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W.A. Heindl

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NOTES AND COMMENTS

A REMEDY FOR ALL INJURIES?

It is apparent that the decision in *Daily v. Parker*¹ has caused a furor in both the academic and the practical fields of law; witness not only the large number of discussions of the case in recent issues of law reviews published throughout the country² but also the almost daily newspaper accounts of other similar suits that have been filed since the opinion was handed down. The factual situation is simple. Certain minors sued in a federal district court, by their mother as next friend, to recover damages allegedly sustained by the enticing away of their father. Jurisdiction was based upon diversity of citizenship. The complaint was dismissed in the lower court on the ground that no cause of action was stated. On appeal to the Circuit Court of Appeals for the Seventh Circuit, the decision of the lower court was reversed. By the higher court's own admission, no precedent could be found sustaining the action,³ but as it apparently felt that natural justice demanded a recovery, the court achieved the decision it did.⁴ Stripped of all its talk of analogous and reciprocal rights and duties, the effect of the decision was to create a right never before recognized.

It would appear, from the opinion, that the court justified its action on three grounds, to-wit: (1) a judicial law-making power denoted by the phrase "judicial empiricism"; (2) because required by the common-law maxim *ubi jus ibi remedium*; and (3) from authority derived under Article II, Section 19 of the Illinois Constitution.⁵ There are, however, overtones in the case which suggest that the court was convinced that a grave moral wrong had been committed, one which would be apt to go unpunished before the law unless it was translated into a legal wrong as well. The question is whether any court today, unaided by legislation, has that power.

For the sake of clarity in evaluating the decision, each of the grounds

¹ 152 F. (2d) 174 (1945). A companion case, brought by the wife for alienation of the husband's affections, may be noted in 61 F. Supp. 701 (1945).

² The case has been commented upon in 26 Bost. U. L. Rev. 402, 46 Col. L. Rev. 464, 15 Ford. L. Rev. 126, 59 Harv. L. Rev. 297, 30 Minn. L. Rev. 310, 21 Notre Dame Law. 374, 19 So. Cal. L. Rev. 455, 20 Temp. L. Q. 146, 13 U. of Chi. L. Rev. 375, 94 U. of Pa. L. Rev. 437, 32 Va. L. Rev. 420.

³ There is one case to the contrary which the court failed to note: *Morrow v. Yannantuono*, 152 Misc. 134, 273 N. Y. S. 912 (1934). See also *Coulter v. Coulter*, 73 Colo. 144, 214 P. 400 (1923); *Cole v. Cole*, 277 Mass. 50, 177 N. E. 810 (1931).

⁴ That specific decision will forever stand unreversed, for upon return of the case to the lower court for further proceedings the defendant compromised with a handsome settlement: *Chicago Tribune*, Vol. CIV, No. 287C, p. 17, Nov. 30, 1945.

⁵ Ill. Const. 1870, Art. II, § 19, declares, among other things, that: "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property, or reputation."

relied upon should be considered separately although they are, in some respects, similar. Those who support the theory of judicial power to legislate will always contend, as was done in the instant case, that the law has never remained static but grows continually through judicial decisions. They point to the Statute of Westminster II, especially to the *in consimili casu* clause,⁶ as merely restating the common law rule which gave to the Chancellor the power to create new writs⁷ if none suitable were found in the Register.⁸ It should be borne in mind, however, that the power conferred on the Chancellor, and through him upon our present judges, was not unlimited; it was not to create entirely new writs and remedies but only to develop them by analogy from writs already in existence.⁹ If the litigant needed an entirely new writ, the matter was not one for the Chancellor but concerned Parliament, the law-making body.¹⁰ That principle has been carried down in English law to the point where it has been said that courts can apply recognized principles to new instances,¹¹ but where the case is new in principle the matter is solely one for the legislature.¹²

Some might urge that the instant case is nothing more than an application of old principles to new situations; that it is no more than an illustration of the skill that can be displayed in the application of the idea inherent in "judicial empiricism." But difficulties in that respect will be encountered. The court divided the rights of the children involved in the instant case into two groups: (1) to the affection and society of the father, and (2) to receive support from him. While these are the normal attributes of family life in every civilized community, in fact are so intimately connected with the parental concept that society would stigmatize the father who failed to provide them when he could by calling him an "unnatural"

⁶ 13 Ed. I (1285), c. xxiv; Stats. at Large (Cambridge Ed.), p. 197. The important Latin phraseology is ". . . *in consimili casu cadente sub eodem jure et simili indigente remediū*. . . ." The parallel translation by Danby Pickering is: ". . . in like case falling under like law and requiring like remedy."

⁷ See 3 Bl. Com. 51.

⁸ Reeve, Hist. of Eng. Law (Finlayson ed., Philadelphia, 1880), Vol. IV, p. 571.

⁹ Chitty on Pleading, Vol. I, *94.

¹⁰ The Statute of Westminster II directed: ". . . *et referant eos ad proximo parliamentum, et de consensu jurisperitorum fiat breve, ne contingat de cetero quod curia diu deficiat querentibus in justitia perquirenda*." As translated by Danby Pickering, op. cit. note 6, ante, it directed that: ". . . it shall be adjourned to the next parliament, where a writ shall be framed by consent of the learned in the law, lest it happen for the future that the court of our lord the king be deficient in doing justice to the suitors." See also Stephen on Pleading (Williston ed., Cambridge, Mass., 1895) *7.

¹¹ Street, Foundations of Legal Liability (Edw. Thompson Co., New York, 1906), Vol. III, Ch. 5, provides several illustrations of this fact.

¹² *Pasley v. Freeman*, 3 T. R. 51, 100 Eng. Rep. 450 (1789). Similar expressions may be found in *Cason v. Baskin*, 155 Fla. 198, 20 So. (2d) 243 (1945), and *Pavestich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68 (1905), which are noted merely by way of illustration.

parent, the law has never seen fit to protect the child as to the former¹³ while the latter has received only partial recognition in the common law or by statute.¹⁴ There is, then, no settled legal principle upon which the court could build by way of analogy. It is absurd to say that since a husband could sue for the alienation of the affections of his wife then a child may sue if the parent's affections are aliened, for the second is not a "like" case to the first. Although the modern conception of the husband's action may be changing,¹⁵ the fact remains that it is predicated upon an invasion of a right to consortium which does not exist in the parent-child relationship. It would seem, therefore, that the Statute of Westminster II can afford no basis for such a decision as that announced in the instant case.

Unhampered judges in other countries¹⁶ might achieve such a result with acknowledged frankness that they were "declaring," that is making, new law. But in this country and in this age the proper relationship existing between the legislative and the judicial departments, both operating under written constitutions, is too well-known and too clearly defined to permit of such unabashed assumption of power on the part of our judges. It is for the legislature to enact the laws;¹⁷ the judicial department merely applies them.¹⁸ In full recognition of that fact, many courts have announced that it is for the legislature, and not the courts, to change or abrogate the common law¹⁹ and, in the same way, to create rights or remedies which

¹³ See Pound, "Individual Interests in the Domestic Relation," 14 Mich. L. Rev. 177 (1916), particularly p. 185.

¹⁴ The abandoned child in common law days might seek aid from the poor relief authorities or, at best, could only pledge the parent's credit for necessaries, leaving any action against the parent to the merchant who supplied the goods: *Bagely v. Forder*, L. R. 3 Q. B. 559 (1868). Statutory enactment was necessary to permit the child to recover directly for non-support: Vernier, *American Family Laws* (Stanford University Press, 1935), Vol. IV, § 234, pp. 56-93. Compare Ill. Rev. Stat. 1945, Ch. 107, § 1. In the same way, statutory enactments were necessary to permit the child to sue a third person who sold liquor to a parent thereby producing a loss of support: Vernier, *op. cit.*, Vol. IV, § 266, p. 473, and Ill. Rev. Stat. 1945, Ch. 43, § 135.

¹⁵ See Lippman, "The Breakdown of Consortium," 30 Col. L. Rev. 651 (1930); Holbrook, "The Change in the Meaning of Consortium," 22 Mich. L. Rev. 1 (1923).

¹⁶ Even the Roman Praetor was acting in a legislative capacity when he created new rights: Goudsinit, *The Pandects: A Treatise on Roman Law* (Longmans, Green & Co., London, 1873), pp. 242-5.

¹⁷ Ill. Const. 1870, Art. IV, § 1, declares: "The legislative power shall be vested in a general assembly. . . ." Art. III thereof provides for the separation of governmental power and its distribution among the customary three departments. See also *People v. Roth*, 249 Ill. 532, 94 N. E. 953 (1911).

¹⁸ *Owners of Land v. People*, 113 Ill. 296 (1885).

¹⁹ *Colo. Fuel & Iron Co. v. Hawkins*, 23 Colo. App. 420, 130 P. 70 (1913); *Modern Woodmen of America v. International Trust Co.*, 25 Colo. App. 26, 136 P. 806 (1913); *Henry Grady Hotel Co. v. Sturges*, 70 Ga. App. 379, 28 S. E. (2d) 329 (1943); *In re Hulett's Estate*, 66 Minn. 327, 69 N. W. 31 (1896); *Wells v. Guardian Life Ins. Co. of N. Y.*, 213 N. C. 178, 195 S. E. 394 (1938).

heretofore have not existed.²⁰ If there is doubt that these principles hold true of the family relationship, reference may be had to the many statutes enacted to eliminate common-law hardships or to create new rights and remedies which the courts have felt themselves powerless to provide.²¹ The argument of the judicial empiricists, then, points directly toward an unconstitutional seizure of power which properly belongs to a co-ordinate branch of the government. It would be well for our courts to refrain from following such lines.

The second predicate for the decision, i. e. that it is dictated by the maxim *ubi jus ibi remedium*, aptly illustrates what Edmund Burke meant when he said that a "great part of the mischiefs which vex this world arise from words." He might have said from an insufficient understanding of words. By the terms of that maxim, a remedy is to be found wherever a right exists, and by "right" is meant one that is recognized in the law.²² As the maxim now presupposes that a primary legal right must exist before any invasion thereof will be considered actionable,²³ it can afford little help in the instant case for the court admitted that "such rights have not heretofore been recognized."²⁴ If no right existed, then, according to the maxim, there should be no remedy. That, at least, is the order of search followed by most modern courts,²⁵ although it was not always so. In

²⁰ *United States v. Roberts & Oake*, 1 F. Supp. 797 (1932), affirmed in 65 F. (2d) 630 (1932); *Leland v. Leland*, 319 Ill. 426, 150 N. E. 270 (1926); *Murrell v. Industrial Commission*, 219 Ill. 334, 126 N. E. 189 (1920); *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 56 N. E. 638 (1900); *Smith v. Luckhardt*, 299 Ill. App. 100, 19 N. E. (2d) 446 (1939); *Stemmer v. Kline*, 128 N. J. L. 455, 26 A. (2d) 489 (1942), reversing 19 N. J. Misc. 15, 17 A. (2d) 58 (1940); *Ryan v. Public Service Co-ordinated Transport Co.*, 18 N. J. Misc. 429, 14 A. (2d) 52 (1940); *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442 (1902); *Hughes v. City of Auburn*, 161 N. Y. 96, 55 N. E. 389 (1899).

²¹ In general, see Vernier, *op. cit.*, Vol. IV, §§ 234, 235 and 266; Prosser, *Handbook of the Law of Torts* (West Pub. Co., St. Paul, Minn., 1941), p. 898; Cooley on Torts, Vol. II, §§ 210-1. Specific instances may be found in Ill. Rev. Stat. 1945, Ch. 107, § 1, giving the child recourse against the parent for non-support and vice versa; *ibid.*, Ch. 43, § 135, and Ch. 70, § 2, for actions by or for the child against third persons whose acts have resulted in loss of support. The whole series of Married Women's Acts, Ill. Rev. Stat. 1945, Ch. 68, §§ 1-10, are but further illustrations.

²² Broom, *A Selection of Legal Maxims* (A. Maxwell & Sons, London, 1848), 2d Ed., p. 146. See also *Hastings v. Livermore & Another*, 7 Gray (Mass.) 194 (1856); *Thornton v. City of Clinton*, 148 Mo. 648, 50 S. W. 295 (1899).

²³ *Watters v. City of Ottawa*, 240 Ill. 259, 88 N. E. 651 (1909), reversing 144 Ill. App. 379 (1908); *Buell v. Lansky*, 232 Ill. App. 500 (1924).

²⁴ 152 F. (2d) 174 at 177.

²⁵ *Parker v. Griswold*, 17 Conn. 288, 42 Am. Dec. 739 (1845); *Bass v. Emery*, 74 Me. 338 (1883); *Stearns v. Atlantic & St. Lawrence Railroad Co.*, 46 Me. 95 (1858); *Stout v. Keyes*, 2 Dougl. (Mich.) 184, 43 Am. Dec. 465 (1845); *Willis v. St. Paul Sanitation Co.*, 48 Minn. 140, 50 N. W. 1110 (1892); *State v. Titman*, 103 Mo. 553, 15 S. W. 936 (1891); *Newell v. Meyendorff*, 9 Mont. 254, 23 P. 333 (1890); *Yates v. Joyce*, 5 N. Y. 134 (1814); *Eller v. Carolina & W. Ry. Co.*, 140 N. C. 140, 52 S. E. 305 (1905).

ancient jurisprudence, the maxim was reversed and read *ubi remedium ibi jus*,²⁶ for then the measure of a man's rights was fixed by whether or not the court afforded a remedy; any doctrine of pre-existing rights was unheard of.²⁷ By granting the remedy, the right was called into existence and added to the stock of the law. As society has advanced, however, and new ways have been found to bring rights into existence, the emphasis has changed so the modern version of the maxim now controls. The decision is, therefore, from that standpoint a logical non-sequitur of the premise upon which it is erected.²⁸

The third of the grounds is not so easily nullified. The Illinois Constitution, like those to be found in thirty-six other states,²⁹ does provide that every person "ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property, or reputation."³⁰ That phraseology is also usually coupled with the statement that he ought to obtain "right and justice freely and without being obliged to purchase it, completely and without denial, promptly and without delay." As an expression of idealized fundamental rights,³¹ such provisions are beyond criticism. But, if they can be said to confer upon the courts the power to recognize new legal rights and to grant hitherto unknown remedies, our whole theory of constitutional government under law is due for a profound disturbance. The implications lying behind such an idea are too vast to

²⁶ Salmond, *Jurisprudence* (Sweet & Maxwell, Ltd., London, 1937), 9th Ed., p. 701.

²⁷ Morey, *Outlines of Roman Law* (G. P. Putnam's Sons, London, 1885), 2d Ed., pp. 387-8.

²⁸ The court could have been using the maxim in the form sometimes used, i. e. "there is no wrong without a remedy." At first blush this would seem to fit the case exactly, but again the term "wrong" means legal wrong, an injury recognized by the law. It does not refer to every loss suffered. See, for example, *Carroll v. Rye Tp.*, 13 N. D. 458, 101 N. W. 894 (1904); *Drummond v. Rowe*, 155 Va. 725, 156 S. E. 442 (1931); *Carton v. City of Seattle*, 66 Wash. 447, 120 P. 111 (1912); *Pietsch v. Milbrath*, 123 Wis. 647, 102 N. W. 342 (1905).

²⁹ Ala. Const. 1901, Art. I, § 13; Ark. Const. 1874, Art. II, § 13; Colo. Const. 1876, Art. II, § 6; Conn. Const. 1818, Art. I, § 12; Dela. Const. 1897, Art. I, § 9; Fla. Const. 1887, Dec. of Rights, § 4; Ida. Const. 1890, Art. I, § 18; Ind. Const. 1851, Art. I, § 12; Kan. Const. 1861, Bill of Rights, § 18; Ky. Const. 1891, Bill of Rights, § 14; La. Const. 1921, Art. I, § 6; Me. Const. 1820, Art. I, § 19; Md. Const. 1867, Dec. of Rights, Art. 19; Mass. Const. 1790, Part the First, Art. XI; Minn. Const. 1857, Art. I, § 8; Miss. Const. 1890, Art. III, § 24; Mo. Const. 1875, Art. II, § 10; Mont. Const. 1889, Art. III, § 6; Neb. Const. 1875, Art. I, § 13; N. H. Const. 1784, Part First, Art. 14; N. C. Const. 1876, Art. I, § 35; N. D. Const. 1889, Art. I, § 22; Ohio Const. 1851, Art. I, § 16; Okla. Const. 1907, Art. II, § 6; Ore. Const. 1859, Art. I, § 10; Pa. Const. 1874, Art. I, § 11; R. I. Const. 1843, Art. I, § 5; S. C. Const. 1895, Art. I, § 15; S. D. Const. 1889, Art. VI, § 20; Tenn. Const. 1870, Art. I, § 17; Tex. Const. 1876, Art. I, § 13; Utah Const. 1895, Art. I, § 11; Vt. Const. 1793, Ch. 1, Art. 4; W. Va. Const. 1872, Art. III, § 17; Wis. Const. 1848, Art. I, § 9; Wyo. Const. 1889, Art. I, § 8. See also Ga. Code 1933, Tit. 3, § 105.

³⁰ Ill. Const. 1870, Art. II, § 19.

³¹ The provision is usually placed in the Bill of Rights section of the typical constitution.

comprehend for it could have the most far-reaching effect upon the law of the future. Does the provision in question contemplate any such thing?

Tracing the expression to its origin is not easy. Without doubt, the last part of it is but an echoing³² of Magna Carta's sonorous phrase "*Nulli vendemus, nulli negabimus, aut differemus, rectum aut justiciam.*"³³ The practice, prior to Magna Carta, of commensurating the type and speed of justice with the amount the litigant was willing to pay for the use of the royal courts is too well-known to require comment.³⁴ All the commentaries recognise that the purpose of that grant was to prevent the charging of exorbitant fees by the courts,³⁵ and the courts themselves have admitted that such was the evil intended to be rectified.³⁶ It cannot be said, however, that there is the remotest connection between it and the part which guarantees a remedy for every injury, other than the fact that the two phrases are now usually linked together.

One eminent legal authority does add something to the provision found in Magna Carta, something not to be found in the other commentaries. In his Second Institute, Coke states: "And therefore, every subject of this

³² The Maryland Constitution of 1776 seems to have been the first to include it, and one historian points out that it came direct from Magna Carta: Niles, Maryland Constitutional Law (Hepbron & Haydon, Baltimore, 1915), pp. 39-40. The courts have also indicated the same thing: *Ex parte Wetzel*, 243 Ala. 130, 8 So. (2d) 824 (1942); *Swann & Billups v. Kidd*, 79 Ala. 431 (1885); *Henderson v. State*, 137 Ind. 552, 36 N. E. 257 (1894); *Knee v. Baltimore City Pass. Ry. Co.*, 87 Md. 623, 40 A. 890 (1898); *State v. Gorman*, 40 Minn. 232, 41 N. W. 948 (1889); *DeMay v. Liberty Foundry Co.*, 327 Mo. 495, 37 S. W. (2d) 640 (1931); *First Trust Co. of Lincoln v. Smith*, 134 Neb. 84, 277 N. W. 762 (1938); *Phelps Dodge Copper Pr. Co. v. United E., R. & M. Wkrs.*, 138 N. J. Eq. 3, 46 A. (2d) 453 (1946); *In re Lee*, 64 Okla. 310, 168 P. 53 (1917); *Harris v. State Board of Optometrical Examiners*, 287 Pa. 531, 135 A. 237 (1926); *Narragansett Electric Lighting Co. v. Sabre*, 50 R. I. 288, 146 A. 777 (1929); *Henry v. Cherry & Webb*, 30 R. I. 13, 73 A. 97 (1909); *McHenry v. Humes*, 112 W. Va. 432, 164 S. E. 501 (1932).

³³ Magna Carta, c. 40; Stubbs, *Select Charters* (Clarendon Press, Oxford, 1900), Vol. II, p. 301. Texas Const. 1876, Art. I, § 13, omits the phrase, but it appears in variant language in all of the others.

³⁴ See Madox, *Hist. of Exchequer* (London, 1769), 2d Ed., Vol. I, pp. 425-55.

³⁵ Hantos, *The Magna Carta of the English and of the Hungarian Constitution* (Paul, Trench, Trubner & Co., London, 1904), p. 174; Horne, *Mirror of Justices* (John Byrne & Co., Washington, D. C., 1903), Ch. V, § 2; McKechnie, *Magna Carta* (Maclehose and Sons, Glasgow, 1905), p. 296; Reeve, *Hist. of Eng. Law* (Finlayson ed., Philadelphia, 1880), Vol. 2, p. 43; Sullivan, *Lectures on the Constitution and Laws of England* (Edw. and Chas. Dilly, London, 1776), 2d Ed., Lecture 42, p. 377; Thomson, *An Historical Essay on the Magna Charta of King John* (Major and Jennings, London, 1779), p. 229; Thompson, *The First Century of Magna Charta* (*Studies in the Social Sciences*, No. 16, Univ. of Minn., Minneapolis, 1925), p. 63.

³⁶ *Swann & Billups v. Kidd*, 79 Ala. 431 (1885); *Henderson v. State*, 137 Ind. 552, 36 N. E. 257 (1894); *Knee v. Baltimore City Pass. Ry. Co.*, 87 Md. 623, 40 A. 890 (1898); *State v. Gorman*, 40 Minn. 232, 41 N. W. 948 (1889); *Narragansett Electric Lighting Co. v. Sabre*, 50 R. I. 288, 146 A. 777 (1929); *Henry v. Cherry & Webb*, 30 R. I. 13, 73 A. 97 (1909); *McHenry v. Humes*, 112 W. Va. 432, 164 S. E. 501 (1932).

realme, for injury done to him in bonis, terris, or vel persona, by any other subject, be he ecclesiasticall, or temporall, free, or bond, man, or woman, old, or young, or be he outlawed, excommunicated, or any other without exception may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely, without sale, fully without any deniall, and speedily, without delay."³⁷ When so restating the guarantee, which he relegated to the end, Coke added some thoughts of his own concerning a remedy "by the course of law" for every injury done. His innovation, like many another for which he was the parent, is undoubtedly the source for the first part of the constitutional guarantee under consideration,³⁸ the language of the several constitutions following closely upon that used by him. As he does not amplify the word "remedy," except in its association with the idea that justice shall not be sold, denied, or delayed, it is probable that he was merely stating the spirit that lies behind Magna Carta, i. e. that the courts should be open to all who have legitimate business therein.

Any meaning that Coke may have attributed to his words, however, is not conclusive so far as our state constitutions are concerned. The problem is to ascertain what the same phraseology meant to the founders who incorporated the idea in our organic laws. Unfortunately, there is no record of the motive which prompted the inclusion, nor the arguments and exposition which accompanied the insertion, of those words in the first of our state constitutions.³⁹ The founders must have conceived the expression to be one of some fundamental right, for they incorporated it in the Bill of Rights. As the clause concerned "remedies," it must have been intended as an address to the courts.⁴⁰ Being a part of the organic law, it might be regarded as self-executing.⁴¹ But, being tied to the phrase forbidding the sale of justice, it might have been intended to come "laden with its previous meaning."⁴² As the last part of the clause would be comprehensive enough

³⁷ Coke, *Second Inst.*, pp. 55-6.

³⁸ *In re Lee*, 64 Okla. 310, 168 P. 53 (1917). See also *Stearns v. Atlantic & St. Lawrence Railroad Co.*, 46 Me. 95 (1858); *First Trust Co. of Lincoln v. Smith*, 134 Neb. 84, 277 N. W. 762 (1938); *Phelps Dodge Copper Pr. Corp. v. United E., R. & M. Wks.*, 138 N. J. Eq. 3, 46 A. (2d) 453 (1946).

³⁹ It would seem that credit belongs to Maryland, for its constitution of 1776 is the earliest in point of time to include the clause. Other states apparently have merely copied the idea.

⁴⁰ *Adams v. Iten Biscuit Co.*, 63 Okla. 52, 162 P. 938 (1917); *Scott v. Nashville Bridge Co.*, 143 Tenn. 86, 223 S. W. 844 (1920).

⁴¹ *Burnham v. Bennison*, 121 Neb. 291, 236 N. W. 745 (1931); *Perkins v. Cooper*, 155 Okla. 73, 4 P. (2d) 64 (1931).

⁴² In *Henry v. Cherry & Webb*, 30 R. I. 13 at 38, 73 A. 97 at 107 (1909), the court construed the clause to have no wider meaning than to prohibit the charging of exorbitant fees for justice. See also *Narragansett Electric Lighting Co. v. Sabre*, 50 R. I. 288, 146 A. 777 (1929).

to prevent that evil, the "remedy" clause must have had some other significance to the framers, i. e. to represent the recital of some fundamental right whose existence would have been recognized even though it did not appear in any written form,⁴³ but which, for safety's sake, was included in the Bill of Rights.

As the framers have not explained their meaning and purpose, it has become necessary for the courts to provide interpretation. They have said that the "remedy" clause does not repeal any of the common law,⁴⁴ nor does it, *ipso facto*, create new rights and remedies.⁴⁵ It has been argued that while the provision does not create any new remedies, it at least empowers the courts to do so. That argument has been flatly rejected by the statement that it does not "empower the courts to legislate, or to amend, modify, or repeal laws to meet their ideas of what is 'natural justice.'"⁴⁶ In the main, the provision has been said to be no more than a declaration of fundamental principles;⁴⁷ to mean "no more nor less than that, under the provisions of the constitution and laws constituting them, the courts must be accessible to all persons alike, without discrimination, at the time or times, and the place or places, appointed for their sitting, and afford a speedy remedy for every wrong recognized by law as being remedial in a court."⁴⁸ Therein lies the key to the probable purpose of the framers: the courts are to afford speedy remedies not *for every wrong* but for every wrong *recognized by law*; for legal injuries or wrongs already re-

⁴³ *Allen v. Pioneer Press Co.*, 40 Minn. 117, 41 N. W. 936 (1889). *Ariz. Const.* 1912, Art. 2, § 11, and *Wash. Const.* 1889, Art. I, § 10, have the "sale" clause but not the "remedy" clause. Conversely, *Texas Const.* 1876, Art. I, § 13, contains only the "remedy" clause. The only inference that can be drawn is that the two are not synonymous.

⁴⁴ In *Cahill v. Plumbers, etc.*, Local 93, 238 Ill. App. 123 (1925), the plaintiff sued a union in its own name. He claimed that, while a voluntary association could not be so sued at common law, the constitutional provision remedied this. The claim was overruled. See also *Woltman v. Woltman*, 153 Minn. 217, 189 N. W. 1022 (1922); *Gowin v. Gowin*, 264 S. W. (Tex. Civ. App.) 529 (1924). It would seem that the Illinois decision, interpreting the provision in question, should have been binding on the federal court in the instant case by reason of *Erie Ry. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1937).

⁴⁵ *Kirkpatrick v. Parker*, 136 Fla. 689, 187 So. 620 (1939); *Francis v. Western Union Tel. Co.*, 58 Minn. 252, 59 N. W. 1078 (1894). The administrator in *State v. Seehorn*, 344 Mo. 547, 127 S. W. (2d) 418 (1939), argued that it permitted him to continue a suit brought by the deceased for loss of consortium of his wife by reason on injuries inflicted by the defendant. The court said: "We do not believe [it] was intended to create, by its own vigor, any new rights or remedies which were not in existence or recognized at the time of its adoption." 344 Mo. 547 at 557, 127 S. W. (2d) 418 at 424.

⁴⁶ *Moon v. Bullock*, — *Ida.* — at —, 151 P. (2d) 765 at 771 (1944). The case involved the question as to whether it was possible, in a wrongful death action, to sue the estate of the tortfeasor who had subsequently died.

⁴⁷ *Allen v. Pioneer Press Co.*, 40 Minn. 117, 41 N. W. 936 (1889); *Conley v. Conley*, 92 Mont. 425, 15 P. (2d) 922 (1932).

⁴⁸ *Shea v. North-Butte Mining Co.*, 55 Mont. 522 at 533, 179 P. 499 at 502 (1919).

garded as actionable;⁴⁹ for acts done which constitute infringements of rights sanctioned or recognized by the common law or by statute.⁵⁰ Even when viewed as a restatement of the maxim that where there is a wrong there is a remedy,⁵¹ it has been said to authorize no more than a responsibility to grant a remedy only for acts which were wrong in legal, as contrasted with moral, contemplation.⁵²

It must be admitted that there are a few minority cases where the courts, as in the instant case, have used the provision as a basis for the recognition of new rights and the creation of new remedies.⁵³ Those courts seem to feel that to interpret it in any other way would be to treat it merely as "a gesture and had as well be consigned to the pictograph corner in the museum along with the Code of Hammurabi and the Tablets that Moses brought down from the mountain."⁵⁴ They have, for example, permitted a wife to obtain a remedy for injuries inflicted upon her by her husband during marriage.⁵⁵ They have tolerated suits against administrators, in the absence of statute, for injuries to person or property inflicted by the deceased during his lifetime.⁵⁶ They have recognized a right of privacy⁵⁷ that has been denied elsewhere.⁵⁸ One court has gone so far as to hold that the giving of perjured testimony could, by reason of the provision, be

⁴⁹ *Eastman v. County of Glackamas*, 32 F. 24 (1887); *State v. McPhall*, 182 Miss. 360, 180 So. 387 (1938); *Stokes v. Newell*, 174 Miss. 629, 165 So. 542 (1936); *DeMay v. Liberty Foundry Co.*, 327 Mo. 495, 37 S. W. (2d) 640 (1931); *Landis v. Campbell*, 79 Mo. 433, 49 Am. Rep. 239 (1883); *Steward v. Standard Publishing Co.*, 102 Mont. 43, 55 P. (2d) 694 (1936); *Jackman v. Rosenbaum Co.*, 263 Pa. 158, 106 A. 238 (1919).

⁵⁰ *In re Peters*, 119 Minn. 96, 137 N. W. 390 (1912); *Templeton v. Linn Co.*, 22 Ore. 313, 29 P. 795 (1892); *McCoy v. Kenosha County*, 195 Wis. 273, 218 N. W. 348 (1928).

⁵¹ *Holland v. Mayes*, 155 Fla. 129, 19 So. (2d) 709 (1944); *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68 (1905); *Platt v. City of Newberg*, 104 Ore. 148, 205 P. 296 (1922).

⁵² *Carroll v. Rye Tp.*, 13 N. D. 458, 101 N. W. 894 (1904).

⁵³ *Rains v. Rains*, 97 Colo. 19, 46 P. (2d) 740 (1935); *State v. Wester*, 126 Fla. 49, 170 So. 736 (1936); *Waller v. First Savings & Trust Co.*, 103 Fla. 1025, 138 So. 780 (1931); *Wilfong v. Omaha & Council Bluffs St. Ry. Co.*, 129 Neb. 600, 262 N. W. 537 (1935); *Kintz v. Harriger*, 99 Ohio St. 240, 124 N. E. 168 (1919).

⁵⁴ *State v. Wester*, 126 Fla. 49 at 52, 170 So. 736 at 738.

⁵⁵ *Rains v. Rains*, 97 Colo. 19, 46 P. (2d) 740 (1935). But see contra: *Woltman v. Woltman*, 153 Minn. 217, 189 N. W. 1022 (1922); *Conley v. Conley*, 92 Mont. 425, 15 P. (2d) 922 (1932); *Gowin v. Gowin*, 264 S. W. (Tex. Civ. App.) 529 (1924).

⁵⁶ *Waller v. First Savings & Trust Co.*, 103 Fla. 1025, 138 So. 780 (1931). But see contra: *Moon v. Bullock*, — Ida. —, 151 P. (2d) 765 (1944); *State v. Seehorn*, 344 Mo. 547, 127 S. W. (2d) 418 (1939); *Brown v. Wightman*, 47 Utah 31, 151 P. 366 (1915).

⁵⁷ *Cason v. Baskin*, 155 Fla. 198, 20 So. (2d) 243 (1945); *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68 (1905).

⁵⁸ *Henry v. Cherry & Webb*, 30 R. I. 13, 73 A. 97 (1909).

made the basis of a civil suit against the perjurer.⁵⁹ Such holdings are in direct conflict with the interpretation given by the majority of courts and cannot be reconciled, but they tend to lose weight when it is realized that the majority interpretation is not as useless as the minority argument would lead one to believe. That interpretation may not have positive effect but it has been used many times to prevent the legislative department from taking away rights and remedies which had previously been enjoyed⁶⁰ unless, perhaps, something better be provided.

The question then really boils down to one as to just what the terms "wrong" and "injury" mean. They will bear defining. "Wrong" has a technical meaning in the law; it is the invasion of a legal right.⁶¹ "Injury," on the other hand, has two meanings; a technical one to the effect that it is the result of an invasion of a legal right, and a popular meaning that describes any harmful result.⁶² While courts may have been prone to use the popular meaning when forced to construe statutes,⁶³ they are more inclined to the technical meaning when it comes to construing constitutional provisions.⁶⁴ It is unthinkable that the constitutional language in question should be regarded as furnishing carte blanche authority to the courts to provide any remedy they might conceive to be proper merely because they consider some given result to be morally or socially harmful. In fact, to insure that such is not the interpretation to be given, twenty-one of the constitutions expressly provide that the "remedy" to be given for every "wrong" or "injury" sustained shall be one provided "by due process of law" or by the "due course of law."⁶⁵ It would seem, therefore, that there

⁵⁹ *Kintz v. Harriger*, 99 Ohio St. 240, 124 N. E. 168 (1919). Contra: *Hermor v. Jobs*, 209 Ind. 196, 198 N. E. 316 (1935).

⁶⁰ See a recent application along those lines to Ill. Rev. Stat. 1945, Ch. 38, § 246.1, et seq., which purports to prohibit the filing of suits for alienation of affections, in *Schupp v. Heck*, 394 Ill. 296, 68 N. E. (2d) 464 (1946). When holding the statute unconstitutional, the court said: "The contract of marriage has always been known in the law as a contract involving civil rights just as other contracts involve such rights, and no reason appears why, under section 19 of Article II of our constitution, such rights should not have their day in court." See also *Coffman v. Bank of Kentucky*, 40 Miss. 29, 90 Am. Dec. 311 (1868); *First Trust Co. of Lincoln v. Smith*, 134 Neb. 84, 277 N. W. 762 (1938); *Theiler v. Tillamook County*, 75 Ore. 214, 146 P. 828 (1915); *Mattson v. City of Astoria*, 39 Ore. 577, 65 P. 1066 (1901).

⁶¹ *Mobile County v. Williams*, 180 Ala. 639, 61 So. 963 (1913); *City of Manchester v. Furnald*, 71 N. H. 153, 51 A. 657 (1901); *Hurwitz v. Hurwitz*, 31 N. Y. S. 25 (1894); *McDonald v. Brown*, 23 R. I. 546, 51 A. 213 (1902).

⁶² *State v. Bd. of Trustees of Policemen's Pension Fund*, 138 Wis. 133, 119 N. W. 806 (1909).

⁶³ *In re Wells*, 167 Wis. 345, 167 N. W. 445 (1918).

⁶⁴ *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541, 13 A. 690 (1888); *Smith v. St. Paul, M. & M. Ry. Co.*, 39 Wash. 355, 81 P. 840 (1905).

⁶⁵ See note 29, ante, for specific references to the state constitutions of Alabama, Louisiana, and North Dakota, which use the phrase "by due process of law," and

is no room for a belief that the majority construction of the provision is anything but the correct one. As so developed, the third foundation for the decision in the instant case can be seen to be slender justification for the result attained.

If our courts continue to operate on common-law principles, as perforce they should, there is room for development and expansion in the law within constitutional limitations. No one would deny to a judge the power to fit old doctrines to the determination of new disputes. In that way the law may be kept up as a living force. The danger that arises from a case like the Daily decision, however, lies in the fact that it would sanction the expansion of judge-made law to an extent unparalleled in judicial history. In the absence of restraint, and the Illinois provision contains no express ones, judges would be free, any time they concluded that a person had suffered a harmful result, to fashion whatever remedy they might conceive to be appropriate. So long as the injury was "received in his person, property, or reputation," and that covers all conceivable harms that a person might suffer, the individual would be entitled to ask the courts to grant relief, and they would be empowered to grant it. Carried to its ultimate end, the thought would indicate that there is no longer need for a legislative department to speak the will of the people; our judges can serve to make the law as well as apply it. It can only be reiterated that the whole idea is unthinkable!

W. A. HEINDL

to those of Connecticut, Delaware, Florida, Indiana, Kansas, Kentucky, Maine, Mississippi, Nebraska, North Carolina, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, and West Virginia, all of which limit the remedy to the "due course of law."