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Recent Decisions

RECENT DECISIONS

Searches and Seizures—Electronic Devices—Misplaced Confidence.

Under the fourth amendment evidence acquired by an illegal search and seizure is inadmissible in both federal[1] and state[2] prosecutions.[3] It is not always easy, however, to determine a violation of the fourth amendment, and this problem has become more acute with the introduction of sophisticated electronic devices into the field of crime prevention.

In its first case involving an illegal search and seizure,[4] the Supreme Court of the United States was concerned with police violation of the privacy of a man's home.[5] The Court, relying on common law decisions, established a sacrosanct area, which, if unlawfully invaded, brought the fourth amendment's ban against illegal searches and seizures into play.[6] The effect of the decision was to establish the dual requirement of (1) an invasion into (2) a constitutionally protected area for the amendment to be violated.[7]

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[1] Weeks v. United States, 232 U.S. 383 (1914).

[2] Mapp v. Ohio, 367 U.S. 643 (1961).

[3] Before the amendment itself was first interpreted, the Supreme Court had held that the contents of mail were private and not subject to inspection by postal employees. *Ex parte* Jackson, 96 U.S. 727 (1877). Contrary to this, objects falling within the plain view of a non-trespassing officer are not protected. *See, e.g.*, Harris v. United States, 390 U.S. 234 (1968); Ker v. California, 374 U.S. 23 (1963); Rios v. United States, 364 U.S. 253 (1960); Trupiano v. United States, 334 U.S. 699 (1948); United States v. Lee, 274 U.S. 559 (1927).

[4] Boyd v. United States, 116 U.S. 616 (1886). *See generally* Stengel, *The Background of the Fourth Amendment to the Constitution of the United States*, 3 U. Rich. L. Rev. 278.

[5] Boyd v. United States, 116 U.S. 616, 630 (1886).

[6] Privacy as it applies to search and seizure has been discussed in a great many cases. *See, e.g.*, Mancusi, Warden v. DeForte, 392 U.S. 364, 368 (1968); Terry v. Ohio, 392 U.S. 1, 9 (1968); Katz v. United States, 389 U.S. 347, 353 (1967); Warden v. Hayden, 387 U.S. 294, 304 (1967); Camara v. Municipal Court, 387 U.S. 523, 528 (1967); Berger v. New York, 388 U.S. 41, 53 (1967); Schmerber v. California, 384 U.S. 757, 767 (1966); Griswold v. Connecticut, 381 U.S. 479, 484 (1965); McDonald v. United States, 335 U.S. 451, 455 (1948); Johnson v. United States, 333 U.S. 10, 14 (1948); Wolf v. Colorado, 338 U.S. 25, 27 (1948); Gouled v. United States, 255 U.S. 298, 305 (1921); Weeks v. United States, 232 U.S. 283 (1914); Boyd v. United States, 116 U.S. 616 (1886).

[7] Judge Prettyman stated this proposition quite well when he said, ". . . The basic premise of the prohibition against searches was . . . the common law right of a man to privacy in his home. . ." District of Columbia v. Little, 178 F.2d 13, 16, 17 (D.C.

With the increased use of electronic devices as a method of law enforcement, the protective requirement of a physical invasion into a constitutionally protected area lost its effectiveness.[8] To maintain the individual's right of privacy in the face of sophisticated electronic eavesdropping devices, the Supreme Court in *Katz v. United States*[9] extended the protective veil of the fourth amendment to the person.[10] In so doing, the Court specifically abrogated the necessity of a physical invasion into a sacrosanct area.[11] Yet the *Katz* decision did not hold that all conversations were protected from a search and seizure.[12] Rather, only those statements which an individual might reasonably expect to be private were deemed to fall under the protective wing of the fourth amendment.[13] Thus, cases involving misplaced confidence have been

Cir.), *aff'd on other grounds*, 339 U.S. 1 (1950).

[8] Olmstead v. United States, 277 U.S. 438 (1928). The Court also held that conversations were not the subject of seizure. *Id.* at 464. *See also*, Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View*, 44 MINN. L. REV. 891, 912-13 (1960) (attacking this limitation). The fourth amendment was later extended to cover conversations. Silverman v. United States, 365 U.S. 505 (1961). But the requirement of a physical invasion, although liberalized, remained. Clinton v. Virginia, 377 U.S. 158 (1964) ("spike mike" attached to a party wall by use of a thumb tack held a violation); Silverman v. United States, 365 U.S. 505 (1961) ("spike mike" inserted into a party wall and making contact with a heating duct held a violation); Goldman v. United States, 316 U.S. 129 (1942) (placing of a detectaphone against the walls of a private office not a violation); Olmstead v. United States, 277 U.S. 438 (1928) (tapping of telephone wires not a violation of the fourth amendment).

Two cases in which an informer either recorded or transmitted a conversation by using a concealed electronic device also show the necessity for a physical invasion. Lopez v. United States, 373 U.S. 427 (1963); On Lee v. United States, 343 U.S. 747 (1952). In these cases the petitioners had consented to the informer's entry into the protected "area," and this along with agreement by the informer that the conversation could be recorded or monitored formed the bases for the Supreme Court's holdings that the fourth amendment was not violated.

[9] 389 U.S. 347 (1967). The Supreme Court later stated that the holding in *Katz*, concerning the fourth amendment's protection of persons, did not withdraw any of the protection extended by the amendment to the "area." Alderman v. United States, 394 U.S. 165 (1969).

[10] Katz v. United States, 389 U.S. 347, 351 (1967).

[11] *Id.* at 353. Here, Mr. Justice Stewart, speaking for the majority, said:

> . . . [O]nce it is recognized that the Fourth Amendment protects people—and not simply "areas"—against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

Therefore, while a person could knowingly make words spoken in a constitutionally protected area public, he could also seek to "preserve as private" words emitted in a public place. *Id.* at 351-52.

[12] *Id.* at 351-52. *See also* Lopez v. United States, 373 U.S. 427, 449 (1963) (Brennan dissenting).

[13] United States v. White, 405 F.2d 838, 845 (7th Cir. 1969). *See generally* Greena-

held to be outside the scope of the fourth amendment's protection.[14] New constitutional questions have been raised, however, in situations involving misplaced confidence as it applies to "bugged informers." Two recent federal court decisions will serve to point out the confusion in this area.[15]

In *United States v. Kaufer*[16] the petitioner Kaufer offered a bribe to an IRS agent. While another agent listened,[17] the offeree accepted by telephone, and scheduled a meeting with Kaufer. The two met in a subway station, and the agent taped the conversation. In upholding Kaufer's conviction, the Court held that the introduction of the agent's testimony and the recorded conversation into evidence was properly admissible. The Court reasoned that there was no illegal search and seizure, due to the consent of one of the parties to the conversation, and the introduction of the tape was only corroborative evidence.[18]

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walt, *The Consent Problem in Wiretapping and Eavesdropping: Surreptitious Monitoring With the Consent of a Participant in a Conversation,* 68 COLUM. L. REV. 189, 231 (1968); 5 HOUSTON L. REV. 990, 994 (1968).

[14] Lewis v. United States, 385 U.S. 206, 210 (1966); Hoffa v. United States, 385 U.S. 293, 302 (1966).

[15] The Supreme Court recently ruled that *Katz* does not apply retroactively; therefore, these cases are not affected by the *Katz* ruling. Desist v. United States, 394 U.S. 244 (1969). But at the time *Kaufer* and *White* were handed down, the Court's reasoning was based on *Katz.* Consequently, the decisions were based on the merits of *Katz* and present problems pertinent in future decisions.

[16] 406 F.2d 550 (2d Cir. 1969).

[17] Rathbun v. United States, 355 U.S. 107 (1957). The Supreme Court held that a party to a telephone conversation takes the risk that the other party may have an extension phone and may allow a third person to listen to or record the conversation. *Id.* at 110-11. The *Kaufer* Court cited the *Rathbun* case in disposing of Kaufer's contention that the second agent's listening to the telephone conversation between Kaufer and the officer violated the fourth amendment. United States v. Kaufer, 406 F.2d 550, 552 (2d Cir. 1969).

A recent Virginia case presented a similar situation. Harmon v. Commonwealth, 166 S.E.2d 232 (1969). A telephone company executive attached a pen register to the phone of the defendant, who was suspected of making obscene calls. The Virginia Supreme Court of Appeals held that while a private individual may be guilty of trespass by acting in this manner, there is no violation of the fourth amendment because the amendment does not protect against private individuals acting on their own initiative. The court also incorrectly reasoned that, due to *Rathbun,* the victim's consent to attaching the pen register to the *defendant's* phone eliminated the interception qualification necessary for a violation of the Federal Communications Act, 47 U.S.C. § 605 (1934). *Id.* at 235.

[18] United States v. Kaufer, 406 F.2d 550, 551 (2d Cir. 1969). This reasoning was also used in another recent federal case involving electronic eavesdropping. Velez v. United States, 397 F.2d 788 (5th Cir. 1968). Here, both the informer and the eavesdropper testified. The court called the eavesdropper's testimony corroboration and stated that it had previously rejected the application of *Katz* to this situation. Dryden v. United States, 391 F.2d 214 (5th Cir. 1968). But *Dryden* involved the tapping of a telephone

United States v. White[19] presented much the same problem. Two government agents planted a transmitter on a consenting informer's person, and overheard conversations taking place in defendant White's home, car, place of business, and in the informer's home and car. Here the Court overturned White's conviction, basing its holding on the extension of search and seizure protection to the person.[20] The Court stated that this extension made it impossible for anyone but White to consent to the monitoring of his statements.[21]

White and *Kaufer*, as well as other "bugged informer" cases,[22] are examples of cases involving misplaced confidence. In *White* the Court stated "that an informer is a competent witness as to conversations and dealings with a defendant." [23] Therefore, even though a confidant could memorize or actually record statements, he is limited to mere *repetition* of those statements at the trial.[24] But in these two cases the actual "fruits" of the electronic search were introduced, in one by the presentation of the tape, and in the other by the testimony of the eavesdroppers, thereby making the situations more than mere repetition of the misplaced confidence. *White* duly recognized this fact,[25] but *Kaufer* failed to make the distinction when it labelled the introduction of the tape corroborative evidence.[26]

This approach in *Kaufer* places a premium on whether or not the informer testifies. Yet, whether he testifies or not should make no difference.[27] From the viewpoint of the jury it is not the informer's testimony that convicts the speaker. It is the tape or the eavesdropper's testimony which convinces the jurors, and they are convinced irrespective of whether or not the informer takes the stand.[28] This is not to say, how-

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conversation, a situation which comes under the reasonable risk theory. *See* Rathbun v. United States, 355 U.S. 107, 110-11 (1957). *Katz* has no application to *Dryden*, but it does apply to *Velez*.

[19] 405 F.2d 838 (7th Cir. 1969).

[20] Katz v. United States, 389 U.S. 347, 351 (1967).

[21] United States v. White, 405 F.2d 838, 843-44 (7th Cir. 1969).

[22] Osborn v. United States, 385 U.S. 323 (1966); Lopez v. United States, 373 U.S. 427 (1963); On Lee v. United States, 343 U.S. 747 (1952).

[23] United States v. White, 405 F.2d 838, 846 (7th Cir. 1969).

[24] *Id.*

[25] *Id.* at 845-46.

[26] United States v. Kaufer, 406 F.2d 550, 551 (2d Cir. 1969).

[27] Lopez v. United States, 373 U.S. 427, 448 (1963) (Brennan dissenting).

[28] Even though the majority in *Lopez* called the introduction of the tape corroborative evidence (*id.* at 439), it relied on another case in which the informer did not testify. On Lee v. United States, 343 U.S. 747 (1952). The dissent in *Lopez* specifically denied the importance of the informer testifying by calling the tape independent evidence. *Id.*

ever, that the use of electronic devices is unconstitutional per se. Electronic eavesdropping is merely another method of conducting a search and seizure,[29] thereby making that use subject to the procedures followed in other fourth amendment cases.[30]

While deferring to local law,[31] the Supreme Court has, with few exceptions,[32] always upheld the necessity for search warrants in federal prosecutions.[33] Electronic device cases fall into a grey area because to inform the suspect would destroy any effective use of the device.[34] The situation is likened to those in which "announcement would provoke the escape of the suspect or the destruction of critical evidence." [35]

Recognition of this factual limitation does not compromise too greatly the procedure generally followed in a search and seizure. The bugging device may be used only when the precise and discriminate circumstances are set forth in the affidavit,[36] to insure that "the procedure of

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at 448. Only Chief Justice Warren considered the fact that the informer testified in *Lopez* important (*id.*, Warren concurring), and it has been submitted that his reasoning was due not to the propriety of "bugging" under the Constitution, but rather to fairness at the trial. Greenawalt, *The Consent Problem in Wiretapping and Eavesdropping: Surreptitious Monitoring With the Consent of a Participant in a Conversation*, 68 COLUM. L. REV. 189, 196-97 (1968).

29 Lanza v. New York, 370 U.S. 139 (1962).

30 Katz v. United States, 389 U.S. 347, 356 (1967) (government agents "bugged" a telephone booth). Mr. Justice Stewart, speaking for the majority, stated, "It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer."

31 Miller v. United States, 357 U.S. 301, 305-06 (1958).

32 *See, e.g.*, Cooper v. California, 386 U.S. 58 (1967) (search of a car validly held by police as evidence in a forfeiture proceeding); Warden v. Haden, 387 U.S. 294 (1967) (search where suspect might escape before warrant issued); Schmerber v. California, 384 U.S. 757 (1966) (taking blood to prevent the dissipation of its alcoholic content); Preston v. United States, 376 U.S. 364 (1964) (contemporaneous search of the person following a lawful arrest); Beck v. Ohio, 379 U.S. 89 (1964) (search incident to a valid arrest); United States v. Lee, 274 U.S. 559 (1927) (search of a boat that could be moved); Carroll v. United States, 267 U.S. 132 (1925) (search of a vehicle that could be moved before a warrant was issued).

33 *See, e.g.*, See v. City of Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967); United States v. Ventresca, 380 U.S. 102 (1965); Preston v. United States, 376 U.S. 364 (1964); Stover v. California, 376 U.S. 483, *reh. denied*, 377 U.S. 940 (1964); Wong Sun v. United States, 371 U.S. 471 (1963) (concurring opinion); Chapman v. United States, 364 U.S. 610 (1961); Rios v. United States, 364 U.S. 253 (1960); Jones v. United States, 357 U.S. 493 (1958); Trupiano v. United States, 334 U.S. 699 (1948); Johnson v. United States, 333 U.S. 10 (1948); Taylor v. United States, 286 U.S. 1 (1932); Agnello v. United States, 269 U.S. 20 (1925).

34 Katz v. United States, 389 U.S. 347, 355 n. 16 (1967).

35 *Id.*

36 Osborn v. United States, 385 U.S. 323, 329 (1966). *See generally* Schwartz, *The*

antecedent justification that is central to the Fourth Amendment" [37] is preserved. While adherence to these strict guidelines affords the speaker protection similar to that which is present in conventional search warrant situations,[38] it also frees the government from undue inhibition.

Outside the conflict involved in such decisions as *White* and *Kaufer* lies a broader theoretical problem created by the *Katz* decision. By extending search and seizure protection to the person,[39] *Katz* invites the assertion that the fifth amendment's protection against self-incrimination is at issue rather than the fourth amendment's ban against unlawful searches and seizures.[40] More specifically, since the words spoken by the defendant may eventually convict him, should not the fifth amendment be invoked to protect against a recording of these incriminating words? This argument may be refuted by a close examination of the Supreme Court's interpretation of the fifth amendment's protection. Despite recent Supreme Court decisions extending effective implementation of the fifth amendment beyond criminal proceedings,[41] the essential element of physical or psychological coercion must still be present to invoke fifth amendment protection.[42] There still must be a setting in which the speaker's "freedom of action is curtailed," [43] and, to date, electronic eavesdropping cases have not presented this factual setting.[44]

Legislation of Electronic Eavesdropping: The Politics of Law and Order, 67 MICH. L. REV. 455, 463-66 (1969).

[37] Osborn v. United States, 385 U.S. 323, 330 (1966).

[38] Berger v. New York, 388 U.S. 41, 57 (1967), *noted in* 1 IND. L.F. 250 (1967).

[39] Katz v. United States, 389 U.S. 347, 351 (1967).

[40] Besides the fourth and fifth amendments, there is also the possibility of a sixth amendment problem. Massiah v. United States, 377 U.S. 201 (1964). After the defendant and a companion had been indicted and released on bail, and the defendent had retained a lawyer, agents persuaded the companion to install a radio transmitter in his car, thereby overhearing incriminating statements by Massiah. By holding that incriminating statements had been deliberately elicited from the defendant in the absence of an attorney, *Massiah* established that under the sixth amendment, evidence obtained by an outside agent after indictment is inadmissible. The decision also implies that evidence obtained by the informer himself in such situations is also inadmissible. It has also been speculated that if *Miranda* established that sixth amendment protection extends to custodial interrogation rather than indictment, then informers could not be used at this stage of the proceedings. 52 CORNELL L.Q. 975, 992, 992 n. 112 (1967).

[41] Miranda v. Arizona, 384 U.S. 436, 467 (1966).

[42] *Id.*; Hoffa v. United States, 385 U.S. 293, 304 (1966).

[43] Miranda v. Arizona, 384 U.S. 436, 467 (1966).

[44] In *Miranda* the Supreme Court held that custodial interrogation was based on psychological coercion which in turn took away the defendant's feeling of freedom to speak or not, as he saw fit. *Id.* at 467. This could lead to a desire to find that an informer, merely by being an informer, places the suspect in custody, thereby bringing the suspect's statement within the fifth amendment. Whether such situations will be declared custodial

Although there is no compulsion evident in recent cases involving electronic eavesdropping,[45] there has obviously been indiscriminate use of these devices, thereby encroaching upon one's right of privacy. The basis of the misplaced confidence cases is that the fourth amendment protects reasonable expectations of privacy, but does not protect people from the risk that those with whom they converse will cooperate with the police.[46] Another way of stating this proposition is that the speaker has impliedly consented to the possibility of the confidant's repetition of the conversation. But it is unreasonable to say that the speaker impliedly consents to, or runs the risk of, an invasion of his privacy by an electronic device without knowing of its presence. The Supreme Court recognized this problem, and consequently limited the reasonableness of electronic eavesdropping to those instances in which probable cause has been demonstrated to an impartial judicial authority.[47] In this way the Court justified the invasion of an individual's right of privacy by electronic devices, and at the same time protected him from their indiscriminate use.

Therefore, in absence of coercion, the theoretical basis of eavesdrop-

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interrogation remains to be seen. But the determination of this question is unimportant, because *Miranda* stated very clearly that the fifth amendment protects people "in *all* settings in which their *freedom of action* is curtailed from being compelled to incriminate themselves." *Id.* (emphasis added).

[45] An important question regarding compulsion was raised by Schmerber v. California, 384 U.S. 757 (1966), *noted in* 1967 DUKE L.J. 366 (1967); 52 IOWA L. REV. 344 (1967); 45 N.C. L. REV. 174 (1967); 44 TEXAS L. REV. 1616 (1967); 14 U.C.L.A. L. REV. 680 (1967). The majority held the taking of blood from the defendant was not compulsive self-incrimination because the fifth amendment is limited to evidence of a testimonial or communicative nature. Mr. Justice Black dissented, saying this evidence was testimonial and communicative because it provided testimony which served to convict Schmerber. In principle Mr. Justice Black has a valid point, but he declined to state the extent to which he would follow this principle. Would he declare as inadmissible fingerprints, photographs, writing or speaking for identification, and all other uses of the body which had been held as not part of the fifth amendment? Holt v. United States, 218 U.S. 245 (1910). It appears that practicality must take precedence to principle in this instance. To adhere to Mr. Justice Black's desires instead of limiting the amendment to evidence which is testimonial or communicative in itself would allow too many known criminals to go free. Furthermore, to hold that the blood taken from Schmerber's body is not communicative under the fifth amendment is not spurious reasoning. Unlike speech, papers, or even lie-detector tests, the accused himself was not compelled to indicate the degree or knowledge of his guilt. The test did not depend upon his testimonial or communicative response. Therefore, unlike the other situations, no reliance for conviction was placed upon his own knowledge.

[46] *See* note 14 *supra.*

[47] Katz v. United States, 389 U.S. 347, 353, 356 (1967); Osborn v. United States, 385 U.S. 323, 329-30 (1966).

ping cases rests on the right of privacy, not self-incrimination.[48] To hold otherwise would allow a person to be protected not in spite of his incriminating statements, but because of those statements. Yet, by basing these cases on the circumstances surrounding the statements, rather than on the statements themselves, both the individual's rights and effective law enforcement are protected. The individual is protected from unreasonable search and seizure, and the government has the ability to make use of electronic eavesdropping as a basically sound method of law enforcement.

D. P. B.

[48] Judge Prettyman stated this proposition quite well when he said, ". . . The basic premise of the prohibition against searches was not protection against self-incrimination; it was the common law right of a man to privacy in his home. . ." District of Columbia v. Little, 178 F.2d 13, 16-17 (D.C. Cir.), *aff'd on other grounds*, 339 U.S. 1 (1950). Mr. Justice Stewart merely added "and his person" to Judge Prettyman's statement. Katz v. United States, 389 U.S. 347 (1967).

Infants—Retrial As Adult—REDMON v. PEYTON

Juvenile courts were established in order to provide a separate system of justice to protect and rehabilitate, rather than to punish, misguided child offenders.[1] Realizing, however, that some juveniles are more mature and, at the same time, less amenable to such corrective measures than others, Virginia, like many states,[2] provides a procedure whereby the juvenile court, upon a preliminary hearing and investigation, can "waive" its jurisdiction over a juvenile above a certain age[3] and certify him to a court of record to be tried as an adult.[4] The power of the adult court in this instance is derived from, and dependent entirely upon, the proper waiver of jurisdiction by the juvenile court.[5] Consequently, if it be discovered either before or after an adult court conviction that the proper certification procedure has not been complied with, the defendant, if still a juvenile, is remanded to the juvenile court for all procedures to begin anew.[6] If, on the other hand, the defendant has reached majority, the juvenile court under present Virginia law looses all authority over him.[7] Recognizing this shortcoming, Virginia has in past decisions held that one in such a situation can be retried on new indictments as an adult.[8] Recently, however, in the

[1] *See, e.g.*, Kiracofe v. Commonwealth, 198 Va. 833, 844, 97 S.E.2d 14, 21 (1957); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107-12, 119-20 (1909); Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167, 173-74.

[2] *See generally* Wade v. Warden of State Prison, 145 Me. 120, 73 A.2d 128 (1950); State v. Dehler, 257 Minn. 549, 102 N.W.2d 696 (1960); Trujillo v. State, 74 N.M. 618, 447 P.2d 279 (1968); *Ex parte* Lewis, 85 Okla. Crim. 322, 188 P.2d 367 (1947).

[3] The age is fourteen in Virginia as stipulated in the statute quoted in note 4 *infra*.

[4] VA. CODE ANN. § 16.1-176 (1960) provides in part as follows:

> . . . if a child fourteen years of age or over is charged with an offense which, if committed by an adult, could be punishable by confinement in the penitentiary the court after an investigation . . ., and hearing thereon may, in its discretion, retain jurisdiction or certify such child for proper criminal proceedings to the appropriate court of record having criminal jurisdiction of such offenses if committed by an adult. . . .

[5] *See, e.g.*, Pruitt v. Peyton, 209 Va. 532, 165 S.E.2d 288 (1969); Peyton v. French, 207 Va. 73, 147 S.E.2d 739 (1966); Norwood v. City of Richmond, 203 Va. 886, 128 S.E.2d 425 (1962); Tilton v. Commonwealth, 196 Va. 774, 85 S.E.2d 368 (1955).

[6] *See, e.g.*, Norwood v. City of Richmond, 203 Va. 886, 128 S.E.2d 425 (1962); Tilton v. Commonwealth, 196 Va. 774, 85 S.E.2d 368 (1955).

[7] VA. CODE ANN. § 16.1-159 (1960) provides in part as follows:

> When jurisdiction has been obtained by the court in the case of any child, such jurisdiction may be retained or reassumed by the court until the child becomes twenty-one years of age. . . .

[8] *See* Pruitt v. Peyton, 209 Va. 532, 165 S.E.2d 288 (1969); Peyton v. French, 207 Va. 73, 147 S.E.2d 739 (1966).

case of *Redmon v. Peyton*,[9] a federal court has ruled such a retrial to be unconstitutional.[10]

In *Redmon*, the petitioner, age fifteen, was arrested on charges of stealing an automobile in Gloucester County, Virginia. Some months later he was convicted of grand larceny by the circuit court and sentenced to serve two years in the state penitentiary. After being released from prison, Redmon was convicted and sentenced several more times, culminating in his being convicted as a third offender under Virginia's recidivist statute.[11] On finding that there was no state remedy available to attack the recidivist conviction,[12] Redmon petitioned the federal district court for a writ of habeas corpus.[13] The court, in granting the petition, found that the grand larceny conviction[14] was not preceded by a proper certification from the juvenile court and was, therefore, void for lack of jurisdiction.[15] Whether or not this finding is a correct one is, in itself, an interesting,[16] though far less significant, topic than

[9] 298 F. Supp. 1123 (E.D. Va. 1969), *notice of appeal filed*, E.D. Va., May 19, 1969. (The appellant was given by order dated June 17, 1969, ninety days from May 19, 1969, in which to docket his appeal with the Fourth Circuit.)

[10] *Id.* at 1127.

[11] VA. CODE ANN. § 53-296 (1967).

[12] Sentence on the recidivist conviction was to begin after the completion of all sentences currently being served. When Redmon filed his petition with the district court on Dec. 5, 1966, he was still serving a prior sentence for forgery. At that time Virginia provided no method to attack a conviction unless the sentence on it was being presently served. Although later in 1968 Virginia enacted legislation allowing one to attack a sentence to be served in the future [VIRGINIA CODE ANN. § 8-596 (b)(3)(Cum. Supp. 1968)], the district court reasoned that exhaustion being a rule of comity and not of law, it would continue with the case.

[13] Redmon first petitioned the court on December 5, 1966. The court dismissed the petition, whereupon Redmon appealed to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit on July 23, 1968, remanded the case to the district court to hear allegations as to the convictions leading up to the recidivist conviction and sentence, which even though fully served, still constituted a "present burden" upon the petitioner.

[14] The court also ruled that another of the three convictions (unauthorized use of an automobile), should be vacated, but for entirely different reasons.

[15] Redmon v. Peyton, 298 F. Supp., 1123, 1126-27 (1969).

[16] The court in *Redmon* states:

> . . . . [N]o . . . . hearing was ever had in the Juvenile Court of Gloucester County. Rather, the Circuit Court took jurisdiction and used an investigative report from an earlier juvenile hearing to determine if Redmon should be tried as an adult. *Id.* at 1126.

An examination of the above statement in light of the lower court records reveals that the court confused the facts leading up to the grand larceny conviction with those of another conviction on the same date. What actually occurred was that after a hearing, but without an investigation by the juvenile court, Redmon was certified to the circuit court. Commonwealth v. Redmon, Order B-426 (Oct. 31, 1956). The

the court's self-imposed problem[17] concerning the propriety of retrying Redmon on new indictments. As to this final question, the court, after

circuit court, purportedly relying on VA. CODE ANN. § 16.1-175 (1960), conducted its own investigation and, afterwards, on Jan. 7, 1957, adjudged Redmon guilty of grand larceny. Commonwealth v. Redmond [*sic*], Cir. Ct. No. 944, C. L. Order Bk. 14, at 294 (Jan. 7, 1957). Setting of sentence was suspended until July 1, 1957, with Redmon to remain on probation until then. *Id.* at 304.

Soon, however, Redmon got into more trouble, whereupon the court on April 2, 1957, after finding that he had violated the conditions of his parole, revoked the prior suspension of punishment, entered an order of conviction, and sentenced Redmon to serve two years in the penitentiary. *Id.* at 340. Also, on April 2, 1957, the court entered a separate conviction order against Redmon for statutory burglary, with sentence set to run concurrently with the one for grand larceny. Commonwealth v. Redmond [*sic*], Felony No. 952, C. L. Order Bk. 14, at 340 (April 2, 1957). The statutory burglary conviction was preceded by neither a hearing nor an investigation in the juvenile court, indicating perhaps that the court in *Redmon* confused this conviction, which was in no way a part of the recidivist conviction, with the grand larceny conviction. *See* the notice of hearing (Jan. 8, 1965) as part of the record in Commonwealth v. Redmon, OB-70, at 247 (Jan. 27, 1965). The latter was, in fact, preceded by a hearing and investigation, even though it was conducted by the circuit court, rather than the juvenile court.

Ordinarily, a court's misconception of the facts would render irrelevant any discussion of its interpretation of a statute applicable to them. Since, however, the particular statute concerned [VA. CODE ANN. § 16.1-175 (1960)] applies to situations where a circuit court carries out its own investigation pursuant to a prior juvenile court hearing, as well as to situations where such an investigation is conducted without any prior juvenile court proceedings whatsoever, the court's final conclusion that the conviction was void for lack of jurisdiction is not ipso facto incorrect.

The court interpreted the above mentioned statute as allowing a court to conduct its own investigation, but only on occasions when such court is at the commencement of the trial under the mistaken belief that the defendant was over the age of eighteen. Whether or not this interpretation of legislative intent is accurate is, however, immaterial, for prior to *Redmon,* the Virginia Supreme Court of Appeals had already determined the legislative intent of this statute. Toran v. Peyton, 207 Va. 923, 153 S.E.2d 213 (1967). *Toran* held that VA. CODE ANN. § 16.1-175 (1960) allows a court of record, instead of the juvenile court, to conduct an investigation, as stipulated in VA. CODE ANN. § 16.1-176 (b) (1960), in any case, regardless of whether or not the circuit court thinks that the defendant is an adult. Although this might not be the correct interpretation of legislative intent, it is, nevertheless, binding on all courts, including the federal court in *Redmon,* which only has the power to decide whether or not the statute is constitutional. *See* Hill v. Peyton, 271 F. Supp. 891 (E.D. Va. 1967), *aff'd,* No. 11846, (4th Cir. 1968). It thus appears, in light of the actual facts involved and the applicability of *Toran* to them, that there was no error committed in certifying Redmon to the adult court. Providing these discrepancies are brought out on appeal, it would further appear that *Redmon* should be reversed.

[17] The court did not actually have to decide this issue, since Redmon had already fully served his sentence for grand larceny. Any new conviction and sentence for an offense in which sentence has already been fully served under a previous conviction is, of course, double jeopardy. However, it is in no way certain that either this point or even the points discussed in note 15 *supra* will be raised by the

first noting that the juvenile courts were no longer open to the then adult petitioner, reasoned that to retry him in any other court would merely serve to deny him, for a second time, his privilege of being proceeded against as a juvenile and would, as a result, amount to a further violation of his constitutional rights.[18]

Although recent United States Supreme Court decisions have held it to be a violation of due process for a juvenile court under the guise of "rehabilitation" or "protection" to deny a juvenile offender certain of the same basic rights guaranteed an adult,[19] *Redmon* is the first case to hold that a denial of the statutory rights peculiar to juveniles is a basis for federal intervention.[20] Such intervention was necessitated by a long line of cases,[21] including two from Virginia,[22] permitting an adult retrial in a situation similar to Redmon's. These decisions were based on the rule that the defendant's age either at the time of trial or at the time legal proceedings are instituted against him, rather than his age at the time the offense is committed, determines whether he will be tried in a juvenile or an adult court.[23] Regardless of whether or not such a rule is valid,[24] it is apparent that to try one in an adult court for an offense, which at the time of commission is re-

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respondent on appeal. Instead, the respondent may contest only the validity of the court's ultimate ruling, since a reversal on other grounds would merely delay the decision of a matter certain to come up again in the near future. *See, e.g.*, Pruitt v. Peyton, 209 Va. 532, 165 S.E.2d 288 (1969).

[18] Redmon v. Peyton, 298 F. Supp. 1123, 1127 (1969).

[19] *See In re* Whittington, 391 U.S. 341 (1968); *In Re* Gault, 387 U.S. 1 (1967).

[20] Kent v. United States, 383 U.S. 541 (1966). That case dealt with the waiver of a juvenile to an adult court in the District of Columbia, and although the court hinted that it might have decided the case on constitutional grounds if it had been forced to, it expressly declined to do so, choosing rather to decide the case in its appellate capacity for the District of Columbia, and to apply an applicable District of Columbia statute similar to Virginia's (outlined in note 4 *supra*). *Id.* at 556. However, for a review of some of the many different interpretations of *Kent*, *see* 1 Juv. Cr. Dig. No. 3., at 4-8 (1968).

[21] *See, e.g.*, People v. Carlson, 360 Mich. 651, 104 N.W.2d 753 (1960); State v. Dehler, 257 Minn. 549, 102 N.W.2d 696 (1960); Wheeler v. Shoemake, 213 Miss. 374, 57 So.2d 267 (1952); McLaren v. State, 85 Tex. Crim. 31, 207 S.W. 669 (1919).

[22] Peyton v. French, 207 Va. 73, 147 S.E.2d 739 (1969), *citing* State v. Dehler, 257 Minn. 549, 102 N.W.2d 696 (1960); Pruitt v. Peyton, 209 Va. 532, 165 S.E.2d 288 (1969), *relying upon* Peyton v. French 207 Va. 73, 147 S.E.2d 739 (1969).

[23] *See* cases cited note 20 *supra*.

[24] Several cases have followed the rule that the defendant's age at the time the offense was committed determines whether he will be tried in a juvenile court or an adult court. *See, e.g.*, United States v. Jones, 141 F. Supp. 641 (E.D. Va. 1956); Metcalf v. Commonwealth, 338 Mass. 648, 156 N.E.2d 649 (1959); State v. Jones, 220 Tenn. 477, 418 S.W.2d 769 (1965).

viewable only by a juvenile court, is to take away his right to be protected merely because of the passage of time.[25] Thus, the court in *Redmon* was correct in holding that such a retrial would be a violation of one's right to the equal protection of the laws under the United States Constitution.[26] Accordingly, the court made it clear that it will no longer tolerate such practice.[27]

If *Redmon* appears insignificant for the reason that such an unusual factual situation is unlikely to recur, examine its extension to a far more probable situation where a juvenile commits a crime and avoids trial altogether until reaching majority.[28] Although the court in *Redmon* does not even mention the possibility of such an extension, since retrial of a defendant in either situation would deny him his right to be tried as a juvenile merely because of the passage of time, such an extension necessarily follows from the court's reasoning.[29]

Some jurisdictions, in handling situations similar to the ones posed by *Redmon*, remand the case to the adult court for a new and properly conducted waiver hearing and investigation.[30] If at this hearing it is decided that the juvenile was inappropriately "waived" to the adult court, then the conviction is vacated.[31] However, if it is decided that jurisdiction was appropriately "waived", the subsequent adult conviction may be re-instated.[32] Although such a procedure allows the state to proceed further with the ensuing possibility that the original adult court conviction will ultimately be given effect, it places on the adult court the burden of deciding a question that was primarily intended for the more experienced and better equipped juvenile court to answer.

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[25] *See* Redmon v. Peyton, 298 F. Supp. 1123, 1127 (1969).

[26] U. S. CONST. amend. XIV, § 1.

Although the court mentions due process, it for the most part does so only in asserting its relation to equal protection, the concept on which the court finally seems to rest its decision. Redmon v. Peyton, 298 F. Supp. 1123, 1127 (1969).

[27] Redmon v. Peyton, 298 F. Supp. 1123, 1127 (1969).

[28] Although the two situations are distinguishable on the basis that in one it's the error of the court and in the other it's the defendant's evasion of the police that allows time to escape before the proper juvenile proceedings have taken place, no case has deemed such a distinction worthy of consideration. Indeed, several cases, in concluding that retrial as an adult should be allowed, have done so, in part at least, on the basis that any attempt to distinguish the two cases would be merely superficial. *See, e.g.*, State v. Dehler, 257 Minn. 549, 102 N.W.2d 696, 702 (1960).

[29] *See generally* Redmon v. Peyton, 298 F. Supp. 1123, 1127-28 (1969).

[30] *See, e.g.*, Kent v. United States, 383 U.S. 541, 564-65 (1966).

[31] *Id.* at 565.

[32] *Id.*

The best way for a state to solve the dilemma is to revise its present juvenile statutes in order to eliminate any provision[33] that imposes a maximum age limit upon which a juvenile court can retain jurisdiction over a juvenile offender. Such an enactment would allow the upper court to remand the case to the juvenile court, rather than the ill-equipped adult court,[34] to conduct a new and proper hearing for the purpose of determining whether jurisdiction was appropriately waived. It would also allow the juvenile court, in situations where the defendant has never before been tried for an offense committed as a juvenile, to conduct a proper waiver hearing and determine whether he might be tried as an adult.[35] Guaranteed in either event would be the upholding of the defendant's constitutional rights under the due process and equal protection clauses of the fourteenth amendment.[36]

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[33] *See* VA. CODE ANN. § 16.1-159 (1960).

[34] Apparently, however, the Virginia legislature feels that the adult court is adequately equipped to conduct, in some instances at least, its own investigation to decide the issue of waiver. *See* VA. CODE ANN. § 16.1.-175 (1960). For cases construing this statute, *see* Toran v. Peyton, 207 Va. 923, 153 S.E.2d 213 (1967), and Tilton v. Commonwealth, 196 Va. 774, 85 S.E.2d 368 (1955).

[35] If in either situation the juvenile court finds that jurisdiction cannot be appropriately waived, the case should be dismissed. It is pointless to try the now adult defendant as a juvenile, since he is no longer amenable to juvenile correction methods.

[36] The closer a juvenile is to his majority, the more probable it is that a juvenile court will certify him to be tried as an adult. Therefore, the juvenile court must be restricted to decide the issue of waiver in light of the defendant's age and personality at the time of the original hearing, or in a case where there was no previous hearing, at the time of the offense. Undoubtedly, there will be times when not enough facts are available to adequately make such a decision, in which case the court must as a matter of law, rule that waiver is inappropriate. But unless such a restriction is invoked, the court will again be punishing one merely because of the passage of time.

Statute of Limitations for Personal Injuries–Four-Year U.C.C. Statute or Two-Year Virginia Statute?

In Virginia warranty and negligence have traditionally been considered two distinct forms of legal action, the first sounding in contract, the second in tort.[1] The applicable statute of limitations for both, however, begins to run when a cause of action accrues, irrespective of the wronged party's knowledge or reason to know of the damage or injury complained of.[2]

A cause of action for breach of warranty arises when the contractual standards are not met and there is a resulting injury to an interest of the obligee to the contract.[3] In a sale of goods the cause of action arises when either tender of delivery is made or when the product is installed.[4] Where the alleged breach results from the rendition of services, the cause of action arises when the work is accepted.[5]

A cause of action in tort for negligence arises when the defendant, owing a duty to the plaintiff, breaches this duty in such a way that the breach causes injury or damage to the plaintiff.[6] The Virginia court has consistently held that a plaintiff need not know nor have reason to know of an injury, in order for this cause of action to accrue and start the ap-

[1] Brockett v. Harrell Bros., 206 Va. 457, 143 S.E.2d 897 (1965); Swift & Co. v. Wells, 201 Va. 213, 110 S.E.2d 203 (1959); Blythe v. Camp Mfg. Co., 183 Va. 432, 25 S.E.2d 254 (1945).

[2] Owens v. Combustion Engineering, Inc., 279 F. Supp. 257 (E.D.Va. 1967); Hawks v. DeHart, 206 Va. 810, 146 S.E.2d 187 (1966); Weaver v. Beneficial Finance Co., 199 Va. 196, 98 S.E.2d 687 (1957); Seymour and Burford Corp. v. Richardson, 194 Va. 709, 75 S.E.2d 77 (1953); Page v. Shenandoah Life Insurance Co., 185 Va.. 919, 40 S.E.2d 922 (1947); Street v. Consumers Mining Corp., 185 Va. 561, 39 S.E.2d 271 (1945); G. L. Webster Co. v. Steelman, 172 Va. 342, 1 S.E.2d 305 (1939); Louisville & Nashville Ry. Co. v. Saltzer, 151 Va. 165, 144 S. E. 456 (1928); Southern Ry. Co. v. Leake, 140 Va. 439, 125 S.E. 314 (1924); Huston v. Cantril, 38 Va. (11 Leigh) 142 (1840).

[3] *See* cases cited notes 4, 5, 6 *supra*. *See also* Newbern v. Joseph Baker & Co., 147 Va. 996, 133 S.E. 500 (1926); Jacot v. Grossmann Seed & Supply Co., 115 Va. 90, 78 S.E. 646 (1913).

[4] Owens v. Combustion Engineering, Inc., 279 F. Supp. 257 (E.D.Va. 1967); Matlack, Inc. v. Butler, 253 F. Supp. 972 (E.D.Pa. 1966); Howard v. United Fuel Gas Co., 248 F. Supp. 527 (S.D.W. Va. 1965); Rufo v. Bastian Blessing Co., 417 Pa. 107, 207 A.2d 823 (1965); Va. Code Ann. § 8.2-725 (1965).

[5] Richmond Redevelopment & Housing Authority v. Laburnum Construction Co., 195 Va. 827, 80 S.E.2d 574 (1954).

[6] Balderson v. Robertson, 203 Va. 484, 125 S.E.2d 180 (1962); Seymour and Burford Corp. v. Richardson, 194 Va. 709, 75 S.E.2d 77 (1953); Trimyer v. Norfolk Tallow Co., 192 Va. 776, 66 S.E.2d 441 (1951); Stephens v. Virginia Electric & Power Co., 184 Va. 94, 34 S.E.2d 374 (1945); Wyatt v. Chesapeake & Potomac Telephone Co., 158 Va. 470, 163 S.E. 370 (1932).

plicable statute of limitations running.[7] Yet where no injury has resulted, a negligent act alone will not create a cause of action nor start the statute of limitations running.[8]

Damages for personal injuries are recoverable in Virginia in warranty[9] and negligence actions, but the statute of limitations for both is the same. The Virginia court has held that all actions for personal injuries must be brought within two years of the accrual of the cause of action.[10]

Recently, the Fourth Circuit Court of Appeals, applying Virginia law in *Sides v. Richard Machine Works, Inc.*,[11] rendered a decision that will have a noticeable impact on personal injury actions in Virginia. The plaintiff, Sides, was injured in 1966 while operating a locomotive in his employer's plant. The locomotive was manufactured by the defendant and purchased by the plaintiff's employer in 1958. Sides brought his action in negligence against the manufacturer within two years of his injury, but more than nine years after the date of the sale of the locomotive. In allowing recovery, the court held that the defendant's negli-

[7] Hawkes v. DeHart, 206 Va. 810, 146 S.E.2d 187 (1966); Street v. Consumers Mining Corp., 185 Va. 561, 39 S.E.2d 271 (1945); Louisville & Nashville Ry. Co. v. Saltzer, 151 Va. 165, 144 S.E. 456 (1928); Southern Ry. Co. v. Leake, 140 Va. 439, 125 S.E. 314 (1924). *Contra,* Urie v. Thompson, 377 U.S. 163 (1949); Quinton v. United States, 304 F.2d 234 (5th Cir. 1962); Prince v. U. of Pa., 282 F. Supp. 832 (E.D.Pa. 1968); 63 HARV. L. REV. 1177 at 1204-205 (1950).

[8] Southern Ry. Co. v. Leake, 140 Va. 439, 125 S.E. 314 (1924).

[9] Daniels v. Truck & Equipment Corp., 205 Va. 579, 139 S.E.2d 31 (1964); Cody v. Norton, 110 Va. 363, 66 S.E. 33 (1909).

[10] Friedman v. Peoples Service Drug Co., 208 Va. 700, 160 S.E.2d 563 (1968). The court held that the recovery sought, rather than the form of the action, determines the applicable statute of limitations. The practical result was that VA. CODE ANN. § 8-24 (1950), which provides in part that, "Every action for personal injuries shall be brought within two years next after the right to bring the action shall have accrued," controlled in all actions to recover for personal injuries, whether the action be in negligence or warranty. VA. CODE ANN. § 8-13 (Supp. 1968), therefore, never controls where recovery for personal injuries is sought in warranty.

An apparent conflict in Virginia law must be noted. The court in *Friedman* held that all actions to recover for personal injuries must be brought within two years of the accrual of the cause of action. The Uniform Commercial Code as adopted in Virginia clearly allows four years in which to bring an action for personal injuries that are consequential to the breach of the sales contract. VA. CODE ANN. § 8.2-715 (1965) and VA. CODE ANN. § 8.2-725 (1965). These positions are, however, reconcilable. The factual situation in *Friedman* involved a cause of action accruing before Jan. 1, 1966, the effective date of the U.C.C. in Virginia. Furthermore, as amended the general statute of limitations for contract actions has yielded to the U.C.C. whenever the U.C.C. is applicable. VA. CODE ANN. § 8-13 (Supp. 1968). The present situation is that personal injuries are recoverable under the U.C.C. within four years of the breach of warranty.

[11] 406 F.2d 445 (4th Cir. 1969).

gence was not actionable until the plaintiff was injured, and since the statute of limitations controlling actions for personal injuries began running on the day of the injury, Sides' action was timely brought.

It is important to note that in *Sides*, recovery was allowed solely on the basis of negligence. Had the action been brought in warranty under the law controlling at the time, recovery would have been barred in 1960, two years after the breach occurred and six years before the plaintiff was injured.[12] Had the action been brought under the Uniform Commercial Code, the cause of action would have accrued in 1958 and been barred in 1962.[13]

The fundamental significance of *Sides* was that recovery was allowed in negligence rather than warranty. If the identical factual situation arose today in Virginia, an action could be brought in warranty under the Uniform Commercial Code, as well as in negligence. This plurality of methods of relief has presented problems that Virginia will have to resolve. Other courts have held that negligence actions and warranty actions under the Uniform Commercial Code are quite different, even when relied on to recover for personal injuries.[14] It has been held, however, that when the action is brought under the Uniform Commercial Code, that law as adopted should control exclusively.[15]

The result of *Sides* in Virginia is that a plaintiff in all actions to recover for personal injuries caused by a defective product may have an election of methods with which to proceed against the manufacturer.

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[12] *See* cases cited notes 3, 4 *supra*. The breach would have occurred in 1958 when the locomotive was delivered and the action in warranty would have been barred two years thereafter under *Friedman*.

[13] Under Virginia law, a cause of action for breach of warranty occurs when delivery is made unless the warranty explicitly extends to future performance of the goods. VA. CODE ANN. § 8.2-725 (1965). An action for personal injuries brought in warranty is permissible if the injuries are consequential to the breach. VA. CODE ANN. § 8.2-715 (1965). This action, however, could have been brought within four years of the breach or until 1962.

[14] Matlack Inc. v. Butler, 253 F. Supp. 972 (E.D.Pa. 1966); Rosenau v. New Brunswick, 51 N.J. 130, 238 A.2d 169 (1968).

[15] The four-year period in which to bring an action under U.C.C. § 2.725 controls whether the action in warranty be for personal injuries or for property damage. Lewis v. Food Machinery & Chemical Corp., 245 F. Supp. 195 (W.D. Mich. 1965); Gardiner v. Philadelphia Gas Works, 413 Pa. 415, 197 A.2d 612 (1964). The four-year period under the U.C.C. superceded an 1895 two-year period of limitation. Engleman v. Eastern Light Co., 30 Pa. D. & C.2d (1962). The four-year period under the U.C.C. was not a matter of substantive right; thus where the question was whether to use the U.C.C. as adopted by one state as opposed to the common law in another, the common law should prevail. Natale v. Upjohn Co., 236 F. Supp. 37 (D.C. Del. 1964), *aff'd*, 356 F.2d 590 (3rd Cir. 1964). *See also* cases cited note 10 *supra*.

This election depends on the time when the alleged injury is caused. If the injury occurs one year after the delivery of the product, the plaintiff will have two years in which to bring an action in negligence or three years in warranty under the Uniform Commercial Code.[16] If the injury occurs two years after the delivery of the defective product, then recovery must be sought within two years in either warranty or negligence. If the injury is caused by the defective product more than four years after its delivery, then the only relief would be under the theory of outstanding negligence used in *Sides*.

The concept of outstanding negligence is a strict adherence to the principle that negligence which causes no injury is not actionable.[17] The result of the concept is that years after a negligent act has been committed it may cause an injury and then become actionable.[18] The period that this negligence remains in the abstract conceivably could be decades after its inception, and yet, if a causal connection be found between the negligence and the injury, recovery could be had long after any action in warranty had been barred.

Outstanding negligence is not a novel theory in the law.[19] Its use in *Sides v. Richard Machine Works, Inc.*, however, is a recognition of an additional path of recovery for a plaintiff who has sustained personal injuries. The theory of outstanding negligence facilitates recovery by obviating problems involving statutes of limitation that would otherwise bar recovery. This result is consistent with the present trend toward strict liability[20] but it is not a true extension of this trend. Strict liability is liability without fault whether the approach be in tort[21] or contract,[22] whereas liability based on outstanding negligence still requires the element of fault. The ultimate effect of *Sides* is, therefore, to run the

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16 VA. CODE ANN. § 8.2-725 (1965).

17 *See* cases cited notes 7, 8, 9 *supra*.

18 *Accord*, Barnes v. Sears, Roebuck and Co., 406 F.2d 859 (4th Cir. 1969). *See* Howard v. United Fuel Gas Co., 248 F. Supp. 527 (S.D.W.Va. 1965); Rodibaugh v. Caterpillar Tractor Co., 225 Cal. App. 2d 570, 37 Cal. Rptr. 646 (1964); Gile v. Sears, Roebuck and Co., 281 App. Div. 95, 120 N.Y.S.2d 258 (1952); Theurer v. Condon, 34 Wash. 2d 448, 209 P.2d 311 (1949).

19 *See* cases cited notes 9, 21 *supra*.

20 Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

21 Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); RESTATEMENT (SECOND) OF TORTS § 402 A (1965).

22 Swift & Co. v. Wells, 201 Va. 213, 110 S.E.2d 203 (1959). *See also* Higbee v. Giant Food Shopping Center, 106 F. Supp. 586 (E.D.Va. 1952); VA. CODE ANN. § 8.2-318 (1965).

statute of limitations indefinitely until the defendant's fault causes an injury.*

C. L. W.

*Editor's Note—Since the writing of this article, the Virginia Supreme Court of Appeals has dealt with a factual situation analagous to that in *Sides*. *See* Caudill v. Wise Rambler Inc. and American Motors Corp., 210 Va. 11, 168 S.E.2d 257 (1969). The court held that an action to recover for personal injuries caused by breach of an implied warranty was timely brought within two years of the injury, even though brought more than two years after the sale of the automobile.

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