LEGAL CRITERIA FOR DISTINGUISHING BETWEEN LIVE AND DEAD HUMAN FOETUSES AND NEWBORN CHILDREN

BY
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I. INTRODUCTION

There are no uniformly applicable legal criteria in the States and Territories or at the Commonwealth level that determine the dividing line between life and death. Even within a single State or Territory different criteria may apply for different legal purposes; for example, different criteria may apply for homicide laws, transplant laws, and registration of births and deaths. Advances in biomedical technology in recent decades have generated heightened social demands for consistent and unambiguous criteria of life and death. The law has consistently lagged behind technologically induced pressures for reform in these areas.

Traditionally there were no legal criteria of death. The determination of death for legal purposes depended on the clinical criteria which were used by members of the medical profession as approved clinical practice from time to time. The Australian Law Reform Commission (A.L.R.C.) recommended more precise definitions of death in its 1977 report[1] suggesting that:

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1 Australian Law Reform Commission, *Human Tissue Transplants* Report No. 7 (1977) para. 136.

A person has died when there has occurred —
(a) irreversible cessation of all function of the brain of the person; *or*
(b) irreversible cessation of circulation of blood in the body of the person. [emphasis added]

Some commentators have criticised these A.L.R.C. proposals as recognising two separate definitions of death.[2] A counter argument, however, is that death is a protracted biological process and any line is, to some extent, arbitrary. Some tissues and organs survive long after others. Indeed, the whole science of organ transplantation from cadavers is premised on the survival of the particular organs and tissues which are to be donated by the "deceased". Therefore, the A.L.R.C. contended that it was quite sensible to have different legal definitions of death for different legal purposes.[3] The Law Reform Commission of Canada and the President's Commission for the Study of Ethical Problems in Medicine and Biomedical Behavioral Research in the United States of America have adopted the A.L.R.C. approach in their latest recommendations.[4]

Problems may arise if other laws place importance on whether someone has "died" at one particular moment rather than another. For example, matters such as whether a death must be reported to coronial authorities, and the value of an inheritance may be decisively affected by whether the person is dead at an earlier or later time. The question arises as to which of the two definitions for recognising when a person has died should be preferred in those situations. The A.L.R.C. did not consider how these difficulties should be resolved, being primarily concerned with determining whether a person has died, rather than with identifying the particular moment of death. A further problem is that the A.L.R.C. recommendations apply only to the death of "persons". The question of who is a person in the eyes of the law was not addressed. Is a separated viable foetus a "person"? Is a separated previable foetus a "person" if that foetus exhibits some signs of life for at least a brief moment after delivery even if the foetus is so premature that it has no possible chance of sustaining independent existence? These questions are considered below.

The A.L.R.C. definitions have been adopted in the Australian Capital Territory (1978), the Northern Territory (1979) and Victoria (1983). In 1979, Queensland adopted the criteria only for the purpose of human tissue and anatomy law. Western Australia has deferred the A.L.R.C. definitions pending further investigation of the topic.[5] New South Wales proposes to introduce new legislation later this year to adopt the A.L.R.C. definitions for the purpose of human tissue and anatomy law, and perhaps also for other legal purposes.[6] South Australia has just enacted legislation

2 *Eg.*, P. Gerber, "Some Medico-legal implications of the Human Tissue Transplant Act" (1979) 2 *M.J.A.* 533-35; T. O. Brophy, "Comment 1" *id.*, 535, 538; P. D. Phelan, "Comment 2" *id.*, 538-39; P. Gerber, "The Human Tissue Transplant Act" (1980) 1 *M.J.A.* 38-39.

3 See H. Windsor, "Some Medico-legal implications of the Human Tissue Transplant Act" (1980) 1 *M.J.A.* 235-36; M. Kirby, "Human Tissue Transplants: A Riposte" *id.*, 331-32.

4 Canadian Law Reform Commission, *Criteria for the Determination of Death* Report No. 15 (1981); President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research (U.S.A.) *Defining Death* (July 1981).

5 Transplantation and Anatomy Ordinance 1978 (A.C.T.) s.45; Human Tissue Transplant Act 1979 (N.T. s.23; Human Tissue Act 1982 (Vic.) s.41 — this Act was assented to on 5 January 1983 and commenced to operate on 4 April 1983; Transplantation and Anatomy Act 1979 (Qld) s.45; Human Tissue and Transplant Act 1982 (W.A.) — the Act does not include any legal definition of death at this time.

6 Press release issued by the N.S.W. Minister for Health, the Hon. L. Brereton, 29 April 1983.

which adopts the A.L.R.C. definitions.[7] Tasmania has not made any move to adopt statutory definitions of death, nor has the Commonwealth adopted any statutory definitions of death for matters which are in Commonwealth rather than State jurisdiction. The A.L.R.C. was concerned with the end of life rather than the beginning of life and hence devised definitions for ascertaining the death of "persons" who had undoubtedly been alive rather than definitions to determine when a foetus becomes a "living person" in the eyes of the law. Indeed, the A.L.R.C. expressly avoided the latter issues in paragraph 48 of its Report.

II. BIRTH AND PRE-BIRTH

The act of "live birth" is the single most important event which gives an individual independent legal status as a legal "person" or "human being". The distinctive concepts of "birth", "live" birth and "person/human being" must be considered. Statutes in three jurisdictions provide that a child is born when "it has completely proceeded . . . from the body of its mother".[8] This definition, which applies for the purposes of the law of homicide, both murder and manslaughter, reiterates earlier judicial pronouncements which predated the legislation in England and emphasises the *complete* rather than partial separation of the child from its mother. But the "child" is born when it has completely proceeded from its mother even if the umbilical cord has not been severed and the placental tissue and afterbirth remain inside the mother. The New South Wales and Australian Capital Territory statutes similarly provide that a child is born when it "has been wholly born into the world";[9] severance of the umbilical cord and separation of the placental tissue and afterbirth is not required. This legislation applies only to murder prosecutions.

The remaining jurisdictions do not have legislative definitions and are governed by the common law which requires the complete extrusion of the foetus from the body.[10] However, although the cord and the major part of the afterbirth are paraphernalia of the foetus, they are not legally considered as an essential part of the delivered child; to consummate birth, these structures need not be either severed from the child or expelled from the mother. Recent Australian decisions concur with this view of the law.[11] Hence, if any part of the child, other than the cord or afterbirth, remained unextruded when the child was killed as it was being born, a charge of murder or manslaughter could not traditionally be sustained.[12]

This gap in the law has been overcome in varying degrees by parliamentary intervention in all jurisdictions except the Northern Territory. In Queensland and Western Australia it is an offence to prevent the live birth of a child who "is about to

7 Death (Definition) Act 1983 (S.A.).
8 Criminal Code 1899 (Qld) s. 292; Criminal Code 1913 (W.A.) s.262; Criminal Code (Tas.) s.153(4).
9 Crimes Act 1900 (N.S.W.) s.20; Crimes Act and Ordinance 1900 (A.C.T.) s.20.
10 See the authorities cited in S. Atkinson, "Life, Birth and Live-Birth" (1904) 20 *L.Q.Rev.* 134, 139-40.
11 *R.* v. *Hutty* [1953] V.L.R. 338, 339; *R.* v. *Smith*, unreported, Supreme Court of the A.C.T., 1976, discussed and quoted in A. Bartholomew & K. Milte, "Child Murder: some problems" (1978) 2 *Crim.L.J.* 2, 7.
12 Glanville Williams, *The Sanctity of Life and the Criminal Law* (1958) 19; A. Bartholomew and K. Milte, note 11 *supra*, 5-6.

be delivered" unless this is necessary to preserve the mother's life.[13] In South Australia and Victoria the protection is not restricted to a child who is about to be delivered but extends to protect "the life of a child capable of being born alive . . . before it has an existence independent of its mother".[14] However, in South Australia, and presumably also in Victoria,[15] the preservation of the mother's life is a defence. In Tasmania the protection refers more extensively to causing "the death of a child which has not become a human being" but preservation of the mother's life is expressly a defence.[16] In New South Wales and the Australian Capital Territory the unborn child is protected against being killed "during delivery" *by the mother* (unless, presumably, she is acting to preserve her life) but the unborn child is not protected against being killed during delivery by other persons who are acting without the mother's assistance.[17] It is an offence, however, for the mother or anyone else to maliciously injure the child during or after birth.[18]

These statutory protections overlap the laws regulating attempts to procure miscarriages. Attempted miscarriage laws vary throughout Australia[19] but the following brief observations may be made. These laws are popularly, but somewhat misleadingly, described as "abortion" laws. The popular vernacular overlooks the legal realities that:

(a) The offence is committed by an unlawful *attempt* to procure miscarriage. The attempt need not succeed;

(b) Some academic writers have contended that it is not an offence under any circumstances to attempt to procure a miscarriage before the moment of *fertilisation* of the ovum by the sperm. Other academics have contended that it is not an offence under any circumstances to attempt to procure a miscarriage before the moment at which a fertilised ovum *implants* in the womb. This dispute has not been resolved.[20] A further complicating factor is that a person's attempt to procure the miscarriage of a woman may be unlawful even if the latter is not, in fact, pregnant. However, if a woman attempts to procure her *own* miscarriage (as distinct from someone else making the attempt) then she cannot be guilty of any offence in so doing unless she is, in fact, pregnant (A.C.T., N.S.W., N.T., S.A., Tas., Vic.). However, in two jurisdictions (Qld and W.A.) a woman may be guilty of attempting to procure her own miscarriage regardless of whether she is pregnant or not when she makes her attempt;

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13 Criminal Code 1899 (Qld) ss 282, 313; Criminal Code 1913 (W.A.) ss 259, 290.

14 Criminal Law Consolidation Act 1935 (S.A.) s.82a(7); Crimes Act 1958 (Vic.) s.10.

15 Criminal Law Consolidation Act 1935 (S.A.) s.82a(7); *cf. R.* v. *Davidson* [1969] V.R. 667-72. See also D. Seaborne Davies, "Child Killing in English Law" (1937) 1 *Mod. L. Rev.* 202-23, 269-87.

16 Criminal Code 1924 (Tas.) s.165.

17 Crimes Act 1900 (N.S.W.) s.21; Crimes Act and Ordinance 1900 (A.C.T.) s.21.

18 Crimes Act 1900 (N.S.W.) ss 21, 42; Crimes Act and Ordinance 1900 (A.C.T.) ss 21, 42.

19 They are outlined in H. Finlay & J. Sihombing (eds.), *Family Planning and the Law* (2nd ed. 1978) 10-11, 61-92; J. O'Sullivan, *Law for Nurses and Allied Health Professionals in Australia* (3rd ed. 1983) 71, 234-42.

20 V. Tunkel, "Modern Anti-Pregnancy Techniques and the Criminal Law" (1974) *Crim.L.Rev.* 461; V. Tunkel, "Abortion: how early, how late and how legal?" (1979) 2 *Br.Med.J.* 253; Commonwealth Secretariat, *Three Studies of Abortion Laws in the Commonwealth* (1977); G. Woods, "Minors, Fertility Control and the Law in Australia" in H. Finlay & J. Sihombing (eds.), note 19 *supra*, 138, 145-48; *R.* v. *Price* [1969] 1 Q.B. 541; *Royal College of Nursing of the United Kingdom* v. *Department of Health and Social Security* [1981] A.C. 800.

(c) The laws in this area apply also to attempts to procure the miscarriage of a woman who is carrying a *dead* foetus;[21]
(d) No offence of attempting to procure miscarriage is committed if the attempt is made after a foetus has already left the womb but has not been wholly extruded.[22] Other offences, however, may be committed.

The precise grounds on which an attempt to procure miscarriage may lawfully be made vary between jurisdictions. New South Wales courts have ruled that it is lawful for a registered medical practitioner to do so if he or she:

> has an honest belief on reasonable grounds that the termination of pregnancy was necessary to preserve the woman involved from serious danger to her life or physical or mental health and that in the circumstances the danger of the operation was not out of proportion to the danger to be averted. Reasonable grounds can stem from social economic or medical bases.[23]

This has also been adopted by courts in Victoria and Queensland except for the reference to social and economic bases; it may well be that a medical basis is necessary but this question remains to be resolved. Furthermore, the "serious danger" involved must be more than merely the normal danger of pregnancy and childbirth.[24] The Australian Capital Territory legislation follows the New South Wales wording, while the Western Australian legislation follows that of Queensland. It must be stressed, however, that none of the aforesaid jurisdictions (N.S.W., A.C.T., Vic., Qld and W.A.) allows an attempt to procure miscarriage simply because a pregnant woman wants it or because she knows or suspects that the foetus is handicapped or deformed. It is unlawful in all of these jurisdictions to attempt to procure miscarriage merely because genetic counselling or foetal diagnosis demonstrates or suggests that the foetus is abnormal. But if such knowledge or suspicion of handicap or abnormality so disturbs the pregnant woman that her physical or mental health is in serious danger if the pregnancy were to continue (other than the normal dangers of pregnancy and childbirth) it would be lawful to attempt to procure miscarriage.

Tasmanian legislation provides that it is lawful to attempt to procure miscarriage of a woman provided the operation is "reasonable, having regard to all the circumstances".[25] There are no judicial guidelines as to the meaning of "reasonableness" in this context. In South Australia and the Northern Territory complex legislation sets out the grounds for lawful attempts to procure miscarriage.[26] These are the only jurisdictions which permit termination of pregnancy on the distinct ground that there is a "substantial risk that, if the pregnancy were not terminated and the child were born to the pregnant woman, the child would suffer from such physical or mental abnormalities as to be seriously handicapped". A second medical opinion is

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21 *R.* v. *Trim* [1943] V.L.R. 109.
22 Glanville Williams, *Textbook of Criminal Law* (1978) 250.
23 *K.* v. *Minister for Youth and Community Services* [1982] 1 N.S.W.L.R. 311, 318; *R.* v. *Wald* (1971) 3 D.C.R. (N.S.W.) 25, 28.
24 *R.* v. *Davidson* [1969] V.L.R. 667; *Kerr* v. *Turner and Waterhouse*, unreported, Supreme Court of Queensland, 25 March 1983; *Attorney-General for the State of Queensland and Kerr* v. *Turner*, unreported, Full Court of the Supreme Court of Queensland, 29 and 30 March, 1983; *Attorney-General for the State of Queensland* v. *Miss T.* (1983) 46 A.L.R. 275.
25 Criminal Code 1924 (Tas.) ss.51, 134, 135.
26 Criminal Law Consolidation Act and Ordinance 1876 (N.T.) ss 78-79A; Criminal Law Consolidation Act 1935 (S.A.) ss 81-82a; see also *R.* v. *Anderson* [1973] 5 S.A.S.R. 256-278.

required. The Northern Territory limits the ground to pregnancies of not more than fourteen weeks while South Australia allows it until the unborn child is capable of being born alive. South Australia and the Northern Territory also allow an attempt to procure miscarriage at any stage of the pregnancy to preserve the mother's life; a second medical opinion is not required in such instances.

Another independent ground for lawful termination of the pregnancy is the prevention of injury to the mother's physical or mental health. In South Australia account may be taken of the woman's actual or foreseeable environment for this purpose. If the continuance of the pregnancy would involve "greater risk of injury to the woman's physical or mental health than if the pregnancy were terminated" then a second medical opinion is required and the attempt to procure miscarriage can be made in the Northern Territory if the woman is not more than fourteen weeks pregnant and in South Australia if the child is not yet capable of being born alive. It is also presumed in South Australia that an unborn child of twenty-eight weeks' pregnancy is capable of being born alive but this presumption is not decisive if other evidence is available. If the continuance of the pregnancy poses a "grave" risk of injury to the woman's physical or mental health then no second medical opinion is required and in the Northern Territory, attempts to procure miscarriage can be made if the woman is not more than twenty-three weeks pregnant, while in South Australia the attempt is lawful if the child is not yet capable of being born alive.

III. LIVE BIRTHS, HUMAN BEINGS AND LEGAL PERSONS

Legal definitions of "live" birth in the legislation pertaining to registrable births apply for registration purposes only[27] and are not necessarily the same as other legal definitions which define the legal status of the new born living child. The legal definitions that apply in the law of homicide are crucial in the present inquiry. These have been discussed above.[28] Professor Colin Howard has summarised these definitions:

> The common denominator in the code states [Queensland, Western Australia and Tasmania] is the exclusion of the tests whether the child has a circulation independent of its mother, or has breathed, or the umbilical cord has been severed in favour of the test of complete extrusion of the body of the baby from its mother. Unfortunately this test is rendered virtually meaningless by the inclusion of the requirement that the baby be thus born 'in a living state', which begs the question, for no guidance is given as to what state counts as living. The New South Wales section fills this gap with the rule that the baby starts to live as soon as it breathes. This section, however, is limited to trials for murder. Why the statute should not apply to a charge of manslaughter is not clear.[29]

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27 Registration of Births, Deaths and Marriages Ordinance 1963 (A.C.T.); Registration of Births, Marriages and Deaths Act 1963 (N.T.); Registration of Births, Deaths and Marriages Act 1973 (N.S.W.); Registration of Births, Deaths and Marriages Act 1959 (Vic.); Registration of Births and Deaths Act 1895 and Notification of Births Act 1966 (Tas.); Births Deaths and Marriages Registration Act 1966 (S.A.); Registration of Births, Deaths and Marriages Act 1961 (W.A.); Registration of Births, Deaths and Marriages Act 1962 (Qld).

28 See text at notes 8-12 *supra.*

29 C. Howard, *Criminal Law* (4th ed. 1982) 24.

Prosecutions for murder and manslaughter in South Australia, Victoria and the Northern Territory (and in N.S.W. and the A.C.T. so far as manslaughter but not murder is concerned) depend on judicial definitions of live birth rather than statutory ones. These have evolved over time and in *R.* v. *Hutty*[30] Mr Justice Barry ruled that:

> Murder can only be committed on a person who is in being, and legally a person is not in being until he or she is fully born in a living state. A baby is fully and completely born when it is completely delivered from the body of its mother and it has a separate and independent existence in the sense that it does not derive its power of living from its mother. It is not material that the child may still be attached to its mother by the umbilical cord; that does not prevent it from having a separate existence. But it is required before the child can be a victim of murder or of manslaughter or of infanticide, that the child should have an existence separate from and independent of its mother, and that occurs when the child is fully extruded from the mother's body and is living by virtue of the functioning of its own organs.

The present position is summarised in *Halsbury's Laws of England*:[31]

> A child is not considered in law to be in being, so as to be the subject of a charge of murder or manslaugher, until the whole body of the child is extruded from the womb and has an existence independent of the mother. Whether the child has an independent existence turns upon whether it has an independent circulation, and has breathed or has a capacity for independent breathing. But a child may have an independent existence even though it has not drawn breath and even though the umbilical cord is not severed. In relation to the law of homicide a person continues in being until his being is extinguished by death.[32]

Homicide prosecutions in England and Queensland cast light on the above statutory and judicial definitions. It seems clearly established that a "child" who has been "born" in a "living state" is a "human being"/"legal person" who is protected by homicide laws even if the new-born child is so pre-viable and premature at the time of complete extrusion from the mother that the child is doomed to die. Hence, the homicide laws do not only protect viable new-born children who would have the capacity to survive and reach the point of sustaining independent life indefinitely. They emphasise the fact that the foetus is born *alive* rather than whether the living foetus will survive after its birth. Thus in *R.* v. *West*[33] an apparently unqualified abortionist, Ann West, inserted a pin up and into the womb of Sarah Henson who was a single pregnant woman in a sixth month of pregnancy. This procured Henson's miscarriage and a male child was thereby born alive and survived about five hours. Evidence was given by an expert medical witness that although the boy had been born healthy and without any unusual appearance he had been born too prematurely and had been incapable of surviving for any length of time outside the womb at that stage of pregnancy. Nevertheless, Mr Justice Maule directed the jury that:

> . . . if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external

30 Note 11 *supra.*
31 (4th ed. 1976) Vol. XI, para. 1153.
32 Approved in the judgment of Williams J. in *Kerr* v. *Turner and Waterhouse,* note 24 *supra.*
33 (1848) 175 E.R. 329.

> world, the person who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder.[34]

A similar situation arose in *R.* v. *Castles*.[35] An apparently unqualified abortionist, Leo Castles, attempted to procure the miscarriage of an unnamed pregnant woman by introducing warm water into the woman's uterus using a syringe. The woman was no more than 24 weeks pregnant and was more reliably estimated to be 20 to 22 weeks pregnant at the time. Two days later, the woman, still pregnant, but ill, attended a public hospital and was admitted as a patient in the early stages of labour. A female baby was delivered, started breathing irregularly and was blue-coloured. The baby was placed in an oxygen tent and survived a little over two hours. Castles was prosecuted for manslaughter. Mr Justice Lucas adopted the earlier ruling in *West's* case and said that when the Queensland legislation refers to a child proceeding in a living state from the body of the mother:

> . . . it is referring to the state in which the child proceeds from the body of its mother and . . . a child who lives, albeit doomed to die, for some period after it has proceeded from the body of its mother, is within the section.[36]

However, the case did not proceed to final resolution as counsel for the defence successfully argued that the proof of the Crown case was lacking certain evidence. Mr Justice Lucas then expressed the view that it may have been more appropriate to have prosecuted the accused for an unlawful attempt to procure miscarriage. The Crown Prosecutor eventually discontinued the manslaughter proceedings by entry of a *nolle prosequi.*

It will be noted that the babies in *West's* case and *Castles'* case had been born alive, albeit only for a short time, following unlawful attempts to procure abortion. However, if the abortion itself is not unlawful, but is performed by a qualified medical practitioner in the circumstances permitted by law than it would seem that a clear distinction can be drawn from *West's* case and *Castles'* case. If the child is born alive in a pre-viable state following a *legal* attempt to procure miscarriage, and then dies, a strong argument could be made that no homicide has been committed. However, it should be stressed that no court has yet ruled on this distinction. Perhaps this is what one judge had in mind when he observed recently in relation to lawfully performed medical induction method of abortion that ". . . the unborn child is expelled from the body — usually dead, but sometimes at the point of death."[37]

Another question which has not been legally resolved is that if an unborn foetus is completely extruded from the mother's womb so early in pregnancy that the foetus lacks certain anatomical or physiological structures which are found in pre-viable foetuses at later stages of pregnancy, would the extruded foetus be sufficiently developed and exhibit sufficient signs of life in the legal sense to be regarded as a human being within the legal tests that have been explained, even though the child will not be able to survive outside the womb?

A further legal issue concerns foetuses which are born either at pre-viable or viable stages with gross deformities such as two heads. Are these born alive and are they legal

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34 *Id.*, 330.
35 [1969] Q.W.N. 36.
36 *Ibid.*
37 The *Royal College* case, note 20 *supra,* 803, *per* Lord Denning M.R.

persons in the eyes of the law? There are some old legal writings which suggest that these are not legal persons protected against homicide. The leading English text on criminal law, *Archbold on Pleading Evidence and Practice in Criminal Cases* confines the law of homicide to the protection of "reasonable creatures" and "reasonable" in this context "relates to appearance rather than the mental capacity of the victim and is apt to exclude monstrous births".[38] Professor Glanville Williams expresses a similar tentative view and believes that a monster in this sense could legally be put to a merciful death;[39] however, Professor Colin Howard expresses the contrary view that it is more probable that the courts would regard any offspring of a human mother as itself human.[40]

IV. CONCLUSION

This background paper has attempted to outline legal matters relevant to the current study by the Medical Research Ethics Committee of the National Health and Medical Research Council concerning the use of foetuses and foetal tissue in medical research and experimentation. Although the Committee is concerned with the ethical, rather than with the legal position, it is submitted that neither should be considered *in vacuo* but should ideally be harmonious with each other. A need for substantial updating to take account of modern knowledge and developments has been perceived. There is a conspicuous lack of uniformity between jurisdictions and also within the one jurisdiction, so much so that it has not been possible to ascertain any clear statement of the law in some of the areas which have been discussed.

38 (41st ed. 1982) para. 2643.
39 Note 22 *supra*, 31-35.
40 Note 28 *supra*, 25.