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Recent Cases

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RECENT CASES

ADJOINING LANDOWNERS—OVERHANGING BRANCHES—INJUNCTION AGAINST MAINTENANCE REFUSED

Plaintiff and defendant were adjoining landowners. Defendant planted a hedge on her side of the boundary which in time grew 20 feet tall. The branches from this hedge extended across the boundary line and against plaintiff's house, causing the walls and sills to decay. Plaintiff filed a bill in equity seeking a permanent injunction against allowing the branches to overhang the plaintiff's land and for damages. *Held,* bill dismissed. *Granberry v. Jones,* 216 S. W. 2d 721 (Tenn. 1949).

At common law the person on whose land the trunk of a tree was located owned the tree, even though the roots extended into and the branches overhung the land of another.[1] The owner of the land over which the branches protruded or the roots penetrated had no right in or title to the roots, the branches or the products of the tree.[2] In case of a tree located on the boundary line, the better view seems to be that the adjoining landowners are tenants in common of the tree.[3]

The adjoining landowner, however, has a right to remove overhanging branches or protruding roots from trees growing upon his neighbor's land.[4] This right is based on the right to abate a private nuisance and not on any property right in the roots or branches.[5] Further, notice need not be given the adjoining landowner before the roots or branches are severed unless the actor has encouraged the maintenance of such nuisance.[6] This right of removal extends only to the boundary line and not to the cutting down of the tree.[7] If the actor severs the roots or branches or cuts the tree beyond

1. Lyman v. Hale, 11 Conn. 177, 27 Am. Dec. 728 (1836); Wideman v. Faivre, 100 Kan. 102, 163 Pac. 619 (1917); Hoffman v. Armstrong, 46 Barb. 337 (N. Y. 1866), *aff'd,* 48 N. Y. 201, 8 Am. Rep. 537 (1872); Cobb v. Western Union Tel. Co., 90 Vt. 342, 98 Atl. 758 (1916); Holder v. Coates, M. & M. 112, 173 Eng. Rep. 1099 (N. P. 1827). See Note, 13 TEMP. L. Q. 370 (1939); 11 B. U. L. REV. 588 (1931).

2. Lyman v. Hale, 11 Conn. 177, 27 Am. Dec. 728 (1836); Skinner v. Wilder, 38 Vt. 115, 88 Am. Dec. 645 (1865); Mills v. Brooker, [1919] 1 K. B. 555; see Note, 18 A. L. R. 655 (1922).

3. Musch v. Burkhart, 83 Iowa 301, 48 N. W. 1025, 12 L. R. A. 484 (1891); Griffin v. Bixby, 12 N. H. 454, 37 Am. Dec. 225 (1841); Skinner v. Wilder, 38 Vt. 115, 88 Am. Dec. 654 (1865); 1 AM. JUR., *Adjoining Landowners* § 58 (1936).

4. Grandona v. Lovdal, 70 Cal. 161, 11 Pac. 623 (1886); Harndon v. Stultz, 124 Iowa 440, 100 N. W. 329 (1904); Gostina v. Ryland, 116 Wash. 228, 199 Pac. 298, 18 A. L. R. 650 (1921); Mills v. Brooker, [1919] 1 K. B. 555; Notes, 18 A. L. R. 655 (1922), 76 A. L. R. 1111 (1932); 1 AM. JUR., *Adjoining Landowners* § 56 (1936).

5. See note 2 *supra.*

6. Hickey v. Michigan C. R. R., 96 Mich. 498, 55 N. W. 989 (1893); Mills v. Brooker, [1919] 1 K. B. 555. See Note, 18 A. L. R. 655, 659 (1922).

7. Newberry v. Bunda, 137 Mich. 69, 100 N. W. 277 (1904); Wideman v. Faivre, 100 Kan. 102, 163 Pac. 619 (1917); Wegener v. Sugarman, 104 N. J. L. 26, 138 Atl. 699 (1927).

his boundary he will be liable in an action for damages.[8] This is true even though the tree on his neighbor's land shades his property, cuts off light and air, and is generally annoying.[9]

This right of removal by the aggrieved party is so complete that he cannot maintain an action for a mandatory injunction to require his neighbor to remove the protruding branches or roots.[10] The reason for this rule is well stated in *Michalson v. Nutting*,[11] where it is said: "His remedy is in his own hands. The common sense of the common law has recognized that it is wiser to leave the individual to protect himself, if harm results to him from this exercise of another's right to use his property in a reasonable way, than to subject that other to the annoyance, and the public to the burden, of actions at law, which would be likely to be innumerable and, in many instances, purely vexatious." The Tennessee court in the instant case adopted the reasoning of the *Michalson* case. The court states, however, that the dismissal of the action did not prejudice the plaintiff as to recovery of any expense she might incur in cutting the overhanging branches or foliage.[12]

ADMINISTRATIVE LAW—ZONING BOARD—RIGHT OF BOARD TO APPEAL FROM ADVERSE DECISION OF LOWER COURT

A corporation applied to the municipal zoning board for a permit to construct an outdoor motion picture theater in an area zoned for residences. The board issued an order granting the zoning variance. Neighboring property owners then obtained certiorari from the district court, naming the zoning board and the applicant as defendants. The district court set aside the order and dismissed the suit against the applicant, and the board appealed. The Court of Civil Appeals dismissed this appeal on the ground that the board had no appealable interest. *Held,* reversed. The zoning board, as the representative of the public interest in the controversy, is a proper party to

8. See note 7 *supra.*

9. "As against adjoining proprietors, the owner of a lot may plant shade trees upon it, or cover it with a thick forest, and the injury done to them by the mere shading of the trees is *damnum absque injuria.* It is no violation of their rights." Bliss v. Ball, 99 Mass. 597, 598 (1868). See also Michalson v. Nutting, 275 Mass. 232, 175 N. E. 490 (1931), 11 B. U. L. REV. 588, 16 MINN. L. REV. 210; *cf.* Humes v. Mayor of Knoxville, 20 Tenn. 403, 34 Am. Dec. 657 (1839); Burton v. Chattanooga, 75 Tenn. 739 (1881).

10. Bliss v. Ball, 99 Mass. 597 (1868); Michalson v. Nutting, 275 Mass. 232, 175 N. E. 490 (1931), 11 B. U. L. REV. 588, 16 MINN. L. REV. 210; Hickey v. Michigan C. R. R., 96 Mich. 498, 55 N. W. 989 (1893); Smith v. Holt, 174 Va. 213, 5 S. E. 2d 492 (1939). *Contra:* Gostina v. Ryland, 116 Wash. 228, 199 Pac. 298, 18 A. L. R. 650 (1921) (decided under a nuisance statute). See Notes, 18 A. L. R. 655, 659 (1922), 76 A. L. R. 1111, 1113 (1932), 128 A. L. R. 1221, 1223 (1940).

11. 275 Mass. 232, 175 N. E. 490, 491 (1931).

12. For conflicting cases dealing with damages caused by overhanging branches and protruding roots, see Notes, 18 A. L. R. 655, 662 (1922), 76 A. L. R. 1111, 1113 (1932), 128 A. L. R. 1221, 1223 (1940). For a survey of the law governing adjoining landowners and growing trees see Macneil, *Growing Lawlessness of Trees,* in LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP MCMURRAY 375 (1935).

appeal from a judgment vacating its order. *Board of Adjustment of City of Fort Worth v. Stovall,* 216 S. W. 2d 171 (Tex. 1949).

As a general rule, an administrative board exercising quasi-judicial powers has neither a right to appeal nor a right to be heard in an appeal from a judgment affecting its order.[1] But where the board demonstrates that it has a legal interest [2] and is aggrieved,[3] or was a necessary party to the review,[4] it has been allowed to appeal. The majority of the courts have held that a zoning board is engaged in quasi-judicial functions only, and have denied its right to appeal.[5]

Some courts denying the right in zoning cases have recognized the existence of a public interest in the subject matter of the controversy, but have ascribed it to the municipality,[6] and have allowed the municipality to appeal though it was not a party below.[7] But in 1940, the case of *Rommell v. Walsh* [8] not only recognized the existence of a public interest in a zoning controversy, but also held that the zoning board could appeal as the representative of such interest. This holding was approved and followed in the instant case.[9] When a variance is granted to prevent "unnecessary hardship" [10] and then is vacated upon appeal, the applicant can appeal.[11] "Unnecessary hardship," however, means hardship to the individual and not to the public,[12] and there is little reason for allowing the board to appeal when no particular public interest is involved in a reversal of its order. On the other hand, where the board denies a variance, its denial merely leaves in operation the ordinance as passed

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1. People *ex rel.* Breslin v. Lawrence, 107 N. Y. 607, 15 N. E. 187 (1888) (justice of supreme court appealed); State *ex rel.* Kempster v. Common Council, 90 Wis. 487, 63 N. W. 751 (1895) (city council); 4 C. J. S., *Appeal and Error* § 205(d) n. 31 (1937).

2. Moode v. Board of County Comm'rs, 43 Minn. 312, 45 N. W. 435 (1890) (order of school board setting up a new school district quashed).

3. People *ex rel.* Burnham v. Jones, 110 N. Y. 509, 18 N. E. 432 (1888) (land commissioners issued a patent for certain lands, which was reversed).

4. Cleburne County v. Morton, 69 Ark. 48, 60 S. W. 307 (1900) (county court judge required by statute to defend its order, received adverse judgment).

5. State *ex rel.* Hurley v. Zoning Board, 198 La. 766, 4 So. 2d 822 (1941); Miles v. McKinney, 174 Md. 551, 199 Atl. 540, 117 A. L. R. 207 (1938); Appeal of Board of Adjustment, 313 Pa. 523, 170 Atl. 867 (1934) (all zoning board cases); 4 C. J. S. *Appeal and Error* § 205 (1937). The argument has been advanced that since these boards are of purely statutory creation, absence of specific provision allowing appeal negates legislative intent that there should be one. Miles v. McKinney, 174 Md. 551, 199 Atl. 540, 545 (1938).

6. Mayor and City Council v. Linthicum, 170 Md. 245, 183 Atl. 531 (1936) (appeal taken by mayor and city council); *see* Miles v. McKinney, 174 Md. 551, 199 Atl. 540, 545 (1938).

7. State v. Sarasota County, 118 Fla. 629, 159 So. 797 (1935); Roy Newman Cigar Co. v. Murphy, 2 Tenn. App. 321 (E. S. 1926); 4 C. J. S., *Appeal and Error* § 171 (1937).

8. 127 Conn. 16, 15 A. 2d 6.

9. 216 S. W. 2d at 174.

10. "Unnecessary hardship" is the customary statutory criterion for granting a variance from the zoning ordinances.

11. This is true even though, as here, suit has been dismissed against him. Ballard v. Kennedy, 34 Fla. 483, 16 So. 327 (1894); 4 C. J. S., *Appeal and Error* § 169 n. 44 (1937).

12. TEX. REV. CIV. STAT. ANN. art 1011g (1925).

by the city council.[13] If the variance denied by the board is granted by the reviewing court, the applicant has neither the desire nor the standing to appeal.[14] Public interest now lies in the enforcement of the ordinance, and the board should be allowed to appeal as the representative of this interest.[15] Probably, in order to be consistent, the board should be allowed to appeal in all cases where the reviewing court reverses the board's order, regardless of whether the variance was originally granted or denied.

It has been held that where there is ambiguity in the provisions of appeal statutes, the language should be resolved in favor of allowing the appeal,[16] and in this light the doctrine of the instant case is correct.[17] The simple solution lies in an express statutory provision allowing appeal by the board.[18] But in the absence of such provisions, the doctrine of the instant case will probably be extended to analogous situations involving administrative regulations where there is an appealable public interest in the subject matter and where the administrative tribunal is the proper representative of that interest.

CONSTITUTIONAL LAW—FREEDOM OF RELIGION—STATUTE OUTLAWING SNAKE-HANDLING

Defendants were convicted of violating a Tennessee statute[1] which makes it unlawful for any person to handle poisonous snakes "in such a manner as to endanger the life or health of any person." All were members of a religious sect which practiced snake-handling as a form of evangelism. *Held,* conviction affirmed. Since defendants' conduct involved grave, immediate danger to life and health, the statute was not an invalid encroachment upon religious freedom under either the Federal or State Constitutions. *Harden v. State,* 216 S. W. 2d 708 (Tenn. 1948).

The Fourteenth Amendment by its due process clause guarantees the free exercise of religion against infringement by state action.[2] Within this guaranty, freedom of religious belief is absolute. Freedom to practice that

13. Ordinarily a variance is granted only as a matter of grace, and the situation would be highly unusual where it could be demanded as a matter of right. Rubin v. Board of Directors, 16 Cal. 2d 119, 104 P. 2d 1041 (1940) (zoning); People *ex rel.* Fordham Church v. Walsh, 244 N. Y. 280, 155 N. E. 575, 578 (1927) (zoning).

14. He is not aggrieved thereby. Olsen v. Jacklowitz, 74 F. 2d 718 (2d Cir. 1935); Donovan v. Donovan, 223 Mass. 6, 111 N. E. 607 (1916). But applicant might appeal if judgment were only partly in his favor. Houchin Sales Co. v. Angert, 11 F. 2d 115 (8th Cir. 1926); Nashville v. Mason, 11 Tenn. App. 344 (M. S. 1930).

15. There is to date no case under this statute on this point. As to the applicant, he can contest only the legality of the board's denial, and that legality will ordinarily be sustained. San Angelo v. Boehme Bakery, 144 Tex. 281, 190 S. W. 2d 67 (1945).

16. Victor Talking Mach. Co. v. George, 69 F. 2d 871 (3d Cir. 1934); Abilene v. American Surety Co., 73 S. W. 2d 616 (Tex. Civ. App. 1934).

17. Walker, *Zoning Law in Texas,* 3 S. W. L. J. 50, 73 (1949).

18. Note, 21 B. U. L. REV. 122, 124 (1941).

1. TENN. CODE ANN. § 11412.14 (Williams' Supp. 1947).

2. Cantwell v. Connecticut, 310 U. S. 296, 60 Sup. Ct. 900, 84 L. Ed. 213 (1940).

belief, however, is subject to regulation for the protection of society.[3] But, in general, no regulation of a religious practice is valid unless the court regards it as reasonable under all the circumstances.[4] In determining the reasonableness of the regulation, the courts ordinarily consider the relative importance of the respective interests—those restricted and those protected—the extent of the conflict between them, the degree of regulation attempted, and other possible means of adjusting the conflict.[5]

In recent years, when dealing with problems involving those freedoms specified in the First Amendment, the courts have often applied the "clear and present danger" doctrine. As applied to freedom of religion, the premise is that a religious practice may not be restricted unless it involves a clear and present danger to the interests of other members of society.[6] This doctrine by no means represents an abandonment of the principle that the regulation must be reasonable. If the practice regulated involves no clear and present danger, the regulation is unreasonable, hence invalid; if a clear and present danger is involved, the regulation may or may not be reasonable.[7] The problem remains essentially one of balancing the interests. The effect of the clear and present danger doctrine is to weight the scales somewhat in favor of religious freedom. The normal presumption of the validity of legislative acts does not apply.[8]

One difficulty of the doctrine is that the concept of clear and present danger in application has not been clearly defined.[9] This difficulty does not complicate the instant case, however. The handling of poisonous snakes in-

3. Cantwell v. Connecticut, *supra* note 2. That this distinction is not always clear cut is demonstrated by *In re* Summers, 325 U. S. 561, 65 Sup. Ct. 1307, 89 L. Ed. 1795 (1945).

4. Prince v. Massachusetts, 321 U. S. 158, 64 Sup. Ct. 438, 88 L. Ed. 645 (1944).

5. In each of the following cases most or all of these factors are considered: Follett v. Town of McCormick, 321 U. S. 573, 64 Sup. Ct. 717, 88 L. Ed. 938 (1944); Murdock v. Pennsylvania, 319 U. S. 105, 63 Sup. Ct. 870, 87 L. Ed. 1292 (1943); Jamison v. Texas, 318 U. S. 413, 63 Sup. Ct. 669, 87 L. Ed. 869 (1943); Jones v. City of Opelika, 316 U. S. 584, 62 Sup. Ct. 1231, 86 L. Ed. 1691 (1942); Cox v. New Hampshire, 312 U. S. 569, 61 Sup. Ct. 762, 85 L. Ed. 1049 (1941).

6. Board of Education v. Barnette, 319 U. S. 624, 63 Sup. Ct. 1178, 87 L. Ed. 1628 (1943).

7. *Compare* Kovacs v. Cooper, 69 Sup. Ct. 448 (1949), *with* Saia v. New York, 334 U. S. 558, 68 Sup. Ct. 1148, 92 L. Ed. 1574 (1948), 2 VAND. L. REV. 113. The cases involved the same danger—the invasion of privacy by unrestricted use of sound amplifiers (protected as a form of speech). The cases reach different results, apparently on the ground that the ordinance in one case was a reasonable regulation, while the ordinance in the other was not.

8. Kovacs v. Cooper, 69 Sup. Ct. 448 (1949).

9. Compare these various statements of the concept: Cantwell v. Connecticut, 310 U. S. 296, 308, 60 Sup. Ct. 900, 84 L. Ed. 1213 (1940) ("clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order"); Board of Education v. Barnette, 319 U. S. 624, 639, 63 Sup. Ct. 1178, 87 L. Ed. 1628 (1943) ("grave and immediate danger to interests which the State may lawfully protect"); Thomas v. Collins, 323 U. S. 516, 530, 65 Sup. Ct. 315, 89 L. Ed. 430 (1945) ("the gravest abuses, endangering paramount interests"); Bridges v. California, 314 U. S. 252, 263, 62 Sup. Ct. 190, 86 L. Ed. 192 (1941) ("the substantive evil must be extremely serious and the degree of imminence extremely high"); Kovacs v. Cooper, 69 Sup. Ct. 448, 451 (1949) ("[a] state or city may prohibit acts or things reasonably thought to bring evil or harm to its people").

volves an obvious physical danger to participants and bystanders. Danger seldom appears in more concrete form. The decision is sustained by authority[10] and seems clearly reasonable.

The case is significant in Tennessee law in that it construes for the first time that part of the Tennessee Constitution which provides that "no human authority can, in any case whatever, control or interfere with the rights of conscience." [11] As construed by the court this provision guarantees absolute freedom of belief, but does not gnarantee absolute freedom to practice that belief. The court leaves no doubt that society is to be protected "from a practice, religious or otherwise, which is dangerous to life and health." [12]

CONSTITUTIONAL LAW—STATE CONSTITUTIONAL REQUIREMENT FOR VOTING, TO "UNDERSTAND AND EXPLAIN" THE CONSTITUTION—EFFECT OF DISCRIMINATORY ADMINISTRATION AGAINST NEGROES

Plaintiff sought a declaratory judgment against the defendant individually and as a member of an Alabama board of election registrars, to have declared unconstitutional an amendment to the Alabama Constitution [1] which provided, in effect, that only those persons who could understand and explain any article of the Federal Constitution to the satisfaction of the board would be allowed to register. The evidence was found to show that in the administration of the law, the requirements had been enforced almost exclusively against negroes. *Held,* the amendment attempted to grant arbitrary power to the boards to accept or reject any prospective elector and hence was a denial of equal protection of the law under the Fourteenth Amendment, and in its object and manner of administration it was violative of the Fifteenth Amendment. *Davis v. Schnell,* 72 F. Supp. 872 (S. D. Ala. 1949), *aff'd mem.,* 69 Sup. Ct. 749 (1949). [2]

10. State v. Massey, 51 S. E. 2d 179 (N. C. 1949), *appeal dismissed sub nom.* Bunn v. North Carolina, 17 U. S. L. WEEK 3258 (U. S. Apr. 5, 1949) (snake-handling); Lawson v. Commonwealth, 291 Ky. 437, 164 S. W. 2d 972 (1942) (snake-handling); *cf.* Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244 (1879) (polygamy); Kirk v. Commonwealth, 186 Va. 839, 44 S. E. 2d 409 (1947) (religious belief held no defense in criminal prosecution for death caused by snake-handling).

11. TENN. CONST. Art. 1, § 3. The language of this section would seem a stronger guaranty of religious freedom than the corresponding language of the Federal Constitution (U. S. CONST. AMEND. I).

12. 216 S. W. 2d at 711. If the only persons endangered were those participating in the practice, a more difficult problem would be presented. In the present case defendants argued that they had taken precautions adequate to protect the audience. The court intimates that this assertion, if established, would be no defense.

1. ALA. CONST. AMEND. 55.

2. The opinion of the Supreme Court reads as follows: "PER CURIAM: The judgment is affirmed. Lane v. Wilson, 307 U. S. 268, 59 S. Ct. 872, 83 L. Ed. 1281; Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220. Cf. Williams v. Mississippi, 170 U. S. 213, 18 S. Ct. 583, 42 L. Ed. 1012."

The constitutional amendment here involved represents another in a series of efforts to restrict voting by negroes without violating the Fourteenth or Fifteenth Amendments.[3] Most of the recent attempts to reach this result have been through party primaries, with the states seeking to disassociate themselves from actions taken by the party. Though there was some vacillation by the Supreme Court in the early cases, recent decisions have uniformly held that state action is involved, and the series of cases culminating in *Rice v. Elmore*[4] has apparently eliminated this method. These cases are discussed and analyzed in a discussion of the *Rice* case in an earlier issue of this Review.[5] The instant case involves resort to another method.

The states have the power to prescribe the qualifications for voting as long as they do not conflict with the Federal Constitution.[6] Literacy requirements have been adopted by a number of states,[7] while others by constitutional provision require some degree of interpretation or explanation of the Federal Constitution.[8] A provision of the latter type was held in *Trudeau v. Barnes*[9] not to violate either the Fourteenth or Fifteenth Amendments. In that case there was apparently no discriminatory administration.

The decision of the district court in the instant case was clearly to the effect that the amendment was defective both because of the unrestricted power given to the boards by its indefinite language and because of the unfairness of its actual administration. This would mean that the amendment is completely unconstitutional. But the Supreme Court opinion is not as clear. The reliance on *Yick Wo v. Hopkins*[10]—the leading case holding that the administration of a statute may constitute a deprival of equal protection even though the statute is constitutional on its face—may possibly indicate that the Court was concerned only with the *administration* of the amendment. This conclusion is strengthened by the additional reference to *Williams v. Mississippi*,[11]

3. See generally Note, *Negro Disenfranchisement—A Challenge to the Constitution*, 47 COL. L. REV. 76 (1947).

4. 165 F. 2d 387 (4th Cir. 1948), *cert. denied*, 333 U. S. 875 (1948).

5. 1 VAND. L. REV. 645 (1948).

6. *See e.g.*, Breedlove v. Suttles, 302 U. S. 277, 283, 58 Sup. Ct. 205, 82 L. Ed. 252 (1937); Guinn v. United States, 238 U. S. 347, 362, 35 Sup. Ct. 926, 59 L. Ed. 1340 (1915); McPherson v. Blacker, 146 U. S. 1, 37-38, 13 Sup. Ct. 3, 36 L. Ed. 869 (1892).

7. GA. CONST. § 2-704; LA. CONST. Art. 8, §.1; MASS. CONST. Art. XXI, § 122; MISS. CONST. Art. 12, § 244; N. C. CONST. Art. VI, § 4; OKLA. CONST. Art. III, § 4a; S. C. CONST. Art. 2, § 4; VA. CONST. § 20. That literacy tests for electors are valid see Guinn v. United States, 238 U. S. 347, 366, 35 Sup. Ct. 926, 59 L. Ed. 1340 (1914).

8. *E.g.*, LA. CONST. Art. 8, § 1.

9. 65 F. 2d 563 (5th Cir. 1933), *cert. denied*, 290 U. S. 659 (1933); *cf.* Williams v. Mississippi, 170 U. S. 213, 18 Sup. Ct. 583, 42 L. Ed. 1012 (1898) (indictment by grand jurors who must be electors qualified under "reasonable-interpretation" provision of state constitution held valid because the provision did not discriminate against negroes on its face and no discriminatory administration was shown).

10. 118 U. S. 356, 6 Sup. Ct. 1004, 30 L. Ed. 220 (1886) (city ordinance prohibiting operation of laundries without consent of administrative board, unless in a brick or stone building, held void under the equal protection clause of the Federal Constitution because discriminatory administration was apparent, without consideration of validity of the ordinance itself).

11. 170 U. S. 213, 18 Sup. Ct. 583, 42 L. Ed. 1012 (1898).

which involved a provision somewhat similar to the Alabama amendment and which distinguished the *Yick Wo* case on the ground that no discriminatory administration of the statute was shown.[12]

As a result of the opinions by the district court and the Supreme Court in the instant case, three possible interpretations as to the effect of the state amendment may be reached: (1) The amendment is unconstitutional on its face because it gives unrestricted power to control voting rights not governed by standards sufficiently definite.[13] (2) The amendment is unconstitutional because the motive of disenfranchisement of negroes within the state was so inextricably bound up in the history of its adoption. (3) The amendment is not unconstitutional as such, but any administration of it in a discriminatory fashion, particularly if directed against negroes, is unconstitutional. It is not possible to tell with certainty which of these interpretations is the correct one.

Two conclusions from the case do seem warranted: (1) The case does not indicate that literacy requirements are unconstitutional if they are properly expressed in the statute and fairly administered. (2) The Supreme Court will continue to be alert to invalidate any method intended to restrict the voting rights of negroes, no matter how legitimate it appears on the surface; "sophisticated as well as simple-minded modes of discrimination" [14] will be banned.

CONTRACTS—OFFER AND ACCEPTANCE—EFFECT OF ATTEMPTED REVOCATION OF UNILATERAL OFFER AFTER PART PERFORMANCE

Defendant appointed plaintiff, a real estate broker, as his exclusive agent for 90 days to sell certain property and agreed to pay him a commission if the property were sold during that time by plaintiff, defendant or any other party. After spending time and money attempting to procure a purchaser, plaintiff learned that the property had been sold by another agent of defendant. Plaintiff brought suit to recover the commission. *Held,* that part performance of the consideration for an offer contemplating a unilateral contract makes that offer irrevocable. *Hutchinson v. Dobson-Bainbridge Realty Co.,* 217 S. W. 2d 6 (Tenn. App. M. S. 1946).[1]

12. *Cf.* MCGOVNEY, CASES ON CONSTITUTIONAL LAW 171 (Supp. 1946).

13. *Cf.* Connally v. General Construction Co., 269 U. S. 385, 46 Sup. Ct. 126, 70 L. Ed. 322 (1926) (statute requiring contractor to pay employees "not less than the current rate of per diem wages in the locality where work is performed" violates the Fourteenth Amendment because of uncertainty); Screws v. United States, 325 U. S. 91, 65 Sup. Ct. 1031, 89 L. Ed. 1495 (1945) (federal statute making it an offense to "willfully deprive one of rights . . . secured by the Constitution or laws of the United States").

14. Lane v. Wilson, 307 U. S. 268, 275, 59 Sup. Ct. 872, 83 L. Ed. 1281 (1939).

1. Though this case was decided by the Tennessee Court of Appeals on Aug. 31, 1946, the opinion was not published until Mar. 8, 1949. In the case of Lazarov v. Nunnally, 217 S. W. 2d 11, decided on Jan. 17, 1949, the Tennessee Supreme Court cited the

There is a split of authority as to whether an offer looking forward to a unilateral contract may be revoked after part performance.[2] According to the traditional view, an offeror may revoke his offer to a unilateral contract at any time before the requested act is completed.[3] The application of this strictly logical view has led to rather harsh results in some cases.[4] Consequently, the courts have attempted to find a bilateral agreement wherever possible.[5] This approach does not solve all cases, however, because some offers cannot be interpreted as anything but unilateral in nature. Several commentators have attempted to find some logical way to hold that an offer of this nature cannot be revoked.[6] McGovney has suggested that an offer contemplating a unilateral agreement is accomplished by an implied promise to keep the original offer open for a reasonable time once performance is commenced.[7] This has received some support.[8] Corbin proposes a rule that offers become irrevocable for a reasonable time once performance by the offeree has begun.[9] The *Restatement of Contracts* sets forth a similar rule,[10] expressing the trend towards the liberal view. These suggestions have been attacked as binding the offeror

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instant case with approbation and recommended that the opinion be published. The two cases were therefore reported together.

2. *Holding offer irrevocable:* Lyon v. Goss, 19 Cal. 2d 659, 123 P. 2d 11 (1942); Abbott v. Stephany Poultry Co., 62 A. 2d 243 (Del. 1948); Braniff v. Baier, 101 Kan. 117, 165 Pac. 816 (1917); Brackenbury v. Hodgkin, 116 Me. 399, 102 Atl. 106 (1917). *Holding offer revocable:* Bretz v. Union Central Life Ins. Co. 134 Ohio St. 171, 16 N. E. 2d 272 (1938) (although there is a suggestion that there would be recovery if the performance were substantial); Kolb v. Bennett Land Co., 74 Miss. 567, 21 So. 233 (1897); Charles E. Quincy & Co. v. Cities Service Co., 156 Misc. 83, 282 N. Y. Supp. 294 (Sup. Ct. 1935); Flinders v. Hunter, 60 Utah 314, 208 Pac. 526 (1922).

3. 2 MECHEM, AGENCY § 2452 (2d ed. 1914); 2 PARSONS, CONTRACTS 520 (1866); Wormser, *The True Conception of Unilateral Contracts,* 26 YALE L. J. 136 (1916).

4. Biggers v. Owen, 79 Ga. 658, 5 S. E. 193 (1888); Stensgaard v. Smith, 43 Minn. 11, 44 N. W. 669, 19 Am. St. Rep. 205 (1890); Petterson v. Pattberg, 248 N. Y. 86, 161 N. E. 428 (1928), 7 TENN. L. REV. 207 (1929).

5. S. Blumenthal & Co. v. Bridges, 91 Ark. 212, 120 S. W. 974 (1909); Davis v. Jacoby, 1 Cal. 2d 370, 34 P. 2d 1026 (1934); Petroleum Research Corp. v. Barnsdall Refining Corp., 188 Okla. 62, 105 P. 2d 1047 (1940); RESTATEMENT, CONTRACTS § 31 (1932).

6. Ashley, *Offers Calling for a Consideration Other Than a Counter Promise,* 23 HARV. L. REV. 159 (1910) (considers estoppel as a solution); Ballantine, *Acceptance of Offers for Unilateral Contracts by Partial Performance of Service Requested,* 5 MINN. L. REV. 94 (1921) ("the law imposes the obligation precluding the offeror from arbitrarily revoking the offer, after inducing a person to act on the faith of it, because this is demanded by good faith and common honesty"); Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations,* 26 YALE L. J. 169 (1917) (suggests that a rule consistent with justice and policy be formulated and followed); McGovney, *Irrevocable Offers,* 27 HARV. L. REV. 644, 654 (1914) (implied promise to keep offer open).

7. McGovney, *supra* note 6, at 659.

8. 1 WILLISTON, CONTRACTS § 60A (Rev. ed. 1936); Roth v. Moeller, 185 Cal. 415, 197 Pac. 62, 64 (1921).

9. Corbin, *supra* note 6, at 195.

10. RESTATEMENT, CONTRACTS § 45 (1932): "If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time."

but not the offeree. This may be true, but the offeror can always protect himself by requiring a return promise.[11]

The instant case definitely places Tennessee in the group following the rule adopted by the *Restatement*. The fact that there are very few decisions on this point in Tennessee tends to show that the courts have followed other states in holding agreements bilateral rather than unilateral whenever possible.[12] The old approach has been utilized in the past to some extent,[13] yet there are decisions which have allowed recovery.[14] It should be noted that the rule expressed in the instant case has been restricted to certain types of unilateral contracts in some states.[15] How broadly the Restatement rule will be applied in Tennessee remains to be seen, but it would seem best to restrict its application to those situations where an obvious and real injustice would occur if it were not used.

In his opinion in the instant case Judge Felts said that the "theoretical difficulties, formidable as they seem, are outweighed by considerations of practical justice."[16] However, the result reached seems to be both rational and just. One who makes an offer looking forward to the creation of a unilateral contract, where time and effort will be needed to render the performance that constitutes acceptance, may reasonably be deemed to promise that his offer shall be left open while the acceptance is being rendered. Once the performance is started, the offeror's implied promise is supported and made contractual by the doctrine of promissory estoppel, summed up in Sec-

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11. 1 WILLISTON, CONTRACTS § 60A n. 3 (Rev. ed. 1936).

12. Farabee-Treadwell Co. v. Union & Planters' Bank & Trust Co., 135 Tenn. 208, 186 S. W. 92 (1916); Fourth Nat. Bank v. Stahlman, 132 Tenn. 367, 178 S. W. 942 (1915).

13. McFadden v. Crisler, 141 Tenn. 531, 213 S. W. 912 (1919) (exclusive agency to sell land is revoked upon sale by owner when there was no explicit agreement that owner could not sell); Charlton & Lewis v. Wood, 58 Tenn. 19 (1872) (real estate agent was not allowed to recover a commission for the sale of land when the owner himself sold it even though the purchaser had become interested through the agent's advertisements); Clayton v. McKinney, 57 Tenn. 72 (1872) (no allowance for work done on a levee in part performance of an offer when a flood destroyed the partially completed levee).

14. Sylvester v. Johnson, 110 Tenn. 392, 75 S. W. 923 (1903) (where a person who had an exclusive agency to sell land had commenced negotiations with a purchaser to whom the owner later sold, the agent was allowed his commission); Dulaney v. Page Belting Co., 59 S. W. 1082 (Tenn. Ch. App. 1900) (agent to sell chattels was allowed to recover on a quantum meruit basis when the agency was revoked prior to his making any sales but after he had expended time and money in the interest of his principal); Woodall v. Foster, 91 Tenn. 195, 18 S. W. 241 (1892) (real estate agent recovered his commission where he had been urged by the owner of land to seek a quick sale and had found a purchaser after three days but then learned that the owner had already sold the property); Bush v. Jones, 2 Tenn. Ch. 190 (1874) (bricklayer was allowed recovery for value of his work when he did a very poor job whereas the offer had called for a good job); *see* Curtiss Candy Co. v. Silberman, 45 F. 2d 451, 453 (6th Cir. 1930) (indicated that if injustice and hardship result from revocation, part performance may in some cases make an offer irrevocable).

15. Note, 33 COL. L. REV. 463 (1933) (suggestion that there might be a different law of reward, tender, brokerage, personal service, etc., in the same state even though the underlying agreement in each is unilateral).

16. 217 S. W. 2d at 10.

tion 90 of the *Restatement*.[17] The effect of the part performance by the offeree then is to give him an option to complete the act required. Therefore the instant case is supported by reason and by principle, as well as by the considerations of practical justice.

CRIMINAL LAW—DOUBLE JEOPARDY—CONVICTION OF HIGHER OFFENSE ON RETRIAL

Defendant was indicted and tried for murder, and convicted of manslaughter. On appeal he obtained a new trial, and on retrial was convicted of second degree murder. He contends that the conviction of manslaughter in the first trial amounted to an acquittal of murder in the first or second degree; hence, trying him for murder at the second trial constituted double jeopardy. *Held,* conviction affirmed; when an accused obtains a new trial on appeal he may be retried under the original indictment, even though convicted at the earlier trial of a lesser offense than charged, without being subjected to double jeopardy. *State v. Correll,* 50 S. E. 2d 717 (N. C. 1948).

The Federal Constitution and the constitutions of at least 43 states contain a provision to the effect that no person shall, for the same offense, be twice put in jeopardy of life or limb.[1] And where the state constitution is silent on the point, the doctrine has either been enacted by statute or recognized by the courts as part of the common law.[2] In spite of the language "life or limb," the doctrine is generally applied to all indictable offenses, including misdemeanors.[3] The great weight of authority in the United States is to the effect that jeopardy attaches when a trial jury has been impanelled and sworn,[4] or, if there is no jury, at the equivalent in time to the swearing

17. "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

1. *E.g.,* TENN. CONST. Art. 1, § 10. Citations of 41 state constitutions are collected in Note, 16 CORN. L. Q. 201, 202 (1931). Similar provisions are also found in ARK. CONST. Art. II, § 8 and IOWA CONST. Art. I, § 12.

2. Connecticut, Maryland, Massachusetts, North Carolina, and Vermont appear to have no express constitutional provision against double jeopardy. However, at least one of these, Massachusetts, has a statutory prohibition, MASS. ANN. LAWS, c. 263, §§ 7-8A (1933); while another, North Carolina, interprets its constitution as prohibiting double jeopardy, although the prohibition is not expressly stated. State v. Mansfield, 207 N. C. 233, 176 S. E. 761 (1934). For cases announcing the principle as a part of the common law, see State v. Benham, 7 Conn. 414 (1829); Johnson v. State, 62 A. 2d 249 (Md. 1948); State v. O'Brien, 106 Vt. 97, 170 Atl. 98 (1934).

3. Clawans v. Rives, 104 F. 2d 240 (D. C. Cir. 1939); People v. Matiasevich, 12 Cal. App. 2d 759, 55 P. 2d 942 (1936); State v. O'Brien, 106 Vt. 97, 170 Atl. 98 (1934).

4. *E.g.,* McCarthy v. Zerbst, 85 F. 2d 640 (10th Cir. 1936); McGill v. State, 209 Ark. 85, 189 S. W. 2d 646 (1945); Barbour v. State, 66 Ga. App. 498, 18 S. E. 2d 40 (1941); State v. Charles, 183 S. C. 188, 190 S. E. 466 (1937); Note, 24 MINN. L. REV. 522, 524 (1940).

of a jury.[5] This constitutional guaranty may be waived, and "it is generally conceded that a person convicted of a crime waives his constitutional protection against being put twice in jeopardy and may be tried again where a verdict against him is set aside and a new trial granted on his motion in the trial court or a conviction is reversed on appeal or error proceedings instituted by him." [6]

But there is a definite dispute as to the extent of this waiver where a new trial has been obtained by a defendant who was convicted of a lesser offense than that charged in the indictment. The 32 jurisdictions which have ruled on this question are evenly divided. One group takes the position that a person convicted of a lesser offense than the indictment charges cannot, on a new trial, be prosecuted for the greater offense.[7] The reasoning behind this view is that the "waiver, unless it be expressly of the benefit of the verdict of acquittal, goes no further than the accused himself extends it His application for a correction of the verdict is not to be taken as more extensive than his needs. . . . The waiver is construed to extend only to the precise thing concerning which the relief is sought." [8] The other group of cases holds that conviction of the lesser offense is not a bar to prosecution for the greater on a new trial.[9] These courts feel that in appealing from the judgment the defendant necessarily appeals from the whole thereof, as well that which acquits as that which condemns, for the judgment is one entire thing and is not divisible.

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5. Hasse v. State, 8 Ind. App. 488, 36 N. E. 54 (1894) (when the trial begins); State v. Yokum, 155 La. 846, 99 So. 621 (1923) (when the first witness is sworn); Rosser v. Commonwealth, 159 Va. 1028, 167 S. E. 257 (1933) (after the State has begun to introduce evidence).

6. 15 AM. JUR., *Criminal Law* § 426 (1938). Stroud v. United States, 251 U. S. 15, 64 L. Ed. 103, 40 Sup. Ct. 50 (1919); Pratt v. United States, 102 F. 2d 275 (D. C. Cir. 1939); Allen v. Commonwealth, 272 Ky. 533, 114 S. W. 2d 757 (1938); People v. Bellows, 281 N. Y. 67, 22 N. E. 2d 238 (1939).

7. Hearn v. State, 212 Ark. 360, 205 S. W. 2d 477 (1947); McLeod v. State, 128 Fla. 35, 174 So. 466 (1937); State v. Coleman, 226 Iowa 968, 285 N. W. 269 (1939); State v. Wilson, 172 Ore. 373, 142 P. 2d 680 (1943); Commonwealth v. Flax, 331 Pa. 145, 200 Atl. 632 (1938); Reagan v. State, 155 Tenn. 397, 293 S. W. 755 (1927); State v. McLane, 126 W. Va. 219, 27 S. E. 2d 604 (1943); see 71 U. S. L. REV. 421, 423 (1937) (citing earlier cases). While California is in accord with this view [People v. Muhlner, 115 Cal. 303, 47 Pac. 128 (1896)], it makes a unique distinction: a difference in the degrees of murder is held not to constitute a difference in offenses, and a conviction of murder in the second degree is therefore held not to bar a conviction, on a new trial, of murder in the first degree. People v. McNeer, 14 Cal. App. 2d 22, 57 P. 2d 1018 (1936). See also Hall v. State, 145 Tex. Cr. App. 192, 167 S. W. 2d 532, 533 (1943), holding that "upon a reversal of a conviction for murder without malice the accused could again be placed upon trial for murder with malice," even though Texas also adheres to the above view. Brown v. State, 99 Tex. Cr. App. 19, 267 S. W. 493 (1925).

8. People v. Dowling, 84 N. Y. 478, 484 (1881).

9. Trono v. United States, 199 U. S. 521, 26 Sup. Ct. 121, 50 L. Ed. 292 (1905); Perdue v. State, 134 Ga. 300, 67 S. E. 810 (1910); Christensen v. State, 203 P. 2d 258 (Kan. 1949); Hoskins v.Commonwealth, 152 Ky. 805, 154 S. W. 919 (1913); Butler v. State, 177 Miss. 91, 170 So. 148 (1936); Macomber v. State, 137 Neb. 882, 291 N. W. 674 (1940); State v. Hiatt, 187 Wash. 226, 60 P. 2d 71 (1936); *cf.* State v. Palko, 122 Conn. 529, 191 Atl. 320 (1937); see Notes, 71 U. S. L. REV. 421, 423 (1937), 59 A. L. R. 1160 (1929).

The court in the instant case, in ruling on this point of law, has merely restated a doctrine which has been accepted in North Carolina for over a century, first pronounced in the case of *State v. Stanton*.[10] This ruling is supported by many opinions, and appears to be the better of the two conflicting views. As was said by Mr. Justice Peckham in *Trono v. United States*:[11] "When at his own request he has obtained a new trial he must take the burden with the benefit, and go back for a new trial of the whole case."

Mr. Justice Holmes would reject the waiver theory and explain on another ground the holding that an accused can be convicted of a higher offense on retrial. In his dissenting opinion in *Kepner v. United States*,[12] he declared that putting the defendant on retrial because of a mistake of law does not constitute double jeopardy at all, since a second trial in the same case must be regarded as only a continuation of the jeopardy which began with the trial below. While this view would seem, upon reflection, to be the most desirable of the three discussed, it does not appear to have received much support in the cases.[13]

CRIMINAL LAW—LARCENY—SINGLE ACT CONSTITUTING SEPARATE OFFENSES

Goods were shipped by two different owners through an interstate trucking line. Appellant "hi-jacked" a truck containing both shipments, but was apprehended before he could unload it. He was convicted on separate counts for stealing the goods. *Held,* appellant was properly convicted of separate offenses; it was the intention of Congress, in enacting the National Stolen Property Act,[1] to protect every interstate shipment of goods. *Oddo v. United States,* 171 F. 2d. 854 (2d Cir. 1949).[2]

The reported case tends to add to the confusion surrounding an important question in criminal pleading: whether a defendant may be convicted of different offenses for stealing at the same time and place property owned by different persons. The cases directly deciding the point are about equally

10. 23 N. C. 424 (1841).
11. 199 U. S. 521, 534, 26 Sup. Ct. 121, 50 L. Ed. 292 (1905).
12. 195 U. S. 100, 134, 24 Sup. Ct. 797, 49 L. Ed. 114 (1904).
13. In accord with Holmes' theory is State v. Lee, 65 Conn. 265, 30 Atl. 1110 (1894) (appeal by the State in a criminal case).

1. "[W]hoever shall steal . . . from any truck . . . with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express . . . shall in each case be fined not more than $5,000.00, or imprisoned not more than ten years, or both. . . ." 37 STAT. 670 (1913), as amended, 18 U. S. C. A. § 409 (1940) [now Pub. L. No. 772, 80th Cong., 2d Sess., §§ 659, 2117 (June 25, 1948)].

2. The facts are reported more fully in United States v. De Normand, 149 F. 2d 622 (2d Cir. 1945), *cert. denied,* 326 U. S. 756 (1945).

divided.[3] Perhaps the majority of the cases hold only that the offenses may be joined without duplicity.[4] In at least one jurisdiction, a plea of *autrefois convict* will bar a subsequent prosecution for theft of other property at the same time and place; while a plea of *autrefois acquit* will not.[5]

If the same transaction results in separate offenses, there is no good reason for not punishing the offender by separate convictions. It has been held that the test for determining identity of offenses is "whether the same evidence is required to sustain them." [6] Its application brings divergent results. If the property was taken by separate acts, clearly, different evidence is required to find each taking. So, in *United States v. Beerman*,[7] where the defendant stole property of lodgers from five different rooms in a boarding house, five convictions were held proper. But this case was disapproved in *Hoiles v. United States*,[8] and the latter was followed in *Chanock v. United States*.[9]

Many other cases contain dicta to the effect that separate takings "at the same time and place" result in only one offense.[10] Although there are separate trespasses as to the owners, there is said to be but one trespass as to the state.[11] The Missouri court has said that although different evidence is required to prove each taking, the act, intent and volition are the same.[12] This does not appear to be realistic, since each taking must be a distinct act. Some courts express the fear that, by splitting the offenses, the thief might escape a penitentiary sentence,[13] but there is no danger of this where the state is given an election between one prosecution and several.[14]

The attitude of the *Beerman* case is that separate property rights have been violated, and that the state should redress each wrong. While fully protecting the defendant's rights, this view is more consistent with the common law concept of larceny.

A more difficult question is presented when, as in the principal case, the defendant has taken possession of the diversely owned property by a

3. See Note, 42 L. R. A. (N.S.) 967, 973 (1913). But *cf.* Note, 31 L. R. A. (N.S.) 693, 723 (1911) (majority rule said to be that separate offenses are committed); 22 C. J. S., *Criminal Law* § 298(c) (1940) (majority rule said to be that only one offense is committed).

4. *E.g.*, People v. Israel, 269 Ill. 284, 109 N. E. 969 (1915); State v. Douglas, 26 Nev. 196, 65 Pac. 802 (1901); State v. Hennessey, 23 Ohio St. 339 (1872).

5. Wright v. State, 37 Tex. Crim. App. 627, 40 S. W. 491 (1897).

6. Morgan v. Devine, 237 U. S. 632, 641, 35 Sup. Ct. 712, 59 L. Ed. 1153 (1915); *cf.* United States v. Miro, 60 F. 2d 58, 61 (2d Cir. 1932); Reger v. Hudspeth, 103 F. 2d 825, 826 (10th Cir. 1939), *cert. denied*, 308 U. S. 549 (1939).

7. 24 Fed. Cas. 1065, No. 14,560 (C. C. D. C. 1838).

8. 3 MacArth. 370, 36 Am. Rep. 106 (D. C. 1877).

9. 267 Fed. 612 (D. C. Cir. 1920).

10. *See, e.g.*, Furnace v. State, 153 Ind. 93, 54 N. E. 441 (1899); State v. Emery, 68 Vt. 109, 34 Atl. 432 (1896).

11. People v. Israel, 269 Ill. 284, 109 N. E. 969 (1915).

12. State v. Toombs, 326 Mo. 981, 34 S. W. 2d 61 (1930).

13. People v. Israel, 269 Ill. 284, 109 N. E. 969 (1915).

14. Commonwealth v. Sullivan, 104 Mass. 552 (1870). *But see* Phillips v. State, 85 Tenn. 551, 558, 3 S. W. 434, 437 (1887).

single act. Since larceny is an offense against possession, in its essence a trespass,[15] the fact of ownership is material only insofar as it is necessary for description of the property taken.[16] And if chattels owned by different persons are taken from a single possession, it would seem that only one offense is committed in taking all. Often, the thief does not even know or care who owns the property he is taking.[17] The fact of ownership by several different persons alters neither the moral nor the legal aspects of the wrong done to the public.[18]

The principal case seems to be based primarily on the National Stolen Property Act. Undoubtedly, Congress may provide that one act may constitute several distinct offenses.[19] Theft of or from an interstate shipment is made "in each case" punishable.[20] Even if this construction is sound, the authority of the case should be restricted to cases arising under the statute.

FEDERAL JURISDICTION—AMOUNT IN CONTROVERSY—DEGREE OF EVIDENCE REQUIRED

Plaintiffs licensed movie films to defendant exhibitors under a percentage agreement, and they now seek to recover in a federal district court sums allegedly withheld through systematic and continuous under-reporting of ticket sales. Defendants put the jurisdictional amount in issue, whereupon plaintiffs, unable to allege or show the exact amounts withheld, submitted affidavits substantiating a reasonable belief that more than $3,000 was involved.[1] *Held,* that plaintiffs had sustained their burden of showing that jurisdiction was properly invoked. *Columbia Pictures Corporation v. Rogers,* 81 F. Supp. 580 (S. D. W. Va. 1949).

15. People v. Murphy, 47 Cal. 103 (1873); Hite v. State, 17 Tenn. 197 (1836); Regina v. Gruncell, 9 Car. & P. 365, 173 Eng. Rep. 870 (N. P. 1840); Rex v. Walsh, 1 Moody 14, 168 Eng. Rep. 1166 (Crown Cas. 1824). It is larceny even if the owner steals from a bailee. Palmer v. People, 10 Wend. 165 (N. Y. 1832).

16. State v. Mickel, 23 Utah 507, 65 Pac. 484 (1901).

17. Dean v. State, 9 Ga. App. 571, 71 S. E. 932 (1911).

18. *See* State v. Kieffer, 17 S. D. 67, 95 N. W. 289, 290 (1903).

19. Reynolds v. United States, 280 Fed. 1 (6th Cir. 1922), *modified,* 282 Fed. 256 (6th Cir. 1922).

20. It will be interesting to observe what the court will do with a case in which defendant has stolen different shipments of goods belonging to one owner. This would seem to present the question of the application of the statute distinct from the question here discussed. Such a case would occur where defendant has stolen a truck containing shipments by different consignors to one consignee under such circumstances that title passes on delivery to the carrier. The decision would indicate clearly the grounds of the decision in the principal case, either by distingnishing it or by citing it as authority.

1. The affidavits were those of a lawyer employed by plaintiffs and showed that agents of affiant had observed specific instances of under-reporting, amounting in one case to more than $350, in two others to more than $500, from which an inference of a continuous practice resulting in defalcation in excess of $3,000 might reasonably be drawn. The court met defendants' contention that such evidence was based on hearsay by finding the affidavits competent to establish an evidentiary fact—the existence of the reports.

The jurisdiction of federal courts is limited by Congress,[2] is strictly construed,[3] and those invoking it must sufficiently state facts from which that jurisdiction clearly appears.[4] A general statement that the matter in controversy is in excess of $3,000 constitutes a sufficient showing, unless the defendant properly puts in issue the jurisdictional amount.[5] Then the burden is on the plaintiff to introduce proof of the existence of jurisdictional facts.[6] The mode of determining the issue of jurisdiction is within the discretion of the court.[7] But the problem apparent in the present case, the quantity and degree of proof the court should require, has been little discussed. The decided cases, speaking in general terms, have set the requirement variously.[8] Plaintiffs in the present case urged the so-called "legal certainty" rule that "it must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal," [9] while defendants contended that the court must hear evidence and be satisfied, with plaintiffs bearing the burden of proof, that the requisite jurisdictional facts are present.[10]

It is submitted that the problem involved is the same as that confronting any court required to make a preliminary finding of fact.[11] The courts have traditionally taken the view that what is required is a preponderance of the evidence to satisfy the court,[12] with an occasional relenting to permit a finding based on only a prima facie case.[13] That there was no departure from the traditional rule in the present case is apparent when one bears in mind the fact to be found. The court was not required to find that the amount of

2. 28 U. S. C. § 1332 (1948).

3. Thompson v. Gaskill, 315 U. S. 442, 62 Sup. Ct. 673, 86 L. Ed. 951 (1941); *see* Healy v. Ratta, 292 U. S. 263, 270, 54 Sup. Ct. 700, 78 L. Ed. 1248 (1934).

4. *E.g.*, McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 56 Sup. Ct. 780, 80 L. Ed. 1135 (1936). The court must dismiss where it appears from the pleadings that plaintiff could not recover in excess of $3,000, or where there is apparent colorable exaggeration for the purpose of invoking jurisdiction. DOBIE, FEDERAL PROCEDURE 152 (1928).

5. Gibbs v. Buck, 307 U. S. 66, 59 Sup. Ct. 725, 83 L. Ed. 1111 (1939); KVOS v. Associated Press, 299 U. S. 269, 57 Sup. Ct. 197, 81 L. Ed. 183 (1936).

6. MONTGOMERY, MANUAL OF FEDERAL JURISDICTION AND PROCEDURE § 100 (4th ed. 1942).

7. *E.g.*, Gibbs v. Buck, 307 U. S. 66, 59 Sup. Ct. 725, 83 L. Ed. 111 (1939).

8. Hague v. C. I. O., 307 U. S. 496, 59 Sup. Ct. 954, 83 L. Ed. 1423 (1939) (substantial proof); Buck v. Gallagher, 307 U. S. 95, 59 Sup. Ct. 740, 83 L. Ed. 1128 (1939); McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 56 Sup. Ct. 780, 80 L. Ed. 1135 (1936) (preponderance of the evidence).

9. Saint Paul Indemnity Co. v. Cab Co., 303 U. S. 283, 289, 59 Sup. Ct. 586, 82 L. Ed. 845 (1938). A paraphrasing of the term defines it as that certainty required in a legal proceeding.

10. An analysis of these two contentions reveals that each aims at placing the risk of non-persuasion on the adverse party.

11. For a "prefatory" discussion of this problem see MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 211 *et seq.* (1947).

12. *Id.* at 212.

13. Scherf v. Szadeczky, 4 E. D. Smith 110 (N. Y. City Ct. 1855); Cardozo, J., in Clark v. United States, 289 U. S. 1, 14, 53 Sup. Ct. 465, 77 L. Ed. 993 (1933) ("There must be a showing of a *prima facie* case sufficient to satisfy the judge that the light should be let in").

ultimate recovery would exceed $3,000, but only that the controversy or dispute involved more than that amount. Hence the evidence to furnish the basis of the finding need not have established losses in excess of $3,000, but merely information warranting plaintiffs' belief in good faith [14] that with the aid of discovery and inspection proceedings, defalcations exceeding that amount might come to light. Therefore reports of specific instances of under-reporting to the extent of more than $350 in one case and more than $500 in two others, when thousands of films had been supplied, warranted the court's finding that a bona fide dispute of the required magnitude was sufficiently shown.

INSURANCE—INCONTESTABLE CLAUSE—EFFECT ON ACTION BY INSURER TO REFORM POLICY

In 1926 defendant applied to the complainant for an ordinary life insurance policy. Through a clerical error he received a "Pension Policy," entitling him to twice the benefits of the ordinary life policy. Yet the premium inscribed on the issued policy, which was paid throughout the life of the policy, was the amount required for an ordinary life policy and considerably less than the "Pension Policy" premium. Becoming aware of the mistake in 1946, the complainant sought a reformation of the policy, so that the benefits accruing to the defendant would not exceed those of the ordinary life policy. Defendant's principal defense rested upon an incontestable clause in the issued policy. The trial court granted the reformation. *Held* (2-1),[1] reversed; an action for reformation is a contest within the contemplation of the incontestable clause. *Richardson v. Travelers Insurance Co.,* 171 F. 2d 699 (9th Cir. 1949).

Since the turn of the present century it has been customary for incontestable clauses to be inserted in life insurance policies.[2] They are intended as an assurance that after a certain period, seldom more than two years, the obligation of the insurer to pay on the maturity of the policiy will become absolute.[3] Originating as a voluntary inducement to prospective policyholders,[4] they are now required in the majority of states by statute.[5] The

14. For one legal writer's explanation of this good faith, see DOBIE, FEDERAL PROCEDURE 152 (1928).

1. Opinion by Orr, J. (Healy, J., concurring); Bone, J. dissenting without written opinion.

2. On the history, purpose and scope of incontestable clauses, see Notes, 24 CALIF. L. REV. 722 (1936), 31 ILL. L. REV. 769 (1937), 82 U. OF PA. L. REV. 839 (1934).

3. Orr, J., in instant case, 171 F. 2d at 701. See also Note, 24 CALIF. L. REV. 722 (1936).

4. "It is generally agreed that the origin of the clause may be found in the competitive idea of offering to policyholders assurance that their dependents would be the recipients of a protective fund rather than a lawsuit." 171 F. 2d at 699. See also Wright v. Mutual

courts have uniformly upheld the validity of such clauses where the policy is stated to be incontestable after a year or longer.[6] Where the incontestable clause allows the insurer a reasonable time for discovery, it is held to exclude as defenses not only inadvertent breaches of warranty and misrepresentations,[7] but also fraud in the inception of the policy.[8] Although there is a split of authority on whether fraud is a defense to a policy declared incontestable from date of issuance, the majority of courts have held even here that the clause prevents such a defense.[9]

The cases have held that certain defenses are available to the insurer after the incontestable clause has run. Thus, enumerated limitations on the coverage or risk assumed by the insurer are generally treated as exceptions and are held not to be affected by the clause.[10] Also, a showing that suit was not brought or proof of death was not supplied within the time allowed by the policy,[11] and a denial that insurance was written on the insured's life

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Benefit Life Ass'n, 118 N. Y. 237, 23 N. E. 186 (1890); Clement v. New York Life Ins. Co., 101 Tenn. 22, 46 S. W. 561 (1898); VANCE, INSURANCE § 231 (2d ed. 1930).

5. The state statutes in point are summarized in Note, 31 ILL. L. REV. 769, 772 n. 14 (1937). It is there stated that 31 states have a statutory incontestable requirement for life policies.

6. New York Life Ins. Co. v. Panagiotopoulos, 83 F. 2d 957 (1st Cir. 1936); Dibble v. Reliance Life Ins. Co. of Pittsburgh, 170 Cal. 199, 149 Pac. 171 (1915); Drews v. Metropolitan Life Ins. Co., 79 N. J. L. 398, 75 Atl. 167 (1910). See Notes, 85 A. L. R. 317 (1933), 98 A. L. R. 710 (1935), 135 A. L. R. 445 (1941), 147 A. L. R. 1015 (1943), 170 A. L. R. 1040 (1947).

7. One purpose of the incontestable clause is to prevent forfeiture for innocent mistake, and no cases have been found which have questioned its validity as applied to misrepresentations of this type.

8. Dibble v. Reliance Life Ins. Co. of Pittsburgh, 170 Cal. 199, 149 Pac. 171 (1915); Wright v. Mutual Benefit Life Ass'n, 118 N. Y. 237, 23 N. E. 186 (1890); Metropolitan Life Ins. Co. v. Peeler, 71 Okla. 238, 176 Pac. 939 (1918); Clement v. New York Life Ins. Co., 101 Tenn. 22, 46 S. W. 561 (1898); Harrison v. Provident Relief Ass'n, 141 Va. 659, 126 S. E. 696 (1925).

9. The clause prevents the defense of fraud: Pacific Mutual Life Ins. Co. v. Strange, 223 Ala. 226, 135 So. 477 (1931) (health policy); Duvall v. National Ins. Co. of Montana, 28 Idaho 356, 154 Pac. 632 (1916); McKendree v. Southern States Life Ins. Co., 112 S. C. 335, 99 S. E. 806 (1919); Union Central Life Ins. Co. v. Fox, 106 Tenn. 347, 61 S. W. 62 (1901).

The clause does not prevent the defense of fraud: New York Life Ins. Co. v. Weaver, 114 Ky. 295, 70 S. W. 628 (1902); Reagan v. Union Mutual Life Ins. Co., 189 Mass. 555, 76 N. E. 217 (1905); *cf.* Welch v. Union Central Life Ins. Co., 108 Iowa 224, 78 N. W. 853 (1899).

10. Flannagan v. Provident Life and Accident Ins. Co., 22 F. 2d 136 (4th Cir. 1927) (injuries received in driving while drunk); Sanders v. Jefferson Standard Life Ins. Co., 10 F. 2d 143 (5th Cir. 1925) (injuries intentionally inflicted by a third party); Wright v. Philadelphia Life Ins. Co., 25 F. 2d 514 (E. D. S. C. 1927) (suicide); Lee v. Southern Life & Health Ins. Co., 19 Ala. App. 535, 98 So. 696 (1924) (death by malicious act of beneficiary); Mutual Life Ins. Co. v. New, 125 La. 41, 51 So. 61 (1910) (adjustment for misstatement of age); Penn Mutual Life Ins. Co. v. Hartle, 165 Md. 120, 166 Atl. 614 (1933) (disability and double indemnity rider); Metropolitan Life Ins. Co. v. Conway, 252 N. Y. 449, 169 N. E. 642 (1930) (death while in aerial flight); American National Ins. Co. v. Turner, 226 S. W. 487 (Tex. Civ. App. 1920) (death in military service in time of war). *Contra:* Philadelphia Life Ins. Co. v. Burgess, 18 F. 2d 599 (E. D. S. C. 1927) (suicide); Sun Life Ins. Co. v. Taylor, 108 Ky. 408, 56 S. W. 668 (1900) (death as the result of insured's own criminal act); Bernier v. Pacific Mutual Life Ins. Co., 173 La. 1078, 139 So. 629 (1932) (death while in aerial flight).

11. Illinois Bankers' Life Ass'n v. Byassee, 169 Ark. 230, 275 S. W. 519 (1925); Brady v. Prudential Ins. Co., 168 Pa. 645, 32 Atl. 102 (1895).

because of a substitution during the medical examination [12] have been allowed as valid defenses after the running of the incontestable clause. The courts have also held that the clause does not preclude the insurer from defending on the ground of no insurable interest [13] or because recovery would be in contravention of a strong public policy.[14]

In the principal case the court denied the insurer a policy reformation sought on the ground of mutual mistake. The holding was based upon a construction of the incontestable clause inconsistent with several prior decisions.[15] In construing the clause, "This contract shall be incontestable . . . ," the court held that the phrase, "This contract," referred only to the printed provisions appearing on the document of insurance.[16] Yet the leading prior case in point, *Columbian National Life Insurance Co. v. Black*,[17] construed an equivalent term, "this policy," as it appeared in the incontestable clause, to mean the actual understanding between the parties as a result of oral conversations and negotiations preliminary to the execution of the written instrument.[18]

Prior to the instant case, a suit for the reformation of a life insurance policy was always held not to be a contest within the contemplation of incontestable clauses.[19] Two reasons can be offered why such an interpretation of a suit for policy reformation may not appear too unjust to the insured.

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12. Obartuch v. Security Mutual Life Ins. Co., 114 F. 2d 873 (7th Cir. 1940), *cert. denied*, 312 U. S. 696 (1941); Maslin v. Columbian National Life Ins. Co., 3 F. Supp. 368 (S. D. N. Y. 1932).

13. Aetna Life Ins. Co. v. Hooker, 62 F. 2d 805 (6th Cir. 1933), *cert. denied*, 289 U. S. 748 (1933); Commonwealth Life Ins. Co. v. George, 248 Ala. 649, 28 So. 2d 910 (1947); Home Life Ins. Co. v. Masterson, 180 Ark. 170, 21 S. W. 2d 414 (1929); Wharton v. Home Security Life Ins. Co., 206 N. C. 254, 173 S. E. 338 (1934). See also Notes, 6 A. L. R. 452 (1920), 13 A. L. R. 675 (1921), 35 A. L. R. 1492 (1925), 170 A. L. R. 1046 (1947).

14. Burt v. Union Central Life Ins. Co., 187 U. S. 362, 23 Sup. Ct. 139, 47 L. Ed. 216 (1902) (insured executed for crime); Protective Life Ins. Co. v. Linson, 245 Ala. 493, 17 So. 2d 761 (1944) (murder of insured by beneficiary). *Contra:* Afro-American Life Ins. Co. v. Jones, 113 Fla. 158, 151 So. 405 (1933) (insured's execution for crime held no bar to beneficiary's recovery).

15. Donnelly v. Northwestern Life Ins. Co., 59 F. 2d 46 (5th Cir. 1932), *cert. denied*, 287 U. S. 638 (1932); Columbian National Life Ins. Co. v. Black, 35 F. 2d 571 (10th Cir. 1929); Mates v. Penn Mutual Life Ins. Co., 316 Mass. 303, 55 N. E. 2d 770 (1944); Equitable Life Assurance Society of the United States v. Rothstein, 122 N. J. Eq. 606, 195 Atl. 723 (1937), *aff'd mem.*, 123 N. J. Eq. 591, 199 Atl. 43 (1938); Buck v. Equitable Life Assur. Soc. of the United States, 96 Wash. 683, 165 Pac. 878 (1917); *see* American Nat. Ins. Co. v. McPhetridge, 28 Tenn. App. 145, 152, 187 S. W. 2d 640, 643 (E. S. 1945).

16. 171 F. 2d at 700.

17. 35 F. 2d 571 (10th Cir. 1929).

18. *Id.* at 577. The ambiguous phrases, "this contract" and "this policy," may have any of three distinct connotations: (1) The acts of the parties; such acts and their effect can be impeached by fraud, mistake and other congenital defenses. (2) The obligations created by the acts of the parties; these include the intangible rights and duties as distinguished from the acts which created them. (3) The terms of the obligations; this means the definition of the obligations as spelled out in the four corners of the issued instrument. While the court in the principal case chose the third interpretation, it could just as easily have chosen one of the other two.

19. Cases cited note 15 *supra*.

First, before a court of equity will reform a policy, a mutual mistake must be established by clear and convincing proof; no lesser quantum of proof will be sufficient.[20] Second, reformation will be allowed only when the insurer is not guilty of laches, and when the insured has not changed his position by reliance on the issued policy.[21] Yet inasmuch as the incontestable clause prevents an insurer from relying upon the defense of fraud after a stated period of incontestability has expired, it would seem reasonable to hold, as does the principal case, that an action for reformation on the ground of mutual mistake is not excepted from the coverage of the incontestable clause.

LOTTERIES—SLOT MACHINES—FREE GAMES AS PROPERTY OF VALUE

An electrically operated slot machine was found in the defendant's pool room, and he was prosecuted under a Massachusetts statute prohibiting the setting up of a lottery or other gaming device for money or other property of value.[1] The machine registered free games for a winning combination of symbols but it did not reward the player with money or other tangible property. *Held,* free games are "property of value" within the meaning of the lottery statute, so that the machine constituted a lottery or gaming device. *Commonwealth v. Rivers,* 82 N. E. 2d 216 (Mass. 1948).

Ordinarily slot machines are not unlawful per se,[2] although under some statutes or ordinances all coin operated amusement devices are prohibited, whether used for gambling or not.[3] But such machines are generally made illegal if operated as gambling devices.[4] Various types of machines have been developed in attempts to avoid anti-gambling provisions in constitutions, statutes and ordinances and at the same time to offer enough inducement to

20. Snell v. Insurance Co., 98 U. S. 85, 25 L. Ed. 52 (1878); Graves v. Boston Marine Ins. Co., 2 Cranch 419, 2 L. Ed. 324 (U. S. 1805); Mutual Life Ins. Co. v. Wetzger, 167 Md. 27, 172 Atl. 610 (1934); New York Life Ins. Co. v. Street, 265 S. W. 397 (Tex. Civ. App. 1924). See also Note, 125 A. L. R. 1058 (1940).

21. New York Life Ins. Co. v. Street, 265 S. W. 397 (Tex. Civ. App. 1924); *cf.* McCuen v. Sovereign Camp, W. O. W., 192 S. C. 38, 5 S. E. 2d 449 (1939).

1. MASS. ANN. LAWS c. 271, § 7 (1933).

2. Stoutamire v. Pratt, 148 Fla. 725, 5 So. 2d 248 (1941); Kirk v. Morrison, 108 Fla. 144, 146 So. 215 (1933); King v. McCrory, 179 Miss. 162, 175 So. 193 (1937); *In re* Mapakarakes, 169 Misc. 766, 8 N. Y. S. 2d 826 (Sup. Ct. 1938); Times Amusement Corp. v. Moss, 160 Misc. 930, 290 N. Y. Supp. 794 (Sup. Ct. 1936); Brafford v. Calhoun, 72 Ohio App. 920, 51 N. E. 2d 920 (1943); Commonwealth v. Mihalow, 142 Pa. Super. 433, 16 A. 2d 656 (1940); Harvie v. Heise, 150 S. C. 277, 148 S. E. 66, 68 (1929).

3. Silfen v. Chicago, 299 Ill. App. 117, 19 N. E. 2d 640 (1939); Colbert v. Superior Confection Co., 154 Okla. 28, 6 P. 2d 791 (1931); Couch v. State, 71 Okla. App. 223, 110 P. 2d 613 (1941).

4. Steed v. State, 189 Ark. 389, 72 S. W. 2d 542 (1934); Kirk v. Morrison, 108 Fla. 144, 146 So. 215 (1933); People v. Wertheimer, 152 Misc. 733, 274 N. Y. Supp. 90 (City Ct. 1934); Adams v. Antonio, 88 S. W. 2d 503 (Tex. Civ. App. 1935); Roberts v. Gossett, 88 S. W. 2d 507 (Tex. Civ. App. 1935).

make the operation of the machine profitable.[5] The familiar "one-armed bandits," when designed to pay off in actual money, have quite generally been held to be illegal devices under these anti-gambling laws.[6] Alteration of the machine to pay off in slugs or tokens, exchangeable for merchandise in some cases but more often usable only for deposit in the machine to obtain some form of amusement, has not changed the result in most cases.[7] Machines were devised to indicate to the operator in advance of play exactly what the payoff on that play would be, in the hope that the courts would find no element of chance remaining to make the machine illegal. The attempt failed,[8] the courts saying that the game consisted not of one play but of several and that the element of chance lies in the uncertainty as to what the indicator will show on the next play.[9] Further attempts to evade the statutes included machines which vended an unvarying piece of merchandise, such as candy mints, on each play, and at irregular intervals produced slugs which could be used to play the machine for amusement only. These have been declared illegal in numerous decisions.[10]

The final step was to produce the type of machine involved in the instant case, which rewarded the winning player with no tangible property but only with a chance to play again.[11] Under statutes which prohibit gambling gen-

5. "In no field of reprehensible endeavor has the ingenuity of man been more exerted than in the invention of devices to comply with the letter, but to do violence to the spirit and thwart the beneficent objects and purposes of the laws designed to suppress the vice of gambling. Be it said to the credit of the expounders of the law that such fruits of inventive genius have been allowed by the courts to accomplish no greater result than that of demonstrating the inaccuracy and insufficiency of some of the old definitions of gambling that were made before the advent of the era of greatly expanded, diversified, and cunning mechanical inventions." Moberly v. Deskin, 169 Mo. App. 672, 155 S. W. 842, 844 (1913).

6. People v. Kay, 38 Cal. App. 2d 759, 102 P. 2d 1110 (1940); Territory v. Jones, 14 N. M. 579, 99 Pac. 338 (1908); State v. Busch, 59 R. I. 382, 195 Atl. 487 (1937); State v. Gaughan, 55 W. Va. 692, 48 S. E. 210 (1904); *see* Stewart v. State, 108 Tex. Crim. Rep. 661, 2 S. W. 2d 440, 442 (1928); Berry v. State, 106 Tex. Crim. Rep. 657, 294 S. W. 216 (1927).

7. Boynton v. Ellis, 57 F. 2d 665 (10th Cir. 1932); Chambers v. Bachtel, 55 F. 2d 851 (5th Cir. 1932); Rankin v. Mills Novelty Co., 182 Ark. 561, 32 S. W. 2d 161 (1930); Commonwealth v. McClintock, 257 Mass. 431, 154 N. E. 264 (1926); Crippen v. Mint Sales Co., 139 Miss. 87, 103 So. 503 (1925); People v. Kopper, 253 N. Y. 83, 170 N. E. 501 (1930); People v. Spitzig, 133 Misc. 508, 233 N. Y. Supp. 228 (Co. Ct. 1929); Snyder v. Alliance, 41 Ohio App. 48, 179 N. E. 426 (1931); Harvie v. Heise, 150 S. C. 277, 148 S. E. 66 (1929); Painter v. State, 163 Tenn. 627, 45 S. W. 2d 46 (1932).

8. Commonwealth v. McClintock, 257 Mass. 431, 154 N. E. 264 (1926); Crippen v. Mint Sales Co., 139 Miss. 87, 103 So. 503 (1925); State v. Apodoca, 32 N. M. 80, 251 Pac. 389 (1926); State v. McTeer, 129 Tenn. 535, 167 S. W. 121 (1914).

9. "The chance of game from the second operation was the inducement. It was an appeal to the gambling desire, a temptation to take the chance of gaining a substantial prize by continuing to operate the machine." Commonwealth v. McClintock, 257 Mass. 431, 154 N. E. 264, 265 (1926).

10. Boynton v. Ellis, 57 F. 2d 665 (10th Cir. 1932); Howell v. State, 184 Ark. 109, 40 S. W. 2d 782 (1931); Rankin v. Mills Novelty Co., 182 Ark. 561, 32 S. W. 2d 161 (1930); State v. Mint Vending Machine, 85 N. H. 22, 154 Atl. 224 (1931); Painter v. State, 163 Tenn. 627, 45 S. W. 2d 46 (1932).

11. Most such machines are of the pinball variety, but the result under any particular statute would seem to be the same, since pinball machines have quite generally been held to be games of chance, rather than skill. Howle v. Birmingham, 229 Ala. 666,

erally without defining the term, the courts must consider common definitions of gambling which require that money or some other valuable thing be played for.[12] It has been held that free amusement is such a thing.[13] Often a statute will particularize as to what things must be played for to constitute gambling,[14] and whether a particular machine is illegal under the statute often depends upon whether free amusement is one of those things. Where the statute uses such terms as "thing of value," "valuable thing," "property of value," and the like, the tendency in the majority of the more recent cases seems to be that free amusement comes within the meaning of such terms.[15] The instant case is an illustration of this tendency. Perhaps this represents a realization on the part of the courts that the purpose of anti-gambling statutes can best be served by prohibiting those devices which develop the gambling habit, even though it may require stretching the words of the statute beyond their literal meaning.

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159 So. 206 (1935); Sparks v. State, 48 Ga. App. 498, 173 S. E. 216 (1934); Commonwealth v. Bowman, 267 Ky. 602, 102 S. W. 2d 382 (1937); State v. Barbee, 187 La. 529, 175 So. 50 (1937); Shapiro v. Moss, 245 App. Div. 835, 281 N. Y. Supp. 72 (2d Dep't 1935); Milwaukee v. Burns, 225 Wis. 296, 274 N. W. 273 (1937); *see* Adams v. Antonio, 88 S. W. 503, 505 (Tex. Civ. App. 1935). *But see* Commonwealth v. Mihalow, 142 Pa. Super. 433, 16 A. 2d 656, 658, 659 (1940). Some statutes make no distinction between chance and skill: TEX. PEN. CODE. ANN. art. 619 (1938).

12. *See* Thrower v. State, 117 Ga. 753, 45 S. E. 126, 127 (1903); State v. Shaw, 39 Minn. 153, 39 N. W. 305, 307 (1888); State v. Grimes, 74 Minn. 257, 77 N. W. 4, 5 (1898); Proctor v. Territory, 18 Okla. 378, 92 Pac. 389, 390 (1907); Bell v. State, 37 Tenn. 507, 509 (1857); State v. Smith, 10 Tenn. 272, 281 (1829).

13. State v. Wiley, 232 Iowa 443, 3 N. W. 2d 620 (1942); Oatman v. Davidson, 310 Mich. 57, 16 N. W. 2d 665 (1944); Alexander v. Martin, 192 S. C. 176, 6 S. E. 2d 20 (1939). Several courts have generalized by saying that the stake may be anything that offers the necessary inducement to indulge the gambling instinct. *See* State v. Mint Vending Machine, 85 N. H. 22, 154 Atl. 224 (1931); People v. Gravenhorst, 32 N. Y. S. 2d 760, 775 (City Ct. 1942); People v. Cerniglia, 11 N. Y. S. 2d 5, 7 (City Ct. 1939); Painter v. State, 163 Tenn. 627, 632, 45 S. W. 2d 46, 47 (1932).

14. ARK. STAT. ANN. § 41-2003 (1948) ("property"); ILL. ANN. STAT., c. 38, § 341 (1935) ("other valuable thing"); MASS. ANN. LAWS, c. 271, § 7 (1933) ("property of value"); N. Y. PENAL LAW § 982(2) ("thing of value"); N. D. REV. CODE § 12-2301 (1943) ("property"); PA. STAT. ANN., tit. 18, § 4604 (1931) ("property of value"); TENN. CODE ANN. § 11276 (Williams 1934) ("other valuable thing"); TEX. PEN. CODE ANN. art. 619 (1938) ("anything of value"); MILWAUKEE CODE § 1069 (1914) ("other valuable thing").

15. Howell v. State, 184 Ark. 109, 40 S. W. 2d 782 (1931); Rankin v. Mills Novelty Co., 182 Ark. 561, 32 S. W. 2d 161 (1930); Thamart v. Moline, 66 Idaho 110, 156 P. 2d 187 (1945); People v. One Pinball Machine, 316 Ill. App. 161, 44 N. E. 2d 950 (1942); State v. Mint Vending Machine, 85 N. H. 22, 154 Atl. 224 (1931); Giomi v. Chase, 47 N. M. 22, 132 P. 2d 715 (1942); Heartley v. State, 178 Tenn. 254, 157 S. W. 2d 1 (1941); Painter v. State, 163 Tenn. 627, 45 S. W. 2d 46 (1932); Martin v. State, 144 Tex. Crim. Rep. 313, 162 S. W. 2d 722 (1942); Broaddus v. State, 141 Tex. Crim. Rep. 512, 150 S. W. 2d 247 (1941); State v. Langford, 144 S. W. 2d 448 (Tex. Civ. App. 1940). *Contra:* Davies v. Mills Novelty Co., 70 F. 2d 424, 426 (8th Cir. 1934); Mills Novelty Co. v. Farrell, 62 F. 2d 476, 478 (2nd Cir. 1933); Gayer v. Whelan, 59 Cal. App. 2d 255, 138 P. 2d 763 (1943); *In re* Wigton, 151 Pa. Super. 337, 30 A. 2d 352 (1943).

PERSONAL PROPERTY—NON-TRANSFERABLE WAR SAVINGS BONDS—INTER VIVOS GIFT BY DELIVERY

Deceased, intending to make an inter vivos gift, delivered four Series E war bonds to defendants. Under Treasury regulations these bonds were not transferable.[1] Plaintiff, deceased's administrator, brought this action to recover the bonds. *Held,* for plaintiff. Deceased had no power to transfer any interest in the bonds except by cancellation and re-issuance; and, since no dominion or control over the claim was surrendered to defendants, the gift was ineffective. *Brown v. Vinson,* 216 S. W. 2d 748 (Tenn. 1949).

When a commercial document representing a chose in action has been delivered to the donee with donative intent, the attempted inter vivos gift is generally given effect even though the claim cannot be enforced against the obligor because of some defect in the assignment.[2] In such cases the donee acquires equitable title to the claim.[3] Regulations concerning the transfer of United States bonds, however, are not enacted solely to protect the Government from vexatious litigation; they also serve to make the bonds more attractive to small investors by providing simple, uniform rules for the transfer of interests in their proceeds.[4] With this in mind most courts have interpreted these regulations as a complete and binding legislative declaration of all the rights, legal and equitable, which can be created in connection with Series E bonds.[5] This view is adopted by the Tennessee court in the instant

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1. It was specified on each bond that "[t]his bond is not transferable; and . . . is payable only to the registered owner." 216 S. W. 2d at 749. Other regulations provide for payment to creditors of a registered owner through judicial proceedings, but they specifically refuse to recognize proceedings "which would give effect to an attempted voluntary transfer inter vivos of the bond. . . ." 21 CODE FED. REGS. § 351.51 (Cum. Supp. 1944).

2. BROWN, PERSONAL PROPERTY § 60 (1936); Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Documents,* 21 ILL. L. REV. 341, 343-44 (1926). This seems to be the rule in Tennessee. In Nashville Trust Co. v. Williams, 15 Tenn. App. 445 (M. S. 1932), a gift of life insurance by delivery of the policies without assignment was sustained. In McAdoo v. Dickson, 23 Tenn. App. 74, 126 S. W. 2d 393 (W. S. 1938), delivery of unindorsed corporate stock was held sufficient to complete a gift causa mortis. And in Dietzen v. American Trust and Banking Co., 175 Tenn. 49, 131 S. W. 2d 69 (1939), the court gave effect to a gift causa mortis made by mere delivery of non-transferable government bonds and postal savings certificates. See 9 TENN. L. REV. 113, 116 (1931).

3. *E.g.,* Leyson v. Davis, 17 Mont. 220, 42 Pac. 775, 31 L. R. A. 429 (1895); Notes, 38 A. L. R. 1366 (1925) (stock), 84 A. L. R. 558, 566 (1933) (savings passbook); *see* Figuers v. Sherrell, 181 Tenn. 87, 93, 178 S. W. 2d 629, 631 (1944). By the Uniform Stock Transfer Act § 9, 4 TENN. CODE ANN. § 4103 (Williams 1942), delivery of shares without indorsement but with intent to transfer imposes an obligation on the donor to complete the transfer by indorsement, and this obligation may be specifically enforced.

4. And also, perhaps, to control inflation, to encourage thrift, and to give their holders a greater stake in the government. See Moore's Administrator v. Marshall, 302 Ky. 729, 196 S. W. 2d 369, 372 (1946); Fidelity Union Trust Co. v. Tezyk, 140 N. J. Eq. 474, 55 A. 2d 26, 28 (1947); *In re* Owens' Estate, 177 Misc. 1006, 32 N. Y. Supp. 2d 747 (1941); 61 HARV. L. REV. 542 (1948).

5. Moore's Administrator v. Marshall, 302 Ky. 729, 196 S. W. 2d 369 (1946); Fidelity Union Trust Co. v. Tezyk, 140 N. J. Eq. 475, 55 A. 2d 26, 28 (1947); Bergman v. Greenwich Savings Bank, 74 N. Y. Supp. 2d 638 (City Ct. 1947); *cf.* N. Y. PERS. PROP. LAW § 24. *Contra:* Marshall v. Felker, 156 Fla. 476, 23 S. 2d 555 (1945) (gift effective be-

case.[6] The problem is more fully treated in an earlier issue of this Review,[7] discussing *Fidelity Union Trust Co. v. Tezyk*,[8] in which the New Jersey court held ineffective an attempted gift causa mortis of similar bonds.[9]

SEARCHES AND SEIZURES—SUBPOENA DUCES TECUM TO MEMBER OF PARTNERSHIP DIRECTING PRODUCTION OF PARTNERSHIP PAPERS—HELD VIOLATION OF FOURTH AMENDMENT

The Anti-trust Division of the Department of Justice caused a subpoena duces tecum to be issued, directing one of the members of a partnership to produce specified papers and communications belonging to the firm. The undisputed purpose of the subpoena was to obtain evidence to be used against all the partners. The other partners joined the subpoenaed partner in a motion to quash the subpoena on the ground that it violated their rights under the Fourth and Fifth Amendments. *Held,* motion granted. Only the subpoenaed partner would be eligible to claim immunity under the Fifth Amendment, but the protection of the Fourth Amendment extends to all the partners, because the subpoenaed papers are their private and personal, though common, property. In re *Subpoena Duces Tecum,* 81 F. Supp. 418 (N. D. Cal. 1948).

An unreasonable search and seizure[1] does not require an actual entry into a man's house or a forcible dispossession of his property.[2] The essence of the offense is the "invasion of his indefeasible right of personal security, personal liberty and private property." [3] Thus, the compulsory production of one's private papers by means of a subpoena duces tecum may constitute an unreasonable search and seizure.[4] The early case of *Boyd v. United States*[5]

tween donor and donee), criticized in 30 MARQ. L. REV. 208 (1946); *cf.* Katz v. Driscoll, 194 P. 2d 822 (Cal. App. 1948) (constructive trust imposed on beneficiary of bonds bought by deceased in fraud of creditors); Dietzen v. American Trust & Banking Co., 175 Tenn. 49, 131 S. W. 2d 69 (1939) (regulations not found to prohibit gift causa mortis); *see* United States v. Sonnenberg, 158 F. 2d 911, 914 (3d Cir. 1946).

6. This is the primary basis of the decision. Although the opinion also states that the gift was ineffective because deceased did not take all possible steps to surrender dominion and control over the claim to defendants, 216 S. W. 2d at 749 and 751, the only real reason no equitable title was transferred is that federal regulations expressly prohibit such a transfer; thus the case is not in conflict with those cited in note 2 *supra.*

7. 1 VAND. L. REV. 318 (1948).

8. 140 N. J. Eq. 474, 55 A. 2d 26 (1947).

9. *But cf.* Dietzen v. American Trust & Banking Co., 175 Tenn. 49, 131 S. W. 2d 69 (1939) (distinguished with some difficulty in the instant case).

1. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U. S. CONST. AMEND. IV.

2. *E.g.,* Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652 (1906); Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746 (1886).

3. Boyd v. United States, 116 U. S. 616, 630, 6 Sup. Ct. 524, 29 L. Ed. 746 (1886).

4. Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652 (1906); Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746 (1886).

5. 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746 (1886).

held that to compel an individual to produce his private papers or effects for the purpose of obtaining evidence to be used against him in a criminal case, being violative of the Fifth Amendment,[6] also constitutes an unreasonable search and seizure within the meaning of the Fourth Amendment. A subpoena duces tecum ordering production of documentary evidence constitutes an unreasonable search and seizure if not properly limited in scope and in proportion to the ends sought,[7] or if invalidly issued.[8]

But the right is personal and cannot be availed of by one whose property interests have not been invaded,[9] regardless of whether the search or seizure was reasonable or unreasonable.[10] A private corporation may invoke the aid of the Fourth Amendment (though not the Fifth)[11] if the subpoena is unreasonable, *i.e.,* too broad or too indefinite,[12] or if it was invalidly issued.[13] But an officer of the corporation cannot refuse to produce corporate documents in his custody on the ground that his rights under the Fourth or Fifth Amendments would be violated.[14] This principle of non-protection has been extended to apply to officers and members of unincorporated associations,[15] such as labor unions[16] and private trust organizations.[17]

It would seem that all these cases raise two questions: (1) whether the petitioners are eligible to claim the protection of the Fourth Amendment against invasion of their personal and private rights, and (2) whether the subpoena was unreasonable. Both of these questions must be answered in the affirmative if a claimant is to be granted relief under the Fourth Amendment. Cases concerning compulsory production of partnership documents are few.[18] In the principal case the court disposed of the first question

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6. "No person . . . shall be compelled, in any criminal case, to be witness against himself; . . ." U. S. CONST. AMEND. V.

7. Wilson v. United States, 221 U. S. 361, 31 Sup. Ct. 538, 55 L. Ed. 771 (1911); Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652 (1906); McMann v. Securities and Exchange Commission, 87 F. 2d 377 (2d Cir. 1937), *cert. denied, sub nom.* McMann v. Engel, 301 U. S. 684 (1937).

8. Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319 (1920).

9. *E.g.,* Cravens v. United States, 62 F. 2d 261 (8th Cir. 1932), *cert. denied,* 289 U. S. 733 (1933); Shore v. United States, 49 F. 2d 519 (D. C. Cir. 1931), *cert. denied,* 283 U. S. 865 (1931); Kelleher v. United States, 35 F. 2d 877 (D. C. Cir. 1929).

10. *In re* Upham's Income Tax, 18 F. Supp. 737 (S. D. N. Y. 1937).

11. Wilson v. United States, 221 U. S. 361, 31 Sup. Ct. 538, 55 L. Ed. 771 (1911); Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652 (1906); see Note, 120 A. L. R. 1102 (1939).

12. See note 7 *supra;* CORNELIUS, SEARCH AND SEIZURE 6 (2d ed. 1930).

13. See note 8 *supra.*

14. Lagow v. United States, 159 F. 2d 245 (2d Cir. 1946), *cert. denied,* 331 U. S. 858 (1947) (where subpoenaed person was sole officer and shareholder of corporation); Frankel v. United States, 65 F. 2d 289 (2d Cir. 1933) (contraband goods).

15. United States v. White, 322 U. S. 694, 64 Sup. Ct. 1248, 88 L. Ed. 1542 (1944); see Note, 152 A. L. R. 1208 (1944).

16. United States v. White, *supra* note 15.

17. *See* United States v. Invader Oil Corp., 5 F. 2d 715, 717 (S. D. Cal. 1925); Mulloney v. United States, 79 F. 2d 566, 577 (1st Cir. 1935), *cert. denied,* 296 U. S. 658 (1936).

18. United States v. Brasley, 268 Fed. 59 (W. D. Pa. 1920); Lisansky v. United

by reasoning that by the test set out in *United States v. White*[19] the members of a partnership, especially a small family partnership, are not disabled from claiming the benefits of the Fourth Amendment. This refusal to extend the principle of non-protection seems sound, because the papers of a partnership represent the personal and private interests of its constituents. But the prohibition of the Fourth Amendment applies only to *unreasonable* searches and seizures.[20] There was nothing to indicate that the subpoena was too broad or too indefinite.[21] It demanded the production of "certain specified records and communications." [22] Nor did there appear to be any procedural defects in the issuance of the subpoena.[23] The unreasonableness of the subpoena lies in the fact that it was issued to compel the production of documents for the purpose of obtaining evidence to be used in penal proceedings against the joint owners and rightful possessors of those documents. Although the non-subpoenaed partners could not themselves claim the protection of the Fifth Amendment, nevertheless the language and spirit of the *Boyd* case unquestionably indicates that these partners were the victims of an unreasonable search and seizure forbidden by the Fourth Amendment.[24]

TORTS—ATTRACTIVE NUISANCE—HUM IN ELECTRIC WIRES AT TOP OF TOWER HELD NOT WITHIN THE DOCTRINE

For several years defendant had maintained an uninsulated high voltage electric line across a field owned by plaintiff's father. The steel tower bearing

States, 31 F. 2d 846 (4th Cir. 1929), *cert. denied*, 279 U. S. 873 (1929); Haywood v. United States, 268 Fed. 795 (7th Cir. 1920), *cert. denied*, 256 U. S. 689 (1921); Note, 1 VAND. L. REV. 626, 628 (1948). The *Brasley* case is very similar to the principal case, the only substantial difference being that in the former the subpoena was directed to all the partners. The court held that their rights under both the Fourth and Fifth Amendments had been violated.

19. "The test . . . is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only." 332 U. S. 694, 701, 64 Sup. Ct. 1248, 88 L. Ed. 1542 (1944). The court was dealing particularly with the Fifth Amendment, but the language of the case indicates that this test would be applicable as well with respect to the Fourth Amendment.

20. Carroll v. United States, 267 U. S. 132, 45 Sup. Ct. 280, 69 L. Ed. 543 (1925); 47 AM. JUR., *Searches and Seizures* § 52 (1943).

21. See note 8 *supra*.

22. 81 F. Supp. at 419.

23. See note 9 *supra*.

24. The Fourth and Fifth Amendments "throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment." Boyd v. United States, 116 U. S. 616, 633, 6 Sup. Ct. 524, 29 L. Ed. 746 (1886). The *Boyd* case does not hold that a person must be eligible to claim the benefit of the Fifth Amendment in order to be able to invoke the aid of the Fourth Amendment where the unreasonableness of the subpoena lies only in the fact that it would compel him to give evidence against himself.

the line had a ladder from the ground to the top, was not fenced off, and did not have any warning signs about it. Plaintiff, a fourteen-year-old boy, heard an unusual hum coming from transmission wires atop the tower and "decided to climb the tower in order to play on the tower and to ascertain . . . why it was making the noise." [1] He was shocked when he climbed up to or near the high voltage wires by way of the ladder and sues for resulting injuries. *Held,* demurrer properly sustained. The case does not come within the attractive nuisance doctrine inasmuch as the plaintiff was attracted, not to the tower, but to the unusual hum the wires were making on this particular occasion. *Gouger v. Tennessee Valley Authority,* 216 S. W. 2d 739 (Tenn. 1949).

The attractive nuisance doctrine,[2] sometimes called the "turntable doctrine," [3] is recognized today by nearly all American courts. There is much variance, however, among the courts as to the extent of its application[4] and as to the explanations given to justify its existence.[5]

The doctrine was developed through the fiction that the trespassing child has an implied license or invitation to enter,[6] or, as otherwise stated, he has been allured or enticed onto the premises "as a bait attracts a fish or a piece of stinking meat draws a dog." [7] A few jurisdictions have continued to hold to the original fiction to the extent that they impose a requirement that the "attractive" object be visible to and seen by the child from a point where he is not a trespasser, and that it in fact lead or attract him onto the

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1. 216 S. W. 2d at 739.

2. On the subject in general, see: BOHLEN, STUDIES IN THE LAW OF TORTS 157, 190 (1926); 3 COOLEY, TORTS § 441 (4th ed. 1932); HARPER, TORTS §§ 93, 94 (1933); PROSSER, TORTS 617 (1941); RESTATEMENT, TORTS § 339 (1934); Green, *Landowner v. Intruder; Intruder v. Landowner. Basis of Responsibility in Tort,* 21 MICH. L. REV. 495 (1923); Hudson, *The Turntable Cases in the Federal Courts,* 36 HARV. L. REV. 826 (1923); Smith, *Liability of Landowners to Children Entering Without Permission,* 11 HARV. L. REV. 349, 434 (1898); Notes, 36 A. L. R. 34, 223, 267 (1925), 39 A. L. R. 486 (1925), 45 A. L. R. 982 (1926), 53 A. L. R. 1344 (1928). As to duty to guard against danger to children by electric wires, see Notes, 17 A. L. R. 833 (1922), 41 A. L. R. 1337 (1926), 49 A. L. R. 1053 (1927), 100 A. L. R. 621 (1936).

3. So called because early cases arose out of injuries on railway turntables. *E.g.,* Sioux City & Pac. R. R. v. Stout, 17 Wall. 657, 21 L. Ed. 745 (U. S. 1873); Keffe v. Milwaukee & St. P. Ry., 21 Minn. 207 (1875).

4. See Notes, 36 A. L. R. 34 (1925), 39 A. L. R. 486. (1925), 45 A. L. R. 982 (1926), 53 A. L. R. 1344 (1928) for an extensive collection of cases classified by subjects and by states. The best statement of the rule yet made is that as to trespassing children, the possessor of land owes a duty to exercise reasonable care where (1) the trespass is foreseeable, (2) the condition of the premises should be recoguized as involving an unreasonable risk of harm to the child, (3) the child because of his immaturity does not discover or appreciate the danger, and (4) the utility of maintaining the condition is slight as compared to the risk. RESTATEMENT, TORTS § 339 (1934).

5. "The decisions show an effort to hammer out a compromise between the interest of society in preserving the safety of its children and the legitimate interest of landowners to use their land for their own purposes with reasonable freedom, and so are naturally in a state of flux and motion." BOHLEN, STUDIES IN THE LAW OF TORTS 191 (1926).

6. *E.g.,* McCulley v. Cherokee Amusement Co., 182 Tenn. 68, 184 S. W. 2d 170 (1944); 3 COOLEY, TORTS 202 (4th ed. 1932).

7. 1 THOMPSON, NEGLIGENCE 305 (1st ed. 1886), cited in PROSSER, TORTS 618 (1941); United Zinc and Chemical Co. v. Britt, 258 U. S. 268, 275, 42 Sup. Ct. 299, 66 L. Ed. 615 (1922); Kelley v. Tennessee Electric Power Co., 7 Tenn. App. 555, 559 (W. S. 1928).

premises.[8] The most famous application of this principle was made in *United Zinc & Chemical Co. v. Britt*.[9] Subsequently, the Tennessee Court of Appeals in *Kelley v. Tennessee Electric Power Co.*,[10] quoting with approval from the *Britt* case,[11] held a power company not liable for the death of an eleven-year-old boy which occurred when he climbed one of its towers, on the ground that he originally entered the company's right-of-way for the sole purpose of using it as a short-cut, the tower not having induced the "trespass" in the beginning.[12]

In the instant case, the court cited the *Kelley* case as being factually analogous to the situation at hand,[13] and reasoned that the tower was not an attractive nuisance here since the plaintiff was not attracted by it, but by the unusual humming of the wires on top of it.[14] The analogy is hard to see.

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8. United Zinc & Chemical Co. v. Britt, 258 U. S. 268, 42 Sup. Ct. 299, 66 L. Ed. 615 (1922); Salt River Valley Water Users' Ass'n v. Compton, 39 Ariz. 491, 8 P. 2d 249 (1932); Hayko v. Colorado & Utah Coal Co., 77 Colo. 143, 235 Pac. 373 (1925); Smith v. Illinois Cent. R. R., 177 Iowa 243, 158 N. W. 546 (1916); Carr v. Oregon-Washington R. R. & Nav. Co., 123 Ore. 259, 261 Pac. 899 (1927); Louisville & N. R. R. v. Ray, 124 Tenn. 16, 134 S. W. 858 (1910); Kelley v. Tennessee Electric Power Co., 7 Tenn. App. 555 (W. S. 1928). This principle has been rejected by the greater number of courts, however, and is uniformly criticized by legal writers. "The better authorities now agree that the element of 'attraction' is important only in so far as it may mean that the trespass is to be anticipated, and that the basis of liability is merely the foreseeability of harm to the child, and considerations of common humanity and social policy which curtail the defendant's privilege to use the land as he sees fit." PROSSER, TORTS 619 (1941); *cf.* RESTATEMENT, TORTS § 339 (1934); Green, *supra* note 2; Gimmestad v. Rose Bros. Co., 194 Minn. 531, 261 N. W. 194 (1935) (following the *Restatement*). *But cf.* McCulley v. Cherokee Amusement Co., 182 Tenn. 68, 73, 184 S. W. 2d 170 (1944) (liability not rested upon humanitarian principles).

9. 258 U. S. 268, 42 Sup. Ct. 299, 66 L. Ed. 615 (1922). In an opinion by Mr. Justice Holmes, the Court denied recovery because the child was not induced to trespass by the presence of the pool of poisoned water which killed him, but discovered it only after he had entered upon the land. "In the case at bar it is at least doubtful whether the water could be seen from any place where the children lawfully were and there is no evidence that it was what led them to enter the land. But that is necessary to start the supposed duty." *Id.* at 275-76. The case has been the subject of much criticism. See, *e.g.*, HARPER, TORTS § 93 (1933); Note, 16 TENN. L. REV. 251, 252 (1940). The *Restatement* treats the requirement as unnecessary; see § 339, comment *a* (1934).

10. 7 Tenn. App. 555 (W. S. 1928).

11. *Id.* at 559.

12. It is noteworthy that the doctrine, even with the qualification added by the *Britt* case, would permit recovery in the situation involved in the *Kelley* case. For there, in conformance with the doctrine so qualified, the little boy saw and was attracted to the dangerous object (tower) from a point where he was not a trespasser—at least not so far as the electric company was concerned. An electric company having a mere easement over the land of a third person is not entitled to defend on the ground that the plaintiff in such an action is a trespasser on real property. This principle, followed by probably a majority of the courts at the present time, applies to adult trespassers as well as to infants. Humphrey v. Twin State Gas & Electric Co., 100 Vt. 414, 139 Atl. 440, 442 (1927), 26 MICH. L. REV. 707 (1928), 12 MINN. L. REV. 420 (1928). *Accord,* Birmingham Ry. Light & Power Co. v. Cockrum, 179 Ala. 372, 60 So. 304 (1912); Nelson v. Branford Lighting & Water Co., 75 Conn. 548, 54 Atl. 303 (1903); Stedwell v. Chicago, 297 Ill. 486, 130 N. E. 729 (1921); Lipovac v. Iowa Ry. & Light Co., 202 Iowa 517, 210 N. W. 573 (1926); Guinn v. Delaware & A. Telephone Co., 72 N. J. L. 276, 62 Atl. 412 (1905). See Notes, 77 U OF PA. L. REV. 506 (1929), 19 CORN. L. Q. 125 (1933), 14 A. L. R. 1023 (1921), 56 A. L. R. 1021 (1928).

13. 216 S. W. 2d at 740.

14. *Cf.* Louisville & N. R. R. v. Ray, 124 Tenn. 16, 134 S. W. 858 (1910) (no liability where child climbed upon defendant's car to watch a boat unload, the boat

It seems more reasonable to anticipate that a child would be attracted by a tower making an unusual hum[15] than by a silent one. If it had been giving off a strange glow about the top and plaintiff had investigated that, would he be denied recovery just because he was attracted by the glow and not by the "manner of its construction or its customary way of being maintained"? [16] The case seems made to order for the enticement fiction and for the doctrine as qualified. The plaintiff had a lawful right to be where he was when he first noticed the strange noise coming from the wires atop the tower and was thereby induced to commit his act of climbing the tower. From the first he was induced to enter upon defendant's structure solely by the attraction of the dangerous instrumentality maintained thereon—the humming electric current. Quite the contrary was the situation in the *Kelley* case, for there the child originally decided to trespass upon the land of the third party where the electric company's tower was located for a reason entirely foreign to the attractiveness of the dangerous instrumentality.[17]

Even assuming the validity of the doctrine of the *Kelley* case,[18] therefore, the court incorrectly used it as persuasive authority to hold as it did here,

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being the attraction rather than the car); Erie R. R. v. Hilt, 247 U. S. 97, 38 Sup. Ct. 435, 62 L. Ed. 1003 (1918) (no "implied invitation" where injury incurred while reaching under car to recover a toy); Salt River Valley Water Users' Ass'n v. Compton, 39 Ariz. 491, 8 P. 2d 249 (1932), *aff'd,* 40 Ariz. 282, 11 P. 2d 839 (1932) and Salt River Valley Users' Ass'n v. Green, 39 Ariz. 508, 8 P. 2d 255 (1932) (recovery denied where child climbed electric company's pole to get a bird's nest, the pole not being the primary attraction), criticized, 18 IOWA L. REV. 286 (1933), 27 ILL. L. REV. 459 (1932); Burns v. Chicago, 338 Ill. 89, 169 N. E. 811 (1929) (doctrine held not to apply where boy climbed pole as a result of a wager with his companions); Dennis' Adm'r v. Kentucky & West Virginia Power Co., 258 Ky. 106, 79 S. W. 2d 377 (1935) (allegation that boy was shocked and killed when he climbed tower built so as to attract children held not to state a cause of action within the doctrine, there being no allegation that this characteristic caused him to climb it, but rather that he climbed it to see football game in adjacent field). *But cf.* O'Donnell v. Chicago, 289 Ill. App. 41, 6 N. E. 2d 449 (1937) (liability under the doctrine where injury sustained in climbing pole near stadium to view boxing matches, despite argument that the attraction was the boxing instead of the pole); McKiddy v. Des Moines Elec. Co., 202 Iowa 225, 206 N. W. 815 (1926) (liability under the doctrine when boy climbed pole to look up and down river); Znidersich v. Minnesota Utilities Co., 155 Minn. 293, 193 N. W. 449 (1923) (liability under doctrine where boy climbed pole on public highway to disengage kite).

15. *Cf.* Holbrook Light & Power Co. v. Gordon, 61 Ariz. 256, 148 P. 2d 360 (1944). There an eight-year-old boy playing near a transformer station was attracted by its humming noise, and, the gates being padlocked, climbed a seven-foot mesh wire fence with sharp points on top to get inside, despite signs, "Danger—High Voltage," which he was able to read. With the help of companions he placed a heavy ladder found inside so that he could climb up to a platform ten feet above the ground, where he was injured by shock. The power company was held liable on the attractive nuisance theory, the court stressing the ease and slight expense with which added safegnards could have been maintained. As to the latter consideration, see Bauer, *The Degree of Danger and the Degree of Difficulty of Removal of the Danger as Factors in "Attractive Nuisance" Cases,* 18 MINN. L. REV. 523 (1934).

16. 216 S. W. 2d at 741.

17. Kelley v. Tennessee Electric Power Co., 7 Tenn. App. 555, 563 (W. S. 1928).

18. See note 10 *supra.*

since the two cases are clearly distinguishable upon their facts. It is possible, however, that the result in the instant case can be justified on other grounds.[19]

WILLS—RENUNCIATION OF LEGACY—POWER OF CREDITORS TO ENJOIN RENUNCIATION BY INTENDED BENEFICIARY

A judgment debtor renounced a legacy ten months after the testatrix's death. Shortly before the renunciation, and in connection with pending proceedings by the judgment creditor supplementary to the judgment, a court order was issued forbidding the debtor from transferring or disposing of any of his property. *Held,* that the long delay coupled with his conduct at an examination in the supplementary proceedings constituted an acceptance of the legacy as a matter of law. As an alternative ground the court held that the judgment debtor had a property right in the bequest, at least from the date of probate, and that the subsequent injunction prevented effective renunciation. In re *Wilson's Estate,* 83 N. E. 2d 852 (N. Y. 1949).

On well-settled principles the right to accept or renounce a legacy or devise is a personal one, and neither courts nor creditors have the power to control the beneficiary's election.[1] In the absence of fraud or collusion it is not material what the beneficiary's motives are in renouncing,[2] and any unequivocal act on his part indicating a desire to renounce will be given effect [3]

19. The court might possibly have ruled as a matter of law that defendant was not negligent in view of the fact that the tower was located in the country where the presence of children was not to be readily anticipated; and, in view of the extreme expense involved in constructing a fence around all of defendant's towers, it could logically be held as a matter of law that defendant was not negligent in failing to provide that safeguard. The same might also be held in regard to the failure to erect warning signs and to start the ladders above a child's reach from the ground, though this is more doubtful. It is also possible that the court could find from the declaration as a matter of law that the plaintiff was contributorily negligent. These considerations may have influenced the court in reaching its decision, though they were not expressed in its rationale. The court merely states, "This youth was familiar with this tower located on his father's farm. That tower supported plainly visible wires commonly known to be for the sole purpose of transmitting electricity in such quantity as to be instantly fatal in most instances to anyone who make contact or near contact with them." 216 S. W. 2d at 741. On the contributory negligence aspect, *see* Whirley v. Whiteman, 38 Tenn. 343, 350 (1858); McCulley v. Cherokee Amusement Co., 182 Tenn. 68, 76, 184 S. W. 2d 170 (1944); Wallace v. Great Western Power Co. of California, 204 Calif. 15, 266 Pac. 281 (1928); Turner v. Texas Electric Service Co., 77 S. W. 2d 728 (Tex. Civ. App. 1934).

1. Kearley v. Crawford, 112 Fla. 43, 151 So. 293 (1933); Watson v. Roberts, 108 Ind. App. 388, 26 N. E. 2d 75 (1940); Coomes v. Finegan, 233 Iowa 448, 7 N. W. 2d 729 (1943); Austin v. Collins, 317 Mo. 435, 297 S. W. 36 (1927); Bradford v. Calhoun, 120 Tenn. 53, 109 S. W. 502, 19 L. R. A. (N.S.) 595 (1908); Note, 133 A. L. R. 1428 (1941).

2. Goodsman v. Jannsen, 234 Iowa 925, 14 N. W. 2d 647 (1944); Coomes v. Finegan, 233 Iowa 448, 7 N. W. 2d 729 (1943); Pike County v. Sowards, 147 Ky. 37, 143 S. W. 745 (1912); Ohio National Bank of Columbus v. Miller, 57 N. E. 2d 717 (Ohio 1943); Bradford v. Calhoun, 120 Tenn. 53, 109 S. W. 502, 19 L. R. A. (N.S.) 595 (1908).

3. Peter v. Peter, 343 Ill. 493, 175 N. E. 846, 75 A. L. R. 890 (1931); Goodsman v. Jannsen, 234 Iowa 925, 14 N. W. 2d 647 (1944); Strom v. Wood, 100 Kan. 556, 164 Pac. 1100 (1917); Perkins v. Isley, 224 N. C. 793, 32 S. E. 2d 588 (1945).

if done within a reasonable time after the testator's death.[4] Where the beneficiary neither acceptst nor renounces the gift within such a reasonable time his silence operates as an acceptance.[5] Delays of six,[6] thirteen,[7] and twenty[8] years have been held to be unreasonable, while periods of four days,[9] six[10] and sixteen[11] months have been found to be reasonable.[12]

The alternative ground suggested by the court[13] represents a distinct departure from traditional doctrine. In holding that the judgment debtor had a property right upon which the restraining order operated, the court in fact controlled the judgment debtor's election. There is ample authority to the contrary,[14] but very little to support such a proposition.[15] The weight of authority is that if a beneficiary renounces a legacy, the renunciation relates back to the date of the death of the testator; and the beneficiary is treated as though he had never received any property right or interest under the will.[16]

4. "A gift or devise by which one's estate is materially increased naturally carries a material benefit, and it is not human nature to refuse or reject such visitations of the fickle goddess of fortune, and the law does not require such an absurd result to be inferred or presumed. This being the sensible and practical presumption, it would naturally be expected that if the devisee should desire to renounce he would do so at least within a reasonable time." Strom v. Wood, 100 Kan. 556, 164 Pac. 1100, 1102 (1917). See also Pournelle v. Baxter, 151 Fla. 32, 9 So. 2d 162 (1942); Seifner v. Weller, 171 S. W. 2d 617 (Mo. 1943); Bacon v. Barber, 110 Vt. 280, 6 A. 2d 9, 123 A. L. R. 253 (1939).

5. See note 4 *supra*. "[T]he law presumes the acceptance by the testamentary donee of a beneficial gift and this presumption is conclusive where the donee has had an opportunity to elect and has not rejected within a reasonable time." Pournelle v. Baxter, 151 Fla. 32, 9 So. 2d 162, 163 (1942); *accord*, Sanders v. Jones, 347 Mo. 255, 147 S. W. 2d 424 (1941); *In re* Howe's Estate, 112 N. J. Eq. 17, 163 Atl. 234 (1932).

6. Strom v. Wood, 100 Kan. 556, 164 Pac. 1100 (1917).

7. Crumpler v. Barfield & Wilson Co., 114 Ga. 570, 40 S. E. 808 (1902).

8. McGivney v. McGivney, 142 Mass. 156, 7 N. E. 721 (1886).

9. Bradford v. Calhoun, 120 Tenn. 53, 109 S. W. 502, 19 L. R. A. (N.S.) 595 (1908).

10. Schoonover v. Osborne, 193 Iowa 474, 187 N. W. 20, 27 A. L. R. 465 (1922).

11. Seifner v. Weller, 171 S. W. 2d 617 (Mo. 1943).

12. "The general principle is that an election must be made within a time that is equitable in the light of all the circumstances. This time may be very long, if injury to others will not result from the delay, and by the same token very short if the failure to act promptly may work injury or hardship." Oliver v. Wells, 254 N. Y. 451, 173 N. E. 676, 679 (1930).

13. "It is sufficient in this case to say that the debtor had a property right in the legacy, that he was enjoined from disposing of it. . . ." 83 N. E. 2d at 855.

14. *E.g.*, Schoonover v. Osborne, 193 Iowa 474, 187 N. W. 20, 27 A. L. R. 465 (1922); Bradford v. Calhoun, 120 Tenn. 53, 109 S. W. 502, 19 L. R. A. (N.S.) 595 (1908); see note 1 *supra*.

15. *In re* Kalt's Estate, 16 Cal. 2d 807, 108 P. 2d 401, 133 A. L. R. 1424 (1941); Kearley v. Crawford, 112 Fla. 43, 151 So. 293 (1933) *semble; see* Bouse v. Hull, 168 Md. 1, 176 Atl. 645 (1935) ("If there is a substantial reason for the donee's conduct, other than the unworthy object of baffling his creditor, as, for instance, when the legacy or devise is coupled with a duty or obligation not incident to the bare absolute ownership of property, a disclaimer ought to, and doubtless would, prevail; but if it is clear that the donee, supposing him to be possessed of the average traits of humanity, would accept for himself were he unobstructed and unprovoked by his creditor, and that he is moved to disclaim by mere perverseness or passion, it would seem that the law ought to overrule his election"); Daniel v. Frost, 62 Ga. 697, 707 (1879); Note, 43 YALE L. J. 1030 (1934).

16. Goodsman v. Jannsen, 234 Iowa 925, 14 N. W. 2d 647 (1944); Coomes v. Finegan, 233 Iowa 448, 7 N. W. 2d 729 (1943); Schoonover v. Osborne, 193 Iowa 474, 187 N. W. 20, 27 A. L. R. 465 (1922); Strom v. Wood, 100 Kan. 556, 164 Pac. 1100 (1917); Albany Hospital v. Hanson, 214 N. Y. 435, 108 N. E. 812 (1915);

It is this doctrine of "relation back" that prevents creditors from controlling the debtor's interest in the gift. The principal case adopts a rule which in essence prevents a beneficiary from renouncing even within a few day after the will is probated, if his creditors diligently procure the necessary injunction. However, despite the language used by the court in the instant case,[17] the force of the holding that one may be enjoined from renouncing a bequest because of a property right in it is weakened by the fact that there is a strong alternative basis for the decision.

WRONGFUL DEATH—CONTRIBUTORY NEGLIGENCE OF BENEFICIARY—MOTHER'S CONTRIBUTORY NEGLIGENCE IMPUTED TO FATHER

A three-year-old child, left unattended in a bathroom by her mother, fell into a bathtub containing hot water drawn by the mother, accidentally turned on the hot water, and was scalded to death. Action was brought by the child's parents under the wrongful death statute[1] against the defendant, from whom the apartment was rented. For purposes of the case it was assumed that the defendant was negligent in overheating the water, and the mother was found to be contributorily negligent in leaving the child unattended in the bathroom.[2] The father was guilty of no actual negligence. *Held,* that the mother's negligence is imputable to her husband so as to bar all recovery. *Nichols v. Nashville Housing Authority,* 216 S. W. 2d 694 (Tenn. 1949).

The courts have almost uniformly held that contributory negligence of the deceased is a bar to recovery by the beneficiaries of a wrongful death action,[3] regardless of the type of statute involved;[4] but they have not been in agreement as to the adequacy of the defense of contributory negligence on the part of beneficiaries.[5] Disregarding the technical form of the statutes

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Bradford v. Leake, 124 Tenn. 312, 137 S. W. 96 (1911); Bradford v. Calhoun, 120 Tenn. 53, 109 S. W. 502 (1908); 4 PAGE, WILLS § 1404 (Perm. ed. 1941).

17. See note 13 *supra.*

1. TENN. CODE ANN. §§ 8236, 8237, 8240 (Williams 1934).

2. The case was decided on a demurrer to the declaration, the court treating the defendant as admitting its negligence in filing the demurrer. But the declaration was found to state the mother's negligence as a matter of law, and the demurrer was sustained. It is not within the scope of this discussion to consider the validity of the holding that the mother was negligent as a matter of law.

3. TIFFANY, DEATH BY WRONGFUL ACT § 66 (2d ed. 1913); HARPER, TORTS § 280 (1933); PROSSER, TORTS 966 (1941); RESTATEMENT, TORTS § 494 (1934).

4. Wrongful death statutes fall into two general classifications: those giving a new cause of action to certain designated beneficiaries, and those merely preserving to the administrator or to certain beneficiaries the cause of action the deceased would have had if he had not died. Those giving a new cause of action, if strictly interpreted, would exclude as a defense contributory negligence on the part of the deceased, in the absence of an express provision for that defense. However, the courts in the few states which have such statutes with no express provision for this defense have supplied it by judicial construction. Wettach, *Wrongful Death and Contributory Negligence,* 16 N. C. L. REV. 211, 215 (1938).

5. See Wettach, *Wrongful Death and Contributory Negligence,* 16 N. C. L. REV.

at times,[6] they have divided into three main schools of thought. A small group of courts holds that the contributory negligence of one beneficiary is immaterial and does not affect recovery.[7] Taking the opposite viewpoint are a few cases which hold that the contributory negligence of one beneficiary bars all recovery, even if there are innocent beneficiaries.[8]

A majority of courts and legal scholars[9] favor a mean between the extremes. It is their position that the contributory negligence of a sole beneficiary, or of all the beneficiaries, bars all recovery;[10] but that where there are innocent beneficiaries recovery is denied only to the extent of the negligent party's interest.[11] This position is consistent both with the theory that one should not be allowed to recover for an injury to which his own negligence was a contributing cause, and with the theory that an innocent person should not suffer loss because of the negligence of another without receiving compensation.

The Tennessee decisions seem to fall into this last mentioned category. In *Bamberger v. Citizens' Street R. R.*[12] the court held that the contributory negligence of a father, through a custodian to whom he had intrusted his daughter, barred all recovery, since he was the sole beneficiary of the death action. In *Anderson v. Memphis Street Ry.*,[13] where the mother of the deceased was contributorily negligent but a sister who joined in the action was entirely innocent, recovery was denied to the mother but granted to the sister. In the instant case the court recognized the holding of the *Anderson* case but found that the relationship between the mother and the father in the care of a child was such that the doctrine of respondeat superior should apply. Thus the negligence of the mother was the negligence of the father. Since both

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211, 219-31 (1938); Gilmore, *Imputed Negligence,* 1 WIS. L. REV. 193, 257, 259-73 (1921); Wigmore, *Contributory Negligence of the Beneficiary as a Bar to an Administrator's Action for Death,* 2 ILL. L. REV. 487 (1908); Notes, 70 U. S. L. REV. 502 (1936), 2 A. L. R. 2d 785 (1948); 17 B. U. L. REV. 429 (1937).

6. If the statutes were strictly interpreted in those states where the cause of action of the deceased survives and passes to the administrator, the defense of contributory negligence on the part of beneficiaries would not seem to be available. Wymore v. Mahaska County, 78 Iowa 396, 43 N. W. 264, 6 L. R. A. 545, 16 Am. St. Rep. 449 (1889) (strict interpretation). But some courts with this type of statute have disregarded this technicality. Note, 70 U. S. L. REV. 502, 507-9 (1936).

7. *E.g.,* Hines v. McCullers, 121 Miss. 666, 83 So. 734 (1920); see Note, 2 A. L. R. 2d 785, 795-99, 808-11 (1948).

8. *E.g.,* Hazel v. Hoopeston-Danville Motor Bus Co., 310 Ill. 38, 141 N. E. 392, 30 A. L. R. 491 (1923); see Note, 2 A. L. R. 2d 785, 806-7 (1948).

9. PROSSER, TORTS 424 (1941); Wettach, *Wrongful Death and Contributory Negligence,* 16 N. C. L. REV. 211, 225-29 (1938); Gilmore, *Imputed Negligence,* 1 WIS. L. REV. 193, 257, 270-71 (1921); Wigmore, *Contributory Negligence of the Beneficiary as a Bar to an Administrator's Action for Death,* 2 ILL. L. REV. 487, 493-95 (1908); Note, 70 U. S. L. REV. 502, 514-15 (1936).

10. *E.g.,* Jenson v. Glemaker, 195 Minn. 556, 263 N. W. 624 (1935); see Note, 2 A. L. R. 2d 785, 788-95 (1948).

11. *E.g.,* City of Danville v. Howard, 156 Va. 32, 157 S. E. 733 (1931); see Note, 2 A. L. R. 2d 785, 799-806 (1948).

12. 95 Tenn. 18, 31 S. W. 163, 28 L. R. A. 486, 49 Am. St. Rep. 909 (1895).

13. 143 Tenn. 216, 227 S. W. 39 (1921).

beneficiaries were negligent there could be no recovery. The court recognized that one parent is not necessarily the agent of the other in all dealings with their child, but held that under the facts of this case a mutual agency existed.[14]

The doctrine of imputed negligence has now been generally repudiated (especially as to imputing negligence from bailor to bailee, from driver to passenger, and from parent to child); but it is still applied in situations involving a master-servant relationship, a joint enterprise, a partnership, and other so-called agency relations.[15] Most courts when faced with the problem of the instant case have failed to find such a relationship between parents with respect to the care of a minor child that the negligence of one is imputable to the other.[16] But a respectable minority, now joined by Tennessee, have reached the opposite conclusion on the ground that there is such a mutual agency between parents in the care of a minor child that the doctrine should be retained and applied.[17]

This view has much to justify it. Although each parent has a right and a duty to care for the child it would seem that each also impliedly assents to and authorizes the acts done by the other in the performance of that duty.[18] The relationship seems directly analogous to a partnership or a joint enterprise,[19] and the fact that either party could act in his own right does not preclude the existence of authority to act for the other at the same time. Had the mother in the instant case exercised no control whatsoever over the child, both parents might well have been found negligent in allowing the

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14. The court cites and distinguishes Highland Coal and Lumber Co. v. Cravens, 8 Tenn. App. 419 (M. S. 1928), in which the negligent act of the father consisted in securing unlawful employment for his son and was not an act growing out of the family relation.

15. See PROSSER, TORTS § 55 (1941); Gilmore, *Imputed Negligence*, 1 WIS. L. REV. 193, 237 (1921); Keeton, *Imputed Contributory Negligence*, 13 TEX. L. REV. 161 (1935).

16. Phillips v. Denver City Tramway, 53 Colo. 458, 128 Pac. 460, Ann. Cas. 1914B, 29 (1912); White v. National Lead Co., 99 S. W. 2d 535 (Mo. App. 1937); Los Angeles & S. L. R. R. v. Umbaugh, 61 Nev. 214, 123 P. 2d 224 (1942); Humphreys v. Ash, 90 N. H. 223, 6 A. 2d 436 (1939); Pearson v. National Manufacture & Stores Corp., 219 N. C. 717, 14 S. E. 2d 811 (1941); MacDonald v. O'Reilly, 45 Ore. 589, 78 Pac. 753 (1904); Horne v. Atlantic Coast Line R. R., 177 S. C. 461, 181 S. E. 642 (1935); City of Danville v. Howard, 156 Va. 32, 157 S. E. 733 (1931); Potts v. Union Traction Co., 75 W. Va. 212, 83 S. E. 918 (1914).

17. Womack v. Preach, 64 Ariz. 61, 165 P. 2d 657 (1946); Agdeppa v. Glougie, 71 Cal. App. 2d 463, 162 P. 2d 944 (1945); Turner v. St. Louis-S. F. Ry., 106 Kan. 591, 189 Pac. 376 (1920); Burton v. Spurlock's Adm'r, 294 Ky. 336, 171 S. W. 2d 1012 (1943); Darbrinsky v. Pennsylvania Co., 248 Pa. 503, 94 Atl. 269, L. R. A. 1915E, 781 (1915); *cf.* Crevelli v. Chicago, M. & St. P. Ry., 98 Wash. 42, 167 Pac. 66, L. R. A. 1918A, 206 (1917) (similar result based on community property statutes).

18. *See* Darbrinsky v. Pennsylvania Co., 248 Pa. 503, 94 Atl. 269, 270, L. R. A. 1915E, 781 (1915).

19. It is generally stated that the existence of a joint enterprise requires a mutual right to control and govern the movements and conduct of each other with respect to a common purpose, in which all persons involved have a mutual interest. When such a relation exists each party is charged with any negligence of another party to the enterprise in a matter involving the common purpose. PROSSER, TORTS § 65 (1941); 38 AM. JUR., *Negligence* § 237 (1941); Note, 13 TEXAS L. REV. 161, 165 (1935).

child access to a place of known danger;[20] had the father entrusted the care of the child to a servant he would have been charged with that person's negligence.[21] It does not seem reasonable then, that the father could by consenting to the mother's exercise of exclusive control escape responsibility for her negligence while acting in behalf of the family group.

20. Concerning the care required of parents for the safety of their children, see 38 AM. JUR., *Negligence* § 207 (1941); Note, 16 L. R. A. (N.S.) 395 (1908).

21. Or suppose that a mother hired a nurse to care for her child under authority from her husband. The father would be liable for the nurse's wages and chargeable with her negligence in caring for the child. Why should not the father be charged with the negligence of the mother if she did not hire a nurse?