restriction on the powers of a board of education, but it does not create a contract right.

TORTS—ACTIONS BY UNEMANCIPATED INFANT AGAINST PARENT—PERSONAL INJURIES.—The right of an unemancipated infant to sue its parents in tort for personal injuries has generally been denied. It appears that no action of this kind had been brought until a comparatively recent date. From the outset, the courts took the view that the common law never permitted this type of action. In 1891, in *Hewlett v. George*,[1] it was said that the common law did not allow such an action (citing no authorities) and, since the legislature had not made provision for it, it could not be allowed. This case has been frequently cited by cases following as an authority for the common law. From its nature it is not a type of action which is apt to arise often. But recently, with the popularity of the automobile, the problem occurs with greater frequency. The precise question has not been adjudicated in many of our states but, where it has, the majority view has given no right of action to the infant. In New Jersey, in *Mannion v. Mannion*,[2] Circuit Court Judge Ackerson held that an unemancipated minor child could not maintain a suit against its parent for injuries caused by the parent's negligent operation of an automobile.[3] That decision has been followed by the courts in New Jersey[4] and in a recent case, *Reingold v. Reingold*,[5] the Court of Errors and Appeals adopted that view as being the sounder and in accord with the weight of authority.

Various reasons have been assigned by the courts for the denial of the right of action: the disruption of domestic tranquillity,[6] the necessity for maintaining parental discipline and control,[7] the unfairness of enrich-

1. 68 Miss. 703, 9 So. 885, 13 L. R. A. 682 (1891).

2. 3 N. J. Misc. 68, 129 Atl. 431 (C. C. 1925).

3. *Ibid.* It was held that the action could not be maintained at least during minority. *Cf.* McCurdy, *Torts between Persons in Domestic Relations* (1929) 43 HARV. L. REV. 1056, 1074.

4. Damiano v. Damiano, 6 N. J. Misc. 849, 143 Atl. 3 (Sup. Ct. 1928), holding that the administrator could not sue for wrongful death; Goheen v. Goheen, 9 N. J. Misc. 507, 154 Atl. 393 (Sup. Ct. 1931).

5. 115 N. J. L. 532, 181 Atl. 153 (E. & A. 1935).

6. Small v. Morrison, 185 N. C. 577, 118 S. E. 12, 31 A. L. R. 1135 (1923).

7. *Ibid.*; Roller v. Roller, 37 Wash. 242, 79 Pac. 788, 68 A. L. R. 193 (1905); Matarese v. Matarese, 47 R. I. 131, 131 Atl. 198, 42 A. L. R. 1360 (1925).

ing the child at the expense of other members of the family,[8] the possibility of the parent's succession to the child's claim[9] and the danger of fraud.[10] The Court of Errors and Appeals in New Jersey adopted the language of *Small v. Morrison*,[11] which denies the right of action on the ground that to do otherwise would be to disrupt "the peace of the fireside and contentment of the home."[12] The soundest reasons appear to be those which abhor the destruction of parental discipline and the disruption of the domestic organization. The basis for such reasoning is the fact that the family unit is the basis of our social structure and must be protected against inroads that tend to destroy the efficacy of that family unit.[13]

It is to be noted that the majority of our courts have barred the action indiscriminately, regardless of the nature of the injury or how it arose. Actions for assault, battery, false imprisonment, have all been denied. In the extreme case of *Roller v. Roller*,[14] an action for damages after the father had been convicted of rape upon his minor daughter was denied. There seems to be no justification for barring the right of action in such a situation. In New Jersey, no cases of intentional harms have arisen; actions have arisen for injuries sustained because of the imputed negligence of the parent. Elsewhere the tendency appears to be to deny all actions for personal injuries, howsoever inflicted by the parent on the child.

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8. Small v. Morrison, *supra* note 6; Roller v. Roller, *supra* note 7.

9. Roller v. Roller, *supra* note 7.

10. Smith v. Smith, 81 Ind. App. 566, 142 N. E. 128 (1924). The danger of fraud is said to be greater when suit is brought after majority for injuries sustained during minority. That problem was involved in Reingold v. Reingold, *supra* note 5, and was decided on the sounder basis that the right of action did or did not exist as of the date of the injury.

11. *Supra* note 6.

12. *Ibid.*

13. See Mesite v. Kirchstein, 109 Conn. 77, 145 Atl. 753 (1929) where it is said, "The state and society are vitally interested in the integrity and unity of the family, and in the preservation of the family relation. The obligation of the father, or it may be the mother, to care for, guide, control, and educate their child and the reciprocal obligation of the child to serve and obey the parent are essentials of the family relationship. Authority in the parent to require obedience in the child is indispensable to the maintenance of unity in the family. Anything which undermines this authority, brings discord into the family, weakens its government, and disturbs its peace, is an injury to society and the state."

14. *Supra* note 7.

There has been some expression of a contrary opinion but it has been confined for the most part to dissenting opinions[15] and to actions against persons *in loco parentis*.[16] The only case found in the United States permitting an action by an unemancipated minor against the parent is *Dunlap v. Dunlap*.[17] There, a minor son, employed during high school summer vacation by his father in his factory, brought an action for injuries based on the negligence of his father in not maintaining proper and safe working conditions. The court recognized the injustice of barring a right of action in all cases. But it reached its conclusion in the case at bar through specious reasoning. It permitted the action because factual liability would not fall upon the father but upon an insurance company. Such a rule seems illogical. Should the factual liability of another be admissible to prove the liability of the parent? Further, would judgment against the parent be nullified in the event of subsequent insolvency of the insurance company? Would judgment only be to the extent to which

15. Clark, C. J., dissenting in Small v. Morrison, *supra* note 6; Crownhart, J., dissenting in Wick v. Wick, 192 Wis. 260, 212 N. W. 787 (1927). In Sorrentino v. Sorrentino, 248 N. Y. 626, 162 N. E. 551 (1928), the Court of Appeals of New York denied a cause of action, without opinion. Chief Judge Cardozo and Judges Crane and Andrews dissented, also without opinion.

16. Treschman v. Treschman, 28 Ind. App. 206, 61 N. E. 961 (1901); in an action for assault by an unemancipated minor against the stepmother, who at the time of the suit was separated from the father and the child, the court said: ". . . courts should hesitate to invade the privacy of the home, or to question the mutual confidence which should obtain in the household. But this privacy and mutual confidence should not be permitted to shield the evil doer from the consequences flowing from a palpable wrong. They are not sufficient to shield a parent from criminal prosecution for an assault and battery on his child. . . . Nor can it be said that such criminal prosecutions are ample to correct and punish all such abuses. They may afford protection from parental violence and wrongdoing thereafter, but the fine which the state has imposed leaves the clear and palpable justice to the individual child still unredressed. It is not to be anticipated that acts so abhorrent to the family relation will be committed, but when they have been committed and have been committed malo animo, as here charged, and an injury inflicted which can never be compensated for thereafter through the family relation, howsoever exemplary it may be, courts should not hesitate to redress the wrong so far as it may be redressed through an action for damages." It is to be noted, however, that in Smith v. Smith, *supra* note 10, the Indiana court ignored the language used in the Treschmann case. See also Clasen v. Pruhs, 69 Neb. 278, 95 N. W. 640 (1903); Dix v. Martin, 171 Mo. App. 266, 157 S. W. 133 (1913); Steber v. Norris, 188 Wis. 366, 206 N. W. 173, 43 A. L. R. 501 (1925).

17. 84 N. H. 352, 150 Atl. 905, 71 A. L. R. 1055 (1930).

the parent was indemnified by the insurance company? *Dunlap v. Dunlap* recognizes the unsatisfactory result of a complete denial of a right of action, but is not helpful in finding a solution to the problem.

It is submitted that there is a problem in this situation and that the courts have not come to a completely satisfactory solution of it. To deny a right of action in all cases for personal injuries appears to be a palpable injustice. Witness the *Roller* case.[18] Chief Justice Clark, dissenting in *Small v. Morrison*,[19] expressed the injustice of barring all actions by saying, "To so hold would put children out of the law and make them outlaws and why should they be outlawed?"[20] One of the strongest arguments against the present trend of opinion is the fact that in other realms of the law, actions are allowed by unemancipated infants against their parents. In suits involving property rights no question seems to be raised whether or not the action can be maintained.[21] Certainly a judgment recovered in a property suit would have repercussions felt in family. Further, a parent may be subjected to criminal prosecution for wilful injuries inflicted upon a child[22] and may even be deprived of custody.[23] The courts are undoubtedly justified in saying that the parent and child relationship is of such a nature that it should not be open to fulsome litigation. The courts have answered that problem largely by barring all actions for personal injuries. Such an answer avoids the problem rather than attempts to solve it. It should be noted that there is no unanimity of expression why the action should be barred. Most of the courts have contented themselves with vague reasons that are not entirely satisfactory. There is, perhaps, another method of answering the question.

The relationship of parent and child is unique. Its complexities become apparent when legal rights are involved. But it can be simplified by stripping it of its nonessentials. For the purposes of the present problem the relationship can be fundamentally divided into two classes

18. *Supra* note 7.

19. *Supra* note 6.

20. *Ibid.*

21. Keeney v. Henning, 58 N. J. Eq. 74, 42 Atl. 807 (Ch. 1899); see also McCurdy, *op. cit. supra* note 3, at 1057, 1058.

22. Hinkle v. State, 127 Ind. 490, 26 N. E. 477 (1890); State v. Koonse, 123 Mo. App. 655, 101 S. W. 139 (1907); see also McCurdy, *op. cit. supra* note 3, at 1059.

23. Farnham v. Pierce, 141 Mass. 203, 6 N. E. 830 (1886).

of intercourse between parent and child as they come into contact with each other by virtue of the relationship. The first is what may be called the direct intercourse of parent and child. The parent in rearing his child controls his conduct, educates and disciplines him. The second class of contact may be called the incidental intercourse. The parent and child live together in the same residence. They are united in joint enterprise. They are thrown together in common pleasures. The two types of intercourse are closely integrated, each having its effects upon the other. These types of contact should be borne in mind when we consider the parent and child relationship as it is affected by legal rights.

The relationship carries with it many possibilities for infliction of personal injuries on the child, whether wilful or negligent. To bar a right of action for an injury that grew out of one of the types of intercourse as outlined seems wise. The parent's place in the relationship is one of authority and control. It is that position that is sought to be maintained. To subject the parent to an action for his conduct in his direct intercourse with his child, for example, in punishing his child, would undermine parental control and direction. The incidental intercourse being so closely integrated with the direct, an action having its origin in that type of contact, for example, in taking a child for an automobile trip, would jeopardize the parent's position in the relationship. In the effort to protect the value of the family as a social unit, the courts are sound in barring actions which impinge upon the parent's position in the relationship.

It is submitted that the position of the courts is no longer either sound or satisfactory when they go further and bar all actions by the child against his parent, no matter how the right of action may have arisen, but simply because the parties are parent and child. Many of our courts have taken just that position in suits for personal injuries. It is suggested that no right should be allowed when the right of action arose from an act done in the parent and child relationship as outlined. But when the injury occurred by virtue of the conduct of the parent toward his child as toward any other fellow man, that is, not in the relationship of parent and child, the reason for barring the action falls and the suit should be permitted. The position of the parent in the relationship would not then be encroached upon because his authority and control are not being questioned or subjected to criticism. The situation is then analogous to suits involving property rights.[24] The courts have

24. *Supra* note 20.

not held that a recovery there would be subversive to family discipline and domestic tranquillity. The true reason for barring the action exists only when the act done was done in the relationship of parent and child. Then and then only is the parent's position of authority infringed.[25]

Several illustrations may serve to clarify the position taken here. No cause of action should be permitted where a parent inflicts injuries in chastizing his child; nor in an action based on negligence, where the injury resulted to the child from allegedly unfit food provided by the parent; nor for injuries sustained by a child as a passenger in an automobile negligently operated by his parent. There the injuries are directly traceable from and originate in the parent and child relationship. But a cause of action should be sustained in an action for assault and battery after rape of a minor child by the parent; or in an action based on negligence, where the child sustains injuries as a pedestrian struck down by his parent, operating an automobile. In those cases the act done had no origin in the relationship of parent and child.[26] The action does not question the parent's position in the relationship. In New Jersey, the decisions of the courts have, thus far, been confined to the situation where the child, as passenger, sustained injuries by virtue of the negligent operation of an automobile by its parent.[27] Under the solution suggested, that is sound. It remains as yet an open question whether the denial of a right of action will be extended as far as it has been in other jurisdictions.

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25. McCurdy, *op. cit. supra* note 3, at 1080, qualifies any recovery by the minor in this way: "Except where there has been complete emancipation, in no event should there be a cause of action unless the child's earning capacity after minority is impaired." This seems sound, for the parent is bound to support his minor child. On the obligation of the parent to support the child, see Tomkins v. Tomkins, 11 N. J. Eq. 512 (Ch. 1858); Tompkins v. Tompkins' Executors, 18 N. J. Eq. 303 (Ch. 1867); In re Bloomfield Trust Co., 2 N. J. Misc. 309 (Orph. Ct. 1924); *cf.* In re Ganey, 93 N. J. Eq. 389, 116 Atl. 19 (Ch. 1922), *aff'd,* 94 N. J. Eq. 502, 119 Atl. 925 (E. & A. 1923). On the right of an emancipated minor to sue his parent for personal injuries, see Taubert v. Taubert, 103 Minn. 247, 114 N. W. 763 (1908); Martens v. Martens, 11 N. J. Misc. 705, 167 Atl. 227 (Sup. Ct. 1933) (recognizing a cause of action in an emancipated minor), *rev'd on other grounds.*

26. Under this solution the result reached in Dunlap v. Dunlap, *supra* note 16, would be the same although reached on different reasoning. An injury resulting to the son working as an ordinary employee in a factory owned by his father would not have its origins in the parent and child relationship under the facts of the case.

27. Mannion v. Mannion, *supra* note 1; Damiano v. Damiano, *supra* note 4; Reingold v. Reingold, *supra* note 5.