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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

Recent Cases

COMMUNITY PROPERTY—FEDERAL INCOME TAXATION—SEPARATE RETURNS OF COMMUNITY INCOME

Harmon v. Commissioner of Internal Revenue[1]

Oklahoma in 1939 adopted an optional community property statute,[2] which provided that any couple so desiring might file with the proper official, a written election to avail themselves of the statute. This election was irrevocable, and was

1. 323 U. S. 44, 65 Sup. Ct. 103 (1944).
2. Okla. Sess. Laws 1939, c. 62, Art. 2, §§ 1-15.

dissolved only by death of one of the parties, or divorce. The normal community property concept that each spouse has a vested interest in one-half of all community income[3] was embodied in the statute.

In the case of *Harmon v. Commissioner of Internal Revenue*,[4] the United States Supreme Court held the statute not applicable for purposes of federal income taxation.[5] Harmon and his wife having elected to come within the Oklahoma statute, had filed separate federal income tax returns, each claiming half the community income, which consisted of Harmon's salary and returns from oil leases held by him. The Commissioner of Internal Revenue adjudged a deficiency, contending that the spouses had no right to divide the income. Harmon paid the tax under protest and sued for a refund. The Tax Court[6] and the Circuit Court of Appeals[7] upheld the taxpayer's contention, and ordered a refund.

In reversing this decision, the immediate issue decided by the Supreme Court was that *Lucas v. Earl*[8] rather than *Poe v. Seaborn*[9] controlled the case. The *Earl* case held that a contract providing that all property to be acquired by either spouse was to be held by both as joint tenants, although valid under California law, did not give a spouse an interest sufficient to allow her to claim half the property earned by the other spouse for purposes of federal income taxation. The *Seaborn* case, decided some eight months later, held that in Washington, husband and wife are entitled to file separate tax returns in which each may return one-half of community income—wife having equal vested interest in community property.

The court in the instant case reasoned that the Oklahoma statute, through its elective provision, said election arising out of a written contract, created a consensual community, arising out of the contract, rather than a legal community, arising out of the settled legal policy of the state. That here the vested interest in one-half of the community income, as set forth by the statute, resulted from the contract between Harmon and his wife, as in *Lucas v. Earl*, rather than through the settled law of the state as in *Poe v. Seaborn*.[10]

It was pointed out by Mr. Justice Roberts in the majority opinion that prior to the passage of the statute in question in 1939, the common law represented the policy of the state as to the relation of husband and wife, and that since community property was not made an incident of marriage there was no change in policy. Here the statute only permitted husband and wife to do what they might do in any state where husband and wife can contract freely with each other[11]—as in *Lucas v. Earl*.

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3. On this general topic see McKAY, COMMUNITY PROPERTY (2d Ed. 1925) § 1262; DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY (1943) § 66.
4. See note 1 *supra*.
5. 53 STAT. 5, 26 U. S. C. § 11 (1940).
6. 1 T. C. 40 (1942).
7. 139 F. (2d) 211 (C. C. A. 10th, 1943).
8. 281 U. S. 111, 50 Sup. Ct. 241 (1929).
9. 282 U. S. 101, 51 Sup. Ct. 58 (1930).
10. 323 U. S. 44, 46, 65 Sup. Ct. 103, 104 (1944).
11. *id.* at 47, 65 Sup. Ct. at 104.

In a dissenting opinion concurred in by Mr. Justice Black, Mr. Justice Douglas said that the majority's distinctions between the Oklahoma law and those of the other community property states were unable to meet the test of close scrutiny.[12] It is certainly true that the questions raised by Mr. Justice Douglas would be difficult to answer while following the majority's reasoning. He asks what difference there is between an ability of the spouses to avail themselves of the statute, and the power of the spouses in some of the community property states to change community property to separate property.[13] This would indicate that community property is no more a settled legal policy in the latter states than in Oklahoma. He points out that the distinctive feature of the community property system is that the products of either spouse are attributable to both, and since the Oklahoma law gives each spouse a vested interest in one-half the earnings of the other, that *Poe v. Seaborn* should be controlling.

The dissent does not attempt to justify the *Seaborn* case—the argument is that it should apply to all community property states if it is to be allowed to stand. Its most meritorious suggestion is that the court reconsider the whole problem of community property's relation to federal income taxation.

The handling of this problem by the Supreme Court has failed to establish any settled policy. As each case arises the court inserts a further exception to the doctrine of the previous cases. In *Lucas v. Earl* the court interpreted the Internal Revenue Act as taxing income to the person earning it, and said that it would make no difference for taxing purposes whether the income never vested in the party earning it.

Yet less than a year later,[14] the court said in effect that because state law in Washington gives the wife a vested interest in one-half of all income earned by her husband, a half of it was properly taxable to her, regardless of the fact that it was earned entirely by her husband, and thus ignoring the construction of the *Earl* case that the revenue act intended to tax the income to the person earning it. In *U. S. v. Malcolm,*[15] decided two months after the *Seaborn* case, the court again said that vested interest was the important factor and allowed the wife to return one-half the community income. In these cases the court emphasized that the law of the state was controlling in determining the wife's interest. In interpretations of the Internal Revenue Act concerning other matters, however, the court has not allowed technicalities of the law to defeat the purpose of the act—see *Helvering v. Clifford,*[16] where the court said that the technicalities of the law of trusts could not be used to avoid the tax.

In the *Harmon* case it was said that although the wife has a vested interest in the community property by virtue of the Oklahoma statute, that the interest, by arising from a consensual agreement, instead of the legal policy of the state, is

12. *id.* at 53, 65 Sup. Ct. at 107.
13. *id.* at 54, 65 Sup. Ct. at 108.
14. See note 8 *supra.*
15. 282 U. S. 792, 51 Sup. Ct. 184 (1932).
16. 309 U. S. 331, 334, 60 Sup. Ct. 554, 556 (1939).

insufficient to make *Poe v. Seaborn* controlling. It is difficult to see how this essentially differs from the contractual ability of the spouses to change separate property to community property in several of the community property states.[17]

Thus today we are faced with a situation of citizens of the eight original community property states[18] being able to divide their income with their spouses, but with other states finding it exceedingly difficult to grant the same privilege, because of the minor distinctions pointed out by the court when comparing new laws to those of the eight traditional states.

The basic problem is still before us. We are still left with the discrimination in favor of those states under the community property system. As is pointed out in the dissenting opinion in the *Harmon* case, a married resident of a non-community property state with $100,000 annual income would pay about $32,500 tax, while a resident of a community property with the same income, by having half of it returned in his wife's name would only be subject to a tax of $18,500.

The majority of the court seem to be awaiting a legislative solution to this problem. A simple change in the Internal Revenue Act would solve the problem for all time. Some progress in this direction has been made, through a statute[19] levying an estate tax upon the whole of property held in community upon the death of the husband. This is based upon the husband's almost absolute power of control of community property. The Supreme Court held the statute not violative of due process of law in *Fernandez v. Wiener*.[20] A similar decision by the Supreme Court would be almost a certainty should Congress pass a statute of the same nature in regard to income taxation of community property. The eighteen senators from the nine[21] community property states are vitally interested in preventing legislation of this sort, while in other states, there is little pressure for its adoption. Proposals of this nature have been made, but their passage has effectually been prevented.[22]

If *Poe v. Seaborn* were being decided today its result might well be different. The basis of this contention is *Helvering v. Clifford*.[23] There Clifford set up a trust for the benefit of his wife and children, reserving in himself almost complete power over the trust res. The trust was for a five year period, and Clifford had power of

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17. Volz v. Zang, 113 Wash. 378, 194 Pac. 409 (1920); State *ex rel.* Van Moss v. Sailors, 180 Wash. 269, 39 P. (2d) 397 (1934); Kenny v. Kenny, 220 Cal. 134, 30 P. (2d) 398 (1934).

18. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington.

19. 56 STAT. 798 (1942), 26 U. S. C. A. § 811 (e) (2) (Supp. 1944); 26 U. S. C. § 811(g) (4) (Supp. 1944).

20. 66 Sup. Ct. 178 (U. S. 1945).

21. Oklahoma, after the decision in the Harmon case, passed a statute much like the one upheld in the Seaborn and related cases. There is little doubt that this statute is valid. 32 OKLA. STAT. ANN. §§ 66-82 (Supp. 1945).

22. Ray, *Proposed Changes in Federal Taxation of Community Property: Income Tax* (1942) 30 CALIF. L. REV. 397.

23. See note 14 *supra.*

investment of the securities which constituted the bulk of the fund. The court held that Clifford still had substantial control over the income of the securities, that the purpose of the revenue act was to tax all income, and mere technicalities of the law could not be used to defeat this purpose. The court here took cognizance of the fact that state laws are being used to avoid the burden of income tax. The next step should be an awakening in the community property field, and a return to the construction of *Lucas v. Earl*—tax the income to those who earn it, and stop the discrimination which results in higher taxes for everyone to offset the lower taxes paid by married persons in community property jurisdictions.

W. R. KEGEL

CONSTITUTIONAL LAW—FREEDOM OF RELIGION—CONSCIENTIOUS OBJECTOR AND ADMISSION TO THE BAR

In Re *Summers*[1]

Petitioner had complied with all other prerequisites for admission to the bar of Illinois, but had not obtained the certificate of the Committee on Character and Fitness of his district, to which it is required that there be furnished concerning each candidate " . . . such evidence of his moral character and good citizenship as in the opinion of the Committee would justify his admission to the bar."[2] The Committee denied the certificate because petitioner was a conscientious objector and a believer in non-violence:[3] "Your position," wrote the Secretary, "seems inconsistent with the obligations of an attorney at law." Petitioner then applied to the Supreme Court of Illinois for admission to the bar, but the report of the Committee was sustained, and admission denied. Upon denial of rehearing petitioner then sought and obtained a writ of *certiorari* from the United States Supreme Court, in his petition challenging the right of the Supreme Court of Illinois to exclude him from the bar under the due process clause of the Fourteenth Amendment which secured him protection against state action in violation of the principles of the First Amendment.

The Supreme Court of Illinois maintained that an application for admission to the bar was of non-judicial character, and acceptance or rejection of the candidate a merely ministerial act. This contention was accepted as an authoritative commentary upon the law of Illinois. But since there had arisen a question respecting the Constitution which had assumed such a form that judicial power was capable of acting upon it, it was held that the proceedings fell within the category of "case and controversy" of Article III, Section 2, Clause 1 of the

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1. 65 Sup. Ct. 1307, 1309, 1314, 1316 (1945); 13 U. S. L. WEEK 4518. Reviewed, (1945) 31 A. B. A. J. 415.

2. ILL. REV. STAT. (1943) c. 110, § 259.58.

3. Throughout all proceedings petitioner justified his position by his acceptance of the teachings of Jesus; his sincerity was admitted; no indication appears in the report as to whether he was a member of any religious group.

Federal Constitution, and so were subject to review by the United States Supreme Court.

Refusal of admission to the bar was justified by the Illinois Supreme Court on the ground that the petitioner was unable to take in good faith the required oath to support the Constitution of Illinois; therefore the good citizenship required for practising law in Illinois was not satisfactorily shown. Petitioner, however, was willing to take the oath. Article XII of the state constitution provides that "The militia of the State of Illinois shall consist of all able-bodied male persons resident in the state, between the ages of eighteen and forty-five," (in which age group is petitioner), "except such persons as now are, or hereafter may be, exempted by the laws of the United States, or of this state."[4] But further provision is: "No person having conscientious scruples against bearing arms shall be compelled to do militia duty in time of peace: *Provided,* such person shall pay an equivalent for such exemption."[5] Petitioner was classed as a conscientious objector under the Selective Service Act of 1940, which permits conscientious objectors to do non-war work of national importance.[6]

It was held, however, that any exemption conferred in time of War by the Selective Service Act was by mere grace of Congress; the act may be repealed; and no exemption during war exists under Illinois law. Neither, seemingly, is there any real right of exemption in time of peace. *Hamilton v. Regents*[7] in time of peace has reasserted that " . . . every citizen owes the . . . duty, according to his capacity, to support and defend government against all enemies."[8] The majority opinion, by Mr. Justice Reed, finds, therefore, that no right of the petitioner was violated. Petitioner's contention that free exercise of religion is impaired is dismissed with the observation that no purpose is discovered to exclude from the practice of law merely because of membership in any one religious group—which could not be permitted under the Constitution. Furthermore, the opinion continues, since the Supreme Court in *United States v. Schwimmer*[9] and *United States v. Macintosh*[10] had upheld the denial of citizenship to those refusing to pledge military service, it could not say that religious freedom is violated by Illinois' insistence that a future court officer must take an oath to support the state constitution and Illinois' interpretation of the oath to require a willingness to perform military service.

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4. ILL. CONST. Art. XII, § 1.
5. ILL. CONST. ART. XII, § 5.
6. 50 U. S. C. A. (Appendix) § 305(g).
7. 293 U. S. 245, 261-265, 55 Sup. Ct. 197, 203-205 (1934).
8. The pertinent decision from the time of World War 1 is Selective Draft Law Cases, 245 U. S. 366, 378, 38 Sup. Ct. 159, L. R. A. 1918C. 261 (1918); VATTELL, LAW OF NATIONS is cited. [Inconsistency in VATTELL claimed in Irion, *The Legal Status of the Conscientious Objector* (1939) 8 GEO. WASH. L. REV. 125, 129.] *Hamilton v. Regents* merely affirmed the validity of the idea in times of peace (1934).
9. 279 U. S. 644, 49 Sup. Ct. 448 (1929).
10. 283 U. S. 605, 51 Sup. Ct. 470 (1931).

A dissenting opinion is by Mr. Justice Black, and Mr. Justice Douglas, Mr. Justice Murphy, and Mr. Justice Rutledge join in the dissent. After an opening statement that "The State of Illinois has denied the petitioner the right to practise his profession and to earn his living as a lawyer," the dissent emphasizes that the sole reason for rejection of petitioner was his religious beliefs. The right to practise law would not be denied members of religious bodies for their beliefs; yet under the test applied by Illinois no Quaker could be admitted to the bar. Under the present decision any believer in non-resistance could be barred from every public occupation. The dissent grants that Illinois has the power to draft conscientious objectors for war duty and to punish them for refusal to serve as soldiers. But to employ an oath as used is stigmatized as a circuitous method of penalizing religious belief, and a test oath. A parting shot points out that since draft of conscientious objectors is prohibited in time of peace, and Illinois has not drafted men into the militia since 1864, in view of the exemption of the Selective Service Act, ". . . the probability that Illinois would ever call the petitioner to serve in a war has little more reality than an imaginary quantity in mathematics." "I cannot agree," concludes Mr. Justice Black, "that a state can lawfully bar from a semi-public position, a well-qualified man of good character solely because he entertains a religious belief which might prompt him at some time in the future to violate a law which has not yet been and may never be enacted."

This decision reasserts that exemption from military service is not a legal right. The majority opinion makes reference to the majority opinions in *United States v. Schwimmer* and *United States v. Macintosh,* in which naturalization was denied applicants who would not unqualifiedly swear to bear arms.[11] In these cases the Court emphatically disposed of the argument that a conscientious objector has a right to refuse to bear arms. "Of course, there is no such pinciple of the Constitution, fixed, or otherwise," was the language in the latter case in regard to a claim that there is a "fixed principle of our Constitution, zealously guarded by our laws, that a citizen cannot be forced and need not bear arms in a war if he has conscientious religious scruples against doing so."[12] The same language denying the claim was repeated in *Hamilton v. Regents* in 1934; but since then the Selective Service Act has been passed, and judicial interpretation at least has extended the meaning of the exemption section to cover all conscientious objectors on philosophical and humanitarian grounds as well as those upon recognized religious grounds.[13] To the majority

11. There is no reference in either majority or minority opinion to Schneiderman v. United States, 320 U. S. 118, 63 Sup. Ct. 1333 (1943), in which the Court seemed inclined to agree with the dissent of Chief Justice Hughes in the *Macintosh* case, and to lay less stress upon the oath in naturalization.

12. The opinion of the lower court, which found for Macintosh, favors the ". . . right of a citizen to be excused from military service based on conscientious religious scruple. . . ." 42 F. (2d) 845, 847 (C. C. A. 2nd, 1930).

13. Waite, *Section 5(g) of the Selective Service Act, as Amended by the Court* (1945) 29 MINN. L. REV. 22 [protesting against the decisions stemming from United States v. Kauten, 133 F. (2d) 703 (C. C. A. 2nd, 1943)]; CORNELL, THE CONSCIENTIOUS OBJECTOR AND THE LAW (1943) 11.

of the Court, however, this is but another instance of grace of the legislative body; it is not a recognition of a right which can be demanded in case denied by the legislature. "If it is withheld, the native-born conscientious objector cannot successfully assert the privilege"[14] still seems to hold. Even the minority opinion here states, "It can be assumed that the State of Illinois has the constitutional power to draft conscientious objectors for war duty, and to punish them for a refusal to serve as soldiers—powers which this Court held the United States possesses."[15]

Since *United States v. Schwimmer, United States v. Macintosh,* and *Hamilton v. Regents* have come the numerous Jehovah's Witnesses cases,[16] and the influence of these appears in the minority opinion, especially that of the second flag salute case, *West Virginia v. Barnette.*[17] The earlier Jehovah's Witnesses cases involved chiefly the rights of freedom of speech or freedom of the press. But to evangelical sects witnessing to the faith or attempting missionary effort is as much exercise of religion as exercise of the right of free speech; and the several freedoms came to be joined in argument as the Witnesses became more frequent in litigation.[18] In the flag salute cases they were standing for the obverse side of the right to speak out, the right to remain silent. In upholding that right in *West Virginia v. Barnette,* the opinion of Mr. Justice Jackson emphasizes the right of free speech, but the concurring opinions, that of Mr. Justice Black and Mr. Justice Douglas as well as that of Mr. Justice Murphy, decide the issue on the basis of an abidgement of freedom of religion.

In the present case, however, the argument of the petitioner does not rest in any way upon freedom of speech. He stands upon freedom of religion alone. The majority opinion does not really come to grips with this. Its language is that of discrimination; it finds that no religious group is purposely discriminated

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14. United States v. Macintosh, 283 U. S. 605, 624, 51 Sup. Ct. 570, 575 (1931); quoted in Hamilton v. Regents, 293 U. S. 245, 264, 55 Sup. Ct. 197, 205 (1934).

15. On the general subject: CORNELL, THE CONSCIENTIOUS OBJECTOR AND THE LAW (New York, 1930); Note (1942) 27 WASH. U. L. Q. 565; Irion, *The Legal Status of the Conscientious Objector* (1939) 8 GEO. WASH. L. REV. 125; Freeman, *The Constitutionality of Peacetime Conscription* (1944) 31 VA. L. REV. 40, 74. [The answer of Montgomery, *The Relation of the Militia Clause to the Constitutionality of Peacetime Compulsory Universal Military Training* (1945) 31 VA. L. REV. 628 does not concern the point under discussion here.]

16. For summary and comment: Green, *Liberty under the Fourteenth Amendment* (1942) 27 WASH. U L. Q. 497; Green, *Liberty under the Fourteenth Amendment: 1942-43* (1943) 28 WASH. U. L. Q. 251; Green, *Liberty under the Fourteenth Amendment: 1943-44* (1944) 43 MICH. L. REV. 437; Waite, *The Debt of Constitutional Law to Jehovah's Witnesses* (1944) 28 MINN. L. REV. 209; McCown, *Conscience v. The State* (1944) 32 CALIF. L. REV. 1.

17. 319 U. S. 624, 63 Sup. Ct. 1178 (1943).

18. In Cantwell v. Connecticut, 310 U. S. 296, 60 Sup. Ct. 900 (1940) the decision was that religious freedom was violated by the statute which regulated solicitation of funds. Actually, however, the Witnesses were canvassing from house to house, playing records and soliciting sales of religious books and pamphlets,

against, and does not mention the *amicus curiae* brief filed by the American Friends Service Committee. The case, therefore, does not add to the situations which the Court may be said to have brought under the protection of freedom of religion. Beyond mere belief one may worship, one may witness, one may attempt to gain converts, one may solicit funds for a religious organization, one may insist upon maintaining silence in the face of an attempted exaction of expression contrary to religious beliefs—this is the extent to which he may rely upon recent decisions in claiming the protection of the free exercise of religion. That is, to date the protection afforded to actions is to those having some connection with the testimony to religious belief, with its propagation, and with the maintenance of a religious organization.

There has been a very familiar distinction drawn between belief and action motivated by belief, the first an absolute right, but the second subject to regulation for the protection of society.[19] When such attempted regulation conflicts with the liberty of the Fourteenth Amendment, Mr. Justice Jackson in his opinion in *West Virginia v. Barnette* distinguished between the test of due process in cases where freedom of religion, speech, the press, and assembly were concerned, and in cases where invasions on other scores were involved. In the latter cases, a state's right to regulate "may well include . . . power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting." (Regulation of a public utility is used as an example.) But the freedoms mentioned in the First Amendment "are susceptible of restrictions only to prevent grave and immediate danger to interests which the State may lawfully protect."[20] Thus the "grave and present danger" test, originally developed in cases of freedom of speech, has been applied to cases of freedom of religion.[21]

The dissent in the present case, I think, reflects both ideas, though Mr. Justice Jackson is not among the dissenters. When Mr. Justice Black says that Illinois "has denied the petitioner the right to practice his profession and to earn his living as a lawyer," his words recall the language of *Allgeyer v. Louisiana*[22] and the early cases which began the enlargement of the concept of liberty in the Fourteenth Amendment from freedom from physical restraint to liberty to engage in a useful business and liberty of contract. If it is the liberty "to earn his livelihood by any lawful calling" which is denied in the instant case, the question is whether denying a conscientious objector admission to the bar is a reasonable measure with a rational basis. More specifically, it must be decided whether it is reasonable or rational for a certifying committee to say that a conscientious objector lacks the

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—an obvious form of missionary work—and both freedom of speech and freedom of religion were advanced by their counsel.

19. Reynolds v. United States, 98 U. S. 145 (1878); Davis v. Beason, 133 U. S. 333, 10 Sup. Ct. 299 (1890) repeated many times, *inter alia* Cantwell v. Connecticut, 310 U. S. 296, 303, 60 Sup. Ct. 900, 903 (1940).

20. 319 U. S. 624, 639, 63 Sup. Ct. 1178, 1186 (1943).

21. Green, *loc. cit. supra* note 16, *passim.*

22. 165 U. S. 578, 17 Sup. Ct. 427 (1897).

good citizenship which it may be presumed all would agree is a valid prerequisite to admission to the bar. If, however, the liberty of which he is deprived is comprised under freedom of religion the question is whether the admission of such a candidate would constitute a danger, variously called "clear and present" or "grave and immediate," and whether the committee is offering protection from some such peril. Mr. Justice Black, one would opine, has the remoteness of any danger to the bar or society in mind when he emphasizes the unlikelihood of the petitioner being called into armed service.

Apart from the regulation of action motivated by religious belief, Mr. Justice Black's characterization of Illinois' denial of admission as a penalizing of the belief itself is suggestive. Any restraint of actions will have a deterrent effect upon beliefs lying back of them. If polygamy is forbidden, sooner or later the religious belief in polygamy is affected; enforcement of vaccination probably makes it harder to be a member of some sects. It is well established, however, that restraints of this nature are not barred, but are employments of a permitted power. But what if a qualified man is forbidden the practice of law because he is thought unable to take an oath? It would seem that if the requirement of such an oath, interpreted as pledging a willingness to render military service,[23] is essential to the maintenance of a trusted and reliable administration of justice in the courts, or to the avoidance of a clear and present danger, such a requirement should be held constitutional as a valid exercise of regulatory power irrespective of its result upon the belief of the individual. If, however, the requirement bears no demonstrably close relationship to trusted and reliable administration of justice, and is not necessary to avert a clear and present danger, is it not unconstitutional if it has a deterrent effect upon religious belief?

W. E. GWATKIN, JR.

TORTS—DUTY TO RESCUER OF DEFENDANT WHOSE CONDUCT CAUSES THE NEED FOR RESCUE

Brugh v. Bigelow[1]

Defendant negligently drove across an intersecting highway and collided with another's automobile, resulting in the defendant's car turning over on its side and pinning the defendant and his passenger beneath it. Plaintiff, after rescuing the

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23. The oath involved in this case is merely to support the constitution of the United States and the constitution of Illinois. Consequently there is no mention of the point stressed in Chief Justice Hughes' dissent in *United States v. Macintosh,* that a conscientious objector might in good faith take an oath to "support and defend the Constitution of the United States against all enemies, foreign and domestic." Mr. Justice Black's reference to a test oath in the present case is taken from his concurring opinion and that of Mr. Justice Douglas in *West Virginia v. Barnette,* and here post-Civil War cases are cited: Cummings v. Missouri, 4 Wall. 277 (1866); and *Ex parte* Garland, 4 Wall. 333 (1866). In his dissenting opinion in *West Virginia v. Barnette,* Mr. Justice Frankfurter maintains that the flag salute exercise "has no kinship whatever to the oath tests so odious in history."

1. 310 Mich. 74, 16 N. W (2d) 668 (1944).

passenger and in effecting the defendant's rescue, lifted the car and, while in the act of removing the defendant, was struck and injured by the car when it righted itself and rolled backwards. HELD: There is no distinction in the liability of a defendant to one injured in the rescue of the defendant's passenger and one injured in the rescue of the one whose negligence caused the accident. Judgment dismissing the plaintiff's action reversed and remanded.

The law has not recognized the moral obligation of common decency, to assist another human being who is in danger. The remedy in such cases is left to the "higher law" and the "voice of conscience" which, in the present state of morals, would seem to be singularly ineffective either to prevent the harm or to compensate the victim.[2] On the other hand, the rule is well settled that one who sees a person in eminent and serious peril, through the negligence of another, cannot be charged with assumption of risk or negligence as a matter of law in risking his own life, provided the attempt is not recklessly or rashly made.[3]

The cases arising from the situation where the rescuer is injured while trying to effect a rescue fall into three categories.

The first situation is where the defendant is negligent as to the person rescued. It is generally conceded that a person who imperils himself, in order to rescue a person who is in danger of being injured or killed through the negligence of another person, may recover damages from the negligent person for injuries received while effecting such rescue. The conduct of the defendant not only brings him into a relation with the person imperiled, but also with the rescuer. In the case of *Wagner* v. *International Ry.*,[4] the defendant operated a railway. The plaintiff and his cousin boarded one of the defendant's cars which was crowded. The conductor failed to close the door with the result that excessive speed of the car at a sharp curve threw the cousin out over a bridge. The plaintiff while walking back along the trestle to find his cousin's body slipped and fell through the bridge to the ground sustaining injuries for which suit was brought. The New York Court of Appeals, Cardoza delivering the opinion of the court, held that "The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to the rescuer," for which the wrongdoer is liable.[5]

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2. PROSSER, TORTS (1941) 192, 193; *see* Matthews v. Carolina & N. W. Ry., 175 N. C. 35, 94 S. E. 714 (1918); Buch v. Amory Mfg. Co., 69 N. H. 257, 44 Atl. 809 (1897); United States v. Knowles, 26 Fed. Cas. 800, No. 15540, (D. C. Cal. 1864).

3. *Accord,* Donahoe v. Wabash, St. L. & P. Ry., 83 Mo. 560, 53 Am. Rep. 594 (1884); Williams v. U. S. Incandescent Lamp Co., 173 Mo. App. 87, 157 S. W. 130 (1913); Eversole v. Wabash R. R., 249 Mo. 523, 155 S. W. 419 (1913); Sherman v. United Rys., 202 Mo. App. 39, 214 S. W. 223 (1919); Rovinski v. Rowe, 131 F. (2d) 687 (1942).

4. 232 N. Y. 176, 133 N. E. 437, 19 A. L. R. 1, 3 (1921).

5. One that leaves an opening in a bridge is liable to the child that falls into the stream, and is liable also to the parent who plunged to its aid. Gibney v. State, 137 N. Y. 1, 33 N. E. 142 (1893); *Accord,* Eckert v. Long Island R. R., 43 N. Y. 502, 3 Am. Rep. 721 (1871); *cf.* Waters v. William J. Taylor Co., 218 N. Y. 248. 112 N. E. 727 (1916); Dixon v. N. Y., N. H. & H. R. R., 207 Mass. 126, 130, 92 N. E. 1030 (1910).

The second situation is where the defendant is negligent as to the person rescued, and the person rescued is contributorily negligent. By the better view, in case of an injury to the one attempting the rescue, the antecedent negligence of the person rescued is not imputable to the rescuer. In *Bond v. Baltimore & O. R. R.*,[6] the defendant negligently failed to maintain a lookout at a railroad crossing. A passenger, also negligent, stepped in front of an approaching train. The plaintiff grabbed her and threw her out of the path of danger, but in doing so was struck and injured by the pilot beam of the defendant's engine. The West Virginia court held that the right of a person to rescue another from danger of any kind, though voluntarily exercised, is as perfect and complete as any other personal right, and the fact that the danger springs from a negligent act of a third person does not in any way affect or impair the right of rescue, or the moral obligation to exercise it. Thus where a child playing with a guy wire negligently drew the guy wire in contact with a power wire, resulting in his instanteous death, his negligence did not preclude recovery against the power company for the death of a younger brother who, upon seeing the situation, went to his older brother's rescue and also was killed.[7]

The third situation arises where the defendant negligently creates a circumstance necessitating his own rescue. Such a situation is evidenced by the instant case. In order that one may be held liable for negligence, it is essential that a duty breached by him should have been a duty which he owed to the person injured. Duty arises from a relationship. There has been no improvement in determining where there is a relationship upon which to predicate a duty over the classic statement in *Heaven v. Pender*[8] "that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

In the instant case it was alleged by the plaintiff, and sustained by the court, that the defendant was negligent in creating a situation that would prompt the plaintiff to respond thereto imperiling her safety and causing injury. It is recognized that under these circumstances the defendant does bring himself into a relationship with the rescuer out of which a duty arises to use care so as to avoid a risk of injury to one coming to his rescue.

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6. 82 W. Va. 557, 96 S. E. 932, 5 A. L. R. 201 (1918).

7. Pierce v. United Gas & Electric Co., 161 Cal. 176, 118 Pac. 700 (1911); *see* Walters v Denver Consol. Electric Light Co., 12 Colo. App. 145, 54 Pac. 960 (1898); Norris v. Atlantic Coast Line R. R., 152 N. C. 505, 67 S. E. 1017, 27 L. R. A. (N. S.) 1069 (1910); Pittsburg, C., C. & St. L. Ry. v. Lynch, 69 Ohio St. 123, 68 N .E. 703 (1903); *cf.* Donahue v. Wabash St. L. & P. Ry., 83 Mo. 560, 53 Am. Rep. 594 (1884), where contributory negligence of parent in allowing a child to get into a position of danger, held not to preclude a recovery for injury received by the parent in attempting to rescue the child.

8. L. R. 11 Q. B. 503 (1883); *see* Terry, *Negligence* (1915) 29 HARV. L. REV. 40, 42-44.

A contrary view was reached in the case of *Saylor* v. *Parsons*,[9] where the plaintiff was injured when he went to the rescue of the defendant who was in iminent danger of being overwhelmed by a wall about to collapse upon him which the defendant was undermining on private property. In holding that the defendant owed the plaintiff no duty as rescuer, the court said, "He cannot be guilty legally, though he may be morally, of neglecting himself. It matters not whether he (Parsons) was vice principal or fellow servant, as he voluntarily undertook on his own motion to undermine the wall. This endangered no one's life but his own. If he was in peril, it was because he placed himself there. There was no negligence on the part of either defendant as to him, and for this reason there could have been none to his rescuer." The court did point out however that it might be said that the defendant " . . . ought, in placing himself in peril, to have anticipated that someone would, upon discovering his danger, undertake to shield him from harm." But the court arrived at the conclusion that such a contingency could not be contemplated, relying principally upon the thesis that "Men do not expose their lives to danger with the idea that others will protect them from harm by risking their own lives."[10]

The court in the instant case distinguishes the *Saylor* case from the principal case on the ground that, in the former, the rescue took place on " . . . private property where the safety of others would not necessarily be involved."[11] This distinction seems questionable as the duty problem is based on reasonable anticipation of risks to others who may feel their moral obligation to rescue another in peril. This moral obligation is as strong and the efforts to rescue equally impelling whether the rescued is on his own private property or on the highway.

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9. 122 Iowa 679, 98 N. W. 500, 64 L. R. A. 542 (1904).
10. *id.* at 683, 98 N. W. at 500, 64 L. R. A. at 545.
11. Brugh v. Bigelow, 310 Mich. 74, 16 N. W. (2d) 668, 671 (1944).