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Recent Case Comments

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RECENT CASE COMMENTS

Accounting—Return To Be Allowed Utilities on Deferred Tax Reserves Instituted in Connection with Accelerated Depreciation Methods

In a rate proceeding[1] the Federal Power Commission allowed plaintiff Panhandle Eastern Pipe Line Co., a regulated distributor of natural gas,[2] an overall return of six and one-fourth per cent on its total rate base.[3] This percentage reflected a one and one-half per cent rate of return[4] on the utility's reserve for deferred income tax while all other assets carried a rate of 6.46 per cent.[5] This reserve was instituted in connection with tax deferred by plaintiff's use of accelerated amortization and the liberalized method of depreciation computation.[6] Plaintiff

1. Natural Gas Act § 4(e), 52 Stat. 822 (1938), 15 U.S.C. § 717c(e) (1958). This subsection gives the Federal Power Commission power, subject to judicial review, to set rates of natural gas companies engaged in interstate commerce. The courts recognize the expertise of the Commission in this field and do not in any manner actually set rates; they only review them.

2. "[F]ederal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." Natural Gas Act § 1(a), 52 Stat. 821 (1938), 15 U.S.C. § 717(a) (1958).

3. A rate base is computed by adding a reasonable amount for working capital to the Commission's determination of the fair value of the utility's plant and equipment. A fair rate of return for the investor is determined by consideration of the current rates of return to investors in private industry, the risk involved, and the need for capital. The rate base is then multiplied by the rate of return and the resulting figure is added to the utility's anticipated expenses to determine the gross income. Finally, rates to consumers are fixed at the level calculated to return this gross income. Note, 69 HARV. L. REV. 1096, 1097-98 (1956).

4. The determination of a rate of return of one and one-half per cent on the reserves for deferred taxes was largely a matter of the Commission's judgment based on such factors as its knowledge of the money market and the return that a utility will earn on borrowed funds if it elects not to use liberalized depreciation and borrows money to invest in facilities.

In support of its determination of a one and one-half per cent return the Commission offered the following computation (which the author has paraphrased): If Northern is allowed a 6.25 per cent return on its total rate base and decides to borrow money rather than raise it by using liberalized depreciation it would probably have to pay interest of 4.5 per cent to 5.0 per cent. Stockholders would receive a net return of 1.25 per cent to 1.75 per cent on the borrowed money. To allow less than 1.5 per cent return on the deferred taxes would mean that the stockholders would gain more by borrowing than by using rapid write-off methods for tax purposes. Northern Natural Gas Co., 25 F.P.C. 431 (1961).

5. Panhandle Eastern Pipe Line Co. v. Federal Power Comm'n, 316 F.2d 659, 661 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 881 (1963).

6. Liberalized depreciation procedures are authorized by INT. REV. CODE OF 1954, § 167. Subsection (b) provides:

"For taxable years ending after December 31, 1953 . . . [an allowance for depreciation may be computed] under any of the following methods:

filed a petition for review of the rate order with the United States Court of Appeals for the District of Columbia Circuit[7] contending that Congress in the Revenue Code of 1954 intended all the benefits of accelerated depreciation for the taxpayer and none for the ratepayer.[8] Consequently, plaintiff urged, the rate allowed on the reserve should be equal to that allowed on the other assets. The three-judge circuit court set aside the Commission's rate allowance on the reserve and ordered the Commission to allow Panhandle a full return on its de-

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(1) the straight line method,

(2) the declining balance method, using a rate not exceeding twice the rate which would have been used had the annual allowance been computed under the method described in paragraph (1),

(3) the sum of the years-digits method, and

(4) any other consistent method . . . which . . . does not, during the first two-thirds of the useful life of the property, exceed the total of such allowances . . . computed under . . . paragraph (2)."

Accelerated amortization procedures are authorized by INT. REV. CODE OF 1954, § 168. Subsection (a) provides:

"Every person, at his election, shall be entitled to a deduction with respect to the amortization . . . of any emergency facility . . . based on a period of 60 months. Such amortization deduction shall be an amount [for each month] equal to the adjusted basis of the facility at the end of such month divided by the number of months (including the month for which the deduction is computed) remaining in the period."

Use of liberalized depreciation and accelerated amortization methods provides higher expense deductions and therefore lower taxes during the early life of a given facility. In later years lower deductions are taken and higher taxes are paid. Total depreciation deductions over the life of a given property are the same using either the straight-line method or a liberalized or accelerated method. The advantage provided by these methods is that the taxpayer can defer a portion of the taxes on income during the early life of a facility aud use the money in the interval. 316 F.2d at 661. To illustrate the most generally accepted accounting procedure: If tax expense computed with the straight line method equals $100,000 and with a liberalized or accelerated method the same year's tax expense equals $80,000 the accounting entries would be:

Income Tax Expense	$80,000	
Deferred Income Tax Expense	20,000	
Reserve for Deferred Income Tax		20,000
Cash		80,000

Until the funds in the reserve account are needed to pay the taxes the utility has an interest-free loan. The Commission has never required the reserve for deferred taxes to be funded. Note, 69 HARV. L. REV. 1096, 1099 n.3 (1956).

Although the majority opinion states that plaintiff's reserve for deferred income tax was composed entirely of taxes deferred under Section 167, the dissenting judge correctly points out that $6,960,095 of this $11,076,954 balance was instituted in connection with Panhandle's use of accelerated amortization under Section 168. 316 F.2d at 667 (Miller, J., dissenting). Deferrals of tax from both methods are credited to the same reserve.

7. Natural Gas Act § 19(b), 52 Stat. 831 (1938), 15 U.S.C. § 717r(b) (1958), provides for review of a Commission's decision as to rates directly to the United States court of appeals in the circuit where the company is located or has its principal place of business, or to the United States Court of Appeals for the District of Columbia.

8. Plaintiff's contention is based mainly on the interpretation of the legislative intent underlying INT. REV. CODE OF 1954, §§ 167, 168 in City of Detroit v. Federal Power Comm'n, 230 F.2d 810 (1955), *cert. denied*, 352 U.S. 829 (1956).

ferred tax reserves.[9] On rehearing en banc, *held*, reversed. The congressional intent underlying the tax statute was to provide incentive for plant investment; a return of one and one-half per cent on reserves for deferred income tax, taken with other advantages, is consistent with this policy. *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 316 F.2d 659 (D.C. Cir.), *cert. denied*, 375 U.S. 881 (1963).

A rapid asset write-off procedure was first authorized in the Internal Revenue Code of 1939 through a provision for accelerated amortization of emergency facilities.[10] This provision allowed facilities certified by a defense agency as essential to the war effort to be written off at the rate of twenty per cent per year. Similar legislation was enacted in 1950.[11] An accounting technique developed to be used in conjunction with these statutes is known as "normalization." Under this technique straight-line depreciation is used for financial reporting purposes, even though the taxpayer computes his depreciation expense for tax purposes by an accelerated method. With this procedure, during the early life of an asset the difference between the actual tax paid and the amount which would have been paid if straight-line depreciation had been used is credited to a reserve for deferred taxes. The corresponding debit is to tax expense. Subsequently, when the actual tax expense rises above the tax computed by the use of straight-line depreciation, the excess of the former is credited to tax expense and the reserve for deferred tax is debited an equal amount. The taxpayer is allowed the same total amount of depreciation on an asset; the effect of using a rapid write-off procedure is that more depreciation is taken in the early life of an asset, thus decreasing taxes, while later in the life of an asset less depreciation allowance is taken and higher taxes are paid.[12]

In the case of a public utility, a reflection in the rates of the disparity of tax payments over the life of an asset can be prevented if straight-line depreciation computed for normalization purposes, rather than accelerated depreciation, is used for the purpose of determining current operating expenses. However, if the reserve account is allowed the same rate of return as other assets, normalization would appear to overcompensate for the initial reduction in taxes. Until it is necessary to charge the reserve for the deferred taxes, the utility has an interest-

9. Panhandle Eastern Pipe Line Co. v. Federal Power Comm'n, No. 16,479, D.C. Cir., Sept. 17, 1962 (3 judges sitting).

10. Int. Rev. Code of 1939, ch. 1, § 124, 54 Stat. 999.

11. Int. Rev. Code of 1939, ch. 1, § 124, 54 Stat. 999, as amended, ch. 994, § 124A, 64 Stat. 939 (1950); see note 6 *supra* for discussion of accelerated amortization.

12. The American Institute of Accountants has approved normalization of deferred tax payments. ACCOUNTING RESEARCH BULLETIN 44 (rev. 1958).

free loan available for investment[13] and possibly a higher rate base.[14] Opponents of "normalization" have condemned its use as being unfair to the consumer since it has a twofold increasing effect on rates. The argument is that the consumer is prejudiced first when the higher tax figured on the basis of straight-line depreciation is charged as a reimbursable expense and then again when the utility is allowed a return on the cost-free capital in the tax reserve. It is argued that there is no present liability and that a continued use of accelerated depreciation on future acquisitions of an expanding company will preclude arriving at a point where tax payments are subject to a net increase. The tax is thought by these theorists to be permanently deferred, thus no provision for its later payment need be made. A weakness of this reasoning in so far as the charge against current operations is concerned is that natural gas companies may not continue to expand at their present rate.[15]

Until 1954 the only rapid write-off method was accelerated amortization of emergency facilities. At that time section 167 of the Internal Revenue Code of 1954 authorized liberalized depreciation deductions on any asset acquired or constructed by the taxpayer after December 31, 1953.[16] In connection with the predecessors of the present accelerated amortization statute, section 168, the Federal Power Commission decreed in 1953 that pipeline companies would be allowed both to charge current operations with a normalization charge and to earn a return on the reserve created incident to such a charge.[17] The

13. See Priest, *What Should Commissions Regulating Public Utilities Do About Accelerated Amortization?*, 39 VA. L. REV. 579, 582 (1953).

14. In determining the fair value to be placed on the facilities to be included in a company's rate base all regulatory agencies do not use the more common technique of deducting from the original cost of an asset its accumulated reserve for depreciation computed under the straight-line method. Some agencies use current cost of reproduction less "observed depreciation," which is determined by a physical appraisal of the facilities. See Note, 69 HARV. L. REV. 1096, 1097 (1956). If this latter method is used the fair value of an asset could be determined to be more than its original cost less its accumulated straight-line depreciation. The inclusion of this "fair value" figure in the rate base along with the reserve for deferred taxes which is related to the asset will result in the company's enlarging its rate base. Even if the reserve is not included in the rate base normalization of the tax payments results in the acquisition of assets by a company—either cash or plant purchased with the cash. These new assets acquired by the company enlarge its rate base. When assets are valued above original cost less accumulated straight-line depreciation, the inclusion of the deferred tax reserves in the rate magnifies the enlargement.

15. See Swiren, *Accelerated Depreciation Tax Benefits in Utility Rate Making*, 28 U. CHI. L. REV. 629 (1961).

16. INT. REV. CODE OF 1954, § 167.

17. In August 1952 Panhandle petitioned the Commission for a declaratory order as to whether it would receive all the benefits of accelerated amortization if it were to adopt the procedure. On December 4, 1953, after expanding the proceeding into a rule-making determination in which Panhandle participated, the Commission issued its Opinion No. 264, Treatment of Federal Income Taxes as Affected by Accelerated

court in *City of Detroit v. Federal Power Commission*[18] interpreted the intent behind the tax statute to be in accordance with the Commission's decree. The Commission and courts also have held that reserves resulting from the use of liberalized depreciation under section 167 should be accorded similar treatment.[19] As late as 1960, the Commission continued to adhere to these views. In *Phillips Petroleum Co.*[20] it reaffirmed its earlier court-approved ruling that a normalization charge against current operations was proper and that the corresponding reserve for deferred taxes was properly included in the rate base. Then, in 1961, in *Northern Natural Gas Co.*[21] the Commission decided to divide the benefits of rapid write-off between the utility and the ratepaying consumer. The Commission reasoned that it was its duty to protect the consumer under the Natural Gas Act and in so doing to adopt ratemaking principles which would assure the lowest reasonable rates. Only such a rate of return was allowed on the reserve for deferred tax as the Commission felt would provide an incentive to the utilities to continue to use the rapid write-off procedures.

In the instant case, the three-judge United States Circuit Court reversed the Commission's ruling embodying allowance of a less than full return on Panhandle's tax reserves and ordered the Commission to allow Panhandle the full benefit of normalization as related to the reserve for deferred taxes. On rehearing, the court sitting en banc

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Amortization, 12 F.P.C. 369 (1953), announcing that the utilities would receive the same rate of return on their reserves for deferred taxes as they were allowed on their other assets.

In its opinion the Commission said, "It is clear to us that Congress by the enactment of this law did not intend to make gifts [lower rates] to the consumers of the public utilities and natural gas companies . . . ." *Id.* at 373. With this assurance Panhandle elected to use accelerated amortization for federal income tax purposes and constructed new facilities with funds thereby accumulated. In April 1954 the Commission fixed rates and charges for Panhandle. In computing these rates depreciation was figured per the straight-line method and the deferred taxes were credited to a reserve account.

18. 230 F.2d 810 (D.C. Cir. 1955), *cert. denied,* 352 U.S. 829 (1956).

19. El Paso Natural Gas Co., 23 F.P.C. 260 (1959), *aff'd as to this issue,* 281 F.2d 567 (5th Cir. 1960), *cert. denied,* 366 U.S. 912 (1961); Amere Gas Util. Co., 15 F.P.C. 781 (1956).

20. 24 F.P.C. 537 (1960), *aff'd sub nom.* Wisconsin v. Federal Power Comm'n, 303 F.2d 380 (D.C. Cir. 1961), *aff'd,* 373 U.S. 294 (1963).

21. "In our view, the best solution to this problem is to divide the benefits of liberalized depreciation between the regulated company and the taxpayer. In dividing these benefits . . . we are guided by the principle that it is our duty to protect the consumer, and adopt ratemaking principles which will assure the lowest possible rates. Accordingly, we believe that the major portion of the benefits accruing from the use of liberalized depreciation should go to the ratepayer, and the company should be allowed only so much of the benefits accrning from the use of liberalized depreciation as is necessary to provide it with a sufficient incentive to continue to use liberalized depreciation, and not return to the use of straight-line depreciation in the computation of its income taxes." 25 F.P.C. 431, 439 (1961).

divided five to four. The majority held that, giving due consideration to established principles of regulatory law,[22] a return of one and one-half per cent on the utility's deferred tax reserves, taken with other "material advantages,"[23] did give proper effect to the congressional policy underlying the tax statute.[24] First, the majority determined that the intent of Congress was to aid economic growth through providing an incentive to industry to invest in new facilities.[25] They further determined that as to a regulated industry, the least return which would provide this incentive was proper. They reasoned that a less than full return on these reserves would serve to reduce rates, and that a public utility's rates must be as low as reasonably possible "consistent with good service and sound finance."[26] The majority was satisfied that the Commission properly reached the one and one-half per cent figure by " 'careful consideration of the various factors involved.' . . . Since these evaluations are within the expert competence of the Commission, we do not disturb the conclusions derived from them."[27] The underlying theme of the dissenting opinion is that the Commission and the majority did not have authority to withhold from the taxpayer *any* of the incentive to investment that Congress intended to bestow.[28]

This court has reached a desirable result in dividing between the taxpayer and the ratepayer the benefits which are derived from the

22. "[F]undamental principles of rate regulation . . . require rates to reflect actual cost of capital." 316 F.2d at 662. "The recovered funds were acquired at no cost to the company." *Id.* at 663.

23. "The other 'material advantages' which the Commission found would result from 'the use of deferred taxes to supply a portion of the company's capital requirements,' are as follows: The substantial sums involved are readily available without resort to the market, and such additions to capital serve to reduce the company's debt ratio. The acquisition of plant by use of deferred taxes provides additional security not subject to lien on which new loans can be based, perhaps at lower interest rates than would otherwise be possible. Furthermore, deferred tax funds accumulated between rate cases and invested in plant may, during that period, increase the company's earnings. Finally, the accumulation of deferred taxes increases the company's funds available for expansion without issuing additional common stock." *Id.* at 662 n.5.

24. "Since there is no indication that Congress intended to bestow upon the producers *qua* producers any benefits beyond those necessary to provide incentives to investment, we conclude that, if a return of 1.5 per cent taken with the other advantages does provide such incentive, the Commission's decision would be consistent with the congressional policy underlying the tax statute." *Id.* at 663.

25. "Congress permitted acceleration in the speed of the tax-free recovery of costs [because it considered this] of critical importance in the decision of management to incur [such] risks." *Id.* at 662.

26. *Id.* at 663.

27. *Ibid.*

28. "My point . . . is that the Commission and the majority of this court do not have authority to decide that, although Congress offered unequivocally a definite benefit to encourage taxpayers to modernize and expand their facilities, the same result may be achieved by offering only a part—indeed, a small part—of the designated benefit to regulated companies." *Id.* at 674 (Miller, J., dissenting).

former's use of rapid write-off procedures. It is undisputed that Congress enacted these procedures to provide an investment incentive for industry. The error of earlier decisions and of the dissenting opinion was their failure to balance this congressional intent with principles of regulatory law so that a result would be reached which would give effect to both. These principles include the requirement that a public utility must operate as economically as reasonably possible with the results of its economy flowing to the consumers by way of lower rates.[29] An implication of this requirement is that rates to consumers must reflect a company's total investment including its cost of capital. The court correctly reasoned that some return had to be allowed on the tax reserve to provide an incentive to investment. However, since the capital in the reserve account cost the utility nothing, this return should be no higher than that necessary to effectuate the congressional intent. This court gave no opinion on whether it would be within the Commission's discretionary power to deny the utilities any return on the reserves and to require them to use accelerated depreciation.[30] Unless the other "material advantages"[31] accruing to the taxpayer from the use of the statutes are extraordinarily material it seems that such action would not give effect to the congressional intent underlying the statutes and thus would be an abuse of discretion. A statement that this one and one-half per cent return, taken with other advantages accruing to the utility, will give effect to the intent of Congress to provide an investment incentive to industry must be qualified. Only the passage of time will reveal whether utilities will continue to use the rapid write-off methods and normalization to generate reserve funds for investment.[32]

An additional effect of this decision is the support it gives to the process of "normalization" in regulatory accounting. However, opponents of normalization[33] have won a partial victory through this decision, since some of the burden on the consumer has been alleviated by the reduction in the rate of return on the tax reserves. This reduction eliminates some incentive to invest, but in those cases in which regulatory agencies have the power to compel utilities under their jurisdiction to invest no investment incentive is needed. Congress apparently failed to consider when the statutes were enacted that certain utilities did not need the investment incentive of accelerated

29. 316 F.2d at 663. See Swiren, *supra* note 15, at 632.

30. 316 F.2d at 661.

31. See note 23 *supra.*

32. The Federal Power Commission has begun a study to determine the propriety of the one and one-half per cent rate of return on the tax reserves. 32 U.S.L. WEEK 3153 (Oct. 22, 1963).

33. See text discussion of objections to normalization at p. 278 *supra.*

depreciation, but in the "investment credit" statute of 1962[34] recognition was given to this fact, as certain "public utility property" was allowed a substantially smaller percentage of credit against tax than that allowed to other property.[35] The provisions with respect to "public utility property" did not affect natural gas pipeline companies such as Panhandle which are allowed the same credit as unregulated companies.[36] The fact that some regulated companies are required to pass on to their consumers some of the benefits of the investment incentive statutes[37] has concerned Congress.[38] In the tax bill recently passed by the House of Representatives a provision was included in which Congress declared its intent that no company that receives the same credit as an unregulated company should be compelled by any federal regulatory agency to "use . . . any credit against tax allowed by the [investment credit statute] to reduce such taxpayer's Federal income taxes for the purpose of establishing the cost of service of the taxpayer."[39] If Congress intends to maximize the benefits to utilities of the tax savings arising from the use of this statute it has not gone far enough with this provision. Nothing is said to prevent regulatory agencies from reducing rates to consumers by allowing a less than full return on the reserves instituted in connection with the use of the investment credit. When Congress enacted accelerated depreciation

34. The "investment credit" statute allows a credit against federal income taxes of seven per cent of the cost of certain depreciable assets acquired and placed in service after 1961. INT. REV. CODE OF 1954, §§ 38, 46(2).

35. "[P]roperty used predominantly in the trade or business of the furnishing or sale of—

(i) electrical energy, water, or sewage disposal services,

(ii) gas through a local distribution system,

(iii) telephone service, or

(iv) telegraph service by means of domestic telegraph operations . . . if the rates" are established by a regulatory agency, receives only a three per cent credit for tax purposes. INT. REV. CODE OF 1954, §§ 38, 46(c)(3).

36. Natural gas pipelines, railroads, airlines, truck and bus operators, and other types of public carriers receive an investment credit of seven per cent on their investment in qualified property. H.R. REP. No. 749, 88th Cong., 1st Sess. 39 (1963).

37. INT. REV. CODE OF 1954, §§ 38, 167, 168.

38. The instant case has decided that the benefits of accelerated amortization should be shared by the taxpayer with the consumer. It follows that benefits accruing from the "investment credit" statute should also be shared. The Federal Communications Commission has ruled "that the proper accounting treatment with respect to the investment tax credit . . . is to account for it as a reduction in income taxes and let such reduction flow through to operating income." Order FCC 63-744 38445 (1963). The adoption of this procedure passes the full benefit on to the consumer immediately. The American Institute of Certified Public Accountants' Accounting Principles Board has advocated "normalization" to reflect the credit in net income spread over the life of the asset. Opinion No. 2, "Accounting for the 'Investment Credit.'" This seems to be the better approach as the credit should be matched to the life of the investment which gave rise to the credit. Under either view the consumer shares in the benefits of the statutes.

39. H.R. 8363, § 202(e)2, 88th Cong., 1st Sess. (1963).

statutes it apparently did not consider that regulatory agencies would allow utilities to normalize the deferred taxes arising from the use of the statutes and to include the reserves instituted in connection with the process in the utilities' rate bases.[40] This practice was approved in the *City of Detroit* case.[41] Neither did Congress consider that the tax reserves would not be allowed a full rate of return. The instant case for the first time before a federal court raised the question of the rate of return allowable on the reserves. Since *City of Detroit* approved normalization and the inclusion of deferred tax reserves in the rate base, and since the instant case has allowed a less than full return on such reserves, Congress should be aware of these procedures which reduce the investment incentive of the statutes.[42] However, in the pending tax bill Congress has taken no action to prevent regulatory agencies from allowing a less than full return on deferred tax reserves. Apparently Congress has not considered that an allowance of a less than full return on reserves instituted in connection with the "investment credit" statute would eliminate some of the investment incentive directed by this statute to the utilities.

Conflict of Laws—Torts—Repudiation of Place of Injury Rule

In a New York case, plaintiff was an automobile guest of the defendant host on a weekend trip to Canada. Both were residents of New York. While driving in the Province of Ontario, the host lost control of the car; plaintiff was seriously injured when the car

40. The use of the accounting procedure outlined in paragraph 13 of Accounting Research Bulletin No. 43, ch. 9(c), would result in there being no deferred tax reserve to include in the rate base where "book value" (*i.e.*, cost less accumulated depreciation) of assets is the asset value figure included in the rate base. Under this procedure a charge for additional depreciation is made to the depreciation expense account with the related credit being made to accumulated depreciation. This procedure recognizes the loss of future deductibility of the cost of assets for income tax purposes but provides no separate reserve for deferred taxes. The answer to a utility's claim to include deferred tax reserves in its rate base would simply be that there are no deferred tax reserves.

41. *Supra* note 18.

42. Since the deferred tax reserves are similar to loans, one of the strong arguments for their inclusion in the rate base is that since borrowed money is included in the rate base the tax reserves should also be included. The tax savings arising from the "investment credit" statute cannot be analogized to a loan since they are never to be repaid. Thus these tax savings really amount to cost-free capital. A strong argument can be made that capital which cost the utility nothing should not be included in the rate base. However, if the tax savings are not included in the rate base the question is raised whether effect is given to the congressional intent behind the tax statute of providing an incentive to invest to those regulated companies which cannot be compelled to invest.

struck a stone wall. In New York, plaintiff's action for negligence against the host[1] was dismissed by the trial court on the ground that although New York law permitted an automobile guest to recover from his host,[2] the law of the place where the tort occurred[3] governed the action, and an Ontario statute[4] barred recovery of damages by an automobile guest against his host. The appellate division affirmed the judgment. On appeal to the Court of Appeals of New York, *held*, reversed. The law to be applied in resolving each substantive issue in a tort action is the law of the state having the most substantial interest in the particular issue presented. *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279 (1963).

In a New Hampshire case, a wife filed suit against her husband in New Hampshire, the state of the spouses' domicile, to recover for injuries sustained in a Massachusetts accident resulting from alleged gross negligence of her husband in operating a motor vehicle in which she was a passenger. Although New Hampshire law allows one spouse to bring a tort action against the other,[5] the lower court dismissed the action on the ground that the law of the place where the tort occurred governed and there was no tort action in favor of one spouse against the other under Massachusetts law.[6] On appeal, *held*, reversed. The question of marital immunity from tort liability is governed by the law of the spouses' domicile. *Thompson v. Thompson*, 193 A.2d 439 (N.H. 1963).

In the United States a large majority of the courts have followed a general conflict of laws rule that the law of the place of injury governs the substantive rights of parties in a tort action.[7] The place-of-injury rule was adopted by the first *Restatement of Conflict of Laws*.[8] Thus, the liability of a motorist to his guest has generally been determined by application of the place-of-injury rule with con-

1. The host died after the suit was commenced and his executrix was substituted as defendant.

2. Higgins v. Mason, 255 N.Y. 104, 174 N.E. 77 (1930).

3. Where the state in which the injury occurred is not the same as the state where the wrongful acts occurred, the law of the state where the injury occurred is generally applied. Hunter v. Derby Foods, Inc., 110 F.2d 970 (2d Cir. 1940); Dallas v. Whitney, 118 W. Va. 106, 188 S.E. 766 (1936).

4. Highway Traffic Act of Province of Ontario, ONTARIO REV. STAT. c. 172, § 105(2) (1960).

5. Lumberman's Mut. Cas. Co. v. Blake, 94 N.H. 141, 47 A.2d 874 (1946); Gilman v. Gilman, 78 N.H. 4, 95 Atl. 657 (1915).

6. Callow v. Thomas, 322 Mass. 550, 78 N.E.2d 637 (1948).

7. "The general conflict-of-laws rule, followed by a vast majority of the States, is to apply the law of the place of injury to the substantive rights of the parties." Richards v. United States, 369 U.S. 1, 11-12 (1962); GOODRICH, CONFLICT OF LAWS 219 (2d ed. 1938).

8. RESTATEMENT, CONFLICT OF LAWS § 378 (1934).

sequent reference to the law of the state where the accident occurred.[9] In the same manner, tort liability between spouses has most often been determined by the rule of marital tort immunity in the state where the injury occurred, without regard to the law of the spouses' domicile.[10] Although New York had followed the place-of-injury rule until the *Babcock* decision,[11] the court's dissatisfaction with the rule was evident in a previous decision involving a Massachusetts airplane crash. In that case, the court refused to limit the amount of plaintiff's recovery under a provision of a Massachusetts wrongful death statute, on the theory that the question of damages is procedural and therefore governed by the law of the forum.[12] New Hampshire, in the case of *Gray v. Gray*,[13] was among the first states to apply the place-of-injury rule to the question of marital immunity for tort; it had previously applied the rule to other situations as well.[14] The place-of-injury rule reflects the vested rights theory of conflict of laws,[15] which is now discredited by many writers.[16] Widespread criticism of the place-of-injury rule and the first *Restatement*'s position is based on the idea that choice of law problems should be resolved by applying the law of the state which has the most substantial interests and connections with the particular legal issue.[17]

9. Blount v. Blount, 125 So. 2d 66 (La. Ct. App. 1960); Sharp v. Johnson, 248 Minn. 518, 80 N.W.2d 650 (1957); Naphtali v. Lafazan, 8 App. Div. 2d 22, 186 N.Y.S.2d 1010 (1959), *aff'd mem.*, 8 N.Y.2d 1097, 171 N.E.2d 462 (1960); Estate of Bednarowicz v. Vetrone, 400 Pa. 385, 162 A.2d 687 (1960); Fysken v. Fysken, 267 Wis. 542, 66 N.W.2d 150 (1954).

10. Dawson v. Dawson, 224 Ala. 13, 138 So. 414 (1931); Robinson v. Gaines, 331 S.W.2d 653 (Mo. 1960); Gray v. Gray, 87 N.H. 82, 174 Atl. 508 (1934); Howard v. Howard, 200 N.C. 574, 158 S.E. 101 (1931); Holder v. Holder, 384 P.2d 663 (Okla. 1963); Buckeye v. Buckeye, 203 Wis. 248, 234 N.W. 342 (1931).

11. Kaufman v. American Youth Hostels, 5 N.Y.2d 1016, 158 N.E.2d 128 (1959), *modifying* 6 App. Div. 2d 223, 177 N.Y.S.2d 587 (1958); Poplar v. Bourjois, Inc., 298 N.Y. 62, 80 N.E.2d 334 (1948); Naphtali v. Lafazan, *supra* note 9. *But see* Mertz v. Mertz, 271 N.Y. 466, 3 N.E.2d 597 (1936).

12. Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526 (1961). Pearson v. Northeast Airlines, Inc., 309 F.2d 553 (2d Cir. 1962), held the full faith and credit clause of the Constitution of the United States did not require application of the Massachusetts limitation on wrongful death damages in a suit brought in New York under the same facts as *Kilberg*.

13. *Supra* note 10.

14. See Zielinski v. Cornwell, 100 N.H. 34, 118 A.2d 734 (1955).

15. The place-of-injury rule "had its conceptual foundation in the vested rights doctrine, namely, that a right to recover for a foreign tort owes its creation to the law of the jurisdiction where the injury occurred and depends for its existence and extent solely on such law." Babcock v. Jackson, 12 N.Y.2d 473, 477-78, 191 N.E.2d 279, 281 (1963). A discussion of the vested rights theory and other American theories of conflict of laws is found in Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361 (1945).

16. *Id.* at 379-85; Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457, 479-85 (1924); Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468, 473-83 (1928).

17. Ford, *Interspousal Liability for Automobile Accidents in the Conflict of Laws:*

Similar criticism of inflexible choice of law rules as to contracts has led several courts in contracts cases to adopt the "center of gravity" rule, which resolves conflict problems through a determination of which state has the most significant relation to the particular question.[18] In recent years there have been significant departures from the place-of-injury rule in tort cases. In one line of cases, state dram shop acts have given rise to liability where the plaintiff was injured outside the state by an intoxicated motorist to whom defendant had served alcoholic beverages within the state, even though the state in which the plaintiff was injured imposed no liability.[19] In a group of earlier cases, interspousal tort actions were denied in states recognizing marital immunity from tort liability, even though the state where the injury occurred did not recognize such immunity, on the ground that interspousal tort actions were against the public policy of the state.[20] In the noted case of *Haumschild v. Continental Casualty Co.*[21] the court held that the question of marital immunity for tort was governed by the law of the spouses' domicile, on the ground that the question was one of family law. Similarly, the place-of-injury rule has been avoided in several other cases by the device of classifying the question presented as one of family law,[22] procedural law,[23] or decedents' estates law,[24] and therefore, under widely accepted conflict of laws principles, governed by choice of law rules other than the place-of-injury rule. The Supreme Court of the United States gave its approval of the trend away from the place-of-injury

Law and Reason Versus the Restatement, 15 U. PITT. L. REV. 397 (1954); Morris, *The Proper Law of a Tort*, 64 HARV. L. REV. 881 (1951); Weintraub, *A Method for Solving Conflict Problems—Torts*, 48 CORNELL L.Q. 215 (1963).

18. Jansson v. Swedish American Line, 185 F.2d 212 (1st Cir. 1950); Kievit v. Loyal Protective Life Ins. Co., 34 N.J. 475, 170 A.2d 22 (1961); Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954); Boston Law Book Co. v. Hathorn, 119 Vt. 416, 127 A.2d 120 (1956). The "center of gravity" theory is also adopted by the UNIFORM COMMERCIAL CODE § 1-105 and the RESTATEMENT (SECOND), CONFLICT OF LAWS § 332(1) (Tent. Draft No. 6, 1960).

19. Zucker v. Vogt, 200 F. Supp. 340 (D. Conn. 1961); Osborn v. Brochetta, 20 Conn. Sup. 163, 129 A.2d 238 (1956); Sehmidt v. Driscoll Hotel, 249 Minn. 376, 82 N.W.2d 365 (1957). *Contra*, Eldridge v. Don Beachcomber, Inc., 342 Ill. App. 151, 95 N.E.2d 512 (1950).

20. Kircher v. Kircher, 288 Mich. 669, 286 N.W. 120 (1939); Kyle v. Kyle, 210 Minn. 204, 297 N.W. 744 (1941); Mertz v. Mertz, *supra* note 11; Poling v. Poling, 116 W. Va. 187, 179 S.E. 604 (1935).

21. 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

22. Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955) (unemancipated minors permitted to recover from parent under law of domicile).

23. Kilberg v. Northeast Airlines, Inc., *supra* note 12.

24. Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953) (survival of tort action against decedent held governed by law of decedent's domicile and not law of state where injury to plaintiff occurred). *Contra*, Allen v. Nessler, 247 Minn. 230, 76 N.W.2d 793 (1956).

rule in *Richards v. United States*,[25] ruling on the law applicable to claims arising under the Federal Tort Claims Act.[26] In response to the dissatisfaction of the courts with the place-of-injury rule, the American Law Institute, in the *Restatement (Second) of Conflict of Laws*, has abandoned the rule and has replaced it with a principle which determines the applicable law by reference to the state having "the most significant relationship with the occurrence and with the parties."[27] The Institute further proposes to adopt the more specific rule that the law governing the question of family immunity from tort liability is the law of the domicile of the family.[28]

In *Babcock*, the court recognized that New York had followed the place-of-injury rule in the past,[29] but found the rule to be a product of the vested rights theory of conflict of laws which "ignores the interest which jurisdictions other than that where the tort occurred have in the resolution of particular issues."[30] The court reasoned that "justice, fairness and the best practical result" could best be achieved by enforcing the law of the jurisdiction having the strongest interest in the resolution of the particular question presented.[31] Applying this principle to the case, the court found that Ontario had no interest in denying a remedy to a New York automobile guest against his New York host since the purpose of the Ontario statute was to protect insurance carriers in Ontario from collusive suits.[32] New York, however, had a strong interest in the remedy available to a New York automobile guest against his New York host.[33] Furthermore, the

25. *Supra* note 7.

26. The Federal Tort Claims Act imposes tort liability on the federal government "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b) (1958). In *Richards*, the Supreme Court held the law governing a claim arising under the act was the "whole law" of the place where the acts of negligence occurred, including its conflict of laws rules. The Court based the decision, in part, upon the consideration that the interpretation adopted would allow federal courts to utilize flexible choice of law rules existing in states where cases arise under the act and the act would not be tied down to an inflexible choice of law rule. 369 U.S. at 12-13.

27. RESTATEMENT (SECOND), CONFLICT OF LAWS § 379(1) (Tent. Draft No. 8, 1963). Important contacts to be considered in determining the state having the most significant relationship include: "(a) the place where the injury occurred, (b) the place where the conduct occurred, (c) the domicile, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered." *Id.* § 379(2).

28. *Id.* § 390(g).

29. Babcock v. Jackson, 12 N.Y.2d 473, 477, 191 N.E.2d 279, 281 (1963).

30. *Ibid.* Similar criticism led to dissatisfaction with mechanical contract choice of law rules also based on the vested rights theory; these rules were abandoned in New York in favor of the "center of gravity" rule in Auten v. Auten, *supra* note 18.

31. Babcock v. Jackson, *supra* note 29, at 481, 191 N.E.2d at 283.

32. *Id.* at 482-83, 191 N.E.2d at 284.

33. The policy of New York to allow unrestricted recovery by an automobile guest

court thought it more desirable that rights stemming from the host-guest relationship remain constant in travel through different jurisdictions.[34] Therefore, plaintiff's right of action was held governed in this respect by New York law.[35] The court noted that New York law would govern in a similar case where the foreign guest statute requires a showing of gross negligence.[36] The court was careful to point out, however, that different elements of a tort claim may be governed by the law of different jurisdictions[37] and that the jurisdiction where the tort occurs almost always has a predominant interest in questions concerning the element of due care.[38] Two judges dissented on the ground that the decision was a confusing alteration of existing law not justified by public policy.[39]

The *Thompson* court found well established in New Hampshire the rule that marital immunity from tort liability is governed by the law of the place where the tort occurred.[40] Reviewing the wisdom of this rule, the court found that the purposes of prohibiting interspousal tort actions were to prevent collusive suits against insurance carriers and to preserve domestic harmony.[41] Massachusetts has no interest in advancing these purposes in a New Hampshire suit between New Hampshire spouses.[42] New Hampshire, on the other hand, allows interspousal tort actions without fear of collusive suits or marital discord and has a strong interest in the policies which govern New Hampshire suits between New Hampshire spouses.[43] The court concluded that the question of interspousal immunity from tort liability should be determined by the law of the spouses' domicile, since that jurisdiction has the strongest interest in the question.[44] However, the court stated that the law of the place where the tort occurred governed the standard of care required of the defendant[45]

against his host was indicated by the refusal of the legislature to enact a statute limiting or denying such recovery. *Ibid.*

34. One reason to have rights which stem from the host-guest relationship remain constant in multi-state travel is to enable the host to procure insurance adequate under the applicable law and the insurer to more accurately determine the proper premium. *Id.* at 483-84, 191 N.E.2d at 285. See generally Ehrenzweig, *Guest Statutes in the Conflict of Laws—Towards a Theory of Enterprise Liability Under "Foreseeable and Insurable Laws,"* 69 YALE L.J. 595 (1960).

35. Babcock v. Jackson, *supra* note 29, at 484, 191 N.E.2d at 285. New York imposes no restrictions on an automobile guest's recovery from his host. See note 33 *supra;* Higgins v. Mason, 255 N.Y. 104, 174 N.E. 77 (1930).

36. Babcock v. Jackson, *supra* note 29, at 484 n.14, 191 N.E.2d at 285 n.14.

37. *Id.* at 484, 191 N.E.2d at 285.

38. *Id.* at 483, 191 N.E.2d at 284.

39. *Id.* at 485-87, 191 N.E.2d at 285-87.

40. Thompson v. Thompson, 193 A.2d 439, 440 (N.H. 1963).

41. *Ibid.*

42. *Ibid.*

43. *Id.* at 441.

44. *Ibid.*

45. *Ibid.*

and therefore the defendant should be liable only for gross negligence as required for recovery by an automobile guest against his host under Massachusetts law.[46]

It is not surprising that a rule which invariably determines the law applicable to a wide variety of tort claims arising from varied factual situations solely by reference to the place of injury has caused much dissatisfaction. Since laws are grounded in public policies which the state seeks to advance, a satisfactory solution of choice of law problems is not possible unless consideration is given to the policies of competing laws and the selection of law is determined by ascertaining the state which, in light of these policies, has the strongest interest in the resolution of the particular issue. *Babcock* and *Thompson* are based on a policy analysis of competing laws and therefore represent a significant departure from the place-of-injury rule. Such a policy analysis is superior to the device employed by earlier cases which classified issues into particular areas of law, such as procedure or domestic relations, and concluded that the place-of-injury rule, applicable only to tort issues, did not govern the choice of law.[47] Such classification is an arbitrary means of avoiding the place-of-injury rule which provides a poor basis for the prediction of future cases[48] and ignores the policies of competing laws in the same manner as the place-of-injury rule. *Babcock* establishes the broad principle that the elements of a tort are governed by the law of the state having the strongest interest in the *particular* question presented. Application of this principle was not difficult in *Babcock* because New York clearly had the strongest interest in the question presented. Future cases will present more difficult decisions where more than one state has a substantial interest in the question before the court, and the ultimate wisdom of the *Babcock* decision will be determined by the resolution of these cases. *Babcock* is a

46. Marshall v. August, 338 Mass. 790, 155 N.E.2d 800 (1959); Motta v. Mello, 338 Mass. 170, 154 N.E.2d 364 (1958). Contrast the statement in *Thompson*, that the defendant is liable only for gross negligence since the standard of care is governed by the law of the place where the tort occurred, with the statements in *Babcock* that where the defendant's exercise of due care is at issue, that question should almost always be determined by the law of the place where the tort occurred, *supra* note 38, but that in a case similar to *Babcock*, New York law would govern even though the foreign guest statute requires a showing of gross negligence. *Supra* note 36. The dissent in *Babcock* thought these statements were inconsistent. Babcock v. Jackson, *supra* note 29, at 486-87, 191 N.E.2d at 287. However, the majority opinion in *Babcock* indicates that what was meant was that the law of the jurisdiction where the tort occurred should almost always control questions concerning the care exercised by the defendant, but other relevant considerations arise where a special standard of care is imposed as a result of a particular relationship between the parties.

47. Emery v. Emery, *supra* note 22; Kilberg v. Northeast Airlines, Inc., *supra* note 12; Haumschild v. Continental Cas. Co., *supra* note 21.

48. For a discussion of this point see Weintraub, *supra* note 17, at 218-20.

landmark case in the establishment of a broad principle of conflict of laws which should find recognition in other jurisdictions in the future.[49] In *Thompson*, a narrower rule was decided, that the question of interspousal immunity from tort liability is governed by the law of the spouses' domicile since that state has the strongest interest in the question. *Thompson* establishes a rule within the broad principle of *Babcock*, which should yield to that principle where the particular facts of a case indicate the state of domicile does not have the strongest interest in the question of marital immunity.[50] Although the broad principle of *Babcock* is implicit in *Thompson*, that the *Thompson* court did not fully adopt the principle is apparent from its statement that the law of Massachusetts requiring gross negligence for recovery by an automobile guest against his host should govern the plaintiff's action.[51] Under the broad principle of *Babcock*, the court should have realized that Massachusetts has no more interest in the question whether gross negligence is required in a New Hampshire suit by a New Hampshire automobile guest against his New Hampshire host than does Massachusetts concerning the question whether the action should be barred by marital immunity for tort.

49. The importance of the *Babcock* decision is reflected in a complete treatment of the case by several authorities in *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963).

50. In Haynie v. Hanson, 16 Wis. 2d 299, 114 N.W.2d 443 (1962), the state of domicile does not seem to have had the stronger interest in the question of marital immunity as it was there presented. There, husband and wife were involved in an automobile accident in Wisconsin with a Wisconsin resident, while the husband was driving. Husband and wife were residents of Illinois, which did not permit interspousal tort actions. In an action in Wisconsin by the wife against the Wisconsin resident and his Wisconsin insurance carrier, the court held defendants could not implead the husband since the law of the state of domicile governed the question of marital immunity and under Illinois law the husband had no underlying liability to his wife on which contribution could be based. The case followed Haumschild v. Continental Cas. Co., *supra* note 21, which classified the question of marital immunity as one of family law and therefore held the question was governed by the law of the spouses' domicile. Weintraub points out that in the *Haynie* case the policies of the Illinois rule against interspousal tort actions, prevention of collusive suits, and marital discord, were not applicable because the wife was not suing her husband. Weintraub, *supra* note 17, at 219.

51. Thompson v. Thompson, *supra* note 40, at 441.

Constitutional Law—Due Process—Juvenile Court Proceeding a Bar to Subsequent Criminal Trial for the Same Act

Defendant was charged with murder. Since he was sixteen years of age, he was bound over to juvenile court pursuant to Texas statutes.[1] The district attorney moved to withdraw the murder charge in juvenile court because he feared that the state would be precluded from trying the defendant in criminal court when he reached the age of seventeen. This motion was denied;[2] defendant was adjudged a delinquent and sentenced to reform school. Upon reaching seventeen, defendant was indicted for murder and convicted in criminal court; he was given a sentence of seven years, with credit allowed for the time spent in reform school.[3] On appeal to the Texas Court of Criminal Appeals,[4] *held,* reversed. To adjudge one accused of a crime a delinquent in juvenile court renders a later criminal prosecution for the same offense a violation of fundamental fairness and a deprivation of liberty without due process, prohibited by the fourteenth amendment of the United States Constitution.[5] *Garza v. State,* 369 S.W.2d 36 (Tex. Crim. App. 1963).

The application to juvenile court proceedings of the traditional constitutional guarantees applied to criminal trials, such as right to counsel,[6] right to protection against self-incrimination,[7] right to bail,[8] right

1. "The term 'delinquent child' means . . . any male person over the age of ten (10) years and under the age of seventeen (17) years: (a) who violates any penal law of this state of the grade of felony. . . ." TEX. REV. CIV. STAT. ANN. art. 2338-1, § 3 (1950); "The Juvenile Court shall have exclusive original jurisdiction in proceedings governing any delinquent child. . . ." TEX. REV. STAT. ANN. art. 2338-1, § 5 (1950).

2. State v. Garza, 358 S.W.2d 749 (Tex. Civ. App. 1962).

3. "Provided that in all criminal cases the judge of the court in which defendant was convicted may, within his discretion, give the defendant credit on his sentence for the time . . . defendant has spent in jail in said cause, from time of arrest and confinement until his sentence by the trial court." TEX. CODE CRIM. PROC. ANN. art. 768 (Supp. 1962).

4. Texas has separate civil and criminal courts; the Court of Criminal Appeals is the court of last resort in the criminal system, and the Supreme Court is the highest in the civil system.

5. In addition to the due process argument the defendant pleaded that the state's actions in having two trials constituted double jeopardy under both the Texas and federal constitutions. However, the court did not think it necessary to decide this point.

6. *In re* Poff, 135 F. Supp. 224 (D.D.C. 1955) (right to counsel allowed). *Contra,* People v. Dotson, 46 Cal. 2d 891, 299 P.2d 875 (1956).

7. Hampton v. State, 167 Ala. 73, 52 So. 659 (1910) (privilege against self-incrimination applied). *Contra, In re* Holmes, 379 Pa. 599, 109 A.2d 523, *cert. denied,* 348 U.S. 973 (1954); People v. Fifield, 136 Cal. App. 2d 741, 289 P.2d 303 (1955).

8. Trimble v. Stone, 187 F. Supp. 483 (D.D.C. 1960) (right to bail allowed). *Contra, In re* Holmes, *supra* note 7.

to trial by jury,[9] right to confrontation of witnesses,[10] and the prohibition against being placed twice in jeopardy,[11] has been a subject of divergent views in the courts. The weight of authority is that in a state juvenile proceeding the accused is not entitled as a matter of right to the above.[12] The basic theory underlying this denial of protection is that the state as *parens patriae* is taking the child into custody, not for punishment but for the purpose of rehabilitation.[13] Thus, the juvenile hearing is considered to be civil in nature rather than criminal. It is reasoned that the state as *parens patriae* is not required to provide the protection required in a criminal trial. The juvenile trial should be informal with relaxed rules of evidence[14] and standards of proof,[15] as this will best serve the needs of the child. The result of this reasoning has been the holding that jeopardy cannot attach since the juvenile is not convicted of, or charged with, any crime.[16] The *parens patriae* theory has been challenged by way of strongly worded dissents in several recent cases.[17] "What a child

9. People v. Fifield, *supra* note 7 (no right to jury trial).

10. *In re* Mantell, 157 Neb. 900, 62 N.W.2d 308 (1954) (right to confrontation of witnesses applied). *Contra, In re* Holmes, *supra* note 7.

11. United States v. Dickerson, 168 F. Supp. 899 (D.D.C. 1958), *rev'd on other grounds*, 271 F.2d 487 (D.C. Cir. 1959) (double jeopardy prohibition applied). *Contra,* Moquin v. State, 216 Md. 524, 140 A.2d 914 (1958).

12. See, *e.g.*, People v. Fifield, *supra* note 7; People v. Silverstein, 121 Cal. App. 2d 140, 262 P.2d 656 (1953); Moquin v. State, *supra* note 11; State v. Smith, 25 N.W.2d 270 (N.D. 1946); *In re* Holmes, *supra* note 7; Hultin v. State, 171 Tex. Crim. 425, 351 S.W.2d 929 (1961). *Contra, e.g.*, United States v. Dickerson, *supra* note 11; Carza v. State, 369 S.W.2d 36 (Tex. Crim. App. 1963). See generally Annot., 48 A.L.R.2d 668 (1956); Annot., 43 A.L.R.2d 1128 (1955).

13. Breitenbach, *Due Process of Law for Youthful Offenders*, 32 CAL. ST. B.J. 665, 668 (1957); Yehile, *The Role of the Juvenile Court in Our Legal System*, 41 MARQ. L. REV. 284 (1957).

14. *In re* Holmes, *supra* note 7, at 606, 109 A.2d at 526.

15. *Ibid.*

16. "The rule of double jeopardy is applicable only where the first prosecution involves a trial before a criminal court or at least a court empowered to impose punishment . . . . The question to be decided is whether the hearing before the Juvenile Court . . . subjected the defendant to the risk of these penalties. We answer this question in the negative. The juvenile act does not contemplate the punishment of children . . . . The act contemplates an attempt to correct and rehabilitate." Moquin v. State, *supra* note 11, at 528, 140 A.2d at 916. "The proceedings in such a court are not in the nature of a criminal trial but constitute merely a civil inquiry or action looking to the treatment, reformation and rehabilitation of the minor child." *In re* Holmes, *supra* note 7, at 603, 109 A.2d at 525. "No adjudication upon the status of any child in the jurisdiction of the court shall operate to impose any civil disabilities . . . nor shall any child be deemed a criminal by reason of such adjudication, nor shall such adjudication be deemed a conviction . . . ." TEX. REV. CIV. STAT. ANN. art. 2338-1, § 13(3) (1950).

17. People v. Dotson, 46 Cal. 2d 891, 229 P.2d 875, 880 (1956); Moquin v. State, *supra* note 11, at 531, 140 A.2d at 918; *In re* Holmes, *supra* note 7, at 610, 109 A.2d at 528; Martinez v. State, 171 Tex. Crim. 443, 449, 350 S.W.2d 929, 932 (1961). Wigmore questions whether some of these reformations of the rules of evidence have not gone too far. 5 WIGMORE, EVIDENCE § 1400 (3d ed. 1940).

charged with crime is entitled to, is *justice* not a *parens patriae* . . . ."[18] However, prior to the present decision no state court had rejected the *parens patriae* theory and the results which flow from it.[19] Only in the federal courts, with the juvenile charged with a federal offense, has he been given the protection applicable to criminal proceedings.[20]

In the instant case the court relied upon the fundamental fairness test of the fourteenth amendment to determine whether the second trial deprived the defendant of his liberty without the requisite due process. The court reasoned that when the state by judicial proceedings in a juvenile court deprives a person of his liberty by incarcerating him in a state reform school, it cannot then further deprive him of his liberty for the same act in a later criminal trial without violating the defendant's constitutional right to due process. The court did not specifically decide the question of double jeopardy nor whether the juvenile court is a regular criminal court.[21] The court did, however, recognize that the juvenile court's action deprived the defendant of his liberty.[22]

The instant case breaks with the traditional state view of juvenile proceedings. The court appears to be correct both in principle and in result. The doctrine of *parens patriae* is acceptable on the theory that it allows the state to take action against young offenders without attaching the lasting stigma of a criminal conviction. However, this doctrine should not be the basis for denying constitutional rights afforded an accused in a regular criminal trial. A juvenile court must determine whether or not the defendant did an act which if done by an adult would be a violation of the penal code. This determination is one of fact, and it should be made with all the protection afforded an adult defendant under due process, even if after this determina-

18. *In re* Holmes, *supra* note 7, at 615, 109 A.2d at 530.

19. See notes 12 and 16 *supra*.

20. Trimble v. Stone, *supra* note 8; United States v. Dickerson, *supra* note 11; *In re* Poff, *supra* note 6.

21. The question of double jeopardy had been before the court in five cases in the past three years. Hultin v. State, 171 Tex. Crim. 425, 351 S.W.2d 248 (1961); Lopez v. State, 171 Tex. Crim. 552, 352 S.W.2d 106 (1961); Martinez v. State, 171 Tex. Crim. 443, 350 S.W.2d 929 (1961); Perry v. State, 171 Tex. Crim. 282, 350 S.W.2d 21; Wood v. State, 171 Tex. Crim. 307, 349 S.W.2d 605 (1961). In all of these cases the court distinguished the juvenile court charges from the criminal charges. They avoided reaching double jeopardy by holding that the two trials were for different acts. However, Judge Morrison, dissenting in *Martinez*, laid the groundwork for the present decision when he stated that the state's action in that case did constitute double jeopardy and hence a denial of the constitutional rights guaranteed to an accused. 171 Tex. Crim. at 449, 350 S.W.2d at 932.

22. In holding that the juvenile conviction did deprive the juvenile of his liberty the court raises the strong implication that the actions of the juvenile court are something more than a civil trial under the *parens patriae* doctrine, as was formerly held in Hultin v. State, *supra* note 21, and Dearing v. State, 151 Tex. Crim. 6, 16, 204 S.W.2d 983, 989 (1947).

tion a specific criminal conviction is not recorded against the defendant and he is sentenced as a delinquent. Well meaning attempts to modify this determination of guilt or innocence can lead to unconscionable results.[23] Thus, it is submitted that in any determination of the acts which the accused youth committed, the courts should require, by the use of the test of fundamental fairness adopted in the instant case, the protection afforded in a regular criminal trial. After a determination of fact is made by the court, or after the juvenile pleads guilty, then the treatment of the youth can be modified to suit the act and the age of the youth. To require such a practice would achieve the intent and purpose expressed by the legislatures in enacting juvenile court statutes.[24] Yet it would not so easily allow a youth to be punished, because of loose procedure or a lack of full protection in the determination of facts, for an act that he did not commit.[25]

23. Breitenbach, *Due Process of Law for Youthful Offenders*, 32 CAL. ST. B.J. 665 (1957); Diana, *The Rights of Juvenile Delinquents: An Appraisal of Juvenile Court Procedures*, 47 J. CRIM. L., C. & P.S. 561 (1957).

24. "The purpose of this act is to secure for each child under its jurisdiction such care, guidance and control . . . as will serve the child's welfare and the best interest of the state . . . ." TEX. REV. CIV. STAT. ANN. art. 2338-1, § 1 (1950); "This act shall be liberally construed to accomplish the purposes herein sought." TEX. REV. CIV. STAT. ANN. art. 2338-1, § 2 (1950).

25. The instant holding raises the possibility of one abuse. Since the prosecutor will not be able to bring a later criminal prosecution to secure a severe punishment for a grave felony, he may deliberately delay bringing a petition against the accused in juvenile court until the passage of time divests that court of its jurisdiction and a regular criminal indictment may be returned. Under the current view of the discretion of the prosecuting officer in bringing charges this result is quite possible. The "speedy trial" guarantees of both state and federal constitutions are "intended to prevent the government from oppressing the citizen by holding criminal prosecution suspended over him for an indefinite time, and to prevent delays in the customary administration of justice . . . ." Watson v. State, 90 Tex. Crim. 577, 578, 237 S.W. 298, 299 (1922). While this guarantee is intended to prevent delay after indictment, it would seem reasonable to apply the same requirement where the only reason for not bringing the indictment is to secure criminal jurisdiction, and not because of any need to secure additional proof or witnesses. Certainly the resulting effect on the defendant is the same in either case. Most jurisdictions avoid this problem by allowing the juvenile court to waive jurisdiction, transferring the case to the criminal court, when a serious crime is involved. See, *e.g.*, D. C. CODE ANN. § 11-914 (1961). For a discussion of the need for better juvenile statutes, see Paulsen, *Fairness to Juvenile Offenders*, 41 MINN. L. REV. 547 (1957). However, until the state of Texas makes some change in its laws, the court should extend the speedy trial guarantees of the state and federal constitution to prevent any deliberate delay in prosecution of the juvenile. Another possible solution of this problem is stated in TEX. REV. STAT. ANN. art. 2338-1, § 7 (1950): "Any person may, and any peace officer shall give to the Judge . . . information in his possession that a child is within the provision of this Act. . . . If either the Judge or the County Attorney shall determine that formal jurisdiction should be acquired . . . any attorney may prepare and file in the court, a petition alleging briefly the facts which bring said child within the provisions of this Act . . . ." Thus, if the county attorney delayed the prosecution, the child himself or his parents could bring the petition and secure the benefits provided by the juvenile act. It would seem that once the state prosecutes either by private petition or state petition it should be precluded from a later criminal prosecution by the reasoning of the instant case.

Family Law—Divorce—Insanity as a Defense to Action for Divorce on the Ground of Cruelty

Defendant's persistent accusations of adultery allegedly were causing injury to his wife's health.[1] These accusations were caused by the defendant's insanity.[2] As a result of the defendant's actions, his wife petitioned for divorce on the ground of cruelty.[3] Defendant contended that insanity is a defense against an action for divorce on the ground of cruelty. An order of the Probate, Divorce, and Admiralty Division of the High Court of Justice dismissed the petition. The Court of Appeals affirmed.[4] On appeal to the House of Lords, *held*, reversed. An objective test is applied to determine whether one spouse has treated the other with cruelty and, therefore, proof of insanity is not an answer to that charge. *Williams v. Williams*, [1963] 3 Weekly L.R. 215 (H.L.).

English case law has been in a state of confusion[5] in regard to the validity of the defense of insanity in an action for divorce on the ground of cruelty.[6] The divergence of opinion as to the relevance of intention or *mens rea*[7] as an element of cruelty has produced much of this confusion.[8] Additional confusion has resulted from the use of the

1. "For the next nine months he was at home and his conduct during that time caused damage to his wife's health. This was caused by the voices which told him of men up in the loft of the house and of his wife's persistent adultery. He persisted in accusing her; if she tried to get away he would follow her about the house." Williams v. Williams, [1963] 3 Weekly L.R. 215, 217 (H.L.).

2. "It is found as a fact on medical evidence that . . . he was certifiably insane and the evidence suggests that this is incurable." *Ibid.* At the trial medical evidence was introduced to show that the husband was suffering from paranoid schizophrenia, that he knew what he was doing when he made the accusations, but did not know they were wrong. *Id.* at 216.

3. "[A] petition for divorce may be presented to the court . . . on the ground that the respondent . . . (c) has since the celebration of the marriage treated the petitioner witb cruelty . . . ." Matrimonial Causes Act, 1950, § 1, 14 Geo. 6, c. 25.

4. [1962] 3 Weekly L.R. 977 (C.A.). This is the first recorded English case in which a petitioner has failed to get relief on some ground against a spouse who is insane.

5. Goodhart, *Cruelty, Desertion and Insanity in Matrimonial Law*, 79 L.Q. REV. 98 (1963).

6. "In these jurisdictions in which it is by statute made a ground for divorce, the plaintiff's cause of action is usually predicated on the ground of insanity, and the question of whether insanity may be relied upon as a defense to an action for divorce on other grounds does not ordinarily arise." 19 A.L.R.2d 144, 147 (1951). See MADDEN, PERSONS AND DOMESTIC RELATIONS § 84 (1931).

7. "[T]he doctrine of *mens rea*, which plays such a leading part in the criminal law, cannot be applied to the law of divorce without difficulty because *mens rea* is an actual guilty mind, and not a constructive one." Goodhart, *supra* note 5, at 116.

8. In a perceptive analysis of the law of matrimonial cruelty, Sir Carleton Allen, Q.C., in *Matrimonial Cruelty* (pts. 1-2), 73 L.Q. REV. 316, 512 (1957), described the mental element of cruelty as "a realm of mystery." In a consideration of the competing theories as to cruelty, Allen says, "One is the offspring of the 'doctrine of danger.' Since the law . . . is concerned only with the safety of the injured spouse, it does not matter whether cruelty was intended or not—it will still be a menace to the

M'Naghten rules[9] as the test of insanity[10] where cruelty is held to proceed from malignity[11] and the defendant interjects insanity as a defense.[12] However, the prevailing English view has been that mental disorder short of legal insanity is no defense,[13] but where legal insanity is proved it is a valid defense.[14]

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victim of it, whatever its mental origin. The other is a principle of far wider extent. . . . It is the principle that a human action is not an act-in-the-law involving liability unless it is . . . 'voluntary and manifest.'" *Id.* at 515. (Footnotes omitted.)

9. M'Naghten's Case, 10 Clark & F. 200, 8 Eng. Rep. 718 (1843); PERKINS, CRIMINAL LAW 746 (1957).

10. The test for legal insanity requires the respondent to establish either that he did not know the nature and quality of the acts committed or that if he did know their nature and quality he did not know that they were wrong. Palmer v. Palmer, [1955] P. 4 (C.A. 1922).

11. Astle v. Astle, [1939] P. 415, was the first case interpreting cruelty in the context of the Matrimonial Causes Act of 1937 and it held that acts of cruelty must be shown to proceed from malignity. Subsequent cases followed this reasoning with the exception of Lissack v. Lissack, [1951] P. 1 (C.A. 1950), until the recent decision by the House of Lords in Gollins v. Gollins, [1963] 3 Weekly L.R. 176 (H.L.), where presence of an intention to injure on the part of the spouse charged or proof that the conduct of the party to be charged was aimed at the other spouse was not an essential requisite for cruelty. Thus the objective test was substituted for the subjective consideration.

12. "[T]he onus of proving insanity under the M'Naghten Rules rests on the party who sets up the defence." Allen, *supra* note 8, at 517.

13. White v. White, [1950] P. 39 (C.A. 1949). Bucknill, L.J., determined respondent was not insane by application of the *M'Naghten* rules. He expressly left open, without giving an opinion either way, the question as to whether insanity can be a defense to a charge of cruelty. Asquith, L.J., held that insanity must, at all events, not fall short of insanity as would afford a defense to a criminal charge within the *M'Naghten* rules. The theory behind the majority view is illustrated by Asquith, L.J., who said that he was unable "to accept the view that insanity can never be a defence, partly because that view rests on an assumption which, if valid, compels one logically to say that no state of mind on the part of the person charged with cruelty can be relevant to his liability, and I cannot believe that a man whose acts are completely automatic and unconscious . . . can be guilty of 'cruelty' in respect of such acts . . . ." *Id.* at 52. Denning, L.J., retorted with a strong dissent holding that insanity should not be a defense to a divorce action. "[I]t seems to me that, in divorce cases, if such a man has treated his wife with cruelty, she will be entitled to maintenance, judicial separation, or a divorce, because there again it is not a question of punishing him but only of giving her relief from a situation which has been rendered intolerable by his conduct. The presence of mental disease makes this relief more, and not less, necessary." *Id.* at 57. The court in Lissack v. Lissack, *supra* note 11, followed the reasoning of Lord Justice Denning and held the defense of insanity was not valid when used by a defendant in a divorce action. This decision was overruled by Swan v. Swan, [1953] P. 258 (C.A.).

14. "I should have thought that it was a contradiction in terms to describe as cruel the conduct of a person who did not know what he was doing." Swan v. Swan, *supra* note 13, at 263 (C.A.) (Hobson, L.J.). Where a husband, though certified as of unsound mind, had shown by his actions that he realized his cruel behavior was wrongful, his defense of insanity failed as not having satisfied the *M'Naghten* rules. Palmer v. Palmer, [1955] P. 4 (C.A. 1954). In another case, respondent with paranoid schizophrenia realized her conduct was wrong; thus insanity was no defense because it did not measure up to the degree of insanity required by the *M'Naghten* rules. S. v. S., [1962] P. 133 (1961). Where respondent was suffering from a paranoid psychosis and, in the delusional belief that petitioner was conspiring with others against her, tormented him with accusations, the court held that although when she made the

In the United States, the rule is well settled that insanity is a valid defense in a divorce action.[15] The rationale behind this rule is that the marital relationship imposes "upon each spouse the duty of care and protection of the other when in disease."[16] The crux of the problem in the United States has been the method by which insanity is to be determined.[17] The position followed by the majority of the courts[18] is that no mental illness short of insanity[19] as measured by the *M'Naghten* rules[20] is an adequate defense.[21] However, a strict application of

false accusations she knew what she was doing, she was not in law responsible for them because she did not know what she was doing was wrong. (A decree was granted, however, because she had also used violence against him, knowing that this was wrong.) Elphinstone v. Elphinstone, [1962] P. 203. See also Allen, *supra* note 8, at 512; Goodhart, *supra* note 5; Hall, *Matrimonial Cruelty and Mens Rea,* 1963 CAMB. L.J. 104; Samuels, *Cruelty and Mental Illness,* 2 SOL. J. 97 (1963); 24 MODERN L. REV. 382 (1961).

15. Many of these cases involved close factual decisions. ABANDONMENT OR DESERTION: Cox v. Cox, 268 Ala. 572, 109 So. 2d 703 (1959); Storrs v. Storrs, 68 N.H. 118, 34 Atl. 672 (1894); McElroy v. McElroy, 185 Pa. Super. 78, 138 A.2d 299 (1958); Quinn v. Quinn, 169 Tenn. 173, 83 S.W.2d 269 (1935). ADULTERY: Hadley v. Hadley, 144 Me. 127, 65 A.2d 8 (1949); Bailey v. Bailey, 115 N.J. Eq. 565, 171 Atl. 797 (1934); Manley v. Manley, 193 Pa. Super. 252, 164 A.2d 113 (1960). CRUELTY: Cohn v. Cohn, 85 Cal. 108, 24 Pac. 659 (1890); Tretheway v. Tretheway, 115 So. 2d 712 (Fla. App. 1959); Hilburn v. Hilburn, 210 Ga. 497, 81 S.E.2d 1 (1954); Carlson v. Carlson, 308 Ill. App. 675, 32 N.E.2d 365 (1941); Bosveld v. Bosveld, 232 Iowa 1199, 7 N.W.2d 782 (1943); Rice v. Rice, 332 Mass. 489, 125 N.E.2d 787 (1955); McIntosh v. McIntosh, 151 Miss. 78, 117 So. 352 (1928); Dunn v. Dunn, 240 Mo. App. 87, 216 S.W.2d 141 (1948); Aurutis v. Aurutis, 140 N.Y.S.2d 365 (Sup. Ct. 1955); Heim v. Heim, 35 Ohio App. 408, 172 N.E. 451 (1930); Castner v. Castner, 159 Pa. Super. 387, 48 A.2d 117 (1946); Wolfe v. Wolfe, 42 Wash. 834, 258 P.2d 1211 (1953). GROSS NEGLECT OF DUTY: Crosby v. Crosby, 186 Kan. 420, 350 P.2d 796 (1960); Lindbloom v. Lindbloom, 177 Kan. 286, 279 P.2d 243 (1955). INDIGNITIES: Fossett v. Fossett, 243 S.W.2d 625 (Mo. App. 1951); Stewart v. Stewart, 171 Pa. Super. 218, 90 A.2d 402 (1952); Benjeski v. Benjeski, 150 Pa. Super. 57, 27 A.2d 266 (1942). INHUMAN TREATMENT: Tiffany v. Tiffany, 84 Iowa 122, 50 N.W. 554 (1891). SEPARATION: Dorsey v. Dorsey, 90 App. D.C. 284, 195 F.2d 567 (1952); Wilder v. Wilder, 207 Ark. 414, 181 S.W.2d 17 (1944); Clark v. Clark, 215 La. 835, 41 So. 2d 734 (1949); Moody v. Moody, 253 N.C. 752, 117 S.E.2d 724 (1961); Lawson v. Bennett, 240 N.C. 52, 81 S.E.2d 162 (1954). See also Annot., 19 A.L.R.2d 144 (1951).

16. Tiffany v. Tiffany, *supra* note 15, at 555.

17. See generally 10 KAN. L. REV. 95 (1961); 18 WASH. & LEE L. REV. 321 (1961).

18. Fansler v. Fansler, 344 Mich. 569, 75 N.W.2d 1 (1956); Kanz v. Kanz, 171 Minn. 258, 213 N.W. 906 (1927); Longbottom v. Longbottom, 119 Minn. 139, 137 N.W. 387 (1912); Niedergerke v. Niedergerke, 271 S.W.2d 204 (Mo. App. 1954); Serota v. Serota, 20 Misc. 2d 184, 186 N.Y.S.2d 713 (1959); Benjeski v. Benjeski, 150 Pa. Super. 57, 27 A.2d 266 (1942).

19. The requirements of this test are not satisfied by a showing of any one of a number of recognized mental illnesses: Dochelli v. Dochelli, 125 Conn. 468, 6 A.2d 324 (1939) (paranoia); Champagne v. Duplantis, 147 La. 110, 84 So. 513 (1919) (insane jealousy); Bryce v. Bryce, 229 Md. 16, 181 A.2d 455 (1962) (mental illness); Gardener v. Gardener, 239 Mich. 306, 214 N.W. 133 (1927) (beginning dementia praecox); Schuler v. Schuler, 290 S.W.2d 192 (Mo. App. 1956) (psycho-neurosis).

20. Cases cited *supra* note 19; HERZOG, MEDICAL JURISPRUDENCE § 648 (1931).

21. "[I]nsanity which will constitute a good defense in an action for divorce, must be such as deprives the defendant's conduct of the element of willfulness and as

this doctrine[22] has been qualified to some extent by a growing dissatisfaction[23] with such an antiquated and irrational standard.[24] A Kansas court[25] has followed a procedure similar to the *Durham* rule,[26] which permits a psychiatrist to testify as to the complete mental condition of an accused.[27] Other courts[28] have experimented with a "sliding scale" test[29] that allows the degree of insanity necessary for a valid defense to fluctuate with the seriousness of the marital offense.[30]

In the instant case the House of Lords in a three-to-two decision expressly approved the view established in *Lissack*[31] that insanity is no defense in an action for divorce on the ground of cruelty. The court rejected entirely "the notion that 'aiming at' the injured party or intention to hurt on the actor's part is an essence of cruelty,"[32] and held that the test is objective as to whether the spouse charged has treated the other with cruelty.[33] The court found that the practical difficulties to the wife of allowing insanity as a defense greatly outweigh the relative hardship to the husband[34] and concluded that "practical social considerations speak strongly against insanity as a defense for divorce."[35] The dissent of Lord Morris and Lord Hodson

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divests the defendant of the use of his reason to the extent of his being unable to differentiate between right and wrong, or that, if capable of so differentiating, defendant must be acting by force of an irresistible impulse generated by a diseased mind and not by volition." Willis v. Willis, 274 S.W.2d 621, 627 (Mo. App. 1954).

22. "[T]he law does not undertake to distinguish among the various degrees of lack of control short of insanity, and select those which prevent a divorce and those which do not." Kruse v. Kruse, 179 Md. 657, 22 A.2d 475, 478 (1941).

23. Articles cited *supra* note 17. One commentator has said: "It seems strange to force the strait jacket of the M'Naghten rules on the law of divorce at a time when they are being altered if not discarded, in the criminal law." Goodhart, *supra* note 5, at 123.

24. Samuels, *supra* note 14, at 104.

25. Crosby v. Crosby, 186 Kan. 420, 350 P.2d 796 (1960).

26. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

27. MACDONALD, PSYCHIATRY AND THE CRIMINAL 29 (1958).

28. Crosby v. Crosby, 186 Kan. 420, 350 P.2d 796 (1960); Nelson v. Nelson, 108 Ohio App. 365, 154 N.E.2d 653 (1958); Manley v. Manley, 193 Pa. Super. 252, 164 A.2d 113 (1960); Stewart v. Stewart, 171 Pa. Super. 218, 90 A.2d 402 (1952).

29. *Supra* note 17.

30. "Care must be taken not to confuse the mental or physical ill health which we have held to be a defense to indignities, with the insanity which has been held in other states, and which we here hold to be a defense to adultery. . . . [A] person because of a mental condition may be irritable and may spontaneously say and do mean and contemptible things. If this conduct is *caused* by the physical or mental condition of a wife-defendant in a divorce action, she is excused from them *on the theory that such conduct lacks the spirit of hate, estrangement and malevolence which is the heart of the charge of indignities.*" Manley v. Manley, *supra* note 28, at 265, 164 A.2d at 120.

31. [1951] P. 1 (C.A. 1950).

32. [1963] 3 Weekly L.R. 232 (H.L.).

33. *Id.* at 234.

34. *Id.* at 257-58.

35. *Id.* at 258.

was based on the theory of recent cases[36] that cruelty involves an implication of blameworthiness[37] and thus the "adjective 'cruel' should not be applied to one who, through disease of the mind, does not know what he is doing is wrong."[38] The court was unanimous in holding that whether insanity is or is not a defense, the *M'Naghten* rules should be rejected as the test for insanity.[39]

English case law has been committed to the view that insanity should be a defense in an action for divorce on grounds of cruelty, so that the insane spouse could not be divorced for acts of cruelty over which he had no control. As a practical matter, every such case resulted in a divorce either because the mental illness of the spouse did not measure up to insanity as determined by the *M'Naghten* rules or on some other ground.[40] This paradox has been correctly resolved in the instant case. The *Williams* case firmly commits the English courts to the basic view that the essential function of the divorce law in this situation is to provide a remedy to the parties regardless of what causes the matrimonial offense when the marital union is irreparably divided. This places divorce in its proper perspective as a protection afforded the spouse against future acts rather than a punishment for past ones.[41] This view is worthy of consideration by the American courts, which in the past have strictly adhered to the view that the insane spouse should be protected at the expense of subjecting the other spouse to future cruelty. The question whether our courts are firmly committed to this view is raised merely by the use of the *M'Naghten* rules to determine insanity. This results in a paradoxical situation similar to that in England prior to the instant case, where the majority of mentally ill spouses do not meet the standards of the *M'Naghten* rules, and thus regardless of the view the courts purport to follow, the divorce is granted. This has been the practical result where the *M'Naghten* rules are employed. A few recent cases[42] have disregarded the *M'Naghten* rules and reinforced the American view both in theory and in practice by allowing lesser degrees of insanity to suffice as a valid defense. Although a certain degree of hardship will result from either view, it seems that the English court is correct in giving priority to the protection of the spouse from future cruelty, regardless of its cause.

36. Palmer v. Palmer, *supra* note 14; Swan v. Swan, *supra* note 13.
37. Williams v. Williams, *supra* note 32, at 245.
38. *Id.* at 249.
39. *Id.* at 224-25, 242-43, 248-49, 259.
40. Elphinstone v. Elphinstone, *supra* note 14.
41. There would be no justification for punishment of past cruelty if there was no intention to perform the cruel acts. A voluntary act is necessary for the theory of punishment for past cruelty to be applied.
42. Cases cited *supra* note 28.

Labor Law—Unemployment Compensation—Status of Laid-Off Worker Under No-Strike Clause

Appellant employer brought suit to review decisions of the Indiana Employment Security Division Review Board awarding unemployment benefits.[1] Claimant employees, while occupying a layoff status, picketed and demonstrated against appellant. Afterwards, claimants were recalled to work and then discharged. Appellant filed information reports with the local office of the Board stating that the claimants were discharged for cause because of their participation in an unauthorized strike in violation of a no-strike clause in the collective bargaining agreement between appellant and claimants' union.[2] The referee affirmed the opinion of the deputy of the local office that the claimants were not discharged by appellant for "misconduct in connection with his [their] work."[3] On petition for review, the Board affirmed. On appeal to the Indiana Court of Appeals, *held*, affirmed. A laid-off worker who participates in an unauthorized strike and work stoppage is not an employee, within the meaning of a no-strike clause in a collective bargaining agreement; his discharge for such activities is not for "misconduct in connection with his work" which will render him ineligible to receive benefits under the Indiana Employment Security Act. *Youngstown Sheet & Tube Co. v. Review Board of the Indiana Employment Security Division*, 191 N.E.2d 32 (Ind. App.), *rehearing denied*, 191 N.E.2d 524 (Ind. App. 1963).

The no-strike clause in a collective bargaining agreement is obviously of vital significance to employers,[4] unions,[5] and employees.[6]

1. This appeal is a consolidation for review of three decisions of the Board holding three discharged employees eligible for unemployment benefits.

2. The collective bargaining agreement provided: "There shall be no strikes, work stoppages, or interruption or impeding of work ° ° °. No *employee* shall participate in any such activities." Youngstown Sheet & Tube Co. v. Review Bd. of the Ind. Employment Security Div., 191 N.E.2d 32, 35 (Ind. App. 1963). The agreement also provided that employees, while occupying a layoff status, retained their seniority rights and rights of recall. *Id.* at 34.

3. The Indiana Employment Security Aet provides: "An individual shall be ineligible for waiting period or benefit rights: For the week in which he . . . has been discharged for misconduct in comection with his work, and for all weeks subsequent thereto until such individual has thereafter earned remuneration equal to not less than ten [10] times his weekly beuefit amount in employment . . . ." IND. ANN. STAT. § 52-1539 (Supp. 1963).

4. "To the employer in a unionized plant, the no-strike clause is probably the most significant provision of the collective bargaining agreement to which it is a party. An examination of virtually every collective bargaining agreement will disclose that the agreement is a series of concessions from the employer to the union and the employees. The only real concession running from the union and the employees to the employer in a collective bargaining agreement is the pledge of the union and employees to refrain from strikes, slowdowns, and other concerted interruptions of operations during the life of the agreement. In reliance upon the no-strike clause, the unionized

An employee who breaches the no-strike clause can be discharged for "misconduct in connection with his work"[7] and thereby be disqualified from receiving unemployment benefits.[8] Defining the word "employee" therefore becomes very important. No previous case has been found in which a court has decided whether a laid-off worker is an "employee," as that word is used in a no-strike clause of a collective bargaining agreement. Two principal tests, however, have been applied in defining the word "employee": (1) the narrower common law "control" test;[9] and (2) the broader "economic reality" test.[10] The

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employer is enabled to plan and schedule operations and make commitments of production and shipment to its customers. If its plant is struck, despite the existence of a valid no-strike clause, it may resort to various remedies . . . to prevent continued violation of the agreement, punish the violators, and recoup its losses arising out of the violation." TORFF, COLLECTIVE BARGAINING 91-92 (1953).

5. "To the union, the signing of a collective bargaining agreement containing a no-strike clause means the relinquishment of its most potent weapon for carrying out its collective bargaining policy. Once it has signed an agreement containing a no-strike clause, the instigation, encouragement, participation in, or direction of a strike by it against the employer who is a party to this agreement subjects it and its members to the possibility of severe penalties." *Id.* at 92.

6. "To the individual employee covered by the terms of a collective bargaining agreement containing a no-strike clause, the no-strike clause is, of course, a restriction upon his otherwise legal right to join with his fellow employees in a concerted cessation of work to obtain better wages or working conditions from his employer during the life of the agreement. On the other hand, the no-strike clause could be regarded as a protection to the individual employee in the event that control of his union fell into the hands of an irresponsible faction or leadership which might be prone, in the absence of a no-strike clause, to instigate sporadic or lengthy work stoppages involving considerable loss of earnings to the employees during the term of the agreement." *Ibid.*

7. *Id.* at 100-01.

8. Sanders, *Disqualification for Unemployment Insurance*, 8 VAND. L. REV. 307, 333 (1955).

9. The control test was first applied in determining the scope of vicarious tort liability under the doctrine of respondeat superior. For a historical development of the control test, see Leidy, *Salesmen as Independent Contractors*, 28 MICH. L. REV. 365 (1930); Steffen, *Independent Contractor and the Good Life*, 2 U. CHI. L. REV. 501 (1935); Stevens, *The Test of the Employment Relation*, 38 MICH. L. REV. 188 (1939); Wolfe, *Determination of Employer-Employee Relationships in Social Legislation*, 41 COLUM. L. REV. 1015 (1941). There were other tests applied but the employer's right to control was the most important. A modern illustration of these tests is to be found in the Restatement of Agency:

"(1) A Servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

"(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

word "employee" has been defined in such legislative enactments as the Social Security Act,[11] workmen's compensation acts,[12] the Railway Labor Act,[13] and the National Labor Relations Act.[14] In factual situations which seem analogous to the present case two federal courts of appeal have held that furloughed and laid-off workers were "employees" of their former employer. In *Nashville, Cincinnati & St. Louis Ry. v. Railway Employees' Department of AFL*,[15] the Sixth

(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is a part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant; and
(j) whether the principal is or is not in business."
RESTATEMENT (SECOND), AGENCY § 220 (1958).

10. NLRB v. Hearst Publications, Inc., 322 U.S. 111, 127 (1944). "The word [employee] 'is not treated by Congress as a word of art having a definite meaning . . . .' Rather 'it takes color from its surroundings . . . [in] the statute where it appears' . . . and derives meaning from the context of that statute, which '*must be read in the light of the mischief to be corrected and the end to be attained.*'" *Id.* at 124. (Emphasis added.)

11. The act defines the word "employee" to be: "(1) any officer of a corporation; or (2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee . . . ." 64 Stat. 477 (1950), 42 U.S.C. § 410(k) (1958). Before the word "employee" was defined in the act, the Supreme Court had reasoned that "the terms 'employment' and 'employee', are to be construed to accomplish the purposes of the legislation." United States v. Silk, 331 U.S. 704, 712 (1947).

12. "The term 'employee' is defined by most statutes to include every person in the service of another under any contract of hire, express or implied." 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION § 43.00 (1952). It has been stated that "in construing the legislative definition of 'employee' a measure of liberality should be indulged in, to the end that in doubtful cases an injured workman or his dependents may not be deprived of the benefits of the humane provisions of the compensation plan." McDowell v. Duer, 78 Ind. App. 440, 133 N.E. 839, 841 (1922). See, *e.g.*, Mitchell v. Consolidated Coal Co., 195 Iowa 415, 192 N.W. 145 (1923) (coal miner quitting job, injured while going down a manway of the mine to get his tools, was "employee"); Kiernan v. Priestedt Underpinning Co., 171 App. Div. 539, 157 N.Y.S. 900 (1916) (worker excused from work because thought to be inebriated, injured while leaving subway, was "employee").

13. "The term 'employee' as used herein includes every person in the *service* of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission . . . ." 48 Stat. 1185 (1934), 45 U.S.C. § 151(5) (1958). (Emphasis added.)

14. "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . . ." 49 Stat. 449 (1935), 29 U.S.C. § 152(3) (1958).

15. 93 F.2d 340 (6th Cir. 1937), *cert. denied*, 303 U.S. 649 (1938), 51 HARV. L. REV. 1299. This case also discusses how furloughed workers have been regarded as "employees" within the meaning of the Transportation Act, 41 Stat. 474 (1920), as amended, 49 U.S.C. § 1(7) (1958), and the Railroad Retirement Act, 49 Stat. 967 (1935), as amended, 45 U.S.C. § 215 (1958).

Circuit Court of Appeals held that furloughed workers entitled to priority in any subsequent reemployment were "employees" within the meaning of the Railway Labor Act[16] and therefore eligible to vote in a forthcoming election.[17] In *North Whittier Heights Citrus Ass'n v. NLRB*,[18] the Court of Appeals for the Ninth Circuit held that laid-off workers were "employees" within the meaning of the National Labor Relations Act[19] and that the temporary shut-down of the employer's business did not change their employment status.[20]

In the instant case the court reasoned that, since the claimants had been determined entitled to receive and had been receiving unemployment benefits prior to the work stoppage, it would be illogical to hold that they were still occupying an employee relationship.[21] The court then noted that the only ground on which the claimants could be discharged for "misconduct in connection with his [their] work" would be a breach of their collective bargaining agreement.

16. See note 13 *supra*.

17. In determining the interpretation to be given the word "employee" the court said: "The statute has not been judicially interpreted upon the point in issue [the definition of the word 'employee'], and the question is one of first impression. Having in mind, however, its beneficent purpose, the several interests of employer, employee, and public sought to be served by encouragement of peaceful settlement of labor disputes, and recognizing also that the aim of the statute is to preserve the craft as the bargaining unit rather than a lesser or greater group, we see no occasion for resort to narrow and too literal construction. The statute is in purpose, mechanism and effect, in the highest sense remedial." 93 F.2d at 342.

18. 109 F.2d 76 (9th Cir.), *cert. denied*, 310 U.S. 632 (1940).

19. See note 14 *supra*. The Board has consistently decided that the mere fact that a laid-off worker has contractual seniority rights does not entitle him to vote. The determinative test is whether the laid-off worker has a reasonable expectation of reemployment in the near future. Higgins, Inc., 111 N.L.R.B. 797 (1955); Harris Prods. Co., 100 N.L.R.B. 1036 (1952); General Motors Corp., 92 N.L.R.B. 1752 (1951); Lima Hamilton Co., 87 N.L.R.B. 455 (1949). Workers employed seasonally, Gerber Prods. Co., 93 N.L.R.B. 1668 (1951), permanently laid-off, Gerber Plastic Co., 110 N.L.R.B. 269 (1954); Avco Mfg. Corp., 107 N.L.R.B. 295 (1953), and indefinitely laid-off, F. C. Mason Co., 86 N.L.R.B. 71 (1949), are ineligible to vote. The reasonable expectation of reemployment is to be determined as of the date of the election. Sangamo Elec. Co., 110 N.L.R.B. 1 (1954); F. B. Rogers Silver Co., 95 N.L.R.B. 1430 (1951). Those laid-off workers who have a reasonable expectation of reemployment are deemed eligible to vote because "[they] have a reason to anticipate returning to their work at the Company's plant. They have therefore an interest in any negotiations toward fixing the terms of the employment of the Company's polishers and hence an interest in determining the representatives who are to conduct these negotiations." City Auto Stamping Co., 3 N.L.R.B. 306, 312 (1937).

20. "This shutdown and layoff was no more than a suspension of work. It was not a termination of work. It was in accordance with long established custom. *The relation of employer and employee does not always depend upon continuity of actual every day work.*" 109 F.2d at 82. (Emphasis added.)

21. "To hold to the contrary [that claimant appellees were employees] would, in effect result in a concomitant holding that the award of unemployment benefits to appellees by the local office may be subject to enquiry and the acceptance of such benefits by appellees may be in violation of [IND. ANN. STAT. § 52-1559 (1951)] . . . ." 191 N.E.2d at 36.

However, the collective bargaining agreement could only be breached by an "employee." The court then found that there was nothing in the collective bargaining agreement to indicate that the word "employee" should be given a special or technical definition contrary to its "common well-established meaning."[22] Applying that meaning to the instant case, the majority concluded that the claimants were not employees of the appellant and therefore "were not and could not be guilty of 'misconduct in connection with his (their) work' in the respect asserted by appellant."[23] In answer to appellant's contention that claimants retained employee status and were entitled to return to work as a matter of law, the majority emphasized the fact that the parts of the collective bargaining agreement relied upon by appellant were not set forth in the appellant's original brief.[24] Justice Hunter dissented on the grounds that: (1) the claimants' participation in the unauthorized strike and work stoppage should be construed as "misconduct in connection with his [their] work" and to hold otherwise would be to contravene both logic and justice;[25] (2) the majority had written conditions into the statute and had thereby limited and destroyed its effect;[26] (3) the National Labor Relations Board had

22. "The word here used ('employes') has a definite, well established meaning, commonly known, and is applicable only to one who is *in the present service of* another *for pay* at *a particular time.* In its accepted usage, it does not embrace one who has at some time been, *but no longer is,* in the employment of another." Koch v. Wix, 108 Ind. App. 20, 25 N.E.2d 277, 279 (1940). (Emphasis added.) However, it is not clear whether the rights of laid-off workers were involved in this decision. It would appear that this definition was used solely to determine whether workers who had previously quit or been discharged were "employees" within the meaning of decedent's will.

23. 191 N.E.2d at 36.

24. "We have previously adverted to the absence in appellant's brief of the provisions or parts of said bargaining agreement relied upon by appellant in this contention. We are thus deprived of measuring the actual wording at any such provisions with the contention now projected. Said statement of appellant is a self-serving conclusion unsupported by appropriate citation to and incorporation of the pertinent sustaining evidence." 191 N.E.2d at 36-37.

25. "It seems intuitively obvious that the referee's decision as affirmed by the board and majority opinion of this court have contravened logic and justice by allowing a laid-off employee to openly defy his employer in an 'illegal' and 'wildcat' labor dispute knowing that the employer has no choice but to fulfill the contractual obligations owed to the employee at his (the employee's) option regardless of the scope, time and extent of the employee's misconduct, and yet still be eligible for unemployment benefits notwithstanding his discharge for such subsequent 'misconduct'." 191 N.E.2d at 39.

26. "However the majority in upholding the Review Board's order has held as a matter of law that there must be (1) actual or contractual control by the employer (2) the employee must be performing services for his employer and (3) receiving pay for the work performed, and that there must be a concurrence of all of the above facts with 'misconduct' in point of time. It seems apparent that the Board of Review in its findings and order have, in reaching such a conclusion, written conditions in the statute that were not written there by the legislature and further in adopting such conditions have literally destroyed any legal significance of the phrase 'misconduct

consistently held that a laid-off worker still occupies an employee relationship;[27] and (4) the claimants were not the type of persons for whom the Indiana Employment Security Act was enacted.[28]

The decision of the Indiana court is unfortunate in that (1) it tends to lend judicial approval to attempts, by "illegal" and "wildcat" strikes, to force premature reemployment, (2) it creates a loophole whereby a laid-off worker can effectually circumvent the purpose of the no-strike clause in his collective bargaining agreement,[29] (3) it extends the benefits of unemployment compensation to persons who have been laid off because of their own fault,[30] and (4) it may subsequently be cited as authority for the proposition that, regardless of the definition of "employee" in the no-strike clause, a laid-off worker can never be disqualified from receiving unemployment benefits because of "misconduct in connection with his work." As the dissent properly points out, this decision allows the laid-off worker to have his cake and eat it too.[31] It is submitted that the majority erred in applying such a literal and narrow construction to the word "employee."[32] Instead, the court should have considered the purpose of the no-strike clause in the collective bargaining agreement, the purpose of the unemployment compensation statute, and the several interests of the employer, employee, and public, sought to be served in preventing illegal and wildcat labor disputes.[33] A more realistic and logical construction is that used by the National Labor Relations Board.[34] That test is whether the laid-off workers have a reasonable expectation of reemployment in the near future. Applying that test to the instant case, it appears obvious that the claimants were still "employees" of their former employer because (1) they retained their seniority rights and rights of recall until such time as the appellant was in a position to reemploy them, (2) they attempted to force their premature reemployment, thereby recognizing and claiming their status as employees under the collective bargaining

in connection with his work' except in concurrence with the above three conditions." *Id.* at 40.

27. Cases cited note 19 *supra.*

28. "It seems obvious that but for their *'misconduct'* during *'lay off'* they would still be employed and this being true their *'misconduct'* could logically be construed to be *'in connection with (their) work'* therefore it should necessarily follow that their employment was terminated *'through their own fault'* and hence they are not the type of persons referred to in the public policy of the Act and should be declared ineligible for benefits." 191 N.E.2d at 40.

29. Note 4 *supra.*

30. Note 28 *supra.*

31. 191 N.E.2d at 41.

32. Note 22 *supra.*

33. See note 17 *supra.* The same considerations that were applied in that decision should be considered in the decision of the instant case.

34. Note 19 *supra.*

agreement, (3) they had not found other employment elsewhere in the interim, and, most significant of all, (4) they were reemployed less than two months after being laid off. The potential adverse significance of this holding could be limited by defining the word "employee" in the no-strike clause of the collective bargaining agreement to include a worker who is temporarily laid off and who has not found other employment, or by amending the disqualifying clause of the unemployment compensation statute to include a worker who is temporarily laid off and who has not found other employment.

Real Property—Future Interests—Valuation of Possibility of Reverter

The owner of an undivided one-fifth[1] of a possibility of reverter sought to share in the proceeds from the condemnation of the determinable fee.[2] The court disallowed his claim on the grounds that the possibility of reverter was valueless since a breach of the condition was not imminent.[3] On appeal to the Supreme Court of Minnesota, *held,* affirmed, without prejudice to the owner of the possibility of reverter to file for a further hearing on the basis of the new rule established by this case. A possibility of reverter is a compensable interest and is, at least, entitled to nominal damages when the land is condemned; if a breach of the condition is imminent or the fair market value of the land when applied to its best practical use exceeds the value of its restricted use, the owner of the possibility of reverter is entitled to a proportion of the condemnation award the denominator of which is the fair market value of the land applied to its best practical use and the numerator of which is the difference between that value and the value of the restricted use.[4] *State v. Independent School District No. 31,* 123 N.W.2d 121 (Minn. 1963).

1. The owner of the determinable fee had previously acquired quitclaim deeds from the owners of the other undivided four-fifths of the possibility of reverter. State v. Independent School District No. 31, 123 N.W.2d 121, 124 n.1 (Minn. 1963).

2. The parcel of land in question was restricted to use as an athletic field and playground for children who attended the school of the owner of the determinable fee. 123 N.W.2d at 123.

3. The trial court found that at the time of the condemnation proceeding the parcel of land was being used as an athletic field and that there was no intent to abandon the land or to put it to any other use. 123 N.W.2d at 125.

4. "*Illustration 1.* Assume: A. Reasonable market value of the land if applied to highest and best use $100,000
B. Reasonable market value of land if used as a high school athletic field for such period as continued use for that purpose is reasonably to be anticipated . . $75,000
Ratio by which distribution of award is made is 1:3, with ¼ of the award payable to

Under the general rule the owner of a possibility of reverter is not entitled to share in the proceeds from the condemnation of the determinable fee.[5] The reasons generally given for this rule are that a possibility of reverter is not an estate but a mere expectancy,[6] that compliance with the condition is made impossible and, therefore, excused by condemnation,[7] and that any valuation of a possibility of reverter must necessarily be speculative and contingent.[8] These reasons have been severely criticized by legal writers.[9] In view of the weakness of these reasons, the drafters of the *Restatement of Property* provided an exception to the general rule. The exception was designed to alleviate the situation in which the operation of the general rule is most objectionable, *i.e.*, when the future interest is about to become a present possessory interest due to an imminent breach of the condition. Under the *Restatement* rule if a breach of the condition is imminent "within a reasonably short period of time,"[10] the condemnation award is to be divided between the owners of the possibility of reverter and the determinable fee in such manner "as fairly represents the proportionate value"[11] of each interest. In accordance with a discernible trend to allow future interests to share in the condemnation award,[12] a number of courts have adopted the *Restatement* rule in

owner of the possibility of reverter and ¾ to the owner of the fee simple determinable. *Illustration 2.* Assume the value determined under (A) above is $75,000 or less aud the value under (B) above remains the same. In such event the owner of the determinable fee would be entitled to the entire award minus an allowance to the owner of the possibility of reverter for nominal damages." 123 N.W.2d at 130 n.11.

5. See, *e.g.*, Woodville v. United States, 152 F.2d 735 (10th Cir.), *cert. denied*, 328 U.S. 842 (1946); Beard's Erie Basin, Inc. v. New York, 142 F.2d 487 (2d Cir. 1944); Puerto Rico v. United States, 132 F.2d 220 (1st Cir. 1942); United States v. 1119.15 Acres of Land, 44 F. Supp. 449 (E.D. Ill. 1942); Chandler v. Jamaica Pond Aqueduct Corp., 125 Mass. 544 (1854); Lyford v. City of Laconia, 75 N.H. 220, 72 Atl. 1085 (1909); First Reformed Dutch Church v. Crowell, 210 App. Div. 294, 206 N.Y. Supp. 132 (1924); 2 NICHOLS, EMINENT DOMAIN § 5.221 (3d ed. 1950); 81 A.L.R.2d 568 (1962). For a discussion of the general topic see Browder, *The Condemnation of Future Interests*, 48 VA. L. REV. 461 (1962); Stoyles, *Condemnation of Future Interests*, 43 IOWA L. REV. 241 (1958).

6. See Chandler v. Jamaica Pond Aqueduct Corp., *supra* note 5, at 547.

7. See Woodville v. United States, *supra* note 5, at 738.

8. See Beard's Erie Basin, Inc. v. New York, *supra* note 5, at 489.

9. The writers point out that although the possibility of reverter may not technically be an estate in land, it still has value. And this value is no more contingent and speculative than the value of a right of inchoate dower, whieh has been valuated in condemnation by several courts. Furthermore, to say that condemnation makes compliance with the condition impossible is but a play on words; it could as easily be said that condemnation makes the possibility of reverter unenforceable. Browder, *supra* note 5, at 472-73; Stoyles, *supra* note 5, at 247-53.

10. RESTATEMENT, PROPERTY § 53 comment *c* (1936).

11. *Ibid.*

12. See, *e.g.*, Brugh v. White, 267 Ala. 575, 103 So. 2d 800 (1957) (remainderman); Hemphill v. Mississippi State Highway Comm'n, 145 So. 2d 455 (Miss. 1962) (executory interest).

cases dealing with the rights of the owner of the possibility of reverter.[13] However, only a few courts in applying the rule have found that a breach of the condition was imminent, and only one court has attempted to apportion the condemnation award between the two interests.[14]

In the instant case the court held that a possibility of reverter is always compensable when a determinable fee is condemned. Since in Minnesota a possibility of reverter is alienable,[15] the court held that this type of future interest is protected by the provision of the state constitution that the state may not take property without compensation.[16] For this reason the owner of the possibility of reverter must at least be given nominal damages; and, if a breach of the condition is immment, he must receive substantial damages. Furthermore, since the basis for the condemnation award is the fair market value of the land applied to its best practical use,[17] the court reasoned that if the value of the land in its restricted use were less than the best use value, the owner of the determinable fee wonld receive a windfall if he were allowed the entire condemnation award. Therefore, in this situation, the owner of the possibility of reverter is entitled to substantial damages even if a breach of the condition is not imminent. Substantial damages are to be determined by the use of a ratio which is based on the relative values of the best practical use and the restricted use.[18] The result of the ratio in the normal situation is that the owner of the possibility of reverter receives any excess of the condemnation award over the value of the restricted use.

The instant case is significant for three reasons. First, it recognizes that a possibility of reverter is compensable and at least entitled to nominal damages when the determinable fee is condemned. Second, it establishes an additional situation in which the possibility of reverter is entitled to substantial damages—when the best use value of the land is greater than its restricted use value. And, third, it

13. See, *e.g.*, United States v. 16 Acres of Land, 47 F. Supp. 603 (D. Mass. 1942); United States v. 2184.81 Acres of Land, 45 F. Supp. 681 (W.D. Ark. 1942); City of Santa Monica v. Jones, 104 Cal. App. 2d 463, 232 P.2d 55 (Dist. Ct. App. 1951); Chew v. Commonwealth, 400 Pa. 307, 161 A.2d 621 (1960).

14. United States v. 2184.81 Acres of Land, *supra* note 13. The court gave the building to the owner of the determinable fee and the land to the owner of the possibility of reverter.

15. This is the general rule. SIMES, FUTURE INTERESTS § 33 (1951).

16. MINN. CONST. art. 1, § 13. The Minnesota provision is representative of similar provisions in other state constitutions. See, *e.g.*, MO. CONST. art. 1, § 26; N.Y. CONST. art. 1, § 7.

17. 4 NICHOLS, EMINENT DOMAIN §§ 12.1, 12.2[1] (3d ed. 1950).

18. The court uses a ratio to insure that the proportion of the interest of the possibility of reverter will remain constant in case the value of the condemnation award is changed. See State v. Independent School District No. 31, 123 N.W.2d 121, 130 n.11 (Minn. 1963).

provides a rational method of measuring the value of a possibility of reverter. The Minnesota court is correct in holding that a possibility of reverter is compensable as a property interest when the determinable fee is condemned. This harmonizes with the general recognition of the interest as alienable and descendible.[19] Although other suggestions of possible ways to protect the interest when the determinable fee is condemned have been made,[20] the court provides a rational method of compensating the owner of the possibility of reverter. However, if a breach of the condition is not imminent, it is questionable whether substantial damages should be allowed merely because the condemnation award exceeds the value of the restricted use. In this situation it is doubtful if the owner of the possibility of reverter suffers substantial damages when the determinable fee is condemned, since he is not deprived of a possessory estate in the near future. Although we may expect more courts to hold that a possibility of reverter is a compensable interest when the determinable fee is condemned, it is doubtful that many will be willing to give the owner substantial damages if a breach of the condition is not imminent.

Taxation—Federal Income Tax—Deductibility of Contingent Witness Fees

Petitioner Reffett's[1] non-union coal mine was destroyed by fire in 1951. In 1953 he was referred to Bolling, who knew two persons who would testify that they were hired by the United Mine Workers[2] to set the fire. After meeting with the two in Bolling's office,[3] Reffett

19. SIMES, FUTURE INTERESTS §§ 33, 34 (1951).

20. A student author in 46 CORNELL L.Q. 631 (1961) suggests a similar approach to the one taken by the court in the instant case. His suggestion is that the apportionment of the condemnation award be determined by the difference in values of the two estates at the time of the original conveyance. However, this presents a difficult problem of determining the value of the fee simple estate. Another writer has suggested that the respective rights be attaehed to a trust funded with the condemnation award or to similar realty purchased with the condemnation award. Stoyles, *supra* note 5, at 256. But it is doubtful that this type of arrangement would be acceptable to the courts, which are not inclined to perpetuate dead hand control of property, especially if there is an equitable way of concluding the arrangement when the property is condemned.

1. Reffett's attorney, one Bolling, was also challenging a tax deficiency determined by the Commissioner arising out of the same transactions. The cases were consolidated for trial, but Bolling is not affected by the issue to be discussed in this note.

2. Hereinafter referred to as UMW.

3. At this meeting, the two told Reffett that they would not testify in any legal action he might bring unless he hired Bolling as his attorney. Reffett was also told that Bolling had in his safe the depositions of the two concerning the fire. Reffett

signed an agreement[4] to pay each of the prospective witnesses ten per cent of any amount he might recover in his damage suit against the UMW in return for their services as witnesses.[5] The suit for damages resulted in a verdict in petitioner's favor for $46,750, which the UMW paid in 1954. In his 1954 tax return, Reffett reported a long-term capital gain of over twelve thousand dollars from this judgment; the remainder of the judgment was deducted as litigation expense.[6] The Commissioner denied the deduction and assessed a deficiency against Reffett. In the Tax Court of the United States, *held,* a deduction for contingent witness fees must be denied, as such fees are not "ordinary" expenses within the meaning of section 162 of the Internal Revenue Code of 1954; besides, the allowance of this deduction would be violative of public policy. *Sanford Reffett,* 39 T.C. 869 (1963).

The deductibility of contingent witness fees under section 162 of the Internal Revenue Code of 1954 has not previously been decided. However, the "ordinary and necessary" requirement for deduction of business expenses under that section has received much treatment.[7] Section 162 provides that "there shall be allowed as a deduction all the ordinary and neeessary expenses paid or incurred during the taxable year . . . ." In its first definition of "ordinary and necessary"[8] the Supreme Court held that the phrase meant an expense "directly connected with" or one which "proximately resulted from" a taxpayer's business.[9] This did not mean that the taxpayer had to incur the expense often in order to be able to deduct it. It meant, rather, that an expense would be held "ordinary," even if unique to the particular taxpayer, as long as the group of which that taxpayer was a

had not known Bolling before this meeting, but "agreed" to hire him.

4. While the court doesn't make clear whether this agreement was entered into voluntarily, a reasonable conclusion from the facts seems to be that it was also a requirement insisted upon by the two prospective witnesses. Judge Mulroney based his dissent on the force placed on Reffett to agree to the fee arrangement.

5. The damage suit was litigated in Virginia which has statutory provisions for compensation of witnesses. VA. CODE ANN. § 14-187 (Supp. 1962).

6. INT. REV. CODE OF 1954, § 162. While Reffett did not specifically claim the deductions under this seetion, the court assumed that he was, necessarily, relying on it.

7. Since the Supreme Court has dealt extensively with the meaning of "ordinary and necessary" within the scope of section 162, little reference will be made to lower court decisions on this aspect of the problem. There are many law review articles on the subject. For a recent discussion which gives a very good treatment to the question see Comment, *Business Expenses, Disallowance, and Public Policy: Some Problems of Sanctioning with the Internal Revenue Code,* 72 YALE L.J. 108 (1962).

8. Kornhauser v. United States, 276 U.S. 145 (1928). An interesting fact can be noted when the cases discussing "ordinary and necessary" are looked at together. The Court hasn't always made a decision on the basis of an expense being both "ordinary and necessary." This has relevance with respect to the instant case, as will be indicated in the later discussion.

9. *Id.* at 153. In using these criteria, the Court was able to determine whether the expense in question was "ordinary and necessary."

part would incur the expense in question when faced with a similar problem.[10] The Court subsequently noted, however, that while it might be unique to the taxpayer, the expense, to be "ordinary," had to be such that "the transaction which gives rise to it . . . . [is] of common or frequent occurence in the type of business involved."[11] Thereafter, the Court, in several cases,[12] suggested that public policy might be a relevant consideration in interpreting the "ordinary and necessary" requirement governing the deduction of business expenses.[13] Restrictions were placed, however, on the type of public policy that could be used in disallowing a deduction, should it otherwise be "ordinary and necessary."[14] Thus, the deduction would have to "frustrate sharply defined national or state policies proscribing particular types of conduct"[15] and "the policies frustrated must be national or state policies evidenced by some governmental declaration"[16] before the deduction would be disallowed on the grounds of public policy. In *Tank Truck Rentals, Inc. v. Commissioner*,[17] the Court decided that if allowance of a deduction would frustrate some state or national public policy "a finding of necessity cannot be made."[18]

10. Welch v. Helvering, 290 U.S. 111 (1933). In this case, the Court assumed the "necessity" of the expense and decided the case by discussing what "ordinary" meant. This discussion gave rise to the "uniqueness" test. Of course, the Code requirement that the expense be "ordinary and necessary" means that the expense must be both "ordinary" *and* "necessary." *Id.* at 113.

11. Deputy v. duPont, 308 U.S. 488, 495 (1940). This case is particularly interesting, as the Court decided the deductibility of the expense both on the Kornhauser v. United States, *supra* note 8, and the Welch v. Helvering, *supra* note 10, tests, implying that "ordinary" meant something in addition to "ordinary and necessary."

12. Lilly v. Commissioner, 343 U.S. 90 (1950); Commissioner v. Heininger, 320 U.S. 467 (1943). In both these cases the Court talked only about the expenses involved being "ordinary and necessary."

13. The cases concerned predecessors of section 162 of the 1954 Code; these were section 23(a) of the Revenue Acts of 1936 and 1938 and section 23(a) of the Internal Revenue Code of 1939. The substantive portion of these sections, as far as this note is concerned, was identical. Thus, section 23(a)(1)(A) of the 1939 Code provided that in computing net income there would be allowed as deductions "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . ."

14. As has been pointed out, the criterion of public policy as affecting deductibility is one of judicial origin. 1 RABKIN & JOHNSON, FEDERAL INCOME, GIFT AND ESTATE TAXATION § 3.11 (1962).

15. Commissioner v. Heininger, *supra* note 12, at 473.

16. Lilly v. Commissioner, *supra* note 12, at 96. As to the problems concerning what constitutes a "governmental declaration" see Schwartz, *Business Expenses Contrary to Public Policy: An Evaluation of the Lilly Case*, 8 TAX L. REV. 241 (1953). There was some feeling of relief that the Court did not find a controlling public policy in either of these cases. This was taken to mean that the Court would not be too concerned with the argument of public policy in the future. *Id.* at 249.

17. 356 U.S. 30 (1958).

18. *Id.* at 33. Without spelling out a complete explanation, the Court here seemed to put the whole question of public policy in context. Thus, presumably, courts would have to consider whether a particular expense violated public policy and, if it did,

While the Court retained the requirement of a governmental declaration, it seemed to broaden the possible scope of that declaration[19] by noting that

> the test of nondeductibility always is the severity and immediacy of the frustration resulting from allowance of the deduction. The flexibility of such a standard is necessary if we are to accommodate both the congressional intent to tax only net income and the presumption against congressional intent to encourage violation of declared public policy.[20]

This point raises the important question of the policies, if any, of states concerning contingent witness fee arrangements. Declarations of such policies by the legislatures themselves are nonexistent;[21] however, state courts have dealt extensively with the question. Generally, any agreement to pay a witness a fee above the statutory allowance has been held void as violative of public policy.[22] Witness fees contingent on the outcome of the litigation are held to be especially bad, for they tend to "contaminate the stream of justice at its source. It can admit neither of doubt or question, that both morality and sound policy forbid the toleration of such contracts as this."[23] Other courts use similar strong language in condemning such agreements, and this doctrine early became the uniform rule in this country.[24]

The Tax Court in the instant case dismissed the Commissioner's finding that the expenses "were not 'ordinary and necessary,' principally because they were violative of public policy,"[25] noting that the Commissioner had not proved that the public policy of Virginia was against contingent witness fees. The court, in passing, did agree that public policy was as stated by the Commissioner, but went on to deny the deduction "on more basic grounds; namely, because they were not 'ordinary' within the meaning of section 162."[26] In doing so, the court concluded that the expenses were not "ordinary" because they

to hold that it was not "necessary." Necessarily, therefore, an expense could not then be deducted under section 162.

19. At no time has the Court held that the "governmental declaration" must be a statute. In fact the Court expressly disavowed decision of that point. Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30, 34 n.6. Furthermore, language in the case implies that something other than a statute would be sufficient to meet the requirement of a "governmental declaration." *Id.* at 35.

20. Tank Truck Rentals, Inc. v. Commissioner, *supra* note 19, at 35. For an especially strong criticism of basing tax policy on moral considerations see Reid, *Disallowance of Tax Deductions on Grounds of Public Policy—A Critique*, 17 FED. B.J. 575 (1957).

21. It might be said that the statute fixing witness fees in Virginia indicates legislative intent to forbid contingent wituess fees. See note 5 *supra.*

22. Dodge v. Stiles, 26 Conn. 463 (1857).

23. Dawkins v. Gill, 10 Ala. 206, 208 (1846).

24. Perry v. Dicken, 105 Pa. 83 (1884); Bowling v. Blum, 52 S.W. 97 (Tex. Civ. App. 1899).

25. 39 T.C. 869, 877.

26. *Id.* at 878.

were not only unique to Reffett, but were also "not in our experience the common and accepted means used by a coal operator or any other person in prosecuting an action for damages to his business."[27] Having "decided" the issue, the court, "for completeness, but without elaboration,"[28] discussed public policy and found that such fee agreements violated public policy. The court, citing one of its earlier cases,[29] found that, had it based its decision on the violation of public policy, the governmental declaration required for a denial of the deduction did exist in this case.

The Tax Court's treatment of this case indicates the uncertainty still plaguing the courts about the relative weight, if any, to be given public policy in making a determination of "ordinary and necessary" under section 162.[30] The court here tried to avoid deciding the case on the basis of public policy; rather, it "decided" that the expenses were not "ordinary" as they were unique not only to Reffett, but would also be unique to the group of which he was a part.[31] Having thus decided the issue, the court threw in the argument of public policy, almost as an afterthought. However, under the criterion set out by the Supreme Court in *Tank Truck Rentals, Inc. v. Commissioner*,[32] the Tax Court here should have based its finding, if not solely, at least jointly on the grounds of the expense not being "necessary," there being an overriding public policy against allowing contingent witness fees. Yet, mere criticism of the Tax Court's decision of one case does not warrant a great deal of attention; the hesitation of the Tax Court to base its decision squarely on the grounds of public policy might better prompt an examination of the place of such considerations in cases arising under section 162. Unfortunately, much that has been written on the question concludes that, because of the difficulty surrounding the matter, public policy considerations should be dropped.[33] A more realistic analysis[34] would attempt to formulate bases for the decision of such cases. The first question is, of course, how public policy is to be determined in a given case. Statutes[35] and judicial decisions

27. *Ibid.*

28. *Id.* at 879.

29. Luther M. Riehey, Jr., 33 T.C. 272 (1959).

30. Comment, *Business Expenses, Disallowance, and Public Policy: Some Problems of Sanctioning with the Internal Revenue Code*, 72 YALE L.J. 108, 109-10 nn.4-12 (1962).

31. This being true, they were not deductible under the test of Welch v. Helvering, *supra* note 10.

32. 356 U.S. 30 (1958). See note 18 *supra*.

33. Reid, *supra* note 20.

34. Realistic if only because the courts, especially the Supreme Court, have continued to base decisions on public policy in the face of adverse commentary. Perhaps the most notable example was the decision of Tank Truck Rentals, Inc. v. Commissioner, *supra* note 32, coming almost on the heels of Mr. Reid's strong critique of public policy as a criterion under section 162. Reid, *supra* note 20.

35. However, one court recently held that a Mississippi statute prohibiting traffic

naturally are of substantial value, the latter especially when uniform. Administrative rulings, while farther down the scale of authority, might be taken into account, at least where a statutory or judicially declared policy can not be found. A major criticism of using public policy as a criterion is met when the relevant policy is found. When that problem is solved, however, a far more difficult one, and one that seems not yet to have been discussed, would arise if there were found conflicting national and state policies in an area. To ask the question might seem to be to answer it, but perhaps the obvious answer—that the national policy would preempt that of the state—would be misleading in this case.[36] It should not be axiomatic that merely to find a national policy in an area would be to supersede a state policy in the same area. An attempt to balance the interests involved should be made to determine which interests should be dominant in a given situation. While the various balances which could be struck immediately suggest answers, the solution would not be a panacea. However, it does seem preferable to the solution which would merely dismiss the problem as being unwieldy. Most critics of the process of considering public policy in determining "ordinary and necessary" problems under section 162 point out that it is impossible to state a rule for determining public policy and the weight to be given to it in any particular case. Although this is true, the difficulty in weighing the interests involved would be worthwhile if effect can be given to the policies of both federal taxation and governmental declarations in other areas. In view of the fact that the courts have ignored such critics, it seems that this solution should be given a fuller, and more understanding, consideration.

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in alcoholic beverages within that state did not set the public policy of that state with respect to liquor, since the state, as well as local governments, derived a sizeable amount of revenue from the taxation of such traffic as did take place within the state. The court allowed as an "ordinary and necessary" business expense a deduction for whisky purchased in the state for distribution to customers. Stacy v. United States, CCH 1963 STAND. FED. TAX REP. (63-2 U.S. Tax Cas.) ¶ 9746 (S.D. Miss. July 30, 1963). Furthermore, even when a statute ostensibly sets a policy, a problem can arise as to which of several possibly conflicting policies was intended to be adopted. This is where any decisions interpreting the statute would be particularly helpful.

36. Thus, a court, with reasoning akin to the rationale of Stacy v. United States, *supra* note 35, could easily decide that a particular federal policy was not definitive enough to override a strongly defined state policy in a given case.

Torts—Warranty—Relation of Foreseeability of Risk to the Implied Warranty of a Cigarette Manufacturer

The widow and the administrator of the estate of a lung cancer victim brought a consolidated[1] diversity suit in the District Court for the Southern District of Florida[2] against a cigarette manufacturer, alleging that the use of the manufacturer's product was a proximate cause of the decedent's lung cancer. The case went to the jury on two of the plaintiffs' six theories of liability[3]—breach of implied warranty and negligence. The jury returned a general verdict for the defendant based on its special finding that the cigarette manufacturer could not reasonably have known that the use of its product created a risk of lung cancer.[4] The judgment for defendant was affirmed by the Court of Appeals for the Fifth Circuit, one judge dissenting.[5] Upon petition for hearing, the court of appeals certified to the Supreme Court of Florida the question whether under Florida law strict liability would be imposed on a cigarette manufacturer in such a case, even though the manufacturer could not reasonably have known of the risk of lung cancer to smokers.[6] The Florida Supreme

1. The widow sued under the Wrongful Death Statute. FLA. STAT. ANN. §§ 768.01-.02 (1959). The administrator's action was substituted for a prior action instituted by the decedent under the Survival Statute. FLA. STAT. ANN. § 45.11 (1959). These actions were consolidated for trial by order of the federal district court.

2. Choate, Emett C., J. (no opinion published).

3. Plaintiffs' original theories were: (1) breach of implied warranty; (2) breach of express warranty; (3) negligence; (4) misrepresentation; (5) battery; and (6) violation of the Federal Food, Drug, and Cosmetics Act, 52 Stat. 1040 (1938), as amended, 21 U.S.C. §§ 301-92 (1958); Federal Trade Commission Act, 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-51 (1958); Florida Food, Drug, and Cosmetic Act, FLA. STAT. ANN. §§ 500.01-.45 (1959). Defendant's motion for directed verdict was granted as to theories (2), (4), (5), and (6). Plaintiffs did not appeal these rulings or the findings on the negligence count.

4. The jury was given four special interrogatories under FED. R. CIV. P. 49(b). "'(1) Did the decedent Green have primary cancer in his left lung? . . . . [Yes.] . . . . (2) Was the cancer in his left lung the cause or one of the causes of his death? . . . . [Yes.] . . . . (3) Was the smoking of Lucky Strike cigarettes on the part of the decedent, Green, a proximate cause or one of the proximate causes of the development of cancer in his left lung? . . . . [Yes.] . . . . (4) Could the defendant on, or prior to, February 1, 1956, by the reasonable application of human skill and foresight have known that users of Lucky Strike cigarettes, such as the decedent Green would be endangered, by the inhalation of the main stream smoke from Lucky Strike cigarettes, of contracting cancer of the lung? . . . . [No.]'" Green v. American Tobacco Co., 304 F.2d 70, 71-72 (5th Cir. 1962).

5. Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962).

6. The exact question certified was: "Does the law of Florida impose on a manufacturer and distributor of cigarettes absolute liability, as for breach of implied warranty, for death caused by using such cigarettes from 1924 or 1925 until February 1, 1956, the cancer having developed prior to February 1, 1956, and the death occurring February 25, 1958, when the defendant manufacturer and distributor could not on, or prior to, February 1, 1956, by the reasonable application of human skill

Court *held*, the question should be answered in the affirmative. An unforeseeable injury to a consumer resulting from reasonable use of cigarettes constitutes a breach of implied warranty for which the cigarette manufacturer is strictly liable. *Green v. American Tobacco Co.*, 154 So. 2d 169 (Fla. 1963).

Early in the development of the common law, the tort concept of liability without fault was applied to the sale of goods;[7] the mere sale of goods was held to imply that the seller warranted his product to be reasonably fit for the purpose intended.[8] However, due to the contractual nature of sales, recovery under implied warranty was available only to persons in privity of contract with the party against whom recovery was being sought.[9] The privity requirement created few hardships to consumers until the advent of the modern wholesaler-retailer system of product distribution, which eliminated the privity between the consumer and the manufacturer.[10] Deprived of his action in implied warranty by the lack of privity, the consumer who was injured by a defect in the product, in order to recover from the manufacturer, was required to prove that the defect was caused by the manufacturer's negligence.[11] Recoveries in negligence were rare because consumers usually were not in a position to obtain enough evidence to prove either negligence of the manufacturer or causation.[12] The courts, realizing that the law of negligence did not provide an adequate remedy in these situations, created an exception to the requirement of privity in actions based on implied warranty when the goods involved were intended for human consumption.[13] Although about half of the states have not yet abol-

and foresight, have known that users of such cigarettes would be endangered, by the inhalation of the main stream smoke from such cigarettes, of contracting cancer of the lung?" 304 F.2d at 86. This procedure is authorized by the Florida Certification Statute, FLA. STAT. ANN. § 25.031 (1959). Florida is the only state authorizing such a certification procedure and it has been used only once prior to the instant case. For approval of this procedure, see Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 212 (1960). For criticism, see Note, 21 LA. L. REV. 777, 781 (1961), suggesting that certification leads to deciding cases in a pieeemeal fashion, shading the answer by framing the issues in the abstract, and removing the legal problem from its factual context. See also Moore & Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 VA. L. REV. 1 (1949) (discussing the reluctance of the Supreme Court to consider certified questions).

7. PROSSER, TORTS § 83 (2d ed. 1955).

8. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 138 (1943).

9. 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 16.03[1] (1961).

10. See Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 16.03 n.1 (1961).

11. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960) [hereinafter cited as Prosser, *The Assault*].

12. See 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 5 (1961); 2 HARPER & JAMES, TORTS § 28.1 (1956); PROSSER, TORTS § 84 (2d ed. 1955).

13. See Prosser, *The Assault*, at 1107-08.

ished the privity requirement where such products are concerned, it has been held in the great majority of recent cases that a manufacturer of products for human consumption is liable under the law of implied warranty to a consumer who is not in privity with the manufacturer.[14] Since tobacco, including cigarettes, had been long considered a product for human consumption,[15] it was apparent that the studies correlating lung cancer with smoking[16] would lead to a suit by a lung cancer victim against a cigarette manufacturer under the law of implied warranty. Prior to the first cigarette-cancer case in 1957, there existed three possible barriers to recovery against a cigarette manufacturer under implied warranty: lack of privity of contract;[17] lack of proof sufficient to establish a causal relationship between smoking and lung cancer;[18] and lack of an implied warranty broad enough in scope to include the risk of lung cancer.[19] The privity barrier was involved in the first cigarette-cancer case, *Cooper v. R. J. Reynolds Tobacco Co.*,[20] where the consumer's warranty count was dismissed due to lack of privity with the defendant manufacturer. However, lack of privity has not been a barrier in subsequent cigarette-cancer cases[21] since they have all been brought in jurisdictions in which there is no requirement of privity when the product involved is intended for human consumption. The causation barrier was breached in *Pritchard v. Liggett & Myers Tobacco Co.*[22] where the court, in remanding the case for jury trial, held that sufficient

14. See RESTATEMENT (SECOND), TORTS § 402A (Tent. Draft No. 7, 1962) (listing approximately 25 states which have abandoned the privity rule). *But see* DEFENSE RESEARCH INSTITUTE, INC., PRODUCTS LIABILITY 21-23 (monograph series) (listing only 16 states as having abandoned the privity rule).

15. See, *e.g.*, De Lape v. Liggett & Myers Tobacco Co., 25 F. Supp. 1006 (S.D. Cal. 1939), *aff'd*, 109 F.2d 598 (9th Cir. 1940); Pillars v. R. J. Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365 (1918).

16. See studies cited in Brumfield, *Liability of Tobacco Industry: Cancer and its Relationship to Smoking—Is it Actionable*, in TRIAL & TORT TRENDS 1-12 (Belli ed. 1958).

17. See note 9 *supra*. *But see* Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958).

18. See Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292, 294 (3d Cir. 1961) (at district court level plaintiff required to prove causation first).

19. *Compare* 26 ALBANY L. REV. 354, 358 (1962), 50 CALIF. L. REV. 566, 568-69 (1962), and 63 COLUM. L. REV. 515, 535 (1963) (cigarettes merchantable), *with* Rossi, *The Cigarette-Cancer Problem: Plaintiff's Choice of Theories Explored*, 34 So. CAL. L. REV. 399, 410-11 (1961) (cigarettes unmerchantable).

20. 158 F. Supp. 22 (D. Mass. 1957), *aff'd*, 256 F.2d 464 (1st Cir.), *cert. denied*, 358 U.S. 875 (1958).

21. *But see* Ross v. Philip Morris Co., 164 F. Supp. 683 (W.D. Mo. 1958) (warranty count dismissed due to lack of privity), *modified*, Civil No. 9494, W.D. Mo., Oct. 22, 1959 (warranty count reinstated following a Missouri Supreme Court ruling that privity was no longer required); Midwest Game Co. v. M. F. A. Milling Co., 320 S.W.2d 547 (Mo. 1959).

22. 295 F.2d 292 (3d Cir. 1961).

evidence had been introduced to sustain a jury finding that the smoking of the manufacturer's cigarettes was a proximate cause of the plaintiff's lung cancer.[23] By way of dictum, the majority of the *Pritchard* court attempted to dispose of the third barrier by defining the scope of the cigarette manufacturer's implied warranty to be the production and sale of cigarettes "reasonably fit and generally intended for smoking without causing physical injury."[24] However, the concurring judge did not agree to any extension of the scope of the implied warranty beyond the earlier common-law requirement that the defendant's product be as safe and well-made as competing products in the market.[25] A third definition of the scope of the implied warranty, which constituted a compromise between the two definitions adopted in the *Pritchard* case, was formulated in *Lartigue v. R. J. Reynolds Tobacco Co.*,[26] where the court held that strict liability was imposed only for a defective condition not contemplated by the consumer, the harmful consequences of which, based on the existing state of human knowledge, were foreseeable by the manufacturer.

In the principal case, the federal district court, in determining the scope of the implied warranty, reached the same result as that subsequently taken in *Lartigue*.[27] The court of appeals affirmed by finding a "foreseeability-of-the-risk" requirement from a synthesis of the Florida implied warranty cases.[28] The Florida cases seemed to impose liability based on the superior position of the manufacturer to know the nature of its product. These cases, however, did not deal with injuries resulting from unforeseeable risks, but rather with unknown and/or undiscernable specific defects which caused a foreseeable injury.[29] This lack of any clear-cut precedent in Florida,[30]

23. *Id.* at 296. See also 2 WIGMORE, EVIDENCE §§ 662-63 (3d ed. 1940).

24. 295 F.2d at 296 (dictum).

25. *Id.* at 302. *Accord*, Simmons v. Rhodes & Jamieson, Ltd., 46 Cal. 2d 190, 293 P.2d 26 (1956) (cement causing burns held merchantable). *Contra*, Twombley v. Fuller Brush Co., 221 Md. 476, 158 A.2d 110 (1960) (spot remover causing hepatitis held unmerchantable). See also UNIFORM SALES ACT §§ 15(1), (2); UNIFORM COMMERCIAL CODE §§ 2-314 to -315; 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 16.03[4][a] n.14.5 (Supp. 1962).

26. 317 F.2d 19 (5th Cir.), *cert. denied*, 375 U.S. 865 (1963).

27. Green v. American Tobacco Co., 304 F.2d 70, 72 (5th Cir. 1962).

28. *Id.* at 73-76.

29. *Ibid.*

30. It was unfortunate that Florida had not considered any allergy cases, which present an analogous problem under the law of implied warranty. The courts have in such cases adopted a principle similar in nature to that established in *Lartigue*. In order to recover against the manufacturer, a consumer who is injured by his allergic reaction to the manufacturer's product must be in an appreciable group of potential users who would suffer the same consequences. This effectively limits the scope of the manufacturer's implied warranty by the same considerations used by courts in determining the scope of the duty to be imposed in negligence actions. See, *e.g.*, Crotty

coupled with the dissent by Judge Cameron, persuaded the court of appeals to certify the question to the Florida Supreme Court for a ruling on the correctness of the synthesis of Florida decisions. The Florida court, rejecting both the *Lartigue* decision on the scope of implied warranty and the synthesis by the court of appeals, reasoned that the manufacturer's knowledge, or ability to know, of a risk of injury was no more necessary to the imposition of liability than the knowledge, or ability to know, of a specific defect in the product.[31] Actual safety is the only standard in Florida for determining the merchantability of a product for human consumption.[32]

The ruling by the Florida Supreme Court is neither supported by its precedents nor in accord with the principles underlying the extension of implied warranty to consumers. There is a difference between the process of ascertaining the risks within the scope of an implied warranty and the process of imposing liability for a subsequent manifestation of the actual risks.[33] The court failed to recognize this difference when it applied the rationale developed in the food retailer cases to the instant situation. In the retailer cases the risk of the injury incurred by the consumer was obviously one against which the law required sellers to warrant; retailers sought to escape liability for these foreseeable injuries by showing that the presence of the defects in the sealed products was unknown and undiscoverable. The Florida courts correctly held that the retailers' lack of knowledge would not exempt them from liability.[34] However, the purpose of implied warranty is not to render the manufacturer the complete insurer of its product, but rather to afford to the consumers a certainty of recovery for those injuries which were reasonably attendant to the business conducted by the manufacturer. If the manufacturer of products for human consumption is to be held strictly liable for any breach of implied warranty, it is only fair that the manufacturer have

v. Shartenberg's-New Haven, Inc., 147 Conn. 460, 467, 162 A.2d 513, 516 (1960); Bianchi v. Denholm & McKay Co., 320 Mass. 469, 473, 19 N.E.2d 697, 699 (1939). See also Esborg v. Bailey, 61 Wash. 2d 347, 378 P.2d 298 (1963), holding that a plaintiff must show that sueh an ingredient is harmful to a *reasonably foreseeable* and appreciable class of potential users of the product.

31. Green v. American Tobacco Co., 154 So. 2d 169, 170 (Fla. 1963). The Florida court purports not to reach the issue of the scope of the warranty; however, a ruling on an unforeseeable risk must go to the scope of the warranty. For an opposing view, see Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEXAS L. REV. 856, 868-73 (1963).

32. 154 So. 2d at 172.

33. See notes 19 and 25 *supra*.

34. Following the decision by the Florida Supreme Court in the instant case, the Court of Appeals for the Fifth Circuit reversed the district court judgment for defendant American Tobacco Co. The case was remanded to the district court on the issue of reasonableness—that is, whether the cigarettes were *reasonably* fit and wholesome. Green v. American Tobacco Co., 325 F.2d 673 (5th Cir. 1963).

some means of ascertaining the extent of its warranty. The ruling by the Florida court allows the science of tomorrow to set the scope of the warranty implied today. Admittedly, the scope of the warranty to be imposed on manufacturers presents a difficult problem which has not received much attention by the courts; however, it is suggested that the approach taken by the *Lartigue* court presents a fair solution since it provides recovery to the consumer for the vast majority of his injuries while protecting the manufacturer from a possibly crushing retroactive burden of unforeseeable liability. The *Lartigue* approach expresses the volitional-fault basis of all modern liability, since the cigarette industry is given the choice of continuing business with this added risk of liability or of transferring its assets to another field without having its funds greatly impaired by the unforeseen liability. *Lartigue* also insures the owners of other businesses that the risks of their enterprises are only those that can be reasonably foreseen, that is, what is foreseeable on the basis of knowledge existing at the time of the sale.

Unfair Competition–Secondary Meaning and Functionality in the Shape of Cigarette Lighters

Plaintiff Zippo, a well-known manufacturer of cigarette lighters, began marketing its standard lighters in 1932 and obtained a patent therefor in 1936. The Zippo lighter marketed today differs from the patented one in only a few details, the most important of which is a change from severely square corners and straight lines to rounded corners and beveled edges. Zippo today produces more units than any other domestic manufacturer of lighters (over 3,180,000 in 1958), and since 1949 the company has spent at least 500,000 dollars a year on advertising. Defendant Rogers in 1957 began importing and selling Japanese lighters very similar to the Zippo in size, shape, and appearance. In 1958 Rogers sold between 240,000 and 360,000 of these lighters. The name "Rogers" is stamped prominently on the bottom of the case of the defendant's lighters and also appears on the display cards used to market the lighters. Zippo brought an action in federal district court for trademark infringement and unfair competition against Rogers, seeking damages and injunctive relief restraining Rogers from marketing the Japanese lighters. Zippo, after commencement of the suit, conducted an extensive consumer survey to support its contentions that secondary meaning had been established for its lighter and that confusion existed among buyers as to the source of the Rogers lighter. The survey, conducted by an independent market

research firm, resulted in findings to the effect that: (a) 42.6 per cent of the persons surveyed, when shown an unmarked Zippo lighter, were "certain" the lighter was a Zippo; (b) when offered the choice between a clearly marked Zippo lighter and a clearly marked Rogers lighter, 66.9 per cent of those surveyed took the Zippo; and (c) when shown a clearly marked Rogers lighter, 34.7 per cent of those surveyed thought it was a Zippo. As further proof of confusion, Zippo showed that 191 Rogers lighters had been returned to Zippo for repair. *Held*, judgment for the defendant. Even though a manufacturer shows that the shape of its product has acquired a secondary meaning, if that particular shape is functional it may be copied by a competitor so long as the competitor takes reasonable steps to inform the buyer that its product is not made by the original manufacturer. *Zippo Manufacturing Co. v. Rogers Imports, Inc.*, 216 F. Supp. 670 (S.D.N.Y. 1963).

Secondary meaning is essentially an association made in the mind of the buyer between a product and the maker of that product.[1] The criteria required to establish secondary meaning, as that concept is applied to the features of an innovating producer's goods, were first authoritatively imposed upon the law of unfair competition by Judge Learned Hand in *Crescent Tool Co. v. Kilborn & Bishop Co.*[2] For a plaintiff to successfully maintain an action for unfair competition against a copyist of his goods, he must show: (1) the appearance of his goods has become associated in the buyer's mind with the source of those goods; (2) the buyer cares who makes the goods and to some extent is motivated to purchase them because of the maker; (3) the copied feature is non-functional; and (4) the buyer is likely to believe the copyist's goods come from the first producer and is thus likely to be deceived as to their source.[3] These requirements have been adopted by other courts[4] and by the *Restatement of Torts*.[5] The

1. NIMS, UNFAIR COMPETITION AND TRADE-MARKS § 37, at 154 (4th ed. 1947). The modern doctrine of secondary meaning has its roots, as does most of the modern law of unfair competition, in the English common law concept of passing off. This concept, in essence, was that one trader or craftsman could not falsely represent that his goods were made by, or came from, another trader or craftsman and thereby be unjustly enriched by the use of the other party's name or mark. 1 NIMS, *op. cit. supra* § 2.

2. 247 Fed. 299 (2d Cir. 1917).

3. *Id.* at 300.

4. See, *e.g.*, Vaughn Novelty Mfg. Co. v. G. G. Greene Mfg. Co., 202 F.2d 172 (3d Cir. 1953), *cert. denied*, 346 U.S. 820 (1953); Zangerle & Peterson Co. v. Venice Furniture Novelty Mfg. Co., 133 F.2d 266 (7th Cir. 1943); American Fork & Hoe Co. v. Stampit Corp., 125 F.2d 472 (6th Cir. 1942); Zippo Mfg. Co. v. Manners Jewelers, Inc., 180 F. Supp. 845 (E.D. La. 1960); Columbus Plastic Prods., Inc. v. Rona Plastic Corp., 111 F. Supp. 623 (S.D.N.Y. 1953); Squeezit Corp. v. Plastic Dispensers, Inc., 31 N.J. Super. 217, 106 A.2d 322 (1954).

5. RESTATEMENT, TORTS § 741 (1938).

requirements of secondary meaning represent the courts' attempts, by means of a rather formal and inflexible test, to balance the public interest in not being deceived as to the source of the goods it wishes to buy with the public interest in maintaining competition between rival producers of the same product. These requirements are difficult for a plaintiff to meet because the courts have traditionally demanded convincing evidence that consumer confusion exists before granting an injunction which gives the first producer a perpetual monopoly over the feature copied by his competitor.[6] Whether the test of secondary meaning as propounded by Judge Hand would be strictly applied in the Second Circuit today is a question of some doubt. Two recent Second Circuit decisions[7] have reaffirmed these requirements, yet three relevant decisions[8] appear to have dispensed with the stringent requirements of secondary meaning.[9] Judge Moore, in *Norwich Pharmacal Co. v. Sterling Drug Co.*,[10] attempts to distinguish these three cases by explaining that the *Oneida* and *Flint* cases involved "actual deception," and that *Mastercrafters* involved "actual confusion, palming-off, and intent to deceive." These cases, representing a retreat from the uncompromising application of the secondary meaning test, cannot be dismissed so easily. This is particularly true of the *Mastercrafters* decision, which appears to be in conflict with the *Crescent Tool* case and can be justified only upon some theory of misappropriation.[11]

The court in the instant case accepted the secondary meaning requirements[12] as articulated in *Crescent Tool*[13] and section 741 of the *Restatement of Torts*. After examining the results of Zippo's consumer

6. Stern & Hoffman, *Public Injury and the Public Interest: Secondary Meaning in the Law of Unfair Competition*, 110 U. PA. L. REV. 935 (1962).

7. Hygienic Specialties Co. v. H. G. Salzman, Inc., 302 F.2d 614 (2d Cir. 1962); American-Marietta Co. v. Krigsman, 275 F.2d 287 (2d Cir. 1960).

8. Mastercrafters Clock & Radio Co. v. Vacheron & Constantin—Le Coultre Watches, Inc., 221 F.2d 464 (2d Cir.), *cert. denied*, 350 U.S. 832 (1955); Flint v. Oleet Jewelry Mfg. Co., 133 F. Supp. 459 (S.D.N.Y. 1955); Oneida, Ltd. v. National Silver Co., 25 N.Y.S.2d 271 (Sup. Ct. 1940).

9. The court in *Mastercrafters* enjoined defendant from copying the design of plaintiff's clock and selling such copies at a lower price. The court avoided the issue of secondary meaning and based its holding upon the theory that visitors in the homes of purchasers of defendant's clocks were likely to think the clock was made by plaintiff and thus be confused as to the source. In the *Flint* case, the defendant was enjoined from copying plaintiff's "Mustard Seed Remembrancer." The court said that the absence of secondary meaning was unimportant, that defendant intended to create confusion in the minds of buyers. The court in the *Oneida* case, in enjoining the defendant's copying of plaintiff's silver pattern, emphasized the likelihood of confusion and an intent on the part of the defendant to deceive buyers.

10. 271 F.2d 569, 573 (2d Cir. 1959), *cert. denied*, 362 U.S. 919 (1960).

11. Stern, *Buyer Indifference and Secondary Meaning in Unfair Competition and Trademark Cases*, 32 CONN. B.J. 381, 394 (1958).

12. Zippo Mfg. Co. v. Rogers Imports, Inc., 216 F. Supp. 670, 677 (S.D.N.Y. 1963).

13. Crescent Tool Co. v. Kilborn & Bishop Co., *supra* note 2, at 299-300.

survey,[14] the court concluded that Zippo had established a secondary meaning for its product.[15] Zippo's request for injunctive relief was denied, however, because the copied feature of the lighter—*i.e.*, its shape—facilitated its inexpensive and efficient manufacture and was thus functional.[16] The shape of Zippo's lighter could therefore lawfully be copied so long as the defendant took reasonable steps to eliminate the confusion of source in the minds of buyers.[17]

By applying the requirements of secondary meaning to the facts of the instant case, the court undoubtedly arrived at the correct result. But in view of the confusion existing within the Second Circuit as to the current status of the secondary meaning test, it would have been desirable for the court to have articulated and balanced, or at least recognized, the competing interests and policies present in the case,[18] instead of mechanically applying a rule of law to a factual situation representative of a complex area of trade regulation. Some of the competing policies and interests which need to be recognized and balanced in cases of this sort are: (1) plaintiff's previous protection under a patent, if any;[19] (2) the public interest in preserving free competition among rival manufacturers of the same product; (3) permitting the ethically questionable practice of allowing a second-comer to take a "free ride" on the innovator's advertising and good will;[20] (4) the need to protect an innovator whose unpatented product is still in the promotional stage;[21] (5) the commercial necessity of copying certain features of the innovator's product;[22] and (6) the existence of actual consumer confusion, whether established by a

14. The court admitted the survey as evidence over the defendant's objection that it was hearsay. The court explained that the admission was justified on either of two grounds: (a) the answers of the people surveyed were expressions of presently existing states of mind, attitudes, or beliefs, and such statements constitute an exception to the hearsay rule; or (b) a necessity exists for admitting the survey because of the inability to get other evidence of the same probative value. Zippo Mfg. Co. v. Rogers Imports, Inc., 216 F. Supp. 670, 683 (S.D.N.Y. 1963).

15. *Id.* at 688.

16. *Id.* at 696-97.

17. *Id.* at 697-98.

18. See Stern & Hoffman, *supra* note 6, at 944.

19. See Zippo Mfg. Co. v. Manners Jewelers, Inc., *supra* note 4, at 847-48.

20. Compare the statement of Brandeis, J., in Kellogg Co. v. National Biscuit Co., 305 U.S. 111, 122 (1938), that "sharing in the goodwill of an article unprotected by a patent or trade-mark is the exercise of a right possessed by all—and in the free exercise of which the consuming public is deeply interested," with that of Clark, J., dissenting in Chas. D. Briddell, Inc. v. Alglobe Trading Corp., 194 F.2d 416, 422 (2d Cir. 1952), that "much of modern advertising offends my sensibilities; on the other hand I cannot develop enthusiasm for the manufacturer who would rely on the advertising of others to market a poorer product, even at a lesser price."

21. Galbally, *Unfair Trade in the Stimulation of Rival Goods—The Test of Commercial Necessity*, 3 VILL. L. REV. 333, 334 (1958).

22. *Id.* at 341.

survey or otherwise. Had the court recognized and weighed these competing interests, its decision would have rested upon a more persuasive and convincing basis.