courts have recognized agreements between husband and wife converting community into separate property.[19]

The holding in the principal case presents again the question of the wisdom of maintaining what the dissenting judge termed "this patent discrimination against the great majority of citizens of the United States." *Poe v. Seaborn*, the dissent argued, did not decide that the law of the state of the taxpayer's residence or of the situs of the income must be applied in determining the question as to whom community income was taxable, since the commissioner had *conceded* that the answer was to be found in state law. The dissenting judge then urged that the word "of" in the phrase "net income of every individual" be so interpreted as to give "a uniform application to a nation-wide scheme of taxation."[20]

But these considerations are not strictly pertinent to the instant case, however forceful they may be as criticisms of the application of the community property doctrine to income taxation in general. There is present in this case no element of "patent discrimination," since married couples in all states can so arrange their property as to enable division of the proceeds for tax purposes. Nor is the instant case an example of lack of uniformity in the application of the tax statute; in fact the only significant difference between this and a similar transaction involving land in a common law state lies in the name of the tenure created by the voluntary act of the parties. Discrimination and lack of uniformity are flagrant only in regard to the treatment of current earnings, which may be divided for income tax purposes by spouses in community property states and not elsewhere.[21] It is primarily in relation to this aspect of the problem that the issues raised by the dissent are of significance.

Torts—Negligence—Used Car Dealer's Liability for Injury to Third Party— [Illinois].—A person bought a low-priced used car on conditional sale. He failed in two attempts to pass an ordinance-required safety test[1] because of unequalized brakes, and each time returned the car to the dealer for repair. Subsequently, in a collision the purchaser lost control of the car which ran onto the sidewalk, killing a bystander. In an action for death damages against the purchaser and the dealer, it was alleged that the latter had failed to equip the car with proper brakes or to repair them after being informed of their faulty condition. The action against the purchaser was voluntarily dismissed. Upon appeal from a directed verdict for the defendant dealer, *held*, that where a used car purchaser has notice of a mechanical defect in the car, the used car

[19] Income tax cases involving agreements converting property from community to separate property: Helvering v. Hickman, 70 F. (2d) 985 (C.C.A. 9th 1934); Marshall v. United States, 26 F. Supp. 474 (Ct. Cl. 1939), cert. den. 308 U.S. 597 (1939); Van Every v. Com'r, 108 F. (2d) 650 (C.C.A. 9th 1940), cert. den. 309 U.S. 689 (1940). Cf. United States v. Goodyear, 99 F. (2d) 523 (C.C.A. 9th 1938) (estate tax case).

[20] Burnet v. Harmel, 287 U.S. 103, 110 (1932).

[21] Compare the cases distinguishing between an assignment of future income and a tranfer of a property interest from which income is derived. Lucas v. Earl, 281 U.S. 111 (1930); Burnet v. Leininger, 285 U.S. 136 (1932); Hall v. Burnet, 54 F. (2d) 443 (App. D.C. 1931), cert. den. 285 U.S. 552 (1932); Nelson v. Ferguson, 56 F. (2d) 121 (C.C.A. 3d 1932), cert. den. 286 U.S. 565 (1932).

[1] Chicago Rev. Code (1939) § 27-83.

seller is not liable to a third party stranger injured as a result of the defect. Judgment affirmed, with one justice dissenting. *Trust Co. of Chicago v. Lewis Auto Sales.*[2]

The instant case treats the conditional vendor-defendant's liability to third persons for injuries caused by mechanical defects as that of a secondhand dealer.[3] It has been said that such a dealer's duty of due care in rebuilding a car is analogous to that of a manufacturer.[4] Under *MacPherson v. Buick Motor Co.*[5] the manufacturer of automobiles owes a duty[6] of reasonable care in construction and inspection to the purchaser from the dealer, the requirement of privity of contract no longer being a defense. Subsequent cases have extended the protection of the rule to guests and to persons using the automobile with the purchaser's consent.[7] The court in the instant case, however, denied the applicability of the *MacPherson* case because the plaintiff was not the purchaser. But the court's distinction does not seem entirely compelling. Since the purchaser from the used car dealer is, in fact, a party to the contract, the injured bystander is in a situation analogous to that of the "third-party" retail purchaser in the *MacPherson* case. Nevertheless, the instant case may always be "distinguished" from the *MacPherson* line of cases on the time-honored ground that if this action succeeded recovery would be allowed to an "unlimited class" of third parties.[8]

[2] 306 Ill. App. 132, 28 N.E. (2d) 300 (1940).

[3] Plaintiff's attempt to base defendant's liability on defendant's security title failed in view of Ill. Rev. Stat. (1939) c. 95½, § 106(d) (Uniform Act Regulating Traffic on Highways), according to which the "conditional vendee . . . . shall be deemed the owner for the purpose of this Act; cf. Uniform Motor Vehicle Registration Act, § 19. The question of ownership under a conditional sales contract may be important, however, in those jurisdictions in which the "owner" is liable for the driver's negligence. In some of the vicarious liability statutes the vendor under a conditional sales contract is expressly excluded. For references see Statutory Liability of Owners for the Negligence of Persons Operating Automobiles with the Owner's Consent, 21 Minn. L. Rev. 828 n. 20 (1937).

[4] Flies v. Fox Bros. Buick Co., 196 Wis. 196, 218 N.W. 860 (1928). Such a view might be doubtful with regard to new car dealers as they are under no obligation to test their articles in order to discover latent defects. Shroder v. Barron-Dady Motor Co., 111 S.W. (2d) 66 (Mo. 1937). See Shepard v. Kensington Steel Co., 262 Ill. App. 117 (1931), relied upon by the court in the principal case.

[5] 217 N.Y. 382, 111 N.E. 1050 (1916). The MacPherson rule is recognized in Illinois. Rotche v. Buick Motor Co., 358 Ill. 507, 193 N.E. 529 (1934).

[6] As to the issues of policy which are involved in a discussion of duty and proximate cause see Gregory, Proximate Cause in Negligence—A Retreat from "Rationalization," 6 Univ. Chi. L. Rev. 36, 38 (1938).

[7] See Waterman v. Liederman, 16 Cal. App. (2d) 483, 60 P. (2d) 881 (1936). The MacPherson rule was further extended to those third parties who are in the "vicinity of probable use." Rest., Torts § 395 (1934). See in general, Manufacturers' Liability—MacPherson v. Buick Comes of Age, 4 Univ. Chi. L. Rev. 461 (1937). The court in the instant case relies on Shepard v. Kensington Steel Co., 262 Ill. App. 117 (1931), which repudiates the extension of liability to third parties other than users of the car with the purchaser's consent, although that case concerned a new car dealer; cf. Bergstresser v. Van Hoy, 142 Kan. 88, 45 P. (2d) 855 (1935), also cited by the court.

[8] The fear of unlimited litigation has been expressed repeatedly, e.g., Shepard v. Kensington Steel Co., 262 Ill. App. 117 (1931). But cf. Fent v. Toledo, P. & W. R. Co., 59 Ill. 349 (1871), and Comment on § 28 of the Draft for a Uniform Sales Act, 1940 (Report to the National Conference of Commissioners on Uniform State Laws, Philadelphia, 1940).

To distinguish the present case from *Flies v. Fox Bros. Buick Co.*,[9] where a pedestrian recovered from the secondhand dealer, the court points out that in that case a representation of the brake's condition was made to the purchaser, upon which he relied.[10] The justification for the decision in the *Flies* case may be that the dealer should reasonably expect reliance upon a representation to forestall any inspection for, or repair of, the defects. But also, it seems that a dealer, such as the defendant, who sells a low-priced[11] used car on time, *without* representing either that the car is sound or unsound, may reasonably anticipate that the purchaser will use the car without change because of his financial inability to repair it.[12] This same reasoning would also cover the case where the purchaser to whom no representation was made had actual notice of the defect in the car. Thus, on broad social considerations one may question the applicability of the view, stated in the instant case, that the purchaser's having notice of a defect precludes the third party's recovery. As a matter of fact, the examination of the authorities cited by the court[13] shows a qualification of this notice rule to the effect that the dealer is liable to the third party in spite of notice if he had reasonable cause to expect the purchaser to use the car without repair.[14]

[9] 196 Wis. 196, 218 N.W. 860 (1928).

[10] The following deal with a secondhand dealers' liability to third parties upon a warranty basis: Nelson v. Healey, 151 Kan. 512, 99 P. (2d) 795 (1940); Jones v. Raney Chevrolet Co., 217 N.C. 693, 9 S.E. (2d) 395 (1940); Curby v. Mastenbrook, 288 Mich. 676, 286 N.W. 123 (1939); Egan Chevrolet Co. v. Bruner, 102 F. (2d) 373 (C.C.A. 8th 1939); Manufacturers' and Vendors' Liability without Fault to Persons Other Than Their Immediate Vendees, 33 Col. L. Rev. 868 (1933). As to manufacturers' warranties consult Baxter v. Ford Motor Co., 168 Wash. 456, 12 P. (2d) 409 (1932), and cases commented upon by Leidy, Another New Tort ?, 38 Mich. L. Rev. 964 (1940).

[11] The transcript of the instant case discloses that the car was bought for eighty-five dollars with a fifteen-dollar down payment. For a history of the used car business see Isaacs, Installment Selling: The Relation between Its Development in Modern Business and the Law, 2 Law & Contemp. Prob. 141 (1935).

[12] Rest., Torts § 389, comment c (1934). A similar consideration can, perhaps, also justify the usual distinction between borrowed and hired automobiles as to the bailor's liability to third parties. Rest., Torts §§405, 408 (1934). The gratuitous bailor can reasonably expect the bailee to inspect and, if necessary, to repair the car. The responsibility toward the public thus being shifted to the bailee, the bailor is not held liable for injuries caused by the defective condition of the car. However, one who lets automobiles for hire is under a duty to inspect the car in order to protect the public. Saunders System Birmingham Co. v. Adams, 217 Ala. 621, 117 So. 72 (1928). And so is the seller of a car lending it to the prospective purchaser "to try it out." O'Connell v. Dellert, 3 Conn. Supp. 25 (Super. Ct. 1935), quoting Rest., Torts §§ 388–89 (1934).

[13] Foster v. Ford Motor Co., 139 Wash. 341, 246 Pac. 945 (1926), and Bergstresser v. Van Hoy, 142 Kan. 88, 45 P. (2d) 855 (1935), quoting Rest., Torts § 388 (1934). The former case, however, may be distinguished from the instant case in that it concerns the dealer's liability to the purchaser's driver for a defect in a car that was capable of safe use by one knowing its true character. Notice to the purchaser has here a direct bearing on the injured's situation since the seller could reasonably expect that the purchaser would duly notify his driver. This argument seems to fail in cases involving the claim of a third party in no way connected with the purchaser.

[14] Rest., Torts § 389 (1934). See Bryson v. Hines, 268 Fed. 290 (C.C.A. 4th 1920). This modification of the notice rule means a complete deviation from its historical basis, i.e., a theory

The plaintiff, in addition to basing his claim on a dealers' liability, contended that the defendant was liable also as a repairman,[15] for failure to fix the brakes after receiving notice that they were defective. As to this contention, probably there can be no liability where the uncorrected defect is known to the owner after he re-acquires the car.[16] This statement seems plausible even if the repairer has reasonable cause to believe that the car would be used without further repair, because the repairer, as opposed to the dealer, has no alternative but to deliver the car.

There is some evidence to indicate that in jurisdictions without compulsory liability insurance, the frequent financial irresponsibility of owners and operators of automobiles may have been one of the factors which led the courts to the creation of manufacturers' and dealers' liability.[17] Similar considerations might cause the courts to extend such liability to secondhand dealers, in order to make them liable to a third party injured as a result of a defective condition of the car. Additional justifications which may be resorted to for this extension are: (1) the similarity between the functions of a secondhand dealer who reconditions a used car and of a manufacturer of a new car; (2) the greater likelihood of hidden defects in a used car coupled with an insufficiency of the purchaser's funds to have the car properly inspected; and (3) the purchaser's probable ignorance of the true condition of the used car he bought. It is suggested that a reinforcement of the above view would result from a modification of the "safety-sticker" statutes[18] so that the secondhand dealer would be required not to sell a car without a certificate of approval. A general legislative solution of the whole problem could perhaps be included in the new proposed "Draft for a Uniform Sales Act, 1940"[19] which undertakes to regulate the manufacturers' liability.[20] This

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of fraud and deceit. If the seller had reasonably to expect that the car would be used without repair in spite of notice, his "deceit" is still rendered ineffectual by the purchaser's knowledge. Berry, The Law of Automobiles § 1632 (4th ed. 1924).

[15] The law of the repairman's liability to third parties is not settled. Recovery was denied for the lack of privity of contract in Hanson v. Blackwell Motor Co., 143 Wash. 547, 255 Pac. 939 (1927); Earl v. Lubbock, [1905] 1 K.B. 253; but was granted in Hudson v. Moonier, 102 F. (2d) 96 (C.C.A. 8th 1939); Kalinowski v. Truck Equipment Co., 237 App. Div. 472, 261 N.Y. Supp. 557 (1933); see Rest., Torts § 404 (1934); Liability of Motor Repairers for Accidents Caused on the Highway through Inefficient Repairs, 73 Irish L.T. 201 (1939); Liability of Suppliers of Chattels to Third Persons, 38 Mich. L. Rev. 116 (1939).

[16] See Wissman v. General Tire Co., 327 Pa. 215, 192 Atl. 633 (1937).

[17] It is perhaps not without significance that the problem of the automobile manufacturers' liability to third parties does not arise in countries with compulsory liability insurance for automobile operators and owners. Cf. Déak, Automobile Accidents: A Comparative Study of the Law of Liability in Europe, 79 U. of Pa. L. Rev. 271 (1931). For statistical data see Report by the Committee to Study Compensation for Automobile Accidents 207 (1932 "Columbia Report"). The so-called "Financial Responsibility Laws" enacted in the majority of states cannot solve the problem adequately as they do not protect the victims of first offenders. Legislative and Judicial Assistance to Automobile Accident Victims—Compulsory Insurance, Financial Responsibility Laws and Automobile Accident Compensation, 16 N. Y. U. L. Q. Rev. 126 (1938).

[18] See, e.g., Chicago Rev. Code (1939) § 27-83.

[19] Draft for a Uniform Sales Act, 1940 (Report to the National Conference of Commissioners on Uniform State Laws, Philadelphia, 1940).

[20] It should be noticed that § 28, by introducing an "assumption of responsibility" terminology and by restricting the liability to "legitimate" users, seems to return to a contract

extension of liability is further supported by the consideration that the used car dealer is such an essential unit in the system of merchandising automobiles that without the used car turnover, the volume of new car sales would be smaller. At the same time, the secondhand car business under the prevalent trade-in arrangement owes its existence mainly to the sales of new cars. Thus it should share the overhead costs of distribution with the manufacturer and other dealers and should be no more immune than they from the obligation to deliver cars free from defects. This is especially true in view of the fact that the duty of manufacturers, dealers and repairmen to eliminate discoverable defects arises from the foreseeability of possible harm to third persons if they do not remedy the defects—a foreseeability of harm no more apparent in their case than in that of a used car dealer. This solution, however, may be unpopular because of a fear that the secondhand dealers will be unable to carry this additional burden.[21] But a slight rise in prices calculated on the basis of an increase in costs caused by insurance against the additional liability would be all that is necessary. This slight trade disadvantage would be negligible compared with the protection thus afforded to the public.

Wills—Implied Revocation—Remarriage by Testatrix—[Nevada].—The probate of a testamentary instrument executed by a married woman, who was later divorced and remarried, was contested by her second husband. The instrument, which was never explicitly revoked, originally provided for the decedent's two minor children and her first husband, but by codicil the bequest to the first spouse was revoked two months before the divorce. At the time of the testatrix's death, two months after the second marriage, no provision had been made by her for the second husband. On appeal from the decree of the district court admitting the instrument to probate, *held*, the will made by a married woman is not revoked by a subsequent marriage of the woman to another man. Judgment affirmed. *In re Walters' Estate*.[1]

Application of the doctrine of implied revocation raises two questions. First, does the doctrine express the general principle that any change in domestic relations operates as a revocation, especially if new duties arise, or is its application limited to a few, narrowly defined situations? Second, since the legislature has acted to remove the usually alleged reason for the rule that marriage revokes the testamentary instrument of a woman, namely, the testamentary incapacity of married women, has the rule likewise ceased to exist?

There were two reasons given at common law for the revocation of a woman's will

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theory. It might be methodically correct to exclude the bystander from the regulations of a "Sales" Act, but this proceeding may easily lead to an argument from the contrary denying liability even under a tort theory. Section 28(2) defines the manufacturer as a "person who processes or assembles goods which he thereafter markets for ultimate use in consumption." It might be advisable expressly to include the secondhand dealer.

[21] As to the similar fear of discouragement of enterprise which would be caused by an ex-extension of liability, see Labatt, Negligence in Relation to Privity of Contract, 16 L. Q. Rev. 168 (1900).

[1] 104 P. (2d) 968 (Nev. S. Ct. 1940). The husband was totally excluded from testatrix's estate unless mentioned in the will since Nevada law provides for neither estate by curtesy nor a statutory share. Nev. Comp. Laws (Hillyer, 1929) §§ 3361, 9906.