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Case Comments

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Automobiles — Guest Statutes — Change of Guest Status

By HARMON S. GRAVES III

William Andrews was drinking in a bar and looking for company for a trip. Nell Kirk, who had gone out with him a few times before, accepted his invitation when her girl friend, Ann Coppinger, agreed to go along with them. They had driven only a short distance when Andrews began swerving the car while laughing and talking to the girls. Both girls protested, and as an answer Andrews increased his speed. Nell requested repeatedly to be let out of the car, right up to the time Andrews entered a curve at eighty-five miles per hour causing the car to leave the road and overturn several times. All three occupants were injured. The court held that when one accepts an invitation to become a passenger in an automobile, without prior knowledge that the driver is likely to drive dangerously, and the passenger is put in fear of serious harm from such conduct, a protest against negligent driving, coupled with a demand to be let out of the car, will change the status of the guest to that of involuntary passenger if the demand is refused. *Andrews v. Kirk*, 106 So. 2nd 110 (Fla. 1958).

The question of change of status met squarely in this case immediately raises the more inclusive question of whether, by allowing a change of status and thus permitting a rider to recover for injuries caused by simple negligence, the protection intended by the guest statutes for the automobile host is abrogated.

In the absence of statute, the majority view under the common law requires the driver to exercise reasonable care toward his invited guest in the operation of the vehicle.[1] But the application of the law of real property normally gives the gratuitous guest the status of a licensee.[2] This means that the operator is not required to make the vehicle safe for the guest, but that the operator owes the guest the duty merely of not increasing the existing hazards of travel nor creating new peril.[3]

The reasoning appears to be that permission to ride in the automobile of another is essentially the same as permission to enter and use another's premises. Under such conditions, the operator owes the guest a duty to exercise reasonable care, or, expressed in terms of negligence, he is liable to his guest for ordinary negligence.[4]

It is primarily against this background that the legislatures in numerous states have enacted statutory changes in the common law rule of ordinary negligence. Much the same result achieved through the "guest statutes" was effected in the minority states under the common law by holding the operator liable to the gratuitous guest only for gross negligence.[5]

1 Annot., 20 A.L.R. 1016 (1922).
2 4 Blashfield, Cyclopedia of Automobile Law and Practice, § 2295, pt. 1 (perm. ed. 1946).
3 Perkins v. Galloway, 194 Ala. 265, 69 So. 875 (1915).
4 Dickerson v. Connecticut Co., 98 Conn. 87, 118 Atl. 518 (1922).
5 E.g., Epps v. Parrish, 26 Ga. App. 255, 195 S.E. 226 (1938).

Perhaps the most emphatic language justifying the adoption of "guest statutes" is that of a Colorado case, *Dobbs v. Sugioka*:[6]

> "Clearly they were enacted to prevent recovery by those who had no moral right to recompense, those carried for their own convenience, for their own business or pleasure, those invited by the operator as a mere generous gesture, 'hitchhikers' and 'bums' who sought to make profit out of softhearted and unfortunate motorists."

Stated in more general terms, the guest statutes were designed to relieve the severity of the common law rule which requires the driver, under the majority view, to exercise ordinary care even to a recipient of his kindness and hospitality.[7]

Guest statutes of the several states have restricted the common law liability in varying degrees. An extreme example is a requirement in the Washington statute[8] expressed in *Atkins v. Hemphill*.[9] There, a sixteen-year-old girl accepted an invitation to ride with the defendant, but upon discovering he had been drinking and was driving in a negligent manner, she demanded to be let out of the car. Her request, although repeated frequently, was refused. While attempting to pass one truck, the defendant collided with

6 117 Colo. 210, 185 P.2d 784 (1947).
7 4 Blashfield, Cyclopedia of Automobile Law and Practice, § 2292, pt.1, at 305 (perm. ed. 1946). For a discussion of the pros and cons of guest statutes see Kripke, *Should Colorado Retain the "Guest Statute"?—Public Policy v. Insurance Policy*, 35 DICTA 179 (1958) and Wormwood, *In Defense of the Colorado Guest Statute*, 35 DICTA 174 (1958).
8 Wash. Rev. Stat. Ann. § 6360-121 (1937).
9 33 Wash. 2d 735, 207 P.2d 195 (1949).

another. The court held that the girl's demands did not terminate her status as a guest within the requirements of the local guest statute, which disallowed recovery for all but "intentional" accidents.

This case should be viewed in light of the question: "Who is a *guest* for the purposes of the automobile guest statutes?" Generally, a "guest" may be defined as one who voluntarily accepts the hospitality of another, and the term normally excludes one who has such hospitality forced upon him.[10] For example, a kidnapped or abducted person who is driven in a car is an involuntary rider and is outside the statute.[11] It would appear, then, that one who is not voluntarily in the car would not be a guest and subject to the guest statute. Unfortunately, Washington has taken the view that once the guest status has been created it continues for the duration of the trip.[12]

There is general agreement that a guest's simple protest to negligent driving, unaccompanied by a demand to be let out, is insufficient to terminate the guest status.[13]

Change of status of a guest was allowed in the Georgia case of *Blanchard v. Ogletree*.[14] The holding of this case was adopted by the Florida court in the instant case, but it must be noted that Georgia does not have a guest statute and it is a minority state under the common law, limiting the driver's liability to gross negligence.[15] In *Blanchard* the court held that one who rode gratuitously in another's automobile became engaged in a joint enterprise and assumed the risk of the driver's ordinary negligence. But, when the passenger requested to leave the car, she withdrew from the joint enterprise and no longer assumed the risk. Thus, the driver was liable for ordinary negligence when he refused the rider's request.

The views of the Florida and Georgia courts appear to reflect the underlying purpose of the guest statutes without generally subjecting the automobile host to the consequences of ordinary negligence. Florida permits a change of status under its guest statute[16] which is similar to those enacted in most states; i.e., it requires a showing of at least gross negligence, and Georgia takes a similar stand under the minority common law view.

Some courts have reached the same result without squarely facing the question. This they have done by making the refusal of the host to allow the guest to depart, one of the elements leading to a finding of gross negligence.[17] Nothing seems to indicate that a person who is invited as a gratuitous guest must remain one. The basis of the host-guest relationship is one of mutual consent and a withdrawal of consent by the guest ought to end the guest status.

10 Kudrna v. Adamski, 188 Ore. 396, 216 P.2d 262 (1950).
11 Green v. Jones, 136 Colo. 512, 319 P.2d 1083 (1958) (dictum).
12 Taylor v. Taug, 17 Wash. 2d 533, 136 P.2d 176 (1943).
13 Annot., 25 A.L.R.2d 1448 (1952).
14 41 Ga. App. 2, 152 S.E. 116 (1930).
15 *Ibid.*
16 Fla. Ann. Stat. § 320.59 (1953).
17 *E.g.*, Berman v. Berman, 110 Conn. 69, 147 Atl. 568 (1929).

Automobiles—Vehicles At Rest Or Unattended—Non-Liability Of Owner To Third Person Injured By Automobile Driven By Escaping Thief

BY JOHN L. RICH

In violation of a city ordinance, the defendant left the keys in the ignition switch of her unlocked, parked automobile. The automobile was stolen, and sometime later, while being pursued by police, the thief lost control of the automobile, damaging the plaintiff's grape arbor. The parties agreed that the collision and damage did not occur in the act of theft or in immediate pursuit thereafter. *Held*: Plaintiff's declaration dismissed. The ordinance imposes upon an owner no duty making him liable to a third person whom a thief might negligently injure. Therefore, the plaintiff was not within the class of persons whom the ordinance was designed to protect. *Corinti v. Wittkopp*, 93 N.W.2d 906 (Mich. 1959).

Under the common law rule where there is no statute or ordinance involved it is generally held that an automobile owner is not liable for the negligence of a thief where the owner has left his keys in the ignition switch.[1] However, some courts have indicated that even though a statute or ordinance is not involved, the owner might be held liable if the circumstances were such that the theft and the subsequent negligence of the thief were reasonably foreseeable by the owner.[2] These courts have placed an owner of an automobile under a duty to exercise such care as a person of ordinary prudence would exercise in leaving an automobile upon a public street.

The reasoning of the courts has been complicated by statutes or ordinances which prohibit an automobile driver from leaving his automobile unattended with the keys in the ignition.[3] The majority of cases involving such statutes or ordinances have held the owner

1 Bennett v. Arctic Insulation, Inc., 253 F.2d 652 (9th Cir. 1950); Holder v. Poperaden, 146 Cal. App. 2d 557, 304 P.2d 204 (1956); Wagner v. Arthur, 134 N.E.2d 409 (Ohio C.P. 1956). *But see* Schaff v. R. W. Claxton, Inc., 144 F.2d 532 (D.C. Cir. 1944).

2 Curtis v. Jacobson, 142 Me. 351, 54 A.2d 520 (1947); Williams v. Mickens, 247 N.C. 262, 100 S.E.2d 511 (1957); Reti v. Vaniska, Inc., 14 N.J. Super. 94, 81 A.2d 377 (App. Div. 1951).

3 See, e.g., Colo. Rev. Stat. § 13-4-76 (1953); Denver, Colo., Rev. Munic. Code § 518.7 (1950).

not liable to third persons for the negligent acts of a thief.[4] However, a respectable minority of courts have held the owner liable because of the statute or ordinance involved.[5] The principal case represents the majority view on this problem.[6]

While the majority view has held the owner not liable, the courts have reached this result by various lines of reasoning.[7] The general theme seems to be that the owner's original act of leaving the keys in the ignition switch is not the proximate cause of the third person's injuries.[8] The proximate cause is the negligent driving of the thief.[9] This negligence of the thief has been called an intervening efficient cause[10] or an intervening independent act[11] which interrupts the chain of causation between the owner's act and the third person's injuries.

It has become necessary for the courts to determine the intent of the legislative body in enacting the ordinance or statute. The second line of reasoning arriving at the majority result is that such an ordinance or statute is enacted for the protection of the automobile owner and as an aid to proper law enforcement rather than to prevent negligent driving from the scene of a car theft.[12] The minority view has interpreted such ordinances or statutes as safety measures intended to prevent injuries to the public.[13]

Occasionally the ordinance or statute itself will contain an exclusionary sentence stating that it shall have no bearing in any civil action.[14] Since the obvious intent of an ordinance or statute containing this proviso is that a violation should not affect civil liability, the third person is not one of the class of persons for whose benefit it was enacted and, hence, cannot recover from the owner for the negligent act of the thief.[15]

The minority view considers an ordinance or statute prohibiting an owner from leaving the keys in the ignition switch of his automobile not an anti-theft measure for the benefit of the owner, but rather as a measure designed to promote the public safety.[16] It is notable that in every case upholding the minority rule, the injury or damage to the third person occurred during the act of theft or during immediate pursuit. The courts seem to emphasize this fact by saying that an owner should foresee that a thief who steals his automobile will be negligent when fleeing from the scene of the

4 Frank v. Ralston, 248 F.2d 541 (6th Cir. 1957); Richards v. Stanley, 43 Cal. 2d 60, 271 P.2d 23 (1954); Kiste v. Red Cab, Inc., 122 Ind. App. 587, 108 N.E.2d 395 (1952); Galbraith v. Levin, 323 Mass. 225, 81 N.E.2d 560 (1948); Slater v. T. C. Baker Co., 261 Mass. 424, 158 N.E. 778 (1927); Anderson v. Theisen, 231 Minn. 369, 43 N.W.2d 272 (1950); Gower v. Lamb, 282 S.W.2d 867 (Mo. App. 1955).

5 Ross v. Hartman, 139 F.2d 14 (D.C. Cir. 1943), *cert. denied*, 321 U.S. 790 (1944); Ney v. Yellow Cab Co., 2 Ill. 2d 74, 117 N.E.2d 74 (1954); Ostergard v. Frisch, 333 Ill. App. 359, 77 N.E.2d 537 (1948); Garbo v. Walker, 57 Ohio Op. 363, 129 N.E.2d 537 (C.P. 1955).

6 Annot., 51 A.L.R.2d 633 (1957).

7 Note, 1951 Wis. L. Rev. 740.

8 See generally Galbraith v. Levin, 323 Mass. 225, 81 N.E.2d 560 (1958); Anderson v. Theisen, 231 Min. 369, 43 N.W.2d 272 (1950).

9 Sullivan v. Griffin, 318 Mass. 359, 61 N.E.2d 330 (1945); Anderson v. Theisen, 231 Minn. 369, 43 N.W.2d 272 (1950).

10 Anderson v. Theisen, *supra* note 9 (alternative holding).

11 Slater v. T. C. Baker Co., 261 Mass. 424, 158 N.E. 778 (1927).

12 Anderson v. Theisen, 231 Minn. 369, 43 N.W.2d 272 (1950) (alternative holding).

13 Ross v. Hartman, 139 F.2d 14 (D.C. Cir. 1943), *cert. denied*, 321 U.S. 790 (1944); Ney v. Yellow Cab Co., 2 Ill. 2d 74, 117 N.E.2d 74 (1954).

14 For cases construing such ordinances or statutes, see Richards v. Stanley, 43 Cal. 2d 60, 271 P.2d 23 (1954); Gower v. Lamb, 282 S.W.2d 867 (Mo. App. 1955).

15 Gower v. Lamb, *supra* note 14.

16 Cases cited note 5 *supra*.

theft.[17] However, the fallacy of this is that an owner would have no reason to foresee that a thief might be negligent, since a thief, in order not to attract attention, may be very careful when leaving the scene of the theft.[18] A recent case, which held an owner not liable, has repudiated any distinction between an injury occurring while the thief is fleeing and one occurring after the theft has been completed.[19] If no distinction is made, the minority rule would apparently hold an owner liable even though a thief injured a third person weeks or months after the theft. While the minority position has been rationalized on the grounds of public policy,[20] such an extreme position "goes far towards making the defendant an insurer as to the consequences of every accident in which his automobile might become involved while operated by the original thief or his successors in possession."[21]

The court in the instant case reasoned that the ordinance did not impose a duty upon the driver to remove his keys from the ignition switch for the benefit of third persons whom a theif might negligently injure. Therefore, the liability sought to be imposed was beyond the scope of duty required by the ordinance. The same result of non-liability would have been reached whether the court reasoned that the conduct of the thief was an intervening cause breaking the chain of causation between the defendant's act of leaving her keys in the ignition switch and the subsequent injury to the plaintiff or, as the court did reason, that the plaintiff was not within the class of persons whom the ordinance was designed to protect.

Obviously the court reached the right decision by following the majority rule. However, since it was agreed by the parties that the damage did not occur during the actual perpetration of the theft or in immediate pursuit thereafter, it is still possible that the Michigan court may make a distinction in a proper case and hold an automobile owner liable to a third person where a thief negligently injures such third person during or just after a car theft. Thus, the instant court may find that an owner owes a duty to a plaintiff who is injured by a thief driving away from the place of his theft. It would have been better had the court reasoned that the negligent driving of the thief was the legal cause[22] of the plaintiff's damage. It would be more difficult for the court to make any future distinction based on time of injury if the reasoning had been in terms of legal cause rather than on the ground that the defendant owed no duty to this particular plaintiff. Then all doubt would have been removed as to whether or not an automobile owner will be liable in the future to third persons injured by a thief fleeing the scene of his theft.

17 See, e.g., *Ostergard v. Frisch*, 333 Ill. App. 359, 77 N.E.2d 537 (1948).
18 Holder v. Poperaden, 146 Cal. App. 2d 557, 304 P.2d 204 (1956); Saracco v. Lyttle, 11 N.J. Super. 254, 78 A.2d 288 (App. Div. 1951).
19 Anderson v. Theisen, 231 Minn. 369, 43 N.W.2d 272 (1950).
20 Comment, 34 Iowa L. Rev. 376 (1949).
21 Curtis v. Jacobson, 142 Me. 351, 362, 54 A.2d 520, 525 (1947).
22 For a definition of "legal cause," see Restatement, Torts § 9 (1934).

Constitutional Law — Commerce and Due Process Clauses — State Regulation of Interstate Commerce — State Taxing Power

By ANNE DOUTHIT

The state income tax laws of both Minnesota and Georgia levy taxes on the net income of foreign corporations whose business within the taxing state consists exclusively of interstate commerce. The taxes are imposed only on that portion of net income which is earned from and fairly apportioned to activities within the taxing state. The statutes were attacked as violating the commerce and due process clauses of the United States Constitution. The Minnesota Supreme Court upheld Minnesota's tax, but Georgia's law was declared invalid by that state's court. The United States Supreme Court noted jurisdiction of the appeal in the Minnesota case and granted certiorari in the Georgia case. The objecting taxpayers were foreign corporations engaged in the manufacture and sale of products from plants located outside the taxing states. Each maintained a sales office within the state from which salesmen solicited orders in the area. Orders were approved in the home offices and shipments were sent directly to the customers. Neither merchandise inventories nor property, other than office furniture, was located within the taxing states; nor was any capital employed in the states other than expenditures for office rent, salesmen's salaries and incidental selling expenses. In each case, a substantial portion of the taxpayer's total sales volume was affected.

The Court held that both of the statutes in question were valid. The opinion declared that net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to activities within the taxing state. Maintaining a sales office for the solicitation of interstate sales is sufficient activity within the state to subject the selling organization to an obligation to share in the cost of local government. *Northwestern States Portland Cement Co. v. Minnesota,* 79 Sup. Ct. 357 (1959).

The conflict between the states' taxing power, and the power of Congress to regulate commerce between and among the states has endured a long and stormy history in the courts. The economic growth of this country, the attendant mushrooming of commerce across state lines, and the increasing revenue requirements of state and local governments, have gradually made it necessary for the courts to distinguish between those taxes which are regulatory in nature, and those which merely prorate the costs of local government over all local activities.

Out of the several hundred cases reviewed by the Supreme Court have evolved a number of tests for determining the validity and constitutionality of state taxing measures. Fundamental to the entire line of cases is the rule that the tax cannot impose a direct restriction on interstate commerce.[1] Nor can it be discriminatory, favoring purely local or intrastate activity.[2] Therefore, a tax imposed upon the privilege of carrying on interstate business is not

1 Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).
2 Robbins v. Shelby County Taxing District, 120 U.S. 489 (1887).

within the power of a state.[3] Some taxing formulas have been declared unenforceable because they have attempted to subject interstate commerce to multiple taxation, an undue burden which would seriously impede commerce among the states.[4] The taxation of property after it has come to rest within a state,[5] and the imposition of sales taxes on certain interstate transactions have been upheld.[6]

The leading case dealing with the taxation of net income from interstate commerce is *United States Glue Co. v. Town of Oak Creek.*[7] There the taxpayer was a domestic corporation. The case established that a net income tax is not a direct, but an incidental, burden on interstate commerce. It was concluded that such a tax, as long as it is nondiscriminatory, is one of the general burdens of government from which persons and corporations otherwise subject to the state's jurisdiction cannot be exempted. While the language did not limit the application of the rule to domestic corporations, it implied that a foreign corporation, to be so taxed, must at least be subject to the state's jurisdiction, and be entitled to the rights and privileges accorded domestic corporations. In order for a foreign corporation to acquire such rights, normally it must qualify to do business in the state, and thus become domiciled.

The question of taxation of income earned within the borders of the taxing state by a person outside that state's jurisdiction was discussed in *Shaffer v. Carter.*[8] However, the facts in that case were not comparable to the present fact situation because interstate activity was not involved. In the *Shaffer* case, Oklahoma was attempting to tax a nonresident's income which derived from oil and gas leases and properties located in Oklahoma. The case turned on the fact that Oklahoma had jurisdiction over the property, though the owner was a nonresident. Although the decision stated that the business of a nonresident should not be exempted from making a ratable contribution in taxes for the support of the government, it cannot be interpreted as authority for taxing income of a nonresident derived from exclusively interstate commerce.

3 Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951).
4 Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939).
5 Minnesota v. Blasius, 290 U.S. 1 (1933).
6 McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940).
7 247 U.S. 231 (1918).
8 252 U.S. 37 (1920).

A later case,[9] following the *United States Glue* and *Shaffer* decisions defined further the obligation of a foreign corporation to share in the costs of local government. The test, stated this opinion, is "whether the taxing power exerted by the state bears fiscal relations to protection, opportunities and benefits given by the state." In a word, has "the state given anything for which it can ask return?"[10] The taxing statute was upheld in this instance, but it must be noted that the foreign corporation was locally licensed and actually deriving benefits from the state. In effect, it had moved into the state to carry on an intrastate operation.

The difference beween an unlicensed foreign corporation and a licensed or qualified foreign corporation was discussed in a case dealing with a sales tax levy.[11] The case declared the levy unenforceable, though it was similar to a sales tax which had previously been upheld.[12] The distinction between the two cases was the fact that in one case, the corporation maintained sales offices in the taxing state, took contracts there, and made deliveries; while in the other case all offices were maintained outside the state, sales made out of the state, and the delivery consummated in interstate commerce. However, since the incidence of a sales tax falls on the consumer, and not on the seller, such cases are not necessarily controlling, or even guiding in the instant fact situation.

The concept established by the principal case is not actually as revolutionary as some of the publicity accorded to it would imply. The Supreme Court without opinion affirmed a California decision upholding a comparable tax imposed upon income earned through similar business activities.[13] There, as in the instant case, the corporation had not qualified to do business, but was merely maintaining a sales office for the purpose of soliciting orders which were accepted and filled from the home office. The salesmen did have the additional authority to make adjustments and collections. The California court based its decision on *United States Glue Co.* and *Shaffer* as well as two other cases.[14] The Court found that these cases established that the taxation of net income from interstate commerce, as distinguished from the taxation of the privilege to engage in interstate commerce, is not prohibited by the commerce clause.

Other cases which have dealt with the question of the state taxation of income from interstate commerce have concerned themselves with the fairness and reasonableness of the apportionment formula established by the statute in question.[15] The foreign corporations involved have been domiciled in the taxing state, and the issue whether they were subject to the income tax imposed has not been in question. Substantial property had been employed in the

9 Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1940); see also Memphis Gas Co. v. Beeler, 315 U.S. 649 (1942) (allowed nondiscriminatory tax on net income of a foreign corporation having a commercial domicile in the state or on income derived from within the state).

10 Wisconsin v. J. C. Penney Co., *supra* note 9, at 445.

11 McLeod v. Dilworth, 322 U.S. 327 (1944).

12 McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940).

13 West Publishing Co. v. McColgan, 27 Cal. 2d 705, 166 P.2d 861 (1946), *aff'd per curiam*, 328 U.S. 823 (1946).

14 Bass, Ratcliff & Gretton v. State Tax Commission, 266 U.S. 281 (1924); Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920).

15 Hans Rees' Sons, Inc. v. North Carolina, 283 U.S. 123 (1931); cases cited at note 16 *supra*.

state in each case, so there was clearly an obligation to the state for the protection, benefits and opportunities being given. This line of cases established merely that the apportionment formula used must be reasonably related to the local activities of the taxpayer.

The chief requisite of a fairly apportioned taxing formula is that it minimize the possibility of the imposition of multiple tax burdens on interstate activities. For this reason, most formulas based upon gross receipts rather than net income have been declared unenforceable by the Supreme Court.[16] The distinction between a tax based upon gross receipts and one based upon net income was defined in the *United States Glue Co.* case.[17] A tax upon gross receipts, is essentially one on each transaction, depending upon its magnitude, whether or not an actual profit was derived from such a transaction. A taxing formula based upon such amounts, imposes a tax even though no income has been earned in connection with the operations being taxed. Tax formulas which have been declared invalid have a common characteristic—that is, the imposition on an activity of a burden which is capable of being imposed by every state that particular activity touches.[18] Gross receipts formulas have been upheld when applied to an intrastate incident sufficiently disjoined from interstate activities so that it could be proven beyond a reasonable doubt that the apportionment was fair, and the taxpayer was free from the cumulative burden threat.[19]

To reiterate the guiding principles established by the cases reviewed, the state may assess the fruits of interstate commerce, in order to defray the costs of local government, providing it does so through a channel which does not conflict with Congress' exclusive power to regulate the commerce among the states. In order to meet this requirement the taxable activities must be sufficiently localized to establish a relationship with the state that brings them within the state's taxing power, and the tax levy must not unduly burden the free flow of commerce across state lines nor favor local commerce. Do the tax levies questioned in the instant cases meet these tests?

Mr. Justice Whittaker, in a particularly sharp dissent, stated that the past decisions in this area are "remarkably consistent," and

16 Freeman v. Hewitt, 329 U.S. 249 (1946); Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939); Galveston, H. & S.A.R. Co. v. Texas, 210 U.S. 217 (1908).
17 247 U.S. at 328.
18 Western Livestock v. Bureau of Revenue, 303 U.S. 250 (1938).
19 Norton Company v. Department of Revenue, 340 U.S. 534 (1951); Joseph v. Carter & Weekes Co., 330 U.S. 422 (1947).

careful analysis, understanding, categorizing, and application of those decisions would result in a somewhat different conclusion.[20] He noted that the following questions should be carefully examined in applying the Court's opinions:

> "(1) whether the tax was laid upon the general income of a resident or domiciliary of the taxing State, (2) whether the taxpayer's production, manufacturing, distribution or management facilities, or some of them, were located in the taxing State, (3) whether the taxpayer conducted *both* intrastate and interstate commerce in the taxing State, and if so, (4) whether the tax was directly laid on income derived from interstate commerce, or—what is the equivalent—on the whole of the income, or whether the whole of the income was used as one of the several factors in an apportionment formula merely for the purpose of fairly measuring the uncertain percentage or proportion of the total income that was earned within the taxing State."[21]

He distinguished all the cases relied upon in the majority opinion, even the California case discussed above.[22] In his opinion there were certain activities which were purely intrastate. His reason for dissenting was that the opinion was not based on precedent, but was breaking new ground in an area expressly forbidden the states by the commerce clause.

Mr. Justice Frankfurter joined with Mr. Justice Whittaker in his dissent, and also added another reason for disagreeing with the majority opinion.[23] He found that taxation of the type of commercial activity here involved would actively and unduly burden the free flow of commerce among the states. His dissenting opinion described the hardships that would be placed on thousands of small and medium-sized corporations doing a small volume of business in a number of states. The additional record-keeping requirements and taxation costs, will, he felt, seriously impede interstate commerce by discouraging selling in states where the volume does not justify the inconveniences which will be involved. Another impediment will be created through the increase of litigation involving the fairness and reasonableness of apportionment formulas applied by taxing states. In view of the extensive litigation now present in this area, this argument is unquestionably valid.

Although the review of the cases has revealed that generally the tax has been laid on a resident or domiciliary employing substantial property and capital in the state, this has not necessarily been the test or guiding principle. Rather the test has been the relationship between the commercial activity and the privileges and protection provided by the state, coupled with the prohibition against discrimination in favor of local commerce.[24] What brings a commercial activity into the realm of the state's taxing power? The case in question has found that the maintenance of a sales office for

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20 79 Sup. Ct. at 372.
21 *Ibid.*
22 West Publishing Co. v. McColgan, 27 Cal. 2d 705, 166 P.2d 861 (1946), *aff'd* per curiam, 328 U.S. 823 (1946).
23 79 Sup. Ct. at 379.
24 See Nippert v. City of Richmond, 327 U.S. 416 (1946).

the solicitation of sales in the state "forms a sufficient nexus."[25] Yet, does a corporation which has not qualified to do business actually receive any benefits and protection from the state in which it is carrying on its interstate business? The instant case holds that it does, or at least it does if a substantial portion of the foreign corporation's operations are transacted in the taxing state. What is substantial? There has been no guide to help determine how substantial and voluminous such an operation must be in order to come within the rule. Economists who have studied this question believe that contacts such as the one now in question are too remote to actually be considered as an integral part of the state's economy.[26] How far can the rule in this case be extended? Could it possibly be construed to cover mail order operations and sales solicited by traveling salesmen when there is no sales office located in the state? These are some of the questions that will be coming up for further litigation and determination by the courts.

From the economists' point of view, there are a number of valid reasons why the rule established by this case can seriously impede the free flow of commerce.[27] One was mentioned by Mr. Justice Frankfurter—that is, the inconvenience and expense of filing a multitude of income tax returns. Also, there is the threat of creating multiple tax burdens. Another one mentioned was the ultimate redistribution of tax resources throughout the states through the divergent apportionment methods and the allowance of tax credits by the various taxing authorities.

The solution suggested in Frankfurter's dissent is congressional action which would restrict or impose well-defined limitations upon the states' taxing powers in this area.[28] This appears to be a stiff measure, yet it comes within the power which is exclusively in Congress if that body should wish to exercise it. In view of the fact that thirty-five states have taxing measures which provide for a direct tax levy on corporate net income, there is little question that many organizations are going to find numerous new tax liabilities imposed upon them within the next few years. Probably the taxing authorities in many states are going to find this source of revenue is not sufficiently lucrative to make it worth the extra cost and trouble of administering it. Yet, as they begin losing present sources of revenue to other states, they may find it necessary to take advantage of this source. Unless some limitations are defined, there will no doubt be some real effort to extend the effect of this decision over situations far beyond the intention of the Court.

25 79 Sup. Ct. at 359.
26 Studenski and Glasser, *New Threat In State Busines Taxation*, Harv. Bus. Rev. Nov.-Dec., 1958, p. 77.
27 *Ibid.*
28 79 Sup. Ct. at 382.

Constitutional Law—Delegation of Legislative Power—Legislature Cannot Delegate Its Power to Define a Crime by Making Violation of Rules and Regulations of Administrative Body a Crime.

By JOHN E. ARCHIBOLD

Casey was a defendant in a justice of the peace court prosecution for a misdemeanor arising from failure to obtain a trailer court license. It was alleged that operation of his trailer court was contrary to the rules and regulations of the Board of Health of the Tri-County District Health Department. Violation of an order, rule of regulation of a county or district health department was by statute declared a misdemeanor punishable by fine up to $1000, one year in jail, or both.[1] A jury returned a verdict of guilty. Appeal was taken to the county court where the defendant was again found guilty. On writ of error to the Supreme Court of Colorado *held:* reversed. The legislature cannot lawfully delegate its power of defining a crime to the district or county health departments by declaring violations of their orders, rules and regulations to be crimes. Such action contravenes Article III of the Colorado Constitution. *Casey v. People,* 336 P.2d 308 (Colo. 1959).

The *Casey* decision is a further manifestation of the vigor with which the rule against delegation of legislative power is applied in Colorado. The prohibition against the delegation of legislative power is a corollary of the separation of powers into legislative, executive, and judicial departments. With the rise of administrative agencies, the courts have had to cope with the problem of how much administrative discretion can be exercised by such agencies without an improper intrusion into the legislative function. The general principle was stated in the 1892 case of *Field v. Clark:* "The Legislature (Congress) cannot delegate its power to make a law, but it can make a law to delegate its powers to determine some fact or state of facts upon which the law makes, or intends to make, its own action depend."[2] By this is meant that the legislative body must declare its policy and establish sufficiently clear standards within which the administrative body is to operate. The principle of this case was strongly reiterated in all of the Colorado cases cited in the *Casey* opinion.

In determining if the *Field* principle applies to the more specific issue of whether or not the legislative body can declare the violation of a rule or regulation of an executive department or agency to be a crime, a majority of federal and state cases have taken a position contrary to that of the instant case. The United States Supreme Court in 1911 upheld the power of Congress to declare that violations of the rules and regulations of the Secretary of Agriculture with respect to grazing and forest regulation would be punishable.[3] Since then there have been decisions upholding punishment for violations of the rules and regulations of the Commissioner of Internal Revenue[4] and the O.P.A. Administrator.[5] Pun-

1 Colo. Rev. Stat. § 66-2-14(1) (1953).
2 143 U.S. 649, 694 (1892).
3 United States v. Grimaud, 220 U.S. 506 (1911).
4 United States v. Tishman, 99 F.2d 951 (7th Cir. 1938), *cert. denied,* 306 U.S. 636 (1939).
5 United States v. Gruenwald, 66 F. Supp. 223 (W.D. Pa. 1946).

ishment for disobeying an order of a local draft board has likewise been sustained.[6] Apparently no federal case has held it to be an unconstitutional delegation of power for Congress to declare that the violation of a rule, regulation or order of a federal department or agency results in a crime.

Although the *Field* principle has been more strictly applied with respect to state cases, even here one finds that the Colorado position exemplified in *Casey* is a minority one. A New York court, upholding the conviction of a motorist who had violated a traffic rule of the Palisades Interstate Park Commission, said that the legislative policy declaring that violations of the rules and regulations of the Commission would be misdemeanors was not an unconstitutional delegation of legislative power to define a crime.[7] The fact that the Director of Conservation of Alabama could change the regulations "from time to time" did not deter the Alabama court from upholding a criminal conviction under such regulations.[8] The Missouri Supreme Court has said, "punitive laws or laws fixing punishment as for violations of administrative rules are solely referrable to the legislative power and function, and an administrative ruling may have the force of law in that violations thereof are punishable as public offenses.[9] The Oklahoma Supreme Court has said what is practically the same thing.[10]

Massachusetts and New York have not only upheld, respectively, the power of the Airport Commission, and the Bureau of Smoke Control, to prescribe rules and regulations backed by criminal sanctions, but they have even gone so far as to allow the administrative agencies to fix the *penalty*, "up to $500" in the Massachusetts case,[11] and "between $25 and $100 for the first offense" in the New York case.[12]

A minimum fair wage standard *order* of the Commissioner of Labor and Industry of New Jersey was upheld in *Lane v. Holderman*.[13] A federal district court, construing a Colorado statute[14] relative to the unfair cancellation of motor vehicle dealer franchises, stated by way of dictum that it was permissible for an administrative body to make rules and regulations, the violation of which is a crime, provided the legislature sets up a primary standard.[15] A Florida case has said that before a person can be charged with a criminal offense for violating an order of an administrative board, the statutory provision permitting such an order should be strictly complied with.[16]

The *Casey* decision apparently stands alone. The author has been unable to discover any other decision, federal or state, where an appellate court has flatly and without qualification denied the

6 United States v. Newman, 44 F. Supp. 817 (E.D. Ill. 1942).
7 People v. Kantrowitz, 10 Misc. 2d 667, 173 N.Y.S.2d 213 (Rockland County Ct. 1958).
8 State v. Keel, 33 Ala. 609, 35 So. 2d 625 (1948).
9 Marsh v. Bartlett, 342 Mo. 526, 121 S.W.2d 737 (1938).
10 Atchley v. Board of Barber Examiners, 208 Okla. 453, 257 P.2d 302 (1953).
11 Commonwealth v. Diaz, 326 Mass. 525, 95 N.E.2d 666 (1950).
12 People v. Bevevino, 202 Misc. 723, 112 N.Y.S.2d 647 (N.Y.C. Magis. Ct. 1952)
13 40 N.J. Super. 329, 123 A.2d 56 (App. Div. 1956).
14 Colo. Rev. Stat. § 13-11-14(10)(c) (Supp. 1957).
15 General Motors Corp. v. Blevins, 144 F. Supp. 381 (D. Colo. 1956).
16 Economy Cash & Carry Cleaners v. Cleaning, Dyeing, & Pressing Board, 128 Fla. 408, 174 So. 879 (1937).

power of the legislative body to declare that the violation of the rules and regulations of an administrative body shall be a crime. One cannot reasonably quarrel with the *result* in the *Casey* case, for to allow a district health department to make rules and regulations at will without a proper legislative standard, and then to make a violation of such rules and regulations a crime, is a clear and unquestioned disregard of the principle of *Field v. Clark*. The *Casey* decision, in the opinion of the author, would have been more satisfactory if it had been couched in terms of the legislature's failure to prescribe sufficiently clear standards within which the county and district health departments could lay down reasonable rules and regulations. Had the legislature done this, its declaration that violation of those rules and regulations would constitute a misdemeanor would not seem so objectionable. We can be grateful that the Supreme Court of Colorado has not emasculated the sound constitutional barrier against the delegation of legislative power, as the New York and Massachusetts courts seem to have done. Nevertheless, the language of the *Casey* opinion is unnecessarily broad. Because of its failure to recognize careful distinctions, the opinion puts Colorado out of step with other courts. This being so, *Casey* stands as a weak precedent, and with the increasing importance of governmental agencies, the Supreme Court of Colorado at some future time may have to limit this ruling.

Constitutional Law — Double Jeopardy — Due Process

By EARNEST E. SCHNABEL

The defendants were indicted by the State of Illinois for violating an Illinois statute making it a crime to conspire to injure or destroy the property of another.[1] Upon pleading guilty, each was sentenced to three months imprisonment. Thereafter they were indicted in a federal district court on a charge of violating a federal statute[2] by conspiring to willfully and maliciously injure or destroy means of communications controlled or operated by the United States. The defendants were found guilty as charged, although the same criminal act had been involved in the first conviction. The Supreme Court of the United States granted certiorari on the defendants' claim that since the same acts were involved in the prior state conviction they were twice put in jeopardy contrary to the fifth amendment.[3] The Court affirmed the second sentence, in a six to three decision, holding that the fifth amendment double jeopardy provision is not applicable to successive state and federal prosecutions. *Abbate v. United States*, 79 Sup. Ct. 666 (1959).

The opinion of the three dissenting Justices declared that iden-

1 Ill. Rev. Stat. ch. 38 § 139 (1957). It provides in pertinent part: "If any two or more persons conspire or agree together . . . with the fraudulent or malicious intent wrongfully and wickedly to injure the . . . property of another . . . they shall be deemed guilty of a conspiracy . . . ." The statute applies to conspiracies within Illinois to destroy property outside the state.

2 18 U.S.C. § 371 (1952) provides in pertinent part: "If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

3 The double jeopardy clause of the fifth amendment provides: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

tical conduct of an accused is but one offense, and cannot be punished by two separate sovereignties as two distinct offenses.

On the same day the principal case was decided, the Court, in *Bartkus v. Illinois*,[4] held that the subsequent trial of the defendant in a state court, based on the same acts which had resulted in an acquittal in a federal court, did not deprive the defendant of due process under the fourteenth amendment. Mr. Justice Brennan, who wrote the majority opinion in the *Abbate* case, dissented, in a five-four decision, on the theory that the state trial of Bartkus was essentially a second federal prosecution because of the extremely active participation of federal officers in preparing and conducting the trial. Such a second prosecution is, of course, barred by the double jeopardy limitation on the national power.

Constitutional challenge to successive state and federal prosecutions based on the same conduct is not new to the courts.[5] In *Houston v. Moore*,[6] an 1820 case, the defendant was indicted in a state court for violating a state statute. His conduct was also a crime against the national government. The Court discussed the possibility of successive prosecutions, but upheld the defendant's conviction on the ground that the state had concurrent jurisdiction as long as the national government had not exercised its power.

In *Fox v. Ohio*,[7] *United States v. Marigold*,[8] and *Moore v. Illinois*,[9] the Court, relying on the *Houston* case, gave clear expression to the emerging principle that the fifth amendment double jeopardy clause does not prohibit a federal prosecution which follows a state prosecution for the same offense. The reasoning of the Court in these cases was approved in principle in later Supreme Court decisions.[10]

Climaxing this development was *United States v. Lanza*,[11] where the issue of successive jurisdiction was squarely before the Court. It was there held that the fifth amendment applied only to successive prosecutions by the federal government. Subsequent cases have reaffirmed the decision.[12]

It should be remembered that the principal case was a six to three decision. This decision centered around the holding in the *Lanza* case, which the Court refused to overrule. It pointed out that if states were free to prosecute persons violating their laws, and thus bar subsequent federal prosecutions based on the same acts, federal law enforcement would necessarily be hindered. A disparity would arise when the defendant's acts impinged more seriously on the federal interest than on a state interest. An example is found in the principal case: the state court sentenced each defendant to three

4 79 Sup. Ct. 676 (1959).

5 See, e.g., Commonwealth v. Fuller, 49 Mass. 313 (1844); Harlan v. People, 7 Doug. 207 (Mich. 1843); State v. Brown, 2 N.C. 100 (1794); State v. Antonio, 2 S.C. 776 (1816); Hendrich v. Commonwealth, 32 Va. 707 (1834).

6 18 U.S. (5 Wheat.) 19 (1820).

7 46 U.S. (5 How.) 213 (1847).

8 50 U.S. (9 How.) 258 (1850).

9 55 U.S. (14 How.) 306 (1852).

10 These later decisions all affirm the principle in dicta only. See, e.g., Sexton v. California, 189 U.S. 319, 322-23 (1903); Pettibone v. United States, 148 U.S. 197, 209 (1892); United States v. Arjona, 120 U.S. 479, 487, (1886); Coleman v. Tennessee, 97 U.S. 509, 518 (1878); United States v. Cruikshank, 92 U.S. 542, 550 (1875).

11 260 U.S. 377 (1922).

12 Screws v. United States, 325 U.S. 91 (1944); Jerome v. United States, 318 U.S. 101 (1942); Westfall v. United States, 274 U.S. 256 (1927); Hebert v. Louisiana, 272 U.S. 312 (1926).

months, while under the federal conviction each received one to three years.

The dissenting opinion was critical of the decision in *Lanza* as being based on dicta in prior cases.[13] These cases had assumed that identical conduct might be prosecuted twice because the offense punished by each was in some sense different. But the Justices in the minority objected that the legal logic used to prove one act to be two was too subtle for them to grasp. They would not accept the majority view which saw no way out of the difficulty posed by a state prosecution being allowed to destroy the federal power to bring suit. In answer to the majority argument that a defendant could plead guilty to the crime in the jurisdiction which provided the lesser minimum penalty, the dissent pointed out that Congress has the power to declare certain conduct criminal. Further, having defined the crime, it could take exclusive jurisdiction for the federal government, or allow states concurrent jurisdiction while still setting minimum penalties applicable in all courts.

It was pointed out that the Bill of Rights, which safeguards against double jeopardy, was intended to establish a broad national policy against a federal court's trying an accused a second time after a final judgment in any other court. The dissent noted that during the first Congress when the Bill of Rights was being considered, a proposed amendment, which was not adopted, apparently would have barred double prosecutions for the "same offense" only if brought under any laws of the United States.[14]

The *Bartkus* case relied on the reasoning of the majority—minority opinions of the principal case for the basis of its holding. The only difference from *Abbate* is that in *Bartkus* there was an acquittal in the federal court, and a subsequent conviction in the state court for the same acts.

The history of court decisions relating to successive state and federal prosecutions, whether in violation of the fifth or fourteenth amendments, hinges upon the interpretations given by the courts in the earlier cases of *Houston v. Moore*[15] and *Fox v. Ohio*.[16] There is a definite conflict as to the proper meaning of these cases. But with regard to the result, there is little doubt. Our constitutional protections embodied in the double jeopardy and due process clauses have been limited by the Court's holdings in the *Abbate* and *Bartkus* cases.

13 See note 10 *supra*.

14 At the time the amendment was offered, the double jeopardy clause read: "No person shall be subject . . . to more than one punishment or one trial for the same offense." 1 Annals of Cong. 434 (1789). Had the amendment passed, the clause would read: "No person shall be subject . . . to more than one punishment or one trial for the same offense by any law of the United States." *Id.* at 753.

15 18 U.S. (5 Wheat.) 19 (1820).

16 46 U.S. (5 How.) 213 (1847).

Constitutional Law — Equal Protection of the Laws — Cruel and Unusual Punishment — Rights of Prisoners

By WILBUR SATO

Plaintiff, an inmate in a state prison, filed a complaint in a federal district court with an accompanying motion to proceed in forma pauperis. Specific allegations of the complaint, taken as true for the

purposes of the motion, showed that the plaintiff was being subjected to systematic segregation and discrimination solely on account of his race. This, he contended, violated the equal protection and due process clauses of the fourteenth amendment. He prayed that the respondent prison officials be enjoined from continuing the alleged abusive practices, or in the alternative, that he be transferred to another prison where such practices did not exist.

Leave to proceed in forma pauperis being discretionary, the court examined the merits of the claim, and concluded that, in view of the extraordinary nature of the relief sought, the acts charged did not show sufficient interference with the plaintiff's constitutional rights to justify judicial action. Leave to file the complaint in forma pauperis was denied. *Nichols v. McGee,* 169 F. Supp. 721 (N.D. Cal. 1959).

The court reasoned that the rationale of *Brown v. Board of Education*[1] should not be applied to state penal institutions because the extent and quality of the difficulties of prison administration are not to be found in educational systems. This position was supported by citing authorities to the effect that federal courts are loath to interfere with the discretion of officials charged with administration of state prisons.

The constitutional guarantee of equality commands that a state shall not enforce segregation solely on the basis of race,[2] nor provide for discrimination in publicly owned or supported facilities.[3] Under this rule racial discrimination is not to be allowed in public schools,[4] buses,[5] or in recreational[6] and cultural[7] facilities. Nor is it permissible in a privately created and supported orphans' school administered by a public trustee.[8] The state may not enforce a racially restrictive covenant,[9] nor entertain a suit to recover for its breach.[10] Nor may ownership of land be prohibited on the basis of race or national origin.[11] The right to engage in a business or occupation,[12] or to practice one's profession[13] similarly may not be denied. Suffrage[14] and immigration matters[15] are within the rule. A person is denied due process of law in a criminal trial when members of his race have been continuously and systematically excluded from the jury lists.[16] The state cannot discriminate in the right to public employment or compensation,[17] nor prohibit the association of races by discriminatory zoning laws.[18] And it has been held, although not without dissent, that the state may not prohibit the marriage

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1 347 U.S. 483 (1954).
2 Tate v. City of Eufaula, 165 F. Supp. 303 (M.D. Ala. 1958).
3 Easterly v. Dempster, 112 F. Supp. 214 (E.D. Tenn. 1953).
4 Brown v. Board of Education, 347 U.S. 483 (1954).
5 Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala. 1956).
6 Moorhead v. Fort Lauderdale, 152 F. Supp. 131 (S.D. Fla. 1957).
7 Harris v. Daytona Beach, 105 F. Supp. 572 (S.D. Fla. 1952).
8 Pennsylvania v. Board of Directors, 353 U.S. 230 (1957).
9 Shelley v. Kraemer, 334 U.S. 1 (1948).
10 Barrows v. Jackson, 346 U.S. 249 (1953).
11 Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952).
12 Takahashi v. Fish and Game Comm., 334 U.S. 410 (1948).
13 Harvey v. Morgan, 272 S.W.2d 621 (Tex. Civ. App. 1954).
14 McDonald v. Key, 224 F.2d 608 (10th Cir. 1955); Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947); Dean v. Thomas, 93 F. Supp. 129 (E.D. La. 1950).
15 Quan Hing Sun v. White, 254 Fed. 402 (9th Cir. 1918).
16 Hernandez v. Texas, 347 U.S. 471 (1954).
17 Reynolds v. Board of Public Instruction, 148 F.2d 754 (5th Cir. 1945).
18 City of Birmingham v. Monk, 185 F.2d 859 (5th Cir. 1950).

of persons of different races.[19] This constitutional mandate also provides that there be no discrimination because of race in the punishment for a crime.[20]

Equal protection of the laws, thus expressed, commands that the exercise of state power in all its varied activities and pursuits shall operate equally upon all, without regard to race, color, or national origin. The rationale of *Brown v. Board of Education* is not limited to the facts of that case. And of course the broad policy of the equal protection clause is not limited in application to educational institutions.

The statement that federal courts are loath to interfere with the administraion of state prisons is misleading. Close examination of the cases cited as supporting the proposition, where courts have refused to intervene, discloses that this is the apparent rather than the real reason for their refusals. Thus in *Wagner v. Ragan*[21] the Seventh Circuit said that it had no power to control or regulate the ordinary internal discipline of prisons. In *Adams v. Ellis*[22] it was stated that withdrawal of rights in prisons is justified by considerations underlying the prison system. *Yaris v. Shaughnessy*[23] held that the complainant had not made out a case serious enough to require court interference.

In *Piccoli v. Board of Trustees*[24] where the petitioner was denied the use and possession of law books he had purchased, the court refused to hear an application for equitable relief, declaring that only manifest oppression will justify judicial intervention, and intervention may be had only to prevent irreparable injury that is clear, imminent and substantial. From a reading of these and other cases[25] the implication is clear that, though the courts, as a matter of policy, are reluctant to intervene, prison administration will be left to prison officials only so long as their conduct does not involve deprivation of prisoners' constitutional rights or amount to treatment that is clearly arbitrary or capricious. Thus in *Davis v. Berry*[26] the petitioner sued in federal district court to restrain prison officials from performing a vasectomy on him. He alleged that the contemplated operation violated the due process clause of the fourteenth amendment. The court concluded that the statute purporting to authorize the operation denied due process, as alleged, because it provided for the deprivation of a right without hearing, and further that the effect of the operation was to impose cruel and unusual punishment. Finding also that irreparable harm was threatened, the court granted relief. Other cases[27] hold that prison rules that interfere with prisoners' rights of appeal or deny access to the courts violate the equal protection clause.

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19 Perez v. Lippold 32 Cal. 2d 711, 198 P.2d 17 (1948). *Contra*, Miller v. Lucks, 203 Miss. 824, 36 So. 2d 140 (1948).
20 Pace v. Alabama, 106 U.S. 583 (1883).
21 213 F.2d 294 (7th Cir. 1954).
22 197 F.2d 483 (5th Cir. 1952).
23 112 F. Supp. 143 (S.D.N.Y. 1953).
24 87 F. Supp. 672 (D.N.H. 1949).
25 Morris v. Igoe, 209 F.2d 108 (7th Cir. 1953); Dayton v. McGranery, 201 F.2d 711 (D.C. Cir. 1952); Curtis v. Jacques, 130 F. Supp. 920 (W.D. Mich. 1954); McBride v. McCorkle, 44 N.J. Super. 468, 130 A.2d 881 (App. Div. 1957); Akamine v. Murphy, 108 Cal. App. 2d 294, 238 P.2d 606 (1951).
26 216 Fed. 413 (D.C. Iowa 1914).
27 Dowd v. United States, 340 U.S. 206 (1951); *Ex parte* Hall, 312 U.S. 546 (1941).

The enunciated principles of specific cases appear to place the rights contended for in the main case within the protection of the Constitution. Equality of protection implies that in the administration of criminal justice, no one shall be subjected, for the same class of offense, to any greater or different punishment from that to which others of the same class are subjected.[28] Greater or different punishment imposed on persons because of their race is therefore prohibited.[29] Due process of law contemplates that freedom from cruel and unusual punishment be protected.[30] Cruel and unusual punishment has been defined as a changing concept which must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.[31]

An examination of the facts of the instant case leaves little room for doubt as to the application of the law. The allegations of the complaint charged that the plaintiff was required to join in an exclusively Negro line formation when proceeding to his assigned cell block for daily lockup; that he was there lodged in an exclusively Negro cell; that he was required to join an exclusively Negro line when proceeding into the prison dining hall; and that he was required to eat in a walled-off and exclusively Negro compartment in the dining hall.

Though there is here no rack or thumbscrew, those are not the only forms of cruel punishment.[32] The degradation, humiliation, and mental suffering imposed here can, in its consequences, be more painful and more destructive than the most brutal physical abuse. The harm is irreparable. This form of punishment is incongruous in a society where equality before the law is a fundamental right. That systematic segregation is also unequal protection is plain, for the prisoner must, because of the segregation of his race, daily undergo humiliation and mental suffering not shared by other prisoners. Both reason and the Constitution oppose a palpably arbitrary and capricious prison policy. In this care the defendant prison officials made no appearance, and no justification for the offending rule was mentioned. The plaintiff's claim clearly merits consideration.

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28 Truax v. Corrigan, 257 U.S. 312, 335 (1921).
29 Pace v. Alabama, 106 U.S. 583, 584 (1883).
30 Francis v. Resweber, 329 U.S. 459, 462 (1946); Johnson v. Dye, 175 F.2d 250, 255 (3rd Cir. 1949).
31 Trop v. Dulles, 356 U.S. 86 (1958).
32 *Ibid.*; Davis v. Berry, 216 Fed. 413 (D.C. Iowa 1914).

Negligence—Automotive Repairers—Liability To Third Persons.

BY SVEN L. JOHANSON

Plaintiff, a stranger to a repair contract between the defendant garage and the lessor of a tractor unit, alleged that he suffered damges to his trailer when, due to the negligent repair of the tractor, the tractor-trailor unit plunged off the highway. The defendant had agreed with the lessor to do certain repair work on the tractor, and improper connection of the right tie rod to its wheel after repairs were completed caused the loss of control by the driver. The defendant contended that the evidence failed to show privity of contract between the plaintiff and defendant, or any duty owed to the plaintiff by the defendant. The novel question before the Kansas City Court of Appeals was whether the court should extend to automotive repairers the doctrine of *MacPherson v. Buick Motor Co.*[1] *Held*: Judgment for the plaintiff; privity of contract between the parties is not requisite to recovery. *Central & So. Truck Lines v. Westfall GMC Truck, Inc.*, 317 S.W.2d 841 (K.C. Ct. of App., Mo. 1958).

The liability of negligent automotive repairmen to third parties is now rapidly becoming accepted as the prevailing rule. It follows the *MacPherson* doctrine by twenty-two years. In that leading case, the court, speaking through Mr. Justice Cardozo, ruled that a manufacturer owes the affirmative obligation to exercise reasonable care in the manufacture of a chattel which is not necessarily dangerous when made properly, but which may place life and limb in peril when made negligently. If such manufacturer knows that the chattel is likely to be used by persons other than the purchaser, without subsequent tests, he is held responsible to such third parties irrespective of a contract relationship.

Dean Prosser has stated[2] that requiring privity of contract is the result of misunderstanding the holding of *Winterbottom v. Wright.*[3] He further has asserted that this is now but ancient history, and that later decisions are agreed that negligent repair of a vehicle[4] or any other chattel[5] creates a liability in favor of third persons injured by that negligence, as if the repairman had made and sold the chattel in the first instance.

In *Vrooman v. Beech Aircraft Corp.*[6] the plaintiff was a pilot of an airplane which the owner had requested the defendant to inspect and repair. Defendant returned the plane after two weeks, thereby impliedly warranting its fitness. Soon afterward, it crashed on a take-off because of the defendant's negligent failure to make proper

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1 217 N.Y. 382, 111 N.E. 1050 (1916).

2 Prosser, Torts 517 (2d ed. 1955).

3 152 Eng. Rep. 402 (1842). Here the defendant had contracted to keep certain mail coaches in repair, and by reason of his failure to do so, a third person, the driver, not a party to the contract, was injured.

4)Hudson v. Moonier, 102 F.2d 96 (8th cir. 1939); Moody v. Martin Motor Co., 76 Ga. App. 456, 46 S.E.2d 197 (1948); Kalinowski v. Truck Equipment Co., 237 App. Div. 472, 261 N.Y. Supp. 657 (1933).

5 *E.g.*, Vrooman v. Beech Aircraft Corp., 183 F.2d 479 (10th Cir. 1950).

6 *Ibid.*

inspection and repairs. The trial court, on the ground that the complaint failed to state a cause of action upon which relief could be granted, refused to find for the plaintiff. The appellate court reversed, saying pontifically, "This concept of non-liability was spawned in the dicta of a breach of contract case and nourished in the perpetration of the false notion that privity of contract is an indispensable prerequisite to a manufacturer's actionable duty to third parties."[7] The 1946 case of *Carter v. Yardley & Co.*[8] reviews the history and transformation of the so-called "general rule."[9]

The *Winterbottom* case held that under the principles of contract law there are many instances when a party is without remedy, and hardship will not be sufficient justification to allow recovery. "Hard cases, it has been observed, are apt to introduce bad law."[10] These early cases did not recognize a duty, outside of contract, for the protection of a third person, except where there was nuisance, or in rare cases involving a public duty. It was said that the only safe rule was to confine the right of recovery to those who are bound by contract, otherwise there would be no end to the absurd and outrageous consequences that would result. The "obvious and simple" solution to the plaintiff's plight was to make himself a party to the contract. We now find this doctrine inconceivable, and failure to exercise reasonable care in the performance of an act which will affect some right of others, may result in a recovery in tort, whether that act be one of commission or omission.

In a federal case[11] which was decided for the plaintiff, the defendant was under a contract to keep in repair the trucks used by a construction company. Plaintiff, a laborer on a company job, was seriously injured when struck by one of the trucks. It had been impossible to warn him because the truck's horn was not operating. Omission to keep the horn in working order was sufficient to establish the defendant's liability. The court held that inasmuch as the truck was returned to the defendant each night for servicing there was notice of the defect, and the defendant had a duty to exercise reasonable care. The negligent breach of that duty created a liability for the resulting injury.

In *Hanson v. Blackwell Motor Co.*,[12] a garage contracted with the owner of an automobile to repair a defective steering mechanism. The garage failed to repair the defect but erroneously informed the owner that it had been repaired when he later returned for the car. On a trip the next day, a passenger was injured when the steering apparatus failed and the automobile was wrecked. The court refused to find a breach of duty to the injured passenger for a mere omission to act.

There is a widely accepted position, consistent with that ap-

7 *Id.* at 480.
8 319 Mass. 92, 64 N.E.2d 693 (1946).
9 See also Annot., 164 A.L.R. 569 (1946).
10 Winterbottom v. Wright, 152 Eng. Rep. 402, 406 (1842).
11 Hudson v. Moonier, 102 F.2d 96 (8th cir. 1939).
12 143 Wash. 547, 255 Pac. 939 (1927).

proved by Prosser,[13] which maintains that any person will be liable who repairs personal property in such a negligent manner as to render it likely to cause injury or property damage to third persons. If, however, such repair is made, and the article returned to its owner's exclusive possession and control in a condition not imminently dangerous, and the article is employed without event for a reasonable period of time, injuries to third persons resulting from the use of the article thereafter, will not expose the repairman to liability.

Generally, in automotive repair cases, acceptance of the automobile by the owner is not a valid defense when the repair was not known to be defective. In the first of two cases in point,[14] the agents of a motor company left a steering arm adjustment tool attached to the automobile. It was held that the company could not escape liability for injuries sustained by the owner's guest. The defendant had argued that the company was an independant contractor whose repair work had been accepted by the owner. In the second case[15] the defendant alleged that the owner had accepted the automobile upon completion of the work, and therefore the owner should be substituted for the defendant as the party responsible to the plaintiff for any defect. The court held that the defendant repairman would be held liable for the damages sustained by both the automobile owner and the plaintiff in the absence of proof that (a) the work was completed and accepted by the owner, *and* (b) the owner knew of the defective repair when he accepted the automobile, or should have discovered the defect before the accidnt.

In *Smith v. Roberts*,[16] the plaintiff, driver of a truck recently repaired by the defendant, was approaching the bottom of a down-grade when he discovered that the truck had no brakes. The truck gained speed until it went out of control and was wrecked, causing serious personal injuries to the plaintiff. The defendant averred that there was no privity of contract between him and the plaintiff as to repair of the truck and that the plaintiff was guilty of contributory negligence. The court found no negligence in the conduct of the driver and held the defendant liable for the injuries which resulted from the defective repairs.

Nine states[17] seem to allow recovery by third persons for damages and injuries due to negligent automotive repairs. The Colorado Supreme Court has not yet considered a case of this nature. It would seem however, in view of the prevailing trend, and, inasmuch as there is a complete absence of recent opposition, that Colorado would follow the principle of the instant case.

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13 Prosser, Torts 517 (2d ed. 1955); 65 C.J.S. *Negligence* § 101 (1950).
14 Burkett v. Globe Indemnity Co., 182 Miss. 423, 181 So. 316 (1938).
15 Zierer v. Daniels, 40 N.J. Super. 130, 122 A.2d 377 (App. Div. 1956).
16 268 S.W.2d 635 (Ky. 1953).
17 Hudson v. Moonier, 102 F.2d 96 (8th Cir. 1939) (failure to keep truck horn functioning; substantive law of Mo.); Spolter v. Four Wheel Brake Service, 99 Cal. App. 2d 690, 222 P.2d 307 (Dist. Ct. App. 1950) (wheel lug bolts not secured); Moody v. Martin Motor Co., 76 Ga. App. 456, 46 S.E.2d 197 (1948) (negligent repair of steering gear and brakes); Smith v. Roberts, 268 S.W.2d 635 (Ky. 1953) (negligent reassembling of rear housing); Miller v. Margot, 42 So. 2d 916 (La. 1949) (improper replacement of a tie rod); Burkett v. Globe Indemnity Co., 182 Miss. 423, 181 So. 316 (1938) (failure to remove a tool attached to the steering arm); Central & So. Truck Lines v. Westfall GMC Truck, Inc., 317 S.W. 841 (Mo. 1958) (improper replacement of tie rod); Zierer v. Daniels, 40 N.J. Super. 130, 122 A.2d 377 (App. Div. 1956) (negligently repaired brakes); Oliver v. Bereano, 293 N.Y. 930, 60 N.E.2d 134 (1944) (brakes); Kalinowski v. Truck Equipment Co., 237 App. Div. 472, 261 N.Y. Supp. 657 (Sup. Ct. 1933) (wheel came off); cf. Vrooman v. Beech Aircraft Corp., 183 F.2d 479 (10th cir. 1950) (failure to repair and inspect airplane; applying Kansas law).

Negligence — Municipal Liability — Failure to Provide Police Protection

By JOHN E. HARRINGTON

In response to a request for information contained in an F.B.I. circular, Arnold Schuster informed the New York City police of the whereabouts of Willie Sutton, a professional criminal of national repute whom he had by chance seen on the street. As a result of this information Sutton was arrested and Schuster's part in his apprehension was given wide publicity. Almost at once Schuster began receiving anonymous threats against his life. The police arranged protection for him at his place of employment and his home, although they informed him that the calls were from cranks and were "child's stuff." After several days the protection was withdrawn and shortly afterward, nineteen days after Sutton was taken into custody, Schuster was fatally shot by an unknown assailant. The complaint in the instant wrongful death action alleged that Schuster's death resulted from the actionable negligence of the city in failing to use reasonable care for his safety. On appeal, the judgment of the trial court granting the defendant's motion to dismiss the complaint was reversed. *Held*: The complaint stated a cause of action. *Schuster v. City of New York*, 5 N.Y.2d 75, 154 N. E.2d 534 (1958).

An ancient tenet in all systems of law is that which assures the immunity of the sovereign from being called to account in his courts.[1] But the erosion of modern interpretation has changed the outline of this precept. In American law, absent a statute, a municipality is liable for injuries resulting from negligent acts of its servants in the performance of proprietary duties but not for those incurred in the performance of a governmental function.[2] The duty to furnish police protection is a governmental function and not merely corporate in character.[3]

Moreover, for some years prior to the instant case, New York has had a statute which divested the state of immunity from suit.[4] As it is well settled that "none of the civil divisions of a state . . . has any independent sovereignty,"[5] this statute makes the municipality liable, equally with individuals and corporations, for wrongs of its agents and employees.[6]

Posed as the ground for the decision in the instant case is the rule that, "If conduct has gone forward to such a stage that inaction would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward."[7]

Mr. Justice McNally based his concurring opinion on the slightly different common law doctrine that once the defendant has as-

1 Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).
2 Noonan v. City of Portland, 161 Ore. 213, 88 P.2d 808 (1938).
3 Schuster v. City of New York, 5 N.Y.2d 75 154 N.E.2d 534 (1958).
4 New York Penal Code, § 8. "The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions . . . against individuals or corporations. . . ."
5 Bernardine v. City of New York, 294 N.Y. 361, 365, 62 N.E.2d 604 (1945).
6 Steitz v. City of Beacon, 295 N.Y. 51, 54, 64 N.E.2d 704, 705 (1945).
7 Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534 (1958), quoting from Moch v. Rensselaer Water Co., 247 N.Y. 160, 166, 159 N.E. 896, 898 (1928).

sumed to act, a duty arises to act carefully, even though the protection may have been gratuitous in the beginning and not the result of a duty.[8]

One must assist in capturing a felon when opportunity presents, at least when called upon to do so. This was written into our law as early as 1285, in the Statute of Winchester.[9] It is in response to this duty, restated by the New York Penal Code,[10] that strict liability is imposed upon the municipality for injury or death incurred by one while helping the police at their direction. The facts of the instant case place it outside the provisions of this law inasmuch as Schuster volunteered his services, and his death occurred some days later, but the policy which underlies the statute is clearly one of solicitude for the safety of those private persons who aid the authorities in the exercise of the police function. It cannot be said that the duty in the present case is solely in the interest of the person concerned. It arises also from the need of the government, "that its service shall be free from the adverse influence of force . . . ."[11]

In New York, nonfeasance as well as misfeasance may constitute negligence,[12] and perhaps the *Schuster* decision was dictated by the simple necessity of recognizing a duty of the municipality toward a private citizen who by his affirmative act had aligned himself on the side of the community, and whose representation should be given an opportunity to prove he lost his life as a proximate result of the city's later failure to act in his behalf.

What would be the probable outcome of a Colorado case presenting a fact situation similar to *Schuster*? *McAuliffe v. City of Victor*[13] was a case of first impression in Colorado regarding the question of municipal negligence in exercise of the police power, and the Court reluctantly distinguished the possible liability arising from negligence involving a proprietary function from the nonliability of the municipality where a governmental function is at issue. The Colorado Court followed this line until 1952 when two decisions moved away from the doctrine of sovereign immunity as it applies to *contract* actions.[14] In the more recent case of *Ace Flying Service v. Colorado Dep't of Agriculture*,[15] the Court accepted the principle that when the state enters into authorized contractual relations it thereby waives immunity from suit. But the non-liability for negligence in the governmental capacity established by prior cases[16] was unaffected by this decision.

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8 154 N.E. 2d at 541 (concurring opinion). And see Marks v. Nambil Realty Co., 245 N.Y. 256, 258, 157 N.E. 129, 131 (1927); Glanzer v. Shepard, 233 N.Y. 233, 236, 135 N.E. 275, 276 (1922).

9 Babington v. Yellow Cab Co., 250 N.Y. 14, 164 N.E. 726 (1928) (dictum).

10 New York Penal Code § 1848: "A person who, after having been lawfully commanded to aid an officer in arresting any person . . . willfully neglects or refuses to aid such officer is guilty of a misdemeanor. Where such command is obeyed and the person obeying it is killed or injured . . . the person . . . so injured . . . or the personal representative of the person so killed shall have a cause of action . . . against the municipal corporation by which such officer is employed . . . ."

11 *In re* Quarles, 158 U.S. 532, 536 (1894); *Ex parte* Yarbrough, 110 U.S. 651, 662 (1884).

12 Meistinsky v. City of New York, 309 N.Y. 998, 132 N.E.2d 900 (1956); McCrink v. City of New York, 296 N.Y. 99, 71 N.E.2d 419 (1947).

13 15 Colo. App. 337, 62 Pac. 231 (1900).

14 Boxberger v. State Highway Dep't, 126 Colo. 438, 250 P.2d 1007 (1952); State Highway Dep't v. Dawson, 126 Colo. 490, 253 P.2d 593 (1952).

15 136 Colo. 19, 314 P.2d 278 (1957).

16 Walker v. Tucker, 131 Colo. 198, 280 P.2d 649 (1955); Atkinson v. Denver, 118 Colo. 322, 195 P.2d 977 (1948); Barker v. Denver, 113 Colo. 543, 160 P.2d 363 (1945); McIntosh v. Denver, 98 Colo. 403, 55 P.2d 1337 (1936); Moses v. Denver, 89 Colo. 608, 5 P.2d 581 (1931); Veraguth v. Denver, 19 Colo. App. 473, 78 Pac. 539 (1904).

In *Colorado Racing Comm'n v. Brush Racing Ass'n*,[17] which followed *Ace Flying Service* by two months, the Colorado Supreme Court cut loose entirely from the traditional sovereign immunity doctrine insofar as contract actions were concerned, saying: "In Colorado 'sovereign immunity' may be a proper subject for discussion by students of mythology but finds no haven or refuge in this court."[18] This could be only a persuasive dictum if applied in a case involving liability under the police power, but it is permissible to speculate that the vigor of the statement and its unqualified nature presage a wider application of the view than a limitation to contract law. This seems the more likely in view of Mr. Justice Moore's concurring opinion in *Ace Flying Service* stating that even in a tort action the doctrine of sovereign immunity is contrary to the Colorado constitutional guarantee of due process.[19]

Perhaps Colorado will arrive at the same destination through case law as that reached by New York through statute,[20] and require the state to come into court in its own defense on equal footing with all other contestants. But would Colorado courts place a duty upon the municipality absent a statute imposing liability on the municipality for injury resulting from intervention in the police function at the direction of the police? Would a solicitation to act be seen in the posting of a "wanted" circular, and a reciprocal duty on the part of the community to protect the responding citizen?

The *Schuster* case is limited to a narrow segment of the law and it seems unlikely that its specialized facts would soon be litigated in another forum. The case is an interesting illustration of the application of basic tort duty and negligence principles in a novel fact situation, but it would be a rare case that could not be distinguished from it through either the non-voluntary nature of the informant's action or the quality of the protection given him by the city. It seems likely that in future cases involving similar facts a distinction will be made along these lines, with the courts following the traditional view that nothing in the law imposes a special duty upon the police to protect an individual citizen, and concluding that there can be no liability where there was no duty.

17 136 Colo. 279, 316 P.2d 582 (1957), 34 DICTA 422.
18 *Id.* at 284, 316 P.2d at 585.
19 Ace Flying Service v. Colorado Dep't of Agriculture, 136 Colo. 19, 29, 314 P.2d 278, 283 (1957) (concurring opinion).
20 New York Penal Code, § 8.

Witnesses — Competency — Husband and Wife — Incompetency as Witness Against Spouse in Criminal Prosecution

By FRED J. MYERS

James Hawkins was indicted under the Mann Act[1] for transporting a female in interstate commerce for immoral purposes. When the government put Hawkins' wife on the witness stand to testify against him, his counsel objected to her competence as a witness. The objection was overruled and she was allowed to testify. She testified that she was a prostitute both before and after her marriage to Hawkins. The defendant admitted that they had never lived together for any appreciable length of time. On appeal, the admission of the wife's testimony was held to be error. The public policy of maintaining peace and harmony in domestic relations required the court to reaffirm the rule barring testimony of one spouse against the other. *Hawkins v. United States,* 358 U.S. 78 (1958).

Neither this comment nor the *Hawkins* case contemplates the privileged communication between husband and wife.[2] Rather, both refer to the rule regarding the competence of one spouse to testify against the other.

At common law the wife was incompetent as a witness either for or against her husband.[3] An accused was disqualified as a witness on his own behalf because he was an interested party. It followed from the legal fiction that husband and wife were one, that she also was incompetent as a witness for him. This does not explain why she could not testify against him. The reason is unknown, but it has been suggested[4] that the most logical explanation is to be found in the loyalty owed to the husband as the head of the paternalistic feudal family. Whatever the reason, the rule was well settled. This does not mean that it was without exception, for it was equally well settled that the rule did not apply when the husband committed an offense against the person of his wife.[5]

The rule and its exception were recognized early in this country by the Supreme Court of the United States.[6] Since that time both have been greatly modified. In *Funk v. United States*[7] the court held that one spouse could testify for the other. The reason given was that all disqualifications because of interest had been abolished. Since an accused could now testify in his own behalf, there was no longer any reason to bar the testimony of the spouse.

The exception has been made more inclusive. Originally it referred to crimes against the person of the wife. Bigamy is now considered a crime against the wife.[8] Importing an alien for immoral purposes is by statute made a crime against the wife.[9] Under

1 18 U.S.C. § 2421 (1952).
2 On that subject, see 8 Wigmore, *Evidence* § 2332 (1940).
3 *Id.* § 2227.
4 *Ibid.*
5 Stein v. Bowman, 38 U.S. (13 Pet.) 129 (1839).
6 *Ibid.*
7 290 U.S. 371 (1933).
8 Miles v. United States, 103 U.S. 304 (1880).
9 8 U.S.C. § 1328 (1952).

the Mann Act, the transportation of one's own wife in interstate commerce for immoral purposes makes her a competent witness against the husband.[10] A crime has been committed against the wife in the corrupting of her morals.[11]

The rule of disqualification has not been completely destroyed. The instant case makes it clear that the present federal rule still holds a wife incompetent to testify against her husband over his objection when the crime is not one against her person.

The states are not completely in accord. A small but growing minority of them have abandoned the rule.[12] Colorado is moving away from the rule by a broader interpretation of the exception. The pertinent Colorado statute[13] was first enacted before the turn of the century and has been re-enacted verbatim ever since. In *Schell v. People*[14] the Supreme Court of Colorado held that bigamy is a crime against the wife and allowed her to testify against her husband. In *Wilkinson v. People*[15] the defendant was indicted for the rape of his step-daughter. His wife, the girl's mother, was allowed to testify against him. The court indicated that any rape by the husband would be a crime against the wife. Logically it would seem that the only crime committed against the wife, if any, would be having intercourse with another woman. In *O'Loughlin v. People*[16] the defendant wife had murdered her step-son and her husband was permitted to testify against her. The Colorado Court upheld the conviction saying that the reason for the existence of the privilege, the maintenance of domestic peace and harmony, had ceased to exist in this case and therefore, the testimony was rightly received. The court also said, in referring to the *Wilkinson* case, that if rape of a step-daughter is a crime against the other spouse, then so is murder of a step-son. By broadening the exception Colorado has moved further from the spirit of the rule, and has taken a stand toward the forefront of the growing view.

The facts of the *Hawkins* case presented the Supreme Court with an opportunity to change the federal rule and they failed to do so. There was no domestic peace or harmony to preserve. The Hawkins' relationship was more that of procurer and prostitute than husband and wife; therefore, in this case there was no reason for maintaining the rule. The government wanted to modify the rule by transforming it into a *privilege,* not of the accused, but of his spouse. She would then be competent to testify over his objection, but not be compellable by the government. This would not destroy the domestic peace and harmony of any marriage worth saving and would aid the discovery of all pertinent facts.

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10 Hays v. United States, 168 F.2d 996 (10th Cir. 1948); Pappas v. United States, 241 Fed. 665 (9th Cir. 1914).

11 This would appear to be true regardless of the wife's moral character prior to the transportation in interstate commerce; no case was found which discusses her prior character.

12 For a survey of the varied state rules see Note, 38 Va. L. Rev. 359 (1952).

13 Colo. Rev. Stat. § 153-1-7(1) (1953). The pertinent language reads: "A husband shall not be examined for or against his wife without her consent, nor a wife for or against her husband without his consent; . . . but this exception does not apply . . . to a criminal action or proceeding for a crime committed by one against the other."

14 65 Colo. 116, 173 Pac. 1141 (1918).

15 86 Colo. 406, 282 Pac. 257 (1929).

16 90 Colo. 368, 10 P.2d 543 (1932).