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# RECENT CASES

## CONFLICT OF LAWS—DOMICIL FOR PURPOSES OF INCOME TAXATION —ABSENCE OF FIXED INTENT TO REMAIN IN RESIDENCE OR TO RETURN TO DOMICIL OF ORIGIN

A District of Columbia statute<sup>1</sup> levied a tax upon the incomes of all domiciliaries. Petitioner moved to the District from Iowa in 1936 to take a civil service position. The Board of Tax Appeals found that she did not have in 1936, and had never since formed, an intent to abandon her domicil in Iowa, and that in the tax year 1945-46 she neither had a fixed intent to remain for the rest of her life in the District of Columbia, nor a fixed intent to return to Iowa. *Held* (2-1), petitioner is domiciled in the District of Columbia and subject to the income tax. *Arbaugh v. District of Columbia*, 176 F. 2d 28 (D. C. Cir. 1949).

A person's domicil is his permanent home,<sup>2</sup> and once established it remains his domicil until he adopts a new one.<sup>3</sup> Two elements must concur for the adoption of a new domicil: presence in the new place,<sup>4</sup> and *animus manendi*—the intent to make one's home there.<sup>5</sup> The English and early American rule required intent to live there permanently for the adoption of a new domicil. Presence in the new place for a temporary purpose could not result in a change of domicil; an intent to return to the former domicil at a later date, or the *animus revertendi*, would prevent the new residence

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1. D. C. CODE § 47-1502 (1940).

2. A person's domicil is also defined as the place "where he has his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning (*animus revertendi*)." STORY, CONFLICT OF LAWS § 41 (8th ed., Bigelow, 1883); 17 AM. JUR., *Domicil* § 2 (1938); 28 C. J. S., *Domicil* § 1 (1941). A more precise definition is "the place with which a person has settled connection for certain legal purposes, either because his home is there, or because that place is assigned to him by law." RESTATEMENT, CONFLICT OF LAWS § 9 (1934); 1 BEALE, CONFLICT OF LAWS § 9.1 (1935). An example of a domicil assigned by law is the domicil of origin, which is the domicil of a legitimate child's father or an illegitimate child's mother at the time of the child's birth. See STUMBERG, CONFLICT OF LAWS 30-33 (1937); GOODRICH, CONFLICT OF LAWS §§ 21-23, 31, 33 (2d ed. 1938).

3. *Ex parte* Weissinger, 247 Ala. 113, 22 So. 2d 510 (1945); *Harris v. Harris*, 205 Iowa 108, 215 N. W. 661 (1927).

4. *In re* Jones' Estate, 192 Iowa 78, 182 N. W. 227 (1921); *White v. Tennant*, 31 W. Va. 790, 8 S. E. 596 (1888); 1 BEALE, CONFLICT OF LAWS § 15.2 (1935); Note, 5 A. L. R. 296 (1920). *But cf.* *Bangs v. Inhabitants of Brewster*, 111 Mass. 382 (1873). An exception to the rule is that where a person leaves his domicil of choice to return to his domicil of origin, there is an immediate change of domicil back to the domicil of origin without the person's presence there. *Allen v. Thomason*, 30 Tenn. 536 (1851); STORY, CONFLICT OF LAWS § 47 (8th ed., Bigelow, 1883). Few American jurisdictions have accepted this exception to the general rule. See, e.g., *In re* Jones' Estate, *supra*.

5. *Brown v. Hall*, 385 Ill. 260, 52 N. E. 2d 781 (1944); *Ruth & Clark, Inc. v. Emery*, 233 Iowa 1234, 11 N. W. 2d 397 (1943); *Howe v. Howe*, 179 Va. 111, 18 S. E. 2d 294 (1942); 1 BEALE, CONFLICT OF LAWS § 18.1 (1935).

from becoming the domicil.<sup>6</sup> In America, where it is not uncommon for a person to have several homes during the course of life, there has been a gradual change of view as to the intent required for a change of domicil. In 1834, Story stated that a person's new residence may become his domicil even though he has a "floating" intention to return to his former domicil at some indefinite future date.<sup>7</sup> The rule subsequently developed that the acquisition of a new residence with the intent to live there for an indefinite time and without any fixed and definite intent to return to the former domicil results in a change of domicil.<sup>8</sup>

The rule that intent to return to the former domicil will prevent the new residence from becoming the domicil may perhaps be regarded as another statement of the rule that a temporary absence from the domicil will not result in a change of domicil. In cases where the new residence is temporary in nature, it is not necessary in order to prevent a change of domicil, that there be an intent to return to the domicil at an exact future time.<sup>9</sup> In cases where the new residence is not temporary in nature, the probable reason for the rule is that a definite intent to return to the former domicil precludes the intent to adopt the new residence as a fixed and permanent home. With the relaxation of the requirement of an intent to remain permanently in the new place in order to adopt a new domicil, there has been a consequent greater degree of certainty required to show the *animus revertendi*. To rebut the showing of an intention to remain indefinitely in the new residence, an intent to return to the domicil at a relatively fixed and definite time must be shown.<sup>10</sup> The intent with regard to the old domicil becomes important only for the purpose of defeating the adoption of a new domicil after a *prima facie* change of domicil has been established.<sup>11</sup>

6. STORY, CONFLICT OF LAWS § 41 (1st ed. 1834). This requirement has often been expressed negatively by saying that the new residence becomes the domicil if the person is living there without any present intention of removing therefrom. *Williamson v. Osenton*, 232 U. S. 619, 34 Sup. Ct. 442, 58 L. Ed. 758 (1914); GOODRICH, CONFLICT OF LAWS § 25 (2d ed. 1938).

7. STORY, CONFLICT OF LAWS § 46 (8th ed., Bigelow, 1883). The rule is usually applied in cases involving long residence in the new place. *Mitchell v. Delaware State Tax Comm'r*, 42 Del. 589, 42 A. 2d 19 (Super. Ct. 1945); *Firth v. Firth*, 50 N. J. Eq. 137, 24 Atl. 916 (Ch. 1892). *But cf.* *Shenton v. Abbott*, 178 Md. 526, 15 A. 2d 906 (1940).

8. *Williamson v. Osenton*, 232 U. S. 619, 34 Sup. Ct. 442, 58 L. Ed. 758 (1914); *Ellison v. Smoot's Adm'r*, 286 Ky. 768, 151 S. W. 2d 1017 (1941); *State-Planters Bank v. Commonwealth*, 174 Va. 289, 6 S. E. 2d 629 (1940); *Sutton v. Sutton*, 128 W. Va. 290, 36 S. E. 2d 608 (1945).

9. *Ex parte Weissenger*, 247 Ala. 113, 22 So. 2d 510 (1945); *Howe v. Howe*, 179 Va. 111, 18 S. E. 2d 294 (1942). Where two persons left North Carolina and went to Nevada to obtain a divorce, intending to return immediately to North Carolina, they were held to have never lost their domicil in North Carolina. *State v. Williams*, 224 N. E. 183, 29 S. E. 2d 744 (1944), *aff'd sub nom.* *Williams v. North Carolina*, 325 U. S. 226, 65 Sup. Ct. 1092, 89 L. Ed. 1577 (1945) (prosecution for bigamy). *But cf.* *Goodloe v. Hawk*, 113 F. 2d 753 (D. C. Cir. 1940) (alternative ground).

10. *Mitchell v. Delaware State Tax Comm'r*, 42 Del. 589, 42 A. 2d 19 (Super. Ct. 1945); *Sparks v. Sparks*, 114 Tenn. 666, 88 S. W. 173 (1905).

11. *District of Columbia v. Murphy*, 314 U. S. 441, 62 Sup. Ct. 303, 86 L. Ed. 329 (1941). Where a domiciliary of New Jersey left that state with the absolute intent to abandon it as his domicil and to live in another state if he could find a job there, but did

The strictness with which the requisites for domicil are adhered to depends to some extent upon the purpose for which the change of domicil is sought to be shown. It has been said that the concept of domicil is merely a tool which the courts use in dealing with a variety of situations.<sup>12</sup> In determining what law applies to the distribution of a decedent's personal property, a comparatively vague *animus revertendi* has been held to be sufficient to prevent a new residence from becoming the domicil.<sup>13</sup> Where the question is whether there is diversity of citizenship or jurisdiction to grant divorce, even a strong intent to return to the domicil of origin may not prevent the acquisition of new domicil. For example, a soldier on war-time duty in Louisiana married a girl who was domiciled in Louisiana and lived there with her for a short time; he was held to be domiciled in Louisiana for divorce purposes.<sup>14</sup> But the result might well have been different had he claimed the right to vote in Louisiana on the ground that he was domiciled there.

Statutes often make "residence" the basis for income taxation<sup>15</sup> and the courts have usually construed "residence" in such statutes to mean "legal residence," or domicil.<sup>16</sup> But it is not unreasonable to impose property and income taxes on persons who reside there for several years, even if they are not domiciled there.<sup>17</sup> In many fact situations, in which it is doubtful whether residents would be held to be domiciliaries for some purposes, they have been held subject to the tax statutes. It was held in one tax case that there was a change of domicil although the person had never been physically present in the new domicil, but had merely sent his wife there with his property.<sup>18</sup> In *District of Columbia v. Murphy*,<sup>19</sup> the United States Supreme Court, construing the same statute as that involved in the instant case, held that

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not succeed in finding a job, it was held that he had not lost his New Jersey domicil. The intent to abandon the old domicil did not lead to a finding of the intent to adopt a new home. *Sprague v. Sprague*, 141 N. J. Eq. 104, 23 A. 2d 810 (Ct. Err. & App. 1942).

12. 3 PROCEEDINGS A. L. I. 226-31 (1925); STRUMBERG, CONFLICT OF LAWS 35 (1937).

13. *Shenton v. Abbott*, 178 Md. 526, 15 A. 2d 906 (1940).

14. *Burgan v. Burgan*, 207 La. 1057, 22 So. 2d 649 (1945); cf. *Goodloe v. Hawk*, 113 F. 2d 753 (D. C. Cir. 1940); *Sutton v. Sutton*, 128 W. Va. 290, 36 S. E. 2d 608 (1945). For discussions of the problems involved in divorces between persons whose domicil is doubtful, see *Goodrich, Five Years of Conflict of Laws*, 32 VA. L. REV. 295, 297 (1946); *Powell, And Repent at Leisure, An Inquiry Into the Unhappy Lot of Those Whom Nevada Hath Joined Together and North Carolina Hath Put Asunder*, 58 HARV. L. REV. 930 (1945).

15. E.g., ALA. CODE ANN., tit. 51, § 373 (1940); ARIZ. CODE ANN. § 73-1502 (1939); GA. CODE ANN. § 92-3103 (1933). The statute in the instant case expressly makes domicil instead of residence the basis of taxation. *Supra* Note 1.

16. *Mitchell v. Delaware State Tax Comm'r*, 42 Del. 589, 42 A. 2d 19 (Super. Ct. 1945); see *Beale, Residence and Domicil*, 4 IOWA L. BULL. 3 (1918).

17. It has been held that the imposition of a tax by a state upon the income of a non-resident earned within the state is not a deprivation of property without due process of law. *Shaffer v. Carter*, 252 U. S. 37, 40 Sup. Ct. 221, 64 L. Ed. 445 (1920); 27 AM. JUR., *Income Taxes* §§ 189-93 (1940). For an analysis of cases involving the constitutionality of state income tax statutes as applied to non-residents, see Note, 64 L. Ed. 445 (1920).

18. *Bangs v. Inhabitants of Brewster*, 111 Mass. 382 (1873).

19. 314 U. S. 441, 62 Sup. Ct. 303, 86 L. Ed. 329 (1941).

the fact of residence in the District of Columbia raises a presumption of domicile there, which can be rebutted only by evidence stronger than that of a sentimental connection with the former domicile.

The instant case may be an important landmark in the development of more liberal rules governing changes of domicile; or it may be restricted to cases involving income taxation, since the concept of domicile is merely the means and not the end in the decision of cases in which it is involved.

#### CONSTITUTIONAL LAW—INTERSTATE COMMERCE—VALIDITY OF STATE TAX UPON GROSS RECEIPTS OF SEGMENT OF INTERSTATE COMMERCE

Petitioner, a Delaware corporation, operated oil pipe lines lying wholly in Mississippi. The pipe lines were used to transport oil from oil fields to loading racks, where it was loaded into railroad tank cars for interstate shipment. Respondent, Mississippi tax commissioner, levied a tax on the privilege of doing an intrastate business, measured by a percentage of gross income.<sup>1</sup> Petitioner sought review of this action, on the ground that the tax was unconstitutional as a tax upon the privilege of engaging in interstate commerce. *Held* (5-4),<sup>2</sup> affirming the decision of the Mississippi Supreme Court, that the state has the power to impose such a tax, whether appellant's business is intrastate or interstate. "The statute is not invalidated by the commerce clause of the Federal Constitution merely because . . . it imposes a 'direct' tax on the 'privilege' of engaging in interstate commerce." Since the tax is placed upon activities conducted entirely within the state, it cannot be repeated by any other state, and apportionment is unnecessary. *Interstate Oil Pipe Line Co. v. Stone*, 69 Sup. Ct. 1264 (1949).

The commerce clause of the Federal Constitution,<sup>3</sup> by delegating to Congress the power to regulate interstate commerce, is held to limit state power of regulation and taxation in that same sphere.<sup>4</sup> Until 1938, it had been a fairly settled doctrine of constitutional law that a state tax upon the privilege of engaging in interstate commerce<sup>5</sup> or upon the gross receipts of

1. MISS. CODE ANN. §§ 10105-09 (Supp. 1948).

2. Opinion by Rutledge, J. (Black, Douglas & Murphy, JJ., joining); concurring opinion by Burton, J.; dissenting opinion by Reed, J. (Vinson, C. J., and Frankfurter & Jackson, JJ., joining).

3. U. S. CONST. Art. I, § 8.

4. ROTTSCHAEFER, *THE CONSTITUTION AND SOCIO-ECONOMIC CHANGE* 96, 107 (1948); Landis, *The Commerce Clause as a Restriction on State Taxation*, 20 MICH. L. REV. 50 (1921).

5. "The tax is one upon the privilege or right to do business . . . and if appellant is engaged only in interstate commerce it is conceded, as it must be, that the tax, so far as appellant is concerned, constitutionally cannot be imposed." *Ozark Pipe Line Co. v. Monier*, 266 U. S. 555, 562, 45 Sup. Ct. 184, 69 L. Ed. 439 (1925); *Alpha Portland*

a foreign corporation engaged in interstate commerce<sup>6</sup> was repugnant to the commerce clause. The decisions reaching this conclusion used the long-familiar language that such a tax was invalid because it imposed a "direct burden" upon interstate commerce.<sup>7</sup> With the decision of the United States Supreme Court in the *Western Live Stock* case,<sup>8</sup> however, a new theory was introduced by which to test the validity of local gross receipts taxes, the so-called "cumulative" or "multiple burden" test.<sup>9</sup> In that case a state privilege tax, levied upon the gross receipts from the sale of advertising in newspapers and magazines distributed among several states, was held valid because it was incapable of being repeated by other states so as to subject a single interstate transaction to multiple tax burdens.<sup>10</sup> Since that decision the Court has wound its way through a maze of cases involving state taxes on the gross receipts derived from interstate transportation,<sup>11</sup> interstate sales,<sup>12</sup> and the manufac-

Cement Co. v. Massachusetts, 268 U. S. 203, 45 Sup. Ct. 477, 69 L. Ed. 916, 44 A. L. R. 1219 (1925); Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649 (1891).

6. Puget Sound Stevedoring Co. v. Tax Comm'n, 302 U. S. 90, 58 Sup. Ct. 72, 82 L. Ed. 68 (1937); Fisher's Blend Station v. Tax Comm'n, 297 U. S. 650, 56 Sup. Ct. 608, 80 L. Ed. 956 (1936); Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 38 Sup. Ct. 126, 62 L. Ed. 295 (1917); Galveston, H. & S. A. Ry. v. Texas, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031 (1908); ROTTSCHAEFER, *op. cit. supra* note 3, at 112-113. Note that such a tax has generally been held invalid, whether "imposed upon," or merely "measured by," the gross receipts.

The commerce clause does not prohibit state taxation of the net income from interstate or foreign commerce, United States Glue Co. v. Town of Oak Creek, 247 U. S. 321, 38 Sup. Ct. 499, 62 L. Ed. 1135 (1918). Nor does it forbid a state to tax the gross receipts from intrastate commerce, Ohio River & W. Ry. v. Dittley, 232 U. S. 576, 34 Sup. Ct. 372, 58 L. Ed. 737 (1914).

7. *E.g.*, Puget Sound Stevedoring Co. v. Tax Comm'n, 302 U. S. 90, 58 Sup. Ct. 72, 82 L. Ed. 68 (1937); Fisher's Blend Station v. Tax Comm'n, 297 U. S. 650, 56 Sup. Ct. 608, 80 L. Ed. 956 (1936).

8. *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 58 Sup. Ct. 546, 82 L. Ed. 823, 115 A. L. R. 944 (1938).

9. "The vice characteristic of those [local gross receipts taxes] which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed . . . with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce." *Id.* at 255-56.

10. "The tax is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate distribution of the magazine." *Id.* at 260.

11. *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 68 Sup. Ct. 1475, 92 L. Ed. 1832 (1948) (franchise tax measured by proportion of capital invested within the state in interstate oil pipe line held valid); *Central Greyhound Lines v. Mealey*, 334 U. S. 653, 68 Sup. Ct. 1260, 92 L. Ed. 1633 (1948) (gross receipts tax on bus line lying partly in other states held invalid where not apportioned by mileage within the taxing state); *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422, 67 Sup. Ct. 815, 91 L. Ed. 993 (1947) (gross receipts tax on business of loading and unloading vessels moving in interstate commerce held invalid).

12. *Freeman v. Hewit*, 329 U. S. 249, 67 Sup. Ct. 274, 91 L. Ed. 265 (1946) (tax imposed by seller's state on proceeds of interstate sale of securities held invalid); *McLeod v. J. E. Dilworth Co.*, 322 U. S. 327, 64 Sup. Ct. 1023, 88 L. Ed. 1304 (1944) (tax by buyer's state upon interstate sale of goods held invalid); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 60 Sup. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876 (1940) (tax by buyer's state on proceeds of interstate sales held valid); *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, 59 Sup. Ct. 325, 83 L. Ed. 272 (1939) (gross receipts tax on business of marketing fruit shipped to places of sale in other states and foreign countries held invalid).

ture of goods intended for interstate shipment,<sup>13</sup> and on specific license fees for doing interstate business within the state.<sup>14</sup> Both the varied results of these cases and the differences of opinion of the Justices in each decision show that the "direct burden" and "multiple burden" doctrines continue to be at odds with one another.<sup>15</sup> The cases suggest, however, that the states may tax "local incidents" of interstate commerce if such taxes are not capable of being repeated by other states; but they also suggest that the mere privilege of engaging in commerce within the taxing state is not such a local incident.

The split over the test to be applied reaches its height in the present case, where the vote stands 4-4 on the main issue, the "multiple burden" theory becoming the opinion of the Court by virtue of Mr. Justice Burton's concurrence on different grounds. The Mississippi Supreme Court had construed the tax as placed upon the privilege of engaging in intrastate commerce, and had upheld it as applied to the Interstate Co. on the sole ground that the operation of pipe lines between points within the state was intrastate rather than interstate commerce.<sup>16</sup> The United States Supreme Court, accepting the state court's construction of the state statute, holds, nevertheless, that even if the pipe line business is assumed to be interstate commerce, the tax is still valid, since there is no attempt to tax interstate activity carried on outside of Mississippi, and no other state can repeat the tax.<sup>17</sup> With this view the four dissenting Justices take sharp issue; holding that

13. *Adams Manufacturing Co. v. Storen*, 304 U. S. 307, 58 Sup. Ct. 913, 82 L. Ed. 1365, 117 A. L. R. 429 (1938) (tax on gross receipts of manufacturer derived from interstate sale of products held invalid).

14. *Nippert v. Richmond*, 327 U. S. 416, 66 Sup. Ct. 586, 90 L. Ed. 760, 162 A. L. R. 844 (1946) (license tax for privilege of engaging in business as solicitor held invalid as applied to soliciting orders of goods to be shipped from other states).

15. ROTTSCHAEFER, *op. cit. supra* note 3, at 112-25; Mendelson, *Recent Developments in State Power to Regulate and Tax Interstate Commerce*, 98 U. OF PA. L. REV. 57 (1949); Powell, *New Light on Gross Receipts Taxes*, 53 HARV. L. REV. 909 (1940); Powell, *More Ado about Gross Receipts Taxes*, 60 HARV. L. REV. 501 (1947).

In the case of state taxes upon foreign, as opposed to interstate, commerce, there is no opportunity for cumulative taxation, and the "multiple burden" theory cannot be applied as the test of validity. In such cases the Court must examine whether the state is taxing the privilege of conducting the business, or whether the tax imposes an undue burden upon the commerce. See *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422, 429, 433, 67 Sup. Ct. 815, 91 L. Ed. 993 (1947).

16. *Interstate Oil Pipe Line Co. v. Stone*, 203 Miss. 715, 35 So. 2d 73 (1948).

17. Petitioner had pressed the argument that two earlier decisions of the Court, where the validity of state taxes upon interstate oil pipe lines had been drawn in question, were determinative of the issue in this case. *Ozark Pipe Line Co. v. Monier*, 266 U. S. 555, 45 Sup. Ct. 184, 69 L. Ed. 439 (1925), held that an annual franchise tax, apportioned by the amount of capital and surplus employed within the taxing state, was invalid as a tax "upon the privilege or right to do business." *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 68 Sup. Ct. 1475, 92 L. Ed. 1832 (1948), held a similar tax valid, accepting the state court's construction of the tax as not upon the privilege of doing business, but as a recompense to the state for the protection of local activities of the business. In its opinion the court reviewed the holding of the *Monier* case and cited it with approval. Although the language of these two cases would apparently lead the Court to a conclusion of unconstitutionality of the present tax, where it accepted the "privilege" construction and assumed the commerce to be interstate, the opinion merely by-passed these holdings and relied upon the old case of *Maine v. Grand Trunk Ry.*, 142 U. S. 217, 12 Sup. Ct. 121, 35 L. Ed. 994 (1891).

the transportation of oil in this case is interstate commerce, they adopt the long-accepted rule that "the privilege of carrying on interstate commerce itself is immune from state taxation. This is because . . . the commerce clause of the Constitution does not leave to the states any power to permit or refuse the carrying on of interstate commerce."<sup>18</sup> Although the dissent is not expressly predicated upon the "direct burden" theory of previous cases, it relies heavily upon those cases as the authority for its position.<sup>19</sup>

The result of the present case, naturally to be expected in the light of Supreme Court cases of the past decade,<sup>20</sup> does little to settle the problem, or to indicate the course likely to be pursued in the future. In all such cases, where Congress has declared no legislative policy, it is the problem of the Court to resolve two conflicting principles of policy:<sup>21</sup> (1) that interstate commerce should be protected from undue interference by state taxation, and (2) that for the benefits bestowed upon interstate commerce by the states, it should be required to pay its share of the costs. Frequently in these circumstances, the trend of court decisions is more significant than the doctrines applied, and the "multiple burden" theory has lent renewed impetus to the recent trend of allowing ever-widening scope to this area of state taxation.<sup>22</sup> Summarizing in the words of Mr. Justice Frankfurter: "To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts."<sup>23</sup>

#### CONSTITUTIONAL LAW—PEACEFUL PICKETING—POWER OF STATE COURT TO ENJOIN

Plaintiffs, co-partners in the used car business, belonged to no union themselves and had no employees. Defendant union engaged in peaceful picketing of plaintiffs' establishment on behalf of an automobile salesmen's union for the purpose of compelling plaintiffs to enter into a contract to operate their business only during certain hours and days fixed by the union. Plaintiffs sued to enjoin this picketing. *Held*, injunction granted. The picketing was not a lawful exercise of the constitutional right of freedom of speech, but constituted unlawful coercion. The interests of the plaintiffs and

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18. 69 Sup. Ct. at 1272-73.

19. See note 17 *supra*.

20. See note 15 *supra*. For another discussion of the present case, see 98 U. OF PA. L. REV. 124 (1949).

21. See *Freeman v. Hewit*, 329 U. S. 249, 252, 67 Sup. Ct. 274, 91 L. Ed. 265 (1946).

22. *ROTSCHAEFER*, *op. cit. supra* note 3, at 127.

23. Majority opinion in *Freeman v. Hewit*, 329 U. S. 249, 252, 67 Sup. Ct. 274, 91 L. Ed. 265 (1946).

of the public outweigh the interest of the union in the welfare of a "mere handful of members" in the used car business. *Hanke v. International Brotherhood of Teamsters*, 207 P. 2d 206 (Wash. 1949), cert. granted,—U. S.—(1949).

In 1940 the United States Supreme Court held that an Alabama criminal statute prohibiting in general terms all picketing for the purpose of interfering with a lawful business was invalid on its face as an unconstitutional abridgment of the right of free speech.<sup>1</sup> By identifying peaceful picketing with free speech the Court assumed jurisdiction to review all state action limiting peaceful picketing and imposed upon itself the responsibility of developing a new body of constitutional law.<sup>2</sup> The Court's decisions since the *Thornhill* case<sup>3</sup> leave considerable doubt as to the scope of the doctrine.<sup>4</sup>

The *Thornhill* case indicated that a state could forbid peaceful picketing only in the case of "clear and present danger."<sup>5</sup> But the *Ritter's Cafe* and *Giboney* cases held that a state court could constitutionally enjoin peaceful picketing where the purpose of the picketing was contrary to the economic policy of the state as announced by its legislature.<sup>6</sup> In the *Swing* and *Angelos* cases, however, the Court held that a state court could not on the basis of the common law restrict picketing to disputes involving an employer and his employees.<sup>7</sup>

It is clear that the states may to some extent limit the right of peaceful

1. *Thornhill v. Alabama*, 310 U. S. 88, 60 Sup. Ct. 736, 84 L. Ed. 1093 (1940); cf. *Carlson v. California*, 310 U. S. 106, 60 Sup. Ct. 582, 84 L. Ed. 1104 (1940) (municipal ordinance). For an indication of the state of the substantive law in regard to peaceful picketing from *Vegeahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443 (1896) through *Senn v. Tile Layers Union*, 301 U. S. 468, 57 Sup. Ct. 857, 81 L. Ed. 1229 (1937), see RESTATEMENT, TORTS §§ 765-68 (1939).

2. For arguments concerning the wisdom of the identification of peaceful picketing with free speech see GREGORY, LABOR AND THE LAW 334-69 (1949); Teller, *Picketing and Free Speech*, 56 HARV. L. REV. 180 (1942); Dodd, *Picketing and Free Speech: A Dissent*, 56 HARV. L. REV. 513 (1943); Teller, *Picketing and Free Speech: A Reply*, 56 HARV. L. REV. 532 (1943); Jaffe, *In Defense of the Supreme Court's Picketing Doctrine*, 41 MICH. L. REV. 1037 (1943).

3. *Thornhill v. Alabama*, 310 U. S. 88, 60 Sup. Ct. 736, 84 L. Ed. 1093 (1940); *Carlson v. California*, 310 U. S. 106, 60 Sup. Ct. 582, 84 L. Ed. 1104 (1940); *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U. S. 287, 61 Sup. Ct. 551, 85 L. Ed. 836 (1941); *A. F. of L. v. Swing*, 312 U. S. 321, 61 Sup. Ct. 568, 85 L. Ed. 855 (1941); *Carpenters & Joiners Union v. Ritter's Cafe*, 315 U. S. 722, 62 Sup. Ct. 807, 86 L. Ed. 1154 (1942); *Bakery & Pastry Drivers & Helpers Local v. Wohl*, 315 U. S. 769, 62 Sup. Ct. 816, 86 L. Ed. 1178 (1942); *Cafeteria Employees Union v. Angelos*, 320 U. S. 293, 64 Sup. Ct. 126, 88 L. Ed. 58 (1943); *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490, 69 Sup. Ct. 684, 93 L. Ed. 649 (1949).

4. GREGORY, LABOR AND THE LAW 350-62 (1949).

5. "Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of the ideas by competition for acceptance in the market of public opinion." *Thornhill v. Alabama*, 310 U. S. at 104.

6. *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490, 69 Sup. Ct. 684, 93 L. Ed. 649 (1949); *Carpenters & Joiners Union v. Ritter's Cafe*, 315 U. S. 722, 62 Sup. Ct. 807, 86 L. Ed. 1154 (1942). But cf. *Bakery & Pastry Drivers & Helpers Local v. Wohl*, 315 U. S. 769, 62 Sup. Ct. 816, 86 L. Ed. 1178 (1942).

7. *Cafeteria Employees Union v. Angelos*, 320 U. S. 293, 64 Sup. Ct. 126, 88 L. Ed. 58 (1943); *A. F. of L. v. Swing*, 312 U. S. 321, 61 Sup. Ct. 568, 85 L. Ed. 855 (1941).

picketing.<sup>8</sup> But even where the purpose of the picketing contravenes the state's legislatively-defined policy, the power of a state court to prohibit peaceful picketing is limited. In the *Giboney* case, the most recent Supreme Court decision on the subject, the Court applied a "clear and present danger" test;<sup>9</sup> but it is questionable whether this test is not in reality the "rational basis" test traditionally applied to economic regulations.<sup>10</sup>

The important question raised by the instant case is whether a state court may evaluate the interests of the picketing group as against the interests of the public and enjoin the picketing on the ground that its purpose is against the policy of the state as a matter of common law.<sup>11</sup> For the Supreme Court to hold that a state court may do so might seem to be the next logical step from the *Giboney* decision, although there are some indications in the *Giboney* case that the Court will still insist upon a legislatively-defined policy.<sup>12</sup> On its facts it would appear to be impossible to reconcile the Washington court's decision in the instant case with the *Swing* and *Angelos* cases.<sup>13</sup> And, if this "next logical step" should be taken, the *Thornhill* doctrine that peaceful picketing is free speech will have lost its practical significance.<sup>14</sup>

8. "The right of the state to determine whether the common interest is best served by imposing some restrictions upon the use of weapons for inflicting economic injury in the struggle of conflicting industrial forces has not previously been doubted." *Carpenters & Joiners Union v. Ritter's Cafe*, 315 U. S. 722, 725, 62 Sup. Ct. 807, 86 L. Ed. 1154 (1942). For a good discussion of legislative problems in drafting such restrictive legislation in the light of Supreme Court decisions see Note, *Regulations of Picketing and Free Speech*, 26 TEXAS L. REV. 783 (1948).

9. "There was clear danger, imminent and immediate, that unless restrained, appellants would succeed in making that policy [of the state against combinations in restraint of trade] a dead letter insofar as purchases by nonunion men were concerned." *Giboney v. Empire Storage & Ice Co.*, 336 U. S. at 503.

10. Compare *Dorchy v. Kansas*, 272 U. S. 306, 47 Sup. Ct. 86, 71 L. Ed. 248 (1926), with *Herndon v. Lowry*, 301 U. S. 242, 57 Sup. Ct. 732, 81 L. Ed. 1066 (1937). The *Giboney* case, 336 U. S. at 503, cites with approval the language of Mr. Justice Douglas, concurring in *Bakery & Pastry Drivers & Helpers Local v. Wohl*, 315 U. S. 769, 776. 62 Sup. Ct. 816, 86 L. Ed. 1178 (1942): "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation."

11. See 49 COL. L. REV. 711 (1949), for a discussion of the unlawful purpose test as applied by state courts in picketing cases since the *Thornhill* case.

12. "The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges . . . to set the limits of permissible contest. . . . This is the function of the legislature." *Giboney v. Empire Storage & Ice Co.*, 336 U. S. at 499 (quotation from the dissenting opinion of Mr. Justice Brandeis in *Duplex v. Deering*, 254 U. S. 443, 448, 41 Sup. Ct. 172, 65 L. Ed. 349 (1921). Throughout the opinion the Court speaks in terms of "legislative power," "legislative control," and "clearly adopted state policy."

13. See 207 P. 2d at 214 (dissenting opinion).

14. "It is hard to understand the Court's present position as being anything but a retreat from the *Thornhill* case, and this can mean only that the majority no longer believe peaceful picketing to be free speech—the dissemination of information—and nothing more." GREGORY, LABOR AND THE LAW 361 (1949).

CONSTITUTIONAL LAW—POWER OF COURT TO PUNISH FOR DIRECT  
CONTEMPT—OPPORTUNITY TO OBTAIN COUNSEL

Petitioner was served with a subpoena duces tecum commanding him to appear before the grand jury with certain papers admittedly in his possession disclosing the membership of a secret organization which was being investigated. He appeared without these papers and refused to deliver them while before the grand jury. He was thereupon taken into court where the judge who impanelled the grand jury ordered him to appear with these papers. Petitioner again refused and was sentenced to jail until such time as he would comply with the court order. From this sentence, petitioner seeks certiorari. *Held* (4-2),<sup>1</sup> writ denied; petitioner was not deprived of due process of law under the state or Federal Constitution by the failure of the trial judge to allow him further hearing and opportunity to secure counsel. *Morris v. Morris*, 42 So. 2d 17 (Ala. 1949).

It is almost universally recognized that courts have the inherent power to punish for contempt,<sup>2</sup> although in some states the mode of procedure is governed by statutory<sup>3</sup> or constitutional<sup>4</sup> provisions. While as a general rule contempts are classified into two categories, civil and criminal, the line of demarcation between the two is at times difficult to determine.<sup>5</sup> The distinction drawn by most authorities is that civil contempts are coercive and remedial in nature, while criminal contempts are penal.<sup>6</sup> Under this rule the contempt in the principal case would appear to be civil, because the commitment of the petitioner to jail was a coercive, not a punitive, measure.

The most important factor for consideration in determining the power of

1. Per curiam opinion; dissent by Lawson, J. (Livingstone, J., concurring).

2. "That the power to punish for contempt is inherent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice." *Michaelson v. United States*, 266 U. S. 42, 65, 45 Sup. Ct. 18, 69 L. Ed. 162 (1924); *accord, Ex parte Beville*, 58 Fla. 170, 50 So. 685 (1909); *In re Hayes*, 200 N. C. 133, 156 S. E. 791 (1931); *Winfree v. State*, 175 Tenn. 427, 135 S. W. 2d 454 (1940); 4 BL. COMM.\* 283-88; Note, 31 COL. L. REV. 956 (1931).

3. *E.g.*, ARK. DIG. STAT. § 34-903 (1947); IOWA CODE § 665.7 (1946); MO. REV. STAT. ANN. § 2030 (1939). For a collection of state statutes governing the mode of procedure in contempt cases, see THOMAS, PROBLEMS OF CONTEMPT OF COURT 47, Appendix B (1934).

4. OKLA. CONST. Art. II, § 25.

5. *United States v. United Mine Workers of America*, 330 U. S. 258, 67 Sup. Ct. 677, 91 L. Ed. 884 (1947); *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797 (1911); *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997 (1904); THOMAS, PROBLEMS OF CONTEMPT OF COURT 3 (1934); Note, 13 GEO. WASH. L. REV. 356, 358 (1945). In answer to a question propounded by defense counsel for the United Mine Workers of America during contempt proceeding before the United States Court of Appeals for the District of Columbia, Judge Goldsborough remarked: "If you know the exact difference between civil and criminal contempt you are the only person in the United States who does." N. Y. Times, Nov. 30, 1946, p. 2, col. 2.

6. *Lamb v. Cramer*, 285 U. S. 217, 52 Sup. Ct. 315, 76 L. Ed. 715 (1932); *Ex parte Grossman*, 267 U. S. 87, 45 Sup. Ct. 332, 69 L. Ed. 527 (1925); *In re Nevitt*, 117 Fed. 448, 458 (8th Cir. 1902); *Porter v. Alexenburg*, 396 Ill. 57, 71 N. E. 2d 58 (1947); *Tabor v. Commonwealth ex rel. Peterson*, 303 Ky. 810, 199 S. W. 2d 613 (1947); *Dahl v. Dahl*, 210 Minn. 361, 298 N. W. 361 (1941); *Roanoke Waterworks Co. v. Roanoke Glass Co.*, 151 Va. 229, 144 S. E. 460 (1928); THOMAS, PROBLEMS OF CONTEMPT OF COURT 2 (1934).

the court to punish summarily for contempt, however, is not whether the contempt was civil or criminal but whether it was committed in the presence of the court.<sup>7</sup> As a general rule the court is deemed to be present in every portion of the place set apart for its use and for the use of its officers, jurors and witnesses.<sup>8</sup> When a contempt is committed in the court's presence it is called direct, and by the weight of authority the court has power to punish without a separate hearing and opportunity to secure counsel.<sup>9</sup> However, in the case of an indirect contempt, *i.e.*, one committed outside the *facie curiae*, the prevailing view is that there should be a hearing.<sup>10</sup> In some states the right to a hearing and to counsel in indirect contempt cases is based on common-law or statutory rules of procedure,<sup>11</sup> while in others this right is guaranteed by the constitution.<sup>12</sup>

Even where the contempt is direct, if the party charged with the reprehensible action claims to have a valid defense, such as the constitutional privilege against self-incrimination, by the better view he must be given an opportunity to state the basis for his defense or justify his position before punishment can be meted out by the court.<sup>13</sup> So also where there is a legitimate dispute as to the facts, and where they are not within the personal knowledge of the judge, there should be a hearing and an opportunity to secure counsel.<sup>14</sup>

7. *E.g.*, *Cooke v. United States*, 267 U. S. 517, 536, 45 Sup. Ct. 390, 69 L. Ed. 767 (1925); *Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405 (1888).

8. *Ex parte Savin*, 131 U. S. 267, 277, 9 Sup. Ct. 699, 33 L. Ed. 150 (1889); *Lockett v. State*, 145 Ark. 415, 224 S. W. 952 (1920); *Harding v. McCullough*, 236 Iowa 556, 19 N. W. 2d 302 (1939); *Beach v. Beach*, 79 Ohio App. 397, 74 N. E. 2d 130 (1946).

9. *Ex parte Hudgings*, 249 U. S. 378, 39 Sup. Ct. 337, 63 L. Ed. 656 (1919); *Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405 (1888); *White v. George*, 195 Ga. 465, 24 S. E. 2d 787 (1943); *In re Na Lepa*, 298 Mich. 310, 199 N. W. 89 (1941); *People v. Higgins*, 173 Misc. 96, 16 N. Y. S. 2d 302 (Sup. Ct. 1939); see *Notes*, 13 GEO. WASH. L. REV. 346 (1945), 27 VA. L. REV. 665 (1941), 57 A. L. R. 545 (1928).

10. *Cooke v. United States*, 267 U. S. 517, 45 Sup. Ct. 390, 69 L. Ed. 767 (1925); *Ex parte Savin*, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. Ed. 150 (1889); *People v. Rosenthal*, 370 Ill. 244, 18 N. E. 2d 450 (1938); *Charles Cushman Co. v. Mackey*, 135 Me. 490, 200 Atl. 505 (1938); *Note*, 57 A. L. R. 545 (1928); 29 GEO. L. J. 917 (1941).

11. ARK. DIG. STAT. § 34-903 (1947); *Lee v. State*, 102 Ark. 122, 143 S. W. 909 (1912); *Kneisel v. Ursus Motor Co.*, 323 Ill. 452, 154 N. E. 195 (1926); *Smilay v. Oakland Circuit Judge*, 235 Mich. 151, 209 N. W. 191 (1926); MO. REV. STAT. ANN. § 2030 (1939); *Bender v. Young*, 252 S. W. 691 (Mo. 1923).

12. OKLA. CONST. Art. II, § 25, *Ex parte Dawes*, 31 Okla. Crim. App. 406, 239 Pac. 689 (1925), *Ex parte Sullivan*, 10 Okla. Crim. App. 465, 138 Pac. 815 (1914).

13. *Ex parte Berman*, 105 Cal. App. 37, 287 Pac. 125 (1930); *People v. Zazove*, 311 Ill. 198, 142 N. E. 543 (1924); *accord*, *State ex rel. Cheadle v. District Court*, 92 Mont. 94, 10 P. 2d 586 (1932); *Robertson v. Commonwealth*, 181 Va. 520, 25 S. E. 2d 352 (1943). *But cf.* *White v. George*, 195 Ga. 465, 24 S. E. 2d 787 (1943). A case very similar to the principal case is *Coyle v. Sawyer*, 198 Iowa 1022, 200 N. W. 721, 723 (1924), where the court says: "The conduct of the petitioner and the language used unmistakably indicate that he would not comply, and that he was ready to be punished for contempt, if his act was so considered by the trial judge. This in itself constituted a waiver of his right to be heard in further explanation or excuse of his conduct. He did make an oral explanation. Nothing would have been effectuated by a further opportunity to explain, and a rule to show cause would have been an idle ceremony not exacted or contemplated by the law under the circumstances."

14. *Sinclair v. United States*, 279 U. S. 263, 49 Sup. Ct. 471, 73 L. Ed. 938 (1929) (shadowing jurors after adjournment of court for the day); *Ex parte Savin*, 131 U. S. 267, 277, 9 Sup. Ct. 699, 33 L. Ed. 150 (1889) (attempting to bribe a witness in court corridors); *In re Creely*, 8 Cal. App. 713, 97 Pac. 766 (1908) (shouting at jury while

In the instant case petitioner's defense was that he was an officer of the secret organization and had taken an oath not to disclose the identity of the members. But the court correctly ruled that the information requested was a proper subject for the grand jury's investigation and held that petitioner had no constitutional privilege to refuse to produce it.<sup>15</sup>

Proper procedure in contempt cases should be controlled by considerations of fairness. In the instant case petitioner was accorded an adequate opportunity to state his defense after having refused to obey the judge's oral command and a subpoena duces tecum to bring certain corporate records before the grand jury. His defense being properly overruled, petitioner's continued refusal to comply with the court order constituted contempt, and the court was justified in summarily imposing punishment.<sup>16</sup>

#### EVIDENCE—ADMISSIBILITY OF SCIENTIFIC TESTS—HARGER DRUNKOMETER TEST TO DETERMINE INTOXICATION

Defendant was indicted on a charge of negligent homicide. Soon after the accident he had voluntarily submitted to a test using the Harger Drunkometer for the purpose of determining intoxication. Over defendant's objection testimony was admitted at the trial concerning the results of the test and the deductions drawn therefrom as to his being under the influence of intoxicating liquor at the time of the accident. From a conviction, defendant brings error. *Held*, reversed. There being no evidence in the record showing general scientific acceptance of the probative value of the Harger Drunkometer, it was error to admit the testimony. *People v. Morse*, 38 N. W. 2d 322 (Mich. 1949).

Evidence obtained from the use of scientific devices is inadmissible unless there is general scientific recognition of their probative value.<sup>1</sup> Expert testi-

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jury was being taken from hotel to juryroom during recess); *Field v. Thornell*, 106 Iowa 7, 75 N. W. 685 (1898) (editor attempted to influence jurors by showing them editorial at newspaper office after court adjourned for the day); *People v. Higgins*, 173 Misc. 96, 16 N. Y. S. 2d 302, 309 (Sup. Ct. 1939) (sheriff assigned to guard jury purchased liquor and had improper relations with woman juror).

15. "[A]n officer of a corporation in whose custody are its books and papers is given no right to object to the production of the corporate records because they may disclose his guilt. He does not hold them in his private capacity and is not, therefore, protected against their production or against a writ requiring him as agent of the corporation to produce them." *Essgee Co. v. United States*, 262 U. S. 151, 158, 43 Sup. Ct. 514, 67 L. Ed. 917 (1923); *In re Verser-Clay Co.*, 98 F. 2d 859 (10th Cir. 1938); 8 WIGMORE, EVIDENCE §§ 2200, 2259a, 2259b, (3d. ed. 1940); Note 120 A. L. R. 1102 (1939).

16. The dissent in the instant case, to sustain the position that there was a lack of procedural due process, cited the recent case of *In re Oliver*, 333 U. S. 257, 275, 68 Sup. Ct. 499, 92 L. Ed. 682 (1948). But the *Oliver* case is easily distinguishable from the usual contempt case, because there the Supreme Court was reviewing a contempt conviction under Michigan's unique one-man grand jury and judge system. In this connection see MICH. STAT. ANN. §§ 28.943-28.946 (1938).

1. *Frye v. United States*, 293 Fed. 1013 (D. C. Cir. 1923); *State v. Duguid*, 50 Ariz. 276, 72 P. 2d 435 (1937); *People v. Becker*, 300 Mich. 562, 2 N. W. 2d 503, 139 A. L. R. 1171 (1942); *People v. Forte*, 167 Misc. 868, 4 N. Y. S. 2d 913 (County Ct. 1938), *aff'd*,

mony based on scientific tests can be very convincing to a jury,<sup>2</sup> and therefore the tests on which such testimony is based should be scientifically reliable. The courts feel that it is for scientists to determine the soundness of new developments in their field, since they are best fitted for that purpose. When a new scientific development is accorded the requisite recognition, the courts admit evidence obtained from its use.<sup>3</sup>

The Harger Drunkometer is a machine which uses the breath for the determination of the alcoholic content of the blood. The subject breathes into the apparatus and certain chemicals contained therein react to the alcohol in the breath. A comparison of the weights of the chemical before and after the test is said to reveal the amount of alcohol in the subject's blood.<sup>4</sup> It is generally recognized by the medical profession and hence by the courts that a certain amount of alcohol in the blood is indicative of an ascertainable degree of intoxication in most people.<sup>5</sup> Chemical analysis of the blood or urine has been recognized as being a reliable method of determining the alcoholic content of the blood.<sup>6</sup> In the instant case there was such conflicting testimony as to the reliability of the Harger Drunkometer as to preclude any finding of general scientific acceptance of the apparatus. Indeed, the medical periodicals reveal that there is no general scientific acceptance of the device at this time.<sup>7</sup>

Law enforcement officers have found evidence interpreting the result of chemical analysis of the blood or urine very helpful in prosecutions for operating a motor vehicle while under the influence of intoxicating liquor.<sup>8</sup> But the use of these tests has raised serious legal problems.<sup>9</sup> One of the problems involved concerns the privilege against self-incrimination. The

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279 N. Y. 204, 18 N. E. 2d 31, 119 A. L. R. 1198 (1938); *State v. Bohner*, 210 Wis. 651, 246 N. W. 314, 86 A. L. R. 611 (1933); 37 MICH. L. REV. 1141 (1939).

2. Inbau, *Detection of Deception Technique Admitted as Evidence*, 26 J. CRIM. L. & CRIMINOLOGY 262, 268 (1936).

3. See *State v. Bohner*, 210 Wis. 651, 246 N. W. 314, 317, 86 A. L. R. 611, 615 (1933); 37 HARV. L. REV. 1138 (1924).

4. *State v. Hunter*, 68 A. 2d 274 (N. J. 1949); Harger, Lamb, and Hulpieu, *A Rapid Chemical Test for Intoxication Employing Breath*, 110 A. M. A. J. 779 (1938).

5. This has generally been conceded or assumed in cases reaching the appellate courts. Objection to the evidence may be based on grounds other than its probative value. See in this connection, *State v. Duguid*, 50 Ariz. 276, 72 P. 2d 435 (1937); *Touchton v. State*, 154 Fla. 547, 18 So. 2d 752 (1944); *Spitler v. State*, 221 Ind. 107, 46 N. E. 2d 591 (1943). For discussions of the standard set up for interpreting the results of chemical analysis of body fluids for alcoholic content, see Newman, *Proof of Alcoholic Intoxication*, 34 Ky. L. J. 250 (1946); Ladd and Gibson, *Legal-Medical Aspects of Blood Tests to Determine Intoxication*, 29 VA. L. REV. 749 (1943).

6. Ladd and Gibson, *Legal-Medical Aspects of Blood Tests to Determine Intoxication*, 29 VA. L. REV. 749 (1943).

7. For a discussion of the Harger Drunkometer see Harger, Lamb, and Hulpieu, *A Rapid Chemical Test for Intoxication Employing Breath*, 110 A. M. A. J. 779 (1938). For a criticism of the Drunkometer, see Haggard, Greenberg, Miller, and Carroll, *The Alcohol of the Lung Air as an Index of Alcohol in the Blood*, 26 J. LAB. & CLIN. MED. 1527 (1938).

8. Leonard, *Tests for Intoxication*, 38 J. CRIM. L. & CRIMINOLOGY 533 (1948).

9. See Note, *To What Extent Does the Privilege Against Self-Incrimination Protect an Accused from Physical Disclosures?* 1 VAND. L. REV. 243 (1948).

privilege is a personal one and is waived when the test is voluntarily taken.<sup>10</sup> But when the defendant has been forced to submit to the test against his will, some courts have held such compulsion to be a violation of the privilege.<sup>11</sup> This view, however, does not seem to be consistent with holdings in other cases that the privilege applies only to oral testimony on the part of the accused.<sup>12</sup> Another problem involved is the possibility that a compulsory test may be deemed an unlawful search and seizure.<sup>13</sup> The results of such a test may nevertheless be admissible in evidence in jurisdictions which hold illegally obtained evidence admissible.<sup>14</sup> It has been recommended that consent to take the test be obtained in order to avert these problems.<sup>15</sup>

The Harger Drunkometer, like the various forms of "lie-detector," would meet a definite social need if recognized as having probative value. Testimony interpreting the results of lie-detector tests has been excluded, however, because of the general rule as to scientific evidence.<sup>16</sup> The Michigan court was undoubtedly correct in the instant case in refusing to allow testimony founded on the Drunkometer test in the absence of a showing of its general scientific acceptance. If and when such machines as the Drunkometer and lie-detector are recognized, they will be valuable to juries in determining the facts of a case and should be used wherever possible.

#### FEDERAL JURISDICTION—REQUIREMENT THAT FEDERAL QUESTION APPEAR ON FACE OF COMPLAINT—APPLICATION TO DECLARATORY JUDGMENT ACTION

Plaintiff was engaged in the business of selling jewelry at retail, his principal method of business being sales by public auction at night. Defendants, city commissioners of Hollywood, Florida, passed an ordinance declaring the holding of such auction sales between 6 PM and 8 AM a misdemeanor. Plaintiff, threatened with prosecution under the ordinance, sought by proceedings under the Federal Declaratory Judgment Act<sup>1</sup> to have

10. *Touchton v. State*, 154 Fla. 547, 18 So. 2d 752 (1944); *Spitler v. State*, 221 Ind. 107, 46 N. E. 2d 591 (1943); *State v. Small*, 233 Iowa 1280, 11 N. W. 2d 377 (1943).

11. *Booker v. Cincinnati*, 5 Ohio Ops. 433, 22 Ohio L. Abs. 286, 1 Ohio Supp. 152 (1936); *Apodaca v. State*, 140 Tex. Crim. Rep. 593, 146 S. W. 2d 381 (1940); *accord*, *People v. Dennis*, 131 Misc. 62, 226 N. Y. Supp. 689 (Sup. Ct. 1928).

12. *Holt v. United States*, 218 U. S. 245, 31 Sup. Ct. 2, 54 L. Ed. 1021 (1910); *Ridgell v. United States*, 54 A. 2d 679 (D. C. Mun. App. 1947); *State v. Cram*, 176 Ore. 577, 160 P. 2d 283, 164 A. L. R. 952 (1945); 8 WIGMORE, EVIDENCE § 2250 (3d ed. 1940). But see collection of cases in 8 *id.* § 2265 n.2.

13. See *United States v. Willis*, 85 F. Supp. 745 (S. D. Cal. 1949) (use of stomach pump held to be unreasonable search).

14. See Note, 150 A. L. R. 566 (1944).

15. Leonard, *Tests for Intoxication*, 38 J. CRIM. L. & CRIMINOLOGY 533 (1948).

16. *People v. Becker*, 300 Mich. 562, 2 N. W. 2d 503, 139 A. L. R. 1171 (1942); *People v. Forte*, 167 Misc. 868, 4 N. Y. S. 2d 913 (County Ct. 1938), *aff'd*, 279 N. Y. 204, 18 N. E. 2d 31, 119 A. L. R. 1198 (1938). See discussion of lie-detector tests in INBAU, LIE DETECTOR AND CRIMINAL INTERROGATION (2d ed. 1948).

1. 28 U. S. C. §§ 2201, 2202 (1948).

the ordinance declared unconstitutional and to enjoin proceedings against him by defendants. By appropriate motion, defendants raised the question of the jurisdiction of the court. *Held*, the federal district court has jurisdiction without reference to diversity of citizenship; a federal constitutional question is involved. *Zaconick v. City of Hollywood*, 85 F. Supp. 52 (S. D. Fla. 1949).

Federal district courts by statute are given jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States, where the proper jurisdictional amount is involved.<sup>2</sup> The rule is well established that the existence of a federal question must appear from the plaintiff's statement of his own case, upon the face of the complaint, in order to warrant federal jurisdiction.<sup>3</sup> Neither the defendant's answer,<sup>4</sup> nor an anticipatory reply asserted in the plaintiff's complaint,<sup>5</sup> nor a petition for removal<sup>6</sup> can serve as the basis for federal jurisdiction.

Although the court in the instant case disposes of the question of jurisdiction without discussion,<sup>7</sup> it may well be important, in view of the general rule stated above, to determine who is the actual plaintiff in a declaratory judgment action. A petition under the declaratory judgment act may often state as a basis of action what normally would be a defense or a reply in a conventional suit. In effect, the declaratory judgment procedure may reverse the normal order of the parties—*i.e.*, the nominal defendant may be the real plaintiff, who is being forced by the nominal plaintiff to state his case. Whether this nominal plaintiff, the normal defendant, in a declaratory judgment suit should be allowed federal jurisdiction when it is his complaint that states the federal question may depend upon the view taken as to his legal status. If he is merely allowed to force the other party, who has the real cause of action, to state this cause of action in court, it would seem that he remains the real defendant and that federal jurisdiction should be denied under the established jurisdictional rule. If, however, the declaratory judgment plaintiff is held in legal theory to have a true cause of action, then federal jurisdiction should, it seems, be granted upon the showing of a federal question in his complaint.<sup>8</sup>

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2. 28 U. S. C. §§ 1331, 1337, 1338 (1948).

3. *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511 (1894); *Metcalf v. Watertown*, 128 U. S. 586, 9 Sup. Ct. 173, 32 L. Ed. 543 (1888).

4. *See The Fair v. Kohler Die & Specialty Co.*, 228 U. S. 22, 25, 33 Sup. Ct. 410, 57 L. Ed. 716 (1913).

5. *Louisville & N. R. R. v. Mottley*, 211 U. S. 149, 29 Sup. Ct. 42, 53 L. Ed. 126 (1908); *Devine v. Los Angeles*, 202 U. S. 313, 26 Sup. Ct. 652, 50 L. Ed. 1046 (1905).

6. *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511 (1894); *see Gully v. First National Bank*, 299 U. S. 109, 113, 57 Sup. Ct. 96, 81 L. Ed. 70 (1936).

7. The district judge dismisses the question of federal jurisdiction in a brief paragraph, holding that "it is obvious that the suit is one which arises under the Federal Constitution . . . . A substantial and material Federal constitutional question is raised by the plaintiffs and the jurisdictional amount is involved." 85 F. Supp. at 54-55. No authority is cited, however, in support of this holding.

8. This problem of the reversal of the parties by the declaratory judgment act is discussed in *Developments in the Law—Declaratory Judgments*. 62 HARV. L. REV. 787 (1949).

That the courts have inquired into the question as to who is the real plaintiff in a declaratory judgment suit is shown by cases concerning a shifting burden of proof, particularly by insurance cases where a declaration of non-liability is sought.<sup>9</sup> Normally the insured would have the burden, since, as plaintiff, he must prove his claim. Some cases have held that when the insurance company sues as plaintiff for a declaration of non-liability, the burden remains on the insured.<sup>10</sup> By analogy, this inquiry into the true status of the parties might well be extended into jurisdictional matters.

The theory of declaratory judgment acts, however, has been stated to be that the nominal plaintiff, the real defendant, does have a "cause of action."<sup>11</sup> The cases seem to uphold this theory of the text authorities, although neither cases nor texts discuss squarely the problem involved in the instant case.<sup>12</sup> Most cases allow jurisdiction without discussing the matter at all.<sup>13</sup>

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Here it is suggested, after the need for congressional clarification is pointed out, that the preferable rule might be "that a declaratory action seeking to test a defense is triable in the federal courts provided this defense would normally arise in answer to a complaint which itself would properly raise a federal question." Such a rule would achieve substantial conformity with principles applicable to conventional suits, and would make jurisdiction depend on the nature of the coercive action anticipated by the declaratory judgment suit.

9. Burden on declaratory plaintiff: *Reliance Life Ins. Co. v. Fancher*, 30 F. Supp. 264 (W. D. Mo. 1939); *Travelers Ins. Co. v. Drumheller*, 25 F. Supp. 606 (W. D. Mo. 1938). Burden on insured: *State Farm Mut. Automobile Ins. Co. v. Smith*, 48 F. Supp. 570 (W. D. Mo. 1942); *Travelers Ins. Co. v. Greenough*, 88 N. H. 391, 190 Atl. 129, 109 A. L. R. 1096 (1937).

10. *State Farm Mut. Automobile Ins. Co. v. Smith*, 48 F. Supp. 570 (W. D. Mo. 1942); *Travelers Ins. Co. v. Greenough*, 88 N. H. 391, 190 Atl. 129, 109 A. L. R. 1096 (1937). See concurring opinion of Sanborn, J., in *Reliance Life Ins. Co. v. Burgess*, 112 F. 2d 234, 240-41 (9th Cir. 1940). The better view may be that the declaratory judgment plaintiff should assume the burden, since he is given substantial procedural advantages. See ANDERSON, *DECLARATORY JUDGMENTS* § 164 (1940); *Developments in the Law—Declaratory Judgments*, 62 HARV. L. REV. 787, 836 (1949); Note, 1941 WIS. L. REV. 513. The important thing, however, is that the courts have considered the problem of the reversal of the parties by the declaratory judgment act.

11. See BORCHARD, *DECLARATORY JUDGMENTS* 16-24 (1941); ANDERSON, *DECLARATORY JUDGMENTS* §§ 1, 2, 30 (1940); Borchard, *The Federal Declaratory Judgments Act*, 21 VA. L. REV. 35, 42-43 (1934). Borchard points out that the defeat and denial of any unfounded claim which disturbs or renders insecure a person's rights, whether of status or property, is as much an interest capable of and in need of judicial protection as the assertion of a valid claim; for example, a debtor has as much interest in denying an unfounded claim of his creditor as the creditor has in asserting a claim upon the debtor. Declaratory judgments, it is pointed out, are merely procedural extensions of judgments of equity courts, which for centuries have been rendering decisions determining the rights of the parties when there could be no execution of judgment.

12. See *Regents of N. M. College v. Albuquerque Broadcasting Co.*, 158 F. 2d 900 (10th Cir. 1947), where a declaratory action to establish a federal statute as a defense to a prospective suit on a contract was held to present a federal question; the court did not consider the fact that in a coercive action on the contract the complaint probably would not have shown a federal question. See also *Chicago Metallic Mfg. Co. v. Katzinger Co.*, 123 F. 2d 518 (7th Cir. 1941); *Edelmann & Co. v. Triple-A Specialty Co.*, 88 F. 2d 852 (7th Cir. 1937). *But cf.* *International Harvest Hat Co. v. Caradine Hat Co.*, 17 F. Supp. 79 (E. D. Mo. 1935). It should be noticed that in patent suits, where the plaintiff seeks a declaration of non-infringement, it is the patentee, the defendant, who truly has the federally protected right; whereas in the instant case, it is the plaintiff who asserts the federally protected right.

13. *E.g.*, *Southern Pacific Co. v. Conway*, 115 F. 2d 746 (9th Cir. 1940); *Publix Cleaners v. Florida Dry Cleaning & Laundry Board*, 32 F. Supp. 31 (S. D. Fla. 1940); *Montejano v. Rayner*, 33 F. Supp. 435 (D. Idaho 1939).

It is interesting to note that there could have been no federal jurisdiction by removal if the City of Hollywood as plaintiff had first brought this action as a prosecution under the ordinance, as it normally would have done had Zaconick actually violated the law.<sup>14</sup> The city's petition would not show a federal question on its face, and removal jurisdiction may not be obtained where the federal question is shown for the first time in the petition for removal.<sup>15</sup> The Federal Declaratory Judgment Act, however, was not intended to extend or enlarge jurisdiction in any way.<sup>16</sup> Seemingly there is a contradiction between the allowance of original federal jurisdiction in the instant case and the intent of the Act not to enlarge jurisdiction. The plaintiff in the instant case by virtue of the Federal Declaratory Judgment Act is allowed original federal jurisdiction which he would not have had otherwise, and which is, without the declaratory judgment act, positively denied by the jurisdictional rule.

It is significant that the award of jurisdiction in most declaratory judgment cases has been given without inquiry into the true nature of the action. Perhaps the jurisdictional rule is satisfied by a statement of the federal question by either party in a declaratory judgment suit; or perhaps the rule in its strict sense is not intended to apply to declaratory judgment actions.<sup>17</sup> In either event, the problem is deserving of attention and should be clarified by the courts.

#### INCOME TAXES—DEDUCTION OF BUSINESS EXPENSES—DEDUCTIBILITY OF PENALTIES FOR VIOLATION OF PRICE REGULATIONS

Petitioner, a converter of textiles, inadvertently violated ceiling price regulations under the Emergency Price Control Act of 1942<sup>1</sup> by making excessive charges for shrinkages. Upon discovering the violations petitioner voluntarily disclosed them to the Office of Price Administration. Refund of the overcharges to its customers being impossible, petitioner paid the amount of the excessive charges to the United States in settlement of all claims

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14. *Cf. Tennessee v. Union and Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511 (1894) (defendant bank tried to raise the federal constitutional question in its petition for removal).

15. *Tennessee v. Union and Planters' Bank*, *supra* note 14.

16. The statute itself states that a remedy is created by the declaratory judgment procedure in cases "of actual controversy within its jurisdiction." 28 U. S. C. § 2201 (1948). See, *e.g.*, *Ambassade Realty Corp. v. Winkler*, 83 F. Supp. 227, 228 (D. Mass. 1949) ("The Federal Declaratory Judgment Act confers no additional jurisdiction on the district courts but applies only to controversies otherwise within the jurisdiction of such courts"). See BORCHARD, *DECLARATORY JUDGMENTS* 232-37 (1941); ANDERSON, *DECLARATORY JUDGMENTS* § 19 (1940).

17. The jurisdictional rule, it should be remembered, was firmly established as early as 1894 in *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511, while the federal declaratory judgment act was not enacted until 1934.

1. 56 STAT. 23 (1942), 50 U. S. C. A. Appendix §§ 901 *et seq.* (1944).

against it by the Government. It now seeks to deduct the sum thus paid from its gross income as a business expense.<sup>2</sup> From disallowance of the deduction by the Tax Court<sup>3</sup> petitioner appeals. *Held*, reversed. The sum paid to the Government was not penal in nature, but even if it were a penalty it would be deductible since the deduction would violate no policy underlying the Price Control Act. *Jerry Rossman Corporation v. Commissioner of Internal Revenue*, 175 F. 2d 711 (2d Cir. 1949).

It is the alternative holding which makes the instant case particularly significant. In allowing the deduction the case not only differs from previous decisions involving payments to the OPA,<sup>4</sup> but insofar as it recognizes the deductibility of penalties it represents a departure from a rule heretofore followed almost without exception. Although the revenue acts do not so provide, prior to the instant case the general rule was that statutory penalties could not be deducted as business expenses.<sup>5</sup> Despite frequent criticism<sup>6</sup> the courts applied this rule automatically. If a payment to the state or Federal Government could be characterized as penal, it was held non-deductible regardless of whether it resulted from a criminal prosecution or civil action by the government.<sup>7</sup> The intentions and good faith of the violator were im-

2. INT. REV. CODE § 23 (a). This section permits as deductions, "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. . . ."

3. 10 T. C. 468 (1948).

4. *E.g.*, *Scioto Provision Co.*, 9 T. C. 439 (1947) (penalties paid although infraction of regulations denied); *Garibaldi & Cuneo*, 9 T. C. 446 (1947) (violations could have been avoided by use of care). In I. T. 3627, 1943 CUM. BULL. 111 and I. T. 3630, 1943 CUM. BULL. 113, the Treasury Department recognized the deductibility of payments to consumers for violations of price regulations but denied deductions where, as in the instant case, the purchaser from taxpayer was not the ultimate consumer and had no right of action but taxpayer made payments to the Government to settle its claims. The latter payments were deemed to be penalties. See 4 MERTENS, FEDERAL INCOME TAXATION § 25.36 (Supp. 1949); Gelfand, *Payments to OPA*, 27 TAXES 961 (1949).

5. *E.g.*, *Comm'r v. Portland Cement Co.*, 148 F. 2d 276 (5th Cir. 1945), *cert. denied*, 326 U. S. 728 (1945) (penalties for violation of state anti-trust laws); *Helvering v. Superior Wines & Liquors, Inc.*, 134 F. 2d 373 (8th Cir. 1943) (fine for negligence in failing to keep records required by federal statute); *United States v. Jaffray*, 97 F. 2d 488 (8th Cir. 1938), *aff'd sub nom. United States v. Bertelsen*, 306 U. S. 276, 59 Sup. Ct. 541, 83 L. Ed. 647 (1939) (understatement of tax liability); *Chicago, R. I. & P. Ry. v. Comm'r*, 47 F. 2d 990 (7th Cir. 1931), *cert. denied*, 284 U. S. 618 (1931) (violation of safety laws); *Great Northern Ry. v. Comm'r*, 40 F. 2d 372 (8th Cir. 1930), *cert. denied*, 282 U. S. 855 (1930) (same). Among the many cases in the Tax Court and Board of Tax Appeals denying deductibility of penalties, see *Universal Atlas Co.*, 9 T. C. 971 (1947), *aff'd per curiam*, 171 F. 2d 294 (2d Cir. 1948); *Kossar & Co.*, 16 B. T. A. 952 (1929); *Columbus Bread Co.*, 4 B. T. A. 1126 (1926); *Sarah Backer*, 1 B. T. A. 214 (1924). *But cf.* *Huff, Andrews & Thomas*, 1 B. T. A. 542 (1925).

6. See *Burroughs Building Material Co. v. Comm'r*, 47 F. 2d 178, 180 (2d Cir. 1931), 17 VA. L. REV. 831; Notes, 31 COL. L. REV. 1344 (1931), 56 HARV. L. REV. 1142 (1943), 54 HARV. L. REV. 852 (1941); 57 HARV. L. REV. 109 (1943); 54 HARV. L. REV. 698 (1941).

7. *E.g.*, *Comm'r v. Portland Cement Co.*, 148 F. 2d 276 (5th Cir. 1945), *cert. denied*, 326 U. S. 728 (1945) (civil action for damages); *United States v. Jaffray*, 97 F. 2d 488, 494 (8th Cir. 1938), *aff'd sub nom. United States v. Bertelsen*, 306 U. S. 276, 59 Sup. Ct. 541, 83 L. Ed. 647 (1939) (negligence penalty in civil action); *Chicago, R. I. & P. Ry. v. Comm'r*, 47 F. 2d 990 (7th Cir. 1931), *cert. denied*, 284 U. S. 618 (1931) (civil liability); *Burroughs Building Material Co. v. Comm'r*, 47 F. 2d 178 (2d Cir. 1931) (fines in criminal action); *Columbus Bread Co.*, 4 B. T. A. 1126 (1926) (criminal action).

material,<sup>8</sup> and no consideration was given to the purposes for which the statute infringed was enacted or to whether the prohibited conduct was *malum in se* or merely *malum prohibitum*.<sup>9</sup>

In many cases the social desirability of denying the deduction may be a controlling factor, particularly where the deduction would thwart some purpose of the underlying statute or where the violation was intentional, fraudulent or morally reprehensible.<sup>10</sup> However, since innocent violations of complex statutory regulations are almost inevitable in the conduct of business,<sup>11</sup> the rule denying deductibility to penalties seems too broad to fit all cases. Several reasons have been given in support of the rule, but none of them is applicable to every situation. For example, many courts have disallowed the deduction on the grounds that violation of the law is no part of a taxpayer's business and therefore penal exactions cannot be "ordinary" or "necessary" expenses within the meaning of the Internal Revenue Code.<sup>12</sup> While many penalties probably are not "ordinary" or "necessary" because not of everyday occurrence in business,<sup>13</sup> nevertheless whether a penal expense is deductible or not should be determined after consideration of the particular penalty involved rather than by an automatic rule applicable to all penalties.<sup>14</sup> It is usually held that expenses incurred in settling claims for tort liability to private persons may be deducted if properly incident to busi-

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8. *Helvering v. Superior Wines & Liquors, Inc.*, 134 F. 2d 373 (8th Cir. 1943) (taxpayer alleged ignorance of rules and procedure); see *Burroughs Building Material Co. v. Comm'r*, 47 F. 2d 178, 180 (2d Cir. 1931) (deductions not allowable regardless of lack of moral turpitude). In many cases the actual guilt of the taxpayer has not even been determined, the taxpayer choosing often to pay the penalty rather than litigate with the government. *E.g.*, *Comm'r v. Portland Cement Co.*, 148 F. 2d 276 (5th Cir. 1945), *cert. denied*, 326 U. S. 728 (1945); *Scioto Provision Co.*, 9 T. C. 439 (1947).

9. Cases cited notes 7 and 8 *supra*; 4 MERTENS, FEDERAL INCOME TAXATION 384 n. 5 (1942). *But see* *United States v. Jaffray*, 97 F. 2d 488, 493 (8th Cir. 1938) (penalty for mere negligence might be deductible under some circumstances); *Sarah Backer*, 1 B. T. A. 214, 216 (1924) (possible distinction between types of conduct).

10. See *Burroughs Building Material Co. v. Comm'r*, 47 F. 2d 178, 180 (2d Cir. 1931); Notes, 31 COL. L. REV. 1344 (1931), 54 HARV. L. REV. 852 (1941); 43 HARV. L. REV. 661 (1930).

11. See *Burroughs Building Material Co. v. Comm'r*, 47 F. 2d 178, 180 (2d Cir. 1931); Gelfand, *Payments to OPA*, 27 TAXES 961 (1949); Notes, 31 COL. L. REV. 1344, 1346 (1931), 54 HARV. L. REV. 852, 854 (1941).

12. *E.g.*, *Helvering v. Superior Wines & Liquors, Inc.*, 134 F. 2d 373, 376 (8th Cir. 1943); *United States v. Jaffray*, 97 F. 2d 488, 493 (8th Cir. 1938), *aff'd sub nom. United States v. Bertelsen*, 306 U. S. 276, 59 Sup. Ct. 541, 83 L. Ed. 647 (1939); *Chicago, R. I. & P. Ry. v. Comm'r*, 47 F. 2d 990, 991 (7th Cir. 1931), *cert. denied*, 284 U. S. 618 (1931); see *National Outdoor Adv. Bureau v. Helvering*, 89 F. 2d 878, 881 (2d Cir. 1937) ("the law will not recognize the necessity of engaging in illegal courses in the conduct of a business").

13. 4 MERTENS, FEDERAL INCOME TAXATION § 25.35 (1942). In order to be an "ordinary" or "necessary" expense an expenditure must be "proximately related" to the business, must be natural and normal in the conduct or defense of the business, and must not be personal to the taxpayer. See generally *Welch v. Helvering*, 290 U. S. 111, 54 Sup. Ct. 8, 78 L. Ed. 212 (1933); *Kornhauser v. United States*, 276 U. S. 145, 48 Sup. Ct. 219, 72 L. Ed. 505 (1928); Note, 54 HARV. L. REV. 852 (1941).

14. As a general rule whether an expenditure meets the requirements for the deduction is a question of fact to be determined from all the circumstances of each case, and it is not a question of law. *Comm'r v. Heininger*, 320 U. S. 467, 475, 64 Sup. Ct. 249, 88 L. Ed. 171 (1943).

ness even though such payments result from the taxpayer's wrongful actions and are often punitive.<sup>15</sup> It is difficult to see why the deduction should be allowed in proper instances in the tort cases and yet be denied as a matter of law when the payment is to the government rather than to a private claimant.<sup>16</sup>

It would seem that in all cases the nature of the taxpayer's conduct, the purposes of the statute or regulation involved, and the incidence of the expense to the business should be considered. While this rule would not be as easy to apply as the broad general rule, it would lead to less arbitrary results. Such a rule has been adopted in considering the deductibility of legal expenses incurred in the defense of criminal or penal actions.<sup>17</sup> Formerly such expenses were deductible where the taxpayer was acquitted if they were reasonably connected with his business,<sup>18</sup> but they were never deductible when the taxpayer was found guilty.<sup>19</sup> The reasons given for non-deductibility were the same as those given in the penalty cases. However, in *Commissioner v. Heininger*,<sup>20</sup> the Supreme Court allowed deduction of legal expenses incurred in the unsuccessful defense of a fraud order issued by the Postmaster General. The deduction was held to violate no policy of the statute authorizing fraud orders, and the expenses were deemed appropriate and helpful to the business.

In the principal case the court followed the approach of the Supreme Court in the *Heininger* case, holding that the general rule as to penalties is a mere "judicial gloss" which is not to be applied to all cases. This result seems sound and the holding will probably be followed when there are inno-

15. *E.g.*, *Helvering v. Hampton*, 79 F. 2d 358 (7th Cir. 1935) (amount of judgment deductible although taxpayer guilty of fraud). See 4 MERTENS, FEDERAL INCOME TAXATION § 25.37 (1942); Note, 31 COL. L. REV. 1344, 1347 (1931). For a collection of cases see Note, 104 A. L. R. 680, 686 (1936).

16. See *Burroughs Building Material Co. v. Comm'r*, 47 F. 2d 178, 180 (2d Cir. 1931). One reason frequently assigned for disallowing the deduction in penalty cases while allowing it in tort cases is that the punishment for violation of a statute is prescribed by the legislature; to allow the deduction would be to mitigate the punishment by reducing the fine or penalty. *E.g.*, *Comm'r v. Portland Cement Co.*, 148 F. 2d 276 (5th Cir. 1945), *crt. denied*, 326 U. S. 728 (1945); *Helvering v. Hampton*, 79 F. 2d 358 (7th Cir. 1935); *Great Northern Ry. v. Comm'r*, 40 F. 2d 372 (8th Cir. 1930), *crt. denied*, 282 U. S. 855 (1930). This "public policy" argument has been criticized on the grounds that (1) Congress, not the courts, should decide whether the deduction violates public policy; (2) denial of the deduction allows additional punishment to be imposed upon the taxpayer through the revenue laws; (3) denial of the deduction is inconsistent with the taxation of illegal income; and (4) disallowance has the effect of taxing gross rather than net income. See Notes, 56 HARV. L. REV. 1142 (1943), 54 HARV. L. REV. 852 (1941); 57 HARV. L. REV. 109 (1943); 54 HARV. L. REV. 698 (1941).

17. *Comm'r v. Heininger*, 320 U. S. 467, 64 Sup. Ct. 249, 88 L. Ed. 171 (1943).

18. For collections of cases, see Notes, 104 A. L. R. 680, 683 (1936), 88 L. Ed. 197 (1944); 4 MERTENS, FEDERAL INCOME TAXATION § 25.36 (1942).

19. *National Outdoor Adv. Bureau v. Helvering*, 89 F. 2d 878 (2d Cir. 1937); *Gould Paper Co. v. Comm'r*, 72 F. 2d 698 (2d Cir. 1934); *Burroughs Building Material Co. v. Comm'r*, 47 F. 2d 178 (2d Cir. 1931). *Contra*: *Foss v. Comm'r*, 75 F. 2d 326 (1st Cir. 1935). See note 18 *supra*.

20. 320 U. S. 467, 64 Sup. Ct. 249, 88 L. Ed. 171 (1943).

cent violations of statutes and regulations other than those on price control.<sup>21</sup> The approach taken in the instant case is in accord with that being adopted in other fields of income taxation. For example, in cases involving the validity for tax purposes of family partnerships, a former rule of thumb has been abandoned in favor of a more comprehensive rule which takes into consideration the intentions of the parties and the circumstances of each case.<sup>22</sup>

#### INSURANCE—"COMPREHENSIVE" COVERAGE OF AUTOMOBILE POLICY —"THEFT" HELD NOT TO INCLUDE "UNAUTHORIZED USE"

Defendant insurer issued to plaintiff a policy of automobile insurance with a comprehensive clause protecting against loss or damage caused by "theft." Plaintiff's husband, who stood in the position of the insured, asked one Campbell to park the automobile. Campbell instead went for an unauthorized ride to another city, during which a collision occurred. Plaintiff sought to recover on the theft insurance policy. The referee found that Campbell had intended to return the automobile at the end of his ride, but concluded that "unauthorized use" was a "theft" within the meaning of the policy. *Held*, exceptions to the report of referee sustained. The absence of *animus furandi* precludes recovery, since as used in the policy, theft is synonymous with common law larceny. *Wheeler v. Phoenix Indemnity Co.*, 65 A. 2d 10 (Me. 1949)

The instant holding is in accord with the holdings in the great majority of the cases to the effect that there must be present a criminal intent permanently to deprive the owner of the insured automobile.<sup>1</sup> This intent is necessary for a taking to constitute common law larceny,<sup>2</sup> and "theft" is generally construed as synonymous with larceny.<sup>3</sup> A few jurisdictions hold that their special statutes have eliminated the necessity for such intent in automobile

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21. Gelfand, *Payments to OPA*, 27 TAXES 961 (1949). The author of this article suggests, for example, that penalties for violations of child-labor laws or postal regulations might well be deductible under the theory of the principal case, where the violations are unintentional and cannot be avoided with reasonable care.

22. *Comm'r v. Culbertson*, 337 U. S. 733, 69 Sup. Ct. 1210 (1949), 3 VAND. L. REV. 136.

1. *Fidelity & Guaranty Fire Corp. v. Ratterman*, 262 Ky. 350, 90 S. W. 2d 679 (1936); *Kovero v. Hudson Ins. Co.*, 192 Minn. 10, 255 N. W. 93 (1934); *Van Vechten v. American Eagle Ins. Co.*, 239 N. Y. 303, 146 N. E. 432 (1925); *Hanes Funeral Home v. Dixie Fire Ins. Co.*, 216 N. C. 562, 5 S. E. 2d 820 (1939); *La Motte v. Retail Hardware Mut. Ins. Co.*, 203 Wis. 41, 233 N. W. 566 (1930). See generally 5 APPLEMAN, *INSURANCE LAW AND PRACTICE* §§ 3209-17 (1941); 5 COUCH, *CYCLOPEDIA OF INSURANCE LAW* §§ 1176, 1176a (1929).

2. *State v. Coombs*, 55 Me. 477, 92 Am. Dec. 610 (1867); MILLER, *CRIMINAL LAW* § 109 (1934); BOUVIER, *LAW DICTIONARY* 662 (Baldwin's ed. 1946).

3. *Hartford Fire Ins. Co. v. Wimbish*, 12 Ga. App. 712, 78 S. E. 265, 266 (1913); *Home Ins. Co. v. Mathis*, 109 Ind. App. 25, 32 N. E. 2d 108 (1941); 41 WORDS AND PHRASES 482 (Perm. ed. 1940).

cases, and have allowed recovery on theft insurance policies in cases like the principal case.<sup>4</sup>

The conflict in the various interpretations of the meaning of the word "theft" as found in automobile insurance policies arises from the "joyriding" or "unauthorized use" statutes enacted in many states.<sup>5</sup> That "theft" includes a mere unauthorized use would seem more probable in a state having a statute which makes such taking punishable as larceny.<sup>6</sup> In *Globe & Rutgers Fire Insurance Co. v. House*<sup>7</sup> the Tennessee court held that a felonious taking was required to constitute "theft," and that by statute the unauthorized taking or use of an automobile (regardless of *animus furandi*) was made a felony. But the court indicated that unauthorized use by a bailee would *not* constitute a "theft" under the terms of the policy, such bailee being guilty only of a misdemeanor. The result is that "theft" remains synonymous with larceny.<sup>8</sup> Yet one jurisdiction has allowed recovery on a theft policy, holding that although the unauthorized taking was not larceny, it was embraced within the term "theft" as in common thought and speech.<sup>9</sup>

In contrast to the rigorous majority requirement of a larcenous intent is the fluid state of the authorities on the analogous question of whether a "theft" comprehends the crime of obtaining property by false pretenses,<sup>10</sup> or that of misappropriation by a bailee.<sup>11</sup> At common law, "larceny by deceit"—that is, where property is acquired by fraud with a larcenous intent—is as much a theft as a stealthful taking,<sup>12</sup> though more difficult to establish. A criminal intent permanently to deprive the owner may be presumed in some instances,<sup>13</sup> but generally the burden of proof is upon the one charging lar-

4. *Baker v. Continental Ins. Co.*, 155 Kan. 26, 122 P. 2d 710 (1942); *Globe & Rutgers Fire Ins. Co. v. House*, 163 Tenn. 585, 45 S. W. 2d 55 (1932).

5. Some statutes make the unauthorized taking of an automobile punishable as larceny: KY. STAT. ANN. § 2739g-58 (Carroll, 1936); N. Y. PENAL LAW § 1293-a; TENN. CODE ANN. § 10948 (Williams, 1934). Others declare such taking a misdemeanor: ALA. CODE tit. 14, § 339 (1940); LA. STAT. ANN. tit. 42, § 5289.1 (Dart, 1939). Some merely state the penalty for conviction of unauthorized taking or use: IND. STAT. ANN. §§ 10-3010, 10-3012 (Burns, 1933); WIS. STAT. § 343:18 (1947).

6. See note 4 *supra*. *But cf.* *Hanes Funeral Home v. Dixie Fire Ins. Co.*, 216 N. C. 562, 5 S. E. 2d 820 (1939).

7. 163 Tenn. 585, 45 S. W. 2d 55 (1932).

8. In the principal case the court considered ME. REV. ST. c. 19, § 120, c. 118, § 25 (1944), and said that "unauthorized use" constituted only a misdemeanor, requiring no *animus furandi*, and was not included as "theft" in the policy.

9. *Pennsylvania Indemnity Fire Corp. v. Aldridge*, 117 F. 2d 774 (D. C. Cir. 1941), 41 COL. L. REV. 1113. *But cf.* *DeLong v. Massachusetts Ins. Co.*, 142 Misc. 654, 256 N. Y. Supp. 300 (Sup. Ct. 1932), *rev'd*, 238 App. Div. 760, 262 N. Y. Supp. 165 (4th Dep't 1933).

10. *James v. Phoenix Assur. Co.*, 75 Colo. 209, 225 Pac. 213 (1924); *Nugent v. Union Auto Ins. Co.*, 140 Ore. 61, 13 P. 2d 343 (1932); 16 IOWA L. REV. 281 (1931); 13 MINN. L. REV. 153 (1929); 17 ORE. L. REV. 345 (1938).

11. *Granger v. New Jersey Ins. Co.*, 108 Cal. App. 290, 291 Pac. 698 (1930); *Allen v. Berkshire Mut. Fire Ins. Co.*, 105 Vt. 471, 168 Atl. 698 (1933).

12. *Champion v. Chicago Fire & Marine Ins. Co.*, 141 Atl. 749 (N. J. 1928); *Home Ins. Co. v. Paul*, 128 Okla. 142, 261 Pac. 927 (1927); *Simpson v. Palmetto Fire Ins. Co.*, 145 S. C. 405, 143 S. E. 184 (1928); MILLER, CRIMINAL LAW § 112 (1934); 24 WORDS AND PHRASES 231 (Perm. ed. 1940).

ceny.<sup>14</sup> In either case, the ascertainment of the wrongdoer's intent still remains a question of fact,<sup>15</sup> and in close cases a verdict for the insured will be affirmed.<sup>16</sup>

As recognized in the principal case, the construction of contracts is traditionally a function of the court.<sup>17</sup> It is well established that contracts of insurance should be liberally construed in favor of the insured;<sup>18</sup> yet the meaning of "theft" is equally as well established. Insurance companies have shown by their adherence to the word "theft" in their policies that they accept the judicial interpretation of the word.<sup>19</sup> Were it changed by the courts, there would necessarily result a change in the language of policies or an increase in theft insurance rates.

#### INSURANCE—FAILURE OF INSURER TO SETTLE CLAIM—NEGLIGENCE OR BAD FAITH AS THE TEST FOR LIABILITY FOR EXCESS JUDGMENTS

The owner of a trucking business sued to recover damages from his liability insurer for the insurer's failure to settle a claim against him. The defendant had refused various offers to settle starting at \$1,113, although the insurance policy covered liability up to \$6,000. Final judgment of \$12,000 had been awarded the claimant in the accident case against the present plaintiff. The trial court gave judgment n.o.v. for the defendant insurer and the intermediate appellate court affirmed. *Held* (5-2), judgment reversed and cause remanded. The insurer is liable if it acted in bad faith (arbitrarily or capriciously), but not for mere negligence, in refusing to settle the claim. *Hart v. Republic Mutual Ins. Co.*, 87 N. E. 2d 347 (Ohio 1949).

The courts are in disagreement as to the standard to set for liability of

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13. "Indeed in the common practice of automobile thieves there is no intention of depriving the owner of it permanently. The thief's intention as indicated by his usual conduct is to use the car for a few hours or a few days and abandon it before the peril of his incriminating possession of it leads to his undoing." Dawson, C. J., in *Baker v. Continental Ins. Co.*, 155 Kan. 26, 28, 122 P. 2d 710, 712 (1942); *State v. Deal*, 64 N. C. 270 (1870). Also see Note, 152 A. L. R. 1100 (1944).

14. *People v. Payne*, 3 P. 2d 328 (Cal. App. 1931); *State v. Allen*, 56 Utah 37, 189 Pac. 84 (1920).

15. *Standard Chevrolet Co. v. Federal Hardware & Implement Mutuals*, 178 So. 642 (La. App. 1937); *Laird v. Home Ins. Co.*, 177 So. 603 (La. App. 1937); *Repp v. American Farmers' Ins. Co.*, 179 Minn. 167, 228 N. W. 605 (1930); *Rapaport v. American Cent. Ins. Co.*, 137 Wash. 236, 242 Pac. 40 (1926).

16. *Pask v. London Ins. Co.*, 211 Ill. App. 271 (1918); *Weir v. Central Nat. Ins. Co.*, 194 Iowa 446, 189 N. W. 794 (1922); *Miller v. Newark Fire Ins. Co.*, 12 La. App. 315, 125 So. 150 (1929); *Mullany v. Firemen's Ins. Co.*, 206 Minn. 29, 287 N. W. 118 (1939). For discussion on admissibility of evidence of previous criminal convictions in civil theft insurance cases, see 5 WIGMORE, EVIDENCE § 1671a (3d ed. 1940).

17. 9 WIGMORE, EVIDENCE § 2556 (3d ed. 1940); 3 WILLISTON, CONTRACTS § 616 (Rev. ed. 1936).

18. *Baker v. Continental Ins. Co.*, 155 Kan. 26, 122 P. 2d 710 (1942); *Globe & Rutgers Fire Ins. Co. v. House*, 163 Tenn. 585, 45 S. W. 2d 55 (1932).

19. 5 COUCH, CYCLOPEDIA OF INSURANCE LAW § 1176 (1929).

an insurer for its refusal to settle a claim against the insured.<sup>1</sup> And there is similar disagreement as to other problems in the field.<sup>2</sup> Some courts hold that in handling claims the insurer is the agent of the insured;<sup>3</sup> others say it is an independent contractor.<sup>4</sup> Some courts make a distinction between the act of defending suits against the insured and the act of negotiating settlements,<sup>5</sup> while others hold the relationship is the same in the two acts.<sup>6</sup> Although recovery has been sought for excess judgments on the basis of contract,<sup>7</sup> most courts hold that liability is on a tort basis.<sup>8</sup>

There is little disagreement with the position that an insurer is liable for negligence in conducting the defense of a suit against the insured.<sup>9</sup> But as to liability for refusing to settle, it has been said that the courts are divided into three groups:<sup>10</sup> (1) those which hold that the insurer is not liable for any amount above the maximum set by the policy, regardless of its conduct in refusing to settle;<sup>11</sup> (2) those which allow recovery only where there is

1. For a discussion of cases, see *Olympia Fields Country Club v. Bankers Indemnity Ins. Co.*, 325 Ill. App. 649, 60 N. E. 2d 896 (1st Dist. 1945); Notes, 34 A. L. R. 730 (1925), 37 A. L. R. 1484 (1925), 43 A. L. R. 326 (1926), 71 A. L. R. 1467, 1485 (1931), 131 A. L. R. 1499 (1941).

2. "Since the whole scheme of liability insurance was predicated on the legal concept of one's responsibility for the harmful consequences of his careless or wrongful acts or of those of his servants, it was also inevitable that these broader considerations of policy, of social expediencies, and of legal implications should come before the courts." McNeely, *The Genealogy of Liability Insurance Law*, 7 U. OF PITT. L. REV. 169, 196 (1941). See 9 MD. L. REV. 349, 356 (1948) (insurer as a public servant).

3. *E.g.*, *Douglas v. United States Fidelity & Guaranty Co.*, 81 N. H. 371, 127 Atl. 708, 37 A. L. R. 1477 (1924). Where the principal has full knowledge and gives his consent, the other party may be an agent although their personal interests are antagonistic. 1 MECH. AGENCY § 177 (2d ed. 1914). But see 13 U. OF CHI. L. REV. 105, 108 (1945).

4. *E.g.*, *Attleboro Mfg. Co. v. Frankfort Marine Ins. Co.*, 240 Fed. 573 (1st Cir. 1917); *Foremost Dairies v. Campbell Coal Co.*, 57 Ga. App. 500, 196 S. E. 279, 283 (1938). For discussion of the kinds of relationships created by an insurance contract, see Note, 8 MINN. L. REV. 151 (1924); 34 COL. L. REV. 511, 512 (1934); 31 ILL. L. REV. 116 (1936); 1 MO. L. REV. 198 (1936); 15 N. C. L. REV. 422 (1937).

5. *E.g.*, *Auto Mut. Indemnity Co. v. Shaw*, 134 Fla. 815, 184 So. 852 (1938). "Although the insurer may be an agent in defense of the suit, in the matter of settlement the relationship between the parties is contractual and not one of agency." 77 U. OF PA. L. REV. 289 (1928).

6. In cases where the plaintiff has alleged negligence in both defending and refusing to settle, the courts are not always clear as to whether relief was granted on the basis of negligence in defending or in refusing to settle or both. *E.g.*, *Ballard v. Ocean Accident & Guaranty Co.*, 86 F. 2d 449 (7th Cir. 1936); *Cavanaugh Bros. v. General Accident Assur. Corp.*, 79 N. H. 186, 106 Atl. 604 (1919).

7. *Belt Automobile Indemnity Ass'n v. Ensley Transfer & Supply Co.*, 211 Ala. 84, 99 So. 787 (1924).

8. *E.g.*, *Attleboro Mfg. Co. v. Frankfort Marine Insurance Co.*, 240 Fed. 573 (1st Cir. 1917); *Brassil v. Maryland Casualty Co.*, 210 N. Y. 235, 104 N. E. 622, 624, L. R. A. 1915A 629 (1914); Note, 48 MICH. L. REV. 95 (1949); 24 MICH. L. REV. 173 (1926). See Note, 131 A. L. R. 1499 (1941).

9. *E.g.*, *Auto Mut. Indemnity Co. v. Shaw*, 134 Fla. 815, 184 So. 852 (1938); *Douglas v. United States Fidelity & Guaranty Co.*, 81 N. H. 271, 127 Atl. 708, 37 A. L. R. 1477 (1924); 15 N. C. L. REV. 422 (1937).

10. *Georgia Casualty Co. v. Mann*, 242 Ky. 447, 46 S. W. 2d 777, 779 (1932); 62 HARV. L. REV. 104, 105 (1948).

11. *E.g.*, *Belt Automobile Indemnity Ass'n v. Ensley Transfer & Supply Co.*, 211 Ala. 84, 99 So. 787 (1924); *Auerbach v. Md. Casualty Co.*, 236 N. Y. 247, 140 N. E. 577, 28 A. L. R. 1294 (1923).

bad faith;<sup>12</sup> and (3) those which make negligence a basis for liability.<sup>13</sup> Commentators are in disagreement as to which is the majority rule.<sup>14</sup>

This division, however, is more apparent than real. The courts holding that there can be no recovery for the insurer's refusal to settle are uniform in their opinions, and the courts holding to the negligence rule generally are consistent in theirs; but courts following the bad-faith doctrine have set up standards which range from just beyond the no-recovery rule to a point overlapping with negligence. The result is that the standards form a continuum stretching from one extreme to the other.

The negligence standard is usually expressed as "that degree of care and diligence which an ordinarily prudent person would exercise in the management of his own business."<sup>15</sup> But there is no customary way of expressing a standard for determining whether the insurer has acted in bad faith. Indeed, there is no clear agreement as to what is meant by bad faith. Each of the following expressions has been used in an attempt to define the concept. The insurer must not be fraudulent or dishonest,<sup>16</sup> but bad faith cannot be based merely on impolitic conduct.<sup>17</sup> It takes something more than mere mistake to constitute bad faith.<sup>18</sup> The obligation is based upon principles of fair dealing, and the insurer must give equal consideration to the interests of the insured.<sup>19</sup> To act in good faith, the insurer must exercise reasonable diligence in learning the facts and its decision must be based on those facts.<sup>20</sup>

12. *E.g.*, *American Fidelity & Casualty Co. v. Nichols Co.*, 173 F. 2d 830 (10th Cir. 1949); *Brassil v. Maryland Casualty Co.*, 210 N. Y. 235, 104 N. E. 622, L. R. A. 1915A 629 (1914).

13. *Attleboro Mfg. Co. v. Frankfort Marine Ins. Co.*, 240 Fed. 573 (1st Cir. 1917); *Anderson v. Southern Surety Co.*, 107 Kan. 375, 191 Pac. 583, 21 A. L. R. 761 (1920).

14. Probably a majority of the courts follow the bad faith doctrine with its many variations. Notes, 71 A. L. R. 1467, 1485 (1931), 131 A. L. R. 1499, 1501 (1941). But see 8 APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4712 (1942): "It should be noted, however, that this bad faith rule is tending to become the minority rule, being displaced by the rule of negligence."

15. *E.g.*, *Ballard v. Ocean Accident & Guaranty Co.*, 86 F. 2d 449, 453 (7th Cir. 1936); *Auto Mut. Indemnity Co. v. Shaw*, 134 Fla. 815, 184 So. 852, 859 (1938).

16. *Maryland Casualty Co. v. Elmira Coal Co.*, 69 F. 2d 616, 618 (8th Cir. 1934); *Noshey v. American Automobile Ins. Co.*, 68 F. 2d 808, 811 (6th Cir. 1934); *Johnson v. Hardware Mut. Casualty Co.*, 109 Vt. 481, 1 A. 2d 817, 820 (1938); *Wisconsin Zinc Co. v. Fidelity and Deposit Co.*, 162 Wis. 39, 155 N. W. 1081, 1086 (1916).

17. See *Levin v. New England Casualty Co.*, 101 Misc. 402, 166 N. Y. Supp. 1055, 1057 (Sup. Ct. 1917) (concurring opinion), *aff'd*, 233 N. Y. 631, 135 N. E. 948 (1922).

18. *Mendota Electric Co. v. N. Y. Indemnity Co.*, 175 Minn. 181, 221 N. W. 61, 62 (1928); *Wynnewood Lumber Co. v. Travelers' Ins. Co.*, 173 N. C. 269, 91 S. E. 946, 947 (1917); *Johnson v. Hardware Mut. Casualty Co.*, 109 Vt. 481, 1 A. 2d 817, 820 (1938).

19. *American Fidelity and Casualty Co. v. Nichols Co.*, 173 F. 2d 830, 832 (10th Cir. 1949); *Farm Bureau Mut. Ins. Co. v. Violano*, 123 F. 2d 692, 696 (2d Cir. 1941), *cert. denied*, 316 U. S. 672 (1942); *American Mut. Liability Ins. Co. v. Cooper*, 61 F. 2d 446, 448 (5th Cir. 1932); *McCombs v. Fidelity & Casualty Co.*, 231 Mo. App. 1206, 89 S. W. 2d 114, 122 (1935); *Brassil v. Maryland Casualty Co.*, 210 N. Y. 235, 104 N. E. 622, 624, L. R. A. 1915A 629 (1914); *National Mutual Casualty Co. v. Britt*, 200 P. 2d 407, 411 (Okla. 1948); *Johnson v. Hardware Mut. Casualty Co.*, 109 Vt. 481, 1 A. 2d 817, 820 (1938). *Contra*: *Wisconsin Zinc Co. v. Fidelity & Deposit Co.*, 162 Wis. 39, 155 N. W. 1081, 1087 (1916).

20. A good faith decision not to settle must be preceded by "the exercise of that degree of care and diligence which a man of ordinary care and prudence would exercise in the investigation and adjustment of claims . . ." *Hilker v. Western Automobile Ins. Co.*,

It has no right to abuse its power by acting recklessly and contumaciously in refusing to settle;<sup>21</sup> and it must not act capriciously<sup>22</sup> on the ground there was an element of chance that the insured might win the suit brought against him by the claimant.<sup>23</sup> "It could not blindly and arbitrarily refuse to make settlement."<sup>24</sup> It could refuse only "upon reasonable ground for the belief that the amount required to effect a settlement is excessive."<sup>25</sup>

Regardless of the rule followed, the courts generally hold that it is for the jury to decide whether there is liability,<sup>26</sup> unless the evidence is so insufficient that the court may decide it as a "matter of law."<sup>27</sup> The administrative problem is a serious one.<sup>28</sup> If the negligence rule is followed, the jury is likely to find against the insurer because hindsight indicates that it erred in refusing to settle. Yet the negligence rule offers a standard which is easier to present to a jury.<sup>29</sup> The bad faith rule would allow the insurer more freedom in deciding whether or not to settle, but the courts have not clearly defined a standard by which to explain to a jury what is meant by "bad faith."

In the instant case the court said that a refusal to settle must not be based on an arbitrary or capricious belief that the insured would not be held liable, and that "conduct of the insurer must be based on circumstances that furnish reasonable justification therefor."<sup>30</sup> These statements do little to clear up the problem of instructing the jury in the meaning of bad faith, but they fit well into the pattern of allowing recovery for bad faith only—a bad faith defined to be close to negligence in effect.

204 Wis. 1, 235 N. W. 413, 415 (1931). See *National Mutual Casualty Co. v. Britt*, 200 P. 2d 407, 412 (Okla. 1948).

21. *Wisconsin Zinc Co. v. Fidelity & Deposit Co.*, 162 Wis. 39, 155 N. W. 1081, 1087 (1916).

22. *Farm Bureau Mut. Ins. Co. v. Violano*, 123 F. 2d 692, 696 (2d Cir. 1941), *cert. denied*, 316 U. S. 672 (1942).

23. *McCombs v. Fidelity & Casualty Co.*, 213 Mo. App. 1206, 89 S. W. 2d 114, 122 (1935); *National Mutual Casualty Co. v. Britt*, 200 P. 2d 407, 412 (Okla. 1948).

24. *Maryland Casualty Co. v. Elmira Coal Co.*, 69 F. 2d 616, 618 (8th Cir. 1934).

25. *Mendota Electric Co. v. N. Y. Indemnity Co.*, 175 Minn. 181, 221 N. W. 61 (1928). In 15 MARQ. L. REV. 225, 226 (1931), it is suggested that proof of negligence is sufficient to find bad faith.

26. *E.g.*, *Noshey v. American Automobile Ins. Co.*, 68 F. 2d 808, 811 (6th Cir. 1934); *Douglas v. United States Fidelity & Guaranty Co.*, 81 N. H. 371, 127 Atl. 708, 710, 37 A. L. R. 1477, 1480 (1924); Note, 131 A. L. R. 1499, 1507 (1941).

27. *E.g.*, *Burnham v. Commercial Casualty Ins. Co.*, 10 Wash. 2d 624, 117 P. 2d 644 (1941).

28. *Appleman, Duty of Liability Insurer to Compromise Litigation*, 26 Ky. L. J. 100, 111 (1938) (jury incompetent to decide).

29. 39 YALE L. J. 283, 285 (1929) (application of the negligence rule is at least as satisfactory as the good faith test).

For a full discussion of the administrative problem see 25 TEXAS L. REV. 423 (1947).

30. 87 N. E. 2d at 349. The court also said that a jury might find bad faith because the traffic injuries were serious and permanent; the insurer had no eyewitness to sustain its claim of non-liability; the first offer of settlement was small; the insured's trucks were seized while the litigation was in progress; and because the president of the insurer corporation failed to keep an engagement with the insured to investigate the claim.

## LANDLORD AND TENANT—COVENANT FOR QUIET ENJOYMENT IN A LEASE—BREACH WITHOUT EVICTION

Complainant lessee, while still in possession of leased premises, sought damages for breach of a covenant for quiet enjoyment upon a showing that defective plumbing in upstairs apartments for which defendant lessor was responsible caused water to seep into the leased premises and damage complainant's merchandise. *Held*, defendant's demurrer was properly overruled; eviction is not prerequisite to maintenance of a suit for breach of a covenant for quiet enjoyment. *Moe v. Sprankle*, 221 S. W. 2d 712 (Tenn. App. E. S. 1948).

A covenant for quiet enjoyment in a lease affords the tenant protection in his quiet and beneficial possession of the premises against acts of the lessor, those claiming through or under him, and persons lawfully claiming under a title paramount to that of the lessor.<sup>1</sup>

Even though the tenant is deprived of beneficial possession, the great weight of authority holds that no action for breach of the covenant will lie so long as the tenant continues in actual possession.<sup>2</sup> In all jurisdictions physical expulsion constitutes an eviction and thus is a breach; this is true even though the lessee is excluded from only a part of the demised premises, if the act indicates intent to deprive the lessee permanently of the portion taken.<sup>3</sup> Courts also recognize as a breach of the covenant a constructive eviction which arises when the lessor, one claiming through or under him, or one claiming lawfully under a paramount title, engages in conduct which materially reduces the lessee's beneficial possession of the leased premises and which is followed by the tenant's vacating the whole premises.<sup>4</sup> Most courts say that there can be no constructive eviction without an actual surrender of possession. Where the equities strongly favor the lessee, however, many of these courts allow recovery

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1. Not included are the acts of strangers, even though they be tenants of other portions of the same property. *Evans v. Williams*, 291 Ky. 484, 165 S. W. 2d 52 (1942); *Weinstein v. Barrasso*, 139 Tenn. 593, 202 S. W. 920, L. R. A. 1918D 1174 (1918); *Stephens Mfg. Co. v. Buntin*, 27 Tenn. App. 411, 181 S. W. 2d 634 (W. S. 1944).

2. *Callahan v. Goldman*, 216 Mass. 238, 103 N. E. 689 (1913); *Levy v. Cohen*, 27 N. Y. S. 2d 385 (New Rochelle City Ct. 1941); *Hayes v. Ferguson*, 83 Tenn. 1, 54 Am. Rep. 398 (1885); *Heywood v. Ogden Motor Car Co.*, 71 Utah 417, 266 Pac. 1040, 62 A. L. R. 1232 (1928); 2 REEVES, REAL PROPERTY § 592 (1909); 1 TAYLOR, LANDLORD AND TENANT § 304 (8th ed., Buswell, 1887); 3 THOMPSON, REAL PROPERTY § 1285 (Perm. ed. 1940); 2 UNDERHILL, LANDLORD AND TENANT § 428 (1909).

3. *E.g.*, *Landon v. Hill*, 136 Cal. App. 560, 29 P. 2d 281 (1934); *Sherman v. Williams*, 113 Mass. 481, 18 Am. Rep. 522 (1873); *Royce v. Guggenheim*, 106 Mass. 201 (1870); 3 THOMPSON, REAL PROPERTY § 1285 (Perm. ed. 1940). In this type of case the tenant's liability for rent ceases until he is restored to possession of the whole premises, the rent for the portion retained being uncollectible because the landlord will not be permitted to apportion his own wrong. *Morris v. Kettle*, 57 N. J. L. 218, 30 Atl. 879 (Sup. Ct. 1895).

4. *Leiferman v. Osten*, 167 Ill. 93, 47 N. E. 203, 39 L. R. A. 156 (1897); *Keating v. Springer*, 146 Ill. 481, 34 N. E. 805, 22 L. R. A. 544, 37 Am. St. Rep. 175 (1893); *Rome v. Johnson*, 274 Mass. 444, 174 N. E. 716 (1931); *Callahan v. Goldman*, 216 Mass. 238, 103 N. E. 689 (1913); *see Weinstein v. Barrasso*, 139 Tenn. 593, 598, 202 S. W. 920, 922, L. R. A. 1918D 1174 (1918).

on almost fictitious constructive eviction, or insignificant partial actual eviction,<sup>5</sup> or sidestep the question and decide the case on other grounds.<sup>6</sup>

The instant case makes the distinction that eviction is necessary where the tenant seeks to deny his liability for rent, but not where he is suing for damages not directly involving rent. This case and those few holding in accord with it<sup>7</sup> say in essence that if the facts would warrant the tenant's giving up possession, he may use them as a basis for a suit for damages, or as a basis for recoupment in a suit by the lessor for rent, even though they will not of themselves remove the liability for rent.

While it is doubted, due to well settled precedents on this point, that many courts will adopt the view expressed in the instant case, it seems to be logically sound. There seems to be no good reason for exempting from the scope of the covenant acts of the lessor which the tenant would be warranted in treating as a constructive eviction although he elects, for reasons of his own, to retain the possession of the premises in their less beneficial state.

#### REAL PROPERTY—ADVERSE POSSESSION BY THIRD PARTY— RUNNING OF STATUTE OF LIMITATIONS AGAINST REMAINDERMAN BEFORE DEATH OF LIFE TENANT

In 1889 one Hopson deeded a tract of land to his daughter-in-law for life, remainder to plaintiffs. The life tenant was dispossessed in 1897 by the defendant, who claimed title by virtue of a mortgage sale, the validity of

5. *McAlester v. Landers*, 70 Cal. 79, 11 Pac. 505 (1886); *Herpolsheimer v. Funke*, 1 Neb. Unoff. 471, 95 N. W. 688 (1901); *Hannan v. Harper*, 189 Wis. 588, 208 N. W. 255 (1926). "In some cases . . . in which there is stated to be an eviction constituting a breach of the covenant, it does not appear that the lessor's [lessee's ?] possession of the premises, as distinct from his right to enjoyment, had been in any way affected. . . ." 1 TIFFANY, REAL PROPERTY 141 (3d ed., Jones, 1939).

6. *Winchester v. O'Brien*, 266 Mass. 33, 164 N. E. 807, 64 A. L. R. 895 (1929). Cases allowing recovery on the covenant but not discussing vacation of the premises include the following: *Brown v. Holyoke Water-Power Co.*, 152 Mass. 463, 25 N. E. 966, 23 Am. St. Rep. 844 (1890); *York v. Steward*, 21 Mont. 515, 55 Pac. 29, 43 L. R. A. 125 (1898); *Washington Chocolate Co. v. Kent*, 28 Wash. 2d 448, 183 P. 2d 514 (1947).

7. The same distinction is made in *Keating v. Springer*, 146 Ill. 481, 34 N. E. 805, 22 L. R. A. 544, 37 Am. St. Rep. 175 (1893); see *Metropole Const. Co. v. Hartigan*, 83 N. J. L. 409, 85 Atl. 313, 314 (Sup. Ct. 1912); *Mecker v. Spalsbury*, 66 N. J. L. 60, 48 Atl. 1026, 1027 (Sup. Ct. 1901). *Contra*: *Callahan v. Goldman*, 216 Mass. 238, 103 N. E. 689 (1913). "While it has been said that the lessor's act must, for this purpose, amount to an eviction, and that his wrongful entry on the premises without claiming title, or without doing such acts as amount to an assertion of title, is insufficient, because constituting merely a trespass not amounting to an eviction, the trend of the later authorities is apparently to the effect that any intentional interference by the covenantor with the covenantee's enjoyment and use of the premises constitutes a breach of the covenant, regardless of whether it results in an eviction." 4 TIFFANY, REAL PROPERTY 151 (3d ed., Jones, 1939). "Acts on the part of the lessor which interfere with the lessee's possession or enjoyment constitute a breach although the lessee does not surrender possession. . . ." BENNETT, LANDLORD AND TENANT 296 (1939). The instant case encroaches on the broad rule that there is no breach without an eviction, announced in *Hayes v. Ferguson*, 83 Tenn. 1, 54 Am. Rep. 398 (1885), but since that rule was largely dictum as applied to the facts of that case, the instant case may be considered to modify rather than to be in direct conflict with the previous case.

which the court deemed it unnecessary to decide. Defendant had held actual, open, notorious and exclusive possession for 49 years immediately preceding the commencement of this action. Plaintiffs had actual knowledge at all times of the existence and character of defendant's possession. The life tenant died in 1940 and the plaintiff-remaindermen brought this action to quiet title in themselves in 1947. Defendant pleaded the Kentucky 15-year statute of limitations.<sup>1</sup> *Held*, judgment for defendant affirmed. The statute of limitations began to run against the life tenant at the time of the commencement of the adverse possession. After 15 years the life estate was extinguished and the statute began to run against the remaindermen. *Brittenum v. Cunningham*, 310 Ky. 131, 220 S. W. 2d 100 (1949).

Statutes of limitations do not begin to run against rights of action until those rights become legally enforceable.<sup>2</sup> "So, as against one who has a remainder upon an estate for life, the statute does not ordinarily begin to run in favor of a third person, who takes wrongful possession during the life tenancy, until the termination of the estate for life."<sup>3</sup> The difficult question is what constitutes a termination of the life estate? The court in the principal case held that possession adverse to the life tenant for the statutory period destroyed the life estate and thus accelerated the remaindermen's right of possession.<sup>4</sup> However, according to the great weight of authority, "no right to possession arises on the part of the remainderman until the actual death of the original tenant for life, even though the remainder be vested and though the statute has run against the original tenant for life."<sup>5</sup> Thus, in cases where the remainderman has sued for possession after the life tenant has been barred, but prior to his death, courts have generally held that the action would not lie.<sup>6</sup> Consistently with this view, where the remainderman has sued for possession after the death of the life tenant, courts have held that possession did not become adverse as to the remainderman until the actual death of the life tenant.<sup>7</sup>

1. KY. REV. STAT. ANN. § 413.010 (1943).

2. 4 TIFFANY, REAL PROPERTY § 1152 (3d ed., Jones, 1939); 33 AM. JUR., *Life Estates, Remainders and Reversions* § 187 (1941).

3. TIFFANY, REAL PROPERTY § 1152 (3d ed., Jones, 1939).

4. 220 S. W. 2d at 103.

5. Kales, *Adverse Possession Against Reversioners and Remaindermen*, 14 ILL. L. REV. 124, 127 (1920); 12 MISS. L. J. 258 (1939).

6. *E.g.*, *Gregg v. Tesson*, 1 Black 150, 17 L. Ed. 74 (U. S. 1861); *Higgins v. Crosby*, 40 Ill. 260 (1866); *Jacobs v. Rice*, 33 Ill. 370 (1864); *Baker v. Oakwood*, 123 N. Y. 16 (1890); *Thompson's Heirs v. Green*, 4 Ohio St. 216 (1854); *Moore v. Luce*, 29 Pa. 260 (1857).

7. "[B]ut it is a well settled rule of law, that one claiming in reversion, though he may, if he will, take notice of any disseisin done to the tenant of the particular estate, is yet not obliged so to do, but may wait till his right of entry accrues, upon the death of the tenant for life, and may then enter, how long soever the particular tenant may have been disseised." *Tilson v. Thompson*, 27 Mass. 359, 362, 10 Pick. 45, 46 (1830); *Blakeney v. DuBose*, 167 Ala. 627, 52 So. 746 (1910); *Jackson v. Claypool*, 179 Ky. 662, 201 S. W. 2 (1918); *Carter v. Moore*, 183 Miss. 112, 183 So. 512 (1938); *Webster v. Pittsburg, C. & T. R. R.*, 78 Ohio St. 87, 84 N. E. 592, 15 L. R. A. (N. S.) 1154 (1908); *Blodgett v. Davenport*, 219 Wis. 596, 263 N. W. 629 (1935).

It is pertinent to consider the nature of the estate which an adverse possessor holds, under this general rule, after the statute of limitations has run against the life tenant but prior to the life tenant's death. He cannot acquire the estate of the life tenant, because the effect of the running of the statute is to *extinguish* the title of him who is barred, and to create a new and original title in the adverse possessor.<sup>8</sup> It is generally said that he acquires a fee simple title good as against everyone except the remainderman.<sup>9</sup> But does this not result in so changing the relation between the remainderman and the adverse possessor as to prejudice the remainderman's rights? "For instance, what would have been waste on the part of a life tenant would not be waste when committed by the holder of a fee, the remainderman being as to him merely one entitled to re-enter upon a future contingency, or the holder of what is in appearance at least a possibility of reverter."<sup>10</sup>

It is apparent that these difficulties do not arise under the view adopted by the court in the principal case. Here too, the adverse possessor holds a fee simple good as against everyone except the remainderman, but, unlike the situation described above, the rights of the remainderman are not prejudiced thereby, for he can maintain an action to secure possession of the land. By the running of the statute, the life estate is as completely extinguished as though the life tenant were dead.<sup>11</sup> And if the remainderman neglects to assert his right to possession for the statutory period after the extinguishment of the life estate, the title is quieted in the adverse possessor, thus accomplishing the ultimate purpose of all statutes of limitations.<sup>12</sup>

In the instant case, the plaintiffs had actual knowledge of all the attendant circumstances of defendant's possession. It is submitted, however, that plaintiffs' knowledge or lack of knowledge should have been immaterial to the decision of this case.<sup>13</sup>

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8. "Although the effect of the statute is to divest the title of the former owner, and to vest title in the wrongful possessor, the statute does not, it appears, transfer the former title, but the wrongful possessor acquires an entirely new title." 4 TIFFANY, REAL PROPERTY § 1172 (3d ed., Jones, 1939); Kales, *supra* note 5, at 127.

9. 4 TIFFANY, REAL PROPERTY § 1173 (3d ed., Jones, 1939).

10. Kales, *supra* note 5, at 127-28; Note, 4 ILL. L. REV. 429 (1910).

11. 220 S. W. 2d at 103.

12. "The great purpose [of statutes of limitations] is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing." Ballantine, *Title By Adverse Possession*, 32 HARV. L. REV. 135 (1919).

13. The rule is generally established that mere ignorance of the existence of a cause of action, or of facts which constitute a cause of action will not postpone the operation of the statute of limitations. *E.g.*, Hudson v. Moore, 239 Ala. 130, 194 So. 147 (1940) (tort); Miller v. Industrial Commission, 106 Colo. 364, 105 P. 2d 404 (1940) (workmen's compensation); Kennedy v. Johns-Manville Sales Corp., 135 Conn. 176, 62 A. 2d 771 (1948) (tort); Wilcox v. Sams, 213 Ky. 696, 281 S. W. 832 (1926) (real property); Kitchen-Miller Co. v. Kern, 170 Tenn. 10, 91 S. W. 2d 291 (1936) (real property); 34 AM. JUR., *Limitation of Actions* § 230 (1941); 54 C. J. S., *Limitation of Actions* § 205 (1948).

The theory of this case that the running of the statute of limitations against the life tenant so effectively terminates the life estate as to immediately start the statute running against the remainderman is not unique;<sup>14</sup> but it is a departure from the lines of reasoning generally followed by the courts heretofore.<sup>15</sup> As the view adopted by this court more effectively serves the purposes of statutes of limitations and more adequately achieves the desired policy considerations, it would appear to be more desirable than the generally accepted doctrine which allows the statute to run only upon the death of the life tenant.

#### REAL PROPERTY—ADVERSE POSSESSION—MISTAKE IN BOUNDARY LINES

Plaintiffs claimed a strip of land by adverse possession. Their predecessors had inclosed this land with their own in the mistaken belief that it was within their true boundary line. It was so held and used continuously for 40 years. A temporary writ of injunction was issued to prevent the defendants from tearing down the existing fence. *Held*, writ made permanent. Occupying property under an honest mistake does not prevent the possession from being adverse and ripening into title. *Liberto v. Steel*, 221 S. W. 2d 701 (Tenn. 1949).

The states are in conflict upon the state of mind required for adverse possession. Some American jurisdictions hold that subjective intent to claim regardless of title is essential and that possession under a mistaken belief as to the true boundary line is not adverse.<sup>1</sup> The majority of jurisdictions, however, hold that subjective intention is immaterial.<sup>2</sup> This latter view gives full force to the doctrine of adverse possession<sup>3</sup> and eliminates the difficulty of determining what the possessor would have intended had he known the facts to be otherwise. Possession for a long period of time leads to a presumption of the existence of a legal right in land,<sup>4</sup> and from a practical stand-

14. See *Kibbe v. Ditto*, 93 U. S. 674, 23 L. Ed. 1005 (1876); *Castner v. Walrod*, 83 Ill. 171, 25 Am. Rep. 369 (1876).

15. Cases cited in notes 6 and 7 *supra*; *Kale*, *supra* note 5, at 127.

1. *Evert v. Turner*, 184 Iowa 1253, 169 N. W. 625 (1918); *Wilson v. Pum Ze*, 167 Kan. 31, 204 P. 2d 723 (1949); *Preble v. Maine Cent. R. R.*, 85 Me. 260, 27 Atl. 149 (1893); *Newton v. McKeel*, 142 Ore. 674, 21 P. 2d 206 (1933); 4 *TIFFANY, REAL PROPERTY* § 1159 (3d ed., Jones, 1939).

2. *Guy v. Lancaster*, 250 Ala. 287, 34 So. 2d 499 (1948); *Pitts v. Pitts*, 213 Ark. 379, 210 S. W. 2d 502 (1948); *Vade v. Sickler*, 118 Colo. 236, 195 P. 2d 390 (1948); *French v. Pearce*, 8 Conn. 439, 21 Am. Dec. 680 (1831); *Bridges v. Brackett*, 54 S. E. 2d 642 (Ga. 1949); *Scoville v. Burns*, 306 Ky. 315, 207 S. W. 2d 756 (1948); *Landers v. Thompson*, 356 Mo. 1169, 205 S. W. 2d 544 (1947); *Hallowell v. Borchers*, 150 Neb. 322, 34 N. W. 2d 404 (1948); *Menzner v. Tracy*, 247 Wis. 245, 19 N. W. 2d 257 (1945). See Note, 97 A. L. R. 14, 58 (1935); 2 C. J. S., *Adverse Possession* § 84 (1936).

3. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135 (1918).

4. See note 15 *infra*; *Hackett*, *Judicial Conflict—Mistake in Boundary Lines*, 9 HARV. L. REV. 464, 469 (1896).

point the mistaken belief of the possessor should be immaterial, allowing what has factually happened to govern.<sup>5</sup>

To depend heavily upon what the mental status of the possessor would have been had he known the facts disregards the very purposes which the doctrine of adverse possession was designed to achieve.<sup>6</sup> Statutes of limitations were drawn as statutes of repose to prevent assertion of claims after the evidence had disappeared, to give effect to the interest of the community in the security of titles, and to give protection to the ostensible owner of the land over a long period of time.<sup>7</sup> A possessor's use and occupation of land which he believes to be his own is hostile to all the world. The fallacy in relying upon "subjective intention" lies in placing too much emphasis upon what the innocent mistaken possessor would have intended had the facts been known to him, and too little emphasis upon the real facts—the actual, visible, and notorious possession and use of the land under a mistaken claim of right. What a person has actually done should be given greater weight than what he would have done had he not been mistaken.<sup>8</sup>

The prevailing rule in Tennessee, established first in *Erck v. Church*,<sup>9</sup> is in accord with the majority rule in stating that possession of land under an honest mistake as to the boundary line will ripen into title when held and used for the statutory period. It was said in effect that the visible and physical fact of possession should not be overcome by the mere refinements of what the possessor would have done had the facts been known to him, because in that event the law would be more favorable to the dishonest intentional wrongdoer than to the possessor under an honest mistake.<sup>10</sup> The rule thus promulgated was reaffirmed and followed in *Williams v. Hewitt*,<sup>11</sup> which sought to distinguish all the preceding cases thought to be in conflict.<sup>12</sup> However, in *Buchanan v. Nixon*,<sup>13</sup> emphasis was placed upon hostile subjective intention,

5. For further discussion on this subject see Bordwell, *Mistake and Adverse Possession*, 7 IOWA L. BULL. 129 (1922); Darling, *Adverse Possession in Boundary Cases*, 19 ORE. L. REV. 117 (1940); Fuller, *Adverse Possession—Occupying of Another's Land Under Mistake as to Location of a Boundary*, 7 ORE. L. REV. 329 (1928); 1 ALA. L. REV. 80 (1948); 10 COL. L. REV. 665 (1910); 14 FORDHAM L. REV. 219 (1945); 26 KY. L. J. 248 (1938); 11 MINN. L. REV. 457 (1927); 11 ROCKY MT. L. REV. 214 (1939); 16 TEXAS L. REV. 562 (1938); 4 WIS. L. REV. 41 (1926).

6. Hackett, *Judicial Conflict—Mistake in Boundary Lines*, 9 HARV. L. REV. 464 (1896).  
7. 4 TIFFANY, REAL PROPERTY § 1134 (3d ed., Jones, 1939); 15 VA. L. REV. 498 (1929); 12 VA. L. REV. 675 (1926).

8. *French v. Pearce*, 8 Conn. 439, 21 Am. Dec. 680 (1831); *Ovig v. Morrison*, 142 Wis. 243, 125 N. W. 449 (1910); 17 N. Y. U. L. Q. REV. 44 (1939); 1 R. C. L., *Adverse Possession* § 11 (1914).

9. 87 Tenn. 575, 11 S. W. 794 (1889) (subjective intention held immaterial but two successive adverse possessors not allowed to tack their holding periods).

10. *Id.* at 580, 11 S. W. at 795.

11. 128 Tenn. 689, 164 S. W. 1198 (1914) (adverse claimant inclosed adjoining land).

12. *Id.* at 691, 164 S. W. at 1199 (distinction made "between an accidental possession held by actual inclosure, and an accidental possession of a part of a large tract, and a claim of actual possession of the entire boundary under color of title").

13. 163 Tenn. 364, 43 S. W. 2d 380, 80 A. L. R. 151 (1931) (owner of tract excluded portion of his land by fence and neighbor built garage along the incorrect fence line; neighbor held not to have possession adversely because of the mistake).

and it was said that if a mistake was made, where the intent was to hold only to the true boundary line, then the possession would not be adverse.<sup>14</sup> The difficulty with this case, as pointed out in subsequent decisions,<sup>15</sup> is that it disregards the possessor's actual intent and emphasizes what would have been his intent had he known the facts. The instant case neither expressly overrules nor expressly affirms *Buchanan v. Nixon*, but since actual possession and use are held the determining factors in mistaken boundary line cases, the force of that decision must be regarded as somewhat weakened. In the *Buchanan* case an attempt was made to distinguish between cases where the adverse possessor had inclosed land of his neighbor within his fence and cases where the owner of land has accidentally failed to inclose all of his own land; in the latter cases it was said that one using the uninclosed portion did not hold adversely to the true owner unless he held with hostile intention. Since *Erck v. Church* and *Williams v. Hewitt* involved inclosure by the adverse claimant, the court in the *Buchanan* case regarded them as distinguishable and stated that the rule of those cases would be confined closely to the factual situation presented in them.<sup>16</sup> While the principal case falls within that factual pattern, its emphasis upon actual possession rather than subjective intention seems to indicate that in the future it may not be important whether the adverse claimant or the true owner establishes the boundary line.

#### TAXATION—EXEMPTION OF PROPERTY USED FOR CHARITABLE PURPOSES—APARTMENTS RENTED TO DISABLED VETERANS BELOW COST

Plaintiff, a corporation not for profit, owned apartment buildings which it rented to disabled veterans and their families at a rental below cost. Plaintiff applied for exemption of this property from state taxation under a statute<sup>1</sup> which allowed exemption of property used exclusively for charitable purposes. *Held* (5-2), exemption denied on the ground that the use of the property was primarily for furnishing low-rent housing and not exclusively for charitable purposes. *Beerman Foundation, Inc. v. Board of Tax Appeals*, 87 N. E. 2d 474 (Ohio 1949).

Generally throughout the states, provision is made for the exemption from state taxation of property used for charitable purposes.<sup>2</sup> However, by

14. *Id.* at 369, 43 S. W. 2d at 382, 80 A. L. R. at 153.

15. *Gibson v. Shular*, 29 Tenn. App. 166, 169, 194 S. W. 2d 865 (E. S. 1946) (adverse claimant included adjoining land within his fence; subjective intention held immaterial and *Buchanan* case held distinguishable on its facts); *People v. Hagaman*, 215 S. W. 2d 827, 829 (Tenn. App. E. S. 1948) (stating that the distinction made in *Williams v. Hewitt* was overlooked in the *Buchanan* case). See Note, 80 A. L. R. 155, 157 (1932).

16. *Buchanan v. Nixon*, 163 Tenn. 364, 367, 435 S. W. 2d 380, 80 A. L. R. 151 (1931).

1. OHIO GEN. CODE ANN. § 5353 (1945).

2. 51 AM. JUR., *Taxation* § 606 (1944); 2 COOLEY, *TAXATION* § 682 (4th ed., Nichols, 1924). For general discussion of tax exemption provisions in the various states, see Baker,

the great weight of authority, property owned by a charitable institution but rented out or otherwise held for revenue is not entitled to exemption, even though the funds derived from such use are devoted to the purposes of the institution claiming the exemption.<sup>3</sup> This rule was prompted by a feeling that property used in competition with commercial enterprises ought to share the burden of taxation with all other commercially used property.<sup>4</sup> That the rule excludes from exemption more than was intended to be excluded by it is evidenced by the fact that in certain instances it is ignored by the very courts which declared it.<sup>5</sup>

In the case of hospitals and charitable homes particularly, it is a well established principle that the buildings used by such institutions may be exempt even though those inmates who are able to pay for the benefits afforded them are required to do so, if no profit is made by the institution and the amounts received are applied in furthering the purposes of the institution.<sup>6</sup> From this, many courts have concluded that it is also immaterial if *all* recipients of benefits are required to pay for them, where the amount received does not exceed the expenses and the institution is not maintained for profit.<sup>7</sup> In either instance, it is clear that the property yields a return, yet such revenue is apparently regarded as incidental to the primary use of the property.

In the case of public housing projects for low-income families, the property is clearly "rented out" to individual families, yet here, too, the

*Tax Exemption Statutes*, 7 TEXAS L. REV. 50 (1928); Hughes, *Tax Exemptions*, 13 TENN. L. REV. 79 (1935). For a discussion of tax exemptions of charitable institutions, see Heisel, *Exemption from Taxation of Property Used for Religious, Educational, and Charitable Purposes in Ohio*, 3 U. OF CIN. L. REV. 40 (1929); Notes, 35 ILL. L. REV. 861 (1941), 80 U. OF PA. L. REV. 724 (1932). Similar provisions are often made for the exemption of property used for educational or religious purposes, and for public purposes. Since in all such cases, the problems of *use* and of *purpose* are substantially similar, the material cited herein is not always restricted to that involving only charitable institutions.

3. *People ex rel. Baldwin v. Jessamine Withers Home*, 312 Ill. 136, 143 N. E. 414, 34 A. L. R. 628 (1924); *Fitterer v. Crawford*, 157 Mo. 51, 57 S. W. 532, 50 L. R. A. 191 (1900). *Cf. City of Mattoon v. Graham*, 386 Ill. 180, 53 N. E. 2d 955 (1944) (municipally-owned property not used for municipal purposes), where the court said, "If property, however owned, is let for a return, it is used for profit and so far as its liability to the burden of taxation is concerned, it is irrelevant whether the owner makes a profit or sustains a loss." 53 N. E. 2d at 958. *But cf. Vanderbilt University v. Cheney*, 116 Tenn. 259, 94 S. W. 90 (1906). See 51 AM. JUR., *Taxation* § 608 (1944); 2 COOLEY, *TAXATION* § 686 (4th ed., Nichols, 1924). For collections of cases, see Notes, 34 A. L. R. 659 (1925), 62 A. L. R. 334 (1929), 108 A. L. R. 292 (1937), 50 L. R. A. (N. S.) 1197 (1914).

4. See Note, 80 U. OF PA. L. REV. 724, 728 (1932).

5. See *infra* notes 6, 7 and 8.

6. *Dayton v. Speers Hospital*, 165 Ky. 56, 176 S. W. 361, L. R. A. 1917B 779, Ann. Cas. 1917B 275 (1917); *O'Brien v. Physicians' Hospital Ass'n*, 96 Ohio St. 1, 116 N. E. 975, L. R. A. 1917F 741 (1917); *Tulsa County v. St. John's Hospital*, 191 P. 2d 983 (Okla. 1948). See 51 AM. JUR., *Taxation* §§ 602, 625, 636 (1944); 2 COOLEY, *TAXATION* § 739 (4th ed., Nichols, 1924).

7. *Bishop and Chapter v. Treasurer*, 37 Colo. 378, 86 Pac. 1021 (1906); *Franklin Square House v. Boston*, 188 Mass. 409, 74 N. E. 675 (1905); *City of Asbury Park v. Salvation Army*, 26 N. J. Misc. 170, 58 A. 2d 216 (Dep't of Tax. and Fin. 1948); *Webster Apartments v. New York*, 118 Misc. 91, 193 N. Y. Supp. 650 (Sup. Ct. 1922). *Contra: Guild of St. Barnabas v. Board of Tax Appeals*, 150 Ohio St. 484, 83 N. E. 2d 229 (1948);

rule is not usually invoked. Where the property of public housing authorities has not been exempted from taxation by specific legislation, the courts have almost universally found as a basis for exemption that the property is used either for public or for charitable purposes.<sup>8</sup>

These cases seem to indicate a growing realization that the yielding of income need not necessarily render the use of property commercial. In other words, property may be used to serve a charitable or any other non-commercial purpose even though some payment of money is involved. Certainly there is no appreciable difference in the ultimate benefit to society when the property is used to provide free lodging accommodations for suitable objects of charity,<sup>9</sup> and when it is employed in the manner and for the purposes claimed by plaintiff in the principal case. Yet the Ohio court has consistently held to the rule that property rented out or otherwise held for revenue is not entitled to exemption.<sup>10</sup> The holding in the principal case is only one of several such holdings which have resulted from this rigid adherence to a rule that seems too broad for realistic application to all situations.

#### TORTS—LIABILITY OF MANUFACTURER OF CHEMICAL DUST— IMPOSITION OF STRICT LIABILITY FOR PROPERTY DAMAGE

When the vendee of a new chemical dust known as 2-4-D sprayed his rice crop by airplane, part of the substance drifted three-quarters of a mile through the air to the plaintiff's cotton field, severely damaging it. No tests had been made by the manufacturer to determine the floating quality of 2-4-D though he knew and had informed the vendee of the product's injurious effect on cotton plants. Evidence showed that no similar dust sprayed by air had ever spread more than 150 feet. The vendee, when sued, joined the manufacturer as a co-defendant. The jury found no negligence on the

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see the principal case, 87 N. E. 2d at 476. See 2 COOLEY, TAXATION § 739 (4th ed., Nichols, 1924).

8. *Bader Realty v. St. Louis Housing Authority*, 217 S. W. 2d 489, 492 (Mo. 1949) ("That this is charity of the most practical character we are firmly convinced"). *Contra*: *Dayton Housing Authority v. Evatt*, 143 Ohio St. 10, 53 N. E. 2d 896, 152 A. L. R. 223 (1944); *Columbus Housing Authority v. Thatcher*, 140 Ohio St. 38, 42 N. E. 2d 437 (1942). For collections of cases, see Notes, 133 A. L. R. 365 (1941), 152 A. L. R. 239 (1944).

9. Even as early as 1601, disabled veterans were recognized as suitable recipients of charity. Among the charitable purposes set forth in the preamble to the Statute of Charitable Uses, 1601, 43 ELIZ., c. 4, is found the following: "Maintenance of sick and maimed Soldiers and Mariners. . . ." While the list of charitable purposes mentioned in the preamble to the statute is not now considered exhaustive, all of the purposes mentioned therein are still held to be charitable. See 2 RESTATEMENT, TRUSTS § 368 (1935).

10. *E.g.*, *Guild of St. Barnabas v. Board of Tax Appeals*, 150 Ohio St. 484, 83 N. E. 2d 229 (1948) (home where all occupants paid nominal fee; held, used for low rent housing, not exclusively for charitable purposes); *Columbus Housing Authority v. Thatcher*, 140 Ohio St. 38, 42 N. E. 2d 437 (1942) (housing for low-income families; held, since rent is required of each family, purpose of the use is rental, and property not entitled to exemption).

part of the vendee, but held the manufacturer liable for breach of a duty to test the floating quality of this inherently dangerous product. *Held* (4-2-1),<sup>1</sup> affirmed. The test of the vendee's liability was correctly that of reasonable care, whereas the manufacturer was properly held on the basis of strict liability. *Chapman Chemical Co. v. Taylor*, 222 S. W. 2d 820 (Ark. 1949).

Stemming from *Winterbottom v. Wright*<sup>2</sup> there developed the rule that a manufacturer was liable in tort only to those in privity of contract with him,<sup>3</sup> but the courts gradually made "exceptions" to this rule,<sup>4</sup> the principal one of which was that if a product was "inherently dangerous" to human safety the manufacturer might be liable for negligence to a remote vendee.<sup>5</sup> This old "general rule" with its "exceptions" has been supplanted in a majority of the states by the doctrine of *MacPherson v. Buick Motor Co.*<sup>6</sup> that a manufacturer of a product is liable without privity of contract for negligence resulting in personal injury when it is reasonably foreseeable that negligence may make the product dangerous to human safety.<sup>7</sup> Likewise, courts following the *MacPherson* doctrine of foreseeability, after some hesitation, have seemed generally ready to extend it to cover property damage sustained by a remote vendee or third party.<sup>8</sup>

1. Opinion by Frank G. Smith, J.; partial dissent by George Rose Smith, J., with written opinion that judgment against manufacturer should be reversed; partial dissents by Holt and McFaddin, JJ. (no opinion) on the ground that judgment for vendee should be reversed.

2. 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

3. See *Stone v. Van Noy R. News Co.*, 153 Ky. 240, 154 S. W. 1092 (1913); *Liggett & Myers Tobacco Co. v. Cannon*, 132 Tenn. 419, 178 S. W. 1009, L. R. A. 1916A 940, Ann. Cas. 1917A 179 (1915); *Burkett v. Studebaker Bros. Mfg. Co.*, 126 Tenn. 467, 150 S. W. 421 (1912); *Hasbrouck v. Armour & Co.*, 139 Wis. 357, 121 N. W. 157, 23 L. R. A. (N. S.) 876 (1909).

4. The opinion of Sanborn, J., in *Huset v. J. I. Case Threshing Machine Co.*, 120 Fed. 865 (8th Cir. 1903) contains the classic analysis of these exceptions. As finally developed, the exceptions imposing liability on a manufacturer for negligence applied when (1) the manufacturer had not disclosed to the vendee a known danger involved in the use of the product; (2) the product was furnished for use on the premises of the vendee's A. L. R. 449 (1945) (poisonous fumes from can of dry-cleaner); RESTATEMENT, TORTS § 83 (1941); Note, 40 HARV. L. REV. 886 (1927).

5. *E.g.*, *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455 (1852); *Boyd v. Coca Cola Bottling Works*, 132 Tenn. 23, 177 S. W. 80 (1915).

6. 217 N. Y. 382, 111 N. E. 1050 (1916); Feezer, *Tort Liability of Manufacturer*, 19 MINN. L. REV. 752 (1935).

7. *E.g.*, *McClaren v. Weber Bros. Shoe Co.*, 166 Fed. 714 (1st Cir. 1909) (defective sewing machine in factory); *Jacobs v. Adams Electric Co.*, 198 Mo. 495, 97 S. W. 2d 849 (1936) (employee injured while installing product supplied to employer); *McLeod v. Linde Air Products Co.*, 318 Mo. 397, 1 S. W. 2d 122 (1927) (injury to bystander); *La Frumento v. Kotex Co.*, 131 Misc. 314, 226 N. Y. Supp. 750 (N. Y. City Ct. 1928) (sanitary napkin containing a pin); *Maize v. Atlantic Refining Co.*, 352 Pa. 51, 41 A. 2d 850, 160 A. L. R. 449 (1945) (poisonous fumes from can of dry-cleaner); RESTATEMENT, TORTS § 395 (1934); Clark, *Let the Maker Beware*, 19 ST. JOHN'S L. REV. 85, 94 (1945); 38 MICH. L. REV. 1116 (1940).

8. *E.g.*, *Spencer v. Madsen*, 142 F. 2d 820 (10th Cir. 1944); *E. I. Du Pont de Nemours & Co. v. Baridon*, 73 F. 2d 26 (8th Cir. 1934); *United States Radiator Corp. v. Henderson*, 68 F. 2d 87 (10th Cir. 1933); *Kolberg v. Sherwin-Williams Co.*, 93 Cal. App. 609, 269 Pac. 975 (1928); *Ebers v. General Chemical Co.*, 310 Mich. 261, 17 N. W. 2d 176 (1945); *Bosch v. Damm*, 296 Mich. 522, 296 N. W. 669 (1941); *Ellis v. Lindmark*, 177 Minn. 390, 225 N. W. 395 (1929); *Fire Relief Ass'n v. Sonneborn*, 263 N. Y. 463, 189 N. E. 551 (1934); *Quackenbush v. Ford Motor Co.*, 167 App. Div. 433, 153 N. Y. Supp. 131 (3d

Most courts have realized that even though an article may be properly constructed, its use may still involve certain hazards or dangers. By the weight of authority, not only is it the duty of a manufacturer to use care commensurate with the harm likely to result from a defect,<sup>9</sup> but also the exercise of due care may require the manufacturer to make tests to ascertain the safety of a product for its intended use,<sup>10</sup> and to give adequate warnings of any discovered dangers.<sup>11</sup>

Instead of reciting the general standard of care to the jury and leaving to them the question of whether in the exercise of reasonable care the manufacturer should have made tests, the trial judge in his charge to the jury in the instant case set forth a specific rule that a manufacturer of an inherently dangerous product must make tests and that failure to do so constitutes negligence.<sup>12</sup> Such specific rules of conduct are occasionally prescribed by the courts,<sup>13</sup> and are entirely consistent with the idea of negligence as the basis for liability.

The appellate court held there was sufficient evidence to warrant the jury's finding that the vendee was not negligent. In approving the charge concerning the manufacturer, the court seemingly went further than other courts have yet gone in stating that the manufacturer was responsible on

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Dep't 1915). *Contra*: Contracting Corp. v. Brooklyn Builders Supply Co., 171 Misc. 157, 11 N. Y. S. 2d 662 (Sup. Ct. 1939), *aff'd*, 258 App. Div. 747, 15 N. Y. S. 2d 424 (2d Dep't 1939).

9. E. I. Du Pont de Nemours & Co. v. Baridon, 73 F. 2d 26 (8th Cir. 1934); Bird v. Ford Motor Co., 15 F. Supp. 590 (W. D. N. Y. 1936); Employers' Liability Assur. Corp. v. Columbus McKinnon Chain Co., 13 F. 2d 128 (W. D. N. Y. 1926); Lill v. Murphy Door Bed Co., 290 Ill. App. 328, 8 N. E. 2d 714 (1937); Payton v. Childers Electric Co., 228 Ky. 44, 14 S. W. 2d 208 (1929); Johnson v. Stoddard, 310 Mass. 232, 37 N. E. 2d 505, 140 A. L. R. 186 (1941); Zesch v. Abrasive Co., 353 Mo. 558, 183 S. W. 2d 140, 156 A. L. R. 469 (1944). *Contra*: Ensign-Bickford Co. v. Reeves, 95 F. 2d 190 (8th Cir. 1938); St. Louis Fireworks Co. v. Wilson, 5 Tenn. C. C. A. 388 (1915).

10. Johnson v. Cadillac Motor Car Co., 261 Fed. 878, 8 A. L. R. 1023 (2d Cir. 1919); Cashwell v. Bottling Co., 174 N. C. 324, 93 S. E. 901 (1917); Heckel v. Ford Motor Co., 101 N. J. L. 385, 128 Atl. 242, 39 A. L. R. 989 (1925); Holzman v. Harkavy Beverage Co., 250 App. Div. 271, 293 N. Y. Supp. 832 (1st Dep't 1937); Hoinig v. Central Stamping Co., 247 App. Div. 895, 287 N. Y. Supp. 118 (2d Dep't 1936); Coakley v. Prentiss-Wabers Stove Co., 182 Wis. 94, 195 N. W. 388 (1923).

11. Luthringer v. Moore, 31 Cal. 2d 489, 190 P. 2d 1 (1948); Kentucky Independent Oil Co. v. Schnitzler, 208 Ky. 507, 271 S. W. 570 (1925); Carter v. Yardley & Co., 319 Mass. 92, 64 N. E. 2d 693, 164 A. L. R. 559 (1946); Statler v. Ray Mfg. Co., 195 N. Y. 478, 88 N. E. 1063 (1909); Noone v. Perlberg, Inc., 268 App. Div. 149, 49 N. Y. S. 2d 460 (1st Dep't 1944), *aff'd*, 294 N. Y. 680, 60 N. E. 2d 839 (1945); Henry v. Crook, 202 App. Div. 19, 195 N. Y. Supp. 642 (3d Dep't 1922); Note, 44 MICH. L. REV. 1157 (1946). If the buyer discovers the danger the manufacturer is not liable. Olds Motor Works v. Shaffer, 145 Ky. 616, 140 S. W. 1047 (1911); *cf.* Ford Motor Co. v. Wagoner, 183 Tenn. 392, 192 S. W. 2d 840 (1945).

12. "It was the duty of the defendant . . . before putting an inherently dangerous product on the market to make tests to determine whether or not it would damage crops of others; if you believe . . . that such tests were not made, then you are told that the defendant . . . is negligent." 222 S. W. 2d at 826.

13. *E.g.*, Baltimore & Ohio R. R. v. Goodman, 275 U. S. 66, 48 Sup. Ct. 24, 72 L. Ed. 167, 56 A. L. R. 645 (1927) ("stop, look, and listen" rule at railroad crossing); Serfas v. Lehigh & N. E. R. R., 270 Pa. 306, 113 Atl. 370, 14 A. L. R. 791 (1921) (negligence to drive at speed making it impossible to stop within range of vision); Schwartz v. Johnson, 152 Tenn. 586, 280 S. W. 32, 47 A. L. R. 323 (1926) (negligence to ride with driver known to be drunk).

the basis of strict liability—apparently in the belief that it was necessary to take this position in order to justify the instruction. The principle of strict liability is not a recent development of the law.<sup>14</sup> Since *Rylands v. Fletcher*<sup>15</sup> there has been an extension of the principle into many different fields<sup>16</sup> until today its application to the consequences of engaging in an ultra-hazardous activity, or utilizing an inherently dangerous substance, is becoming widely recognized.<sup>17</sup> However, this court in its rationale seems to misapply the principle of strict liability for harm ensuing from an ultra-hazardous activity,<sup>18</sup> and to have confused with it the “inherently dangerous” concept based on negligence which was an exception to the old general rule of non-liability of manufacturers.<sup>19</sup> Moreover, the court in a concluding statement said that ordinary care required that the manufacturer should know of the peculiar carrying quality of the dust in view of the dangerous nature of the product, and that it was charged with the knowledge which tests would have revealed. The court then asserts that the “case is therefore one in which the rule of strict liability should be applied.”<sup>20</sup> These statements are logically inconsistent. If “ordinary care” is the standard, then the liability could not be absolute, because under the principles of strict liability a defendant may be liable notwithstanding his exercise of even the highest degree of care.<sup>21</sup>

Since justice demands that the manufacturer be held liable<sup>22</sup> in many situations where it is almost impossible to prove negligence,<sup>23</sup> a large number of courts have virtually imposed strict liability in certain types of situations

14. PROSSER, TORTS § 59 (1941); RESTATEMENT, TORTS § 507 (1938).

15. L. R. 1 Ex. 265 (1866), *aff'd*, L. R. 3 H. L. 330 (1868); Bohlen, *The Rule in Rylands v. Fletcher*, 59 U. OF PA. L. REV. 298 (1911); Thayer, *Liability Without Fault*, 29 HARV. L. REV. 801 (1916).

16. *E.g.*, *Green v. General Petroleum Corp.*, 205 Cal. 328, 270 Pac. 952, 60 A. L. R. 475 (1928) (drilling oil well); *Knoxville v. Peebles*, 19 Tenn. App. 340, 87 S. W. 2d 1022 (W. S. 1935) (blasting); *Weaver Mercantile Co. v. Thurmond*, 68 W. Va. 530, 70 S. E. 126 (1911) (water); PROSSER, TORTS § 61 (1941); Carpenter, *The Doctrine of Green v. General Petroleum Corp.*, 5 So. CALIF. L. REV. 263 (1932).

17. “[O]ne who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm.” RESTATEMENT, TORTS § 519 (1938). “The rule stated in this Section applies only to such harm as results from a risk which, being incapable of elimination by the utmost precaution, care and skill, makes the activity ultrahazardous.” *Id.* at § 519, comment *b*.

18. “An activity is ultrahazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which can not be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage.” RESTATEMENT, TORTS § 520 (1938).

19. See notes 4 and 5 *supra*.

20. 222 S. W. 2d at 827.

21. See note 14 *supra*.

22. See *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P. 2d 436, 440-44 (1944) (bottle explosion); Harris, *Liability Without Fault*, 6 TULANE L. REV. 337 (1932); Russell, *Manufacturers' Liability to the Ultimate Consumer*, 21 KY. L. J. 388 (1933); Seefeld, *Tort Liability of Manufacturers to Users of Their Goods*, 25 MARQ. L. REV. 173, 191 (1941).

23. *Swenson v. Purity Baking Co.*, 183 Minn. 289, 236 N. W. 310 (1931); Note, 2 VAND. L. REV. 675, 685 (1949).

on the bases of implied warranty,<sup>24</sup> misrepresentation,<sup>25</sup> nuisance,<sup>26</sup> or procedural devices such as *res ipsa loquitur*.<sup>27</sup> As yet these are scattered instances and no general principle has developed, but it "would seem desirable . . . for the courts to recognize in name the absolute liability which in substance is fast becoming established by means of legal fiction."<sup>28</sup>

Even though the court in the instant case apparently founded its decision on divergent and dissimilar principles of law, the holding that the manufacturer is liable seems to be justified. Most courts at the present time would have left the question of negligence to the jury under the general standard of care. The procedure of the trial court in laying down a specific rule of conduct for the jury's guidance is not extremely unusual. The appellate court's holding of liability on the ground of strict liability may foreshadow a result which the other courts will soon reach, because the manufacturer can best distribute the loss, and "ultimately those who enjoy the goods and services will pay for the losses which result from making them available."<sup>29</sup>

#### WILLS—CONSTRUCTION—GIFT OVER ON DEATH WITHOUT ISSUE WHEN SPECIFIED TIME FOR TAKING POSSESSION IS MENTIONED BY TESTATOR

Testator devised a tract of land "to my granddaughter . . . to go into her possession when she marries or becomes of age if she dies without bodily heirs then I give it to be divided between" *B*, *C*, and *D*, children of the testator. Some years after the death of testator, the granddaughter became of age and took possession of the land. She subsequently conveyed the land to defendants for a cash consideration; later she died without bodily heirs. *B*, *C*, and *D* all died before the granddaughter. Complainants, legal heirs of *D*, sue for a one-half interest in the tract of land, claiming that the will conveyed to the granddaughter only a life estate with remainder to *B*, *C*, and *D*, and that on her death without bodily heirs complainants took

24. *Bufkin v. Grisham*, 157 Miss. 746, 128 So. 563 (1930); *Coca-Cola Bottling Works v. Lyons*, 145 Miss. 876, 111 So. 305 (1927); *Decker & Sons v. Capps*, 139 Tex. 609, 164 S. W. 2d 828, 142 A. L. R. 1479 (1942).

25. *Chanin v. Chevrolet Motor Co.*, 89 F. 2d 889 (7th Cir. 1937); *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P. 2d 409, 88 A. L. R. 521 (1932).

26. *King v. Columbian Carbon Co.*, 152 F. 2d 636 (5th Cir. 1945); *United Electric Light Co. v. Deliso Constr. Co.*, 315 Mass. 313, 52 N. E. 2d 553 (1943); *Taylor v. Cincinnati*, 143 Ohio St. 426, 55 N. E. 2d 724 (1944).

27. *Nichols v. Continental Baking Co.*, 34 F. 2d 141 (3d Cir. 1929); *Dierman v. Providence Hospital*, 31 Cal. 2d 290, 188 P. 2d 12 (1947); *Patterson, The Apportionment of Business Risks Through Legal Devices*, 24 COL. L. REV. 335 (1924); *Notes*, 33 COL. L. REV. 868 (1933), 61 HARV. L. REV. 515 (1948).

28. *Jeanblanc, Manufacturers' Liability to Persons Other Than Their Immediate Vendees*, 24 VA. L. REV. 134, 157 (1937); *Note*, 23 CALIF. L. REV. 621 (1935).

29. *Note*, 37 CALIF. L. REV. 269, 275 (1949); *Feezer, Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases*, 78 U. OF PA. L. REV. 805 (1930).

the remainder interest. *Held*, bill dismissed. This item of the will vested in the granddaughter the absolute estate in the realty qualified only by a limitation over in the event that she should die without bodily heirs before coming into possession of the land. *Williams v. Gupton*, R. D. No. 12062, Chancery Court of Montgomery County, Tennessee (6th Chan. Div., Marable, C., Sept. 19, 1949).

The problem of determining what the testator actually means when he provides for a devise "to *A* but if *A* dies without issue, then to *B*" has perplexed courts and lawyers since the beginnings of the common law.<sup>1</sup> In the easier case of a devise "to *A* but if *A* dies, then to *B*," the courts have for all practical purposes reached unanimity of construction.<sup>2</sup> Here the testator uses language importing a contingency, but clearly there is nothing contingent about the death of *A*; it is certain to happen. Thus the courts, construing the testator's probable intent, supply the contingency, by interpreting the language to mean "to *A* but if *A* dies before *T* dies, then to *B*."<sup>3</sup> As a result, the gift over is valid only if *A* dies before the testator.<sup>4</sup>

This reasoning, however, does not apply so forcefully where the testator provides for the gift over to *B* if *A* dies without issue. In that case the testator presents an actual contingency, *i.e.*, *A* may or may not die without issue, and thus there is no necessity for the court to supply the contingency.<sup>5</sup> Logically, it might seem that the testator intended the gift over to be effective upon the death of *A* without issue whenever that might happen; and some courts hold to this effect, that if *A* dies without issue at any time, *B* takes.<sup>6</sup> But the majority view is that *A*'s death must occur before that of the testator for the gift over to take effect.<sup>7</sup> Once *A* survives the testator

1. Amram, *Pennsylvania Rules for Construction of the Words "Die Without Issue,"* 79 U. OF PA. L. REV. 15 (1930); Warren, *Gifts Over on Death Without Issue*, 39 YALE L. J. 332 (1930); Notes, 20 TEXAS L. REV. 212 (1941); 18 U. OF CIN. L. REV. 311 (1949).

2. For a general discussion of the subjects covered see: 57 AM. JUR., *Wills* §§ 1236-55 (1948); 69 C. J., *Wills* §§ 1324-39, 1553-54, 1570-79 (1934); 3 PAGE, *WILLS* §§ 1138-41, 1291-93 (Perm. ed. 1941); 2 SIMES, *FUTURE INTERESTS* §§ 326-46 (1936).

3. "When indeed a devise is made to one person in fee, and 'in case of his death' to another in fee, the absurdity of speaking of the one event which is sure to occur to all living as uncertain and contingent has led the courts to interpret the devise over as referring only to death in testator's lifetime." *Britton v. Thornton*, 112 U. S. 526, 532-33, 5 Sup. Ct. 291, 28 L. Ed. 816 (1884).

4. *E.g.*, *Tomlin v. Laws*, 301 Ill. 616, 134 N. E. 24, 26 A. L. R. 606 (1922) (rule not changed by fact that the will was made when testator had met with a fatal accident and was contemplating death at any time, and before birth of first taker); *Fisher v. Eggert*, 64 Atl. 957 (N. J. Ch. 1906) (rule recognized but not followed because of showing of contrary intent of testator); *Katzenberger v. Weaver*, 110 Tenn. 620, 630, 75 S. W. 937, 939 (1903) ("Hence it has become an established rule, that where the bequest is simply to A., and in case of his death, or if he die, to B., A. surviving the testator takes absolutely").

5. THOMPSON, *WILLS* § 226a (3d ed. 1947).

6. *Harvey v. Bell*, 118 Ky. 512, 81 S. W. 671 (1904); *Briggs v. Hopkins*, 103 Ohio St. 321, 132 N. E. 843 (1921); *O'Mahoney v. Burdett*, L. R. 7 H. L. 388 (1874). See Note, 25 L. R. A. (N. S.) 1045, 1056-59, 1076-83 (1910); Notes, 8 COL. L. REV. 37 (1908), 18 U. OF CIN. L. REV. 311, 314 (1949).

7. 69 C. J., *Wills* § 1332 n. 13 (1934); 28 R. C. L., *Wills* § 231 (1921). See Note, 25 L. R. A. (N. S.) 1045, 1059-64, 1108-18 (1910).

and takes the devise, then his estate is held to become absolute and non-defeasible.<sup>8</sup>

Historically, the reason for the majority holding is perhaps found in the fact that the common law held that "death without issue" referred to an indefinite failure of issue, *i.e.*, the death without issue of the last survivor of *A*'s line.<sup>9</sup> Under this indefinite failure theory, the courts were forced to choose between the two constructions, that of giving *A* the fee absolute once he takes upon *T*'s death and that of giving *A*'s line an estate defeasible perhaps for generations; and they understandably chose the former.<sup>10</sup> With the general abolition of the fee tail estate<sup>11</sup> and the adoption of the "definite" failure of issue theory,<sup>12</sup> a court is no longer faced with this dilemma and the historical reason for the holding disappears.<sup>13</sup> The modern courts, however, to effect the same holding generally use another theory, the substitutional or anti-lapse construction, which presumes that *T* intended to provide for the death of *A* without issue only so that if *A* died without issue before *T* dies, the gift over would go to *B* and would not lapse back into *T*'s estate.<sup>14</sup>

8. *E.g.*, *Ewart v. Dalby*, 319 Mo. 108, 5 S. W. 2d 428 (1928), 24 ILL. L. REV. 252 (1929) (clause "and if she dies single and unmarried and without issue" held to mean such death before death of testator); *Schnitter v. McManahan*, 85 Neb. 337, 123 N. W. 299, 27 L. R. A. (n. s.) 1047 (1909) (rule recognized but held to yield to slight showing of contrary intent of testator); *Scruggs v. Mayberry*, 135 Tenn. 586, 188 S. W. 207 (1916); *Katzenberger v. Weaver*, 110 Tenn. 620, 75 S. W. 937 (1903); *Meacham v. Graham*, 98 Tenn. 190, 39 S. W. 12 (1897); *Vaughn v. Cator*, 85 Tenn. 302, 2 S. W. 262 (1886). It has been said that the rule is one of property law. *Frank v. Frank*, 120 Tenn. 569, 575, 111 S. W. 1119, 1120 (1908). But the better view is that the rule is merely one of construction, which will yield to a showing of a contrary intent of the testator. *Eckhardt v. Phillips*, 176 Tenn. 34, 137 S. W. 2d 301 (1940), 16 TENN. L. REV. 479; *Truett v. Cook*, 5 Tenn. C. C. A. 456 (1915) (rule held not to apply where testator was physician afflicted with typhoid and on death bed, and devise was to son then only one year old); *Johnson v. Johnson*, 4 Tenn. C. C. A. 118 (1914).

9. Under the indefinite failure theory, *A* in effect takes an estate in tail, his line retaining the estate until the last of this line without issue, when the gift over becomes effective and *B* or *B*'s heir takes the estate in fee simple. 11 R. C. L., *Wills* § 19 (1921).

10. Theories of construction favor vested rather than contingent estates, and favor the early vesting of absolute estates. *E.g.*, *Smith v. Smith*, 108 Tenn. 21, 24, 64 S. W. 483, 484 (1901); *Bridgewater v. Gordon*, 34 Tenn. 5, 10 (1854); 57 AM. JUR., *Wills* § 1218 (1948).

11. *E.g.*, TENN. CODE ANN. § 7599 (Williams, 1934). See Shinn, *Limitations Over On Dying Without Issue and the Abolition of Estates Tail*, 21 VA. L. REV. 286 (1934). It should be noted that if the statute abolishing estates tail turns them into fees simple, the gift over would ordinarily leave an executory interest, which, if limited to take effect on an indefinite failure of issue, would be void under the rule against perpetuities. *Dennett v. Dennett*, 43 N. H. 499 (1862). See 2 SIMES, *FUTURE INTERESTS* § 343 (1936); 1 TIFFANY, *REAL PROPERTY* § 44 (3d ed., Jones, 1939). In *Parrish's Heirs v. Ferris*, 6 Ohio St. 563, 579 (1856), the court points out that a statute against entailments influenced their decision to adopt the definite failure construction.

12. *E.g.*, TENN. CODE ANN. § 7601 (Williams, 1934).

13. The problem then becomes a much harder one, that of choosing between the alternatives, (a) of the gift over to *B* if *A* dies without issue whenever he does die, a perfectly reasonable interpretation, and (b) of the gift over to *B* only if *A* dies without issue before *T* dies. England by statute adopted the definite failure theory in 1837, 7 WILL. and 1 VICT., c. 26, § 29; the rule in England is that "death without issue" means death of the devisee at any time.

14. *Palmer v. French*, 326 Mo. 710, 32 S. W. 2d 591, 594 (1930) ("The intention of the testator is presumed to be to prevent a lapse"); *Stokes v. Weston*, 142 N. Y. 433, 37 N. E. 515, 516 (1894) ("Ordinary prudence required [the testator] . . . to guard

This anti-lapse argument is complete in itself, and may be used to effect the desired holding whether the jurisdiction follows the definite or indefinite failure theory and regardless of the situation as to fee tail estates.<sup>15</sup>

The formula, "to *A* but if *A* dies without issue, then to *B*," may take varied forms. Thus, testators frequently insert a further provision giving a preceding life estate to *W*. so that the devise goes "to *W* for life, remainder to *A* in fee, but if *A* dies without issue, then to *B*." In this situation the courts have generally reasoned that the time of *A*'s death should be referred to the termination of the preceding life estate in order to determine the contingency, with the result that if *A* survives the holder of the antecedent life estate, his interest becomes absolute and the gift over fails.<sup>16</sup> The rationale of this holding is that *T* has set up an event of a definite time, to which the contingency of *A*'s death without issue may be referred, and thus there is no need for the court to supply the event of *T*'s death as this point of time.<sup>17</sup> This holding has been rejected in England and Canada and in a few American jurisdictions, where the more literal view is taken that in the absence of a showing of contrary intent, the testator will be presumed to have intended a death without issue at any time.<sup>18</sup> A few cases in this country have applied the presumption that in this situation a death prior to the testator's was intended.<sup>19</sup>

A further variation may be made in this type of devise by the testator's mentioning or indicating some point of time intermediate between the death of *T* and that of the devisee, as the time when distribution is to take place, or when the devisee is to enter into possession or full enjoyment of the gift.<sup>20</sup>

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against intestacy as to the share of a son who might die without issue before the will should take effect"); *Meacham v. Graham*, 98 Tenn. 190, 39 S. W. 12 (1897).

15. *Frank v. Frank*, 120 Tenn. 569, 111 S. W. 1119 (1908) (definite failure statute did not change the substitutionary rule). *Contra*: *Kirkman v. Smith*, 175 N. C. 579, 96 S. E. 51 (1918).

16. *E.g.*, *Harrington v. Cooper*, 126 Ark. 53, 189 S. W. 667 (1916); *Rankin v. Rankin*, 227 Ky. 169, 12 S. W. 2d 319 (1928); *Meek v. Trotter*, 133 Tenn. 145, 180 S. W. 176 (1915); *see Cook v. Collier*, 62 S. W. 658, 660 (Tenn. Ch. App. 1901); Note, 25 L. R. A. (n. s.) 1045, 1067-69, 1127-30 (1910).

17. "The rule is well established . . . the testator is held to contemplate a death during the continuance of the particular estate, unless a contrary intent is found in the will." *Baird v. Garman*, 349 Ill. 597, 182 N. E. 739, 740 (1932). It should be noted that this rationale may be used in states following either the substitutional theory, *Booth v. Eberly*, 124 Md. 22, 91 Atl. 767 (1914); *Hohnbach v. Hohnbach*, 151 Wis. 487, 139 N. W. 731 (1913); or in states following the non-substitutional theory, *Spacey v. Close*, 184 Ky. 523, 212 S. W. 127 (1919); *Davis v. Scharf*, 99 N. J. Eq. 714, 133 Atl. 197 (Ch. 1926).

18. *Gavvin v. Carroll*, 276 Ill. 478, 114 N. E. 927 (1916); *Brown v. Gardner*, 233 N. Y. 261, 135 N. E. 325 (1922); *Ziegler v. Love*, 185 N. C. 40, 115 S. E. 887 (1923); *Davis v. Hodge*, 102 S. C. 178, 86 S. E. 478 (1915); *Eggleston v. Swartz*, 145 Wis. 106, 129 N. W. 48 (1910); *O'Mahoney v. Burdett*, L. R. 7 H. L. 388 (1874). See Note, 25 L. R. A. (n. s.) 1045, 1067-69, 1127-30 (1910).

19. *E.g.*, *Moore v. Cook*, 153 Ga. 840, 113 S. E. 526 (1922); *Duzan v. Chappel*, 41 Ind. App. 651, 84 N. E. 775 (1908); *Tarbell v. Smith*, 125 Iowa 388, 101 N. W. 118 (1904); *Stokes v. Weston*, 142 N. Y. 433, 37 N. E. 515 (1894).

20. To *A* upon his reaching certain age: *Horrocks v. Basham*, 139 Ark. 116, 213 S. W. 372 (1919); *Bishop v. McClelland's Ex'rs*, 44 N. J. Eq. 450, 16 Atl. 1, 1 L. R. A. 551 (Ch. 1888); *Colby v. Doty*, 158 N. Y. 323, 53 N. E. 35 (1899); *Jones v. Jones*,

The instant case presents such a situation, where the devise is "to *A*, *A* to go into possession upon reaching majority or upon marriage, but if *A* dies without issue then to *B*." The question of construction here is closely analogous to that presented by the devise containing the preceding life estate,<sup>21</sup> and the holding usually is to the same effect, upon a like rationale, that the operation of the contingency is restricted to the period before the mentioned point of time.<sup>22</sup> Upon analysis of *T*'s probable intent, it would seem that there should be no difference in the holdings for the two types of situations. Thus the holding in the instant case seems well taken.

All of these rules are merely rules of construction, to be used in situations where *T*'s intent is at best doubtful, and all must yield to a showing of a contrary intent of the testator.<sup>23</sup> It is only when the testator's intention is not apparent that the rules of construction need be used at all, for the very purpose of the construction of a will is to ascertain the testator's intention.<sup>24</sup>

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48 Ohio App. 138, 192 N. E. 811 (1933), 10 NOTRE DAME LAW. 325 (1935). Time of distribution of estate held in trust: *Hanna v. Prewitt*, 153 Ky. 310, 155 S. W. 726 (1913); *Boynnton v. Boynnton*, 226 Mass. 454, 165 N. E. 489 (1929). Time when donee entitled to receive gift: *Wurt's Ex'rs v. Page*, 19 N. J. Eq. 365 (Ch. 1869).

21. *Donnell v. Newburyport Homeopathic Hospital*, 179 Mass. 187, 60 N. E. 482 (1901) (gift over after preceding life estate; and gift upon donee's reaching majority, then gift over).

22. *Howard v. Howard's Trustee*, 212 Ky. 847, 280 S. W. 156 (1926); *Willits v. Conklin*, 88 Neb. 805, 130 N. W. 757, 33 L. R. A. (N.S.) 321 (1911); *Massie v. Jordan*, 69 Tenn. 646 (1878); *McNish v. Bryan*, 2 Tenn. C. C. A. 443 (1911) (life estate to *A* held enlarged into fee by happening of those events which prevented the limitation over from taking effect); *Stone v. Maney*, 3 Tenn. Ch. 731 (1878). *Contra*: *Montgomery v. Montgomery*, 236 Ala. 161, 181 So. 92 (1938). In *Harwell v. Benson*, 76 Tenn. 344 (1881), where the devise was to *A* in fee, with gift over to take effect if *A* should die before he marry or have any bodily heirs, it was held that the gift over took effect upon *A*'s death after marriage but before birth of any children.

23. *Smith v. Bell*, 6 Pet. 68, 8 L. Ed. 322 (U. S. 1832); *Schnitter v. McManahan*, 85 Neb. 337, 123 N. W. 299, 27 L. R. A. (N. S.) 1047 (1909); *Eckhardt v. Phillips*, 176 Tenn. 34, 137 S. W. 2d 301 (1940), 16 TENN. L. REV. 479; *Hadley v. Hadley*, 100 Tenn. 446, 45 S. W. 342 (1898). See ATKINSON, WILLS § 265 (1937); 28 R. C. L., WILLS § 173 (1921).

24. Complainants in the instant case relied on *Eckhardt v. Phillips*, 176 Tenn. 34, 137 S. W. 2d 301 (1940), where it was held, despite the contrary rule of construction in Tennessee, that "death without issue" meant death at any time, after as well as before the testator's death. The context of the will in that case, however, showed that the testator contemplated the death of the beneficiary after his own death; thus the holding is based on the testator's intention rather than the "die without issue" rule of construction.

In the instant case the chancellor recognized and affirmed the Tennessee rule of construction, holding that "by the expression 'if she dies without bodily heirs' . . . the testator evidently meant that if his said granddaughter should die without bodily heirs before she obtained possession of the land. . . ." This holding is greatly strengthened by other circumstances indicating the testator's actual intent. An alternate ground for the holding was given, that since the donee of the gift over was dead at the time the gift over should have vested, the gift over failed to take effect. The Tennessee survivorship statute, TENN. CODE ANN. § 8134 (Williams, 1934), was held not to be applicable, since the donee of the gift over died *after* the testator.