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EVIDENCE — CRIMINAL LAW — Admissibility of Evidence Obtained Through Use of Concealed Radio Transmitter. — The defendant was convicted in the United States District Court for the Southern District of New York for selling and conspiring to sell opium in violation of federal statute. As a means of obtaining evidence for the prosecution an "undercover agent" for the government was sent into the defendant's place of business, with a small microphone concealed in his overcoat pocket, for the purpose of transmitting statements of the defendant to another agent of the Narcotics Bureau stationed outside with a receiving set. In the course of conversation between the undercover agent and the defendant, the latter made incriminating statements which were received and "audited" by the Narcotics agent. Over the defendant's objection, the conversation as heard with the aid of the receiving set was admitted in evidence. The defendant contends that the conduct of the two agents in obtaining such evidence amounted to a violation of the search-and-seizure provisions of the Fourth Amendment of the Constitution and therefore, is inadmissible. The Court of Appeals for the Second Circuit affirmed the conviction. On Appeal, HELD: Affirmed. The fact that evidence had been obtained by having an undercover agent, whom the defendant trusted, engage the defendant in conversation so that his incriminating statements would be transmitted by microphone hidden on the undercover agent's person did not render such evidence inadmissible in a criminal prosecution but only presented an issue of credibility. *On Lee v. United States,* .....U. S. ....., 72 S. Ct. 967 (1952).

The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and warrants shall not issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized. *United States Constitution, Amendment IV.* The law of searches and seizures under this amendment reflects the dual purpose of protecting the privacy of the individual and protecting him against compulsory production of evidence to be used against him, as prohibited by the Fifth Amendment to the Federal Constitution. *Davis v. United States,* 328 U. S. 582, 90 L. Ed. 1453 (1945). This constitutional guaranty extends to innocent and guilty alike, *McDonald v. United States,* 335 U. S. 451, 93 L. Ed. 153 (1948); *Kroska v. United*

States, 51 F. 2d. 330 (8th Cir. 1931); it prohibits unreasonable searches and seizures, and must be construed liberally in favor of the individual, *Go-Bart Importing Company v. United States,* 282 U. S. 244, 75 L. Ed. 374 (1931); *Sgro v. United States,* 287 U. S. 296, 77 L. Ed. 260 (1932); *United States v. Lefkowitz,* 285 U. S. 452, 76 L. Ed. 877 (1936). It is the duty of the courts to prevent the impairment of this protection, *Grau v. United States,* 285 U. S. 124, 77 L. Ed. 212 (1932); *Gilbert v. United States,* 163 F. 2d. 325 (10th Cir. 1947); therefore, a search prosecuted in violation of this guaranty is not made lawful by what it brings to light, *Byars v. United States,* 273 U. S. 28, 71 L. Ed. 520 (1926); *United States v. Asendio,* 171 F. 2d. 122 (3rd Cir. 1948), and a conviction, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand. *McNabb v. United States,* 318 U. S. 332, 87 L. Ed. 819 (1943). A search and seizure after entry by means of fraud, stealth, social acquaintance, or business pretense, as well as force, are unreasonable. *Fraternal Order of Eagles v. United States,* 57 F. 2d. 93 (3rd Cir. 1932), and in order to come within the interdiction of the Fourth Amendment, the searches and seizures complained of must be unreasonable. *Harris v. United States,* 331 U. S. 145, 91 L. Ed. 1399 (1946); *United States v. O'Brien,* 174 F. 2d 341 (7th Cir. 1949). The test of reasonableness by which the constitutional permissibility of a search and seizure is determined cannot be stated in rigid and absolute terms; each case must be decided on its own facts and circumstances. *United States v. Rabinowitz,* 339 U. S. 56, 94 L. Ed. 653 (1950); *Harris v. United States, supra; Go-Bart Importing Company v. United States, supra.* All evidence obtained in violation of this guaranty must be suppressed when tendered in court. *McDonald v. United States, supra.* However, in *Olmstead v. United States,* 277 U. S. 438, 72 L. Ed. 945 (1927), it was held that at common law the admissibility of evidence is not affected by the illegality of the means by which it was obtained and that, in the absence of statute, evidence cannot be excluded merely because it was unethically secured; therefore, evidence obtained by wire tapping was held not to be self-incrimination within the Fifth Amendment nor unlawful search and seizure within the Fourth Amendment. Subsequently, Congress passed an act declaring that no person, not being authorized by the sender, shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. *Federal*

Communication Act, Section 605; 47 U. S. C. 605; 47 U. S. C. A. 605 (1934). This statute has been construed to operate to render inadmissible in a trial in the federal courts evidence obtained by tapping telephone or telegraph lines, *Nardone v. United States,* 302 U. S. 379, 82 L. Ed. 314 (1937); *Weiss v. United States,* 308 U. S. 321, 84 L. Ed. 298 (1939), and this is not an "unlawful search and seizure" in contravention of the Fourth Amendment, but evidence secured by such means is inadmissible solely by reason of Section 605 of the Federal Communication Act, *United States v. Coplon,* 88 F. Supp. 921 (S. D. N. Y. 1950). Even though wiretapping is illegal, the Court in *Beard v. United States,* 82 F. 2d. 837 (1936), held that in the prosecution for maintaining gaming establishment and for conspiracy, evidence obtained by such means is admissible to establish that the place was a gambling place and was being used for gambling purposes, even though police were unable to identify the voices. Testimony secured by spying, while acting in an unlawful way which would subject the person obtaining the evidence to punishment, if otherwise relevant, is competent, *Colin v. State,* 120 Tenn. 61, 109 S. W. 1149 (1908); and unless there is some definite limitation, all doubt should be resolved in favor of admission. *United States v. Matot,* 146 F. 2d. 197 (1944). Eavesdropping alone, though an invasion of privacy, is not a violation of a legally recognized "right of privacy". *United States v. Goldman,* 118 F. 2d 310 (2nd Cir. 1941). Where detectives feign themselves as accomplices and thereby obtain evidence, the manner used was held by several state decisions to bear merely upon its credibility, not its admissibility. *Shields v. State,* 104 Ala. 35, 16 So. 85, 53 Am. St. Rep. 17 (1894); *Wright v. State,* 7 Tex. App. 574, 32 Am. Rep. 599 (1880).

Here is presented another situation whereby the Supreme Court has upheld unethical, if not unconstitutional, means of obtaining evidence for admission in a criminal prosecution. It is clear that only because the manner of procuring the evidence was unethical does not prevent its admission. However, in the case here, there is a conflict between construing the constitutional guaranties liberally in favor of the accused and the admission of evidence secured by means which were not in existence or foreseen at the time of the adoption of those guaranties. Such seems to have been the problem in the *Olmstead* case; it took an Act of Congress before the courts would exclude evidence obtained by wiretapping. In both cases mechanical means were used to procure evidence necessary

for prosecution. In the detectaphone case, mechanism was used to hear statements given in a subsequent prosecution; its use was justified on the grounds that it only made hearing better and all of the equipment was outside the defendant's premises. Here the prosecuting witness not only used mechanical means outside the premises of the accused but he sent part of the apparatus into the defendant's shop. Consequently, this is an extension of the rule in the detectaphone case. However, it must be taken into consideration that this is a five-to-four decision, there being four separate dissents. These dissenting justices discredited the employment of science to intrude on a person's privacy through such a manner of eavesdropping and expressed strong resentments against giving "legal sanction to such dirty business that makes for lazy and not alert law enforcement". Despite the vigorous dissents, the inevitable conclusion is that the common law tendency favors admitting evidence not prohibited by some definite rule instead of following any strict rule of incompetence because of the means of procuring it; the court has given sanction to the use of mechanism to procure incriminating evidence.

MARION S. RIGGS.

LABOR LAW — Picketing — When an Injunction Will Lie. — Plaintiff brought an action against Defendant, individually and as an officer of the Brotherhood of Marine Engineers, and others, to enjoin the picketing of Plaintiff's vessels. Intervenor requested the same relief. The Supreme Court, Special Term, held that the evidence established that the picket lines were purely retaliative in nature because of the refusal of West Coast longshoremen members of a CIO affiliated union to load vessels of the Isthmian Steamship Company in California, and the picket lines were not set up as part of an organization drive and were not in aid of an attempt to recruit from Plaintiff's marine engineers members for their union, as the Defendants claimed. The Supreme Court, Appellate Division held that insofar as the judgment restrained threats, intimidations or coercion, it was unwarranted by the record, but affirmed the Special Term in the granting of the injunction. On appeal to the New York Court of Appeals, HELD, affirmed. An injunction will lie to enjoin picketing in aid of a strike which in its nature is retaliatory. *American President Lines, Limited, et al. v. King, et al.*, 109 N. Y. S. 2d 507, 110 N. Y. S. 2d 725, 304 N. Y. 708, 107 N. E. 2d 654 (1952).

Peaceful picketing for a lawful purpose will not be enjoined.

Lauf v. E. G. Shinner & Company, Inc., 303 U. S. 323, 58 S. Ct. 578, 82 L. Ed. 872 (1938); *Bayonne Textile Corporation v. American Federation of Silk Workers et al.*, 116 N. J. Eq. 146, 172 A. 551, 92 A. L. R. 1450 (1934); *J. H. & S. Theatres, Inc. v. Fay et al.* 260 N. Y. 315, 183 N. E. 509 (1932).

The interests of capital and labor are at times inimical and the courts may not decide controversies between the parties so long as neither resorts to violence, deceit, or misrepresentation to bring about a desired result. *National Protective Association of Steam Fitters and Helpers v. Cumming*, 170 N. Y. 315, 63 N. E. 369 (1902); *Bossert v. Dhuy*, 221 N. Y. 342, 117 N. E. 582 (1917). And one's business may be attacked only to attain some purpose in the eye of the law thought sufficient to justify the harm that may be done to others. *Exchange Bakery and Restaurant, Inc. v. Rifkin et al.*, 245 N. Y. 260, 157 N. E. 130 (1927); *Senn v. Tile Layers Protective Union, Local No. 5, et al.*, 222 Wis. 383, 268 N. W. 270 (1936). The resulting injury is incidental and must be endured. *Exchange Bakery and Restaurant, Inc. v. Rifkin, et al., supra.* The mere fact that the plaintiff has sustained and will continue to sustain a loss if picketing is continued is not sufficient to entitle one to injunctive relief. *Scofes v. Helmar*, 205 Ind. 596, 187 N. E. 662 (1933). Thus, it has been held that no injunction will be granted if picketing is in aid of a strike to induce customers not to bestow patronage on the employer's place of business, *Ex Parte Heffron*, 179 Mo. A. 639, 162 S. W. 652 (1914); *Foster v. Retail Clerks' International Protective Ass'n*, 39 Misc. 48, 78 N. Y. S. 860 (1902); or is not conducted in such numbers as will of itself amount to intimidation, and when confined to the seeking of information, such as the number and names and places of residence of those at work or seeking work on the premises against which the strike is in operation, and to the use of peaceful argument and entreaty for the purpose of procuring such workmen to support the strike by quitting work, or by not accepting work, *Duplex Printing Press Co. v. Deering*, 247 F. 192 (aff'd. 252 F. 722, 164 C. C. A. 562) (rev'd. on other grounds 254 U. S. 443, 41 S. Ct. 112, 65 L. Ed. 349) (1917); *Mills v. U. S. Printing Co.*, 99 App. Div. 605, 91 N. Y. S. 185 (1904); *Seubert, Inc. v. Reiff*, 98 Misc. 402, 164 N. Y. S. 522 (1917); or is, by means of a sign truthfully stating that the owners refuse to employ members of a certain union, to coerce the owners, by diminution of their patronage, to violate a contract which they have made with another union to employ, during a stated period, its members only, *Stillwell Theater,*

Inc. v. Sam Kaplan, 259 N. Y. 405, 182 N. E. 63 (1932). On the other hand, Judge Andrews in *Exchange Bakery and Restaurant, Inc. v. Rifkin, supra,* in his exposition of the reciprocal rights of the employer and employee said that freedom to conduct business or engage in labor is like a property right, threatened and unjustified interference with which will be prevented by injunction. Thus, a strike solely to injure an employer's business is unlawful and may be enjoined. *Sarros v. Nouris,* 15 Del. Ch. 391, 138 A. 607 (1927). And picketing will be enjoined if the objective sought is to control employment in retail trade, *Kitty Kelly Shoe Corporation v. United Retail Employees of Newark, N. J. Local No. 108 et al.,* 126 N. J. Eq. 374, 9 A. 2d 295 (1939); or to compel an employer to accept a closed shop, *Canter Sample Furniture House, Inc. v. Retail Furniture Employees Local No. 109 et al.,* 122 N. J. Eq. 575, 196 A. 210 (1937); or to induce a breach of contract, *Rice Etc. Machine & Iron Company v. Willard, et al.,* 242 Mass. 566, 136 N. E. 629 (1922); *Walton Lunch Company v. Kearney,* 236 Mass. 310, 128 N. E. 429 (1920); or if linked with a purpose inimical to the welfare and health of the entire community, *Gottlieb v. Matckin,* 117 Misc. 128, 191 N. Y. S. 777 (1921). It was further held in that case that another's business might not be injured or ruined by combination to strike or picket with malice or ill will, but may be attacked only to attain some purpose legally sufficient to justify harm done, and picketing may not be accompanied by violence, trespass, collection of crowds, or impeding of free entrance to the employer's premises. Thus, picketing may be enjoined if accompanied by obstruction by physical means of access to the premises picketed, *Foster v. Retail Clerks' International Protective Ass'n. supra; Ellis v. Journeyman Barbers' International Union of America Local Union No. 52,* 194 Ia. 1179, 191 N. W. 111 (1922); *Heitkamper v. Hoffman,* 99 Misc. 543, 164 N. Y. S. 533 (1917); or if accompanied by force, violence, threats, physical assaults, abusive and insulting language, coercion, or intimidation designed to prevent workmen from continuing in or accepting employment with the person against whom the acts are designed to operate, *Langenberg Hat Co. v. United Cloth Hat and Cap Makers of North America,* 266 F. 127 (1920); *Marks-Arnheim, Inc. v. Hillman,* 198 App. Div. 88, 189 N. Y. S. 369 (1921); *O'Neil v. Behanna,* 182 Pa. 236, 37 A. 843, 61 Am. St. Rep. 702 (1897). The Illinois Court said in *Schuster v. International Ass'n. of Machinists, Auto Mechanics Lodge No. 701,* 293 Ill. App. 177, 12 N. E. 2d 50 (1937), that peaceful picketing was unlawful

and could be enjoined according to the older decisions in that jurisdiction, but that it did not choose to follow those decisions but preferred the modern view that peaceful picketing (for a lawful purpose) may not be enjoined. But the New Jersey Court said in *Elkind & Sons, Inc. et al. v. Retail Clerks' International Protective Ass'n. et al.,* 144 N. J. Eq. 586, 169 A. 494 (1933), that it must recognize the decision of the U. S. Supreme Court, which held in *Truax v. Corrigan,* 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A. L. R. 375 (1921), that picketing was unlawful, and that it might be enjoined as such, and that peaceful picketing was a contradiction in terms. The New Jersey Court also said that "picketing" is a militant word and the act of picketing is militant in both character and purpose; its purpose, compulsion or coercion, is accomplished only by intimidation. An opposite view is taken in 16 R. C. L. 454, where it is said that picketing is not unlawful *per se.* Picketing may simply mean the stationing of men for observation, and the doing of such an act, solely for such purpose, there being no physical annoyance or hinderance of any person, is lawful. The Supreme Court of the United States follows the later decision of the Illinois Court, *Lauf v. E. G. Shinner & Company, Inc.,* 303 U. S. 323, 58 S. Ct. 578, 82 L. Ed. 872 (1938), and has struck down broadly drawn statutes which place blanket prohibitions on all picketing activities as a violation of the guarantee of free speech by the Constitution. *Thornhill v. Alabama,* 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940). The California Courts follow a liberal rule which allows peaceful picketing for a purpose reasonably connected with a controversy affecting workers in an industry generally as well as those employed by the person against whom the picketing is directed, *C. S. Smith Metropolitan Market Company v. Lyons,* 16 Cal. 2d 389, 106 P. 2d 414 (1940), and in such case the determinative issue is whether the workmen are demanding something reasonably related to the employment and to the purpose of collective bargaining. *C. S. Smith Metropolitan Market Company v. Lyons, supra.*

The majority opinion of the principal case is in accord with the modern trend to allow peaceful picketing in aid of a strike for a lawful purpose. The dissenting opinion that an injunction should not be granted, was based on the fact that the picketing was not disorderly nor untruthful and violated no statute or declared public policy. The dissenting judge evidently took the position that the strike was not retaliative in nature, as claimed by the plaintiffs, but was an organization drive, as the defendants contended. But the

majority of the court held that there was evidence to support the Supreme Court's finding that the strike was retaliative in nature in a dispute with a rival union. Whether or not any particular strike is lawful is a question of law, and it seems clearly that a retaliative strike should fall into that category of strikes which are unlawful.

E. LEE MORGAN, JR.

INSURANCE — Is the Korean Action a War? — On July 25, 1950, one month to the day after the commencement of hostilities in Korea, defendant-appellee issued a policy of insurance upon the life of plaintiff's deceased husband. The face amount of the policy was $2,500 but it contained a clause providing for double indemnity if the death of the insured resulted solely through accidental means. The insured was a member of the National Guard having enlisted in December 1949. His unit was called into federal service in September 1950 and the insured was killed in a railroad accident a few days later while enroute to a military camp where he was to receive training. The plaintiff brought an action in assumpsit for the full amount of $5,000 claiming double indemnity on account of the accidental death. The policy also contained a clause which stipulated that if the insured should voluntarily or involuntarily "engage" in military, air or naval service in "time of war" then the company would not be liable for the additional accidental death benefit. This clause constituted the company's defense. The Court of Common Pleas denied double indemnity, and plaintiff appealed. HELD, reversed. The insurer failed to meet the burden of proving that the term "war" included an undeclared as well as a declared war. Judgment was entered for plaintiff for full amount of policy. *Harding v. Pennsylvania Mutual Life Insurance Co.*, ... Pa. ....., 90 A. 2d 589 (1952).

Where the terms of a policy are susceptible of two interpretations, that construction which is most favorable to the insured, in order to indemnify him for the loss sustained, should be adopted. *Koser v. American Casualty Co. of Reading*, 162 Pa. Super. 63, 56 A. 2d 301 (1948). The reason for this rule is that the language of the policy is prepared by the insurer, presumably with the purpose of protecting itself against future claims in regard to which it does not desire to accept liability. *Hoover v. National Casualty Co.*, 236 Mo. App. 1093, 162 S. W. 2d 363 (1942). Parties to a contract may define the meanings of the terms used therein and such meanings as so de-

fined will ordinarily be enforced by the courts. *Standard Oil Co. v. Powell Paving and Contracting Co.,* 139 S. C. 411, 138 S. E. 184 (1926). The word "engage" within the provision of a life policy that double indemnity benefits should terminate it insured should "engage" in military service in "war time" means "enter into", so that the insurer's liability for double indemnity terminates upon insured's entry into military service, regardless of whether subsequent death of insured is the result of military service or not. *Wolford v. Equitable Life Insurance Co. of Iowa,* 162 Pa. Super. 259, 57 A. 2d 581 (1948). Death resulting from military service in time of war comprehends death in actual combat, but it is not so restricted as to exclude death under other circumstances, if actually resulting from military service, in time of war. *Selenack v. Prudential Insurance Co. of America,* 160 Pa. Super. 242, 50 A. 2d 736 (1947). As is pointed out in *Bas v. Tingy,* 4 Dall. 37, 4 U. S. 37, 1 L. Ed. 731 (1799), there is a vast distinction between a declared war and an undeclared one. Courts do not declare war or make peace. *New York Life Insurance Co. v. Durham,* 10 Cir., 166 F. 2d 874 (1948). In deciding judicial questions concerning the commencement or termination of a state of war, the courts are generally required to refer to some public act of a political department of the Government. *United States v. Anderson,* 76 U. S. 56, 9 Wall. 56, 10 L. Ed. 615 (1870). The condition of peace or war, public or civil, in a legal sense, must be determined by that political department and the courts are bound by its decision. *United States v. One-Hundred and Twenty-Nine Packages,* Fed. Cas. No. 15-941 (1862). The question as to whether war existed or not at a particular time is not a question for the jury but is one to be determined alone by the political power of the Government. *Sutton v. Tiller,* 46 Tenn. 593, 98 Am. Dec. 471 (1869). War does not exist merely because of an armed attack by the military forces of another nation. *Savage v. Sun Life Assurance Co. of Canada,* D. C. La. 1944, 57 F. Supp. 620. However, *New York Life Insurance Co. v. Dennion,* 10 Cir., 158 F. 2d 260 (1946), states that when one sovereign nation attacks another with premeditated and deliberate intent to wage war against it and that nation resists with force, war in the grim sense exists and courts are not required to wait for formalities before recognizing this fact. This is the minority view and the vast majority in the United States agrees with *West v. Palmetto State Life Insurance Co.,* 202 S. C. 422, 25 S. E. 2d 475, 145 A. L. R. 1461 (1942) wherein it is determined that an Act of Congress is necessary to the commencement of a

war, and that the Act is in itself a "declaration" and fixes the date of that war. Even the President's message to Congress, delivered on the day following the Pearl Harbor attack, stating that a state of war "has existed" between the United States and Japan did not amount to a declaration of war since Congress had not acted at the time. *Rosenau v. Idaho Mutual Benefit Association,* 65 Idaho 408, 145 P. 2d 227 (1944); *Pang v. Sun Life Assurance Co.,* 37 Haw. 208 (1945).

The question as to whether or not we are at present engaged in a "war" is one which will take on increasing importance as the next few years pass in review. To the servicemen who are engaged in that conflict in Korea there is no doubt that it is a war in all its grimness. However, to the majority of our American Courts death via bombs and shells is not sufficient evidence to warrant a finding of war as contemplated by the parties to a life insurance policy containing a "war clause" terminating the double indemnity clause for accidental death. These courts hold that the war spoken of in such policies refers only to those wars declared by Congress, thus working a tremendous hardship on the insurance companies. No doubt when the policies were written the men drafting these contracts thought of "war" as being an armed conflict between men regardless of who sponsored it. Since that time we have gone through Pearl Harbor and joined the United Nations. Our courts have held that those men killed at Pearl Harbor could collect double indemnity since Congress had not declared war as of December 7, 1941. The courts denominated that action an undeclared war and point out that such wars were not included under the war clause of the policy. It would follow from the cases that our courts have now worked themselves into something of a dilemma considering that Congress has not declared the Korean action a war. Actually it would seem that our courts would now take a practical view of the facts and reverse the trend started by the Pearl Harbor cases. By doing this the courts would place the insurer and the insured on a level plane and at the same time they would attach a practical definition to the term "war".

JESSE J. GUIN, JR.

INSURANCE — AUTOMOBILE — Effect of Policy as to Replacement of Originally Insured Automobile. — Plaintiff brought an action for damages against defendant insurance company after the company refused to pay a claim made under an automobile insur-

ance policy. The policy provided that if the automobile described in the policy were replaced by another automobile, the second automobile would be insured under the original policy. Plaintiff had an accident involving the first automobile after which it was placed in a garage for repairs. He then purchased another automobile which he wrecked shortly thereafter. Damages for the second collision were awarded. On appeal, HELD, affirmed. The second automobile replaced the automobile described in the policy, in the use of the plaintiff, within the meaning of the policy. *Royer v. Shawnee Mutual Insurance Co.,* 106 N. E. 784 (Ohio 1950).

The general rule of construction of insurance contracts is that the contract shall be construed most strongly against the insurer if such construction is fairly reasonable. *Olson v. Standard Marine Insurance Co.,* ..... Cal. App. 2d ....., 240 P. 2d 379 (1952); *Pendell v. Westland Life Insurance Co.,* 95 Cal. App. 2d 766, 214 P. 2d 392 (1950). And if there is any doubt whether the words are used in an enlarged or restrictive sense, the construction will be adopted which is most beneficial to the insured, other things being equal. *Eaves v. Progressive Fire Insurance Co.,* 217 S. C. 365, 60 S. E. 2d 687 (1950); *Berliner v. Travelers Insurance Co.,* 121 Cal. 458, 53 P. 918 (1898). These rules are illustrated in *Homestead Fire Insurance Co. v. Dewitt et al.,* ..... Okla. ....., 245 P. 2d 92, (1952), where it was held that a builders risk policy designed to cover all loss occurring to a building during construction, also covered loss to an adjoining building which was necessarily involved in the construction within the intention of the parties. It is further shown in *Peony Park v. Security Insurance Co. of New Haven, Conn.,* 137 Nebr. 504, 289 N. W. 848 (1940) that where there are two conflicting clauses within a policy, the one most beneficial to the insured must apply. But the rule of strict construction against an insurer should not be construed "to result in a perversion of language, or exercise of inventive powers for the purpose of creating a liability where none exists". *S. S. Newell and Co. v. American Mutual Liability Co.,* 199 S. C. 325, 19 S. E. 2d 463 (1942). Neither are the courts free to adopt some strained view which was not contemplated by the parties. *Pitts v. Glenn Falls Indemnity Co.,* ..... S. C. ....., 72 S. E. 2d 174 (1952). And Justice Cardozo showed reluctance to apply the rule of strict construction against the insurer in *Byrd v. St. Paul Fire and Marine Insurance Co.,* 224 N. Y. 47, 120 N. E. 86 (1918) in which it is stated that the guide to construction of insurance contracts is the reasonable expectation

and purpose of the ordinary business man when making an ordinary business contract, and it is his intention, expressed or reasonably inferred, which will prevail. There are few cases directly in point with the instant case, but in an analogous situation, it was held in *Dean v. Niagara Fire Insurance Co. et al.,* 24 Cal. App. Supp. 2d 762, 68 P. 2d 1021 (1937) that a newly acquired automobile had replaced, within the meaning of the policy, the originally insured automobile, even though a state statute declared that legal title would not pass until registration with the Highway Department had been completed, and such condition had not been met at the time of the accident. And the insurer is nevertheless liable for damage incurred by the second automobile even though a personal liability against the insured continued by statute as to the original automobile until registration requirements had been complied with. *Schmidt v. C.I.T. Corporation,* 14 Cal. App. 2d 92, 57 P. 2d 1016 (1936). Neither will technicalities bar the company's liability as is illustrated in *Kostecki et al. v. Zaffina,* 384 Ill. 192, 51 N. E. 2d 152 (1943) and *Fucaloro v. Standard Surety and Casualty Co. of New York,* 225 Iowa 437, 280 N. W. 605 (1938) where it was held that the necessary changes in the policy as to motor and serial numbers being omitted, did not defeat the liability of the company as to the newly acquired automobile. This rule is followed in *Reimers v. International Indemnity Co.,* 143 Wash. 193, 254 P. 852 (1927) where a new chassis and motor were installed on the insured automobile without the proper changes thereof being recorded in the policy. More in accord with the problem presented by the instant case is that of *Merchant's Mutual Casualty Co. v. Lambert,* 90 N. H. 507, 11 A. 2d 361 (1940) in which the insured had placed his originally insured automobile in his garage, it being worn out, unfit for use on the public highways, and not having been driven for several months. Held, that another car purchased by the insured was a replacement under the policy. However, where the insured had traded the old car for a new one, leaving the first car with the motor company to sell for him, title remaining in the insured, the newly acquired automobile was not covered by the policy, *Mitchum v. Travelers Indemnity Co.,* 127 F. 2d 27 (1942). But this case was distinguished in *Hoffman v. Illinois National Casualty Co.,* 159 F. 2d 564 (1947) where the insured was allowed to recover damages to secondly acquired tractor where the original tractor had been partially wrecked and it had not yet been decided by insured whether to sell or to repair it.

It appears from the cases cited that where the originally insured automobile has been disabled, a replacement by another automobile in the use of the insured, will be effective under the policy of insurance. But where the automobile is in operating condition, regardless of where its physical possession is, a replacement in the use of the insured by another automobile is not effective. The decisions against the defendant companies do not discuss the nature of the disability, that is, whether it is a permanent or temporary one. If the foregoing may be considered the rule of law, then the instant case is in accord with the other decisions. However, the decision in all of the cases depend on the particular set of facts surrounding the replacement and to declare any established rule may be to work a hardship on the plaintiff in the instant case. Following the broad rule of construction set out by Cardozo in the *Byrd* case, supra, that ordinary reasonableness as applicable to ordinary business contracts shall prevail, i. e. the intention of the parties, a practical question arises in the instant case and also in the *Hoffman* case, supra. Should the insured at any time again make use of the formerly disabled automobile, where would the risk then lie? As was pointed out in the *Mitchum* case, supra, neither the insurer nor the insured would be able to say conclusively which automobile was insured and should the originally insured automobile be further damaged during its course of repair, as by fire, etc. or be driven while under repairs and damaged, the result would be a severe confusion as between the parties and such cannot be held to have been intended by them.

JAMES ALFORD.

TORTS — Injury to Viable, Pre-Natal Child. — An expectant mother, six months pregnant, ate food unfit for human consumption in defendant's eating place. As a consequence she was made ill which resulted in the child being born blind. This suit on the child's behalf was dismissed. On Appeal, HELD: Affirmed. An action of tort may not be had for injuries to a viable child in his mother's womb caused by negligence. *Cavanaugh et al. v. First National Stores, Inc.*, ... Mass. ....., 107 N. E. 2d 307 (1952).

There is no precedent at common law giving a child injured when "en ventre sa mere", but afterwards born alive the right to an action for injuries received. *Buel & United Rys. of St. Louis,* 284 Mo. 126, 154 S. W. 71 (1913). An unborn child is a part of its mother until birth, and, as such, has no judicial existence. *Drabbels v.*

Skelly Oil Co., 155 Neb. 17, 50 N. W. 2d 229 (1951); *Drobner v. Peters,* 232 N. Y. 220, 133 N. E. 567 (1921). An unborn child is a part of the mother at the time of any injury, any damage to it which is not too remote if recoverable at all is recoverable by the mother. *Newman v. Detroit,* 218 Mich. 60, 274 N. W. 710 (1937); *Gorman v. Budlong,* 23 R. I. 169, 91 Am. St. Rep. 188 (1901); *Dietrich v. Northampton,* 138 Mass. 14, 52 Am. Rep. 242 (1884). Also if the action could be maintained, an infant may maintain an action against his own mother for injuries occasioned by the negligence of the mother while pregnant with it. *Albaire v. St. Luke's Hospital,* 184 Ill. 359, 56 N. E. 638 (1900). The right of recovery is denied for it would be impossible to establish except by speculation or conjecture that the condition of the child was proximately caused by the injury, and this would lead to false claims which would be difficult to disprove. *Magnolia Coca Cola Bottling Co. v. Jordan,* 124 Texas 347, 78 S. W. 2d 944 (1935). There are strong grounds for arguments on both sides of this question and although some courts say that they hold as the leading case of *Dietrich v. Northampton, supra* which said that an action could not be brought, they also say that they would not intimate what their decision would be if the question were presented for the first time. *Bliss v. Passanesi,* 326 Mass. 461, 95 N. E. 2d 206 (1950). (Absence of precedent is no ground for denying recovery where a wrong has been committed. *Bombrest v. Katz,* 65 F. Supp. 138 (1946).) The problem of proof does not justify denial of a remedy; strict requirements of competent medical evidence are sufficient safeguards. "It is hoped that science will keep pace with the law." *Williams v. Marion Rapid Transit Inc.,* 152 Ohio St. 114, 87 N. E. 2d 334 (1949). Life is the immediate gift of God and begins in contemplation of law as soon as the infant is able to stir in mother's womb, *Tucker v. Howard L. Carmichael & Sons,* 208 Ga. 201, 65 S. E. 2d 909 (1951) and a child conceived, but not yet born, is to be deemed an existing person so far as may be necessary for its interests, personal and property, in the event of its subsequent birth. *Scott v. McPheeters,* 33 Cal. App. 2d 629, 92 P. 2d 678 (1939). In the case of *Tramways v. Leveille,* 4 Dom. L. R. 337 (1933) the court granted relief saying that to deny the child the right to recover for a pre-natal injury inflicted upon it would be to allow a wrong for which there was no remedy. A much later case, *Woods v. Lancet,* 303 N. Y. 349, 102 N. E. 2d 691, (1951) follows the same reason and the only dissenting judge stated that he also agreed but that the legislature should

pass laws governing this type of tort as they have done in England on the same question.

The decision in this case agrees with the majority of such cases in this country, but the modern trend seems against this view. This case expresses the understandable reluctance of the majority of courts to open a new field in tort liability. However, it has long been established in torts that for every wrong there is a remedy; and as medical science proves more conclusively every day that a viable child is an entity, though in its mother's womb, the trend is toward realizing that in cases such as this recovery ought to be allowed. There should be recognized a legal right in a newborn child to begin life with a sound body.

PERRY WEINBERG.

TORT—Action by Minor Against Parent.—The appellant, minor, child of respondent, living in the home of and supported by respondent, brought suit for the recovery of damages for personal injuries sustained in an automobile accident as a result of the alleged negligence of his father. On appeal, HELD, affirmed. An unemancipated minor child, living in his parents' household, cannot maintain an action in tort against them or either of them, in the absence of any statute abrogating or changing such common law rule. *Redding v. Redding,* ..... N. C. ....., 70 S. E. 2d 676 (1952).

Whether a minor was denied the right of action in tort against his parent at common law appears to be very much a matter of opinion and conjecture. *Cowgill v. Boock,* 189 Or. 282, 218 P. 2d 445, 19 A. L. R. 2d 405 (1950), see Anno. It has been declared that there was never a common law rule that a child could not sue its parents. *Dunlap v. Dunlap,* 84 N. H. 352, 150 A. 905, 71 A. L. R. 1055 (1930); *Mahnke v. Moore,* ..... Md. ....., 77 A. 2d 923 (1951). This conclusion has been concurred with elsewhere as shown by Chief Justice Clark, dissenting in the case of *Small v. Morrison,* 185 N. C. 577, 118 S. E. 12, 31 A. L. R. 1135, 22 N. C. C. A. 961 (1923), and as pronounced in works of English writers. *Dunlap v. Dunlap, supra.* A Scottish case went so far as to uphold the right of an unemancipated minor to maintain a negligence action against his parent. *Young v. Rankin,* Scot., Sc. 499 (1934). However, the opinions of American Courts, with the possible exception of cases involving damage to property or property rights, *Small v. Morrison, supra; Wells v. Wells,* Mo. App., 48 S. W. 2d 109 (1932), often contain the statement that "at common law" such action was denied

because of society's interest in preserving harmony in domestic relations. *Kelly v. Kelly,* 158 S. C. 517, 155 S. E. 888 (1930); *Matarese v. Matarese,* 47 R. I. 131, 131 A. 198, 42 A. L. R. 1360, 25 N. C. C. A. 737 (1925); *Roller v. Roller,* 37 Wash. 242, 79 P. 788, 68 L. R. A. 893, 107 Am. St. Rep. 805, 3 Ann. Cas. 1 (1905). In keeping with this tradition, the majority of the jurisdictions, including South Carolina, have no statutes authorizing such actions. *Kelly v. Kelly, supra.* This denial of an action at common law has been established in the United States by the weight of authority. *Reingold v. Reingold,* 115 N. J. L. 532, 181 A. 153 (1935); *Crosby v. Crosby,* 230 App. Div. 651, 246 N. Y. S. 384 (1930); *Wick v. Wick,* 192 Wis. 260, 212 N. W. 787, 52 A. L. R. 1113 (1927). In recent years, however, it has been held that in cases of gross negligence, approaching or amounting to willful misconduct, the parent may become liable. *Cowgill v. Boock, supra; Mahnke v. Moore, supra.* With the change in modern business methods, particularly with regard to the growth of insurance coverage available, indications have appeared of a growing judicial inclination to modify this broad rule. *Cowgill v. Boock, supra; Dunlap v. Dunlap, supra.* Consequently, it is to be noted that grounds for upholding a minor's suit may be based on the existence of an additional relationship, such as that of master and servant or carrier and passenger. *Worrell v. Worrell,* 174 Va. 11, 4 S. E. 2d 343 (1939); *Lusk v. Lusk,* 113 W. Va. 17, 166 S. E. 538 (1932); *Dunlap v. Dunlap, supra.*

There has been only one case of this type decided in South Carolina, that of *Kelly v. Kelly* cited above. The facts leading up to the bringing of that action were very similar to those that have been set forth in the recent *Redding* case. In the Kelly suit, the Court indicated that it would follow the "common law doctrine" already established by the weight of authority. In adopting this course, however, the Court should recognize that an act done by the parent may reach beyond the protection of the family relation and constitute an invasion of the absolute rights of the child. Under such circumstances the child should have the same right to recover as any other person so injured as a result of the negligence of the parent. Recovery under liability insurance policies should often be allowed regardless of the parent-child relationship, and a great injustice would be done if a child were prevented from holding the parent liable in cases of willful misconduct because of this relation. "The rule of parental immunity from liability should not apply where the reason for the rule fails."

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