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Case Notes


Gordon was convicted in the United States District Court for the District of Columbia of robbery and felonious assault. The only issue of merit on appeal concerned the trial court's discretion in determining whether the defendant's testimony might be impeached by his prior criminal record. The United States Court of Appeals for the District of Columbia Circuit *held*: there was no abuse of discretion, and affirmed.1

In the District of Columbia, much uncertainty has been caused by the prosecution's use of the defendant's criminal record when he testifies on his own behalf. In this carefully reasoned opinion, the court of appeals canvassed some of the perplexing and frequently recurring problems arising from this method of attacking the defendant's credibility. The court discussed the rationale of its earlier opinion, contained in the leading case of *Luck v. United States*,2 and formulated certain guidelines3 which lessen the troublesome task faced by the trial judge in exercising his discretion in admitting evidence of the defendant's former convictions. The applicable statute in the District renders this kind of impeaching evidence admissible, but it is cast in vague and general terms.4 Thus, before *Gordon*, the court had already clarified certain misconceptions and settled many doubts originating from the statute.5

Development of the Discretionary Standard

Previously, the scope of prior offenses admissible was broad, including both felonies and misdemeanors.6 The criterion of “moral corruption” was held to be the controlling factor in *Clawans v. District of Columbia*:7 “But the basis of the admissibility of convictions always was and always should be grounded upon the theory that

2. 348 F.2d 768 (D.C. Cir. 1965).
4. *D. C. CODE ANN.* § 14-305 (1967) provides:
   A person is not incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime. The fact of conviction may be given in evidence to affect his credibility as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining him is not bound by his answers as to such matters. To prove the conviction of crime the certificate, under seal, of the clerk of the court wherein proceedings containing the conviction were had, stating the fact of the conviction and for what cause, is sufficient.
7. 62 F.2d 383 (D.C. Cir. 1932).
the depraved character of persons who commit crimes involving moral corruption makes them unworthy of trust in testifying." A later decision further indicated that evidence of any former crime is admissible.

As late as the 1940's, the courts still held that evidence of conviction of crimes involving moral depravity was admissible for impeachment purposes. The Supreme Court's decision in *Michelson v. United States* dispelled some of the former confusion. There, the Court noted the strong judicial disapproval of the prosecution's use of any kind of evidence as to evil character of a defendant to substantiate the probability of his guilt. The Court said that the "overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." If, however, the defendant takes the witness stand, he exposes himself to the possibility of being impeached by his prior convictions. This attack on defendant's credibility has raised substantial questions as to when, how, and within what limits it may be employed by the prosecution. Balancing the impeachment element, defense counsel is permitted to show the favorable character of his client so that a reasonable doubt of guilt could be created in the minds of the jurors.

Thus, the question of what impeaching testimony is admissible has created a major dilemma in judicial discretion. In this regard, many relevant factors must be considered. One is the nature of the prior offense, for no matter what it may be, the jurors will usually be prejudiced to some degree when they learn that the defendant has a criminal record. "The impact of criminal convictions will often be damaging to an accused and it is admittedly difficult to restrict its impact, by cautionary instructions, to the issue of credibility." The court in *Luck* observed that it is frequently more important "for the jury to hear the defendant's story than to know of a prior conviction." The delicate process herein weighs the "genuine probative

8. *Id.* at 384.
10. *Hamilton v. United States*, 31 A.2d 887 (D.C. 1943). Here a prostitute who, during a nine year period had served six sentences for solicitation, did not forfeit her right to the full and equal protection of the law; however, such a record was held to affect the credibility of her testimony.
11. 335 U.S. 469 (1948).
12. *Id.* at 476; see also *Coleman v. United States*, 371 F.2d 543 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 945 (1967). The *Michelson* doctrine has been further extended in *Barber v. United States*, Crim. No. 21,281 (D.C. Cir., March 8, 1968), in which the Court of Appeals for the District of Columbia Circuit excluded the use of a past criminal record for the first time in a sex case wherein none of the former offenses involved elements of moral depravity. In his majority opinion, Judge J. Skelly Wright said that "[b]ecause of the inflammatory nature of the offense, juries seem to strain to convict the person the Government charges with the crime." *Id.* at 3-4. As a result, he added that the judges should make a special effort in such cases to permit defendants to testify without fear of impeachment.
value on the issue of credibility"¹⁷ on the one hand against the "potential for prejudice"¹⁸ on the other.

This places the burden directly upon the trial judge.¹⁹ He knows that by statute, the prosecution may discredit the defendant's testimony by showing his criminal record. But the Luck opinion clearly indicated that the statute is not an absolute mandate, but leaves much room "for the operation of a sound judicial discretion to play upon the circumstances as they unfold in a particular case."²⁰ As such, the burden of passing on admissibility is definitely within the trial judge's discretion. Gordon supports Luck in this respect, stating that only when presented with a showing that this discretion has been abused must the appellate court set aside the lower court's decision.²¹ The rationale is that the trial judge, being most familiar with the background and facts of the case, has a sound foundation upon which to base a discretionary decision.

Currently, one of the most important questions in this area is how judicial discretion concerning the admissibility of the defendant's convictions is to be employed in a particular case. Some recent cases indicate that defense counsel must formally request the court to withhold the use of the impeaching process from the prosecution.²² This contrasts with the idea that in all other circumstances the court may exercise its discretion on its own initiative.

Judge Fahy, dissenting in Stevens v. United States,²³ strongly condemned such judicial inertia. Basing his views on the Luck opinion, he said that the evidence of the defendant's numerous prior convictions was extremely prejudicial, far outweighing its relevance to the defendant's credibility. Furthermore, in a case where it appears that prejudicial cross-examination would probably have been disallowed had it been challenged, there seems to be no reason why an appellate court could not find plain error²⁴ and reverse on this ground. Judge Fahy believed that the Luck doctrine requires the trial court to exercise its discretion even if counsel is unaware of its applicability or fails to invoke it.

In a similar case, subsequent to Stevens, appellant claimed plain error.²⁵ The court reached the identical result as it did in Stevens, on the same narrow ground that the defendant must make a timely objection and cannot claim error if the trial court fails to act sua sponte following defendant's failure to object.

Hood v. United States²⁶ further shows the firmness and rigidity of courts in ad-

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¹⁷. Gordon v. United States, supra note 1, at 939.
¹⁸. Ibid.
¹⁹. Ibid.
²⁰. Luck v. United States, supra note 2, at 768.
²¹. Id. at 769; Gordon v. United States, supra note 1, at 939.
²³. Stevens v. United States, supra note 22 (dissenting opinion).
²⁴. FED. R. CRIM. P. 52 (b).
²⁶. Supra note 22.
hering to the absolute letter of the law. In this case, the defendant’s counsel actually did raise the question of his client’s impeachment if he took the stand. The judge advised him that the statute permitted the prosecution to show criminal convictions and that the client’s credibility could be thus undermined. Under these circumstances, the defendant did not testify. On appeal, the court ruled that the mere fact that counsel had raised the question of judicial discretion was insufficient, for the defense has the burden of showing the trial court sufficient reason to exercise its discretion in excluding evidence of previous offenses. Thus, the court indicated that it would not reverse on the basis of failure to exercise discretionary power unless it was not only invoked, but invoked specifically and convincingly. The court concluded that there was not “what could be regarded as a meaningful invocation of judicial discretion; and we are not disposed in such case to find abuse.”

Gordon’s Contribution

In contrast, the Gordon court discussed the ultimate test of judicial discretion, which occurs when the trial judge is asked to bar the criminal record, even where circumstances indicate that it is suitable for impeachment. This situation is characterized by the court in terms of the Luck formula:

The test of Luck, however, is that to bar [prior convictions] as impeachment the court must find that the prejudice must “far outweigh” the probative relevance to credibility, or that even if relevant the “cause of truth would be helped more by letting the jury hear the defendant’s story than by the defendant’s foregoing that opportunity because of the fear of prejudice founded upon a prior conviction.”

Gordon considers the precedents previously discussed, and then attempts to establish a guide for future trial courts faced with discretionary judgments. The importance of this opinion lies not only in its resolution of many conflicting views, but also in its addition of some new and necessary criteria.

Gordon analyzes the purposes of the impeachment process, but concludes that the true and pertinent testimony which the defendant can give is of paramount importance; similarly, Gordon agrees with Luck that establishing the truth is more pertinent than permitting the jury to hear of the defendant’s prior record. Certain limiting guidelines are stated for the use of former crimes as impeaching testimony; in order to be admitted into evidence, these offenses should relate directly to the defendant’s credibility and not be too remote in time and relevancy, where

29. Id. at 951.
30. See also Timms v. United States, 367 F.2d 325 (D. C. Cir. 1966); Harley v. United States, 377 F.2d 172 (D. C. Cir. 1967).
31. Hood v. United States, supra note 22, at 951.
32. Gordon v. United States, supra note 1, at 989; see also Smith v. United States, 359 F.2d 243 (D.C. Cir. 1966).
33. Id. at 940-41.
34. Id. at 939.
35. Id. at 940-41.
the offenses are of the same nature as that for which the defendant is on trial, the
court suggests that only one conviction be admitted, and then only in extreme
circumstances.

A major contribution of Gordon is the dictum which suggests that, when difficult
discretionary questions arise, the best way for the judge to reach his decision may
be to have a hearing out of the presence of the jury.37 This procedure would give
the trial judge a clear picture of both the defense and the prosecution arguments as
to the use of defendant's convictions, and as a result, he could more confidently
evaluate the basis of his subsequent decision.

Despite these reforms, the end is not yet in sight. One important question which
remains unanswered, that of the necessity of counsel invoking judicial discretion
on the trial level, has already been mentioned. Recent challenges to this strict court-
room obligation urge that when, in any trial, defense counsel requests that his client
testify, the trial judge should, sua sponte, raise the issue of his discretion with both
the prosecution and defense. To carry this a step further, it is arguable that more
good than harm would be achieved and plain error avoided if the trial judge cau-
tioned counsel regarding the discretionary issue even if they have not raised it.

[I]n the fair administration of justice some obligation is imposed by Luck
upon the trial court and the prosecution, and the time may come when we
shall not feel bound to ignore its principles merely because the defense
does so.38

The striking feature of Gordon is that the appellate court allowed appeal on the
question of judicial discretion, even though counsel did not present it to the trial
judge. This served the ends of justice more efficiently than barring appeal because
of counsel's negligence. Despite this, the court gave thorough consideration to the
various problems involved and suggested certain guidelines for their solution.39 Fur-
thermore, while strict adherence to rules can be stressed in civil litigation, criminal
procedure deals with the fates of men, and procedural rules should sometimes be
subordinated to the necessity of guaranteeing a just result.

Every criminal trial has the overriding goal of reaching a true and just solution.
This objective should remain foremost in the minds of all those involved with
criminal justice. The Gordon decision clearly points in this direction. It has ex-
posed the importance of judicial discretion, so essential in view of the fact that
every day numerous criminal defendants with prior criminal records are brought
into court. The Gordon court took the initiative in delving into an important area
which it could have easily bypassed. In so doing, its opinion is bound to have great
impact on the present restrictions put on judicial discretion in criminal cases.

37. Gordon v. United States, supra note 1, at 941.
38. Lewis v. United States, supra note 22, at 894.

1. Thompson Maple Products, Inc. v. Citizens National Bank

Plaintiff, a small, closely held corporation, was engaged in the manufacture of bowling pin "blanks" from maple logs. It purchased logs from timber owners whose logs were usually transported by local truckers to plaintiff's mill. Ideally, the original delivery receipt or scaling slip was to be kept for the bookkeeping department and a copy handed to the trucker. Instead, the mill employee taking delivery gave the trucker both slips for presentation to the bookkeeping department, at which time a check was made payable to the shipper designated on the scaling slip.

In 1959, Albers, a hauler, devised a scheme by which he would present scaling slips to the office representing fictitious deliveries, but bearing names of local timber owners. Checks were prepared and after volunteering to deliver them to the named payees (this was not unusual), Albers forged the endorsements and cashed or deposited them at the defendant bank.

The court held that since the plaintiff did not carry on its business in a reasonable and diligent manner it, and not the accepting bank, should bear the loss on the checks. The court noted the loose manner in which the business was handled: blank logging slips were left in areas accessible to any hauler; Albers himself was given blank logging slips on two occasions to use as scratch pads; the scaling slips were not numbered; and in 1960, when the management required employees to initial all slips, the bookkeeping department failed to change its procedure to verify any initialing. As a result of plaintiff's own negligence, the court was unwilling to grant recovery under Section 3-404 of the Uniform Commercial Code1 (hereinafter UCC), making an unauthorized signature inoperative. Rather, the court allowed the defense imposed by Section 3-406, which denies recovery to the drawer "who by his negligence substantially contributes to a material alteration of the instrument ...."2

1. Uniform Commercial Code § 3-404 (1) provides:

Any unauthorized signature is wholly inoperative as that of the person whose name is signed unless he ratifies it or is precluded from denying it; but it operates as the signature of the unauthorized signer in favor of any person who in good faith pays the instrument or takes it for value. (Emphasis added.)

2. Uniform Commercial Code § 3-406.

Plaintiff, in countercharge, contended that the bank was negligent in not demanding a second indorsement by Albers when he cashed the checks. If this were negligence, Thompson may have been relieved of the UCC Section 3-406 defense against it. See Gresham State Bank v. O & K Const. Co., 231 Ore. 106, 370 P.2d 726 (1962). The court found that the lack of a second indorsement was not necessary, however, since the blank indorsement made the instrument bearer paper. The court was reluctant to "shift the loss to the defendant bank, in this case, merely because the bank failed to exercise an excess of caution on its

On January 19, 1964, the First Methodist Church of Mena adopted a resolution authorizing a $90,000 bond issue, employing the Institutional Finance Company as its fiscal agent. A facsimile signature of the church treasurer was entrusted to the finance company, the church thus releasing control over the authentication of the bonds. Only one-half of the bond issue was sold. On July 3, 1964, Hayes, the president of Institutional Finance, personally borrowed $25,000 from plaintiff and pledged as collateral, along with other securities, $27,000 worth of the church's bearer bonds, which he did not own. In February 1965, Hayes had reprinted $25,000 worth of the church's numbered bonds, which included duplicates of those numbered bonds pledged to the bank. These in turn were sold to the defendant. This suit was brought to determine which set of duplicate bonds the church would be required to honor.

The Supreme Court of Arkansas ruled that all parties were bona fide purchasers for value. The court looked to the negligent entrusting of the facsimile signature to Hayes and concluded, under UCC Section 8-205, that the forged certificates were valid in the hands of bona fide purchasers.

Comparison

In these cases, the courts held a drawer and an issuer responsible for instruments and securities respectively, the issuance of which was obtained by fraud and without knowledge. Both were held liable because their own negligence precipitated the loss, one under Article 3 of the UCC dealing with negotiable instruments, the other under Article 8 dealing with securities. The relevant Code sections, 3-406 and 8-205, have a common ancestry in Section 23 of the NEGOABLE INSTRUMENTS LAw (hereinafter NIL). Basically, that Section provided that a forged signature was inoperative “unless the party, against whom it [was] sought to enforce such right, own behalf.” Thompson Maple Prods., Inc. v. Citizens Nat'l Bank, 234 A.2d 32, 37 (Super. Ct. Pa. 1967).

It is also interesting to note that the superior court in Thompson did not wish to base its decision on UCC § 3-405 (1) (c), as was done by the trial court. That Section now embodies the fictitious payee and imposter provisions of Sections 9 and 23 of the NIL. Section 3-405 (1) (c) provides:

An indorsement by any person in the name of a named payee is effective if...

(c) an agent or employee of the maker or drawer has supplied him with the name of the payee intending the latter to have no such interest.

The court affirmed on the broader area of Section 3-406, rather than on the precarious reasoning that Albers was plaintiff's agent. Thompson Maple Prods., Inc. v. Citizens Nat'l Bank, id. at 36 n.5. Hayes, deceased at the beginning of this suit, was unavailable as a personal defendant.


4. Id. at 681, 420 S.W.2d at 914.

5. Id. at 683, 420 S.W.2d at 915.

[was] precluded from setting up the forgery or want of authority."

This exception was the source of much litigation under the NIL. While the result in Thompson Maple Products is a product of the same reasoning, the authority used by the court was derived from Sections 3-404 and 3-406 of the UCC. Section 3-404 provides that an unauthorized signature "is wholly inoperative as that of the person whose name is signed unless he ratifies it or is precluded from denying it;" liability primarily lies with the actual signer, when a bona fide purchaser is involved. Section 3-406, extending Section 23 of the NIL, provides:

Any person who by his negligence substantially contributes to a material alteration of the instrument or to the making of an unauthorized signature is precluded from asserting the alteration or lack of authority against a holder in due course or against a drawee or other payor who pays the instrument in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business. (Emphasis added.)

This Section protects parties who act in good faith, but is unavailable to a bank which fails to operate under ordinary banking standards. There is no specified standard as to what conduct constitutes "substantially contributing" to an alteration; the Code leaves this determination to the courts.

The cases have reached variant results on this issue; early cases decided under Section 3-406 hesitated to apply the "substantially contributing" test. In Gresham State Bank v. O & K Construction Co., an interpleader action, defendant's bookkeeper was provided with the authority to endorse checks payable to his employer, but not with the power to draw them. The bookkeeper drew checks on the corporation's account payable to itself, and then endorsed and cashed the checks with the other party in interest here, who in turn presented them to plaintiff for payment. The Oregon Supreme Court ruled that the party cashing the checks, though a payor

8. In pre-Code Pennsylvania, the drawer was precluded from setting up the forgery or want of authority only when he was negligent in the preparation of the check itself. Land Title Bank & Trust Co. v. Cheltenham Nat'l Bank, 362 Pa. 30, 66 A.2d 768 (1949). In other jurisdictions, however, the preclusion was broader. See Critten v. Chemical Nat'l Bank, 171 N.Y. 219, 63 N.E. 969 (1902) (failure to give notice); Citizens' Union Nat'l Bank v. Terrell, 244 Ky. 16, 50 S.W.2d 60 (1932) (laxity in the operation of business); Strader v. Haley, 216 Minn. 315, 12 N.W.2d 608 (1943) (ratification of the forgery); United States Guar. Co. v. Hamilton Nat'l Bank, 189 Tenn. 143, 223 S.W.2d 519 (1949) (mailing to one of the same name, but at a different address).

The NIL made no provision as to what would estop an issuer of securities from using the Section 23 defense, but see Fifth Ave. Bank v. Forty-Second St. & Grand St. Ferry R.R., 137 N.Y. 231, 33 N.E. 378 (1893) (responsible for signatures fraudulently placed upon instruments by those whom they "held out" as agents); Newco Land Co. v. Martin, 558 Mo. 99, 213 S.W.2d 504 (1946) (responsible for forgery of officer or agent in issuance or transfer of stock).

11. Uniform Commercial Code § 3-406, Comment 7. See O'Malley, Subrogation Against Banks on Forged Checks, 51 CORNELL L.Q. 441, at 446-47 n.28 (1966), which discusses the kind of negligence applicable to UCC Section 3-406.
12. Supra note 2.
within the purview of Section 3-406, did not make payment in accordance with reasonable commercial standards.\(^\text{13}\) Therefore, the wrongdoer’s principal did not bear the loss, even though it may have “substantially contributed” to the unauthorized signatures by failing to properly examine its books. That court construed Section 3-406 as requiring “a weighing process in choosing between the owner of the forged instrument and the payor in allocating the loss.”\(^\text{14}\) And in Jackson v. First National Bank,\(^\text{15}\) a Tennessee court refused to charge a church with negligence or notice where the agent, who forged fifty checks, had been with the church for twenty years. The court, citing the reasonable commercial standards test, placed the responsibility on the bank for its failure to inquire as to the trust account.\(^\text{16}\)

In Park State Bank v. Arena Auto Auction, Inc.,\(^\text{17}\) however, the Illinois appellate court would not allow a drawer to recover under 3-404 when he sent a check to a person with the same name as the intended payee, but in another city. The result in Thompson follows the reasoning of Park State Bank and the Code comments to Section 3-406, which place the loss on the drawer whose carelessness occasioned it. This is analogous to ordinary principles of contributory negligence which bar recovery in tort, and is applied in 3-406 to contract law.\(^\text{18}\)

While the Code uses a subjective standard of due care under Section 3-406, an objective standard is used in Section 8-205. Sections 8-202 (3) and 8-205, which were controlling in the duplicate bond situation of First National Bank, are more complex; the Arkansas Supreme Court is the first to interpret these sections. Section 8-202 is known as the validating section of the Code.\(^\text{19}\) It makes effective against the issuer most defective securities in the hands of bona fide purchasers, unless the defect goes to the genuineness of the security.\(^\text{20}\) The Code defines “genuine” as that which is “free of forgery or counterfeiting.”\(^\text{21}\) If the defect goes to the “genuineness” of the security, the result depends upon the source of the defect. Section 8-202 (3) states that lack of genuineness is a complete defense for the issuer as against even a bona fide purchaser, except in the case of certain unauthorized signatures recited in Section 8-205. There, the Code reaffirms the issuer’s defense when an un-

\(^{13}\) Id. at 114, 570 P.2d at 782. Cf. R. Mars, The Contract Co. v. Massanutten Bank, 285 F.2d 158 (4th Cir. 1960) (where the payor’s negligence is the proximate cause of the loss under the NIL); and Kenney v. North Capitol Sav. Bank, 61 F.2d 321 (D.C. Cir. 1932) (where the employer’s negligence is the proximate cause under the NIL).


\(^{15}\) 403 S.W.2d 109 (Tenn. App. 1966).

\(^{16}\) Id. at 112. See also Fidelity & Deposit Co. v. Hamilton Nat’l Bank, 23 Tenn. App. 20, 126 S.W.2d 359 (1938), where it was held that one who takes paper from a trustee, such paper importing a fiduciary character upon its face, is bound to inquire from the transferor as to his rights to dispose of it.


\(^{19}\) Lane, Article 8 Investment Securities, 43 Neb. L. Rev. 792, 796 (1964).

\(^{20}\) UNIFORM COMMERCIAL CODE § 8-202 (3); also Section 8-202 (2) (a) suggests that a security will not be valid in the hands of a bona fide purchaser on original issue if the defect violates a constitutional provision.

\(^{21}\) UNIFORM COMMERCIAL CODE § 1-201 (18).
authorized signature is placed on a security prior to or in the course of issue, unless it is in the hands of a bona fide purchaser and signed by an agent or employee entrusted, directly or indirectly, with the signing or responsible handling of similar securities.\footnote{22} The reasoning behind this position is that "[n]ormally the purchaser is not in a position to determine which signature a forger, entrusted with the preparation of securities, has 'apparent authority' to sign and which he has not."\footnote{23} Thus, the Code estops the issuer from asserting the defense of lack of genuineness when he has entrusted the securities to the wrongdoer.

A problem which was raised by the dissent in First National Bank related to the responsibility of the issuer for counterfeiting in an 8-205 situation; that is, where the counterfeiter is one entrusted with the preparation of the securities. The majority disregarded that consideration and characterized the signatures as unauthorized.\footnote{24} In discussing what constitutes a counterfeit, the court in Pines v. United States\footnote{25} referred to counterfeiting as a "crime based upon a preexisting" instrument.\footnote{26} Forgery, it said, does not require a preexisting instrument, rather, it is the crime of making "an instrument which has no original as such and no genuine maker whose work is copied, although in form it may resemble a type of recognized security."\footnote{27} Following this reasoning, then, the duplicate numbered bonds in First National Bank were counterfeits. There was no entrusting of unsigned securities; Hayes himself did both the duplicating and the signing. Thus, under a literal interpretation of 8-202 (3) and 8-205, the instruments, if counterfeits, would not be valid against the issuer, because the exception of Section 8-205 refers only to unauthorized signatures;\footnote{28} only the agent under Section 8-208 (1) (a) would be liable.\footnote{29}

The Code "shall be liberally construed and applied to promote its underlying purposes and policies."\footnote{30} However, is the construction too liberal when an issuer

\footnote{22. Uniform Commercial Code § 8-205 provides: 
An unauthorized signature placed on a security...in the course of issue is inef-fective except that the signature is effective in favor of a purchaser for value and without notice of the lack of authority if the signing has been done by 
(a) an authenticating trustee, registrar, transfer agent or other person entrusted 
by the issuer with the signing of the security or of similar securities...or 
(b) an employee of the issuer or of any of the foregoing entrusted with responsible handling of the security. (Emphasis added.)

For an excellent discussion, see Guttman, Investment Securities Under the Uniform Commercial Code, 11 Buffalo L. Rev. 1 (1961).


25. 123 F.2d 825 (8th Cir. 1941).

26. Id. at 828.

27. Ibid. See also Hall v. United States, 372 F.2d 603 (8th Cir. 1967).

28. 2 W. Hawland (Chapter IV by W. Klaus), A Transactional Guide to the Uniform Commercial Code 867 (1964), suggests that "[a] counterfeit certificate will be value-less in the hands of any holder...." (Emphasis added.)

29. Uniform Commercial Code § 8-208 (1) (a) provides:
A person placing his signature upon a security as authenticating trustee, registrar, transfer agent or the like warrants to a purchaser for value without notice of the particular defect that 
(a) the security is genuine ....

30. Uniform Commercial Code § 1-102 (1).}
is held responsible for counterfeiting by his entrusted agent under 8-205?

Concerning the policies and effect of 8-205, one commentator stated:

This [Section] fairly allocates risk between purchaser and issuer. The issuer can protect itself against malfeasance of its own or its transfer agent's employees by taking out appropriate fidelity bonds, requiring indemnification agreements from a transfer agent, and so on. In contrast, the innocent purchaser has little or no opportunity to determine whether a seemingly regular procedure is in fact vitiated by want of authority, especially in the mechanized and impersonal operations of stock transfers.31

However, if First National Bank were to have been decided against the bona fide purchasers, would the result have been necessarily inequitable? The purchaser of duplicate bonds does have an action against the transfer agent in warranty or fraud. The issuer, however, would be protected from an unscrupulous agent who could print counterfeit certificates, even after the agency had been terminated and in amounts unlimited by the authorized issue.32

Conclusion

Clearly, the objective standard of negligence contained in Section 8-205 was intended to offer more protection to the unwary purchaser than that afforded by the subjective standard of Section 3-406. But whether Section 8-205 was intended to impose absolute liability upon the issuer for any misfeasance by his agents, as the First National Bank court held, is highly questionable.33 The Code does protect an innocent purchaser from a negligent drawer or issuer. In cases where a duped purchaser fails to seek some self-protection, however, the fault is his, and there it should remain.


32. See W. Hawkland, supra note 28. Also, prior to the adoption of the Uniform Commercial Code, the New York Law Revision Commission noted the change wrought by Section 8-205 over the NIL.

Neither the Code nor the present law holds an issuer responsible for an unauthorized signature by any person in his employ. Under the Code the issuer is not liable unless he has entrusted the unsigned securities to his employee. (Comment 2.) This is in accord with present law. As discussed above, an issuer is not now liable unless he has both entrusted the securities to his employee and given the employee some authority over their issuance. (Emphasis added.)

33. A case relied on in the Comments to 8-205, Jarvis v. Manhattan Beach Co., 148 N.Y. 652, 43 N.E. 68 (1896), suggests a situation parallel to First National Bank, but there the issuer was held liable for the counterfeits because the purchaser, before buying, inquired of the issuer as to the validity of the certificates. This court suggested that had the purchaser been negligent of this responsibility, the issuer would not have been liable.
Henriksen filed a series of six successive patent applications, no more than two of which were copending at any one time. The first of the series matured into a patent in 1954 and was used by the examiner as a reference against the last, on the ground that the last filed application was entitled only to the benefit of the filing date of the third application back under Section 120 of the 1952 Patent Act. The Patent Office Board of Appeals affirmed the examiner's rejection of the claims in the last filed application.

The Board's interpretation of Section 120 was based on a "literal reading" of the statute. The Section was divided into separate clauses in the following manner:

A. An application for patent for an invention disclosed in the manner provided by the first paragraph of section 112 of this title in an application previously filed in the United States by the same inventor shall have the same effect, as to such invention, as though filed on the date of the prior application,

B. if filed before the patenting or abandonment of or termination of proceedings on the first application

C. or on an application similarly entitled to the benefit of the filing date of the first application

D. and if it contains or is amended to contain a specific reference to the earlier filed application.

The Board found that clauses A and B taken together relate to only two applications, with clause B specifying a condition of copendency between them. Clause C, however, was found to be alternative to clause B, so that an application would be entitled to the benefit of the filing date of the prior application if it is copending with "an application similarly entitled to the benefit of the filing date of the first application." Because clause C contains no language which implies "and so forth," the Board concluded that clause C could not be interpreted to mean "a chain of successive intermediate cases."

While the Board assertedly viewed clauses B and C as being alternative, in fact, the interpretation reached required that the clauses be read conjunctively. To illus-

1. Actually a total of ten applications were filed, but only seven were listed by the Board since the other three did not affect the chain of applications. Of the seven, only six were necessary to establish copendency.
4. Id. at 834, 154 U.S.P.Q. at 56.
5. Id. at 833, 154 U.S.P.Q. at 55.
6. Id. at 834, 154 U.S.P.Q. at 56.
trate the interpretation which could be reached if the clauses were actually read in
the alternative, it is helpful to break up the section as follows:

A'. An application . . . shall have the same effect . . . as though filed on the
date of the prior application, if filed before the patenting or abandon-
ment of or termination of proceedings

B'. on the first application or

C'. on an application similarly entitled to the benefit of the filing date of
the first application . . . .

Using this approach, clauses B' and C' are more properly alternative in that each
can be read with clause A' without requiring the other's presence. The second of
two copending applications would then have the same effect as though filed on the
date of the first application under clauses A' and B'. A third application, copend-
ing with the second, would have the same effect as though filed on the date of the
first application, when clauses A' and C' are read in conjunction. Finally, a fourth
application, copending with the third, would have the same effect as though filed
on the date of the third and it would, therefore, also be entitled to the date of the
first application. There appears, then, no limit to the chain of successively filed
applications.

The fact that two such analyses can be made indicates a patent ambiguity7 in the
language of the Section. "The literal terms though 'clear' when considered in vacuo
turned ambiguous when considered in context."8 Thus, it becomes necessary to
resort to extrinsic materials in construing Section 120.9 The Board should have
started its analysis by considering legislative purpose and intent, instead of dis-
cussing this issue in a footnote without reaching any conclusion.10 Expressions of
Congress on Section 120, however, are sketchy11 and it is difficult to ascertain con-
cclusively what that intent was. But, "the operation and administration of the stat-
ute prior to litigation"12 could and should have been investigated.

Such authorities as Rivise and Caesar, and McCrady agree in assuming that an
unlimited chain of successive applications may be filed and that all should be en-
titled to the benefit of the filing date of the earliest filed application.13 Although

7. See In re Wiechert, 370 F.2d 927, 950 (C.C.P.A. 1967) (dissenting opinion). Judge
Smith's dissent is of particular interest because it places in issue the literal interpretation
of 35 U.S.C. § 7 by the Commissioner of Patents.

23 (1965).

9. See J.G. Sutherland, STATUTORY CONSTRUCTION § 4505, at 321 (3d ed. 1943): "Be-
fore the true meaning of the statute can be determined consideration must be given to
the... prior legislative consideration of the problem, the legislative history of the statute
under litigation, and to the operation and administration of the statute prior to litigation."

10. Ex parte Henriksen, supra note 3, at 837 n.4, 154 U.S.P.Q. at 58 n.3.

11. See H.R. Rep. No. 1923, 82nd Cong., 2d Sess. 7 (1952); "Sections 120 and 121 express
in the statute certain matters which exist in the law today but which had not before been
written into the statute, and in so doing make some minor changes in the concepts involved."
See also Reviser's Note, 35 U.S.C.A. § 120 (1964): "This section represents present law not
expressed in the statute, except for the added requirement that the first application must be
specifically mentioned in the second."

12. J.G. Sutherland, supra note 9.

13. See A.R. McCrady, PATENT OFFICE PRACTICE § 44 (4th ed. 1959); 1 C.W. Rivise & A.D.
Caesar, INTERFERENCE LAW AND PRACTICE 510 (1940).
they cite no case law to support their position and, indeed, the Board was not aware of any case involving a chain of more than three continuing applications, there is such a fact situation in Ex parte Harris. There, the Board of Appeals gave the applicant the benefit of the filing date of the earliest of a series of four applications, no more than two of which were copending at any one time, in order to overcome a reference. Thus, prior to Henriksen the policy of the Patent Office was to allow an unlimited chain of successive applications. The case enjoys the distinction of having terminated 25 years of consistent practice. Although it may be presumptuous to assume that Congress was cognizant of Harris when enacting the 1952 Patent Act, Harris does set forth the pre-Henriksen policy, and provides support for the contention that Congress intended to codify such policy. While Harris alone may not be dispositive of the issue presented in Henriksen, it weakens the Board's presumption that Congress intended, as one of the "minor changes," to restrict the relation back of filing dates to the grandparent application. A further indication of the drafter's intent was expressed by Giles S. Rich, a member of the drafting committee appointed by the Coordinating Committee of the National Council of Patent Law Associations and now Associate Judge of the Court of Customs and Patent Appeals:

Section 120 gives co-pending applications the benefit of the filing date of a parent case, but only if there is in the later application a specific reference to the earlier one. Some people have questioned whether this would apply to more than one succession, one application in succession to one parent; I think that, on careful reading, you will agree that the number of generations of the lineage is unlimited.

This contemporaneous statement adds weight to the continued vitality of Harris within the 1952 Patent Act.

14. Ex parte Henriksen, supra note 3, at 836, 154 U.S.P.Q. at 58: "No other court has ever so held on this matter, nor as far as either appellant or we can determine, even had the matter present in the facts of a case."

It is interesting to note that Henriksen was published on June 20, 1967, but on March 7, 1967, Change Notice 12-8 to the MANUAL OF PATENT EXAMINING PROCEDURE (3d ed. 1961) was issued, formally making the decision Patent Office policy.

17. J.G. SUTHERLAND, supra note 9, § 5107, at 520-22: [W]here contemporaneous and practical interpretation has stood unchallenged for a considerable length of time it will be regarded as of great importance in arriving at the proper construction of a statute. Thus contemporaneous interpretations of five, nine, ten, eighteen, twenty... years have been permitted to govern legislative meaning. One of the soundest reasons sustaining contemporaneous interpretations of long standing is the fact that reliance has been placed thereon by the public and those having an interest in the interpretation of the law. While the principle here is not strictly that of estoppel running against the government there is some analogy to that principle when the interpretation has been made by a government agency or officer.
It may be that the motive behind the Board's interpretation of Section 120 was to prevent dilatory tactics in the prosecution of patent applications, "but the cure for this deplorable state of affairs rests with Congress, not with [the Board of Appeals]." 20 There are two patent reform bills now before Congress; both would limit the term of a patent to 20 years from the date of filing of the application or, if the benefit of an earlier filing date is claimed under Section 120, from such earlier filing date. 21 S. 1042 would further restrict an applicant to one continuing application, 22 whereas S. 2597 places no restriction on the number of continuing applications in a chain. 23 Under either bill, delay as a tactic would be discouraged because the filing of even one continuing application would consume a significant portion of the patent's term.

If the Court of Customs and Patent Appeals allows Henriksen to stand, then problems arise involving those patents issued before Henriksen and dependent upon the filing date of a great-grandparent, or even earlier, application. There are two possible grounds for challenging one of these patents: 1) that an existing reference antedates the grandparent or, 2) that there was a public use after the first filed application but more than a year before the grandparent application. In either case, the patent would be invalid. 24

For pending applications affected by Henriksen, relief may be afforded through the use of an affidavit if the required conditions of Rule 131 can be met. 25 In other cases, the Commissioner may adopt a liberal approach in acting upon petitions under Rule 137 to revive applications abandoned for failure to prosecute on the strength of the pre-Henriksen interpretation of Section 120. There may be instances in which applications were expressly abandoned under Rule 138. 26 The

22. S. 1042, 90th Cong., 1st Sess. § 120 (b) (2) (1967).
(a) When any claim of an application is rejected on reference to a domestic patent ... or on reference to a foreign patent or to a printed publication, and the applicant shall make oath to facts showing a completion of the invention in this country before the filing date of the application on which the domestic patent issued, or before the date of the foreign patent, or ... the printed publication, then the patent or publication cited shall not bar the grant of a patent to the applicant, unless the date of such patent or printed publication be more than one year prior to the date on which the application was filed in this country.
26. 37 C.F.R. § 1.137 (1967): Revival of abandoned application. An application abandoned for failure to prosecute may be revived as a pending application if it is shown to the satisfaction of the Commissioner that the delay was unavoidable. A petition to revive an abandoned application must be accompanied by a verified showing of the causes of the delay, by the proposed response unless it has been previously filed, and by the petition fee.
27. 37 C.F.R. § 1.138 (1967): Express abandonment. An application may be expressly abandoned by filing in the Patent Office a written declaration of abandonment signed by the applicant himself
Rules of Practice, however, do not provide for revival of such applications, even though they were abandoned in favor of a later filed application with the clear understanding that the later filed application would be given the effective filing date of the earliest application in the chain. It appears, however, that the Commissioner has ample authority under the Rules of Practice to consider petitions to revive expressly abandoned applications. Obviously, *Henriksen* raises more problems than it solves, even if the motive of the Board was to prohibit the buying of time by filing a chain of applications. An applicant can easily circumvent this attempt by appealing the final rejection of his parent application to the Board of Appeals and continuing the appeal to the courts to buy time for further continuation applications based on the parent.

and the assignee of record, if any, and identifying the application.... An application may also be expressly abandoned by filing a written declaration of abandonment signed by the attorney or agent of record.

28. 37 C.F.R. § 1.182 (1967): Questions not specifically provided for. All cases not specifically provided for in the regulations of this part will be decided in accordance with the merits of each case by or under the authority of the Commissioner, and such decision will be communicated to the interested parties in writing. [Rule 182.]

37 C.F.R. § 1.183 (1967): Suspension of rules. In an extraordinary situation, when justice requires, any requirement of the regulations in this part which is not a requirement of the statutes may be suspended or waived by the Commissioner in person on petition of the interested party, subject to such other requirements as may be imposed. [Rule 183.]


After contracting homologous serum hepatitis, Mrs. Jackson and her husband brought suit against defendants Muhlenberg Hospital, Eastern Blood Bank, and Essex County Blood Bank. Previously, Mrs. Jackson had undergone an operation at Muhlenberg Hospital. During her hospitalization, she received five blood transfusions, with the defendant blood banks supplying the allegedly contaminated blood from which she had contracted the disease. At trial, the defendant's motion for summary judgment was sustained. The Superior Court of New Jersey reversed on the basis of possible recovery under the theory of negligence or express warranty. Of more significance, however, is the court's holding that the transfer of blood did con-
stitute a "sale" within the meaning of the Uniform Commercial Code.\textsuperscript{2}

The plaintiffs' cause of action was founded on negligence and breach of implied warranty. From the court's opinion, it appears that the plaintiffs' theory of implied warranty was used in reference to its meaning at common law, and not in reference to the meaning given implied warranty under the UCC. As will be seen, this distinction becomes fundamental to a plaintiff's recovery in this situation.

**Action Against Hospital**

The Jacksons contended that the blood was a sale of goods by the blood bank to the hospital, and by the hospital to them. The defendants maintained that the furnishing of blood was a service not bearing "the warranties implied on a sale."\textsuperscript{3} This conflict, founded upon a fine distinction, has been resolved in favor of hospitals and blood banks since the problem initially arose in *Perlmutter v. Beth David Hospital*.\textsuperscript{4} There, in a 4-3 decision, the court held that the furnishing of blood was not a sale, but only part of a service rendered by the hospital. Subsequent adjudications have followed the reasoning of the *Perlmutter decision*\textsuperscript{5} in order to protect defendants who are unable to detect or destroy the virus.\textsuperscript{6} Faced with this problem, plain-

\textsuperscript{2} The only time the court made reference to the Uniform Commercial Code, however, was in its holding that the transfer of blood constituted a sale.

\textsuperscript{3} Jackson v. Muhlenberg Hosp., *supra* note 1, at 316, 232 A.2d at 882.

\textsuperscript{4} 308 N.Y. 100, 123 N.E.2d 792 (1954).

\textsuperscript{5} See Sloneker v. Saint Joseph's Hosp., 233 F. Supp. 105 (D. Colo. 1964); Whitehurst v. American Nat'l Red Cross, 98 Ariz. 46, 402 P.2d 584 (1965); Lovett v. Emory Univ., Inc., 116 Ga. App. 277, 156 S.E.2d 923 (1967) (decision here was handed down two months after *Jackson*, but the court merely followed the majority of cases in holding a blood transfusion to be an incidental part of the service rendered by a hospital—there was no mention of the *Jackson* opinion); Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc., 270 Minn. 151, 132 N.W.2d 805 (1965); Godlitz v. Wadley Research Inst., 350 S.W.2d 573 (Tex. Civ. App. 1961); Dibblee v. Groves Latter-Day Saints Hosp., 12 Utah 2d 241, 364 P.2d 1085 (1961); Gile v. Kennewick Pub. Hosp. Dist., 48 Wash. 2d 774, 296 P.2d 662 (1956); Koenig v. Milwaukee Blood Center, Inc., 23 Wis. 2d 324, 127 N.W.2d 50 (1964). But see Community Blood Bank, Inc. v. Russell, 196 So. 2d 115 (Fla. 1967). After being contaminated with the virus of serum hepatitis, plaintiff brought suit against the defendant blood bank. The trial court, on defendant's motion, dismissed plaintiff's cause of action. The appellate court reversed, holding that the transfer was a sale giving rise to a cause of action under breach of implied warranty. The Florida court, however, did note a distinction between a blood bank defendant and a hospital defendant by stating that a hospital supplied blood as part of its overall service, whereas a blood bank did not.

See also Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 539 (1967). Here, the plaintiff was attempting to recover for injuries sustained by defendant's alleged negligence in breaking a hypodermic needle in plaintiff's jaw. By way of dicta the court stated: "It is doubtful that New Jersey would follow *Perlmutter*, at least insofar as it holds that a 'sale' was not involved or that such description of the transaction is necessary to establish strict liability." *Id.* at 233, 227 A.2d at 544.

\textsuperscript{6} It is also obvious that the charitable nature of such institutions has had an impact on the courts. An extreme example is found in Dibblee v. Groves Latter-Day Saints Hosp., *supra* note 5, where the court refused to grant recovery to a plaintiff primarily on the ground that hospitals are charitable institutions whose only interests are directed toward the public welfare. Such thinking, however, controverts the trend of judicial decisions, since "the immunity of charities is clearly in full retreat . . . ." W. Prosser, *Torts* § 127, at 1024 (3d ed. 1964).
tiiffs have been unable to recover on a negligence theory in tort;\textsuperscript{7} therefore, they have naturally turned to the theory of implied warranty, wherein recovery is not contingent upon proof of negligence. Yet, under both the Uniform Sales Act,\textsuperscript{8} and the Uniform Commercial Code,\textsuperscript{9} the requirement of a “sale” is essential to recover under breach of implied warranty, and thus \textit{Perlmuter} has barred recovery to victims of “bad” blood.

By holding the transfer of blood to be a sale, the New Jersey court expanded the recent Florida decision in \textit{Community Blood Bank, Inc. v. Russell}\textsuperscript{10} and gave the hepatitis victim access to recovery against both the blood bank and the hospital. In spite of this holding, recovery for the Jacksons under the common law theory of implied warranty was denied when the court went on to find that “[s]trict liability in tort for harm caused by defective merchandise sold or supplied for a consideration is \textit{the same cause of action} as that asserted under the heading of warranty.”\textsuperscript{11} (Emphasis added.) By so holding, the court bound itself to the limitations of common law strict liability.

The Restatement (Second) of Torts requires that a product be “unreasonably dangerous” before strict liability will be imposed upon the seller.\textsuperscript{12} Owing to the relatively few cases in which patients contract serum hepatitis,\textsuperscript{13} the court here concluded that transfusions are not unreasonably dangerous. In one stroke, the plaintiffs’ causes of action in both strict liability and implied warranty were destroyed. The court conceded, however, that the plaintiffs could recover against the hospital for negligence if they could prove that the hospital “caused or contributed to causing the infection . . . .”\textsuperscript{14} Yet, this is little more than a trivial concession since the resulting burden of proof is almost insurmountable: “[T]he possibility of proving negligence for failure to detect the disease is virtually nil, and it is unlikely that any other form of a negligence argument will be successful.”\textsuperscript{15} The author of this quote concludes that the only way a plaintiff would be likely to recover would be under a theory of strict liability, which only brings the plaintiff back to the problem of unreasonable danger.

10. \textit{Supra} note 5.
12. \textit{Restatement (Second) of Torts} § 402A (1) (1965) states:
One who sells any product in a defective condition unreasonably dangerous to the user or consumer . . . is subject to liability for physical harm thereby caused . . . .
13. In only 0.45% to 1% of all transfusion cases is the virus transmitted, and of these the fatality rate is less than 0.5%. \textit{Jackson v. Muhlenberg Hosp.}, \textit{supra} note 1, at 321, 232 A.2d at 887.
15. 26 Md. L. Rev. 182, 187 (1966); \textit{see also} 29 St. John’s L. Rev. 305, 308-09 (1955).
Action Against Blood Bank

Initially, it seemed as though the plaintiffs' cause of action against the blood banks was enhanced by the court's interpretation of the disclaimer attached to each bottle of blood "sold" to the hospital. The New Jersey court held that the words of the disclaimer\(^{16}\) expressly warranted that the blood bank would use "utmost care" in the selection of donors. Naturally, a breach of this express warranty would render Eastern Blood Bank liable to the plaintiffs. The Jacksons once again faced a solid barrier, however, for it is recognized in \textbf{Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc.}\(^{17}\) that "'no donor's history is really reliable; any donor may be an innocent carrier . . . .'\(^{18}\) (Emphasis added.) Again the plaintiffs were faced with the burden of proving negligence where it can exist only remotely. Thus, the barrier remains unbroken, in spite of the fact that the \textit{Jackson} court disregarded the reasoning of numerous prior decisions by holding the transfer of blood to be a sale.

Future Litigation

If, however, we consider the \textit{Jackson} case as a guidepost to future litigation, it may point the way to the plaintiffs' goal, particularly in view of the fact that the trend of judicial decisions has been to protect the consumer, even when negligence cannot be proved. For example, the defendant in \textit{Vlases v. Montgomery Ward & Co.}\(^{19}\) sold 2,000 diseased chickens to the plaintiff. The court found for the plaintiff, even though it was impossible for the defendant to detect the disease in the one day old chickens. In addition, cases dealing with drugs,\(^{20}\) as well as those dealing with food consumption,\(^{21}\) have followed this same reasoning. By analogy, there appears to be no practical reason for refusing to impose such liability in blood transfusion cases. Noting this imbalance, Duesenberg and King bluntly state that: "It does seem as though the hospitals are getting away with murder."\(^{22}\) Once the

\(^{16}\) The following disclaimer, written in two places and in two sizes of type, was attached to each bottle of blood sold by Eastern Blood Bank:

\begin{quote}
Despite the utmost care in the selection of donors, human blood may contain the virus of Homologous Serum Hepatitis. Therefore Eastern Blood Bank does not warrant against its presence in this blood.
\end{quote}

\textbf{Jackson v. Muhlenberg Hosp., supra} note 1, at 316, 232 A.2d at 882.

\(^{17}\) \textit{Supra} note 5.

\(^{18}\) \textit{Id.} at 152, 132 N.W.2d at 807.

\(^{19}\) 377 F.2d 846 (3d Cir. 1967).


\(^{21}\) \textit{See Belinsky v. Twentieth Restr., Inc.}, 207 F. Supp. 412 (S.D.N.Y. 1962); \textit{Levy v. Paul}, 207 Va. 100, 147 S.E.2d 722 (1966) (restaurant owner impliedly warrants wholesomeness of food, serving thereof is a sale); Betheia v. Cape Cod Corp., 10 Wis. 2d 323, 103 N.W.2d 64 (1960). \textit{See also} Community Blood Bank, Inc. v. Russell, \textit{supra} note 5, at 119, where in a statement of dicta the court remarked:

\begin{quote}
[I]t is well settled in this jurisdiction that the manufacturer or producer of a product intended for human consumption or intimate body use is held strictly liable, \textit{without fault}, for consequential injuries to a consumer or user resulting from a defect in such product. (Emphasis added.)
\end{quote}

\(^{22}\) 3 R. \textit{DUESENBERG} & L. \textit{KING}, \textit{SALES AND BULK TRANSFER UNDER THE U.C.C.}, 7-7, \S 7.01 (2) (1966) [hereinafter cited as \textit{DUESENBERG}]; William L. Prosser points out that one of the most convincing arguments for strict liability lies in the courts' concern for
courts recognize this fact, they should have no trouble in granting recovery under the theory of implied warranty as defined in the Uniform Commercial Code. In so doing, they would be able to bypass the problem of negligence since "[t]here is no element of due care or the converse, negligence, in a breach of implied warranty action." Furthermore, the common law requirement of "unreasonable danger," as found in common law implied warranty, would not bar a plaintiff's recovery, since it involves a theory distinct from that defined under the Code. Duesenberg and King conclude that: "If [the transfer of blood] is constituted a sale, then it would fall within the express terms of Section 2-314 and the implied warranty of merchantability would arise." The Jackson court persuasively solved the sale-service problem, which leaves for our discussion the question of whether the "sale" of blood actually does give rise to a breach of warranty action under the Code.

Section 2-314 will attach an implied warranty of merchantability where there is a "sale" of "goods" by a "merchant" which are not "fit for the ordinary purposes for which such goods are used...." Section 2-105 (1) defines "goods" as meaning "all things... which are movable at the time of identification to the contract...."
The official comment to the Code remarks that the concept of movability is used in order to insure the existence of a "fairly identifiable" product. It cannot be denied that the blood is movable at the time of identification to the contract, since it is a specific bottled quantity transferred directly to the patient. Also, no serious problem arises in classifying the hospital or the blood bank as a "merchant," since Section 2-104 (1) categorizes a merchant as any person who "deals in goods of the kind." Furthermore, it is obvious that blood contaminated with the hepatitis virus is not fit for the "ordinary purposes" for which the blood is used. By fulfilling these requirements, plaintiffs will have a good cause of action under Section 2-314.

23. DUESENBERG, supra note 22, at 7-17, § 7.01 (4); Vlases v. Montgomery Ward & Co., supra note 19, at 849. The court there held that the absence of negligence did "not eliminate the consequences imposed by the Code upon the seller of commercially inferior goods."
24. DUESENBERG, supra note 22, at 7-76, § 7.06 (1); see also Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).
25. DUESENBERG, supra note 22, at 7-7, § 7.01 (2).
26. UNIFORM COMMERCIAL CODE § 2-314:
(1) a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.... (2) Goods to be merchantable must be at least such as... (c) are fit for the ordinary purposes for which such goods are used.
27. UNIFORM COMMERCIAL CODE § 2-104 (1) also explains in greater detail the elements which place a seller in the category of merchant:
or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.
For a brief discussion on this point, see Note, Sales: Implied Warranty: Blood Transfusions, 18 OKLA. L. REV. 104, 106 (1965), which argues that a hospital could be a "merchant" for purposes of Section 2-314.
In addition, Mrs. Jackson and her husband also have a Code remedy for the defendants' breach of an implied warranty of fitness. Section 2-315 states:

Where the seller at the time of contracting has reason to know any particular purpose for which goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is . . . an implied warranty that the goods shall be fit for such purpose.

It should be noted that the implied warranty for merchantability was applicable only to goods unfit for the "ordinary purposes" for which they were to be used. In other words, a purchaser could have a special need for goods, and if the goods did not conform to this special need, then there would not necessarily be a breach of this warranty. Yet, if the seller knew of the purchaser's special need, and the goods did not satisfy this need, there could be a breach of Section 2-315. In this case the plaintiffs' need is not special, however, and thus the distinction becomes academic. There also exists the requisite of reliance—where the patient cannot himself determine the wholesomeness of the blood, he would naturally rely on the seller's "skill or judgment." Thus, a sale of contaminated blood by a hospital to a patient gives rise to a Code remedy under Sections 2-314 and 2-315.

The foresight of Eastern Blood Bank to disclaim implied warranties presents an entirely different problem. Section 2-314 allows a merchant to make a reasonable disclaimer of warranties. The underlying purpose of this Section of the Code, however, is to protect the buyer; thus, it is not only required that the disclaimer be "conspicuous," but to be effective, it must also specifically mention merchantability. The disclaimer of Eastern Blood Bank did not reach this degree of specificity and, therefore, does not alleviate the implied warranty of merchantability.

Although Jackson v. Muhlenberg Hospital has not in itself remedied the inequities involved in the transfusion cases, it may be a significant step in that direction. With the widespread adoption of the Uniform Commercial Code, victims of "bad" blood may well be advised to take advantage of Jackson's sales-service holding and apply it to the warranty remedies of the Code. Such action, coupled with the trend of judicial decisions to impose liability notwithstanding lack of negligence, should produce favorable results for injured plaintiffs.

28. UNIFORM COMMERCIAL CODE § 2-816 (2) states that "to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability . . . ."

29. Supra note 16.


Susquehanna Corporation's managers (the "Lannan group") solicited and obtained proxies for the annual stockholders' meeting. They represented in their proxy
statements that their re-election was essential to the consummation of a proposed beneficial merger. In fact, however, their re-election was part of a scheme to enrich themselves at the expense of the other unwitting stockholders.

After their successful re-election, the Lannan group sold its controlling block of 435,000 Susquehanna shares to one Korholz for $6,525,000, a price 20 percent above the fair market value, and resigned seriatim from the board. Vacancies were filled in turn by Korholz, the new majority holder, and his nominees. Korholz then caused the American Gypsum Company, which he also controlled, to borrow $6,525,000 and use it to buy his Susquehanna shares. Susquehanna and Gypsum, now both under Korholz's direction, agreed to merge, leaving Susquehanna as the surviving corporation. As part of the agreement, Susquehanna was to absorb both the 435,000 shares and Gypsum's loan, thus acquiring its own stock at a price 20 percent above market value.

Threatened with a derivative suit charging mismanagement in the merger transaction, Korholz, acting as director for Susquehanna, bought off the dissidents by purchasing their interests. This he accomplished by causing Susquehanna to exchange shares in Vanadium Corporation, one of its lucrative subsidiaries, on a basis which undervalued the Vanadium stock by $700,000, further damaging Susquehanna.

At this stage, Dasho and other Susquehanna minority shareholders instituted a derivative action in the United States District Court for the Northern District of Illinois attempting to enjoin the entire scheme. The court was thus faced with two questions: First, was the conspiracy to defraud Susquehanna through merger a "sale" within the meaning of Section 17 (a) of the Securities Act of 1933, Section 10 (b) of the Securities Exchange Act of 1934, and Securities Exchange Commission Rule 10b-5? Second, was the mismanagement of the Vanadium stock, without disclosure to Susquehanna's shareholders, a violation of Rule 10b-5?

Relying upon the authority of National Supply Co. v. Leland Stanford Junior

   It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . .
   (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.
3. 17 C.F.R. § 240.10b-5 (1967):
   It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
   (a) To employ any device, scheme, or artifice to defraud,
   (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
   (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.
University for the proposition that a merger is not a sale, the district court in Dasho dismissed the complaint, following the rule of Birnbaum v. Newport Steel Corp., which allows relief under Rule 10b-5 only to "purchasers" or "sellers" of securities. Even had an "actionable sale" occurred, the court continued, Susquehanna had not been "defrauded" or "deceived" within the meaning of the rule. The Court of Appeals for the Seventh Circuit reversed and held: "[A]n acquisition or disposition of securities in exchange for other securities falls within the statutory definitions [of "purchase" and "sale"] and . . . this reasoning applies to a case of merger." Concurring, two members of the three judge panel further determined that the "allegedly improvident exchange of Vanadium shares" transgressed Rule 10b-5. The merger aspect of the decision firmly broadens the base of transactions which fall under the scrutiny of Rule 10b-5.

Is the Merger a "Sale"?

Because the detailed requirements of the Securities Act of 1933, covering filing and effectiveness of registration statements, are difficult to apply to corporate reorganization, the Securities and Exchange Commission exempts statutory mergers from the liabilities of Section 5 imposed upon "sellers" of unregistered securities. Presently promulgated under the Commission’s Rule 133 to the 1933 Act, this exemption has existed since 1935 and is commonly known as the "no-sale" rule. As early as 1941, the Commission expressed its concern that application of the "no-sale" rule to the entire Act created a loophole permitting the offering of billions of dollars of securities without registration. Paradoxically, in Leland Stanford, a suit alleging a fraudulent sale in violation of Section 12 of the 1933 Act, the Commission, arguing as amicus curiae, supported the "no-sale" theory, rationalizing that "in such cases a proposed corporate act is submitted to stockholders as a class, in their capacity as members of the corporate body, and that such an act of submission involves no offer to exchange with any stockholder as an individual the new securities which may be created as a result of the vote of stockholders as a class."
Later attempts by the SEC to limit the "no-sale" exemption to Section 5 occasionally stumbled over the principle which it successfully urged in Leland Stanford.

Officially the Commission's turnabout was gradual. The Leland Stanford brief was filed in support of the "no-sale" rule, at that time expressed in the famous Note to Rule 5 of the instructions to Form E-1.\(^\text{15}\) This registration form expired in 1946. Although its substitute did not contain any exempting note, the Commission nonetheless continued to apply the "no-sale" rule in its administrative determinations until 1951,\(^\text{16}\) when it repromulgated the exemption as Rule 133. The Commission at that time restated the "no-sale" rule in terms expressly limiting its application to Section 5 and further announced:

> [W]hether or not a sale is involved for any other purpose will depend upon the statutory context and the question should in no sense be influenced by [Rule 133]. As a matter of statutory construction the Commission does not deem the "no-sale theory" which is described in the rule as being applicable for purposes of any of the anti-fraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934.\(^\text{17}\)

Within the next several years, the number of mergers increased sharply, and many were merely "cloaks for phony stock promotions."\(^\text{18}\) The SEC proposed to discontinue the "no-sale" rule,\(^\text{19}\) but at administrative hearings on this proposal, the securities bar objected unanimously. One common objection was that exemption from Section 5 was required because "[t]he registration and prospectus mechanics of the Securities Act...[were] not geared to the problems posed by corporate readjustments."\(^\text{20}\) The proposal was subsequently dropped.\(^\text{21}\)

Since Leland Stanford, few courts have considered the question whether a merger constitutes a sale in anti-fraud cases. However, decisions in a majority of courts which have recently ruled on the issue, coupled with the rationale of Rule 10b-5 cases holding that corporations, otherwise involved in exchanges of their own stock, are "purchasers" or "sellers," indicate that Dasho will be followed as the appropriate interpretation of the merger-sale question in anti-fraud cases.

Before the revision of Rule 133 which expressly limited the "no-sale" theory to

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\(^{1}\) L. Loss, supra note 11, at 521.
\(^{20}\) Purcell, supra note 18, at 280. Among the antirevisionists were the American Bar Association, the Association of the Bar of the City of New York, the National Association of Securities Dealers, Inc., and the Investment Bankers Association. Id. at 280 n.79.
registration requirements, the second circuit heard an appeal involving the application of Section 16 (b) of the Securities Exchange Act to reclassification—a form of corporate reorganization also exempted by Rule 133. Without discussing the “no-sale” theory, the court ruled that a “purchase” for the purposes of Section 16 (b) had not occurred, and then expressed “regret” at the SEC’s negative response to “an invitation to express its views as amicus curiae.”

In 1960, two district courts issued opposite decisions on the issue. In *H. L. Green Co. v. Childree*, the court looked to the broad definitions of “purchase” and “sale” contained in Section 3 (a) of the 1934 Act and concluded that a merger “may or may not involve a purchase and sale within the meaning of Section 10 (b) . . . .” In *Sawyer v. Pioneer Mill Co.*, however, it was held on the facts that the solicitation of proxies was for the purpose of effecting a merger, “and not for the purpose of effecting a purchase or sale of any security.” On appeal, the SEC filed an amicus brief arguing the inapplicability of Rule 133 to Rule 10b-5, but the case was dismissed for mootness because the merger had been approved and completed.

Prior to *Dasho*, the seventh circuit had expressed a less liberal attitude toward enjoining a merger based on violations of Sections 10 (b) and 14 (a) of the 1934 Act. Under the facts alleged, the court found a claim stated under Section 14 (a), but observed that “only sheer speculation [could] bring the provisions of 10 (b) into play.”

More recently, however, two district courts granted relief in derivative suits despite arguments that Rule 10b-5 was inapplicable to mergers. In *Simon v. New Haven Board & Carton Co.*, the court held that a merger fell within the statutory defini-

   (13) The terms “buy” and “purchase” each include any contract to buy, purchase, or otherwise acquire.
   (14) The terms “sale” and “sell” each include any contract to sell or otherwise dispose of.
29. Id. at 23.
32. Borak v. J. I. Case Co., 317 F.2d 898, 847 (7th Cir. 1963), aff’d (without discussion of Section 10 (b)), 377 U.S. 426 (1964). Plaintiff did not allege a 10 (b) violation until his third amended complaint, and the trial judge apparently refused to consider it, feeling it was alleged only to circumvent the effect of recently decided Dann v. Studebaker-Packard Corp., 288 F.2d 201 (6th Cir. 1961), which limited 14 (a) recovery to the granting of prospective relief. The *Borak* court thus did not consider whether misleading proxy material could constitute a 10 (b) violation.
tion of “sale.” Voege v. American Sumatra Tobacco Corp. was decided on a narrower theory. There the court reasoned that the “actionable sale” arose when plaintiffs purchased their stock (some twenty years prior to the short-form merger involved) under the assumption that the value of his shares would not be fraudulently decreased should his corporation become involved in a merger. In a similar situation, the second circuit held that a minority shareholder, left with the choice of concurring in a short-form merger or accepting appraisal rights, was in effect a “forced” seller.

In other contexts, a corporation’s issuance of its own shares is a “sale” within the requirements of Rule 10b-5 for the reason that “it would be unrealistic to say that a corporation having the capacity to acquire $700,000 worth of assets for its 700,000 shares of stock has suffered no loss if what it gave up was $700,000 but what it got was zero.”

In Ruckle v. Roto American Co., a derivative action was brought against corporate insiders who caused their corporation to issue stock to themselves in order to solidify their control, the second circuit agreed with the rationale of Hooper v. Mountain States Securities Corp., and added a policy consideration that “[b]arring suit [under Rule 10b-5] by a corporation defrauded under those circumstances would, as a legal and practical matter, destroy any remedy against the perpetrator of the fraud.” Employing logic similar to that which guided the Hooper decision, and motivated by the policy stated in Ruckle, the Dasho court determined:

When the merger was approved and the exchange of securities occurred, the owner of stock had in effect purchased a new security and paid for it by turning in his old one. In such a situation the antifraud protections afforded by the Securities Act are needed no less than in a situation where one makes an outright purchase of stock for cash.

Emphatically extending the scope of Rule 10b-5 to mergers, Dasho agrees with current SEC advocacy “that the complex nature of a merger enhances the opportunities for fraud and thus increases the need for antifraud protection.” Dasho thus substantially devitalizes the extension of the “no-sale” rule to sections other than the registration provisions.

Use of Rule 10b-5 in Mismanagement Cases

Less clear, however, is the effect of the concurring opinion, by two of the court's three judges, that Susquehanna was defrauded in violation of Rule 10b-5 not only by the merger scheme, but also by the disposal of its shares in the Vanadium Cor-

37. 339 F.2d 24 (2d Cir. 1964).
38. Supra note 36.
41. Ibid.
poration. Since first recognized in Kardon v. National Gypsum Co., the nature and scope of the right to a civil remedy implicitly granted by Rule 10b-5 has developed amidst controversy. Particularly controversial are actions brought in the name of a corporation against controlling insiders. The alleged stock misconduct generally constitutes a breach of the fiduciary duties owing the corporation and enforceable under the common law of the states. The Birnbaum case, which technically limited the available relief of Rule 10b-5 to "purchasers" or "sellers" of securities is also cited for the argument that in mismanagement situations, application of the rule is an unnecessary and unwarranted extension of federal law. In contrast with the second circuit's approach in Birnbaum, the third circuit has stated that "Section 10 (b) imposes broad fiduciary duties on management vis-a-vis the corporation and its individual stockholders. As implemented by Rule 10b-5 and Section 29 (b), Section 10 (b) provides stockholders with a potent weapon for enforcement of many fiduciary duties."

Similarly, the District Court for the Southern District of New York, following its cautious approach in Pettit v. American Stock Exchange, asserted that the presence of mismanagement would not preclude an otherwise maintainable action under Rule 10b-5. When the alleged Rule 10b-5 violation is a scheme which has been or can be effectuated by the controlling insiders, a conceptual question arises as to whether the scheme operates as "fraud" or "deceit" upon the corporation. In Ruckle v. Roto American Corp., the court responded affirmatively:

In other contexts, such as embezzlement and conflict of interest, a majority or even the entire board of directors may be held to have defrauded their corporation. When it is practical as well as just to do so, courts have experienced no difficulty in rejecting such cliches as the directors constitute the corporation and a corporation, like any other person, cannot defraud itself.

Shortly after the Ruckle decision, the second circuit abruptly arrested the expanding inquiry of Rule 10b-5 into mismanagement of stock transactions. In O'Neill v. Maytag, controlling directors caused National Airlines to acquire a block of its own stock at a highly unfavorable price. Like Ruckle, this transaction was motivated by the directors' desire to solidify their control. The O'Neill panel rejected an amicus argument by the SEC that failure to disclose the adverse personal in-

43. Birnbaum v. Newport Steel Corp., supra note 5, at 464: "[Section 10 (b)] was directed solely at that type of misrepresentation or fraudulent practice usually associated with the sale or purchase of securities rather than at fraudulent mismanagement of corporate affairs . . . ."
47. Supra note 37.
49. 339 F.2d 764 (2d Cir. 1964).
terests of the directors was a violation of the disclosure duty imposed by Rule 10b-5. *Ruckle* was distinguished upon a somewhat incidental issuance of misleading financial statements, but overtones in the *O'Neill* opinion indicated an attitude sharply contrasting to the broad policy approach stated in *Ruckle*. The court cautioned that while “there may be difficulties in drawing [a] line where... securities transactions are part of an internal struggle for corporate control... these difficulties do not justify our treating [Section 10 (b)] or [Rule 10b-5] as a mandate to inquire into every allegation of breach of fiduciary duty respecting the issuance or sale of corporate securities.”

The court concluded that under the circumstances alleged “[f]here can be no serious claim of deceit, withheld information or misstatement of material fact...” Decisions in which mismanagement is not accompanied by acts clearly constituting common law deceit develop along divergent lines, either finding a Rule 10b-5 violation by applying the broad policy approach or by drawing restrictive lines in emulation of *O'Neill*.

The *Dasho* finding that the directors' disposal of Vanadium shares to buy off a suit violated Rule 10b-5 renders the status of this difficult issue no less uncertain. The concurring opinion indicated that “[f]here may be both palpable deception and failure to disclose defendants' adverse personal interest. With respect to [the Vanadium transaction] there is only the latter.” This finding raises two questions: First, has the court ignored the “deception” requirement emphasized by *O'Neill*? Second, did the court consider that “failure to disclose [the directors'] adverse personal interests” was “deception” within the meaning of Rule 10b-5?

An affirmative answer to the second question justifies sustaining the claimed violation based on the Vanadium transaction, for it has generally been established that “fraud” and “deceit” in the context of Rule 10b-5 have broader meanings than the common law definitions. Commenting upon the results in *Ruckle* and *O'Neill*, however, the judges observed that in both cases “the failure of the defendant directors to perform their duty presumably injured the corporation, and [we] do not believe it is sound to differentiate between situations where the directors were unanimous in wrongdoing and those where less than all were involved.” (Emphasis added.) If this observation does not indicate a disregard of the “deception” requirement, it at least underscores the court's shifting of emphasis from “fraud” and “deceit” to corporate injury resulting from mismanagement.

Characterizing by implication the “failure to perform their duty” as the Rule 10b-5 violation is not only an insensitive response to the difficult federal-state ques-

50. Id. at 768.
51. Id. at 767.
55. *Dasho* v. Susquehanna Corp., supra note 7, at 269 (concurring opinion).
56. *E.g.*, Ellis v. Carter, 291 F.2d 270, 274 (9th Cir. 1961); Hooper v. Mountain States Sec. Corp., supra note 36, at 201.
tion posed by these situations; it also overlooks the fact that the operative terms of
Rule 10b-5 are "fraud" and "deceit." Viewing federal and state law in this area as
bodies to be kept separate by the erection of technical barriers, on the other hand,
engenders unnecessary litigation regarding the nature of the barriers and contradicts
the Supreme Court's directive that the securities laws must be construed "not tech-
nically and restrictively, but flexibly to effectuate [their] remedial purposes."58

In briefs submitted in O'Neill and Dasho, the SEC has approached federal law as
developing parallel to state law, allowing for interplay between the two. This ap-
proach seems to be in keeping with the intent of Congress to provide for the pro-
tection of investors and the public interest by enacting Section 10 (b). Furthermore,
this section gives shareholders an advantageous remedy. In addition to making na-
tionwide service of process available, it relieves them of the onerous burden of post-
ing a security bond as required by many state statutes.59


Summary Judgment—Privilege Against Self-Incrimination—Gerard v. Young,
——Utah——, 432 P.2d 343 (1967).

Mary Louise Gerard, lessor, brought an action for termination of a cafe lease, alleg-
ing that her lessees, Mr. and Mrs. Young, had violated the terms of the lease by operat-
ing gambling devices on the leased premises. Defendants answered with a general
denial and moved for summary judgment, which was denied. Plaintiff then filed affi-
davits of three persons who had observed alleged gambling payoffs, and moved for
summary judgment. Defendant Young's responsive affidavit stated that he did not re-
call any of these events and therefore denied making any of the alleged pay-
offs. Plaintiff's motion for summary judgment was denied. Thereafter, when Young
was questioned under oath in a deposition proceeding, he refused to answer questions
concerning gambling activities and payoffs, claiming the privilege against self-
incrimination guaranteed by both the Utah and Federal Constitutions.3 The trial
court then granted plaintiff's second motion for summary judgment.2 On appeal, a
divided court affirmed the cancellation of the lease.3

A novel question4 arises when granting a motion for summary judgment after

1. Utah Const. art. 1, § 12 provides that the accused shall not be compelled to give evi-
dence against himself. U.S.Const. amend. V. See also State v. Byington, 114 Utah 388, 200
P.2d 723 (1948).
2. The trial court opinion is unreported.
4. The dissenting justices were unable to find a case in which a party was defeated on sum-
mary judgment after claim of privilege. Gerard v. Young, supra note 3, at 351.
defendant’s claim of privilege during the taking of his deposition, when such motion is based on this single addition to the record. Two considerations are important. The backdrop against which the narrow issue of this case is set is the broad problem of the effect to be given defendant’s silence. Different procedural effects result at different points in the litigation. The specific issue posed is whether the effect of defendant’s silence upon claim of privilege should result in summary judgment for the opposing party in the particular factual situation of Gerard.

The privilege against self-incrimination has long been recognized as available to a party in a civil proceeding when there is a possibility of subsequent criminal prosecution. Although a party has a constitutional privilege to remain silent, adjudication requires the presentation of facts relevant to the issues. Defendant’s silence has led to varied results. His failure to deny an allegation of a civil complaint on the basis of his fifth amendment privilege has been held an admission under rules of procedure. The privilege may be asserted by defendant during pre-trial proceedings. His testimony has been excluded when he has claimed the privilege while testifying at trial. A majority of courts have allowed the jury or the court as trier of fact to draw an adverse inference from defendant’s claim of privilege; comment by opposing counsel has also been allowed. Thus the privilege, although available, has not

5. The privilege referred to throughout this note is the privilege against self-incrimination protected by the Utah and the Federal Constitutions.

6. It is assumed that the only addition to the record for review (from the time of plaintiff’s first motion for summary judgment) was defendant’s claim of privilege at deposition. Although other evidence, if relevant, could well be significant in determination of this summary judgment motion, the Utah Supreme Court opinion mentions only defendant’s plea of privilege and so it is assumed that nothing else was put in the record which prompted the trial court’s grant of summary judgment. A second possible reason for variation in outcome, other than defendant’s claim, is a difference in trial court judges deciding the motions.


9. DiFrancesco v. DiFrancesco, 47 Misc. 2d 682, 262 N.Y.S.2d 881 (Sup. Ct. 1965); Wolsen Spice Co. v. Columbia Trust Co., 193 App. Div. 346, 183 N.Y.S. 400 (1920). In Levine v. Bornstein, supra note 7, the court dismissed the action after plaintiff refused to testify at a pre-trial hearing for the reason of privilege. The court differentiated the positions of plaintiff and defendant. While defendant is in court involuntarily, seeking only to defend, the plaintiff is seeking affirmative relief from the court.


generally been held to relieve its claimant from the effect of evidentiary or procedural rules.

Despite his silence, Young, as any defendant in a civil suit, must meet the allegations asserted by plaintiff. In Gerard, defendant’s answer denied the plaintiff’s allegation of gambling, thereby avoiding the abrupt conclusion of the proceedings that might have resulted had he pleaded privilege. The defenses Young thereafter asserted in reply to plaintiff’s affidavits were held sufficient to preclude summary judgment. But at the deposition proceeding, defendant claimed privilege, and in accord with the majority view, an adverse inference was drawn from his silence.

The narrow issue posed in Gerard concerns the propriety of granting summary judgment against a defendant solely on the basis of this adverse inference. The court reasoned that defendant’s claim of privilege when questioned under oath about gambling activities was inconsistent with his general denial of the original complaint alleging gambling. Because of the inconsistency, “[t]his left the sworn affidavits pointing to gambling, which affidavits [defendant] further refused to deny categorically.”

Justice Ellett, concurring, supported the grant of summary judgment, finding that “[b]y claiming the privilege of the Fifth Amendment in that a true answer would tend to incriminate him, the defendant in fact confessed that he conducted gambling in the cafe.” Relying on “an inference as a matter of logic which cannot be denied” and the adverse inference courts have allowed upon plea of the privilege, he concluded that there was no issue for the trier of fact. The two dissenting justices would have denied summary judgment, since the assertion of privilege was “a circumstance which, upon a trial, the court or jury may consider in connection with all other evidence, and may draw an inference adverse to that party’s interest if they so desire.”

The basic disagreement between the majority and dissent concerns the use and permissible scope of an inference on hearing for summary judgment. Summary judgment is to be rendered when, viewing the record in the light most favorable to the party opposing the motion, there is no genuine issue of material fact, thereby

15. Although the two justices in the majority say nothing about an adverse inference, in actuality they drew one. The court found an inconsistency in defendant’s denial of gambling activities and his subsequent claim of privilege. But to find the inconsistency, the court must have inferred from defendant’s silence that he did in fact operate gambling devices.
17. Id. at 346.
18. Ibid.
19. Id. at 351.
20. An inference is to be distinguished from a presumption. While a presumption is a mandatory deduction which the law expressly directs to be made, an inference is a permissible deduction which the reason of the trier of fact makes without an express instruction of law to that effect. Rose v. Missouri Dist. Tel. Co., 328 Mo. 1009, 43 S.W.2d 562 (1931); Bray v. United States, 306 F.2d 743, 747 (D.C. Cir. 1962); Judson v. Bee Hive Auto Serv. Co., 136 Ore. 1, 297 P. 1050 (1931).
entitling the moving party to judgment as a matter of law.\textsuperscript{22} Initially, the trial court denied plaintiff's motion for summary judgment. With a single addition to the record, \textit{i.e.}, defendant's claim of privilege on deposition, the court found that no material issue remained, and that summary judgment was proper\textsuperscript{23} on the basis of the inference drawn from defendant's silence.

In determining whether a material issue exists, there is only a limited area in which a court may conclude from an inference. Where conflicting inferences can be drawn, a material issue remains, and summary judgment should be denied.\textsuperscript{24} "[S]ummary disposition . . . should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party."\textsuperscript{25} A strong implication may arise from a given fact. A contrary implication, even though weaker, may also be reasonable. The court, in such instances, may not resolve a factual issue on the basis of the inference.

Res ipsa loquitur is an area which exemplifies the use and permissible scope of an inference upon motion for summary disposition.\textsuperscript{26} This doctrine has been held a permissible inference rather than a presumption,\textsuperscript{27} and a directed verdict on its basis is usually improper.\textsuperscript{28} But, circumstances may be such that the inference becomes inescapable. In \textit{Moore v. Atchison, Topeka & Santa Fe Ry.},\textsuperscript{29} an action for the death of a railroad brakeman, the court held that plaintiff was entitled to a directed verdict where a train had gone through a red light, and the evidence failed to explain the occurrence. In such a case, the jury is not free to speculate and conjecture. However, where circumstances permit other reasonable inferences to be drawn, a directed verdict is improper.

Where privilege is claimed in a civil suit, courts have generally held that an adverse inference against the defendant is permissible,\textsuperscript{30} but it has been left for consideration by the fact finder as part of the totality of evidence. In \textit{Ikeda v. Curtis},\textsuperscript{31} a purchaser sued for fraud in the sale of hotel property, alleging that defendant's income had resulted from the operation of the property as a house of prostitution.

\textsuperscript{22} \textit{FED. R. CIV. P. 56 (c). Accord, Utah R. Civ. P. 56 (c). See In re Williams' Estates, 10 Utah 2d 83, 348 P.2d 683 (1960).}
\textsuperscript{23} Gerard v. Young, \textit{supra} note 3, at 343.
\textsuperscript{24} Sarkes Tarzian, Inc. v. United States, 240 F.2d 467 (7th Cir. 1957); Girard v. Gill, 261 F.2d 695 (4th Cir. 1958); Winter Park Tel. Co. v. Southern Bell Tel. & Tel. Co., 181 F.2d 341 (5th Cir. 1950); Paul E. Hawkins Co. v. Dennis, 166 F.2d 61 (5th Cir. 1948).
\textsuperscript{25} Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 624 (1944).
\textsuperscript{26} The cases most clearly showing the permissible scope of an inference are res ipsa loquitur decisions involving a directed verdict motion. Since the norm for review of evidence on motion for summary judgment is the same as that for directed verdict, the examples would seem pertinent. For cases in the summary judgment area, see Girard v. Gill, \textit{supra} note 24; Eckhart v. Plastic Film Corp., 129 F. Supp. 277 (D. Conn. 1955). In a leading federal case, Sarkes Tarzian, Inc. v. United States, \textit{supra} note 24, the court reversed the trial court's granting of summary judgment, since two conflicting inferences could be drawn from the evidence received on the motion, and it was not the court's function to conclude in such a situation.
\textsuperscript{28} Sweeney v. Erving, \textit{supra} note 27.
\textsuperscript{29} 28 Ill. App. 2d 340, 171 N.E.2d 393 (1960).
\textsuperscript{30} Cases cited \textit{supra} note 11.
\textsuperscript{31} \textit{Supra} note 11.
Defendant refused to testify concerning the source of income. The court held that while the refusal would not justify a finding that prostitution was practiced in the hotel, an inference could be drawn from the refusal to testify which could be coupled with proper and relevant evidence tending to prove the fact. In another case, although not involving the fifth amendment privilege, the court held that weighing the probative value of the evidence was properly a jury function, and reversed a grant of summary judgment where defendant had stated that a fire resulted from arson, but later in his deposition repudiated the statement by denying knowledge of the fire's origin.32

The propriety of the Gerard court's grant of summary judgment on the basis of the inference arising from defendant's claim of privilege is questionable. Conflicting inferences can be drawn from a defendant's claim.33 A reasonable inference is that Young did conduct gambling activities on the premises, but it could also be reasonably inferred that he was innocent, yet feared being convicted in a criminal proceeding.34 Summary judgment on the basis of an adverse inference in nongovernmental proceedings is constitutionally questionable.35 The Supreme Court, in Slochower v. Board of Higher Education,36 held that the summary dismissal of a college professor after he claimed the privilege against self-incrimination before a United States Senate investigatory committee was a violation of due process of law. The Court found that, in practical effect, the questions asked were taken as confessed, and emphasized that this was the basis of the discharge. The Court went on to state:

The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. . . . [A] witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing.37

The Court objected to the conclusive nature of the presumption flowing from the claim of privilege, and to summary dismissal of the plaintiff from his teaching position on this basis. Yet this is what the Gerard court allowed. Deciding that the inference from defendant's claim of privilege was either conclusive or so overwhelming that reasonable minds could not differ, the court granted summary judgment for plaintiff on this basis.

Malloy v. Hogan,38 which secured the privilege against self-incrimination from state encroachment, characterized it as "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence."39 Two years later, Griffin v. California40 defined

35. See, e.g., Ratner, supra note 33; Comment, Use of the Privilege Against Self-Incrimination in Civil Litigation, 52 VA. L. REV. 322 (1966).
36. Supra note 94.
37. Id. at 557.
39. Id. at 8.
"penalty" as the imposition of any sanction which makes the assertion of the fifth amendment privilege costly. As the dissenting opinion in *Gerard* points out, these characterizations of the privilege were used by the Court in a civil case, *Spevak v. Klein*. In that case, the Court held that the disbarment of a lawyer for his refusal to produce records and testify at a judicial proceeding was a violation of the fifth amendment. The Court found that disbarment, a deprivation of livelihood, was a costly sanction for asserting the privilege.

There can be no doubt that summary judgment on the basis of an inference from defendant's plea of privilege is a costly sanction. Defendant should not be denied the opportunity to present at trial whatever other evidence is available in his defense, even though the probability that he will prevail is limited by his plea of privilege. Procedural and evidentiary rules, as well as constitutional considerations, warranted a contrary result in *Gerard*. The need for information in civil litigation and the desire to avoid littering court dockets with indisputable cases must be balanced against the individual's right to refrain from incriminating himself. This delicate balance cannot be attained by misapplying summary judgment procedure and imposing an adverse judgment as the price of privileged silence.

41. 385 U.S. 511 (1967).

Torts—Evidence—Admissibility of Competitive and Comparative Design—*Blohm v. Cardwell Manufacturing Co.*, 380 F.2d 341 (10th Cir. 1967).

Robert Blohm was fatally injured when the locking pins in a derrick manufactured by defendant failed, causing an extended section of the rig, within which decedent was working, to collapse. In an action for wrongful death brought by the widow-administratrix, the trial court excluded evidence of competitive and comparative design supporting her theory that the Cardwell-manufactured rig was negligently designed and lacked a vital safety device. The jury returned a verdict in favor of the manufacturer and plaintiff appealed.

The Court of Appeals for the Tenth Circuit reversed and ordered a new trial, holding that competitive design testimony given by two witnesses employed by manufacturers of rigs similar to defendant's, and comparative design evidence of an expert,

1. The derrick involved is a jackknife-collapsible rig, made operational by hydraulically telescoping the upper portion into place from its nest inside the base. The extended derrick is locked into place and stabilized by activating locking pins which are automatically inserted in matching holes at the top and bottom section of the derrick. Spring-loaded safety locks are inserted into matching grooves in the locking pins, thus securing them in their locked position. In the instant case, these locks failed to insert properly into their matching grooves.
including a demonstrative model, were admissible to show "what might have been done safely and cheaply to have made this a safer rig."3

This decision presents two significant questions4 concerning the admissibility of comparative evidence in support of a plaintiff's tort claim against a manufacturer for alleged negligent design. First, whether evidence of custom and usage, i.e., competitive design, is properly admissible in support of plaintiff's theory; and second, whether use by others of safer designs is relevant evidence in establishing a defendant-manufacturer's negligent design.

**Distinction Between Substantive Law and Rules of Evidence**

Recognizing a vital distinction between evidence of custom and usage, and the substantive law, Justice Holmes stated: "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."5 In reversing the instant case, the court of appeals noted that the trial court failed to observe this distinction, and in erroneously excluding plaintiff's evidence, relied upon the rule originally laid down in Day v. Barber-Colman Co.6 and subsequently restated in Marker v. Universal Oil Products Co.: "[N]either designer nor manufacturer has a legal duty to adopt or produce a process or product incorporating only features representing the ultimate in safety."7 (Emphasis added.) The court found reliance upon this rule erroneous, indicating that the Day case was concerned "with the legal duty owing in cases of this kind, not with the admissibility of... evidence...."8 (Emphasis added.)

The basic distinction between the substantive law and rules of evidence is essential in the defective design field. The amount of care owed by the manufacturer is determined under the substantive law. Admissibility of comparative design evidence, necessary for jury determination of whether the manufacturer has met this standard of conduct established by the substantive law, is decided under the rules of evidence.9 Therefore, evidence of design of similar products of other manufacturers, although properly rejected as the legal standard of care owed by the manufacturer, need not be excluded. Nevertheless, it may be admitted as "evidence bearing upon the factual question whether in a particular case the challenged product measured up to the legal standard of ordinary care."10 Thus,

3. Id. at 342.
7. 250 F.2d 603 (10th Cir. 1956).
8. Id. at 605.
10. See 2 J. WIGMORE, EVIDENCE § 461 (3d ed. 1940).
11. See Day v. Barber-Colman Co., supra note 6; see also Marker v. Universal Oil Prods. Co., supra note 7. In both cases, the courts properly rejected competitive design evidence as the legal standard of care.
whether a manufacturer is bound to provide the best available safety device,\textsuperscript{13} or devices as good as those used by others in the same enterprise,\textsuperscript{14} or whether the manufacturer is held to possess the skill commonly possessed in his trade,\textsuperscript{15} are questions arising under the general principles of substantive law. Although some courts have recently recognized this,\textsuperscript{16} more often they have excluded plaintiff’s comparative evidence on the supposition that answers to these substantive questions are correctly applied as determinative tests in ruling on the admissibility of evidence.

This distinction has been overlooked in some cases,\textsuperscript{17} recognized but misapplied in others,\textsuperscript{18} and in some instances rejected.\textsuperscript{19} Two arguments have been made in support of this last group of cases. The first, supported by Professor Wigmore,\textsuperscript{20} is the courts’ assumption that the jury will view a comparative design as the standard of care required of the manufacturer. This factor, however, is readily and more properly overcome by a concise jury instruction, rather than by the exclusion of plaintiff’s evidence. This was effectively accomplished in Brigham Young University \textit{v.} Lillywhite.\textsuperscript{21} There, a student sued the university for injuries resulting from an explosion in a chemical laboratory. The court, in admitting plaintiff’s evidence of how other schools supervised their chemistry experiments, instructed the jury:

\textit{[T]he usual practice in other universities... may be considered by you in determining whether or not [there was] due and reasonable care in this particular instance. Such practice would not be conclusive, but it is a matter under all the circumstances of the case that you may take into consideration.}\textsuperscript{22} (Emphasis added.)

The second view supporting rejection, presented in Judge Lewis’ dissent in the instant case, is that comparative design evidence would only tend to confuse the

\textsuperscript{13} See Kientz \textit{v.} Carlton, 245 N.C. 236, 96 S.E.2d 14 (1957). Here the court was concerned with whether the law requires that a merchant sell only the latest models or those having specified safety features. See also Pontifex \textit{v.} Sears, Roebuck \& Co., 226 F.2d 909 (4th Cir. 1955).


\textsuperscript{15} See Heise \textit{v.} J. R. Clark Co., 245 Minn. 179, 71 N.W.2d 818 (1955). In an action brought by a user who was injured when a stepladder suddenly collapsed, the court found that the defendant-manufacturer did not exercise the skill commonly possessed in his trade. See also Simmons \textit{v.} Gibbs Mfg. Co., 170 F. Supp. 818 (N.D. Ohio 1959), aff’d \textit{per curiam}, 275 F.2d 291 (6th Cir. 1960).


\textsuperscript{17} See Siemer \textit{v.} Midwest Mower Corp., 286 F.2d 381 (8th Cir. 1961); Thomas \textit{v.} Jeromeinek, 8 Misc. 2d 517, 170 N.Y.S.2d 388 (Sup. Ct. 1957).

\textsuperscript{18} See Burke \textit{v.} South Boulder Canon Ditch Co., 71 Colo. 58, 205 P. 1098 (1922); Stevens \textit{v.} Allis-Chalmers Mfg. Co., 151 Kan. 638, 100 P.2d 723 (1940); Yaun \textit{v.} Allis-Chalmers Mfg. Co., 253 Wis. 558, 34 N.W.2d 853 (1948).


\textsuperscript{20} 2 \textit{J. WIGMORE}, \textit{supra} note 10.

\textsuperscript{21} 118 F.2d 836 (10th Cir. 1941).

\textsuperscript{22} \textit{Id.} at 840.
jury, "lead[ing] only to a battle of the experts as to overall quality of competing products and divert[ing] consideration of the fact finder from the true issue...." Even though this contention has merit, where technical areas of mechanical design are involved, the exclusion of the expert engineer's evidence could result in far greater confusion. Indeed, in the absence of this expert testimony, it is questionable whether laymen on the jury could reach a meaningful decision in the area of defective design.24

Presumably then, the Blohm court correctly distinguished Day and its progeny when reversing the trial court. The Court of Appeals for the Tenth Circuit capably resolved the difficulties attendant upon the admission of comparative design in evidence by observing the distinction between the effect of such evidence in establishing a standard of conduct and its valid use as evidence.

Absence of a Needed Safety Device

In the instant case, the plaintiff-administratrix also argued that even if Cardwell's design was not negligent in allowing insufficient tolerance for the insertion of locking pins, their design was still improper in that defendant failed to install "adequate and proper safety devices to warn in the event the locking pins failed to seat themselves...."25 Since the court of appeals had already decided to reverse on the trial court's failure to observe the distinction between evidence and the substantive law, it was unnecessary for them to rule upon this allegation.

Courts have rather freely admitted comparative evidence of safer designs used by others, when plaintiff's claim of negligent design alleges the absence of a needed safety device. Thus, evidence of use of safer designs by others has been admitted in cases involving the lack of a pressure reduction valve on a large coffee urn,26 the absence of a device to guard against excessive pressure in a boiler used to heat a house,27 and, when presented with a fact situation similar to the present case, for the failure to have an adequately designed "boom dog" to keep the boom in a crane from falling when in a raised position.28

A more recent decision involved the failure to prevent excessive noise from a telephone receiver.29 While the plaintiff was talking over the phone, an explosive sound caused permanent injury to her ear. The noise also apparently cracked the ear piece of the receiver, which was about thirty years old. The court admitted expert testimony demonstrating the comparative design of modern phones, showing that they were equipped with various devices to limit the sound from the re-

24. See, e.g., Mack v. Davis, 76 Ill. App. 2d 88, 221 N.E.2d 121 (1966). This court notes that the trend is to permit expert testimony in matters which are complicated and outside the knowledge or understanding of the layman on the jury.
27. Crane Co. v. Davies, 30 Ala. App. 471, 8 So. 2d 189 (1941), rev'd, 242 Ala. 570, 8 So. 2d 196 (1942).
ceiver. Under the circumstances, the court sustained a finding of negligence on the part of the supplier of the receiver which lacked the customary safeguards.

The willingness of the courts to admit evidence of comparative design where a safety device is lacking was aptly expressed by the trial judge in Ellis v. H. S. Finke, Inc. After directing a verdict for defendant-manufacturer because of lack of evidence of any negligent or defective construction of the machine in question, he stated: "But if it had been shown here that [a] safety device would have prevented the fall of this elevator, why I would have submitted that case to you [the jury], and I believe you would have found for the plaintiff."31

This theory of a needed safety device, however, does not always result in a recovery for plaintiff. Courts have been equally liberal in these cases in admitting defendant-manufacturer's evidence demonstrating extensive safe use of the design in question by himself and others in the industry. Such evidence, although not always conclusive, has often successfully rebutted plaintiff's evidence of competitive and comparative design. As one court stated, "the longer a machine has been in use before it fails the more unlikely it is that the failure was due to defective construction or design." In addition to showing that the design is not in fact unsafe, such evidence of harmless use tends to prove that the manufacturer was not unreasonable in failing to appreciate the hazard. Thus, where an infant was alleged to have been poisoned by a defectively designed nipple manufactured by the defendant, the court emphasized that "many thousands of these appliances have been sold ... both in England and the United States for a period of more than ninety years," without any significant complaint as to their safety or efficiency by the medical profession. Where plaintiff's evidence of safer design has been rebutted by defendant's evidence of extensive prior safe use, the cases indicate that plaintiff's evidence need not be taken as a standard of care, and that admissibility of competitive and comparative design evidence by both parties is essential for the reasonable and realistic resolution of the issue presented.

Although manufacturer's liability for defective design of a product has long been established, plaintiffs have met with little success in pursuing this theory, owing to judicial exclusion of competitive design evidence, on the erroneous supposition that such evidence is, or will be, equated with the substantive law. The instant case appreciably relieves the confusion in this area, by observing the vital distinction between substantive law and rules of evidence. Until the principles enunciated in

30. 278 F.2d 54 (6th Cir. 1960).
31. Id. at 55.
32. Cf. The T. J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932), where Judge Learned Hand pointed out that "a whole calling may have unduly lagged in the adoption of new and available devices."
37. RESTATEMENT OF TORTS § 398 (1934).
the *Blohm* decision are recognized and applied by a larger number of courts, the plaintiff's attorney will best serve his client by alleging an absence in the manufacturer's product of a needed safety device.


After her husband settled his suit for personal injuries, sustained when he was struck by a door which fell off defendant's boxcar, Fay Deems brought an action for loss of consortium without joining him as a plaintiff. The trial court sustained the defendant's demurrer on the ground that a wife has no action for loss of consortium. Plaintiff appealed, and the Maryland Court of Appeals held: A claim for loss of consortium resulting from the negligent injury of one's spouse by a third party can be asserted only in a joint action for injury to the marriage relationship.¹

The common law rule on loss of consortium is unequivocal: the husband has an action for loss of consortium,² but the wife does not.³ This rule had been adhered to with a strictness and uniformity seldom experienced in the law.⁴ In 1950, however, the United States Court of Appeals for the District of Columbia Circuit, in the landmark decision of *Hitaffer v. Argonne Co.*,⁵ refused to follow the old law and allowed a wife to bring an action for loss of consortium—specifically for loss of sexual relations—which was the result of an unintentional tort. Consortium, said Judge Clark, constitutes more than just material services; it includes love, affection, companionship, and sexual relations. All of these elements are fundamental to the marital relationship, and their loss was held to give rise to a cause of action by either the husband or the wife. To avoid double recovery, however, the wife's damages were limited to those elements of consortium for which the husband had not recovered.

In reaching this decision, the court in *Hitaffer* was confronted with the major arguments which had persuaded courts in the past to deny the wife a cause of action. The common law had consistently held that the predominant element of consortium

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¹ Deems v. Western Md. Ry., 247 Md. 95, 231 A.2d 514 (1967).
⁴ *But see* Hipp v. E.I. Dupont de Nemours & Co., 182 N.C. 9, 108 S.E. 318 (1921) and Griffen v. Cincinnati Realty Co., 27 Ohio Dec. 585 (Super. Ct. 1913) which are the only departures from the common law rule; these decisions were later controverted by Hinnant v. Tide Water Power Co., 189 N.C. 120, 186 S.E. 307 (1935), and Smith v. Nicholas Bldg. Co., 93 Ohio St. 101, 112 N.E. 204 (1915), respectively.
⁵ 183 F.2d 811 (D.C. Cir.), cert. denied, 340 U.S. 852 (1950). This case was overruled with regard to its interpretation of the Longshoremen's and Harbor Workers' Compensation Act, D.C. Code Ann. § 36-501 (1967), in Smither & Co. v. Coles, 242 F.2d 220 (D.C. Cir. 1957). However, *Smither* made it clear that where the wife was not bound by her husband's remedy she retained her right of action.
was material services to which the wife had no rights. The husband could rightfully expect material services such as housekeeping and child rearing, but the wife was not entitled to services from her husband. The District of Columbia court rejected this as being based on "the false premise that . . . the loss of services is . . . predominant," a premise for which there is no precedent. The above statement was also used to refute the argument that the wife's interest in the marriage is neither proprietary nor contractual and that, therefore, she suffers no actionable civil wrong.

Another typical argument is that damages based on sentimental elements are too remote and consequential for liability to attach. Some courts have used this argument to abolish actions by either spouse. The court in Hitaffer, however, found it unreasonable to go to this extreme and stated that such damages are no more remote or consequential than in the case of the husband who is allowed to sue.

A well-founded objection has been the danger of double recovery for the same injury if the wife is permitted to sue. As has been mentioned, the Hitaffer court attempted to resolve this problem by apportioning the elements of damages between husband and wife.

Since Hitaffer, thirteen states and four federal courts have allowed recovery by the wife, and the common law rule has been subjected to increasing criticism. While the solution in Hitaffer seemed to satisfy many courts and most of the commentators, others thought that there remained too great a danger of double recovery and also questioned the policy of imposing any such secondary but unforeseeable liability.

6. Marri v. Stamford St. R.R., 84 Conn. 9, 78 A. 582 (1911).
16. See, e.g., W. PROSSER, supra note 15.
on a merely negligent defendant. The District of Columbia circuit, however, is not committed to the principle of foreseeability as a prerequisite for liability.

While the decision in the instant case is not original in its refusal to follow the common law rule, it is a new judicial solution to the dilemma between the social practicality of allowing a wife to recover for loss of consortium and the common law precedent denying recovery. The court in Deems generally approves the argument of Judge Clark in Hitaffer, but it goes further in an attempt to resolve doubts left by that decision. The purpose of the Hitaffer holding, as in the instant case, was to give equal rights to the wife so as to allow recovery for all the elements of consortium lost to the marriage partners. Yet, the effect of Hitaffer fell short of its goal. Even where the wife's action was consolidated with her husband's, there was no assurance that a jury would not allow double recovery. It is this danger which the court in Deems attempts to reduce by requiring a joint action by the husband and the wife to be heard at the same time as the injured spouse's action for personal injuries. In this joint action, instead of requiring the jury to apportion damages between the husband and wife, as is done under Hitaffer, the Maryland jury is given the simpler task of awarding damages for loss to the marital entity.

The problem of remoteness is met by holding that the injury is not confined to either spouse, but is rather a direct wrong to the marriage relationship as an entity in which both partners share and have a direct interest. This conclusion, the court says, is only a logical extension of the right which the law gives to husband and wife to hold property as tenants by the entirety, whereby each owns all "by reason of the legal unity of their existence" and each has a right to sue for a violation of the other's interest. In effect, the wife is still denied an independent right of action and the husband is deprived of the one he previously had. A joint action now allows them to recover for a broader range of damages resulting from the defendant's negligence. Since the claim for loss of consortium must be included in the action for personal injuries, if it is to be made at all, loss of consortium is reduced to another element of damages. In this respect, the decision makes the law more realistic and easier for the jury to apply.

Professor Prosser sees only three reasons for the continuance of the common law rule: "Obviously it can have no other justification than that of history, or the fear of an undue extension of liability of the defendant, or a double recovery by wife and husband for the same damages." The Hitaffer court recognized the "anomalies created by the contrary result," but this was not its only reason for departing from the historic common law rule. The decision also reflected the court's conviction that the

19. Id. at 521, quoting from McCubbin v. Stanford, 85 Md. 378, 390, 37 A. 214 (1897).
"medieval concepts of the marriage relation to which other jurisdictions have reverted in order to reach the results which have been handed to us as evidence of the law have long since ceased to have any meaning." 24 This view is echoed by Judge Oppenheimer in the instant case: "Is not the criticism [of giving the wife a right to sue] based on the reliance upon the discarded theory that the husband has proprietary rights in his wife, the out-worn fiction that he has a property interest in her services?" 25

The novelty of Deems is the court's finding a right of action inherent in the marriage entity rather than giving the wife a separate right of action. Mrs. Deems sought a separate right of action, arguing that she was entitled to equal protection under the law. While acknowledging the existence of decisions accepting 26 and rejecting 27 the equal protection argument, the Deems court avoided the issue by emphasizing "the real reason for the almost universal criticism of the rationale of the common law rule . . . ." 28 That rule has generally been criticized as relying on "the out-worn fiction that [a husband] has a property interest in [the wife's] services." 29 Deems recognizes a more realistic objection to the common law rule: "there is, in a continuing marital relationship, an inseparable mutuality of ties and obligations, of pleasures, affection and companionship, which makes that relationship a factual entity." 30 The court's recognition of this entity results in the creation of a new right of action which allows "recovery for wrongs negligently caused to the legal unity through the physical injury of either spouse." 31 As a consequence of this unique right of action, any requirement that equal protection be given to the wife is eliminated since the husband himself no longer has a separate right of action. In addition, the single action eliminates the danger of double recovery.

The unique element of this decision becomes clear when compared with Moran v. Quality Aluminum Casting Co. 32 There, the Supreme Court of Wisconsin held that a wife may maintain an action for loss of consortium, following a state statute 33 which provides that women shall have the same rights and privileges under the law as men. In an effort to reduce the danger of double recovery, the court required that the wife's action be joined with the husband's action for personal injuries.

The court in Deems, in contrast, found it unnecessary to decide the constitutional issue in granting the wife an equal remedy. Nor did it rely primarily on a joinder of actions to eliminate the danger of double recovery. Instead, it was able to take a realistic view of loss of consortium and establish a new right of action which satisfies the objections to giving the wife an independent right of action.

24. Id. at 819.
29. Ibid.
30. Ibid.
31. Ibid.
32. Supra note 13.