptr. 708 (1965).

15. People v. Reed, 68 Cal. App. 19, 228 Pac. 361 (1924); People v. Leavitt, 100 Cal. App. 93, 279 Pac. 1056 (1929).

16. In re Dixon, 41 Cal. 2d. 756, 264 P. 2d 513 (1953).

17. In re Rose, *supra* note 8.

18. People v. Ibarra, 60 Cal. 2d 460, 34 Cal. App. 863, 386 P. 2d 487 (1963).

19. *Ibid*.

20. People v. Twiggs, 223 Cal. App. 2d 455, 35 Cal. Rptr. 859 (1963). People v. Hopkins, 214 Cal. App. 2d 487, 29 Cal. Rptr. 636 (1963).

21. People v. Griffin, 209 Cal. App. 2d 557, 26 Cal. Rptr. 311 (1962); People v. Ford, 200 Cal. App. 2d 905, 19 Cal. Rptr. 758 (1962).

22. People v. Lindsey, 56 Cal. 2d 324, 14 Cal. Rptr. 678, 363 P. 2d. 913 (1962).

23. People v. Gaither, 173 Cal. App. 2d 662, 343 P. 2d 799, *cert. denied*, 362 U.S. 991 (1960).

24. In re Lopez, 62 Cal. 2d 368, 42 Cal. Rptr. 188, 398 P. 2d 380 (1965).

25. Escobedo v. Illinois, 378 U.S. 478 (1964).

26. Accord, Johnson v. New Jersey, 384 U.S. 719 (1966).

27. 384 U.S. 436 (1966).

SURETIES—RIGHTS OF MULTIPLE SURETIES AGAINST EACH OTHER:

Contractor's Bond—relation to contract with regard to surety liability. In *Continental Casualty Co. v. Hartford Acc. and Indem. Co.*,¹ plaintiff Continental Casualty Co. was surety to a prime contract between Hal B. Hayes and Associates, Inc., and the United States. Pursuant to Federal statute² and the terms of its bond, Continental was bound with its principal, Hal. B. Hayes, to pay for all labor and materials furnished for work included in the prime contract. This obligation included any claims of unpaid laborers or materialmen of subcontractors.

Hal B. Hayes assigned its entire contract to Hayes-Cal Builders, Inc., who subcontracted certain plumbing work to Country Boys Builders Supply. Defendant Hartford was surety under the subcontract. Its bond to Country Boys designated Hayes-Cal as obligee, but incorporated by reference the subcontract between Hayes-Cal and Country Boys. The subcontract expressly recognized the contractual arrangement between Hal B. Hayes and Hayes-Cal.

Country Boys failed to pay for materials furnished by its suppliers, and Continental, under its statutory obligation, paid the indebtedness then brought this action against Hartford.

In its complaint, Continental alleged that it was subrogated as a matter of law to the rights of Hal B. Hayes and thereby succeeded to a cause of action against Hartford on its bond to Country Boys. Hartford demurred, contending that Continental could not be subrogated to the rights of the prime contractor, Hal B. Hayes, on the subcontractor's bond because that bond was limited in scope to Hayes-Cal, the stated obligee.

The Superior Court entered a judgment of dismissal, sustaining Hartford's general

demurrer without leave to amend. On appeal by Continental, the lower court's judgment was reversed. The District Court of Appeal held (1) that although Hartford's bond designated Hayes-Cal as obligee, by its incorporating by reference the subcontract between Hayes-Cal and Country Boys—which subcontract expressly recognized the assignment by Hal B. Hayes to Hayes-Cal—the bond impliedly recognized Hal B. Hayes, as well as Hayes-Cal, as obligee, and (2) that Continental was entitled to reimbursement by Hartford; the two stood in the position of successive sureties, and as such Continental, having been forced to pay the debt, was subrogated to the creditor's rights upon the bond and could enforce them against Hartford.

The trial court sustained Hartford's demurrer on the proposition that its bond was limited in scope to Hayes-Cal, the stated obligee and assignee of the prime contractor, Hal B. Hayes. The District Court of Appeal's reversal was based upon an implied recognition by Hartford of Hal B. Hayes as obligee, because of the bond's incorporation by reference of a contract which expressly recognized the assignment of the prime contract.

The weight of California case authority supports the reversal. It was held in a 1912 decision that "a bond may incorporate, by reference expressly made thereto, other contracts or written instruments . . . in which case the bond and papers referred to should be read together and construed as a whole."³ And it was held in a more recent case, that "a bond which is given or the faithful performance of a contract, to which it refers, binds the surety for labor performed and materials furnished thereunder as completely as though the surety were a party to the contract".⁴ This doctrine of incorporation by reference was extended further than here required in a 1966 District Court of Appeal decision⁵ wherein it was assumed without discussion that a performance bond incorporated not only the *express* terms of the contract referred to, but also included such terms as could be *implied* from the "fore-

seeable scope" of the contract. (emphasis added)

In its complaint, Continental alleged that it was subrogated as a matter of law to the rights of Hal B. Hayes and had thus succeeded to a cause of action against Hartford. In reaching its conclusion—that the ultimate loss resulting from Country Boys' default should be borne by Hartford rather than by Continental—the court looked to a 1938 New York decision,⁶ and bolstered its rationale with some textbook suretyship principles.

In the New York case, the issue was stated thus:

"Whether the surety of a subcontractor is liable on its bond to the general contractor for an unpaid bill for materials incorporated in the work under the subcontract made with a general contractor doing building work for the United States Government where the subcontractor has failed to complete the work or pay for the material furnished."⁷

It was resolved in the affirmative, although there the major point in controversy seemed to be whether the surety's promise to indemnify the general contractor contemplated not only the subcontractor's actual performance but, impliedly, his obligation as well to pay for materials furnished for that performance.⁸

Quoting *Williston*, the court then said that where in equity one of two sureties rather than the other should bear the ultimate burden, they stand in the position of successive sureties. If the first of two such sureties is forced to pay the debt, he is subrogated to the creditor's rights upon the bond and may enforce it against the second surety.⁹ The court concluded that here Continental and Hartford should be regarded as successive sureties, and that the loss in equity should fall upon Hartford, whose principal's default occasioned it.

The general rule that a surety, upon satisfying the obligation of the principal, is entitled to enforce the creditor's rights against the principal and against co-sureties, is established by California statute.¹⁰ The noted Civil Code sections have been cited

in support of the specific propositions, *inter alia*, (1) that a surety, upon payment of the principal's obligation, succeeds to all rights of the principal in and to such obligation,¹¹ and (2) that an original contractor's surety, repaying a creditor under the original contract, is subrogated to the contractor's rights and may bring action against the subcontractor and his surety for breach of the subcontract.¹²

The major questions presented by the *Continental* case were (1) whether, where a subcontractor's bond by its terms designates a particular obligee, but incorporates by reference an instrument which recognizes the stated obligee as assignee of another, the bond will be construed as impliedly recognizing both assignor and assignee as obligees, and (2) whether, where two persons stand surety for the same debt, and one is forced to pay for a loss occasioned by the default of the other's principal, the first surety may be subrogated to the creditor's rights and thereby recover his loss from the second surety.

In holding that the bond impliedly recognized the assignor as well as the stated obligee, the court merely applied the well settled rule that the bond and instrument incorporated by reference thereto are to be construed as a whole; no extension of or departure from existing doctrine was involved. But by its classification of Hartford as a *successive surety*, the *Continental* decision may be of significance. No prior California cases were found which mentioned successive sureties as such—yet *Continental* defined the relationship and made an important distinction between the liability interrelationships among successive sureties and co-sureties: while co-sureties may be required to *share* a loss, among successive sureties he who in equity should bear the ultimate burden is liable for it in its *entirety*. Thus in cases following *Continental* it would seem that, as between multiple sureties for the same obligation, *total* ultimate liability—rather than an apportionment of it—must result in any situation in which on equitable principles the ingredients of successive suretyship appear.

D.R.W.

FOOTNOTES

1. 243 A.C.A. 716, 52 Cal. Rptr. 533 (1966).
2. Capehart Act, 42 U.S.C.A. §1594 *et seq.*
3. Callan v. Empire State Surety Co., 20 Cal. App. 483, 129 P. 978 (1912).
4. Pacific States Elec. Co. v. United States Fidelity and Guar. Co., 109 Cal. App. 691, 293 P. 812 (1930).
5. Verdugo Highlands, Inc. v. Security Ins. Co. of New Haven, 240 A.C.A. 563, 49 Cal. Rptr. 736 (1966).
6. Seaboard Surety Co. v. Standard Acc. Ins. Co., 277 N.Y. 429, 14 N.E. 2d 778, 117 A.L.R. 658 (1938).
7. *Id.*, 117 A.L.R. at 659.
8. That subissue, too, was decided affirmatively. It was discussed only briefly here, as Hartford's bond by its terms indemnified Hayes-Cal. from "all claims and

demands incurred by the principal (Country Boys);" it was not merely a "performance bond." For the peculiar—and seemingly unique—interpretation that an agreement to "furnish" materials does not imply that the promisor is also to pay for them, see Tremblay v. Soucy, 132 Me. 251, 169 A. 737 (1934).

9. Williston, *Contracts* (Rev. Ed. 1936). §1277A, 1278, 1282.
10. Cal. Civ. Code §2848, 2849.
11. Sanders v. Magill, 9 Cal. 2d 145, 70 P. 2d 159 (1937).
12. Storm and Butts v. Lipscomb, 117, Cal. App. 6, 3 P. 2d 567 (1931).

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CRIMINAL LAW: VOLUNTARY INTOXICATION AS A PARTIAL DEFENSE IN HOMICIDE CASES IN CALIFORNIA

*People v. Conley.*¹

Defendant shot and killed two people. He had been consuming large amounts of intoxicating liquors throughout the three days preceding the shooting. He was found unconscious in a nearby field two hours after the shooting. He pleaded not guilty to two counts of first degree murder. His defense was based on a theory of unconsciousness. At the trial expert testimony was offered of his intoxicated condition and of his abnormal mental condition at the time of the shooting. Both sides requested manslaughter instructions, suggesting diminished capacity and intoxication as theories justifying the instructions. The court refused to give the instructions. Defendant was found guilty on both counts, and judgment was entered with the penalty fixed at life imprisonment for each count.

On appeal, held, reversed. The Supreme Court, in opinion by Traynor, C.J., held that it was prejudicial error to refuse to give manslaughter instructions to the jury where there was evidence to support a theory of defendant's incapacity to form a specific mental state (malice aforethought) essential to the crime of murder. The lower court had, in fact, not even instructed the jury that malice was an essential element of the crime of murder. The court held that diminished capacity due to voluntary intoxication, mental disease, or illness could negate the existence of malice, although voluntary intoxication could not be a complete defense to homicide.

"The determination of an individual's capacity can be used as a sword with which to attack him, or as a shield with which to protect him."²

In the area of diminished mental capacity by reason of intoxication, both Coke and Blackstone took the position that drunkenness at the time of the commission of a

crime was a matter of aggravation,³ but Perkins⁴ and Clark and Marshall⁵ deny that this was ever the law. Early common law, however, made no concession because of intoxication.⁶ The earliest relevant English report, dated 1551, approved the death sentence for a homicide committed in extreme intoxication.⁷ Until the early part of the nineteenth century the general rule was that drunkenness was no defense to a charge of crime.⁸

Mitigation of this harsh rule seems to have been first attempted by Justice Holroyd in a murder case in 1819 where he suggested that the drunkenness of the defendant should be considered on the issue of premeditation.⁹ He is said to have later retracted his statement;¹⁰ at any rate, we see that the defendant was executed.¹¹ In 1838, however, in a case of assault with intent to murder, the jury was instructed that gross intoxication might disprove the intention required for the aggravated offense.¹² This exception, slow to take root, was stated by Justice Stephen in language which has become accepted as the major exculpatory doctrine:¹³

"Although you cannot take drunkenness as any excuse for crime, yet when the crime is such that the intention of the party committing it is one of its constituent elements, you may look at the fact that the man was in drink in considering whether he formed the intention necessary to constitute the crime."¹⁴

That this partial exculpation could have undermined the more general rule is not unlikely considering the importance of "*mens rea*" in criminal law. This modification of the general rule, however, was soon limited to the element of "specific intent" of the crime charged and was not allowed to negate the existence of "general intent."¹⁵ Thus, proof of voluntary intoxication is admissible, and may constitute a complete defense when the accused is charged with an offense of which some specific intent is an essential element.¹⁶ Except for three states, this is the rule in the United States.¹⁷

As reflected in Section 22 of the Penal Code, California follows the majority rule.¹⁸ Before the *Gorschen* case,¹⁹ Califor-

nia also followed the majority application of the rule in homicide cases.²⁰ That is, intoxication could only reduce the criminal homicide conviction to second degree murder.²¹ The way the rule was generally stated, evidence of intoxication in homicide cases could only be considered with respect to the issue of the degree of the offense.²² The courts would not let the jury consider the effect of intoxication on the element of malice aforethought.²³ Malice was not considered to be a particular "motive, purpose, or intent," within Section 22 of the California Penal Code. Other states reached the same result of foreclosing the issue of malice aforethought from the jury by sticking to the dichotomy between specific intent and general intent, with malice aforethought classified under the heading of general intent.²⁴

This was the situation in California until the *Wells* case.²⁵ There, in an attempt to show that a legally sane person could introduce evidence of mental illness to negate the existence of an essential mental element of a crime, the court analogized to the admissibility of evidence of intoxication.²⁶ Malice was the element in dispute.²⁷ The court there assumed that malice aforethought was a specific intent.²⁸

In *People v. Gorshen*,²⁹ the court again relied on an analogy to intoxication as a defense to homicide to overcome certain obstacles in admitting evidence on intent. There, the main issue was the effect of the defendant's mental illness,³⁰ although there was evidence that he was intoxicated at the time of the shooting.

The first obstacle was a number of statutes strictly limiting the admission of evidence on the issue of criminal intent.³¹ But *Wells*³² had concluded that Section 22 of the Penal Code, allowing evidence of voluntary intoxication to negate an essential state of mind, was declaratory of what the rule would be were there no statute, and that the reasons for admitting evidence of partial insanity were fundamentally the same reasons as those that applied in the intoxication situations. *Gorshen* held that Section 22 of the Penal Code controlled the contrary statutes on the admissibility

of evidence of criminal intent. But the analogy to the admissibility of evidence of voluntary intoxication was inadequate in the respect that it could not reduce murder to manslaughter. The question of guilt of murder or manslaughter was previously decided solely on the basis of the reasonable man objective standard of provocation, and voluntary intoxication was not a factor in that standard.³³ The *Gorshen* court solved that problem by overruling the line of cases which limited the admissibility of evidence solely to the issue of the degree of the crime.³⁴

Relying on *Wells*,³⁵ and another case,³⁶ the court in *Gorshen* found no difficulty in holding that malice aforethought is a type of specific intent.³⁷ Thus, a new species of manslaughter in California was added to the previous statutory definition;³⁸ for, in the absence of malice, a homicide cannot be an offense higher than manslaughter.³⁹

Prior to the *Conley* case, on the basis of *Wells-Gorshen*, it can be stated that where a defendant is charged with a crime which requires that a certain specific intent or mental state be established in order to constitute the crime or degree of crime charged, and the defendant has offered evidence of diminished mental capacity because of mental illness or intoxication, that evidence must be considered in determining whether the defendant had the requisite mental state.⁴⁰ It can also be stated that *Gorshen* concluded that malice aforethought is a requisite specific mental state for murder.⁴¹

The problem remains, however, that both the *Wells* and the *Gorshen* cases affirmed their lower court's judgments, and therefore their discussions on diminished capacity could be possibly regarded as dicta. This is unlikely in view of its reception by later courts.⁴² The distinction between dictum and holding might also have effect on the ability of voluntary intoxication to reduce a crime of murder to manslaughter, considering the fact that the main issue in both *Wells* and *Gorshen* was that of the effect of partial insanity. The following of *Wells-Gorshen* on the facts in *Conley* solves that problem. In *Conley*, the prime fact, and focal point of the court's discussion, was

the effect of the defendant's intoxicated condition. In view of the fact that the *Wells-Gorshen* rule was always stated in terms of diminished capacity by mental illness or voluntary intoxication, the result in *Conley* was not to be unexpected.

It is now the law in California that in a prosecution for murder, where the defendant has offered evidence of mental illness, intoxication or any other cause of diminished capacity, and where the question is whether his mental capacity was thereby so diminished that he could not deliberate, premeditate, intend to kill, or harbor malice aforethought, the effect of that evidence must be considered with respect to the defendant's ability to form the requisite specific mental state for the crime.⁴³

The right to a jury instruction on diminished capacity does not have to be based on substantial evidence of intoxication: "any evidence deserving of any consideration whatever," is sufficient.⁴⁴ The defense of diminished capacity due to voluntary intoxication can be raised without the testimony of expert witnesses, either as to the extent of the person's intoxicated condition, or with regard to the effect of the intoxication on the defendant's ability to achieve a specific state of mind.⁴⁵ Thus, it seems that a plea of "not guilty" to a charge of murder will put into issue the existence of the mental state of malice aforethought.⁴⁶ Whereas some authorities⁴⁷ state that the defense of intoxication is considered to be an affirmative one, and therefore puts the burden of proof on the defendant,⁴⁸ in California malice aforethought is a specific intent now⁴⁹ and therefore must be proved beyond any reasonable doubt.⁵⁰

Since the slightest evidence of intoxication will allow a defendant to demand a jury instruction on diminished capacity to form malice aforethought, and since the prosecution must prove beyond a reasonable doubt the existence of a requisite specific intent, then can it not be said that the prosecution now has the burden of disproving beyond a reasonable doubt the operative effect of the intoxication of the defendant

on his capacity to form malice aforethought? If so, then the burden of the prosecution in homicide cases where intoxication is a factor has been materially increased, and to some extent the chances for convictions in these cases will decrease.

The minutiae of evidence required for demanding a jury instruction would seem to remove the issue of such instructions completely out of the trial judge's discretion. Just what constitutes "any evidence deserving of any consideration whatever," will be a major point in the development of future case law in this area of diminished capacity caused by voluntary intoxication.

The holding in *Conley*⁵¹ that expert testimony is not necessary to support a defense of intoxication is not totally impractical. Whereas mental illness is a more prolonged state which renders itself amenable to detailed analysis long after the occurrence of a homicidal act, drunkenness is a transitory state often only supportable by eyewitness testimony, alcoholic consumption and resultant behavior. However, it seems anomalous in two respects. The *Wells-Gorshen* rule was the result of an effort to "ameliorate the law . . . prescribed by the McNaughten rule,"⁵² and to bring the expert knowledge of psychiatry into court on the complex issue of criminal responsibility.⁵³ The offspring of that rule, *Conley*, slights the role of experts by making no provision for them, even though the issue, diminished mental capacity to form a specific intent, is the same in both situations. Considering the fact that the intoxication rule in *Conley* derives its increased effect from a ruling in the *Gorshen* case, and viewing the *Wells* and *Gorshen* cases as being of one purpose,⁵⁴ the *Conley* case appears to give a misdirection in the development of that purpose. Very possibly the role of expert testimony could be modified in succeeding cases.

The lack of necessity for expert testimony does not necessarily mean that a trial of an intoxicated defendant will be devoid of expert testimony. In the recent case of *Schmerber v. California*, the Supreme

Court of the United States held that a compulsory blood test did not violate a defendant's self-incrimination privilege.⁵⁵ Certainly trial counsel will need expert testimony to debate the interpretation of information gathered by such tests.⁵⁶

The most profound change in California law wrought by *People v. Conley* is the attempt by the court to define malice aforethought. After previous disclaimers of ability to define the term,⁵⁷ the court in *Conley* disregards three statutes "defining" malice, as inapplicable and uncomprehensive,⁵⁸ and labels as incomplete, general statements in prior case law of the meaning of the term,⁵⁹ before announcing its own definition. Malice aforethought, according to *Conley*, is evidenced by an intentional act that is highly dangerous to human life, "done in disregard of the actor's awareness that society requires him to conform his conduct to the law."⁶⁰ The other specific intents of murder in the first degree (intent, wilfulness, deliberation and premeditation) can be present, but if the defendant is unable because of mental disease, defect, or intoxication to comprehend his duty to govern his actions in accord with the duty imposed by law, he does not act with malice aforethought.

The presence of malice is not negated when a person does not know that his specific conduct is unlawful, for all persons are presumed to know the law.⁶¹ Lack of "an awareness of the obligation to act within the general body of laws regulating society,"⁶² will prevent an intentional homicide from being characterized as committed with malice aforethought.

The difficulty with the definition is that malice aforethought is a state of mind required by the law before a defendant will be convicted of murder, and this definition seemingly takes away another one of the manifestations of his state of mind—that is, a showing of an intent to kill. Anglo-American law desires to be satisfied that there is a guilty mind behind the criminal hand. This desire, where previously frustrated by difficulties of proof, has been

met by "implications" of malice from the acts of the defendant. Now it seems that the mental state of the defendant must be considered solely in the light of its subjective content; that is, did, or did not, the defendant know of society's obligation to conform to its orders, when that defendant acted.

Neither the layman nor the lawyer is capable of fathoming the depths of a person's consciousness; especially when the person is partially insane or intoxicated to an indeterminate extent. It seems that the court, in an attempt to match the crime with the subjective culpability of the individual defendant, ventured in search of ethical certainty without the ability to conduct the search, and with the possibility that the goal is unattainable. This problem again leads us to the necessity of expert testimony.

One application of the *Wells-Gorshen* rule as applied by *Conley*, which is not discussed in the case, is that intoxication by drugs is included within the term "intoxication" in Section 22 of the Penal Code.⁶³ The rule in *Conley*, however, will not be the subject of such widespread use by drugged defendants as it will by intoxicated defendants. Crimes by drug addicts are generally committed when they are not drugged, and therefore, when the defense will not be available to them. The reason for their crimes is not the drugs taken, but the need for money to get the drugs. When they are drugged they are generally either physically incapable of committing crimes (or doing anything, for that matter) or they are unmotivated to attempt to get money because of the effect of the drug,⁶⁴ or because of the lack of need for money at that time.

An exception to the general statements above exists when certain drugs are taken. Drugs like "marijuana" and "LSD" cause hallucinations and release inhibitions so that impulsive acts, frequently of a violent, criminal nature, result.⁶⁵ The problem is compounded by the fact that these are the types of drugs that "thrill-seekers" and young people generally first come into con-

tact with. The behavior of these inexperienced drug users is unpredictable, and often tragic. Proof of a state of mind clouded by hallucinatory drugs like these would seem to be an extraordinarily complex problem.

Perhaps the key to the problem is that the decision on the existence of a requisite state of mind will be entirely left to the jury's discretion. Conflicting expert witnesses will destroy any chance for a directed verdict or reversed verdict. Thus the ethics and common sense of the jury will in reality be their sole guideline in appraising the defendant's culpability.

D. P. C.

FOOTNOTES

1. 49 Cal. Rptr. 815, 411 P.2d 911 (1966) (Modified on denial of rehearing).

2. Mezer, R.R., and Rheingold, R.D., "Mental Capacity and Incompetency, A Psycho-Legal Problem," 118 Am. J. Psy. 827 (1962).

3. 4 B1. Comm. *26.

4. Perkins, *Criminal Law*, 782 (1957).

5. Clark and Marshall, *Crimes*, 386 (6th ed.1958) (Wingersky Revision).

6. See Singh, "History of the Defense of Drunkenness in English Criminal Law," 49 L.Q.Rev. 528,530 (1933).

7. Reninger v. Fogossa, 1 Plowden 1, 75 Eng. Rep. 1 (1551, K.B.).

8. Hall, "Intoxication and Criminal Responsibility," 57 HARV. L. REV. 1045, 1048 (1944).

9. Rex v. Grindley, quoted in Rex v. Carroll, 7 C.&O. 145, 173 Eng. Rep. 710 (N.P. 1835).

10. Hall, *supra*. at 1048.

11. *Ibid*.

12. Regina v. Cruse, 8 C.&P., 541, 173 Eng. Rep. 710 (N.P. 1838).

13. Hall, *supra*. at 1049.

14. Regina v. Doherty, 16 Cox C.C. 306, 308 (N.P. 1887).

15. 1 Bishop, *Criminal Law*, 299 (9th ed. 1923).

16. Clark and Marshall, *supra*. note 4.

17. "Intoxication as a Criminal Defense." 55 COL. L. REV. 1210, 1211,n.5,10 (1955). Texas allows admission of evidence of intoxication solely for purposes of mitigation of the punishment for the crime. TEX. PEN. CODE, § 36.41 (Vernon 1952). Missouri and Vermont refuse by common law to take intoxication into account at all in determining whether the defendant had the specific state of mind requisite to constitute the crime charge.

18. CAL. PEN. CODE §22:

"No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at

the time, in determining the purpose, motive, or intent with which he committed the act."

19. *People v. Gorshen*, 51 Cal.2d 716, 336 P.2d 492 (1959).

20. *People v. Belencia* 21 Cal. 544, 547, (1893).

People v. Methever, 132 Cal. 326,332, 64 Pac. 481, 484 (1901).

People v. Keyes, 178 Cal. 794, 797, 175 Pac. 6, 7, 8 (1918).

21. In a minority of states, and in England, the reduction is greater and the judgment is manslaughter—Hall, *supra*. at 1051.

22. *People v. Keyes*, *supra*. note 19.

People v. Methever, *supra*. note 19.

23. *People v. Gorshen*, *supra*. at 731, 336 P.2d at 502.

24. Hall, *supra*. at 1063.

25. *People v. Wells*, 33 Cal.2d 330, 202 P.2d 53 (1949).

26. *Id.* at 357, 202 P.2d at 69.

27. *Id.* at 343, 202 P.2d at 60.

28. *Id.* at 357, 202 P.2d at 69.

29. *People v. Gorshen*, *supra*. note 18.

30. Diamond, "Criminal Responsibility of the Mentally Ill," 14 STAN. L. REV. 59, 76 (1961).

31. CAL. PEN. CODE § 21, which provides that the requisite criminal intent is manifested by the circumstances of the offense and the sound mind of the accused, and that "All persons are of sound mind who are neither idiots, nor lunatics, nor affected with insanity." CAL. CODE CIV. PROC. § 1962, declares that a malicious intent is conclusively presumed "from the deliberate commission of an unlawful act, for the purpose of injuring another."

32. *People v. Wells*, *supra*. note 18.

33. *People v. Gorshen*, *supra*. at 731, 336 P.2d at 502.

34. *Id.* at 734, 336 P.2d at 503.

35. *People v. Wells*, *supra*. at 343, 202 P.2d at 60.

36. *People v. Baker*, 42 Cal.2d 550,568,571, 268 P.2d 705,716,718 (1954).

37. *People v. Gorshen*, *supra*. at 732, 336 P.2d at 502.

38. CAL. PEN. CODE § 192, "Manslaughter is the unlawful killing of a human being without malice . . . 1. Voluntary—upon a sudden quarrel or heat of passion . . . 2. Involuntary . . . 3. In the driving of a vehicle . . ."

39. *Jackson v. Superior Court*, 62 Cal.2d 521,525, 399 P.2d 374,377 (1965).

People v. Wolff, 61 Cal.2d 795, 819, 394 P.2d 959, 974 (1964).

People v. Bender, 27 Cal.2d 164, 180, 163 P.2d 8,17 (1954).

People v. Holt, 25 Cal.2d 59,82, 153 P.2d 21,34 (1944).

People v. Kelley, 208 Cal. 387, 393, 281 Pac. 609, 611 (1929).

40. CALJIC 73-B (Revised), 1966 Pocket part.

41. *People v. Gorshen*, *supra*. at 736, 336 P.2d at 502.

42. *People v. Anderson*, 63 Cal.2d 351, 406 P.2d 43 (1965).

People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677 (1963).

43. CALJIC 305.1 (NEW) (Conley Rule) 1966 Pocket part.

DISQUALIFICATION OF AN EXECUTOR

*In re Estate of Dulfon*¹ Ernie I. Dulfon petitioned the court for issuance of letters testamentary pursuant to his appointment as executor by the will of his deceased wife. His stepdaughter, Mary, asked the court to deny the petition on the grounds that petitioner:

1. was the surviving partner of a business with decedent, and was thus barred from appointment by California Probate Code § 421²;
2. was indebted to the estate (amount owed in dispute) and was living rent-free in an apartment owned by the estate;
3. had entered his deceased wife's safety deposit box immediately after her death without witnesses present except an official of the bank who did not know of the wife's death; and had not accounted to his stepdaughter for what the box contained;
4. had on several occasions threatened his stepdaughter concerning her property rights, and had previously beaten her while she was living with Petitioner and deceased;
5. had waived his right to act as executor of the estate by a previous agreement.

The trial court denied Ernie's petition. On appeal, this decision was reversed. The court held that Ernie could not be disqualified by any or all of the grounds stated.

At common law, the selection of the executor of an estate was totally delegated to the testator. Except for the complete insanity of the nominee, there were no grounds upon which the court could refuse to appoint the person chosen by the testator.³

Today, however, the common law has been modified by statutes in all American jurisdictions.⁴ California's statute provides: "No person is competent to serve as an executor or executrix who is under the age of majority, convicted of an infamous crime, or adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity."⁵

Except for these specific statutory grounds, the courts of California, and indeed the

44. *People v. Henderson, supra*, at 490, 386 P.2d at 681. Found in *People v. Carmen*, 36 Cal.2d 768, 773, 228 P.2d 281,284 (1951). 284, quoting from *People v. Burns*, 88 Cal.App.2d 867,871, 200 P.2d 134,136 (1948).

45. *People v. Conley*, 49 Cal.Rptr. 815,825, 411 P.2d 911,921 (1966).

46. *Ibid.*

47. Underhill, *Criminal Evidence*, 473 (5th ed. 1956) (Herrick).

48. *United States ex. rel. Thompson v. Dye*, 113 Fed. Supp. 807. (1953).

49. *People v. Gorshen, supra*, at 732, 336 P.2d at 502.

50. *People v. Fleming*, 94 Cal. 308, 29 Pac. 647 (1892). 14 Cal.Jur.2d, *Criminal Law* 89.

51. *People v. Conley, supra*, at note 45.

52. *People v. Henderson, supra*, at 490-491, 386 P.2d at 682.

53. Diamond, *supra*, at 76.

54. Six Justices set on both courts; all concurred in *Wells* and five concurred in *Gorshen*.

55. *Schmerber v. California*, 16 L.ed 2d 925 (1966).

56. The American Medical Association has concluded that the percentage of alcohol in the blood is a reliable index of the degree of intoxication, especially when it is considered along with other objective symptoms. see 119 AM. MED. ASSOC. JOUR. 653. Medical findings indicate that concentration of .15% or more of alcohol in the blood stream produces a state of intoxication. Underhill, *supra*, at 152.

57. *People v. Gorshen, supra*, at 730, 336 P.2d at 501, n. 11.

58. CAL. PEN. CODE § 188, which provides that malice "may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned or malignant heart.", is rejected as only creating a presumption of malice. The "conclusive presumption" of a malicious and guilty intent set forth in section 1962 of the Code of Civil Procedure is rejected as being dependent on subjective factors upon which evidence of diminished capacity is also relevant. Section 7 of the Penal Code is rejected as not applying to the type of malice required in homicides.

59. The term denotes "purpose and design in contradistinction to accident and mischance."

People v. Silva, 41 Cal. 2d 778,782, 264 P.2d 27, 30, (1953).

People v. Berry, 44 Cal.2d 426,431, 268 P.2d 861, 864 (1955).

60. *People v. Conley, supra*, at 822, 411 P.2d at 918.

61. *Ibid.*

62. *Ibid.*

63. *People v. Baker* 42 Cal.2d 550, 572, 268 P.2d 705, 719 (1954).

People v. Samenigo, 118 Cal. App. 165, 173, 4 P.2d 809,812 (1931).

64. Opium (including morphine and heroin) soothes and relieves tensions and inhibits violent impulses. Cocain stimulates the user up to a point and temporarily creates confidence and courage. However, this phase passes, and is replaced by fear and uncertainty.

65. Cavan, R.S. *Criminology* 179 (3rd ed. 1962).

United States in general, have not been willing to disqualify an executor. The selection of an executor by the testator is a "solemn act"⁵ and it has been repeatedly held that "It is the universal rule that a testator may name the person who shall be the executor of his will, and such person has a right to act in absence of a specific statutory disqualification . . . In the absence of some statute, the power to name an executor is coextensive with the power to bequeath or devise the estate itself."⁷

Under California law, a man has the right to make such disposition of his property as he chooses, subject only to such limitations as are expressly declared by law; and within the same limitations he has the absolute right to select the executor to carry out the provisions of the will.⁸ Thus, any executor named in a will has the right to act, unless there is some provision of law which declares that he shall not; and the testator may lawfully select any person for this trust who is not within a class prohibited.⁹

The paramount rule in the law of wills, to which all other rules must yield, is that the court has a duty to give the utmost effect to the wishes of the testator, consistent with the interests of the estate and beneficiaries.¹⁰ Following this rule, the courts have consistently construed the statutory disqualifications as narrowly as possible.¹¹

In *Cohen's Estate*,¹² the New York courts, under a statute similar to California's, refused to disqualify a nominee even though he had been convicted of a Federal crime. The court held such convictions were not within the scope of the New York law.

The California courts have refused to disqualify executors on the grounds of unfriendliness of the executor toward the heirs;¹³ the friendliness of the executor toward those holding interests adverse to the estate;¹⁴ fraudulently obtaining money from the testator during his life;¹⁵ and claiming an interest adverse to the estate.¹⁶ The fact that the nominee has been known to drink in the past is not grounds for disqualification,¹⁷ nor is being a gambler, a profes-

sional baseball player, and an embezzler.¹⁸ Charges of those challenging the appointment that the nominee had conspired in the murder of the testator were also held to be insufficient.¹⁹

It is thus clear that, except for the most extraordinary circumstances, the California courts will not disqualify an executor on other than statutory grounds, and they are not overly anxious to apply the statutory grounds.

The court in the instant case never refers to Probate Code Section 401.²⁰ However, the decision was consistent with the statute and the case law on the statute.

Probate Code § 421²¹ refers to administrators, not executors. The court in the instant case thus refused to extend this statute to cover executors. This is in line with the general policy of narrow construction of wills statutes. Thus, § 421 did not apply in this case.

In further examining the facts, the court decided that Ernie had acted in good faith in entering his wife's safety deposit box (he had immediately turned the contents over to his attorney). They also decided that he had not waived his right to act as an executor, since this was part of an agreement made subject to the approval of the court, and the court had not approved it. This also follows the general rule that waiver to act as executor may be withdrawn at any time before it is acted on by the court.²²

It is clear that indebtedness to the estate is not a statutory ground for disqualification and no California court has ever disqualified an executor on this ground.²³

This leaves for consideration whether threatening and striking a beneficiary to the will is sufficient grounds for disqualification. In the instant case, the court said that inasmuch as the striking took place during deceased's lifetime, this fact must have been known to her, and that she must not have believed that the act rendered Ernie unfit to act as an executor. It appears to this writer that in view of the cases on this subject, even if decedent had not known of these acts, the court ruling would have been the same. The acts were singular, no evidence appears of past acts of the same

or similar nature, and they were not acts which would be indicative of a tendency to mismanage the estate.

While the case was in the main decided on the general policies associated with the law of wills, it is clear that it accurately followed the established rules regarding executors.

R. E. T.

FOOTNOTES

1. *In re Estate of Dulfon*, 243 A.C.A. 618, 52 Cal. Rptr. 398 (1966).

2. "The surviving partner of a decedent must not be appointed administrator of the estate if any person interested in the estate objects to his appointment."

3. See Note, 18 Minn. L. Rev. 85 (1933).

4. For a comprehensive discussion of the statutory provisions of the various states, see Note, 26 Wash. U.L.Q. 106 (1940), and Note, 26 Wash. U.L.Q. 257 (1941).

5. California Probate Code § 401.

6. *In re Ross' Estate*, 179 Cal.App.2d 765, 4 Cal.Rptr. 95 (1960).

7. *In re Buchman's Estate*, 123 Cal. App. 2d 546, 267 P.2d 73, 47 A.L.R.2d 291 (1954); *In re Piercy's Estate*, 3 Cof. 473 (1904).

8. *In re Bauquier's Estate*, 88 Cal. 302, 26 Pac. 178 (1891).

9. *In re Baquier's Estate*, *supra*, Note 8; *In re Batreiro's Estate*, 125 Cal. App. 153, P.2d 1017 (1932); *In re Fiddymet's Estate*, 74 Cal.App.2d 72, 168 P.2d 61 (1946); *In re Manischewitz' Estate*, 113 Cal.App. 2d 5, 247 P.2d 572 (1952); *In re Dern's Estate*, 114 Cal. App.2d 799, 251 P.2d 28 (1952); *In re Buchman's Estate*, *supra*, Note 7; *In re Piercy's Estate*, *supra*, Note 7.

10. *In re Wilson's Estate*, 184 Cal. 193 Pac. 581 (1920); *In re Lefranc's Estate*, 38 Cal.2d 289, 239 P.2d 617 (1952); California Probate Code § 101.

11. *Conviction of an infamous crime*: The statute requires conviction and a mere allegation of the act by those challenging the appointment is not sufficient. *In re Agoure's Estate*, 165 Cal. 427, 132 Pac. 587 (1913). *Want of Understanding*: A want of common intelligence amounting to a defect in intellect. *In re Piercy's Estate*, *supra*, Note 7.

Drunkenness: Must be of such an excessive, inveterate, and continuous use of intoxicants as to render the person an unsafe agent to be entrusted with the care of the property for the transaction of business. *In re Piercy's Estate*, *supra*, Note 7.

Imprudence: "That want of care or foresight in the management of property as would be likely to render the estate and effects of decedent unsafe or liable to be lost or diminished in value." *In re Connor's Estate*, 105 Cal. 189, 38 Pac. 648 (1894); *In re Piercy's Estate*, *supra*, Note 7.

Want of Integrity: That soundness of moral principle and character in dealing with others which may be equated to probity, honesty, and uprightness in business. *In re Baupier's Estate*, *supra*, note 7.

In General: In order to disqualify an executor, more than one or two isolated episodes are required to be shown. *In re Connor's Estate*, *supra*.

12. 164 Misc. 98, 298 N.Y.S. 368 (1938), 18 B.U.L. Rev. 204.

13. *In re McDougal's Estate*, 1 Cof. 456 (1884); *In re Kelley's Estate*, 182 Cal. 81, 186 Pac. 1041 (1920).

14. *In re Berry's Estate*, 56 Cal.App.2d 621, 132 P.2d (1943).

15. *In re Bauquier's Estate*, *supra*, Note 8.

16. *In re Randall's Estate*, 177 Cal. 363, 170 Pac. 835 (1918); *In re Estate of Daigh*, 59 Cal.2d 367, 379 P.2d 761, 29 Cal. Rptr. 273 (1963); *In re Meyer's Estate*, 130 Cal.App.2d 145, 278 P.2d 471 (1955); *In re Hirschberg's Estate*, 224 Cal.App.2d 449, 36 Cal.Rptr. 661 (1964); *In re Estate of Cole*, 240 A.C.A. 336, 49 Cal. Rptr. 419 (1966).

17. *In re Piercy's Estate*, *supra*, note 7.

18. *In re Piercy's Estate*, *supra*, note 7.

19. *In re Agoure's Estate*, *supra*, note 10.

20. See note 5 *supra*.

21. See note 2 *supra*.

22. The rule is well settled that the renunciation of an executor might be retracted at any time before the letters had been actually granted to another. An agreement not to apply for letters cannot be enforced against the promisor for the reason that it is against public policy. *In re True's Estate*, 120 Cal. 352, 52 Pac. 815 (1898); *In re Clary's Estate*, 98 Cal.App.2d 524, 220 P.2d 754 (1950).

23. See the cases cited note 16 *supra*.

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CALIFORNIA'S OBSCENITY STATUTE

The requirement of intent to distribute or exhibit: *In re Klor*.¹ On September 4, 1964 two police officers entered the home Robert Klor under authority of a warrant charging him with an overdue parking ticket. After making the arrest, the officers informed Klor they had received complaints he was making obscene motion pictures. Klor replied he did not make obscene motion pictures and offered to show the films to the officers. In warning the officers some of the reels might contain objectionable scenes Klor said: "These are not ready for distribution through the mail. They need to be edited."² After viewing the films the officers requested permission to take two of the films to the City Attorney's office for viewing by the City Attorney. Klor consented on the condition the City Attorney be advised the films were not intended for distribution in their present form.

Klor was convicted in the Municipal Court for violation of Cal. Pen. Code. section 311.2 which provides: "Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes or offers to distribute or has in his possession with intent to distribute or to exhibit or offer to distribute any obscene matter is guilty of a misdemeanor." His conviction was affirmed by the Appellate Division of the Superior Court and he petitioned for a Writ of Habeas Corpus to the California Supreme Court.

In re Klor is the first case put before the California Supreme Court challenging a conviction under Cal. Pen. Code section 311.2 since its enactment in 1961.^{3,4} Klor claimed error in the trial court's jury instruction which stated the Jury should find the petitioner guilty if they found the material obscene⁵ and the petitioner "either prepared the material or possessed it with intent to distribute or exhibit it". (Emphasis by court).⁶

In granting Klor's petition the California

Supreme Court held: "The statutory words 'prepares, publishes, prints, exhibits, distributes, or offers to distribute or has in his possession' must *all* be read in connection with the following words 'with intent to distribute or to exhibit or offer to distribute' " (Emphasis by court).⁷ A conviction under section 311.2 of any of the acts described therein without the intent to distribute the material would be a violation of the legislative intent, sensible construction of the statute, and petitioner's rights under the First and Fourteenth Amendments.

In negatively answering the question of whether a person can be convicted under section 311.2 for the preparation of obscene material without the intent to distribute or exhibit it, the court relies on two arguments. The first argument is based on the legislative intent and reasonable construction of the statute. The Court said, "the legislature did not attach the language of such intent [the intent to distribute or exhibit] to each verb in the statutory series because to do so would have been to adopt an awkward construction."⁸ The Court then goes on to say that to read the words in piecemeal fashion would be to assume legislative inconsistency. If possession of finished matter without intent to distribute or exhibit it does not violate the statute, the mere preparation or possession of unfinished matter without the intent could not violate the statute.

The second argument rests on the constitutionality of trial court's interpretation of the statute. The court reasoned that to convict a person for the preparation of obscene material maintained solely for his own personal use and satisfaction would be a violation of his rights under the First and Fourteenth Amendments. Relying on Chief Justice Warren's concurring opinion in *Roth v. United States*⁹ the Court said the key to an obscenity trial is the punishable conduct of the party, not the obscenity of the material. There is no punishable conduct present when a person maintains obscene material for his own use and satisfaction, or when he intends to purge the material of its obscene elements before distribution.

Relying on the rule set down in *Bantam Books, Inc. v. Sullivan*¹⁰ that "regulation by the states of obscenity must conform to procedures which will insure against the curtailment of constitutionally protected expression . . ."¹¹ and citing *Griswold v. Connecticut*¹² the court reasoned, "Such a statute would approach an interdiction of individual expression in violation of the First and Fourteenth Amendments."¹³ The Court then argues, a statute which would convict a person of creating obscene material when he did not intend to distribute or exhibit it, or intended to purge it of its objectionable content before distribution would pose grave technical difficulties to the artist and tend to suppress experimental communication which in the finished form might become constitutionally protected.

Justice Burke's dissent argues a procedural point in the Habeas Corpus proceeding. He states, citing *In re Bell*,¹⁴ that a judgment which is collaterally attacked carries with it a presumption of regularity.¹⁵ If, then, a petitioner is convicted under one of two alternative jury instructions, one of which is valid, he has the burden of proving he was convicted under the invalid instruction. Justice Burke then argues that the petitioner has not affirmatively proved he was not convicted under the valid portion of the instruction, or possessed it with the intent to distribute it. He bases his opinion on the testimony introduced at the trial, which was not rebutted, by the models whom Klor photographed. The models testified he intentionally filmed their sex organs, and explained his actions by saying he was using a special lens. This testimony coupled with the fact that the petitioner was engaged in the business of making and selling films of nude women could have resulted in a conviction under the valid portion of the instruction.

The majority answered the argument raised by Justice Burke's dissent by saying: "So strong was the evidence tending to establish the petitioner's guilt under the erroneous portion of the charge and so weak the evidence which would ground a conviction under the valid portion that we de-

termine that petitioner can discharge his 'burden . . .'"¹⁶

The question of whether a person can be convicted under California Penal Code section 311.2 for mere creation of obscene material, without the intent to exhibit or distribute the material, was answered in the negative by the California Supreme Court. The Court held that the statutory words "intent to distribute or exhibit" must be read with the words "prepares, publishes, prints, exhibits, distributes or offers to distribute or has in his possession."

In the face of *In re Klor* it is now apparent that any conviction under California Penal Code section 311.2 must, in addition to proving the prohibited act, prove the intent to distribute or exhibit the material. No conviction can stand when a person produces material, brings it into the state, or possesses it, unless it can also be shown that he did so with the intent to distribute or exhibit the material.

J.F.S.

FOOTNOTES

1. 64 A.C. 883, 51 Cal. Rptr. 903, 415 P. 2d 791 (1966).

2. Id., at 885, 51 Cal. Rptr. 904, 415 P.2d 792.

3. Cal. Pen. Code section 311.2 was enacted in STATS 1961 ch 2147 section 5 which also repealed former Cal. Pen. Code section 311, STATS 1961 ch 2147 section 1.

4. A conviction under a similar statute was presented to the United States Supreme Court in *Mapp v. Ohio*, 367 U.S. 643 (1961). The defendant was convicted under section 2905.34 of the Ohio Revised Code making mere possession of obscene material a felony. The conviction was reversed on grounds other than the constitutionality of the statute, but Justice Stewart was of the opinion the statute was not consistent with the rights of free thought and expression.

5. Cal. Pen. Code section 311 subsection A defines obscene as: "Obscene means that to the average person, applying contemporary standards, to the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance."

6. *In re Klor*, 64, A.C. 883, 886, 51 Cal. Rptr. 903, 905 415 P2d 791, 793 (1966).

7. Ibid.

8. Ibid.

9. 354 U.S. 476 (1957).

10. 372 U.S. 58 (1963).

11. Ibid at page 66.

12. 381 U.S. 479 (1965).

13. *In re Klor*, supra note 6 at 887, 51 Cal. Rptr. 906, 415 P2d 794.

14. 19 Cal. 2d 488 (1942).

15. *In re Klor*, supra note 6 at 890, 51 Cal. Rptr., 908, 415 P2d 796.

16. *In re Klor* supra note 6 at 889, 51 Cal. Rptr., 907, 415 P2d 795.

TORTS: NEGLIGENCE: DUTY OF PROPRIETOR OF BUSINESS ESTABLISHMENT TO BUSINESS INVITEE

Taylor v. Centennial Bowl, Inc. While an invitee in the defendant's cocktail lounge, plaintiff was propositioned by another patron several times. The bouncer was in close proximity and later was informed by the plaintiff of the confrontations. Subsequently, as the plaintiff was about to leave, the bouncer warned her that the propositioner was outside. She, however, insisted that she had to go home. The bouncer then walked the plaintiff to the doorway and again cautioned her. Upon reaching her car, the plaintiff was attacked and severely lacerated.

The Superior Court granted motion for directed verdict for the defendant. The trial court, utilizing Restatement § 348 and *Hunter v. Mohawk Petroleum Corp.*² as its rule for duty, found no evidence that defendant had breached any duty. The District Court of Appeal affirmed, citing *Porter v. California Jockey Club* as its authority.³

On appeal to the Supreme Court of California, the appellate court's decree was reversed. The court concluded that Restatement § 348 had been repudiated by Restatement § 344 and that the *Hunter* case was distinguishable on its facts. It was held, as a matter of law, that a mere warning of impending danger, was not sufficient to fulfill defendant's duty to the plaintiff. Where defendant has good reason to anticipate injury to a patron from a third person, he has an affirmative duty to control the acts of that third person. In this case, such control could have been accomplished by escorting the plaintiff to her car or notifying the police. The defendant did not do so and, therefore, it is a question of fact for the jury to determine if defendant acted reasonably under the circumstances. With five judges concurring and one dissenting, the Supreme Court reversed the Court of Appeal decision and ordered a retrial.

In 1866, an English court set down the rule that a proprietor of a business establishment is under an affirmative duty to protect business visitors.³⁻⁴ The rule eventually became the common law and, in all such jurisdictions, invitees were placed on a higher footing than licensees. The theory behind the duty was propounded by Professor Bohlen.⁵ Identified as the economic benefit theory, it stated that an affirmative duty to make the premises safe was imposed upon the proprietor; it was the price he must pay for the economic benefit that he obtains from the presence of the business guest. Accepted by the Restatement of Torts,⁶ the theory of economic benefit has not restricted recovery to visitors of business establishments but has been extended to include visitors of such non-pecuniary institutions as churches and municipal parks. Coverage also has been extended to members of the family and friends of such visitors.⁷

This duty to make the premises safe for the invitee was not an absolute duty; the proprietor was not an insurer of the safety of the visitors. His duty was to use reasonable care. Nonetheless, the obligation of reasonable care was entire, and included everything that resulted in an unreasonable risk of harm to the visitor. The proprietor had to be not only prudent in his affirmative actions and warn the visitor of known hidden dangers, but also had to take reasonable precautions in order to make the premises safe for the invitee; he had to take reasonable precautions to protect the invitee from dangers which are foreseeable from the arrangement or use.⁸

Nevertheless, the rule did not extend to situations where the dangers were known to the visitor, nor was there a duty to protect against obvious dangers which one reasonably should be expected to discover. As stated by Keeton, "As to these, it should be expected that the invitee will protect himself."⁹ For this reason, it has been held that reasonable care only requires the duty to warn the person of unknown, impending dangers.¹⁰ An exception was made to public utilities, however, since the members of the public were entitled to the utility

irrespective of consent. As for the public utility, it had a duty to do more than merely warn, if the warning would have been inadequate so as to permit the visitor to avoid the harm.¹¹

Gradually the exception concerning public utilities began to be extended to recoveries for business visitors against private establishments. Nonetheless, the Restatement of Torts steadfastly maintained the distinction. The Restatement's position, after being thoroughly criticized by Professors James¹² and Prosser¹³ as not being truly indicative of the law, was reassessed by the committee. With § 344, the drafters of the Restatement reaffirmed their position on the public utility's greater duty. To a greater extent, however, they amplified and accentuated the duty of a business establishment. The exception engulfed the rule, and proprietors were taxed with the duty to do more than merely warn their invitees of known, impending danger.

Although Supreme Court Justice Peters concluded that this case did not turn on the distinction between the two sections of the Restatement, it is valuable to note the possible changes in the law when Restatement § 344 is adopted by a state. In the first draft of the restatement, the possessor was to use reasonable care:

- (1.) In discovering harmful acts being done or about to be done, and
- (2.) In protecting patrons by controlling the acts of third parties or giving a warning adequate enough so that the invitees could avoid harm without relinquishing any of the patron's rights to services from the **public utility**. (In this respect, the court should be criticized for misquoting and misapplying this subsection of § 348.)

The revised draft stated that the duty was to use reasonable care:

- (1.) In discovering harmful acts being done or likely to be done, and
- (2.) In giving a warning adequate enough so that the invitee could avoid harm or otherwise to protect them against it.

Thus the second draft (Restatement § 344)

was an apparent broadening of the rule in the first draft (Restatement § 348.)

The question then is, to what extent was the original draft extended? Comparing subsections (1.) of each restatement, it appears that the intent of the committee was to extend the proprietor's duty. He not only has a duty to use reasonable care to discover harmful acts, but also he has the duty to foresee harmful acts which are likely to occur in the future. As for subsection (2.), the original Restatement § 348 title¹⁴ could have misled one to interpret, as the court in this case did, that the special duty in § 348 applied to business proprietors, as well as, public utilities. (The misinterpretation by the court is evident after reading comment (b) of § 348 and noting the black letter law of the original Restatement § 340). Thus, it is concluded that the Restatement, prior to § 344, required merely a duty to warn to visitors of unknown dangers.¹⁵ It was only after the adoption of § 344 that the proprietor had a duty to do more than warn the invitee of known impending dangers.

Duty to Warn

It is generally accepted that the owner of land owes a duty to invitees to exercise reasonable care in protecting the invitee from injury. The question is whether the defendant has fulfilled this duty. In order to answer this question it is necessary to determine exactly what duty the proprietor of a business establishment owes to his business invitees. The lower courts concluded, based on Restatement § 348, that defendant's duty was one of merely warning the visitor of impending danger. Nevertheless, warning the visitor does not always fulfill the owner's obligations. The owner's duty to act may be dependent on the specific circumstances of the case:

1.) If defendant has had several hundred disturbances in the past six months, including some stabbings, and if the business is located in a criminal like locale, his duty of care in protecting his patrons would seemingly be much greater than if he were a proprietor of a exclusive neighborhood business with no record of criminal activi-

ty. Hence, the jury might find a breach of defendant's duty, if he fails to have someone guarding his parking lot for a prolonged period on a weekend night. The jury also might find a breach of duty if defendant has not been able to maintain adequate security and protection for its patrons because it has reduced its police protection and number of bouncers.¹⁶ Circumstances may be such that a prudent person could say that the owner is liable for negligently failing to control the conduct of third persons.¹⁷

(2.) So also, the proprietor of any place of entertainment owes a duty to those who come on his premises to protect them from of case required fluctuates with the facts and circumstances. Thus it has been stated that a saloon keeper and proprietors of restaurants and other establishments which serve alcoholic beverages have a duty to exercise greater care for the safety of their guests than a place which doesn't serve alcohol.¹⁸

(3.) The owner's duty also becomes greater than mere warning of danger, if the warning is insufficient to enable the visitor to avoid the harm. Varying with the circumstances, the owner's obligation extends to the entrance of his property, as well as, to a safe exit after the invitee desires to depart.¹⁹ As in *Morris v. Atlantic & Pacific Tea Co.*,²⁰ the parking lot may be included in this "area of invitation."

In this case, the court applied a greater duty on the proprietor because of the situation (3.) above: It held that a mere warning by the proprietor did not help the patron to avoid the harm of the third person and therefore the bouncer had a duty to escort the plaintiff to the car. Nonetheless, it appears that the court could have found that the proprietor had not fulfilled his duty by using any one or a combination of the above.

The law in California, prior to this case, was in accordance with Restatement § 340, that an occupier having learned of a dangerous condition on his premises, as a matter of law, may discharge all duty to his invitees by merely giving them a warning of impending danger.²¹ Some jurisdictions and

authorities were also in accord.²² Nevertheless, this proposition was held to be a very doubtful one in other jurisdictions. If the danger was obvious and could be avoided safely by the ordinary person, mere warning of much danger generally would fulfill the owner's duty. If, however, the condition of danger was such that it could not be encountered with reasonable safety, even if the danger was known and appreciated, then the proprietor would inherit a greater duty. An icy highway,²³ a slippery floor,⁴² a defective crosswalk,²⁵ or a walkway near an exposed high tension wire²⁶ are examples. A less inherently dangerous situation also may impose a greater duty, if the invitee's knowledge is not likely to protect him against the danger.²⁷

Notice of Dangerous Condition

The rule has been stated in California that, where there is no evidence of any facts which would reasonably put the owner on notice that one spectator will harm another, the owner has no greater duty.²⁸ Nonetheless, in this case, the court could find that reasonable men could differ as to whether or not there was notice:

(1.) Notice could be rationalized on the ground that the owner has superior knowledge of existing dangers of which his invitees are unaware. If he is ignorant both actually and constructively of the danger, he is not liable.²⁹ If, however, the defendant has superior knowledge and appreciation of impending harm, he has a duty to do more than merely warn; he must provide against injury to the patron.³⁰

(2.) So also, where there is reasonable cause to anticipate negligent or wrongful acts and the probability of harm therefrom, the proprietor must use reasonable care to protect the invitee against injuries.³¹ If there is evidence to show that the assailant made improper advances and the bouncer knew of it and that the business had numerous disturbances in the prior six months, such reasonable cause to anticipate harm may be present. If so, the company is under a duty to protect the visitor by taking appropriate steps to restrain the conduct of persons of which he should have been aware

and of which he should have realized as dangerous.³²

(3.) The jury could also find constructive notice to do more than merely warn, if there has not been a guard in the parking lot for forty-five minutes and the parking lot is normally patrolled every ten minutes³³ if it was a Sunday night when the majority of the incidents occurred,³⁴ and if there had been prior stabbings on the defendant's premises within the last few months.³⁵ As in *Samples v. Eaton*,³⁶ where the patron was injured when struck by a bottle at a wrestling match, wherein the court held that the owner is put on constructive notice and is under a duty to protect his invitees by taking the necessary action to restrain conduct by a third person of which he should have been aware and of which he should have realized as dangerous. Even though the assailant was unknown, the conduct of the patrons at a wrestling match was foreseeable and, therefore, it was a question of fact to determine whether there was negligence.

The question confronting the court was: Did the business establishment fulfill its duty to the business invitee by merely warning her of impending danger? Answering in the negative, the court appears to have placed the business proprietor on a sliding scale depending on the environment of the business and the immediate fact situation. If the circumstances are such that the visitor may be harmed if not protected, the owner is put on notice and must use reasonable care to protect him. Like the public utility, the proprietor inherits a greater duty of care.

"When a human life is at stake, the rule of care and diligence requires that, without regard to difficulties or expense, every precaution be taken reasonably to assure the safety and security of any persons lawfully coming into the immediate proximity of the dangerous agency . . ."³⁷

R.M.L.

FOOTNOTES

1. 65 A.C. 107, 416 P.2d 793 (1966).
2. *Hunter v. Mohawk Petroleum Corp.*, 51 Cal.2d 439, 334 P.2d 193 (1959).

3. *Porter v. California Jockey Club*, 134 Cal.App.2d 158, 285 P.2d 60 (1955). The appellate court held that there was no evidence as would reasonably put the defendant on notice of any impending danger.

4. *Indermaur v. Dames*, L.R. 2 C.P. 311, 36 L.C.P. 181 (1866).

5. Bohlen, *The Duty of a Landowner Toward Those Entering His Premises of Their Own Right*, 69 U.Pa. L.Rev. 142 (1920).

6. It should be noted that Professor Bohlen was the Reporter of this Section of the Restatement of Torts.

7. Prosser, *Law of Torts*, 399 § 61 (3rd ed. 1964).

8. Id. at 402-405.

9. Keeton, *Personal Injuries Resulting from Open and Obvious Conditions* 100 U.Pa.L. Rev. 629 (1952).

10. James, *Tort Liability of Occupiers of Land. Duties Owed to Licensees and Invitees*, 63 YaleL.J. 605, 622 629 (1953-4).

11. Id. at 622-623.

12. Id. at 623-629.

13. Prosser, supra note 6 at 404-405.

14. Restatement 348 was entitled, "Public Utility or Possessor of Business Premises: Acts of Third Persons."

15. This conclusion is substantiated by Professor James's criticism of the Restatement in this area. See James, supra note 9 at 623.

16. *Sorenson v. Hutson*, 175 Cal.App.2d 817, 348 P.2d 785 (1959).

17. Los Angeles Superior Court, Reporter's Transcript, p. 180.

18. 106 A.L.R. 1003.

19. For cases supporting this statement, see Prosser, supra note 6 at 401.

20. *Morris v. Atlantic & Pacific Tea Co.*, 384 Pa. 464, 121 A.2d 135 (1956).

21. *Funari v. Gravem-Inglis Baking Co.*, 40 Cal.App. 2d 25, 104 P.2d 44 (1940); *Mantino v. Sutter Hospital Assn.*, 211 Cal. 556, 296 Pac. 76 (1931).

22. *Paubel v. Hitz*, 339 Mo. 274, 96 S.W.2d 369 (1936); *Caron v. Grays Harbor Cty.*, 18 Wash.2d 397, 137 P.2d 626 (1943); 38 Am.Jur. *Negligence* § 97 (1941); 65 C.J.S. *Negligence* § 50 (1950).

23. *McCracken v. Curwensville Borough*, 309, Pa. 98, 163 Atl. 217 (1832).

24. *Ward v. Avery*, 113 Conn. 394, 155 Atl. 502 (1931); *Williamson v. Derry Electric Co.*, 89 N.H. 216, 196 Atl. 265 (1938).

25. *Nichols v. Town of Laurens*, 96 Iowa 388, 65 N.W. 335 (1895); *Campion v. City of Rochester*, 202 Minn. 136, 277 N.W. 422 (1938); *Williams v. City of New York*, 214 N.Y. 259, 108 N.E. 448 (1915).

26. *Revels v. Southern Cal. Edison Co.*, 113 Cal.App.2d 673, 248 P.2d 982 (1952); *Reboni v. Case Bros.*, 137 Conn. 501, 78 A.2d 887 (1951).

Mitchell v. Barton and Co., 126 Wash. 232, 217 Pac. 993 (1923); *McCracken v. Curwensville Borough*, 309 Pa. 98, 163 Atl. 217 (1932); James, *Assumption of Risk*, 61 YaleL.J. 141, 144-146 (1952).

28. *Porter v. California Jockey Club*, supra note 2.

29. *Perbost v. San Marino Hall-School*, 88 Cal.App.2d 796, 199 P.2d 701 (1948). *Mantino v. Sutter Hosp. Assn.*, 211 Cal. 556, 296 Pac. 76 (1931).

30. *Terrell v. Key System*, 69 Cal.App.2d 682, 232 P.2d 161 (1945); *Stockwell v. Bd. of Trustees*, 64 Cal.App.2d 197, 148 P.2d 405 (1944).

31. *Winn v. Holmes*, 143 Cal.App.2d 501, 299 P.2d 994 (1956).

32. *Edwards v. Hollywood Canteen*, 27 Cal.2d 802, 160 P.2d 94 (1945).

33. Los Angeles Superior Court, Reporter's Transcript, p. 249.

34. Id. at 86.

35. Id. at 393-394, 493.

36. *Samples v. Eaton*, 145 Cal.App.2d 312, 302 P.2d 431 (1956).

37. *Been v. Lummus Co.*, 76 Cal.App.2d 288, 173 P.2d 34 (1946).

RIGHTS OF LICENSEE— DAMAGES FOR LOST PROFITS—EXEMPLARY DAMAGES—ATTORNEY'S FEES:

*Lucky Auto Supply v. Turner:*¹

In 1954, plaintiff and defendant entered into a ten year lease which included a provision that defendant (lessor) would make available to plaintiff (lessee) a parking lot immediately behind the leased premises. This parking lot was to be for the use of the lessee and its customers for the term of the lease. Lessee was in the auto parts business and its service, installation departments, and rear entrance, were directly across an alley from the parking lot. It was necessary for the efficient operation of lessee's business to have the use of the parking lot for ease in delivering bulky parts to customers' cars, ease in identification of customers' cars without leaving the store and for customer parking. On-street parking was restricted on both major thoroughfares adjacent to the leased store during normal business hours.

In July, 1955 defendant approached plaintiff requesting permission to erect an office building on the parking lot. Plaintiff refused. Defendant, on Sept. 1, 1958, proceeded to erect the building thereby depriving plaintiff of the use of the parking lot for the remainder of the lease period.

Plaintiff instituted this suit for damages based on three counts:

- 1) Defendant wilfully and intentionally entered and trespassed on the lot by erecting a building thereon, thereby depriving plaintiff of its use and causing a loss of profit and good will in the amount of \$25,000.
- 2) Defendant wrongfully deprived plaintiff and its customers of their right to use the property, such deprivation of use amounting to \$17,000 and \$500 per month for the duration of the lease period.

- 3) Reasonable attorney's fees, which were allowable under the terms of the lease.

The trial court rendered a decision in favor of plaintiff in the amount of \$7,000 for loss of profit and good will, \$500 exemplary damages and \$2,500 as reasonable attorney's fees. This decision was affirmed on appeal, the court holding that damages for loss of profit are recoverable provided that evidence of such damage is reasonably reliable.

Cal. Civ. Code § 3333 provides that the measure of damages in tort is that amount which will compensate for all detriment proximately caused by the defendant's wrong. A long line of California cases has established the principle that damages for loss of profits are recoverable where there has been an established business since there is then a basis for estimating probable profit with reasonable certainty.² Thus, the trial judge did not err in admitting evidence as to the income of other stores owned by plaintiff and operated under similar circumstances as the store in question.

In *Natural Soda Products Co. v. City of Los Angeles*,³ damages for lost profits were allowed in a situation where there had been no profit at all in the years immediately preceding the tort. Plaintiff in that case, was in the business of extracting chemicals from the subsurface of a lake. For several years prior to the tort, plaintiff had been investing in a new plant and new equipment in order to increase production. Before this new plant could be put into operation, however, defendant flooded the lake making it impossible for the plant to function. Damages for lost profits were awarded since there was an operating experience sufficient to permit a reasonable estimate of probable income and expense. In the instant case there had been a profit in the years following the tort, but there was strong evidence, based on data obtained from the accounts of five of plaintiff's other stores, which were operated under comparable conditions, that the amount of profit should have been greater. These five stores showed

a 48% average increase in sales between 1958 and 1962, while the store in question showed only a 26% increase in sales.

Defendant generally denied liability for lost profits, because plaintiff's store showed a profit in the years following the tort. This claim does not stand analysis. To uphold this argument would be to decide that damages for lost profits are only to be allowed in a situation where there was no profit before and after the tort, as in *Natural Soda*, or in a situation where there was a profit before the tort which was totally extinguished by the tort. The only difference between these cases and the instant case is in the absolute level of profit before and after the tort. The only factor that is relevant and should be considered is the relative level of profit before and after the tort. Plaintiff should be allowed to recover in any situation where his profit after the tort is less than his profit before the tort, as long as his loss is provable by evidence of reasonable certainty.

The contract between the parties stated that "... if lessee shall bring any action for any relief against lessor, declaratory or otherwise, arising out of this lease, and lessor shall prevail in such action, lessee agrees to pay lessor a reasonable attorney's fee". The court allowed \$2,500 for attorney's fees to plaintiff. Defendant claimed that since plaintiff had been unsuccessful in a previous action seeking injunctive relief, and defendant successfully demurred to three of the six counts of plaintiff's second amended complaint in this action, defendant should be entitled to attorney's fees.

The court held, in effect, that there was a single cause of action, plaintiff eventually prevailing so that \$2,500 was not unreasonable. This seems to be the only reasonable way to construe the agreement. To allow defendant attorney's fees for successfully defending the injunction action and defeating three of the six counts and giving plaintiff attorney's fees for the three counts that succeeded would be a step backward in history to the time when the form of the

pleading was given great weight. In modern jurisdictions such as California, where the importance of the form of the pleadings is minimal, it would be an anachronism to sustain defendant's argument on this point. To do so would be to require that causes be pled with undue particularity to insure that all counts are successful.

In this case, plaintiff was allowed to sue in tort on an action similar to a common law action on the case. Since plaintiff did not have a lease on the parking lot, he had no property interest in it and therefore did not have the possession necessary to allow him to sue the owner in trespass or ejectment.⁴ Here plaintiff was allowed to sue in tort for the intentional interference with his right to exercise the license. It has been held that where a license is coupled with an interest, the licensee can sue in tort for acts depriving him of his right to exercise the license.⁵ Plaintiff's right to sue in tort, in this case, arose out of the contract giving him an interest in the use of the parking lot. Defendant's conduct in depriving plaintiff of this right under the license amounted to a tort, for which defendant was liable.

Plaintiff in this case, had the option of framing his cause of action in contract, but by framing it in tort, advantage was taken of the possibility (indeed the reality) of obtaining a judgment for exemplary damages. The question arises as to whether a plaintiff should be allowed any greater remedy in tort than he would have had in contract. It seems obvious that a licensee should be allowed to recover exemplary damages against a third party who interferes with his right to exercise his license, since in such a case there is no contract cause of action available. However, when the licensor interferes with the licensee's right by breaching his contract, the licensee should only be allowed contract damages. To allow more, as this court did, is to approach the end of allowing exemplary damages for any wilfull breach of contract. This case is no more an example of an intentional tort than is any other intentional breach of contract.

Cal. Civ. Code § 3294 defines the instances where exemplary damages are recoverable and limits those instances to obligations "not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied." Exemplary damages are to be awarded for the "sake of example and by way of punishing the defendant". It has been said that "punitive damages are not favorite of the law and should be allowed only with greatest caution and in the clearest of cases",⁶ and "exemplary damages may not be recovered in an action based on contract, even though the breach is wilfull or malicious, but when the action is in tort such damages may be recovered upon a proper showing of malice, fraud or oppression, even though the tort incidentally involves a breach of contract."⁷ There is certainly nothing in the facts of this case to indicate the presence of the "malice, fraud or oppression" necessary for the award of exemplary damages. Moreover, as has been shown, the tort cause of action in this case was one "arising from contract" within the meaning of § 3294. This case is a departure from the California policy of strictly limiting the instances wherein exemplary damages are to be awarded.

FOOTNOTES

1. Lucky Auto. Supply v. Turner, 244 A.C.A. 997, 53 Cal. Aptr. 628 (1966).
2. Natural Soda Products Co. v. City of Los Angeles, 23 Cal. 2d 193, 143 P. 2d 12 (1943); Hoag v. Jenan, 86 Cal. App. 2d 556, 195 P. 2d 451 (1948); Guttinger v. Calaveras Cement Co., 105 Cal. App.2d 382, 233 P. 2d 914 (1951); Yates v. Kuhl, 130 Cal. App. 2d 536, 279 P. 2d 563 (1955); Grupe v. Glick, 26 Cal. 2d 680, 160 P. 2d 832 (1945); Gainer v. Storck, 169 Cal. App. 2d 681, 338 P. 2d 195 (1959); Edwards v. Container Kraft Carton etc. Co., 161 Cal. App. 2d 752, 327 P. 2d (1958).
3. *Supra* note 2.
4. Union Petroleum Co. v. Bliven Petroleum Co., 72 Pa. 173 (1872); annot., 139 A.L.R. 1204 (1942).
5. Nahas v. Local 905, Retail Clerks Int'l Ass'n, 144 Cal. App. 2d 808, 302 P. 2d 829 (1956); Bell Tel. Co. v. Baltimore & O. Ry Co., 155 Pa. Super, 286, 38 A. 2d 732 (1944); 53 C.J.S., *Licenses* § 96b (1948); 25 Am. Pur. d, *Easements & Licenses* § 136 (1966).
6. Gombos v. Ashe, 158 Cal. App. 2d 517, 322 P. 2d 933 (1958).
7. Haigler v. Donnelly, 18 Cal. 2d 674, 117 P. 2d 331 (1941); Chelini v. Nieri, 32 Cal. 2d 480, 196 P. 2d 915 (1948).

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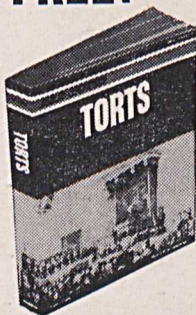
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