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Case Notes

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CASE NOTES

ADMINISTRATIVE LAW—LICENSES—REVOCATION WITHOUT FAULT OF LICENSEE

Pursuant to a rule of the state racing commission, the plaintiff's racing license was automatically revoked when traces of a drug were found in the saliva of her horse. Rule 248, W. Va. Racing Comm., W.Va. Acts, 1935, c. 71, as amended, W.Va. Acts, 1947, c. 158. Plaintiff instituted mandamus proceedings seeking a reinstatement of the license, contending the automatic revocation was a denial of due process in not affording an opportunity to be heard. *Held*: Denied. In the exercise of police power, a grant of power to racing commission to regulate horse racing is valid notwithstanding the absence of a prescribed standard. Such a commission may impose a penalty without fault of the party penalized. *Morris v. West Virginia Racing Commission*, 55 S.E.2d 263 (W.Va. 1949).

The power to regulate and control, in the interest of the public welfare, originates in the police power of a state. *Dening v. Cooke*, 162 Misc. 723, 295 N.Y. Supp. 724 (S.Ct. 1937). The exercise of the power is inherently in the legislature, and of necessity is restrained only by "the public good." *Roth Drugs v. Johnson*, 13 Cal. App.2d 720, 57 P.2d 1022 (1936). A means of effectuating control and regulation is the issuance of a license after the prospective licensee has met the requirements of a given standard. *Denny v. Brady*, 201 Ind. 59, 163 N.E. 489 (1928). Such an issuance confers a privilege to do legally that which would otherwise be unlawful. *Kresge Co. v. Bluefield*, 117 W.Va. 17, 183 S.E. 601 (1936). A license is neither property nor a property right, *Borough Wide Food Dealers Assn. v. La Guardia*, 44 N.Y. Supp.2d 160 (S.Ct. 1943); and its issuance does not create a vested right in the licensee. *Palmetto Fire Ins. Co. v. Beha*, 13 F.2d 500 (D.C. S.D. N.Y. 1926). The state retains the absolute power to revoke for "just cause." *LaCrosse Rendering Works v. City of La Crosse*, 231 Wis. 438, 285 N.W. 393, 124 A.L.R. 511 (1939). The legislature may delegate the power of regulation to a board, commission, or officer. *People v. New York Board of Police*, 36 Misc. 89, 72 N.Y. Supp. 583 (S.Ct. 1901). The delegating statute generally empowers the newly created agency to formulate rules and standards within the limits of a definite policy. *Moormeister v. Golding*, 84 Utah 324, 27 P.2d 447 (1933), *aff'd*, 84 Utah 345, 35 P.2d 307 (1934). Based on such standards, the power to revoke a license is then within the subordinate body. *Marchesi v. Selectmen of Winchester*, 312 Mass. 28, 42 N.E.2d 817 (1942). The revoking power may be expressed in the delegating act, *State v. Milwaukee*, 140 Wis. 38, 121 N.W. 658, 133 Am. St. Rep. 1060 (1909); or may be conferred by implication where such power is a prerequisite to the efficacy of the agency. *Royal Highlanders v. Wiseman*, 140 Neb. 28, 299 N.W. 459 (1941). The delegating act may provide for an automatic revocation of a license issued by the agency. *State v. Pulsifer*, 129 Me. 423, 152 Atl. 711 (1930). The licensee is apprised of the possibility of the automatic

revocation and, should the contingency occur, is estopped to question it. *Child v. Bemus*, 17 R.I. 230, 21 Atl. 539, 12 L.R.A. 57 (1891). Where the agency has enacted rules creating an irrebutable presumption of guilt of the horse trainer, denial of due process has been found. *Mahoney v. Byers*, 187 Md. 81, 48 A.2d 600 (1946); *State v. Baldwin*, 159 Fla. 165, 31 So.2d 627 (1947). But, where such a rule has been subsequently embodied in a statute, it has been upheld. *Sandstrom v. California Horse Racing Board*, 31 Cal.2d 401, 189 P.2d 17, 3 A.L.R.2d 90, *cert. denied*, 335 U.S. 814, 69 S.Ct. 31, 93 L.Ed. 19 (1948).

The instant case is in full agreement with the *Sandstrom* case, *supra*, and both seem to be founded on sound ground. Obviously this view makes the owner-trainer an insurer of the condition of his horse entered in a race, regardless of the acts of third parties, and imposes a penalty without fault. Nevertheless, in view of the urgent need for close and rigid surveillance of race tracks and the evils incident thereto, it is submitted that the loss suffered by the owner-trainer is more than offset by the resulting additional "public good."

ROBERT E. STEELE, JR.

BILLS & NOTES—APPLICATION OF THE IMPOSTER RULE AS DENIAL OF THE EXISTENCE OF FORGERY

"A", identifying herself as "B", a veteran's widow, filed a claim with the Veterans Administration. The claim was approved and widow's benefit checks were mailed to "A" but in the name of "B". The checks were cashed at a bank which endorsed with "Prior Endorsements Guaranteed." After discovery of the fraud, the government sued the bank as an endorsee. The bank defended with the "imposter rule" and was sustained by the trial court. On appeal, *Held*: Affirmed. Under the imposter rule, if a bank sees that the very person to whom a check was issued has endorsed it, the endorsement is genuine although the name used is a wrong one. The bank guarantees that the person to whom the check was issued has endorsed it but not that the check was honestly procured from the drawer. *United States v. Continental-American B. & T. Co.*, 175 F.2d 271 (5th Cir. 1949).

Under the imposter rule, a drawer delivering an instrument to an imposter whom the drawer believes to be the person whose name the imposter has assumed and who the drawer intends shall receive the money, must, as against the drawee, bear the loss when the imposter obtains payment or negotiates the instrument. *Corinth Bank & T. Co. v. Security Nat'l Bank*, 148 Tenn. 147, 252 S.W. 1001 (1923). Though originating in the distant past of small business and face to face dealings, the rule has survived the transition to the intricate business world of today. *Keel v. Wynne*, 210 N.C. 426, 187 S.E. 571 (1936). That the impersonation of the imposter was effected through mail is of no consequence and will not avoid the rule. *First Nat'l Bank v. American Ex. Nat'l Bank*, 170 N.Y. 88, 62 N.E. 1089 (1902). But see *Moore v. Moultrie Banking Co.*, 30 Ga. App. 687, 148 S.E. 311 (1929). The majority of the jurisdictions which have considered the rule support it on the theory that the drawee, in paying the check on the endorse-

ment of the imposter in the name by which the payee was described, is carrying out the intention of the drawer. Hence, since the intention of the drawer is that the drawee pay the person with whom the drawer dealt, the resultant loss should fall on the drawer. *Townsend O. & Co. v. Continental State Bank*, 178 S.W. 564 (Tex. Civ. App. 1915). See *Simpson v. Denver & R.G.R.R.*, 43 Utah 105, 134 Pac. 883 (1913) (right of recovery denied an innocent purchaser for value because the imposter was not the person intended by the drawer to receive the money). Other jurisdictions, while refuting the intention doctrine, support the rule on the theory of estoppel, holding that, as between two innocent persons, the one whose act was the cause of the loss should bear the consequences. *United States v. Nat'l Ex. Bank*, 45 Fed. 163 (C.C.E.D. Wis. 1891). Most of the courts asserting this doctrine recognize the imposter's signature as being a forgery but hold the drawer estopped from utilizing it as a defense. *McHenry v. Old Citizen's Nat'l Bank*, 85 Ohio St. 203, 97 N.E. 395 (1911). Other jurisdictions support the rule on the basis of negligence; because the drawer failed to use diligence in ascertaining the identity of the party with whom he dealt, the perpetration of the fraud was possible, and hence the loss should fall on the one who was negligent. *Central Nat'l Bank v. National Metro. Bank*, 31 App. D.C. 391, 17 L.R.A. (N.S.) 520 (1908). These courts also recognize the imposter's signature as a forgery but preclude the drawer from setting up that defense if his negligence was the proximate cause of the loss. *Jordan Marsh Co. v. National Shawmut Bank*, 201 Mass. 397, 87 N.E. 740 (1909). Directly opposed are those jurisdictions which do not apply the rule and, in the absence of negligence on the part of the drawer, place the loss on the drawee. *Rogers v. Ware*, 2 Neb. 29 (1873). Here the courts reject the intent theory and base their decisions solely on the question of a forgery. *Tolman v. American Nat'l Bank*, 22 R.I. 462, 48 Atl. 480 (1901). An endorsement by another person of the same name as the payee constitutes a forgery and, if payment is made, the loss will fall on the drawee. *Graves v. The American Exchange Bank*, 17 N.Y. 205 (1858). The refutation of the imposter rule because of the forgery theory is generally based on the theory " . . . that a signature to a negotiable instrument which is made without authority or forged shall be wholly inoperative and shall not give a right to enforce payment against a party thereto." UNIFORM LAW ANN., NEGOTIABLE INSTRUMENTS § 23 (1943).

The instant case falls within the intent theory supporting the imposter rule and is decided accordingly. This theory, as well as those of estoppel and negligence, is questioned. The fallacy of the intent doctrine is readily apparent: "Of what consequence is the intent of the drawer when the direction is to pay to the party named in the check? It is a perversion of words to say that it was intended for the imposter simply because he had fraudently impersonated the payee and led the drawer to believe that he was the payee." *Tolman v. American Nat'l Bank, supra.* Further, if A gives a check to B who is C's agent, and B signs C's name to it without authorization and cashes it, all courts will hold this to be a forgery. On the other hand, if A gives

a check to B, thinking B to be C, and B signs C's name to it, the courts invoking the imposter rule will hold the drawer liable. Clearly, there is no logical distinction between the two instances; both are forgeries. As for the theories of estoppel and negligence, no sound reason can be found upon which to hold the drawer liable in the absence of intentional or negligent misrepresentation by the drawer as to the identity of the imposter. Certainly the mere delivery of a check to an imposter, procured by a fraud upon the drawer, is not a sufficient representation of the imposter's ownership so as to hold the drawer liable thereon. It is suggested that the real question is one of forgery. If, as the minority hold, the act of the imposter is a forgery, the issue should be disposed of on the universally accepted theory that such a signature passes no title. It is difficult to see why a court should refuse application of a time-proven and sound rule in favor of one seeking vague intents, elusive estoppels, or degrees of negligence. It is submitted that the determining factor in the instant case should have been one of "forgery."

RUDOLPH SULLIVAN.

CONFLICTS—STATE JUDICIAL PROCEDURE AS IMPAIRMENT OF SUBSTANTIVE FEDERAL RIGHT

Plaintiff, in pursuance of his duties as a brakeman, sustained injuries when he slipped on a clinker on the track bed. Recovery was sought in a state court, under 45 U.S.C. § 51 (1946) (Federal Employer's Liability Act), on the theory that the defendant railroad was negligent in failing to furnish a reasonably safe place of work. The defendant's general demurrer was sustained, affirmed in the state appellate courts, and the Supreme Court granted certiorari. *Held*: Reversed. Local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws. Under the allegations of the petition, a jury might have found the defendant negligent. *Brown v. Western Ry.*, 77 Ga. App. 780, 49 S.E.2d 833 (1948), *cert. granted*, 336 U.S. 96, 695 S. Ct. 939, 93 L. Ed. 860, *decided*, 70 S. Ct. 105 (1949).

As early as 1814 the tremendously significant question of the power of the United States Supreme Court to review decisions of state tribunals came to a sharp focus. *Hunter v. Martin*, 4 Munf. 11, 18 Va. 1 (1814). Two years later the Supreme Court declared that the correct inference of the words of the Constitution granted it this power in all cases arising under the Constitution, treaties, and laws of the National Government. *Martin v. Hunter's Lessee*, 1 Wheat. 303, 4 L. Ed. 97 (U.S. 1816). Since these historic treatments of the broad subject, it has scarcely been questioned that the Supreme Court possesses the power to make a final determination of cases involving federal issues; nevertheless, many ramifications as to mode and extent of examination have subsequently developed and have continued in force down to the present day. *Brown v. Western Ry.*, *supra*. Two broad categories into which arguments over the Supreme Court's authority seem to fall are questions of whether there exists juris-

diction to review findings of fact made by state courts, *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 29 S. Ct. 220, 53 L. Ed. 417 (1909); and issues of interference with federal substantive rights by the rules of judicial practice of the individual states. *Brinkmeier v. Missouri P. Ry.*, 224 U.S. 268, 32 S. Ct. 412, 56 L. Ed. 758 (1912). In general, facts found by state courts are conclusive and binding upon the Supreme Court. *Egan v. Hart*, 165 U.S. 188, 17 S. Ct. 300, 41 L. Ed. 680 (1897); *Waters-Pierce Oil Co. v. Texas, supra.* The same rule applies to matters of local pleading and practice when litigants choose to assert federal rights in state tribunals. *Brinkmeier v. Missouri P. Ry., supra.* However, this rule is not applicable when findings of fact made by state courts are so intimately interwoven with a substantive federal right, timely asserted, that a determination of the right necessitates a review of the facts. *Truax v. Corrigan*, 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A.L.R. 375 (1921); *Southern Pacific Co. v. Schuyler*, 227 U.S. 601, 33 S. Ct. 277, 57 L. Ed. 662, 43 L.R.A. (NS) 901 (1913). This exception also applies when federal rights comingle with local rules of pleading and practice. *Norfolk Southern Railway Co., v. Ferebee*, 238 U.S. 269, 35 S. Ct. 781, 59 L. Ed. 1303 (1915). See *Davis v. Wechsler*, 263 U.S. 22, 23, 44 S. Ct. 13, 68 L. Ed. 143 (1923), wherein Justice Holmes states: "Local practice cannot be used to impair a substantive federal right. . . . " Although all authorities agree that state judicial procedure may not infringe upon these rights, the troublesome question to be answered is that of distinguishing between the rights claimed and the procedure by which they are maintained. *Angel v. Bullington*, 330 U.S. 183, 67 S. Ct. 657, 91 L. Ed. 832 (1947); cf. *Brinkmeier v. Missouri P. Ry., supra.* In resolving this difficulty, it is of primary importance that such rights be uniformly protected as they become apparent within the labyrinth of the various state judicial systems. *Chicago M. & St. P. Ry. v. Coogan*, 271 U.S. 472, 46 S. Ct. 564, 70 L. Ed. 1041 (1926); *Western & Atlantic Ry. v. Hughes*, 278 U.S. 496, 49 S. Ct. 231, 73 L. Ed. 473 (1929); *Brady v. Southern Ry.*, 320 U.S. 476, 64 S. Ct. 232, 88 L. Ed. 239 (1943). In the *Brady* case, *supra*, the identical Act was under scrutiny and the Court there agreed *per curiam* as to the desirability of uniform application of federal substantive rights, but divided over the amount of negligence necessary to warrant submission of the issue to a jury.

The defendant in the instant case, by the general demurrer, admitted all the allegations of fact well pleaded. It follows that the true issue before the trial court, although appearing to be one of the local pleading, in reality was that of a possible interference of a substantive federal right. Therefore, the general rule that the Supreme Court is bound by the findings of fact of a state court should apply just as if the question had been one of a timely filing of a bill of particulars or an application for leave to appeal. By admitting the allegations, the substantive question presented was whether the allowing of clinkers and other debris to collect in the quantity and under the stated circumstances in an area used by brakemen, constituted an act of negligence which Congress intended to come within the scope of the Federal Employer's Liability Act, *supra*. If Congress did so intend to pro-

tect employees, then in order to secure the desired uniformity of application of the Act to employees in all the states, it was only proper that the Supreme Court should hear the instant case. The decision of the majority seems sound and reasonable in holding that a sufficient issue of negligence was alleged so as to raise a jury question.

ROBERT E. HICKS.

CONSTITUTIONAL LAW—EQUAL PROTECTION NOT DENIED BY IMPOSITION OF LONGER SENTENCE ON MINOR THAN ON ADULT FOR SAME OFFENSE

Appellant, a minor, was convicted of second degree burglary and sentenced to one year in the county jail. Execution of the sentence was suspended and appellant was committed to the State Youth Authority, which confined him in the state prison. During the tenure of his term, an additional term was added for an infraction of a rule governing the conduct of prisoners. From the latter sentence an appeal was brought, the appellant contending that because he had served a much longer sentence than could be imposed upon an adult convicted of the identical degree of burglary, he was not legally a prisoner and the conviction of violation of the prison rule was illegal. *Held*: Affirmed. Legislation permitting imposition of a longer sentence upon a minor than could be given an adult for the same offense is not violative of equal protection since the intent of such legislation is to provide a method for correction and rehabilitation of wayward minors. *People v. Scherbing*, 209 P.2d 796 (Cal. 1949).

The state, as *parens patriae*, may assume parental authority over destitute or wayward minors. *Strangway v. Allen*, 194 Ky. 681, 240 S.W. 384 (1922). The rule is well settled that the legislature may delegate its control over juvenile offenders to a board or commission, and such board may exercise its own discretion as to the methods employed in handling such offenders. In the exercise of this discretion, the board may go to the extent of sending a minor to the state prison. *Glazier v. Reed*, 116 Conn. 136, 163 Atl. 766 (1933); In re *Murphy*, 62 Kan. 422, 63 Pac. 428 (1901). It has been held that such authority includes the power to transfer the offender from a reformatory to the state prison. *Kelly v. Wolfer*, 119 Minn. 368, 138 N.W. 315, 42 L.R.A. (N.S.) 978, Ann. Cas. 1914A 1248 (1912). This delegation of authority does not encroach upon judicial power, even though the board be given the power to alter sentence. *State v. Mulcare*, 189 Wash. 625, 66 P.2d 360 (1937).

The Fourteenth Amendment requires that no one shall be subjected to a greater or different punishment for the same offense than that to which others of the same class are subjected. Any statute which provides a possible method for imposing such increased liability will be struck down as a denial of equal protection, unless it serves some specific phase of public policy. *Pace v. Alabama*, 106 U.S. 583, 1 S. Ct. 637, 27 L. Ed. 207 (1883). The legislation is upheld if the statutory classification of offenders to be affected is reasonable. See: *Finley v. California*, 222 U.S. 28, 32 S. Ct. 13, 56 L. Ed. 75 (1911) (reasonable);

Ex parte *Soncke*, 148 Cal. 262, 82 Pac. 956 (1905) (unreasonable). Generally, legislation which seeks to provide a special punishment is not fa ored, whereas that which merely confers some benefit upon prisoners of a reasonable classification for a beneficial purpose, is desirable and not discriminatory. *People v. Smith*, 218 Cal. 484, 24 P.2d 166 (1933). Illustrative of this principle is the situation wherein a statute provides a death penalty for a given offense, but reduces the sentence of a minor who commits the same offense to a prison term. Although such a statute provides for a distinct difference in punishment for two persons guilty of the same crime, it clearly passes the test of a reasonable classification for a reasonable purpose. Ex parte *Walker*, 28 Tex. App. 246, 13 S.W. 861 (1889). In the same category is that legislation which exempts women from a term at hard labor which men receive for the same offense. Ex parte *Dunkerton*, 104 Kan. 481, 179 Pac. 347 (1919).

Without question a minor can be committed to the supervision of a commission designed to handle such cases, and thus be required to serve a lengthy sentence, although an adult would receive a shorter prison term for an identical offense. In re *Herrera*, 23 Cal.2d 206, 143 P.2d 345 (1943); Ex parte *Nichols*, 110 Cal. 651, 43 Pac. 9 (1896). Statutes providing for such handling of juvenile offenders are upheld because the classification of minors into a specific group is reasonable, inasmuch as such a process can reform and rehabilitate youthful offenders into useful members of society. *Bradley v. Illinois*, 148 Ill. 413, 36 N.E. 76 (1894). This greater detention is under such improved circumstances that it is not actually a greater punishment. Ex parte *Liddell*, 93 Cal. 633, 29 Pac. 251 (1892). It has been held that there is no intent to punish a child by committing him to a board such as the Youth Authority, the purpose being to "restrain and correct him under circumstances that tend to the mental and moral uplift of the child." *Taylor v. Means*, 139 Ga. 578, 77 S.E. 373 (1912). A minor who is placed under the care of the Authority is educated and disciplined so that, upon termination of the confinement, the law deems such sentence to have been commuted. The minor may resume his normal citizenship without the odium attached to an ex-convict, free from all the liabilities and penalties which ordinarily result from the conviction of a crime and confinement. Ex parte *Nichols, supra.*

Legislation which provides for the separate treatment of youthful offenders and places them under competent and decent supervision is unquestionably wise. The great majority of the cases construing such legislation are based on sound public policy, and have reached commendable results. The instant case, however, is an example of carrying a beneficial law to an extreme it was not designed to reach. The legislature endeavored to provide a place for delinquent minors where they can be cared for "without being thrown under the baneful influence of veterans in crime." Ex parte *Liddell, supra.* The Youth Authority had the power to take charge of appellant, and to give him a longer confinement than usually accompanies such an offense—but with this power came the attendant responsibility to carry out the intent and purpose of the statute. This intent could have been carried

out only by using the additional confinement to appellant's benefit, or admitting the failure of such measures and returning him to his original status. Such action as taken in the instant case deprives the statute of its beneficial nature, and renders it an instrument of unwarranted discrimination.

PATRICIA BEAUCAMP.

CONSTITUTION LAW—EQUAL PROTECTION—CONDUCT OF TAX-EXEMPT CORPORATION WITH POWER OF EMINENT DOMAIN NOT "STATE ACTION"

Plaintiff, a Negro veteran, brought suit against a city mayor and a private housing corporation, to enjoin the defendants from refusing plaintiff housing facilities in a housing project. Under statutory authority, the corporation had secured substandard areas by condemnation proceedings of the city, and had enjoyed certain tax-exempt benefits for its project. The injunction was denied. On appeal, *Held*: Affirmed. The conduct of a private housing corporation, in excluding Negroes as tenants in its housing project, does not constitute state action within the purview of the equal protection clauses of the federal and state constitutions. *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541 (1949).

The courts, in construing the Fourteenth Amendment, have limited the applicability of the "equal protection" clause to "state action," so as to exclude invasions of civil rights by individuals. *Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1884); *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, 3 A.L.R.2d 441 (1948). It is undisputed that state action not only embraces conduct of the legislative, judicial, and executive branches of the state, but also includes acts of the instrumentalities by which the state acts. *Ex parte Virginia*, 100 U.S. 339, 25 L.Ed. 676 (1879); *Ladner v. Siegel*, 298 Pa. 487, 148 Atl. 699, 68 A.L.R. 1172 (1930). This theory of state action by instrumentalities has been extended to include the conduct of private corporations and individuals when they act under direct mandate of the state. *Buchanan v. Warley*, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149, L.R.A. 1918C, 210, Ann. Cas. 1918A, 1201 (1917); *Nixon v. Herndon*, 273 U.S. 536, 47 S. Ct. 446, 71 L. Ed. 759 (1927). Where the state primaries become an integral part of the machinery for the election of public officers, the conduct of the party conducting the primary is deemed state action. *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987, 151 A.L.R. 1110 (1944); *Rice v. Elmore*, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875, 68 S.Ct. 905, 92 L.Ed. 1151 (1948). The action of the board of trustees of a privately owned library dedicated to the free use of the public is within the scope of the term. *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir. 1945). State accountability cannot be evaded by the leasing of a city swimming pool to a private operator who subsequently practices discrimination. *Kern v. City Comm'rs*, 151 Kan. 565, 100 P.2d 709 (1940). And a broad interpretation of the *Shelley v. Kraemer* doctrine (state action if state enforces restrictive covenants) could make state action

of any state aid to an entity practicing discrimination. Note, *State Action Reconsidered in the Light of Shelley v. Kraemer*, 48 COL. L. REV. 1241 (1948); cf. *Terrel Wells Swimming Pool v. Rodriguez*, 182 S.W.2d 824 (Tex. Civ. App. 1944).

The above authorities indicate a tendency to a broad interpretation of state action. It is doubtful that the courts will enlarge its scope to the extent of holding a state accountable for the mere granting of a charter where the charter holder subsequently engages in discrimination. However, the granting of a charter accompanied with the benefits of the power of eminent domain and tax exemption, is and should be considered within the limits of the term. It is submitted that the instant case should have followed the dissenting opinion and the injunction should have been granted.

LANELLE RIMES.

CONTRACTS—INDEFINITENESS—EXECUTED EMPLOYMENT AGREEMENT UNENFORCEABLE WHEN REMUNERATION NOT SETTLED WITH CERTAINTY

Plaintiff sued for an injunction, receivership, and other equitable relief, basing the action on an alleged contract to share in profits. The agreement originated in correspondence between the parties. Regarding remuneration, plaintiff wrote that, in addition to a salary of $7,500.00, he contemplated an "equitable" distribution of profits. Defendant replied and "confirmed" plaintiff's statement, adding that he would be rewarded in "honest proportion" and pledging good faith in interpreting the value of the services in relation to what was to be achieved. In the trial court, defendant's general demurrer was sustained. On appeal, *Held*: Affirmed. The alleged contract does not with sufficient definiteness indicate any basis upon which the plaintiff's share of the profits could be determined. The correspondence is vague, indefinite, and uncertain, and is insufficient to sustain an action at law or in equity for breach of contract. *Gray v. Aiken*, 54 S.E.2d 587 (Ga. 1949).

In a contract of employment the compensation to be paid is a material part, and until the parties have agreed upon a definite amount to be paid, the contract is incomplete, and either party has a right to withdraw therefrom. *Pita v. Whitney*, 190 Ga. 810, 10 S.E.2d 851 (1940); GA. CODE § 20-108 (1933). Thus contracts where the compensation is to be agreed on in the future are clearly too indefinite to be enforceable. *Bogy v. Berlage*, 265 App. Div. 249, 38 N.Y.S.2d 584 (1942). The same is true of "illusory agreements" by which one party to the agreement reserves the right to determine the amount due. *Tennant v. Fauecett*, 94 Tex. 111, 58 S.W. 824 (1900). Where there is no definite price fixed for services, and there is no agreement between the parties as to the value of the services, with a mutual understanding, or an obligation on the part of the defendant that such price should be paid by him, there is no enforceable contract. *Bentley v. Smith*, 3 Ga. App. 242, 59 S.E. 720 (1907). Where the remuneration to be paid is described as "good wages," "fair share," or the like, the

agreement is held to be unenforceable by most courts. *Canet v. Smith*, 173 App. Div. 241, 159 N.Y.Supp. 593 (1916).

Some authorities, however, advocate the rule that an understanding which is too indefinite to be enforceable as an executory contract, may, by entire or partial performance on the part of the promisee, create a valid contract. RESTATEMENT, CONTRACTS § 33 (1932); see 92 A.L.R. 1396 (1934). Thus where a contract for personal service is fully performed, the rule requiring definiteness of terms in the case of executory understandings is relaxed. *Ireland v. Hibbs*, 125 W.Va. 31, 22 S.E.2d 706 (1946). Where a contract to perform services is indefinite as to price, but the services have been performed by one party and accepted by the other, the promisee does not have to rely on the common law quantum meruit count, for the promisor will be bound by his agreement. *Levitt v. Miller*, 64 Mo. App. 147 (1895). So when the defendant has agreed to remuneration that is "just," "fair," "equitable," "reasonable," or is described by any word of similar import, and the plaintiff has performed, the defendant will be held to his bargain and damages will be measured on an equitable basis, irrespective of any implied promise. *Corthell v. Summit Thread Co.*, 132 Me. 102, 167 Atl. 79 (1933); *Noble v. Joseph Burnett Co.*, 208 Mass. 75, 94 N.E. 289 (1911). The courts which do not allow an action on the contract for such "indefinite" agreements, however, do allow the plaintiff to bring a quantum meruit action. *Rustin v. Norman*, 25 Ga. App. 342, 103 S.E. 194 (1920); *Canet v. Smith, supra*.

Courts insist that the law does not favor the destruction of contracts on grounds of indefiniteness. *Leffler Co. v. Dickerson*, 1 Ga. App. 63, 57 S.E. 911 (1907). Apparently on that theme, authorities announce as a rule of construction, "That is certain which can be made certain." *Dorsey v. Clements*, 202 Ga. 820, 44 S.E.2d 783 (1947); see 12 AM. JUR. 560, § 69. The meaning placed on the contract by one party, and known to be thus understood by the other party, at the time, shall be held as the true meaning. GA. CODE § 20-703 (1933). The cardinal rule of construction is to ascertain the intention of the parties. GA. CODE § 20-702 (1933). In view of the above rules of construction, it appears that courts would be reluctant to declare an agreement that has been executed by competent parties unforceable because of indefiniteness. As is apparent from the principal decision, however, such is not the case. Also apparent is the fact that the quantum meruit action afforded by GA. CODE § 3-107 (1933), is inadequate as a remedy when applied to indefinite agreements, because a reasonable value does not always represent the remuneration justifiably anticipated by the promisee. The $7,500.00 salary paid the plaintiff probably represented the "reasonable value" award that would have been granted in a quantum meruit count, but such award could not represent his fair share of the profits. As a result plaintiff is without remedy in regard to the agreement to share in profits. When a contract involving definiteness in regard to compensation is placed before a court and when the plaintiff is seeking to enforce the contract according to its terms rather than resorting to the quantum meruit action, two considerations should aid a court in resolving the

issue of indefiniteness. The first is whether the understanding is executed or executory; the second is whether the just expectations of the promisee, as a resonable man, might have been anticipated by the promisor. Should both questions be resolved in favor of the promisee, a more justifiable result would be reached by following the example of the West Virginia Court in *Ireland v. Hibbs, supra*, to "relax" to some extent the rule requiring definiteness of contract terms.

JAMES B. O'CONNOR.

CRIMINAL PROCEDURE—DOUBLE JEOPARDY—RIGHT OF STATE TO APPEAL AFTER ACQUITTAL

District attorney filed an information charging the accused with the violation of a statute prohibiting newspaper identification of a rape victim. The accused waived jury trial. At the conclusion of the state's case, the judge ruled the evidence insufficient and ordered accused discharged. The state excepted to the ruling and brought error under statutory authority; the accused cross-appealed, charging that the state's appeal constituted "double jeopardy." On hearing both motions by the state supreme court, *Held*: Appeal by the state was proper; (order discharging accused was affirmed). The state is entitled to a final determination of a criminal case untainted by procedural error, and a defendant is not put in double jeopardy so long as proceedings are all in the same cause. *State v. Evjue*, 37 N.W. 2d 50 (Wis. 1949).

Double jeopardy exists where the accused is tried twice by the same sovereign for the same offense. *Burton v. United States*, 202 U.S. 344, 26 S. Ct. 688, 50 L.Ed. 1057 (1906). The authorities are in accord that once the accused is brought before a court that is competent to decide his innocence or guilt, his original jeopardy begins. Such jeopardy attaches immediately after the jury has been impaneled and sworn, *State v. Blair*, 24 Ohio App. 413, 157 N.E. 801 (1927), or when evidence is introduced to a court where a jury trial has been waived. *People v. Garcia*, 120 Cal. App. 767, 7 P. 2d 401 (1931). Where the jury is dismissed without "sufficient cause" and without the accused's consent, the jeopardy terminates and the accused cannot be retired. *State v. Himes*, 153 Fla. 711, 15 So. 2d 613 (1943). But where a jury fails to agree, sufficient cause for dismissal exists, and the resulting mistrial does not terminate the jeopardy. *State v. Prince*, 185 S.C. 150, 193 S.E. 429 (1937). According to Mr. Justice Holmes, "The jeopardy is one continuing jeopardy from its beginning to the end of the cause." *Kepner v. United States*, 195 U.S. 100, 24 S. Ct. 797, 49 L.Ed. 114 (1904). At what point the continuing jeopardy terminates, so as to end the cause, is the controversial issue in most double jeopardy cases. A majority of the decisions hold that this point is reached when an acquittal is rendered; this breaks the continuity and ends the cause. *People v. Murphy*, 244 App. Div. 382, 280 N.Y. Supp. 405 (1935). Contra: *State v. Flannigan*, 251 Wis. 517, 29 N.W. 2d 771 (1947). This majority view is adhered to whether the acquittal is by a jury verdict or by the order of a judge sitting without a jury. *Tyson v. Western Nat. Bank of Baltimore*, 77 Md. 412, 26 Atl. 520,

23 L.R.A. 161 (1893).

The Constitution of the United States expressly prohibits the federal courts from exposing an accused person to jeopardy twice for the same offense. U. S. CONST. AMEND. V. The state courts, however, are not bound by the Bill of Rights. *Barron v. Baltimore*, 7 Peters 243, (U.S. 1833). Placing a person in double jeopardy does not violate the due process clause of the Fourteenth Amendment. *Palko v. Connecticut*, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937). Nonetheless, most states have either enacted constitutional provisions prohibiting double jeopardy, GA. CONST. Art. I, § 1, Para. VIII; WIS. CONST. Art. I, § 8, or the freedom from double jeopardy has been held to be guaranteed by virtue of the common law. *Ex parte Dixon*, 330 Mo. 552, 52 S.W. 2d 181 (1932). Despite the almost universal protection against double jeopardy, many states provide by statute that the state can appeal on all questions of law that arose at the trial. VT. GEN. LAWS, § 2425 (1933); WIS. STAT. § 358.12 (1947). These statutes have been upheld on the ground that the legislature may provide for the review of all questions of law without placing the accused in jeopardy twice for the same offense. *State v. Stunkard*, 28 S.D. 311, 133 N.W. 253 (1911).

"However unsatisfactory . . . a verdict may be, whatever facts may be discovered after the trial, which if known at the trial would have altered the result, no means are at present provided by law by which a verdict can be reversed." 1 STEPHEN, GENERAL VIEW OF THE CRIMINAL LAW 312 (2d ed. 1890). Such was the English law in the past, not only as to the state's right to appeal but also as to the defendant's right. From so strict a rule as to the finality of a criminal cause has come the present law in many states, where improved procedure permits rectification of a mistake prejudicial to the defendant, but continues to allow outmoded concepts based purely upon historical factors to govern where an error has prejudiced the state. To guard zealously the rights of a defendant in a criminal case is the very basis of criminal procedure in a democracy, but to stretch the double jeopardy doctrine to an unreasonable and unwarranted extreme can only raise doubt as to the soundness of the doctrine in the first instance. Although the rule of the instant case is not universally followed, it provides for a more intelligent disposition of criminal cases because it is based upon the merits of the case rather than on mere technicalities.

EDWARD T. WRIGHT.

DEAD BODIES—INDECENT TREATMENT AND NON-BURIAL —COMMON LAW OFFENSE FOR

Appellant, who had roomed and boarded the deceased, was tried upon an information charging her with "treating a dead body indecently." Allegedly, she had placed the corpse in various life-like positions for five days in order to avoid detection of the death until after she had received the state welfare check of the deceased. Following her conviction, appellant brought error contending that the facts, as established, constituted no offense. *Held*: Affirmed. Treating a

dead body indecently is an offense at common law and refusing or neglecting to perform the duty of burial is a misdemeanor. *Baker v. State*, 223 S.W.2d 809 (Ark. 1949).

Under the early common law of England, burial and preservation of dead bodies were exclusively within the jurisdiction of the ecclesiastical courts and no action for damages would lie for injuries to a corpse. *Griffith v. Charlotte, C. & A. Ry.*, 23 S.C. 25, 55 Am. Rep. 1 (1884); *Pierce v. Swan Point Cemetery*, 10 R.I. 227, 14 Am. Rep. 667 (1872). At later common law, it was held to be an offense to treat a dead body indecently. *People v. Baumgartner*, 135 Cal. 72, 66 Pac. 974 (1901); *Moloney v. Boatmen's Bank*, 288 Mo. 435, 232 S.W. 133 (1921). And it is a criminal offense, both at common law and frequently by statute, to interfere with another's right of burial. *Travelers Ins. Co. v. Welch*, 82 F.2d 799 (5th Cir. 1936). However, it has been held that a statute prescribing a penalty against persons having the unlawful possession of the body of a deceased person is not directed against cemetery associations or their trustees, and that the statute does not pertain to the remains of persons long buried or decomposed. *Carter v. Zanesville*, 59 Ohio St. 170, 52 N.E. 126 (1898). It is a well-settled rule that a violation of the right to bury a corpse and preserve the remains is a tort. *Travelers Ins. Co. v. Welch, supra.* Hence the withholding of the body of a deceased person from those who have a right to the possession thereof for the purpose of interment will give rise to a cause of action against the one holding the body. *Gadbury v. Bleitz*, 133 Wash. 134, 233 Pac. 299, 44 A.L.R. 425 (1925); *Bonaparte v. Fraternal Funeral Home*, 206 N.C. 652, 175 S.E. 137 (1934). In determining the right of possession of a dead body, the rule has been formulated that if there is no surviving husband or wife, the right as custodian is generally in the next of kin in the order of their relationship. *Pettigrew v. Pettigrew*, 207 Pa. 313, 56 Atl. 878 (1904). But this rule may be modified by circumstances of special intimacy or association with the decedent. *Pettigrew v. Pettigrew, supra.* Although the custodian's right to a dead body is definite, it is not absolute for this right must yield when it is in conflict with the public good or when the demands of justice require such subordination. *Gray v. State*, 55 Tex. Cr. 90, 114 S.W. 635 (1908).

The disposition of the human body after death usually follows the desires of the deceased as expressed by him while living. Even in the absence of such expressions and desires, disputes seldom occur, but when questions arise, they are difficult to resolve. Obviously, in the ordinary case, the difficulty confronting the court is the protection of the personal feelings of the survivors. In the instant case the court was not faced with such a situation because the decedent was without survivors, and for all practical purposes the body was a public charge. Nonetheless, the conviction was justified because even in the absence of a statute, there is a duty owing both to society and to the decedent that his body be buried without unnecessary delay.

FRANK H. BASS, JR.

DOMESTIC RELATIONS—DISABILITY TO REMARRY—NON-ESTOPPEL TO CHALLENGE VALIDITY OF SUBSEQUENT MARRIAGE CONTRACTED IN VIOLATION THEREOF

Plaintiff, having in good faith married the defendant, later sued for divorce. Defendant demurred, denying the existence of his marriage to plaintiff on the ground that a previous Georgia divorce decree had imposed upon him a disability to remarry. The trial court sustained the demurrer and plaintiff appealed. *Held*: Affirmed. The defendant is not estopped to interpose the defense of his disability. The plaintiff cannot maintain her action. *Bell v. Bell*, 56 S.E.2d 289 (Ga. 1949).

Georgia law allows a total disability to be imposed upon the guilty party in a divorce action. Remarriage to the former spouse is, where such disability is imposed, the sole exception permitted. *Park v. Barron*, 20 Ga. 702, 65 Am. Dec. 641 (1856). This system should be differentiated from the laws of those jurisdictions which forbid the guilty party in an action arising from adultery to marry his accomplice, *Rhodes v. Miller*, 189 La. 288, 179 So. 430 (1938); and from those in which remarriage is prohibited for a certain lapse of time following divorce. *Allred v. Wood*, 72 Utah 427, 270 Pac. 1089 (1928). The latter laws, while designed to cope with essentially the same problem, are not authority in states following the total disability concept held in Georgia. Even less applicable are decisions relating to marriage following an invalid divorce. This simply presents a case of bigamy. *Christopher v. Christopher*, 198 Ga. 361, 31 S.E.2d 818 (1944).

The question of the validity of a marriage contracted while either of the parties was under disability imposed by a court at the time of granting a previous divorce was first dealt with in Georgia, in *Park v. Barron*, *supra*. Here the court decided that such disabilities were penal in nature and the party violating the decree was subject to contempt of the court imposing the disability, or, as for the felony of bigamy, by that of any other court. Such marriages were held not to be void, but voidable. The doctrine of *Park v. Barron*, *supra*, received widespread consideration as a means of clarifying situations otherwise complicated by a divergence between the desire to interpret stringently and literally the law as written and, at the same time, to protect the interests of parties who had acted in good faith. *Crawford v. State*, 73 Miss. 172, 18 So. 848 (1895). A minority of those states adhering to the total disability doctrine view marriages contracted in violation of a disability as void *ab initio*, but only upon specific statutory mandate. *Cole v. State Comp. Comm.*, 121 W.Va. 111, 1 S.E.2d 877 (1939). Because the situation which this doctrine was devised to meet does not arise frequently and because it is the policy of Georgia not to contest the validity of the marriages of her citizens contracted in states not recognizing such disabilities, little recourse has been had to the doctrine of *Park v. Barron*, *supra*.

Judge Atkinson, in the instant case, points out in his dissent that there can be no partial dissolution of a divorce, leaving but one of the parties married and that Georgia has no statute declaring such marriages void. The majority based its holding upon *Baker v. Baker*,

168 Ga. 478, 148 S.E. 151 (1929), in which a guilty party seeking to claim property under such marriage was denied relief, and stated that while the defendant cannot allege his own disabilities in an action based on an ordinary contract, he may do so in one involving marriage because of public policy. In *Baker v. Baker, supra*, the defendant was seeking gain from a marriage contracted by her in defiance of a disability imposed by a court, but she was restrained from so doing. It may be argued, that a sounder public policy would be one which made a penalty imposed upon a defendant in a divorce action admissible in subsequent litigation only when it was detrimental to his interest. Such a policy would reconcile the decisions of *Park v. Barron, supra*, and *Baker v. Baker, supra*, if not the reasons supporting them. This would avoid the suggestion that a wholly innocent party, who had acted in good faith, is being penalized by subjecting him to a stringent and tortuous interpretation of the law.

JAMES G. MILWAIN.

DOMESTIC RELATIONS—ILLEGAL MARRIAGE—EFFECT ON DIVISION OF PROPERTY JOINTLY-PURCHASED AND ACQUIRED

Plaintiff and defendant in good faith entered into an agreement to contract a common-law marriage. Pursuant thereto, they held themselves out as husband and wife. Both worked at occupations outside the home and invested their joint earnings in realty and commercial ventures. All such investments, however, were in the name of the defendant husband. A number of years after the supposed marriage, and after the parties had acquired considerable property, plaintiff learned that common-law marriages were not recognized by the state. Upon the defendant's refusal to consent to a legal marriage, the plaintiff brought a suit in equity for a division of the jointly-purchased property. The defendant's demurrer was overruled and he appealed. *Held*: Judgment reversed; ignorance of the illegality of the marriage will not justify equitable division of the property. *Smith v. Smith*, 255 Wis. 96, 38 N.W.2d 12 (1949).

Generally, one spouse may acquire rights in the property of the other only if the marriage is a valid and subsisting contract. *Hynes v. Hynes*, 28 Wash.2d 660, 184 P.2d 68 (1947). Where both parties enter into the marriage with knowledge of an existing impediment, their relationship is meretricious. *Hill v. Vrooman*, 242 N.Y. 549, 152 N.E. 421 (1926). Such marriages are void, not voidable. *Reynolds v. United States*, 98 U.S. 145, 25 L. Ed. 244 (1879). And no equitable property rights are acquired where the relation is meretricious. *Baker v. Baker*, 222 Minn. 169, 23 N.W.2d 582 (1946). Property acquired during a void marriage belongs to the party vested with the legal title. *Creasman v. Boyle*, 196 P.2d 835 (Wash. 1948).

Some jurisdictions recognize putative marriages, *i. e.*, marriages entered into in good faith and without knowledge of an existing impediment. *Franzen v. Equitable Life Assur. Asso.*, 130 N.J.L. 457, 33 A.2d 599 (1943). In these jurisdictions, a putative spouse is en-

titled to the rights of a lawful spouse in the property acquired during the supposed marriage. *Lazzarevich v. Lazzarevich*, 88 Cal. App. 708, 200 P.2d 49 (1949). Under this doctrine of putative marriages, where one or both of the parties enter the marriage in good faith, either is entitled to an equitable division of the jointly-acquired property. *Funderburk v. Funderburk*, 214 La. 717, 38 So.2d 39 (1948). But the absence of good faith in the moving party vitiates the doctrine and equitable division will be denied. *Beuch v. Howe*, 71 S.D. 288, 23 N.W.2d 744 (1946). In the jurisdictions where putative marriages are not recognized, rights in the property acquired during a purported marriage may be recognized if the moving party was acting in good faith in entering into the marriage. *Sclamberg v. Sclamberg*, 220 Ind. 209, 41 N.E.2d 801 (1942). Such rights are not, however, based on a marital relation between the parties. *Roberts v. Roberts*, 62 Wyo. 77, 196 P.2d 361 (1948). Instead, relief may be granted on some equitable basis. *Jenkins v. Jenkins*, 107 Utah 239, 153 P.2d 262 (1944); *King v. Jackson*, 196 Okla. 327, 164 P.2d 974 (1945) (judicially found partnership).

The court's refusal, in the instant case, to grant the plaintiff some form of relief, is strongly questioned. Because the suit was based on equitable grounds and the plaintiff's good faith was not denied, it appears that equity would deem relief mandatory. Granted that the doctrine of putative marriages is not recognized in Wisconsin, nevertheless relief could have been granted on some equitable reformation of the admitted contract of marriage entered into in good faith. The plaintiff is clearly left remediless, a result irreconcilable with the maxim that "equity lends its hand to those who act in good faith." It seems that justice and equity would have been better served had the decision of the lower court overruling the defendant's demurrer been sustained and, after trial, a division of the property decreed. Such a disposition would have been in harmony with the undisputed facts and the merits of the case.

MICHAEL A. DEEP.

ELECTIONS—BALLOTS—REGULATION OF BY STATE LEGISLATURE

The state election board's ruling prohibited the printing of the plaintiff's party emblem on the ballot of a general election. The rule was based on a statute which denied this privilege to a political party that did not poll at least five per cent of the votes cast for governor at the preceding general election. On plaintiff's appeal, *Held*: Affirmed. The right to vote is not a personal or property right but a political privilege which the legislature may regulate to any extent not prohibited by the state or federal constitutions. *Morrison v. Lamarre*, 65 A.2d 217 (R.I. 1949).

The "privileges and immunities" protected by the Fourteenth Amendment include those rights and privileges which, under the laws and Constitution of the United States, are incident to citizenship of the United States. They do not include rights pertaining to state cit-

izenship; these rights are derived solely from the relationship of the citizen and his state. *Snowden v. Hughes,* 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497, *rehearing denied,* 321 U.S. 804, 64 S.Ct. 778, 88 L.Ed. 1090 (1944). The privilege of voting is not derived from the United States, but is conferred by the state and, except as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the state may condition suffrage as it deems appropriate. *Breedlove v. Suttles,* 302 U.S. 277, 58 S.Ct. 205, 82 L.Ed. 252 (1937). Also, the right to become a candidate for state office is a privilege of state citizenship, and is not protected by the federal privileges and immunities clause. *Snowden v. Hughes, supra.* Generally, such clauses in state constitutions will not prohibit legislatures from classifying objects or persons who may be exclusively affected by the provisions of a law. *Valley Nat. Bank v. Glover,* 62 Ariz. 538, 159 P.2d 292 (1945). The federal constitutional requirement that all elections be free and equal is not a limitation on the legislative power to enact reasonable regulations for the naming of candidates by political parties and groups of voters. *Asher v. Arnett,* 280 Ky. 347, 132 S.E.2d 772 (1939).

State legislatures have power to establish conditions precedent to the existence and operation of political parties. *Field v. Hall,* 201 Ark. 77, 143 S.W.2d 567 (1940). See 7 GA. B. J. 245 (1944) (discussion of disfranchisement by primary). They also are empowered to prescribe the form of ticket to be used when a particular kind of election is to be held, *Akers v. Remington,* 115 S.W.2d 714 (Tex. Civ. App. 1938); and can bar from the ballot a political party advocating the forceful or violent overthrow of the local, state, or national government. *Field v. Hall, supra*: See 32 ILL. L. REV. 113 (1937). A state may also confine particular methods of nomination to parties having a specified strength at a preceding election without denying any right guaranteed by the Fourteenth Amendment. *Iverson v. Jones,* 171 Md. 649, 187 Atl. 863 (1936); COOLEY, CONSTITUTIONAL LIMITATIONS 1358 (8th ed. 1927).

In affirming the ruling of the election board, the court in the instant case held properly and conformed with the majority decisions. To hold otherwise would be to deny the principle of "states' rights" and deprive state legislatures of their inherent powers to regulate and control elections.

FRANK H. BASS, JR.

EVIDENCE — PRIVILEGED COMMUNICATIONS — COMPETENCY OF FORMER SPOUSE'S TESTIMONY AS TO INCRIMINATING ACTIVITIES OBSERVED DURING MATRIMONY

During the trial of the accused for robbery, his former wife testified for the state. Her testimony pertained to certain incriminating activities which she had observed, as his wife, both during and after the night of the alleged crime. A statute provided that neither husband nor wife could testify for or against the other as to any "communications privately made." The accused's objection to the testimony, on the

ground that it was prohibited by the statute, was overruled by the court. On appeal, *Held*: Reversed. The "communications" contemplated by the statute include not only spoken or written words, but all conduct, acts, signs, and other information obtained as a consequence of the marital relation. *Menefee v. Commonwealth*, 189 Va. 900, 55 S.E.2d 9 (1949).

At common law, neither spouse was competent to testify for or against the other in a criminal case. *State v. Vaughan*, 136 Mo. App. 645, 118 S.W. 1186 (1909); *Meriwether v. State*, 81 Ala. 74, 1 So. 560 (1887). The origin of the rule is unknown: " . . . the history of the privilege not to testify against one's husband or wife is involved . . . in a tantalizing obscurity." 8 WIGMORE, EVIDENCE § 2227 (3d. ed. 1940). Various reasons have been advanced in support of the rule. It has been held sound public policy to preserve domestic tranquility by preventing either spouse from testifying against the other. An additional, but now non-existing reason, was that of the old common law husband-wife concept of unity. Also, because of the joint-interest of the spouses, it was thought that the testimony, even if admitted, would tend to fabrication and unreliability. 3 JONES, EVIDENCE § 732 (4th ed. 1938); MCKELVEY ON EVIDENCE § 236 (5th ed. 1944). However, the rule did not apply when the crime charged was one of violence against the person of the spouse seeking to testify. GREENLEAF ON EVIDENCE § 343 (16th ed. 1899). The competency of a spouse to testify, and the subject-matter of the testimony, are now regulated by legislation in all the states. 70 C.J. 120, § 146 (1935). But, because these statutes are in derogation of the common law, they should be strictly construed. *Cargill v. State*, 26 Okla. Crim. 314, 220 Pac. 64 (1923); *Ector v. State*, 10 Ga. App. 777, 74 S.E. 295 (1912). Therefore, to permit one spouse to testify for or against the other, the statute must be clear and unambiguous to that effect—an intent to alter a rule of such long standing should not be lightly imputed. *Bassett v. United States*, 137 U.S. 496, 11 S. Ct. 165, 34 L. Ed. 762 (1890). Notwithstanding that the *incompetency* of a spouse to testify has now been removed by statute, a policy still exists that one spouse may not testify against the other relative to "confidential communications" made during marriage. *McCormick v. State*, 135 Tenn. 218, 186 S.W. 95 (1916); *Whitfield v. State*, 85 Fla. 142, 95 So. 430 (1923). In general, every communication, *whatever* its nature, is presumed to be confidential and hence, privileged; the contrary must be established before admission into evidence is permitted. *Allen v. Allen*, 60 S.W.2d 709 (Mo. App. 1933); *Whitehead v. Kirk*, 104 Miss. 776, 61 So. 737 (1913). In determining the *scope* of privileged communications, the authorities take diverging views. The federal courts, exemplifying the minority, tend to hold as admissible any information obtained during marriage except written or spoken messages. *Fraser v. United States*, 145 F.2d 139 (6th Cir. 1944); *United States v. Mitchell*, 137 F.2d 1006 (2d Cir. 1943). A few state courts adhere to this narrow concept of the term. *State v. Dixon*, 80 Mont. 181, 260 Pac. 138 (1927); *Howard v. State*, 103 Tex. Crim. 205, 280 S.W. 586 (1926). The great weight of authority, however, holds any fact learned *as a consequence of the marital*

relation to be confidential and therefore non-admissible. The rationale of this view is that it is not a sound public policy which seeks to invade the sanctity of the home and, by evidence elecited from one spouse, consigns the other to the gallows. *Norman v. State*, 127 Tenn. 340, 155 S.W. 135 (1913); *Mercer v. State*, 40 Fla. 216, 24 So. 154 (1898). Under this theory, the testimony of a spouse who became aware of a previously concealed act was held inadmissible on the ground that the act was committed in an *unavoidable confidence*. *State v. Jolly*, 20 N.C. 10, 32 Am. Dec. 656 (1838).

The majority view, in reality, amounts to a mere application of the remnants of the old common law rule of the non-competency of a spouse to testify. The true basis of the decisions seems to be that of effectuating the original rule to the fullest extent possible under the curtailing statutes. Because most of the statutes are general in their terms, the courts continue to pay homage to the ancient rule by tending to a broad interpretation of "communications." Some legal writers deplore the inclination of the courts. They theorize that although the rule was justified in bygone days of close-knit families, it has outlived its utility and has no reason to exist in the modern era of loose family ties. Hutchings & Slesinger, *Some Observations on the Law of Evidence*, 13 Minn. L. Rev. 675 (1929); Note, 19 CALIF. L. REV. 390 (1930). More illogical reasoning can hardly be conceived. If, when in the past the family unit was a veritable tower of strength, the protection of the rule was required, how much more urgent is the need for such protection now that "family" has become almost synonymous with "discord" and "disruption." It is felt that attempts to distinguish marital transactions as confidential or non-confidential would cause a labyrinth of confusion by the resulting growth of microscopically-fine rules of distinction. Such rules do not clarify given issues but tend further to muddle them. It is submitted that the instant decision was correct in holding that the activities observed by the then-wife were properly within the limits of "communications privately made."

H. T. O'NEAL, JR.

GAMING—LOTTERIES—RECOVERY OF MONEY UNDER "INFORMER'S STATUTE"

Plaintiff brought suit as an "informer" to recover money placed in defendant's slot machine over a four-year period. The "informer's statute" provides, in substance, that money paid as consideration under a gaming contract is recoverable by the loser if sued for within six months; and after the expiration of such period, by any person who brings suit for the same. GA. CODE § 20-505 (1933). The trial court sustained a general demurrer to the petition. On appeal, *Held*: Affirmed. The statute has been interpreted to apply only to money lost while "playing or betting at any game." A slot machine is a lottery, and as such does not fall within this interpretation. *Moore v. Atlanta Athletic Club*, 52 S.E.2d 628 (Ga. App. 1949).

Courts universally define a lottery as a scheme wherein a consideration is paid for a chance to win a prize. *Russel v. Equitable Loan*

and Security Co., 129 Ga. 154, 58 S.E. 881 (1907); *Grimes v. State*, 235 Ala. 192, 178 So. 73 (1938); *McFadden v. Bain*, 162 Ore. 250, 91 P.2d 292 (1939). Under such a sweeping definition, almost any game of chance could logically be called a lottery; and Georgia law is well settled that slot machines fall into this category. *Keeney v. State*, 54 Ga. App. 239, 187 S.E. 592 (1936); *Brockett v. State*, 33 Ga. App. 57, 125 S.E. 513 (1924). The relationship between the operator of a lottery and a participant therein is contractual—this particular point being so universally accepted by the judiciary that an enumeration of authorities would be superfluous. Notwithstanding the fact that a gaming contract is thereby formed, and the code section applies *specifically* to gaming contracts, courts have persistently held that a lottery participant cannot recover his losses under the so-called "informer's statute," because he is not "playing or betting at any game." *Thompson v. Ledbetter*, 74 Ga. App. 427, 39 S.E.2d 720 (1946).

Although the operation of a lottery was not illegal at common law, it cannot be said that the courts looked upon lotteries with favor. MOLNAR, GEORGIA CRIMINAL LAW 443 (1935). Money lost at gaming could never, in the absence of fraud, be recovered, because all parties to a game were said to be *in pari delicto*. *Inghram v. Mitchell*, 30 Ga. 547 (1859). This rule applied to every ramification of gaming, without regard to whether the enterprise utilized the medium of dice, cards, horses, or lottery tickets; terminology such as "shooting," "rolling," or "playing" was held to be of no significance but was mere generic expression used interchangeably in different games. *Sims v. State*, 1 Ga. App. 776, 57 S.E. 1029 (1907).

When the Legislature enacted the informer's statute, it attempted to induce the private citizen to aid in suppressing an activity which was believed to be detrimental to public policy and good morals. See *Lasseter v. O'Neil*, 122 Ga. 826, 135 S.E. 78 (1926) (dissenting opinion). The real purpose of the statute was to obliterate gambling—not a few specific types, but *every* form of the evil which human sagacity and ingenuity could contrive, the spirit of the rule being that a winner should not be protected in his illegal gains, even though the loser be equally guilty as a party to the illegal wager. *Dyer v. Benson*, 69 Ga. 609 (1882). There are numerous instances in which the rule has been rigorously applied. *McLennon v. Whidden*, 120 Ga. 666, 48 S.E. 201 (1924) (election bet); *Dyer v. Benson*, *supra* (horse-racing); *Quillian v. Johnson*, 122 Ga. 49, 49 S.E. 801 (1904) (wagering a policy of insurance); *Alford v. Burke*, 21 Ga. 46 (1856) (dogfighting).

The instant case falls squarely within the general rule, for it was decided upon authorities directly in point. The rule itself, however, cannot be defended upon any rational basis. The code provision which permits recovery of money lost at gaming is clear, and its worthy purpose is equally plain; however, most of its potency has been sapped by the instant case, and the authorities upon which it was decided. The resulting conclusion is that any scheme which can be brought within the vast and noxious category of lotteries has been arbitrarily exempted from the operation of the statute.

H. T. O'NEAL, JR.

HUSBAND AND WIFE—CONSORTIUM—RIGHT OF ACTION IN WIFE FOR NEGLIGENT INJURY TO HUSBAND

Plaintiff brought an action for damages for loss of consortium of her husband resulting from personal injuries because of the alleged negligence of the defendants. Trial court dismissed the action on defendant's general demurrer and plaintiff sued out a writ of error. *Held*: Affirmed. There was no actionable negligence shown against defendants. The court was equally divided on the question of whether the wife has a cause of action for damages for the loss of consortium due to injuries suffered by the husband. *McDade v. West*, 56 S.E.2d 299 (Ga. 1949).

The great majority of courts at common law allowed the husband a right of action for loss of consortium against a third party for a negligent or willful injury to the wife. See Note, 21 A.L.R. 1517 (1922). This action was not limited to cases where there was a loss of services, for consortium included services, society and sexual intercourse. *Guevin v. Manchester St. Ry.*, 78 N.H. 289, 99 Atl. 298, L.R.A. 1917C, 410 (1916). But see *Golden v. R. L. Greene Paper Co.*, 44 R. I. 231, 116 Atl. 579, 21 A.L.R. 1514 (1922), where the court allowed recovery for loss of services but would not include damages for injury to the "sentimental" side of the right of consortium. However, a wife could not maintain such an action because she could not sue in her own name for a personal injury. *Feneff v. New York Central R. R.*, 203 Mass. 278, 89 N.E. 436, 24 L.R.A. (N.S.) 1024 (1909). Since the passage of "Married Women's Acts" the courts have almost unanimously allowed the wife an action for damages for the alienation of her husband's affection causing loss of consortium. *Sessions v. Parker*, 174 Ga. 296, 162 S.E. 790 (1932). Recovery has been granted in other cases where the loss was due to intentional or malicious acts. *Pratt v. Daly*, 55 Ariz. 535, 104 P.2d 147 (1940) (sale of intoxicating liquor to husband over wife's protests); *Flandermeyer v. Cooper*, 85 Ohio St. 327, 98 N.E. 102, 40 L.R.A. (N.S.) 360 (1912) (knowingly selling a habit-forming drug to husband). However, the courts will not allow the wife to maintain an action for loss of consortium where the third party negligently injured the husband. *Smith v. Nicholas Bldg. Co.*, 93 Ohio St. 101, 112 N.E. 204, L.R.A. 1916E 700 (1915); *Cravens v. Louisville & N. R. Co.*, 195 Ky. 257, 242 S.W. 628 (1922). Only one court has allowed the action where the injury was due to negligence. *Hipp v. E. I. Dupont de Nemours & Co.*, 182 N.C. 9, 108 S.E. 318, 18 A.L.R. 873 (1921). The same court later repudiated that holding, *Hinnant v. Tide Water Power Co.*, 189 N.C. 120, 126 S.E. 307, 37 A.L.R. 889 (1925); and finally resolved the question by holding that the husband and wife now stand on a parity in respect of such suits and neither can recover. *Helmstetler v. Duke Power Co.*, 224 N.C. 821, 32 S.E.2d 611 (1945). The courts of Michigan and Massachusetts are in accord with this view. *Blair v. Seitner Dry Goods Co.*, 184 Mich. 304, 151 N.W. 724 (1915); *Bolger v. Boston Elevated Ry.*, 205 Mass. 420, 91 N.E. 389 (1910).

Under the present status of the law the wife can generally sue for an intentional injury causing loss of consortium but cannot sue where

the loss is due to negligence. Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923). The reason given by the courts for the distinction is that in the case of negligence the injury is too remote. However the same courts, when considering a husband's action, have found that the negligent injury to the wife is not too remote to allow recovery. The rights of both husband and wife being equal, there seems to be no logical reason for the distinction. The *Helmstetler* case, *supra*, though unjust in denying recovery by either, represents the more logical view.

JAMES T. STEWART.

INTERNAL REVENUE—DOUBLE CAPITAL GAINS TAX—CORPORATE DISSOLUTION PLANNED TO AVOID TAX ON SALE OF APPRECIATED ASSETS

Respondent, a corporation engaged in distributing electricity, offered to sell its stock to a local competing TVA cooperative. The offer was countered with one to purchase only the transmission and distribution equipment. Respondent rejected the counter propcsal becaues of the heavy capital gains tax imposed on such corporate sales. Desiring to avoid the tax, respondent's shareholders offered to acquire and sell the equipment to the cooperative. This offer was accepted. The equipment was transferred to the shareholders as a distribution in kind in partial liquidation and the sale was consummated. The Commissioner, on the theory that the shareholders were a mere conduit for the effectuation of what was really a corporate sale, assessed and collected the capital gains tax. Respondent brought suit for recovery in the Court of Claims, was upheld, and the Supreme Court granted certiorari. *Held*: Affirmed. A corporation may liquidate or dissolve without subjecting itself to the corporate capital gains tax even though a primary motive is to avoid the burden of corporate taxation. *United States v. Cumberland Public Service Co.*, 70 S. Ct. 280 (1950).

A corporation selling its physical properties is taxed on capital gains resulting from the sale. INT. REV. CODE § 22 (a); U.S. Treas. Reg. 103, § 19.22 (a)-19. (an additional tax is imposed when the gain is distributed to the shareholder as a dividend: INT. REV. CODE § 115 (a); U.S. Treas. Reg. 29.115-1).

There is no corporate tax, however, on a distribution of assets in kind to the shareholders when such a distribution is in pursuance of a partial or complete liquidation of the corporation. INT. REV. CODE, § 22 (a); U.S. Treas. Reg. 103, § 19.22 (a)-21. The line distinguishing sales by a corporation from distributions in kind followed by shareholder sales is often nebulous and artificial; nevertheless, Congress has chosen to recognize such a distinction for tax purposes. Logic indicates that the line of differentiation be that of corporate liquidation or dissolution. However, it is not only at this line of divergence that confusion reigns but difficulty is encountered even while the corporation is a going concern. A sale by a corporation, after a decision to dissolve but before dissolution began, has been held a distribution in

kind and not a corporate sale. *Gaunt & Harris v. United States,* 110 F.2d 651 (6th Cir. 1940). *Contra*: held to be a corporate sale. *Dill Mfg. Co. v. Commissioner,* 39 B.T.A. 1023 (1939). When liquidation is involved, discord among the decisions is general. Sales by trustees or agents effectuating a corporate dissolution have been held to be corporate sales and subject to both corporate and shareholder capital gains taxes. *Hellebush v. Commissioner,* 65 F.2d 902 (6th Cir. 1933); *Fairfield Steamship Corp. v. Commissioner,* 157 F.2d 321 (2d Cir.), *cert. denied,* 329 U.S. 724, 67 S. Ct. 193, 91 L. Ed. 665 (1946); *First Nat'l Bank v. United States,* 86 F.2d 938 (10th Cir. 1936). *Contra*: that such trustee sales are sales *after* a distribution in kind. *Gaunt & Harris v. United States, supra.* Sales made by trustees or corporate agents, or by shareholders, *after* liquidation, have been held to be sales by the corporation. *Taylor Oil Co. v. Commissioner,* 47 F.2d 108 (5th Cir. 1931) (sales by trustees and agents); *Commissioner v. Court Holding Co.,* 324 U.S. 331, 65 S. Ct. 707, 89 L. Ed. 567 (1945) (sales by shareholders). *Meurer Steel Barrel Co. v. Commissioner,* 144 F.2d 282 (3rd Cir. 1944) (sales by shareholders). *Contra*: trustee or shareholder sales *after* liquidation are sales following distributions in kind and not subject to double capital gains taxes. *United States v. Cummins Distilleries Corp.,* 166 F.2d 17 (6th Cir. 1948) (trustee and agent sales); *Howell Turpentine Co. v. Commissioner,* 162 F.2d 319 (5th Cir. 1947) (shareholder sales). Cf. *Kaufman v. Commissioner,* 175 F.2d 28 (3rd Cir. 1949).

Reconciliation of the decisions is well nigh impossible. The sole certainty deduceable is that of the "uncertainty" of foretelling whether a sale of assets during or after liquidation will be deemed a corporate sale or a sale subsequent to a distribution in kind. Efforts to resolve this dilema have raised doubts as to the validity of the regulation itself. *F.H.E. Oil Co. v. Commissioner,* 147 F.2d 1002 (5th Cir. 1945). See Cork, *Does a Corporation Realize Gain or Loss On A Liquidating Distribution in Kind,* 1 MERCER L. REV. 69 (1949), for an analytical evaluation and comparison of the code section with the treasury regulation.

Until the instant case was decided, the most serious threat of double taxation by deeming sales of assets to be corporate sales was the *Court Holding* case, *supra.* The facts there were almost identical—a withdrawn corporate proposal followed by a shareholder sale after distribution in liquidation—and were found to be a corporate sale. There the court considered and weighed motives, intent, and conduct before deciding to reverse the judgment of the Court of Appeals and reinstate that of the Tax Court. In the instant case, the Court refused to delve into nebulous motives and intents, and affirmed on the simple basis of accepting, as a fact, the finding of the Court of Claims that a corporate dissolution was effected. Although opposed in their holdings and the means utilized in reaching them, the two decisions are consistent in that both are based on facts as found by the trial courts. Now that the motive to avoid taxes is of no consequence, and because it is for the trial court to determine the factual category into which a particular transaction belongs, the *Court Hold-*

ing case, *supra*, even though not overruled, has lost much of its potency as a threat of double taxation. This threat, and the conflict existing between the code section and the treasury regulation, *supra*, if not entirely resolved is at least alleviated to the point of posing no serious difficulty by the simple expedient of a trial court's finding as a fact that the stockholders, not the corporation, were the sellers after a dissolution. Notwithstanding the rule of the instant case, it has been suggested that the corporate double-tax threat be removed by legislative action. Nelson, *Dissolution Plan Avoids Tax on Gain*, New York Times, January 15, 1950, p. 1, col. 3. It is believed that the doctrine of the case, *i.e.*, the factum of the liquidation or dissolution is for the trier of the facts, furnishes an adequate antidote to such a threat.

JOHN S. KWARCHAK.

PARTNERSHIPS—SERVICE ON ONE PARTNER ONLY—ASSETS OF PARTNERSHIP HELD LIABLE PRIOR TO ASSETS OF INDIVIDUAL PARTNER SERVED

Plaintiff brought suit upon an account against defendant and another as partners. Personal service was duly made on defendant alone. No defensive pleadings were filed and judgment by default was rendered against defendant. A combined motion in arrest of and to set aside the judgment was filed by defendant, based on the ground that while the suit was brought against the partnership, the judgment was against the defendant individually. Motion was sustained and judgment was set aside. On plaintiff's appeal, *Held*: Affirmed. A partner upon whom personal service is made as a member of a partnership and against whom an adverse judgment is rendered, has the right to insist that the partnership assets be exhausted before resort is made to his individual property. *Grogan v. Herrington*, 79 Ga. App. 505, 54 S.E.2d 284 (1949).

From the time of the early common law, a partnership has not been deemed to be a legal entity separate and apart from the members composing it. *Langstaff v. Lucas*, 9 F.2d 691 (W.D. Ky. 1925), *aff'd mem.*, 13 F.2d 1022 (2d Cir. 1926). Most American jurisdictions follow the common law, although a small minority have treated the partnership as an entity for certain purposes. *White v. Tulsa Iron & Metal Corp.*, 185 Okla. 606, 95 P.2d 590 (1939). Even in these minority jurisdictions, the liability of the individual members for partnership debts is unquestioned. *Dunbar v. Farnum*, 109 Vt. 313, 196 Atl. 237 (1938). And while a partnership may own assets, the liability of the members, as true owners, extends beyond such assets and binds the property of the individual partners. *Harris v. Visscher*, 57 Ga. 229 (1876). All jurisdictions agree on the liability of the members, and a judgment obtained against a partnership renders liable both the partnership assets and the personal assets of the several partners. *Porter v. Harden*, 164 F.2d 401 (5th Cir. 1947) (applying Ga. law). But when the liability priority of the partner and partnership assets is in issue, a divergence in the decisions appears. The vast majority hold that

partnership assets must be depleted before resort can be made to the private assets of the partners. *Craig v. Smith,* 10 Colo. 220, 15 Pac. 337 (1887); *Clark v. Johnson,* 7 Ala. App. 507, 61 So. 34 (1913); *Hold v. Oldfield Tire & Rubber Co.,* 117 Ohio St. 247, 158 N.E. 191 (1927). See Note, 100 A.L.R. 997 (1936). Until the instant case, the position of the Georgia Courts has been to the contrary. Statutory mandate that a judgment against a partnership will bind the assets of the partnership and of the partner served, was enacted in Georgia at an early date. Ga. Laws, 1840, pp. 114-115; DIGEST OF STAT. LAWS OF GA. 589-590 (Cobb 1851). The current code embodies the substance of this partner-served liability: "Service of process on one partner, with a return of non est inventus as to the other, shall authorize a judgment against the firm binding all the firm assets and the individual property of the one served." GA. CODE § 75-312 (1933). Neither under the present code nor under its predecessors has the question of the priority of asset liability ever been judicially determined. However, the Supreme Court of Georgia has endorsed the rule that " . . . a partner is liable to have his property seized for a partnership debt regardless of partnership assets." *Drucker & Bro. v. Wellhouse & Sons,* 82 Ga. 129, 131, 8 S.E. 40, 41, 2 L.R.A. 328 (1888). And the Georgia Court of Appeals has held the assets of the partner served, and the partnership assets, *jointly liable* on a judgment secured against the partnership and the partner. *Ragan v. Smith,* 49 Ga. App. 118, 174 S.E. 180 (1934). On the other hand, no Georgia decision can be found holding that the partnership assets must be exhausted before a judgment holder may proceed against a partner's individual assets. The *Drucker* and *Ragan* cases, *supra,* in particular, are so convincing to the effect that a judgment against a partnership will render the private assets of a partner served liable irrespective of partnership assets, as to gain recognition that the Georgia decisions represent the minority view on this question. See Note, 100 A.L.R. 999 (1936).

In the instant case, Georgia clearly falls in line with the majority decisions. Commendable as this course may be for the sake of uniformity, the argument may be made that the now extinct minority view reached a more just result. Ordinarily, when a judgment is obtained against the partnership, the firm will pay it unless it is insolvent or the members of the firm believe that its assets are concealed. If the judgment against the partnership is not paid promptly, the creditor should be at least privileged to levy upon any or all the property of the partner served, wherever it can be found.

ROBERT E. STEELE, JR.

PRACTICE AND PROCEDURE—IMPROPER ARGUMENT—EXTENT OF REMEDIAL INSTRUCTIONS AT DISCRETION OF TRIAL COURT

Defendant was convicted in superior court for a criminal offense. The solicitor-general, in his closing argument to the jury, stated that if no case had been made out against the defendant "the court could and would have directed a verdict for defendant." Counsel for defense

objected to the statement on the grounds that it was improper argument. The trial court overruled the objection and offered no remedial instructions to the jury. On appeal, *Held*: Reversed. It is the duty of the trial court to rule out improper argument and to alleviate its damage by "adequate" remedial instructions—failure to do so constitutes reversible error. *Washington v. State*, 56 S.E.2d 119 (Ga. App. 1949).

There are three possible courses which the trial court may pursue in dealing with improper argument: the judge may *ex mero motu* prevent the argument, rebuke counsel and offer remedial instructions, or declare a mistrial. GA. CODE § 81-1009 (1933). Before an objection will be sustained, the argument must be improper, *Floyd v. State*, 143 Ga. 286, 84 S.E. 581 (1915); *Mitchell v. State*, 38 Ga. App. 360, 144 S.E. 15 (1928); must actually have been heard by the jury, *Finn v. McAllister*, 46 Ga. App. 230, 167 S.E. 309 (1933); and must be capable of working some injury upon the opposite party. *Hoxie v. State*, 114 Ga. 19, 39 S.E. 944 (1901); *Lee v. State*, 116 Ga. 563, 42 S.E. 759 (1902). The trial judge has a broad discretion in determining whether these elements exist, and in applying the appropriate remedy provided by the code. *Harrison v. Langston*, 100 Ga. 394, 28 S.E. 162, (1897); *Spence v. Dasher*, 63 Ga. 431 (1879). The judge is held to be under a *duty* to intervene and prohibit improper argument, even though no objection be made to it by the offended party. *Brown v. State*, 60 Ga. 210 (1878). However, reversible error does not occur if the judge fails in this respect, because the injured party waives his right to raise the point on appeal. *Thomas v. State*, 129 Ga. 419, 59 S.E. 246 (1907); *Herndon v. State*, 111 Ga. 178, 36 S.E. 634 (1900).

Although the numerous cases concerning improper argument and remedial instructions seem to be in confusion, it appears possible to classify improper argument into three broad categories. Remarks which are essentially inflammatory and prejudicial in nature are those which dwell upon some characteristic of the opposite party over which that party has no element of control, in order that the hatred of the jury might be heaped upon him—a reference to *race* is very common. Such remarks comprise the first general classification. *Hammond v. State*, 51 Ga. App. 225, 179 S.E. 841 (1935); *Cofield v. State*, 14 Ga. App. 813, 82 S.E. 355 (1914). A similar practice, in the same group, also widespread is the argument that the *nature* of a corporation is "godless," "soulless," or "money-mad." *Western & Atlantic Ry. v. Cox*, 115 Ga. 715, 42 S.E. 74 (1902); *Southern Ry. v. Gentle*, 36 Ga. App. 11, 135 S.E. 105 (1926). The second category of improper argument may be designated as the practice in which counsel "testify" as to facts not introduced in evidence. *White v. State*, 177 Ga. 115, 169 S.E. 499 (1933); *Wells v. State*, 194 Ga. 70, 20 S.E.2d 580 (1942); *Mitchum v. State*, 11 Ga. 615 (1852). The third general group consists of mere impolite or "side" remarks not of such nature as to be called inflammatory, or extensive enough to be classified as testifying. *Georgia Life Insurance Co. v. Hanvey*, 143 Ga. 786, 85 S.E. 1036 (1915); *Futch v. State*, 137 Ga. 75, 72 S.E. 911 (1911). An argument will never be held improper

merely because it is ardent or zealous, for the use of extravagant language and figurative speech have ever been recognized as legitimate cudgels of forensic warfare. *Taylor v. State*, 121 Ga. 348, 49 S.E. 303 (1914); *Western & Atlantic Ry. v. York*, 128 Ga. 687, 58 S.E. 183 (1907); *Patterson v. State*, 124 Ga. 408, 52 S.E. 534 (1905). It is also well settled that, unless an argument falls within one of the prohibited classifications, it cannot be declared improper merely because it is illogical, even though it be patently so. *Sable v. State*, 14 Ga. App. 816, 82 S.E. 379 (1914).

Even after it has been determined that an argument has fallen into one (or more) of the classifications of impropriety, so many variables exist that it is impossible to formulate a rigid rule as to which remedy is applicable. An improper argument has far more gravity in a case with closely contested facts than in one in which the factual issues are less bitter. *Southern Ry. Co. v. Gentle, supra; Morris v. Maddox*, 97 Ga. 575, 25 S.E. 487 (1895). Emphasis has also been placed upon the status of the offending counsel in his community—a shrewish barrister of low repute cannot give to his words the deadly impact which an eminent counselor of great statue might impart to a similar remark. *Veazey v. Glover*, 47 Ga. App. 826, 171 S.E. 732 (1933); *Pelham & Havana Ry. v. Elliot*, 11 Ga. App. 621, 75 S.E. 1062 (1912). When either of these last mentioned factors—closely contested facts or emminence of counsel—give impetus to an argument which is either inflammatory or based upon extrinsic facts, an *immediate* and *drastic* rebuke of counsel and *emphatic* remedial instructions must be given. See *Americus v. Gammage*, 15 Ga. App. 805, 808, 84 S.E. 144, 146 (1914). The decisions appear to attach great importance to the curative powers of an apology for improper argument. *White v. State*, 19 Ga. App. 230, 91 S.E. 280 (1917); *Hulsey v. State*, 172 Ga. 797, 159 S.E. 270 (1931). However, the very best remedial instruction would seem to be had by the trial judge expressing *his opinion* that the point made by the improper argument is either illegal, impossible, or absurd. See *Mitchell v. State*, 180 Ga. 572, 573, 179 S.E. 706, 707 (1935).

The numerous cases involving improper argument and remedial instructions are difficult to reconcile because of the great discretion given trial judges in ruling upon the propriety of arguments, and the remedial measures necessary to rectify the damage done. There is no alternative than that the judge should possess such power; for it is he alone who, in the intensity of judicial combat, is in a position to weigh the countless factors which constitute the particular atmosphere of a given trial. Reviewal of his actions is difficult, for the personality of a trial cannot be incorporated into the record. An argument which wrongfully spells sudden death to the rights of a litigant in one cause may be perfectly legitimate and proper in another case with almost identical facts. Notwithstanding these premises, a very general classification of the cases appears to formulate a few markers by which to go. In the instant case, counsel was guilty of "testifying" as to an extrinsic fact—that fact being that the trial judge believed the defendant guilty. It appears that the statement

was of such nature that it could have been cured by an ordinary remedial instruction. Since this was not done, the Court was unquestionably correct in holding that reversible error had been committed.

H. T. O'NEAL, JR.

TORTS—FAMILY PURPOSE DOCTRINE—NOT APPLICABLE TO BICYCLES

Plaintiff brought suit against parents and minor son, to recover for injuries sustained when struck by bicycle driven by the son. The action was based on the "family purpose doctrine," *i.e.*, the bicycle was furnished the minor by the parents, to earn money for the benefit of the family by handling a paper route. On appeal from a judgment against the defendants, *Held*: Affirmed as to the son; reversed as to the parents. The family purpose doctrine does not extend to bicycles. *Pflugmacher v. Thomas*, 209 P.2d 443 (Wash. 1949).

The family purpose doctrine was developed to compensate innocent victims for injuries sustained in accidents caused by the negligent operation of a family automobile by an insolvent minor member of the family, against whom a judgment for damages would be an empty form. *King v. Smythe*, 140 Tenn. 217, 204 S.W. 296 (1918). Its basis is that one who maintains an automobile for the general use of his household, is held, upon grounds of public policy and in analogy to principles governing agency, to have made the use of the automobile for such purposes a part of his business. Therefore, any member of the household using the automobile, under general authority to do so, becomes an agent for whose negligence the owner is responsible. *Durso v. A. D. Cozzolino, Inc.*, 128 Conn. 24, 20 A.2d 392 (1941); *Cohen v. Whitman*, 75 Ga. App. 286, 43 S.E.2d 184 (1947). See Lattin, *Vicarious Liability and the Family Automobile*, 26 MICH. L. REV. 846 (1928). About one-half of the jurisdictions reject the doctrine on the basis that the matter is one to be regulated by legislative power. *Van Blaricom v. Dodgson*, 220 N.Y. 111, 115 N.E. 443, L.R.A. 1917F 363 (1917); *White v. Seitz*, 342 Ill. 266, 174 N.E. 371 (1931). Others refuse to recognize a fictitious principal-agent relationship between the owner and a member of his household. *Trice v. Bridgewater*, 125 Tex. 75, 81 S.W.2d 63, 100 A.L.R. 1014 (1935). Generally, the courts accepting the doctrine refuse to consider an automobile to be a dangerous instrumentality *per se*. *Parker v. Wilson*, 179 Ala. 361, 60 So. 150, 43 L.R.A. (N.S.) 87 (1912). Contra: *Crenshaw Bros. v. Harper*, 142 Fla. 27, 194 So. 353 (1940). The doctrine has been held not applicable to motorcycles. *Meinhardt v. Vaughn*, 159 Tenn. 272, 17 S.W.2d 5 (1922). And in refusing to extend it to motorboats, a court has held that the proportionate number of motorboats, as compared to automobiles, did not justify an extension of the rule. *Felcyn v. Gamble*, 185 Minn. 357, 241 N.W. 37 (1932); *Trice v. Bridgewater*, *supra*. See 60 C.J.S. 1059, nn. 71, 72.

In the principal case the court was requested to extend the doctrine on grounds logical from a legal point of view. In refusing, the court stated: " . . . if reasons for extending the application of any estab-

lished rule do not exist, then such extension should not be made by the courts, but left to the legislature." That this refusal may or may not be the correct decision, is purely conjectural. However, the reason given by the court in support of it is inadequate and illogical from a legal standpoint when viewed in the light of reasons given by the courts in the past for establishing the doctrine. The basis of all vicarious liability is to compensate the injured for losses brought about through the negligence of persons under the control of others. See Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105 (1929); Hope, *The Doctrine of the Family Automobile*, 8 A.B.A.J. 359 (1922). To state that the requested extension of the doctrine is within the purview of the legislature is but to state that the entire doctrine is one for legislative police power. A logical extension of an established rule cannot be categorically classed as exceeding legal power or authority without implicating this classification to the evolution of the rule itself. Courts, doubtlessly, must give due consideration to a practical adaptation of legal rules to the attainment of a just result. Nevertheless, consistency demands that symmetry and logic in their development not be arbitrarily disregarded. At most, the reason given by this court for refusing to extend the rule merely adds weight to those reasons given by numerous other courts for rejecting the family purpose doctrine entirely.

DAVID R. ROGERS.

TORTS—WRONGFUL DEATH ACT—APPLICABILITY WHERE INJURY TO MOTHER CAUSES DEATH TO UNBORN INFANT

Plaintiff, father of stillborn infant, brought an action as next friend and special administrator against a doctor and hospital for the wrongful death of the child. Recovery was sought under a wrongful death act providing: "When death is caused by the wrongful act . . . of any person . . . , the personal representative of the decedent may maintain an action therefor if he [the decendent] might have maintained an action, had he lived, for an injury caused by the same act . . . . " MINN. STAT. ANN. § 573.02 (1945). Defendant hospital demurred on the ground that plaintiff's complaint failed to state a cause of action in that the deceased infant had never existed as a person. The demurrer was sustained. On plaintiff's appeal, *Held*: Reversed. The personal representative of an unborn child which was viable and capable of separate existence, whose death was allegedly caused by the wrongful acts of a physician and the hospital where the mother was confined, can maintain an action on behalf of next of kin for the wrongful death of such child. *Verkennes v. Corniea*, 38 N.W.2d 838 (Minn. 1949).

The original wrongful death act created a right of action in the personal representative of the deceased, enabling a recovery against the wrongdoer, for the benefit of the surviving spouse or children. One fundamental basis of the statute was that it could be invoked when, and only when, the tort causing the death was such as would enable the decedent, *had he survived, to maintain an action against the tortfeasor*. Lord Campbell's Act, 9 & 10 VICT., c. 93 (1846).

Within a year of the enactment of this statute, American states were passing similar statutes. See In re *Meng*, 96 Misc. 126, 159 N.Y. Supp. 535, 537 (Surr. Ct. 1916) (judicial review of early acts). Currently, all the states have wrongful death statutes embodying the basis of the original act. See 25 C.J.S. 1091-2; 44 HARV. L. REV. 980 (1931). A recurring controversial issue arising under wrongful death acts is that of the applicability of the act where the death of an unborn infant is caused by an injury to the mother. A leading case expressing the American majority view denying recovery distinguishes between criminal liability, where an unborn infant is deemed a "person" when its death is caused by an intentional miscarriage, and civil liability where the infant is held to be a part of the mother. The court, in denying recovery to the parent, was strongly influenced by the fact that no precedent was found which allowed an action to be maintained by a surviving, prenatally injured infant. *Deitrich v. Northampton*, 138 Mass. 14, 52 Am. Rep. 242 (1884). This view was almost permanently entrenched in the law of this country when a later court, faced with determining whether such a surviving infant could maintain an action, held the infant was not "in being" as a separate existing life at the time of the injury. *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 56 N.E. 638, 48 L.R.A. 225, 75 Am.St.Rep. 176 (1900). The effect of the *Allaire* case, *supra*, was to deny recovery to the parents, under a wrongful death act, on the basis that the act was not applicable because the infant, had he survived, could not maintain an action of his own. See Lord Campbell's Act, *supra; Buel v. United Ry.*, 248 Mo. 26, 154 S.W. 71, 45 L.R.A.(N.S.) 625, Ann. Cas. 1914C 613 (1913). This rule has the approval of almost every American jurisdiction and enjoys the sanction of the American Law Institute. See Note, 45 L.R.A. (N.S.) 625 (1913); RESTATEMENT, TORTS § 925 (1938). Notwithstanding this array of authority, a virile minority view would erradicate the distinction between an infant *en ventre sa mere* being a separate life for the benefit of the criminal law but not for the civil law. Also, this view would hold the foetus a legal entity when it has so far developed as to be alive and capable of maintaining life when separated, by whatever means, from the body of the mother. *Lipps v. Milwaukee E. Ry.*, 164 Wis. 272, 159 N.W. 916 (1916). See dissent in Allaire v. St. Luke's Hospital, *supra*, for a vivid, original exposition of this minority rule. In several instances courts following this view and allowing the parents a recovery have been overruled by subsequent holdings of appellate courts in their jurisdictions. *Drobner v. Peters*, 232 N.Y. 220, 133 N.E. 567, 20 A.L.R. 1503 (1921), overruling *Nugent v. Brooklyn H. Ry.*, 154 App.Div. 667, 139 N.Y. Supp. 367 (2d Dep't 1913); *Stemmer v. Kline*, 128 N.J.L. 455, 26 A.2d 489, 684 (1942), reversing (by 9-6 decision) 19 N.J. Misc. 15, 17 A.2d 58 (1940). However, contemporaneous with these reversals, parental recovery was permitted in a recent federal decision. *Bonbrest v. Kotz*, 65 F.Supp. 138 (D.C. 1946). The minority view has been favorably discussed and re-affirmed. *Cooper v. Blanch*, 39 So.2d 352 (La. App. 1923); *Lipps v. Milwaukee E. Ry.*, *supra*. Further, it is endorsed by able legal writers. See Frey, *Injuries to Infants En Ventre Sa Mere*,

12 ST. LOUIS L. REV. 85 (1935); Kerr, *Action by Unborn Infant*, 61 CENT. L.J. 364 (1905); Straub, *Right of Action for Prenatal Injury*, 33 LAW NOTES 205 (1929-30). And Canada has accepted this American minority view as the Dominion majority rule. *Montreal Tramways v. Leveille*, (1933) 4 D.L.R. 337 (Can.Sup.Ct.).

The court in the instant case is to be commended for breaking away from the majority view. Upon analysis of the merits and infirmities of both views, it is apparent that reason dictates such decision. The blunt fact is that an unborn infant developed to the point of being able to maintain life when separated from the mother, prematurely or otherwise, is a separate existing life. No justification exists for the arbitrary holding that such an infant is a person for one aspect of the law and not for the other; the demand for recognition is equally compelling in each case. It is too plain for argument that one primary purpose of law is to prohibit the destruction of human life. Once the existence of life has been established, its destruction, if through negligence, should be as accountable as is an intentional destruction. And the factor determining accountability should not be an outmoded fiction when the court has access to universally known and established facts on which to base its decision. Equally lacking justification is a court's refusal to grant judicial notice of the separate life of an unborn infant ten days before birth. *Allaire v. St. Luke's Hospital, supra.* The court majority there, in the face of medical knowledge, relied solely on precedent establishing an unborn infant to be a part of the mother, and stated that an injury to the infant was recoverable as an injury to the mother. Such fixed adherence to the principle of stare decisis, when opposed by undisputed and common lay knowledge, is strongly questioned. However, because of the tendency of modern courts more readily to take judicial notice of advancements made in fields of knowledge other than that of law, and of their reluctance to cling to precedent solely because of stare decisis, it seems safe to predict that the current minority view is destined to be the majority rule of tomorrow.

JOHN S. KWARCHAK.

WILLS—PROBATE—FINAL DECREE AS A BAR TO PROBATE OF LATER WILL

Plaintiff sought probate of a will expressly revoking one which had been previously admitted to record. Probate was refused on the ground that the prior decree was conclusive on the court. On appeal, *Held*: Reversed. A final decree of a court of probate admitting a will cannot be asserted as a bar to the probate of a later will expressly revoking all others. Offering the later will constitutes a contest or impeachment of neither the earlier will nor the judgment of probate. In re *Winzenrith's Will*, 55 S.E.2d 897 (W.Va. 1949).

In general, an order of probate indicates that the formalities of execution have been complied with. *Couchman v. Couchman*, 104 Ky. 680, 47 S.W. 858 (1898). Proving a will is peculiarly a subject for the probate court, and until it is established in that forum, it has no

life; so, a court sitting in equity cannot give effect to an unprobated instrument. *Cousens v. Advent Church of City Biddeford*, 93 Me. 292, 45 Atl. 43 (1899). However, the decree is not necessarily conclusive. In re *Bentley's Will*, 175 Va. 456, 9 S.E.2d 308 (1940). Consistent with this view, it has been held that the offering for probate of a later will is not a contest of an earlier one admitted to record. In re *Elliot's Estate*, 22 Wash. 2d 334, 156 P.2d 427 (1945). Likewise, an admission of a will to probate is not an attack, directly or collaterally, on a decree of distribution, since it establishes only the status of the instrument as a will. In re *Walker's Estate*, 160 Cal. 547, 117 Pac. 510 (1911). Most jurisdictions adopt the view that a probate court has the inherent power to revise and correct its own judgments. *Waters v. Stickney*, 12 Allen 1, 90 Am. Dec. 122 (Mass. 1866). A subsequent judgment usually renders inoperative the first will. This does not result from a collateral attack on the prior order but flows from the law which gives vitality and force to the last testamentary act of the testator. *Murrell v. Rich*, 131 Tenn. 378, 175 S.W. 420 (1914). A revocation of the first decree is unnecessary since the prior will may be allowed to stand to the extent that it is not inconsistent with the second. In re *Bentley*, *supra*.

In some jurisdictions a probate decree is conclusive until vacated on appeal or declared void by a court of competent jurisdiction in a proceeding instituted for that purpose. In re *Puett's Will*, 229 N.C. 8, 47 S.E.2d 488 (1948). In the absence of these two remedies, the proponent is in no position to offer the second paper for there has been an adjudication of the last will of the testator. *Sebik's Estate*, 300 Pa. 45, 150 Atl. 101 (1930). *Central Trust Co. v. Bennet*, 208 Ky. 281, 270 S.W. 821 (1925). In others, an application for probate of a later will incompatible with the first *is* a contest of the earlier will, and it may not be admitted after the expiration of the statutory time allowed for contest. *Watson v. Turner*, 89 Ala. 220, 8 So. 20 (1889). In these jurisdictions, a probate court has no power to vacate or revise its decree and admit a subsequent will, In re *Butt's Estate*, 173 Mich. 504, 139 N.W. 244 (1913); hence, it cannot entertain a petition to have its decree set aside. *Mellor v. Kaighn*, 89 N.J.L. 543, 99 Atl. 207 (1916). A few courts require that a request be made to revoke a prior decree. *Conzet v. Hibben*, 272 Ill. 508, 112 N.E. 305 (1916). No separate proceedings are necessary. Revocation of a former judgment may be incidental to, but must precede, the probate of the second instrument. *Bowen v. Johnson*, 5 R.I. 112, 73 Am. Dec. 49 (1858). The theory of these minority jurisdictions is that there can be only one will which is last; consequently, when there has been an adjudication of that fact, the probate court has exhausted its jurisdiction on the subject. *Mellor v. Kaighn*, *supra*.

Whether or not a probate judgment is conclusive is to be determined by the policy of the individual state in pursuance of its own statutory scheme. As probate is peculiarly a creature of statute, there will necessarily be jurisdictional differences. One jurisdiction adhering to the majority view has described its probate court as not an inferior one but one having general jurisdiction limited only to matters pre-

scribed by statute, and within these limitations, the power of this court is plenary. *Water v. Stickney, supra.* Most authorities reason that a probate court in admitting an instrument adjudicates the factum of the will, but it is in no position to determine the legitimacy of other papers which can only be passed on when they are presented to the court. As this procedure is not permitted in the minority jurisdictions, the prevailing view seems to be the better one; and when the probate court admits one will to record, it has not exhausted its jurisdiction.

FRANCIS M. DAVIS.

WILLS & ADMINISTRATION—DOWER ELECTION—EFFECT OF ACCEPTANCE OF BENEFITS UNDER WILL IN FOREIGN JURISDICTION

A widow, electing to take dower in lieu of the benefits of her husband's will, filed a petition in a probate court for an assignment of dower. In one paragraph of his answer, the executor contended that since the widow had previously taken, under the will, some of the decedent's property located in the Republic of Panama and in the Canal Zone, and, since she had not offered to return the property, she should be estopped to claim dower in Florida. The widow's motion to strike this portion of the answer was sustained, and the executor appealed. *Held*: Reversed. The benefits received may not be set up as a defense, either partial or absolute, but they are facts to be considered and taken into account by the probate court in setting off and making an allotment of dower. *Griley v. Griley*, 43 So. 350 (Fla. 1949).

A testamentary election may be express, or may be implied from the acts or conduct of the beneficiary. *Waggoner v. Waggoner*, 111 Va. 325, 68 S.E. 990, 30 L.R.A. (N.S.) 644 (1910). Whether one has made a binding election is only a question of fact, though one of ultimate fact, being merely a final inference to be drawn from other facts. *Graser v. Graser*, 147 Tex. 404, 215 S.W.2d 867 (1949). If a person accepts benefits consistent only with a will, he will be estopped to deny that he has made an election to claim under it. In re *Bernays' Estate*, 344 Mo. 135, 126 S.W.2d 209, 122 A.L.R. 169 (1939); *Carlile v. Harmon*, 179 Okla. 303, 65 P.2d 495 (1937). But acceptance of benefits under a will by a person who is ignorant of his rights and of the status of the estate does not constitute an election, unless the rights of third parties have intervened. *Florida National Bank v. Tavel*, 126 Fla. 415, 171 So. 231 (1936); *Simmons v. Simmons*, 177 Va. 629, 15 S.E.2d 43 (1941). If the act done is equivocal and does not indicate choice, as where a widow remains on property of a testator whose will made provision for her, it is insufficient to show an election. *Walraven v. Walraven*, 76 Ga. App. 713, 47 S.E.2d 148 (1948). An election once made may not be revoked without restoration of property received pursuant to the election, nor may property received when there is no prior election be retained if inconsistent with the choice made. *Merchants National Bank v. Hubbard*, 222 Ala. 518, 133 So. 723, 74 A.L.R. 646 (1931); *Stone v. Cook*, 179 Mo. 534, 78 S.W. 801, 64 L.R.A. 287

(1904).

Little authority exists relative to the question of whether acceptance of benefits in jurisdictions other than the domicile of the testator constitutes an election. It is well settled that if a person elects to take under the will in the state of the testator's domicile, he will be bound thereby in all states. *Martin v. Battey*, 87 Kan. 582, 125 Pac. 88, Ann. Cas. 1914A, 440 (1912); *Lindsley v. Patterson*, 177 S.W. 826, L.R.A. 1915F, 680 (Mo. 1915). Nor can he take under the will in another state after he has denounced it in the state of his domicile. *Colvin v. Hutchison*, 338 Mo. 576, 92 S.W.2d 667, 105 A.L.R. 266 (1936). It has been held that one who asserts ownership over real property in one state devised by will is not bound by such acts in the state of the testator's domicile. *Gillespie v. Boisseau*, 23 Ky. L. 1046, 64 S.W. 730 (1901). Another court has held that a person could renounce a will and take by statute although no election had been made in the state of the testator's domicile; the court inferred that such an election would estop the person from claiming under the will elsewhere. In re *Owsley's Estate*, 122 Minn. 190, 142 N.W. 129 (1913). This view is favored by the American Law Institute. RESTATEMENT, CONFLICT OF LAWS § 253, comment b. (1934).

In the principal case the testator was a bona fide resident of the state of Florida and a valid election by his widow, according to the laws of that state, was necessary before she would be bound to take by will or by statute. Nevertheless, there are sound reasons why she should be held accountable for property received in foreign jurisdictions when she would not be entitled to same following an election in Florida. Should she refuse to return the property, its value may be deducted from her allotment of dower. Only in this way may the assets of a decedent's estate be kept under the surveillance of one court in cases where his property is located in several jurisdictions. Should each state attempt to regard only the property within its own borders, unequal distribution and the thwarting of the desires of the testator would inevitably result.

JAMES B. O'CONNOR.