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Recent Cases

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RECENT CASES

Administrative Law—Due Process—Expulsion From Public University Requires Notice and Hearing

Nine pupils who engaged in a "sit-in" demonstration were expelled by the Alabama State Board of Education from a tax-supported college[1] for misconduct[2] without notice or a hearing. Six of these undergraduates instituted suit on the ground that expulsion without notice or an opportunity to be heard violates the due process clause of the fourteenth amendment to the United States Constitution. On appeal to the Fifth Circuit from a judgment for the defendant,[3] *held*, reversed. Procedural due process requires notice and an opportunity for a hearing before a student can be dismissed from a public college or university for misbehavior. *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961).

Whether some formal notice or hearing is a necessary prerequisite to dismissal of a student from a public institution of higher learning, absent a statute requiring formal charges and an opportunity to be heard,[4] is a question on which the authorities are not in agreement. The view that such administrative action is not within the scope of the due process clause has been based on a number of grounds: the inherent authority of the governing board of a college or university to discipline its pupils,[5] the wide discretion of school officials in such an area,[6] the possibility of flooding the federal district courts with litigation,[7] and the concept that the opportunity to attend a public college or university is a privilege as opposed to a right.[8] Advocates of the application of due process to expulsion proceedings in public schools have balanced the nature of the private interest impaired against the need that governmental or administrative authority be unfettered and determined that, due to the ignominies of

1. The institution from which the students were expelled was the Alabama State College, a state-supported school for Negroes located in Montgomery, Alabama.
2. Dismissal for academic reasons presents entirely different problems and is not treated in this comment.
3. Dixon v. Alabama State Bd. of Educ., 186 F. Supp. 945 (M.D. Ala. 1960).
4. Massachusetts and Pennsylvania are states with representative statutes requiring notice and a hearing as a prerequisite to expulsion of a student from a public school. MASS. ANN. LAWS c. 76, § 17 (1953); PA. STAT. ANN. tit. 24, § 13-1318 (1950).
5. State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822 (1942), *cert. denied,* 319 U.S. 748 (1943).
6. Anthony v. Syracuse Univ., 224 App. Div. 487, 231 N.Y. Supp. 435 (1928).
7. Cranney v. Trustees of Boston Univ., 139 F. Supp. 130 (D. Mass. 1956).
8. See Waugh v. Board of Trustees, 237 U.S. 589 (1915); 186 F. Supp. at 950. *But see* Cafeteria Workers v. McElroy, 367 U.S. 886 (1961); Slochower v. Board of Educ., 350 U.S. 551 (1956).

dismissal for misconduct, the true public interest requires that a student be expelled only after being given notice and a hearing.[9] This result has been reached by finding a fiduciary relationship between a school and its students, with the burden of proof on the administrators of a public institution to show a student guilty of alleged violations.[10]

In the principal case the court[11] concluded that the interest of pupils in notice and an opportunity to be heard prior to dismissal supersedes any possible infringement of the discretion of academic administrators.[12] The court stated that whenever a governmental body acts so as to injure an individual there is a constitutional requirement that the act be done in accordance with due process.[13] Taking cognizance of the fact that based on our societal values a college education is of increasing importance[14] the court noted that expulsion conld well prejudice a student from completing his education at any institution,[15] and at a minimum would injure a pupil by interrupting his studies at mid-term.[16] Although not saying so explicitly, the court rejected the ancient right-privilege doctrine, *i.e.*, "rights" are encompassed by due process, but "privileges" come outside its scope.[17] A substantive interest,[18] regardless of the terminology by which it is called, demands the safegnard of the essential elements of due process —notice and an opportunity to be heard. The procedural requirements necessary to satisfy the due process clause depend on the cirmumstances, individual rights, and interests involved.[19] The courts will not impose unreasonable or arbitrary restraints on the government. Thus the court concluded that in school expulsion situations though a trial-type hearing was not required, at least the rudiments of an adversary proceeding must be maintained.[20]

Due process of law embraces all those rights which courts must protect because they are basic to a free society,[21] and the right to educa-

9. Commonwealth *ex rel.* Hill v. McCauley, 3 Pa. County Ct. 77 (1887); Comment, 10 STAN. L. REV. 746 (1958).

10. Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406, 1407, 1410 (1957).

11. Judge Rives filed the majority opinion in which Judge Wisdom concurred. Judge Cameron dissented, primarily on the ground that the decision was against the weight of applicable law.

12. 294 F.2d at 156-59.

13. *Id.* at 155.

14. *Id.* at 157.

15. *Ibid.*

16. *Ibid.*

17. See DAVIS, ADMINISTRATIVE LAW § 69 (1951).

18. 294 F.2d at 155-59; *accord,* Knight v. State Bd. of Educ., 200 F. Supp. 174, 178 (M.D. Tenn. 1961) where the court said: "Whether the interest involved be described as a right or a privilege, the fact remains that it is an interest of almost incalculable value . . . ."

19. 294 F.2d at 155.

20. *Id.* at 159.

21. Wolf v. Colorado, 338 U.S. 25, 27 (1949).

tion is certainly fundamental today whatever it may have been in the past. The administrators of all institutions of higher learning whether publicly or privately operated should be allowed a wide area of discretion in the discipline of students in order that the schools can achieve their primary purpose and function at maximum efficiency.[22] The courts should use the utmost circumspection before censoring or reversing administrators as to matters pertaining to the governing of student conduct. Yet the burden placed upon the university by the requirements of notice and some form of hearing is not harsh in relation to the magnitude of the risk to students involved in expulsion proceedings.[23] Procedural due process is at least a synonym for "fair play,"[24] and the student should be afforded at a minimum that guarantee of fairness inherent in the basic requirements of notice and a hearing prior to dismissal for misconduct. Practically all the cases in this area have really turned on the sufficiency of notice and hearing[25] and have not been directed to the narrow point of whether or not notice or hearing were in fact constitutionally required.[26] In almost every instance the courts have sustained school authorities as to the sufficiency of notice and hearing,[27] primarily due to the wide range of authority given academic administrators in their disciplinary power. Some unfortunate dicta[28] found in the "sufficiency of hearing" cases led to a misguided belief as to the duty owed by a college to its students and the applicability of due process, but the rationale of the instant case has done much to settle the law in this area and should be uniformly followed. Confusion remains, however, as to what will satisfy the rudimentary requirements of notice and hearing which must be afforded a student in order to satisfy the due process clause. The decisions are at best vague, leaving no clear

22. Stetson Univ. v. Hunt, 88 Fla. 510, 516, 102 So. 637, 640 (1924); People *ex rel.* Latimer v. Board of Educ., 394 Ill. 228, 68 N.E.2d 305 (1946); State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 108, 113, 171 S.W.2d 822, 826-28 (1942), *cert. denied,* 319 U.S. 748 (1943).

23. Comment, 10 Stan. L. Rev. 746, 749-50 (1958).

24. Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123, 161 (1951).

25. See 180 Tenn. at 108, 171 S.W.2d at 826-27; Tanton v. McKenney, 226 Mich. 245, 197 N.W. 510 (1924); State *ex rel.* Ingersoll v. Clapp, 81 Mont. 200, 263 Pac. 433 (1928); People *ex rel.* Bluett v. Board of Trustees, 10 Ill. App. 2d 207, 134 N.E.2d 635 (1956); Commonwealth *ex rel.* Hill v. McCauley, 3 Pa. County Ct. 77 (1887).

26. In 81 Mont. at 216, 263 Pac. at 437 the court indicated by way of dicta that a public college is under a duty to grant a hearing.

27. See cases cited note 26 *supra.*

28. See People *ex rel.* Bluett v. Board of Trustees, 10 Ill. App. 2d 207, 211, 134 N.E.2d 635, 637 (1956) quoting from Smith v. Board of Educ., 182 Ill. App. 342, 346 (1914) where the court said: "In order to carry out the powers and duties of school directors . . . no form of trial or hearing is prescribed." See also 180 Tenn. at 111, 171 S.W.2d at 827 where the court states: "The due process clause of the Constitution . . . can have no application where the governing board of a school is rightfully exercising its inherent authority to discipline students."

standard or guidepost.[29] Certainly college officials should not be required to assume the role of the judiciary by preferring charges and proving them at a hearing clothed with all the attributes of a formal trial,[30] nor need the technical rules of procedure be followed.[31] It is submitted, however, that the alleged student violator should be fully informed as to the nature of the charges against him[32] and given every reasonable opportunity of making his defense before the proper board or authority by offering evidence of his innocence.[33] Although cross-examination as a matter of right would not seem to be a requisite due to impracticability and the possible detrimental effect on the institution and its student body,[34] the accused should at least be given the names of the witnesses against him[35] and the substance of their testimony,[36] as well as the right to counsel at the inquiry.[37] Above all, the burden should remain on the authorities of the school to prove to a reasonable satisfaction the acts charged[38] rather than leaving with the student the almost impossible task of showing that the institution's actions were arbitrary, uureasonable, or uulawful.[39]

29. The best guides can be found in 180 Tenn. at 109-10, 171 S.W.2d at 826; Seavey, *Dismissal of Students: "Due Process,"* 70 Harv. L. Rev. 1406, 1409-10 (1957); Comment, 10 Stan. L. Rev. 746, 749-50 (1958).

30. 294 F.2d at 159; Koblitz v. Western Reserve Univ., 21 Ohio C.C.R. (n.s.) 144, 157 (8th Cir. 1901), where the court said: "[I]n determining whether a student has been guilty of improper conduct . . . it is not necessary that the professors should go through the formality of a trial." *But see* Hill v. McCauley, 3 Pa. County Ct. 77 (1887).

31. 180 Tenn. at 109, 171 S.W.2d at 826.

32. *Ibid;* Comment, 10 Stan. L. Rev. 746, 749 (1958).

33. 180 Tenn. at 110, 171 S.W.2d at 826.

34. See State *ex rel.* Ingersoll v. Clapp, *supra* note 25, at 215, 263 Pac. at 437, where the requirement was criticized since the university has no power to administer the oath to insure trustworthiness; 180 Teun. at 110, 171 S.W.2d at 826, where it was said that informers might refuse to testify if subject to cross-examination. *But see* Commonwealth *ex rel.* Hill v. McCauley, 3 Pa. County Ct. 77 (1887), where cross-examination was held to be an integral part of a proper hearing; Seavey, *supra* note 29, at 1408-10, where its use in such proceedings is strongly advocated.

35. 180 Tenn. at 109-10, 171 S.W.2d at 826.

36. *Id.* at 109, 171 S.W.2d at 826; Comment, 10 Stan. L. Rev. 746, 749 (1958).

37. See 180 Tenn. at 105, 171 S.W.2d at 824.

38. See Commonwealth *ex rel.* Hill v. McCauley, *supra* note 34; Seavey, *supra* note 29, at 1410.

39. See Seavey, *supra* note 29, at 1406, where the author in criticism of the decision in People *ex rel.* Bluett v. Board of Trustees, *supra* note 28, says: "The student is left with the impossible task of proving that the academic judges have acted wantonly or corruptly without having the information from which evidence to support his charges can be found."

Antitrust Law—Investigatory Powers—Federal Trade Commission Has Right To Obtain Private Copies Of Privileged Census Information

During an investigation of antitrust violations, the Federal Trade Commission, pursuant to section 6(b) of the Federal Trade Commission Act,[1] issued orders directing petitioner to submit certain information including copies of its manufacturer's census reports. Petitioner refused to surrender the census reports, claiming they were privileged communications under the Census Act.[2] Thereafter the United States sought a mandatory injunction to enforce the orders.[3] Both the trial court and the court of appeals ruled that the requested copies of the census reports must be filed with the Commission.[4] On certiorari to the Supreme Court of the United States, *held*, affirmed. Private copies of census reports in the possession of a party can be obtained by the Federal Trade Commission for investigatory purposes without violating the privilege provisions of the Census Act. *St. Regis Paper Co. v. United States*, 368 U.S. 208 (1961).

The above action by the Federal Trade Commission originated during an investigation[5] to determine whether certain mergers and acquisitions of the

1. The act provides that the Commission shall have power, "To require, hy general or special orders, corporations engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time he granted in any case by the commission." 38 Stat. 721 (1914), 15 U.S.C. § 46(b) (1958). For a discussion of the statute see note 18 *infra*.

2. 13 U.S.C. §§ 8-9(a) (1958). The parties and the Court primarily relied on section 9(a) which reads: "Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—(1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or (3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports."

3. The United States also sought the statutory forfeiture of $100 for every day petitioner was in default of those orders directed specifically to it. Federal Trade Commission Act § 10, 38 Stat. 723 (1914), 15 U.S.C. § 50 (1958).

4. The trial court denied the forfeiture penalties because some of the requests were too vague to be enforced, but the court of appeals reversed holding that the penalties must he paid because of petitioner's failure to respond in good faith to the requests.

5. In 1956 the Federal Trade Commission requested petitioner to submit voluntarily certain information but only received partial compliance. After further demands

St. Regis Paper Co. violated section 7 of the Clayton Act.[6] The purpose of this section was to establish a test that is more inclusive than that of the Sherman Act, but which will not prohibit all acquisitions between competing companies.[7] Under this provision, a violation[8] is established when there is shown a reasonable probability of a substantial lessening of competition in a relevant market.[9] Traditionally, per se rules as to sufficiency of evidence have not been required[10] to prove a violation of section 7. Rather there has been a case by case analysis[11] of relevant economic data[12] pertaining to the character of the companies involved and

made during the years 1956 through 1959 were not complied with the Federal Trade Commission sought to compel production by court order. St. Regis Paper Co. v. United States, 368 U.S. 208, 213-14 (1961).

6. This provision provides: "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958). This is the 1950 amendment to section 7 of the 1914 Clayton Antitrust Act. For the legislative history of the amendment see Note, *Section 7 of the Clayton Act: A Legislative History*, 52 COLUM. L. REV. 766 (1952); H.R. REP. No. 1191, 81st Cong., 1st Sess. 8-9 (1949). For basic changes made by the amendment and its purposes see BURNS, A STUDY OF ANTITRUST LAWS 254 (1958); Adelman, *Acquire the Whole or Any Part of the Stock or Assets of Another Corporation*, in ABA, AN ANTITRUST HANDBOOK 195 (1958); FTC, REPORT ON CORPORATE MERGERS AND ACQUISITIONS 145, 156-60 (1955); S. REP. No. 132, 85th Cong., 1st Sess. (1957); H.R. REP. No. 1191, 81st Cong., 1st Sess. 8-9 (1949); S. REP. No. 1775, 81st Cong., 2d Sess. 4-5 (1950).

7. Handler & Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 COLUM. L. REV. 629, 662 (1961).

8. Under the original section 7 the courts applied the Sherman Act test, which was whether there was an *actual* restraint of trade, to determine if there was a violation. BURNS, *op. cit. supra* note 6, at 253. Under the amendment the courts are to emphasize Clayton Act tests and not the Sherman Act test. BURNS, *op. cit. supra* note 6, at 255, 323; Handler & Robinson, *supra* note 7, at 629, 648, 656; FTC REPORT, *op. cit. supra* note 6, at 156; S. REP. No. 1775, 81st Cong., 2d Sess. 4-5 (1950); H.R. REP. No. 1191, 81st Cong., 1st Sess. 8 (1949).

9. For cases holding that there must be a reasonable probability of lessening of competition in a relevant market, see United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957); American Crystal Sugar Co. v. Cuban-American Sugar Co., 259 F.2d 524, 527, (2d Cir. 1958); United States v. Brown Shoe Co., 179 F. Supp. 721 (E.D. Mo. 1959); United States v. Bethlehem Steel Corp., 21 F.R.D. 568 (S.N.N.Y. 1958). See BURNS, *op. cit. supra* note 6, at 277; KRONSTEIN, MILLER & SCHWARTZ, MODERN AMERICAN ANTITRUST LAW 52 (1958); Handler & Robinson, *supra* note 7, at 676.

10. *In re* Pillsbury Mills, Inc., 50 F.T.C. 555, 564 (1953) (no single set of standards can be used). See Handler & Robinson, *supra* note 7, at 664; Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 258 (1960) ("Congress (intended) to convey a middle ground between sheer speculation and rigorous and exacting predictions"); Markham, *Economic Analysis*, in AN ANTITRUST HANDBOOK 373, 376 (1958); BURNS, *op. cit. supra* note 6, at 278 (no one pattern of proof can meet the requirement of all cases).

11. *In re* Pillsbury Mills, Inc., *supra* note 10, at 565.

12. *Ibid.* See Bok, *supra* note 10, at 258, 292-95 (says the Federal Trade Commis-

the nature of their transactions,[13] the characteristics of the markets affected,[14] and immediate changes in the acquiring company and adjustments of other companies operating in these markets.[15] The information supplied to the Census Bureau is relevant to these issues, and access to a company's census reports would aid the Commission's investigation considerably. If parties refuse to co-operate the Fcderal Trade Commission can use its compulsory powers[16] to require the submission of information[17] subject to

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sion uses a variety of economic factors, but criticizes using all the relevant economic factors because it clogs the courts and detracts from accuracy of decisions); BURNS, *op. cit. supra* note 6, at 278, 324; FTC REPORT, *op. cit. supra* note 6, at 181; Markham, *supra* note 10, at 376 ("effective adjudication of merger cases is virtually impossible without economic analysis and economic evideuce"); Handler & Robinsou, *supra* note 7, at 676.

13. Such data includes facts about the acquired and acquiring compauies, including their relative size, measured by assets, total sales and total capacity, their major products, location of plants, their geographic market areas, methods of sale, classes of customers, sales of major products in major markets prior to acquisition, special technologies and growth history. FTC REPORT, *op. cit. supra* note 6, at 173. For similar provisions see copy of an address made by Attorney General Brownell, found in 1 TRADE REG. REP. ¶ 4310.16 (1954). See Bok, *supra* note 10, at 255-56 (the writer gives a list of economic factors suggested by the Attorney General, but criticizes him for not suggesting a way these factors are to be applied).

14. This includes facts similar to those found in note 13 *supra*, but related to the entire market rather than just to the acquired and acquiring companies. Some of the factors of the total market that are considered are what do the companies sell aud buy, the prices, differences in companies, the geographic markets, long run supply and demand picture, opportunities for new companies, and innovations in techniques. FTC REPORT, *op. cit. supra* note 6, at 173, 181-82. See 1 TRADE REG. REP. ¶ 4310.16 (1954); Bok, *supra* note 10, at 256. To secure the above facts the Federal Trade Commission questions various companies in the competing market and studies statistical tables put out by the Census Bureau. "Publications of the Bureau of the Census are considered the most important sources of this kind of economic statistics." FTC REPORT, *op. cit. supra* note 6, at 177.

15. *Id.* at 173, 181 (this information is obtained by broad market examinations and by questioning companies as to changes in their sales).

16. See generally KRONSTEIN, MILLER & SCHWARTZ, *op. cit. supra* note 9, at 170; See Babcock, *Legal Investigation*, in AN ANTITRUST HANDBOOK 385, 386 (1958): "This combination of fact finding power represents the broadest power available to any agency of the government." See *id.* at 386 for a discussion of the background of the compulsory powers of the Federal Trade Commission. The Commissioners of the Bureau of Corporations, the investigatory agency preceding the Federal Trade Commission, in its annual reports of 1904 and 1905 suggested the commission be given power to require reports and returns from corporations and a right of inspection of the books of corporations. "In recognition of this need, Cougress, in 1914, included in the Federal Trade Commission Act those additional powers which had been recommended . . . ." *Id.* at 386. These powers must not violate the fourth amendmeut guaranteeing freedom from unreasonable searches and seizures. United States v. Morton Salt Co., 338 U.S. 632, 647-51 (1950); United States v. Basic Prods. Co., 260 Fed. 472 (W.D. Pa. 1919). Furthermore, investigations must be more than mere "fishing expeditions." There must be a suspicion or charge of wrongdoing. FTC v. American Tobacco Co., 264 U.S. 298 (1924); United States v. Morton Salt Co., *supra.*

17. The Federal Trade Commission utilized section 6(b) of the Federal Trade Commission Act to get information from the St. Regis Paper Co. See uote 1 *supra.*

serious penalties[18] for failure to comply. The courts have become more lenient in upholding the investigatory requests of the Commission.[19] This broadening of the investigatory powers of the administrative agencies has tended to conflict with certain privileged communication statutes.[20] The existence and extent of the evidentiary privilege as granted by statute[21]

In United States v. Morton Salt Co., *supra* note 16, at 647-51 the Court said that section 6(b) could be used for investigatory purposes to see if its cease and desist orders were being complied with, and at 632 described the power under 6(b) as "the power to get information from those who best can give it and who are most interested in not doing so." Legislative intent is shown in H.R. Rep. No. 533, 63d Cong., 2d Sess. 4 (1914) which says "if [the] annual report does not adequately disclose its organization, financial condition, business practices, or relation to other corporations, there can be obtained by a special report such additional information as the Commission may deem necessary." In this case the Federal Trade Commission used section 6(b) only to uncover possible violations of section 7 although no complaint had been filed. "This is the first time a § 6(b) order has ever been issued by the Commission prior to the filing of a complaint. It is said that the use of the process of 6(b) has never before been necessary because of voluntary disclosures." United States v. St. Regis Paper Co., 181 F. Supp. 862 (S.D.N.Y. 1960). The lower court, relying on United States v. Morton Salt Co., *supra* note 16, held this to be a proper use of the power and this ruling was not appealed. In *Morton Salt Co.* the court held that section 6(b) could be used in furtherance of any duty which the act empowered the Commission to perform, and that this power granted to the Federal Trade Commission by 6(b) has not been forfeited by nonuse.

Additional legislation has recently been introduced in S. 167 by Senator Kefauver, authorizing the Attorney General to compel the production of documentary evidence required in civil investigations for the enforcement of the antitrust laws. See CCH, 1961-62 Congressional Index 2311.

18. See Federal Trade Commission Act § 10, *supra* note 3.

19. Babcock, *supra* note 16, at 389, 392 says that early requests for reports and subpoenas by administrative agencies were defeated by constitutional arguments, based on privacy, searches and seizures, lack of probable cause and self-incrimination. See Maynard Coal Co. v. FTC, 22 F.2d 873 (D.C. Cir. 1927); FTC v. National Biscuit Co., 18 F. Supp. 667 (S.D.N.Y. 1937); Claire Furnace Co. v. FTC, 285 Fed. 936 (D.C. Cir. 1923), *rev'd*, 274 U.S. 160 (1927). But the development of administrative law has forced a change in attitude toward the function of the administrative agency and "it now appears that, given a sufficiently broad statute, a lawful purpose and a reasonable demand, the courts will do all in their power to honor administrative subpoenas." Babcock, *supra* note 16, at 392. See United States v. Morton Salt Co., *supra* note 16; Durkin v. Fisher, 204 F.2d 930 (7th Cir. 1953); Tobin v. Bachs & Rumbaugh, 201 F.2d 223 (5th Cir. 1953); SEC v. Vacuum Can Co., 157 F.2d 530 (7th Cir. 1946); United States v. United Shoe Mach. Corp., 76 F. Supp. 315 (D. Mass. 1948).

20. For a discussion of privileged communication statutes see McCormick, Evidence § 149, at 311 (1954) (McCormick infers that the legislatures, to encourage frank and full reports, intended that the information be privileged to some extent); 8 Wigmore, Evidence § 2377 (McNaughton ed. 1961) (it is expedient for the Government to cloak the information in some special degree of secrecy in exchange for ready and truthful disclosure).

21. 8 Wigmore, *op. cit. supra* note 20, § 2377. The scope of privileged communications varies from that of the statutes which merely bar extrajudicial disclosure of the report with no evidentiary privilege, to that where there is an evidentiary privilege of the report itself, denying its use in court. There is a question as to whether such evidentiary privilege is carried over to copies of the report in a reporting party's possession.

is usually expressed or at least implied by the wording of the enactment,[22] and the courts are reluctant to find a privilege where not required to do so by the language and the subject matter.[23] Prior to this case the extent to which file copies of census reports[24] were privileged has been the subject of some disagreement among the courts. The Seventh Circuit Court of Appeals[25] had found that the statutory privilege was intended to extend to the party reporting and not merely to the officials of the Census Bureau.[26] The court further emphasized that the corporation had relied on representations of confidentiality made by the Government.[27] The Second Circuit

22. In construing income tax statutes the courts have held that the INT. REV. CODE of 1954, §§ 6103, 7213(a) creates an evidentiary privilege prohibiting disclosure of tax returns in court by the administrative officials. But the courts have generally held that copies in the hands of taxpayers are not privileged. See Volk v. Paramount Pictures, Inc., 19 F.R.D. 103 (D. Minn. 1950); Connecticut Importing Co. v. Continental Distilling Corp., 1 F.R.D. 190 (D. Conn. 1940). *Contra,* as to copies, Maddox v. Wright, 103 F. Supp. 400 (D.C. 1952); O'Connell v. Olsen & Ugelstadt, 10 F.R.D. 142 (N.D. Ohio 1949); Garrett v. Faust, 8 F.R.D. 556 (E.D. Pa. 1949). It has further been held that the taxpayer can be required to obtain copies from tax officials for use in court. Paramount Film Distrib. Corp. v. Ram, 91 F. Supp. 778 (E.D.S.C. 1950); The Sultana, 77 F. Supp. 287 (W.D.N.Y. 1948); Reeves v. Pennsylvania R.R., 80 F. Supp. 107 (D. Del. 1948). See 8 WIGMORE, *op. cit. supra* note 20, § 2377, particularly n.5; 4 MOORE, FEDERAL PRACTICE 1168 n.24 (2d ed. 1950); 10 VAND. L. REV. 150, 156-57 (1956). Courts have adopted a stricter view in construing privileges of selective service laws, indicating that a party may waive his privilege but courts cannot compel him to waive it. These laws and regulations have been interpreted as creating a privilege from production of official records and also of testimony of registrants obtained under the Selective Training and Service Act of 1940. See Gray v. Bernuth, Lembcke Co., 8 F.R.D. 358 (E.D. Pa. 1948); Federal Life Ins. Co. v. Holod, 30 F. Supp. 713 (M.D. Pa. 1940); Stein v. Stein, 132 Misc. 886, 230 N.Y. 757 (Monroe County Ct. 1928). See generally MOORE, *op. cit. supra;* 8 WIGMORE, *op. cit. supra* note 20 at 783.

23. United States v. St. Regis Paper Co., 285 F.2d 607 (2d Cir. 1960); see 8 WIGMORE, *op. cit. supra* note 20.

24. In FTC v. Orton, 175 F. Supp. 77 (S.D.N.Y. 1959) "all schedules submitted to Bureau of Census" were asked for by a subpoena duces tecum. The court refused saying that this was referring to actual reports that were privileged; on petition for rehearing, which was denied, 177 F. Supp. 241 (S.D.N.Y. 1959), the court said a refusal to rule on the legality of requiring file copies was proper since that was not the issue.

25. FTC v. Dilger, 276 F.2d 739 (7th Cir. 1960). Here there was a proceeding to enforce a subpoena duces tecum to produce file copies of manufacturer's census reports. The subpoena was worded the same as in FTC v. Orton, *supra* note 24, but the court said that it was understood by all the parties that the request referred to retained copies in the corporate files.

26. To support this theory the court relied on United States v. Bethlehem Steel Corp., 21 F.R.D. 568, 570-71 (S.D.N.Y. 1958) which said that where Congress imposed a duty to disclose confidential information under the Census Act, the privilege created and the confidence to be respected was in favor of the corporation filing the report.

27. The court first looked at the following wording that is found both on the report forms and also on the forms which are marked "Keep this copy for your files." "Confidential—This report is required by Act of Congress . . . , (13 U.S.C. 131 and 224). Your report is confidential and only sworn Census employees will have access to it. It cannot be used for purposes of taxation, investigation, or regulation." 368

rejected these arguments in ruling on the instant case.[28]

As a basis for its decision, the Supreme Court declared that in construing a statutory privilege it has a duty to avoid suppressing otherwise competent evidence, unless the statute, strictly construed, requires such a result. Applying a "literal" construction of the Census Act, the Court found that section 9 did not "clothe census information with secrecy" nor "prohibit the use of the reports per se." The act only restricts their use while in the hands of governmental officials and grants no immunity to copies. If Congress had intended to protect copies from production, it would have expressly said so. Neither the courts nor administrative agencies by their representations could extend the privilege to cover such copies. The Court further reasoned, as the lower courts had, that the same principles which made copies of income tax returns available to investigators should apply to copies of the census reports.[29] Nor did this result seem unduly harsh since the act did not require that copies be retained by reporting companies and the Commission could obtain the identical information by use of special reports.[30]

The decision in this case raises two basic policy questions. First, whether the information in census reports is *necessary* for investigation of section 7 violations? The Court is somewhat paradoxical in its treatment of this problem for at one place it implies that this information is necessary by

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U.S. at 216. Next the court referred to the following statement by President Hoover admonishing reporting companies: "'[T]he Census has nothing to do . . . with the enforcement of any national, state or local law or ordinance. There need be no fear that any disclosure will be made regarding any individual person or his affairs. For the due protection of the rights and interests of the persons furnishing information every employee of the Census Bureau is prohibited, under heavy penalty, from disclosing any information which may thus come to his knowledge.'" Proclamation by President Hoover, Nov. 22, 1929, 46 Stat. 3011; 368 U.S. at 217. Finally the court relied on representations made by the Bureau officials. In 1955 the Director of the Bureau of Census sent out letters requesting that file copies of census reports be kept and instructing how they should be used. In addition, he specifically called attention to the fact that information on census reports is confidential, and cannot be used for purposes of taxation, regulation or *investigation*, FTC v. Dilger, *supra* note 25, at 743. In this case the court related that "the Bureau is said to have advised reporting companies that they [copies] are confidential." 368 U.S. at 216. The court felt that all of the above representations would cause reporting parties to believe that copies were also confidential.

28. United States v. St. Regis Paper Co., 285 F.2d 607 (2d Cir. 1960), an appeal from United States v. St. Regis Paper Co., 181 F. Supp. 862 (S.D.N.Y. 1960).

29. See note 22 *supra*, concerning privileges as to income tax returns. If the analogy to income tax returns is extended any further, reporting companies who have not kept file copies may be required to obtain copies from the Census Bureau for use in court. This would possibly upset the reasoning of the court in saying the decision was not harsh because they were not required to keep copies.

30. Mr. Justice Black, Mr. Justice Whittaker and Mr. Justice Stewart dissented, primarily on the reasoning presented by the Seventh Circuit Court of Appeals that the representations of governmental agencies and officials as to confidentiality should not be ignored by other agencies of the Government or by the courts.

saying that it must narrowly construe the Census Act so as not to suppress competent evidence. Yet it later justifies its decision by reasoning that the identical information could be required by special reports, which shows that the Commission does not have to use these census reports to get the evidence it needs. The conclusion seems to be that copies of census reports are very useful and time-saving in Federal Trade Commission investigations, but are not absolutely necessary for obtaining the desired information.[31] Second, if there is a conflict between the confidential privilege of copies of census reports, as represented by the Census Bureau, and the investigatory powers of the Federal Trade Commission which should prevail? The majority of the Court resolved this question by broadly construing the Federal Trade Commission Act while narrowly construing the Census Act, reaching the conclusion that there was no conflict because the privilege did not extend to the copies. The dissent,[32] in a well reasoned discussion, was in accord with the Census Bureau, the Department of Commerce, the Bureau of the Budget[33] and the Solicitor General[34] that the majority view ignores the "good faith" representations by the Government[35] and allows the Federal Trade Commission to do indirectly what it cannot do directly.[36] There is reason to believe that the ruling of the majority will materially impede the future effectiveness of the Census Act by discouraging full and accurate reports by companies who

31. See note 14 *supra* concerning the use of census statistics of the overall market. In the Brief for the United States, pp. 39-42, the Solicitor General emphasized the usefulness in using the census report of the individual company to compare with census statistics over the whole market because they are prepared on the same basis and can thus be easily correlated. He further says most of this same material could be obtained otherwise but it would be very time consuming. The Government can obtain identical information by special reports. 368 U.S. at 220.

32. *Id.* at 227.

33. "[T]he Department of Commerce, Census Bureau and the Bureau of the Budget believe that the copies are not subject to legal process . . . ." *Id.* at 217.

34. "The Solicitor General, 'fully recognizing the delicate balance of opposing considerations,' has concluded 'on balance' that the copies are not subject to compulsive production." *Id.* at 217. The United States was primarily claiming a waiver of privilege rather than lack of privilege. "The Solicitor General contends that for the purposes of this case petitioner has waived the point by voluntarily submitting like data to the Commission during its investigation herein." *Ibid.* This was claimed because petitioner had submitted some census reports but refused others. "It is the opinion of the Solicitor General, therefore, that although there are strong arguments for either interpretation, the balance favors the construction which accords the statutory privilege to copies of compulsory census reports which are kept at the request of the Census Bureau for its statistical purposes." Brief for the United States, p. 49.

35. For good faith representations see note 27 *supra.* See 368 U.S. at 216 (majority) and 368 U.S. at 228-29 (dissent). See FTC v. Dilger, *supra* note 25, at 744 where the court says "these assurances of confidentiality and protection constitute a pledge of good faith on the part of the Congress, the President and the Department of Commerce. . . . The United States has given its word and should be permitted to keep it."

36. 368 U.S. at 217; FTC v. Dilger, *supra* note 25, at 744.

may now, justifiably, fear this information will be used against them. The position of the dissent avoids this difficulty by finding that copies were intended to be included in the confidential privilege of the Census Act, thus preserving its effectiveness, without significantly limiting the Federal Trade Commission Act or restricting the Federal Trade Commission investigations.

Constitutional Law–Due Process–Escheat By One State of a Fund Claimed By Other States Held To Violate Due Process

Pennsylvania brought an action under its escheat statute[1] against Western Union, a New York corporation doing business in all fifty states, to recover money deposited for transmission in the company's Pennsylvania offices but unclaimed by either the intended recipient or sender.[2] Western Union resisted the escheat primarily[3] on the grounds that the Pennsylvania court's judgment would not be a bar to liability to other states for the same funds, and therefore, in violation of the due process elause of the fourteenth amendment. The trial court held that Pennsylvania's personal jurisdiction over the company gave it jurisdiction over the intangible res and that full faith and credit would protect the company from escheat

1. "(c) Whensoever any real or personal property within or subject to the control of this Commonwealth has been or shall be and remain unclaimed for the period of seven successive years, such real or personal property, together with the rents, profits, accretions and interest thereof or thereon, shall escheat to the Commonwealth subject to all legal demands on same." PA. STAT. ANN. tit. 27, § 333(c) (1958).

2. Under Western Union's procedure the sender filled out a money order application form at the company's office in Pennsylvania, paid the principal and the tolls. A telegraph message was then transmitted to its office nearest the designated payee, directing that office to pay the principal amount to the payee in the form of a negotiable draft. If the payee could not be located within seventy-two hours, the destination office returned a message to the office of origin advising it of the failure to locate. The office of origin then made a refund to the sender in the form of a negotiable instrument of the sender could be found.

All money received in the telegraph money order phase of business was mingled with other funds of the branch office and any excess over operating needs was eventually transfered to the home office in New York.

The fund in this case was represented by $6,729.72 of unpaid intrastate drafts plus $33,853.82 of unpaid interstate drafts less $725.85 already escheated by New York.

3. Other objections were Pennsylvania's inability to prevent liability to the holders of the outstanding negotiable drafts and the failure to give adequate notice of the escheat action to the last known owners. The United States Supreme Court recognized the weakness of the Pennsylvania judgment but felt that multiple liability to rival states was more important than the above objections and therefore did not comment on the latter.

by another state.[4] The Pennsylvania Supreme Court affirmed.[5] On appeal to the Supreme Court of the United States, *held*, reversed. A state escheat judgment against the holder of unclaimed funds to which another state has substantial claims is in violation of due process because the forum state cannot make the rival state a party nor otherwise render a judgment which would bar the rival claims to the same funds. *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71 (1961).

"Where a thing is subject to the judicial jurisdiction[6] of a state, an action may be brought to affect the interests in the thing of all persons in the world; such an action is called a proceeding in rem."[7] The location of tangible things in the forum state gives judicial jurisdiction to that state.[8] However, intangibles have no physical location and therefore the determination of judicial jurisdiction over them must be made from "a common sense appraisal of the requirements of justice and convenience . . . ."[9] in the light of the purpose for which jurisdiction is to be employed. In prior escheat cases the Court has upheld findings of judicial jurisdiction over intangibles based upon various contacts,[10] with personal jurisdiction over the holder appearing to be the most important.[11] Furthermore, once

4. Commonwealth v. Western Union Tel. Co., 73 Dauph. Co. Rep. 160, 167 (1958).

5. Commonwealth v. Western Union Tel. Co., 162 A.2d 617 (Pa. 1960).

6. Judicial jurisdiction means that "a state must have certain minimum contacts with the parties or their property in order to possess legal power to exercise authority through its courts." RESTATEMENT, CONFLICTS, Introductory Note at 37 (Tent. Draft No. 3, 1957). Since Pennsylvania was acting under its own escheat statute it must also have legislative jurisdiction so that its law can be applied to create or affect legal interests in the fund. Both types of jurisdiction are essential in escheat cases yet the courts often fail to distinguish the two, apparently assuming legislative jurisdiction once they find judicial jurisdiction over the property in question. Nevertheless, they are separate requirements, and when more than one claiming state has reasonable connections for the exercise of both, the right to escheat must go to the state having the *superior* contacts if double liability is to be avoided and a standard more equitable than a race to the courthouse be used.

7. RESTATEMENT, CONFLICTS, Introductory Note at 16, 17 (Tent. Draft No. 4, 1957).

8. *Id.* § 98, at 19.

9. Severnoe Sec. Corp. v. London & Lancashire Ins. Co., 255 N.Y. 120, 123, 174 N.E. 299, 300 (1931) (Cardozo, C.J.).

10. Security Sav. Bank v. California, 263 U.S. 282 (1923) (escheat by California of bank deposits from a California corporation, deposit contracts made in California); Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944) (also bank deposits); Connecticut Mut. Life Ins. Co. v. Moore, 333 U.S. 541 (1948) (escheat by New York of unclaimed insurance proceeds from foreign corporation on policies delivered in New York on the lives of New York residents, payable to New York beneficiaries); Standard Oil Co. v. New Jersey, 341 U.S. 428 (1951) (escheat from domestic corporation of unclaimed stock and dividends belonging to nonresident owners).

11. "It was not solely the fact that the contracts for bank deposits were made in California and Kentucky that gave those states power over the abandoned deposits. . . . The controlling fact was that the banks and the depositors could be served with process, either personally or by publication, to determine rights in this chose in action." Standard Oil Co. v. New Jersey, 341 U.S. 428, 437-38 (1951).

The Pennsylvania Supreme Court in the present case said "that the *res* of the escheat proceedings, is, contrary to the appellant's contention, within the control of the Court found sufficient basis for judicial jurisdiction it assumed that full faith and credit would protect the holder from escheat of the same intangible by another state.[12] However, in none of these cases was the Court faced with actual claims by more than one state.[13]

In the present case the Court was confronted with rival claims by two states,[14] each of which had substantial contacts for judicial jurisdiction over the defendant. Therefore, a judgment by Pennsylvania would not be a bar to an identical recovery by New York because New York could not be made a party nor would it have to abide by the Pennsylvania finding of jurisdiction over the fund.[15] The resulting possibility of multiple liability of Western Union made the Pennsylvania judgment a violation of due process. The constitutional violation, the Court reasoned, could be avoided if the rival claims to escheat were settled in a court with power to bind all parties with an interest in the fund, and this Court was available under the provision of the United States Constitution allowing the Supreme Court of the United States to take original jurisdiction over controversies between states.

Under this decision an obligor of unclaimed intangibles should be able to obtain a dismissal of a state escheat proceeding by showing that another state is asserting a rival and substantial right to escheat. A showing of mere possibility of such a claim may not be sufficient,[16] but the Court thought that New York's claim was sufficient in the present case because that state had previously escheated a small portion of the fund in question and as amicus curiae made known its claim to the remainder. It will be necessary for one of the claiming states to petition the Supreme Court of the United States for exercise of its original jurisdiction if it wishes to pursue its escheat claim.[17] This relief is similiar to that granted in *Texas v. Florida*,[18] which was treated as a bill in the nature of interpleader even

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the Commonwealth. It is within the control of the Commonwealth because the holder Western Union is subject to the jurisdiction of the Courts of the Commonwealth." 162 A.2d at 620.

12. "The *res* is the debt and the same rule applies as with tangible property. . . . [T]he same debts or demands against appellant cannot be taken by another state. The Full Faith and Credit Clause bars any such double escheat." Standard Oil Co. v. New Jersey, 341 U.S. 428, 443 (1951).

13. "The claim of no other state to this property is before us . . . ." *Ibid.*

14. 368 U.S. at 74.

15. See *id.* at 73, citing Pennoyer v. Neff, 95 U.S. 714 (1877) and Riley v. New York Trust Co., 315 U.S. 343 (1942). See also Moore & Oglebay, *The Supreme Court and Full Faith and Credit*, 29 VA. L. REV. 557 (1943); Comment, 59 MICH. L. REV. 756, 770 (1961); RESTATEMENT, CONFLICTS §§ 42(a), (b), 43 (Tent. Draft. No. 3, 1957).

16. See Standard Oil Co. v. New Jersey, 341 U.S. 428, 443 (1951).

17. The holder cannot ask for this relief due to the eleventh amendment. See Worcester County Trust Co. v. Riley, 302 U.S. 292 (1937); Chafee, *Federal Interpleader Since the Act of 1936*, 49 YALE L.J. 377, 383-93 (1940).

18. 306 U.S. 398 (1939).

though the petitioning state was not a stakeholder, as is generally required for interpleader.[19] The Supreme Court indicated that after it takes original jurisdiction it may try the case itself or refer it to a federal district court. In either instance the main issue will then be which state has superior contacts with the fund in question for escheat purposes, a matter expressly left unanswered in the present opinion and in which the Court could use one of several solutions. It could balance the contacts on an *ad hoc* basis or set up speeific contacts which will prevail whenever present, such as state of incorporation of the holder as recommended by Mr. Justice Stewart in his memorandum to the opinion. Another possibility would be a finding that the rival states are substantially equal in contacts and entitled to a proportionate distribution among them. Regardless of what solution the Court uses the relief offered by the decision in this case, while it leaves some problems unsolved, will be welcomed by holders of unclaimed intangibles with multi-state contacts[20] and may also encourage other states to adopt the Uniform Disposition of Unclaimed Property Act.[21]

Sales—Warranty—Advertisement That Cigarettes Are Harmless Held An Express Warranty

An action was brought alleging that plaintiff had contracted lung cancer as a result of smoking cigarettes manufactured by defendant. One ground on which plaintiff sought recovery was breach of an express warranty.[1] It was alleged that certain advertisements stated that smoking defendant's cigarettes would not be harmful to the smoker[2] and that in reliance on this statement plaintiff smoked defendant's cigarettes and as a result was stricken with lung cancer.[3] The United States District Court for the Western

19. Chafee, *Federal Interpleader Since the Act of 1396,* 49 YALE L.J. 377, 389 (1940).

20. For comments on the extent of the multiple escheat danger to corporations due to widespread adoption of comprehensive escheat statutes, see Ely, *Escheats: Perils and Precautions,* 15 BUS. LAW. 791 (1960).

21. For comment on the extent of present adoption of this act and its method of solution to multiple escheat problems, see Comment, 59 MICH. L. REV. 756, 777 (1961); Ely, *Escheats: Perils and Precautions,* 15 BUS. LAW. 791 (1960).

1. Plaintiff brought this action on two grounds, one being that of breach of warranty and the other being on the ground of negligence.

2. The advertisement stated: "Nose, throat, and accessory organs not adversely affected by smoking Chesterfields." This advertisement was used in a nation-wide campaign both in the press and on television.

3. The issue which must be decided before the question of the existence or non-existence of an express warranty need be determined is that of the causal relationship between smoking and the lung cancer of the plaintiff. In the instant case, plaintiff

District of Pennsylvania dismissed the action as founded upon breach of warranty.[4] On appeal, *held,* reversed and remanded. Statements by a manufacturer in an advertisement to the effect that smoking its brand of cigarettes will not be harmful to the smoker constitute an express warranty. *Pritchard v. Liggett & Myers Tobacco Co.,* 295 F.2d 292 (3d Cir. 1961).

The general rule is that an advertisement containing statements that a manufacturer's product possesses certain qualities constitutes an express warranty.[5] Some courts require that the ultimate purchaser rely on these statements[6] while other courts do not make such reliance an element of the purchaser's cause of action.[7] Since breach of warranty was considered as an action *ex contractu,* early cases required that there be privity of contract between the manufacturer and the ultimate consumer.[8] However, there

presented many eminently qualified expert witnesses who testified that in their opinion plaintiff's lung cancer had been caused by smoking. Typical of this testimony was that of Dr. Charles S. Cameron, Dean of the Hahnemann Medical College and former Medical and Scientific Director of the American Cancer Society: "In my opinion it is probable that his cigarette smoking caused it." Record, vol. 1, p. 440a, Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961). There have been other cases which required the courts to determine whether an injury caused or aggravated a cancer of the injured, *e.g.,* Scobey v. Southern Lumber Co., 218 Ark. 671, 238 S.W.2d 640 (1951) (cancer of the lung); Lee v. Blessing, 131 Conn. 569, 41 A.2d 337 (1945) (cancer of the breast); Coddaire v. Sibley, 270 Mass. 41, 169 N.E. 797 (1930) (cancer of the jaw). For a general discussion of the difficulties surrounding this subject, see Russell & Clark, *Medico-Legal Considerations of Trauma and Other External Influences in Relationship to Cancer,* 6 VAND. L. REV. 868 (1953) and Small, *Gaffing at a Thing Called Cause: Medico-Legal Conflicts in the Concept of Causation,* 31 TEXAS L. REV. 630 (1953).

4. On the issue of negligence, the trial court granted defendant's motion for a directed verdict. This court stated that a supplier of a chattel who knows or should know that its use is dangerous to human life unless certain precautions are taken is under a duty to warn the consumer of such dangers and to suggest what proper precautions should be taken. This is the duty that has been imposed on manufacturers of inherently dangerous products which include products for human consumption. See, *e.g.,* Hopkins v. E. I. du Pont de Nemours, 199 F.2d 930 (3d Cir. 1952); Huset v. J. I. Case Threshing Mach. Co., 120 Fed. 865 (8th Cir. 1903). See also RESTATEMENT, TORTS § 388 (1934).

5. *E.g.,* Lane v. C. A. Swanson & Sons, 130 Cal. App. 2d 210, 278 P.2d 723 (Dist. Ct. App. 1955); Matthew v. Croene, 2 Ill. App. 2d 529, 119 N.E.2d 830 (1954); King v. Ohio Valley Terminix Co., 309 Ky. 35, 214 S.W.2d 993 (1948); Turner v. Central Hardware Co., 353 Mo. 1182, 186 S.W.2d 603 (1945); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958); Meyer v. Packard Cleveland Motor Co., 106 Ohio St. 328, 140 N.E. 118 (1922); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932).

6. "[A] positive affirmation of fact by the seller relating to the subject matter of the sale may constitnte an express warranty if it induced the sale and the buyer relied upon it." Turner v. Central Hardware Co., *supra* note 5, at 606. See Landman v. Bloomer, 117 Ala. 312, 23 So. 75 (1898); Harrington v. Smith, 138 Mass. 92 (1884); Ralston Purina Co. v. Cox, 141 Neb. 432, 3 N.W.2d 748 (1942).

7. *E.g.,* Mannsz v. Macwhyte Co., 155 F.2d 445 (3d Cir. 1946); Worley v. Procter & Gamble Mfg. Co., 241 Mo. App. 1114, 253 S.W.2d 532 (1952).

8. Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842). There

seems to be a trend in some recent cases to the effect that privity of contract will not be required in certain types of cases.[9] The primary problem to be determined by the courts is what statements made by the manufacturer in his advertisements are sufficiently binding to be construed as express warranties. On one hand it has been held that a statement that "Tide is kind to hands" constituted not an express but an implied warranty[10] while on the other hand the statement that a product was "very gentle" has been held to constitute an express warranty.[11] In some cases the statements made by the manufacturer are so definite that the courts have had little trouble finding express warranties[12] while other courts appear to strain their interpretation of an advertisement so that the consumer can be given some relief.[13] Whether an advertisement stating that smoking a particular brand of cigarettes is harmless constitutes an express warranty has not been heretofore decided,[14] but certain cigarette manu-

are also some relatively recent cases that have held that the requirement of privity should be met, *e.g.*, Alexander v. Inland Steel Co., 263 F.2d 314 (8th Cir. 1958); Atwell v. Pepsi-Cola Bottling Co., 152 A.2d 196 (D.C. Munic. Ct. App. 1959); Shoopak v. United States Rubber Co., 183 N.Y.S.2d 112 (Sup. Ct. 1959).

9. "It would be unjust to recognize a rule that would permit manufacturers of goods to create a demand for their products by representing that they possess qualities which they, in fact, do not possess, and then, because there is no privity of contract existing between the consumer and the manufacturer, deny the consumer the right to recover if damages result from the abscnce of those qualities, when such absence is not readily noticeable." Baxter v. Ford Motor Co., *supra* note 5, at 412. See also Burr v. Sherwin Williams Paint Co., 42 Cal. 2d 682, 268 P.2d 1041 (1954); Chanin v. Chevrolet Motor Co., 89 F.2d 889 (7th Cir. 1937).

The other exception to the general rule requiring privity is in the area of food and drug cases, but there what the warranty dealt with was an implied warranty of fitness. See, *e.g.*, Dobrenski v. Blatz Brewing Co., 41 F. Supp. 291 (W.D. Mich. 1941); Klein v. Duchess Sandwich Co., 14 Cal. 2d 272, 93 P.2d 799 (1939); Heimsoth v. Falstaff Brewing Corp., 1 Ill. App. 2d 28, 116 N.E.2d 193 (1953); Kroger Grocery & Baking Co. v. Schneider, 249 Ky. 261, 60 S.W.2d 594 (1933). This position has also been adopted by RESTATEMENT (SECOND), TORTS § 402A (Tent. Draft No. 6, 1961): "One engaged in the business of selling food for human consumption who sells such food in a defective condition unreasonably dangerous to the consumer is subject to liability for bodily harm thereby caused to one who consumes it even though . . . (b) the consumer has not bought the food from or entered into any contractual relation with the seller."

10. Worley v. Procter & Gamble Mfg. Co., *supra* note 7.

11. Rogers v. Toni Home Permanent Co., *supra* note 5.

12. Lane v. C. A. Swanson & Sons, *supra* note 5; Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N.W. 309 (1939); Simpson v. American Oil Co., 217 N.C. 542, 8 S.E.2d 813 (1940).

13. Free v. Sluss, 87 Cal. App. 2d 933, 197 P.2d 854 (San Diego County Super. Ct. 1948); Brown v. Globe Labs. Inc., 165 Neb. 138, 84 N.W.2d 151 (1957); Rogers v. Toni Home Permanent Co., *supra* note 5.

14. Plaintiff brought an action against a cigarette manufacturer to recover for her husband's pain, suffering and death due to lung cancer which plaintiff alleged was eaused by smoking defendant's cigarettes. The action was brought in deceit on the basis of an advertisement that stated "20,000 doctors say that 'Camel' cigarettes are healthful" and that "'Camel' cigarettes are harmless to the respiratory system." The court did not discuss express warranty but stated that plaintiff's complaint stated a

facturers have been the subject of actions by government regulatory agencies to prevent them from using advertisements much like those in the instant case.[15]

The majority in the instant case found that the advertisements[16] made by the defendant undoubtedly created an express warranty.[17] However, Judge Goodrich in a concurring opinion used the applicable Pennsylvania statute[18] on which to base his finding of an express warranty. He concluded that if there was an affirmation that the product was harmless and it later turned out to be harmful, there was a breach of warranty. The concurring opinion went still further and stated that even if defendant was still uncertain whether smoking was harmful or not, an advertisement stating that such smoking produced no adverse effects would render defendant liable if a purchaser relied on this assertion and subsequently developed cancer. However, this was the point at which Judge Goodrich drew the line and suggested that cigarettes should be put in the same classification as intoxicating liquors by requiring that before the manufacturer can be held liable he must have told the consumer that the product was harmless or the product itself turned out to be adulterated. The court determined that these advertisements caused plaintiff to rely on their assertions of safety and that the question of whether it was reasonable for him so to rely was a question for the jury.[19] This holding, along with the

cause of action in deceit. However, on a later appeal, summary judgment was given for the defendant because the court said there was no question of fact for the jury concerning the time when such advertisements were published. Cooper v. R. J. Reyonds Tobacco Co. This case involved two court of appeal decisions, 234 F.2d 170 (1st Cir. 1956), and 256 F.2d 464 (1st Cir.), *cert. denied,* 358 U.S. 875 (1958), *affirming* 158 F. Supp. 22 (D. Mass. 1957). See also Mitchell v. American Tobacco Co., 183 F. Supp. 406 (M.D. Pa. 1960); Ross v. Philip Morris Co., 164 F. Supp. 683 (W.D. Mo. 1958).

15. See, *e.g.*, R. J. Reynolds Tobacco Co. v. FTC, 192 F.2d 535 (7th Cir. 1951); FTC v. Liggett & Myers Tobacco Co., 108 F. Supp. 573 (S.D.N.Y. 1952); R. J. Reynolds Tobacco Co., 46 F.T.C. 706 (1950).

16. See note 2 *supra.*

17. Judge Staley states that "the defendant, by means of various advertising media, not only repeatedly assured plaintiff that smoking Chesterfields was absolutely harmless, but in addition the jury conld very well have concluded that there were express assurances of no harmful effect on the lungs." Pritchard v. Liggett & Myers Tobacco Co., *supra* note 2, at 296.

18. "Express Warranties by Affirmation, Promise, Description, Sample. (1) Express warranties by the seller are created as follows: (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to tho affirmation or promise. (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description. . . . (2) It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty." PA. STAT. ANN. tit. 12A, § 2-313 (Supp. 1961).

19. "We think that the clear import of this advertising campaigu was to lead smokers

finding that the notice of breach given by the plaintiff was timely, constituted the ground for reversal by this court.[20]

Although advertisements constituting express warranties have covered a host of other products,[21] apparently this is the first time that such warranties have been extended to cigarette advertisements because of the alleged adverse effects smoking has on the human body. There seems to be no disagreement that the advertising in the instant case was relied on by the plaintiff, but the question was whether it was reasonable for him to do so. In determining the reasonableness of plaintiff's reliance, the fact that sellers naturally overrate their products should be taken into consideration. Such exaggeration or "puffing" should be expected by the buyer and if reliance is placed on such sales talk the seller should not be held liable. It appears that the language of the advertisement in the instant case is far more than sales talk and amounts to a representation of a fact on which the plaintiff relied to his detriment. Since the purpose of advertising is to induce the consumer to purchase the particular product of the manufacturer, the manufacturer should be held responsible for such representations made about his product.[22] There seems to be no reason why advertisements of cigarettes should be held any less likely to constitute an express warranty than those concerning any other product. However, the problem of causation of injury to the body from smoking[23] remains undetermined and its determination will have a great effect upon future advertisements of cigarette manufacturers.

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to believe that in order to 'Play Safe—Smoke Chesterfield.' Plaintiff testified that he relied on these assurances thinking that he would suffer no adverse effects from smoking Chesterfields. Whether it was reasonable for him to so rely was, of course, a matter for the jury." Pritchard v. Liggett & Myers Tobacco Co., *supra* note 2, at 297.

20. The question of whether the notice given by plaintiff of defendant's alleged breach of warranty was timely will not be considered in this report except to say that the trial court's fiuding that such notice was not timely was reversed by the court in the instant case.

21. See, *e.g.*, Mannsz v. Macwhyte Co., *supra* note 7 (rope); Burr v. Sherwin Williams Paint Co., *supra* note 9 (insecticide); Randall v. Goodrieh Gamble Co., 238 Minn. 10, 54 N.W.2d 769 (1952) (liniment); Rogers v. Toni Home Permanent Co., *supra* note 5 (home permanent); Baxter v. Ford Motor Co., *supra* note 9 (automobile).

22. "The warranties made by the manufacturer in his advertisements and by the labels on his products are inducements to the ultimate consumers, and the manufacturer ought to be held to striet accountability to any consumer who buys the product in reliance on such representations and later suffers injury because the product proves to be defective or deleterious." Rogers v. Toni Home Permanent Co., *supra* note 5, at 615.

23. See note 3 *supra*.

Taxation–Income Tax–Deferral Of Prepaid Income Disallowed

An automobile club received annual dues from its members at different times throughout the calendar year. In its federal income tax return, the club reported only that portion of the dues which corresponded ratably to the membership months of the current tax year, deferring the balance to the following tax year.[1] The Commissioner rejected this accounting treatment of annual dues as not clearly reflecting income for the tax year and levied a deficiency assessment. The Court of Claims upheld the Commissioner.[2] On appeal to the Supreme Court, *held*, affirmed. The deferral of prepaid income beyond the current tax year is not within the concept of annual tax accounting required by the Internal Revenue Code. *American Automobile Ass'n v. United States*, 367 U.S. 687 (1961).

Net income normally is computed on the basis of the accounting period, and in accordance with the accounting methods which a taxpayer uses for his business purposes, but if the Commissioner of Internal Revenue thinks a taxpayer's accounting does not clearly reflect income, he may substitute any accounting system which in his opinion will do so.[3] The proper tax accounting treatment of prepaid income derived from advance payments for goods or services which a taxpayer is to render over several years has long been a point of disagreement between taxpayers and the Commissioner. Taxpayers want either to defer a part of this income to the future years in which it is to be liable for the goods or services or alternatively to accrue currently the predicted future expenses which will be incurred in meeting these liabilities. Neither of these approaches has enjoyed much success in the courts. The early cases dealing with deferred income were decided under the "claim of right" doctrine.[4] According to this theory, if a taxpayer received income and could currently enjoy an unrestricted use of it, he would be taxed on the full amount in the year of receipt regardless of his future liabilities. About 1955, however, some of the circuit courts began to distinguish the earlier claim of right precedents and allowed

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1. Upon receipt of a member's annual dues, taxpayer would treat 1/24 as income in the month of receipt and spread 11/12 over the period of membership using the remaining 1/24 in the final month of membership.

2. American Automobile Ass'n v. United States, 181 F. Supp. 255 (Ct. Cl. 1960).

3. "The net income shall be computed upon the basis of the taxpayer's annual accounting period . . . in accordance with the method of accounting regularly employed in keeping the books of such taxpayer, but . . . if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income . . . ." INT. REV. CODE OF 1939, § 41.

4. The leading ease in the claim of right area is North American Oil Consol. v. Burnet, 286 U.S. 417 (1932).

some prepaid income to be deferred.[5] The Supreme Court, in the 1957 case of *Automobile Club v. Commissioner*,[6] refused to allow a taxpayer to defer income but did so on the ground that he had failed to prove sufficient future liability to justify any deferral. Some commentators[7] and at least one circuit court[8] took the *Automobile Club* case to mean that proven, realistic deferral of income would be permissible. Congressional action in this area as well as case law is significant though ambiguous. The 1954 Code had provided for the deferral of prepaid income,[9] but when shown the large loss in revenue which would result from a transition to deferral accounting, this section was repealed.[10]

Before the Supreme Court, the taxpayer in the instant case attempted to distinguish *Automobile Club* by proving that his deferral accounting was a realistic picture of current income. His proof consisted of statistical data showing the relationship between income and future liability based on averages from its overall experience. The Court refused to accept the distinction, however, and stated that for deferral accounting to clearly reflect income, a taxpayer must be able to match income and future expenses on the basis of the demands of individual members for services.[11] The majority went on to say that regardless of *Automobile Club*, the repeal of the deferral section of the 1954 Code was clearly a mandate from Congress that the deferral of prepaid income is not acceptable for tax purposes.[12] In a strong dissent, four Justices rejected this interpretation of congressional intention, pointing to a letter from the Secretary of the Treasury to the House Ways and Means Committee which stated that the Treasury would not consider the repeal of section 452 as any indication of congressional intent but merely as a reinstatement of existing law.[13] They further reasoned that to force the taxpayer to change his method will require him to use a hybrid accounting system—a cash basis for dues

5. The Tax Court and the Court of Claims continued to support the Commissioner in claim of right cases. See Bressner Radio, Inc. v. Commissioner, 267 F.2d 520 (2d Cir. 1959); Beacon Publishing Co. v. Commissioner, 218 F.2d 697 (10th Cir. 1955). *Contra*, Curtis R. Andrews, 23 T.C. 1026 (1955); American Automobile Ass'n v. United States, 181 F. Supp. 255 (Ct. Cl. 1960).

6. 353 U.S. 180 (1957).

7. Note, 67 YALE L.J. 1425 (1958).

8. Bressner Radio, Inc. v. Commissioner, 267 F.2d 520 (2d Cir. 1959).

9. INT. REV. CODE OF 1954, § 452. This section was thought to be a final settlement of the conflict between business and the Treasury as to accounting methods. A good discussion of the technical workings and policy surrounding section 452 can be found in Austin, Surrey, Warren & Winokur, *The Internal Revenue Code of 1954: Tax Accounting*, 68 HARV. L. REV. 257 (1954).

10. In 1955 it was found that between $45,000,000 and $1,000,000,000 would be lost in revenue due to the switch to the deferral method and Congress was forced to repeal the section. S. REP. No. 372, 84th Cong., 1st Sess. (1955).

11. 367 U.S. at 692.

12. *Id.* at 695.

13. *Id.* at 706.

and an accrual basis for all other items.[14] The result would be a distortion of actual income, a result the Commissioner has no right to force upon taxpayers.

The deferral of income is an extension of the accrual theory of accounting based on the idea that income should be put off until all events for which the taxpayer is liable have occurred. Thus income is matched to actual expenses. It is, of course, an important device to those businesses which have variable expenses based on a demand for services. If a taxpayer is taxed in the year income is received without taking into account his future liabilities, he not only has a distorted picture of current income, but he might also be required to pay a distorted tax. Even though the expenses when they occur in following years will offset income then, a normal increase in taxpayer's business would be taxed at an inflated base in each tax year. It would therefore seem that taxpayers using the deferral method are penalized for their choice of a realistic accounting system.[15] The Court's fairly broad holding that this is precisely the result that Congress intended can be accepted only with a cautious qualification. Twice Congress has acted when the issue of deferring prepaid income was in litigation. In 1958, section 455 was added to the Code to allow publishers to defer their prepaid subscriptions, and Congress has already negated the instant case by passing section 456 giving approval to the deferral of automobile club dues. Thus it is apparent that Congress favors the use of a realistic method of deferral but is reluctant to accept the concept generally because of the heavy transitional loss in revenue. As a result of this case, however, taxpayers who want to use deferral accounting for their tax purposes must look to Congress rather than the courts for relief.

14. *Id.* at 714.

15. If taxpayer received \$12.00 in the last month of the tax year and is taxed at 52% he pays a tax of \$6.24 without regard to future expenses. If the same member were to require \$7.00 worth of services in the second year taxpayer would operate at a \$.76 loss per this individual's annual membership. If however taxpayer was allowed to defer income he would subtract the business expense from the income and arrive at a properly computed tax; thus, \$12.00 — \$7.00 = \$5.00 × 52% = \$2.60. The result is that taxpayer under the rule of the instant case is required to pay \$3.84 in tax not due (\$6.24 — \$2.60 = \$3.84).

Taxation—Inheritance, Estate and Gift Taxes— Blockage Rule Rejected in Evaluating Stock For Ohio Succession Tax

In a proceeding for the determination of a succession tax[1] on 8,100 shares of corporate stock, the Tax Commissioner of Ohio contended that the proper valuation of the stock should be the mean between the bid and asked price in over-the-counter sales on the date of death of the testator.[2] The probate court, ruling against the tax commissioner, applied the "blockage rule"[3] and determined the market value to be that price at which the entire block could be discounted to a brokerage firm.[4] The Court of Appeals of Ohio affirmed without written opinion. On appeal to the Supreme Court of Ohio, *held*, reversed. Market value of corporate shares, for the purpose of a succession tax, is the price which would be obtained in the open market between persons who are not under any compulsion to buy or sell, without regard to reduction in the market value as a result of the size of a particular block of shares. *In re Estate of Sears*, 172 Ohio St. 443, 178 N.E.2d 240 (1961).

The proposition that the size of a block of stock should be considered in determining its value for inheritance and estate tax purposes was first recognized by the federal courts.[5] The federal Internal Revenue Code itself

1. OHIO REV. CODE §§ 5731.02, .22 (1953), levys a tax upon the succession to any property, passing in trust or otherwise, by will from a person who was a resident of Ohio at the time of his death. The county auditor is to appraise the property at its "actual market value" as of the date of accrual of the tax. See *In re* Estate of Daniel, 159 Ohio St. 109, 111 N.E.2d 252 (1953).

2. The county auditor ascertained the value of the stock to be $19.75 per share, that figure being the mean between the bid and asked price of over-the-counter sales on the date of death of the testator.

3. A court applying the "blockage" rule in the valuation of a large block of stock will adopt that price at which the entire block would sell if unloaded on the market all at once; the policy behind the rule is a "recognition of the fact that in some instances a large block of stock cannot be marketed and turned into cash as readily as a few shares." Citizens Fid. Bank & Trust Co. v. Reeves, 259 S.W.2d 432, 433 (Ky. 1957). See generally 2 PAUL, FEDERAL ESTATE AND GIFT TAXATION § 18.27 (1942).

4. The testimony of two expert witnesses was offered in the probate court, one on behalf of the estate and the other on behalf of the tax commissioner, the witness for the estate testifying that the shares could only have been sold in a period of thirty days if they were discounted to a brokerage firm. The lower court held that the market price after discounting wonld have been $18.00 per share.

5. "In our opinion, the Board was right in basing its conclusions upon the realities as it found them rather than upon considerations of abstract logic. It could not ignore the pregnant fact, having found it to exist, that a large block of stock cannot be marketed and turned into money as readily as a few shares." Helvering v. Safe Deposit & Trust Co., 95 F.2d 806, 812 (4th Cir. 1938). *Accord*, Helvering v. Maytag, 125 F.2d 55, 63 (8th Cir. 1942) ("it is established that the size of a block of listed stock may be a factor to be cousidered in its valuation for gift or estate tax purposes"). *Cf.* Mott v. Commissioner, 139 F.2d 317 (6th Cir. 1943) (bloekage rule was not allowed to affect valuation).

merely states that the property should be taxed at its "value" at the date of death,[6] providing no definition of the term.[7] Determination of the value of any kind of property under inheritance and estate tax statutes is difficult, the very meaning of the concept "value of the property" being subject to controversy.[8] The federal courts have been realistic[9] in recognizing factors[10] other than the market value of one share at the date of death. Although it is still said that the most persuasive evidence of stock value is its market quotation,[11] there is no presumption that a large block is worth less per share than a small block.[12] For purposes of state inheritance taxation the trend of development is against the allowance of any reduction of value as proposed by the blockage theory.[13] The arguments against using the rule are many and varied, the courts stating that its use would be unconstitutional in that it does not guarantee equality of taxation

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6. INT. REV. CODE OF 1954, § 2032.

7. The early regulations, *e.g.*, Treas. Reg. 80, art. 13(3) (1934), specifically provided that the size of a block of securities should not be considered in determining its market value. Around 1938 the courts re-examined this provision, decided it was contrary to actual fact and refused to be bound by it. See Helvering v. Safe Deposit & Trust Co., *supra* note 5. As a result the provision was removed from the regulations, and neither the statute nor the regulations contained any reference to blockage. The last step occurred in 1958 when the regulations to the 1954 Code specifically noted that due to the size of the block, the market price may not represent the fair market value. Treas. Reg. § 20.2031-1(b) (1958).

8. See Southwestern Bell Tel. Co. v. Public Serv. Comm'n, 262 U.S. 276 (1923), where Mr. Justice Brandeis asserts that "value is a word of many meanings."

9. "To hold that the value of a large block of corporate stock, for which there is no market, must be determined at the same value per share as that for which a few shares were sold, for which there was a market without taking into consideration other factors and circumstances which plainly affects the value is supported by neither logic nor reason." Commissioner v. Shattuck, 97 F.2d 790, 792 (7th Cir. 1938). See Helvering v. Safe Deposit & Trust Co., *supra* note 5 (decision should be based on realities rather than upon abstract logic).

10. In addition to the size of a particular block of stock the court may consider other factors as evidence. *E.g.*, Helvering v. Maytag, *supra* note 5 (compares the size of the block to be valued with the total number of shares outstanding); Groff v. Smith, 34 F. Supp. 319 (D.C. Conn. 1940) (the bid and asked prices on the critical date); Frank J. Kier, 28 B.T.A. 633 (1933) (the trend of prices both before and after the critical date). See Barrett, *Valuation of Stocks by the Blockage Rule*, 29 TAXES 465 (1951).

11. See Richardson v. Commissioner, 151 F.2d 102 (2d Cir. 1945), *cert. denied*, 326 U.S. 796 (1946). In Mott v. Commissioner, 139 F.2d 317 (6th Cir. 1943), the court discussed the element of "blockage" and remarked that it is not an inevitable factor.

12. See Safe Deposit & Trust Co., 35 B.T.A. 259, 263 (1937), where the court stated that "blockage is not a law of economics, a principle of law, or a rule of evidence. If the value of a given number of shares is influenced by the size of the block, this is a matter of evidence and not of doctrinaire assumption." See generally 2 PAUL, *op. cit. supra* note 3, § 18.27.

13. *E.g.*, State v. Wagner, 233 Minn. 241, 46 N.W.2d 676 (1951); Florida Nat'l Bank v. Simpson, 59 So. 2d 751 (Fla. 1952). For a good discussion of other state decisions adopting blockage, see Annot., 28 A.L.R.2d 775 (1952); Annot., 33 A.L.R.2d 581 (1954).

for all,[14] and secondly that the rule places on the government losses[15] which the beneficiary may never realize because in a great number of cases the stock will not be sold in a block.[16] However, the primary argument[17] against its use centers around the language of the state statutes, which usually expressly require the basis of valuation to be some form or variation of "actual market value."[18] Nevertheless there are numerous state decisions[19] which have sustained the blockage theory, most of them taking the position that blockage is not a conclusive or dominant rule, but is one of the various factors to be considered.[20] Other decisions do not refer to the rule as such, but state that evidence of any sort which affects the securities' marketability may be introduced for purposes of valuation.[21] Unlike the instant case, these state decisions have recognized that the size of a block of stock is one of the logical factors which must be considered whenever sufficient proof of its applicability is presented,[22] however distasteful this may be to the taxing authorities.[23]

14. In State v. Wagner, *supra* note 13, at 682, the court recognized the constitutional provision that taxes should be uniform upon the same class of subjects and stated that "allowing a discount for large blocks of stock would discriminate against beneficiaries of small estates being administered at about the same time as a large estate where the estates contain blocks of the same stock." *Contra*, Citizens Fid. Bank & Trust v. Reeves, 259 S.W.2d 432 (Ky. 1953).

15. State v. Wagner, *supra* note 13.

16. In Walker v. People, 192 Ill. 106, 61 N.E. 489 (1901) the court refused to apply blockage because the very fact that the market would be depressed if the large block of stock was forced on the market indicated that it would not be sold in such a block and therefore no loss would be suffered.

17. See Florida Nat'l Bank v. Simpson, *supra* note 13, at 771.

18. See, *e.g.*, HAWAII REV. LAWS §§ 122-25 (1955) (full cash value); KY. REV. STAT. § 140.190 (1955) (full and fair cash value); MINN. STAT. ANN. § 291.23 (1947) (full and true value); N.J. STAT. ANN. §§ 54.34-.35 (1960) (clear market value); TEX. CIV. STAT. art. 14-15 (1948) (actual market value); WIS. STAT. §§ 72.13-.15 (1953) (clear market value). Some states have adopted the federal valuation and therefore recognize blockage when it is applicable. See also Note, 26 IOWA L. REV. 674 (1940).

19. *E.g.*, Citizens Fid. Bank & Trust v. Reeves, 259 S.W.2d 432 (Ky. 1953); Newberry v. Walsh, 20 N.J. 484, 120 A.2d 242 (1956); Montclair Trust Co. v. Zink, 141 N.J. Eq. 401, 57 A.2d 372 (Prerogative Ct. 1948); Calvert v. Katten, 301 S.W.2d 318 (Tex. Civ. App. 1957).

20. One court following this view stated that the blockage rule "has achieved sufficient judicial respect to be regarded in appropriate cases as a material factor entitled to be considered with other relevant circumstances in determining value for computation of transfer inheritance taxes." Montclair Trust Co. v. Zink, *supra* note 19, at 378. See also cases cited *supra* note 19.

21. See *In re* Clabby's Estate, 308 Pa. 287, 162 Atl. 207, 208 (1932) ("While market quotations on the day of death are evidence of value of stock, they are not conclusive of the actual value of the stock at that time. In fixing value, other evidence having a tendency either to decrease or increase the value as of the day of death is competent and should be considered."); *In re* Nieman's Estate, 230 Wis. 23, 283 N.W. 452 (1939).

22. See note 10 *supra*.

23. "[T]here is as much reason to look to evidence of what the beneficiary would have to pay for the stock he receives as there is to look to evidence of what he might

The court in the instant case followed the majority state view[24] and rejected the blockage rule theory. The court pointed out that the Ohio code[25] requires property to be valued at its "actual market value," interpreting this to mean the price at which one could sell who is not compelled to do so.[26] The decision was based upon two criticisms of the rule's use, the first being that its adoption would result in discrimination against the beneficiaries of smaller estates therefore violating the constitution of Ohio.[27] Secondly, the court observed that the blockage rule assumes that beneficiaries will sell their stock, when actually "the very fact that the market would be depressed . . . is a strong indication that such a sale should not be the proper test of the market value of the stock."[28] The court recognized that the blockage rule had been applied in some federal cases, but it distinguished those decisions on the ground that the federal courts use the phrase "fair market value," rather than "actual market value."[29] A well written dissenting opinion presented a very persuasive argument in favor of blockage as one of the factors that should be considered.[30]

Although not expressly so stated it seems perfectly clear that this court would refuse to apply blockage in any situation under which it might arise.[31] By completely rejecting the blockage rule the court has placed upon the taxpayer an arbitrary and unreasonable standard. The majority of the state courts seem to overlook the fact that the basis for valuation, as set forth by statute, is usually some form of "market value" to be determined as of the testator's date of death.[32] This does not mean the value of, or rate at which, one share could be sold on the market, but in all fairness should be construed as being the price at which all property to be valued could be sold on the critical date, taking into consideration all factors which may shed light on increased or decreased value. No reasonable objection should prevent application of the blockage rule where

realize in money from selling it." Hawaii Attorney General's Opinion, CCH STATE INH., EST. & GIFT TAX REP. (7th ed.) ¶ 19194 (Hawaii Jan. 13, 1961).

24. Cases cited note 13 *supra.*

25. See note 1 *supra.*

26. 178 N.E.2d at 243.

27. OHIO CONST. art. 7, § 7. The policy of Ohio, pursuant to the constitution, is a graduated succession tax which on a larger succession is at a higher rate than that on a smaller one.

28. 178 N.E.2d at 244. The court also felt that by advocating this rule the executor of an estate might be taking a position contrary to his fiduciary duty to sell the stock at the highest possible price.

29. 178 N.E.2d at 245.

30. "Only by completely ignoring the unyielding law of supply and demand can anyone even pretend that prices on the so-called over-the-counter market, where sales averaged only 300 to less than 400 shares a trading day, could conclusively establish a market value for 8100 shares." 178 N.E.2d at 246.

31. The court stated that "the majority of the court is disposed to hold that the blockage rule should be generally disavowed . . . ." 178 N.E.2d at 245.

32. See note 13 *supra.*

other classes of assets are involved.[33] Failure to recognize the size of the block ordinarily results in over-valuation whether in the case of stocks, bonds, securities, land, or other assets. Furthermore, application of blockage should not be limited to situations where the result would be a downward valuation. In many cases the sale of such a large block of stock would carry with it control, and therefore the value per share would be greater than the over-the-counter price.[34] Rather than be controlled by arbitrary and inflexible rules, the courts should realistically consider the blockage rule along with all other factors affecting market value.

Taxation–Use Tax–Commerce and Equal Protection Clauses–Discrimination Against Multi-State Business

Plaintiff, an Oklahoma corporation doing business in Louisiana, produced and fabricated oil well servicing equipment in its Oklahoma shops. Some of this equipment was transported into Louisiana and there used by plaintiff. Louisiana, in calculating its use tax,[1] included the labor and shop

33. The blockage rule has been limited to cases involving valuation of stocks, bonds, or similar securities. The rule is not recognized with respect to real estate, nor with respect to other assets. See, *e.g.*, Estate of Henry E. Huntington, 36 B.T.A. 698 (1937) (the court refused to consider difficulty in selling real estate); Estate of James D. McDermott, 12 CCH TAX CT. MEM. 481 (1953). The rule's use has been broadened in recent years to the extent that it has entered into the determination of the value of corporate stock in certain income tax cases. See Dean Babbitt, 23 T.C. 850 (1955).

34. The court should consider whether the block carries control, and whether it is restricted or unrestricted, whether the stock is voting or nonvoting, fully paid, etc. All enter into valuation, whether under the scope of blockage or not. For a good discussion of blockage see Hughes, *Blockage in Valuation of Assets for Federal Tax Purposes*, 25 FORDHAM L. REV. 702 (1957).

1. The statute imposing the tax is contained in LA. REV. STAT. §§ 47-301 to -318 (1950), entitled "Sales Tax." Pertinent provisions are as follows:

> "A. There is hereby levied a tax on the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined herein, the levy of said tax to be as follows:
>
> "(1) At the rate of two per centum (2%) of the sales price of each item or article of tangible personal property when sold at retail in this state; the tax to be computed on gross sales for the purpose of remitting the amount of tax due the state, and to include each and every retail sale.
>
> "(2) At the rate of two per centum (2%) of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of the tax." LA. REV. STAT. § 47-302 (1950).
>
> "'Cost price' means the actual cost of the articles of tangible personal property without any deductions therefrom on account of the cost of materials used, labor or service cost, transportation charges or any other expenses whatsoever." LA. REV. STAT. § 47-301 (1950).

overhead incurred by plaintiff in Oklahoma in constructing the equipment, in addition to the actual cost of physical parts purchased outside Louisiana and incorporated into the equipment. After paying under protest this tax on the shop overhead and labor, plaintiff sued for a refund.[2] Plaintiff claimed that the tax was repugnant to the commerce clause and equal protection clause of the federal constitution, for the reason that, if the equipment had been built entirely within Louisiana neither a sales nor a use tax, nor any other tax would be due on the labor and shop overhead which was put into the completed products.[3] The trial court sustained plaintiff's contentions that this application of the use tax violated the commerce clause by discriminating against interstate commerce, and also was so unequal a burden, as compared with that of the local taxpayer, as to constitute a violation of the equal protection clause. On appeal to the Louisiana Supreme Court, *held,* reversed. Neither the commerce nor the equal protection clause is violated by applying the use tax to labor and shop overhead incurred in fabricating equipment outside the taxing state for use in the taxing state, even though neither a sales nor a use tax would be due on labor and shop overhead which had been put into the finished product had plaintiff built the equipment entirely within the taxing state. *Halliburton Oil Well Cementing Co. v. Reily,* 241 La. 67, 127 So. 2d 502, *prob. juris. noted,* 368 U.S. 809 (1961).[4]

The Louisiana court relying on the case of *Henneford v. Silas Mason Co.,*[5] ruled that the imposition of this nondiscriminatory use tax after the property had completed its interstate journey, had come to rest in Louisiana, and had there acquired a tax situs, did not violate the commerce clause.[6] The court answered the equal protection clause argument by saying that that clause was satisfied since all persons similarly circumstanced were treated alike, and no class was singled out arbitrarily and unreasonably as the subject of the tax.[7] The court said that the statute was not concerned with what occurred while the fabricated products were in interstate commerce before coming to rest in Louisiana, except for determining "cost

2. The total deficiency tax amounted to $57,421.00 of which $36,238.43 represented the assessment on labor and shop overhead.

3. Plaintiff contended that Louisiana had stipulated that had plaintiff operated entirely within Louisiana neither a sales nor a use tax would be due on the labor and shop overhead which plaintiff put into the completed products. See Brief for Appellant, pp. 13, 33-34, Halliburton Oil Well Cementing Co. v. Reily, 368 U.S. 809 (1961).

4. Two other issues were discussed by the court. In the first, the court decided that the correct value to be placed on the equipment for computing the use tax was cost price less depreciation rather than the original cost. In the other issue, the court held that the use tax should also be assessed on the value of equipment purchased by plaintiff outside Louisiana in isolated sales and thereafter used by plaintiff in Louisiana.

5. 300 U.S. 577 (1937).

6. 127 So. 2d at 508-09.

7. *Id.* at 509-10.

price."[8] Citing its prior decision in *Fontenot v. S. E. W. Oil Corp.*,[9] the court concluded that the labor and shop overhead were correctly included in determining the "cost price" of the property upon which the use tax was imposed.

After the states had begun to impose taxes on local sales, it became apparent that there were two primary weaknesses with the sales tax. First, local merchants lost business because their customers bought goods out of state in order to avoid paying the local sales tax; second, out-of-state purchases of goods shipped into the state were regarded as immune from the sales tax because the state could not, consistently with the commerce[10] and due process clauses,[11] extend the reach of its sales tax to extraterritorial sales. To remedy these defects the states began to impose compensating use taxes.[12] The compensating use tax is imposed on the local privilege of using property in the taxing state which would have been subject to the sales tax had the property been purchased in the taxing state. It is generally provided that a use tax is due only on an article upon which the local sales tax has not been paid. The compensating use tax thus complements the local sales tax.[13] The constitutionality of the compensating use tax has been upheld by the Supreme Court against the argument that the tax discriminated against interstate commerce. In *Henneford v. Silas Mason Co.*,[14] the Court, stressing the equality existing between the use tax and corresponding sales tax, reasoned that the nondiscriminatory tax was imposed not on the privilege of doing interstate business but was

8. *Id.* at 510.

9. 232 La. 1011, 95 So. 2d 638, 640 (1957). "According to this section the person importing an article for use in this state must pay the 'use tax' the same as if it had been sold at retail, and such use shall be considered equivalent to a sale at retail as of the time of importation. These provisions along with others above mentioned clearly indicate that the 'use tax' is to be computed on the retail price the property would have brought when imported—that is, its then value of worth."

10. See Henneford v. Silas Mason Co., *supra* note 5, at 581.

11. See Lowndes, *State Taxation of Interstate Sales*, 7 Miss. L.J. 223, 228-29 (1935). See also McLeod v. J. E. Dilworth Co., 322 U.S. 327 (1944). The decision in McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940), removed some of the difficulty in the secoud situation.

12. The Court in upholding the tax has recognized these problems. See Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 363 (1941); Henneford v. Silas Mason Co., *supra* note 5, at 581.

13. Hartman, *Sales Taxation in Interstate Commerce*, 9 Vand. L. Rev. 138, 164-66 (1956). If it occurs as in Gregg Dyeing Co. v. Query, 286 U.S. 472 (1932), that a use tax exemption is allowed only if the local sales tax has been paid, it is possible that the goods could be subjected to both a local use tax and a sales tax imposed by another state. However, this double taxation would not invalidate the use tax. See Henneford v. Silas Mason Co., *supra* note 5, at 587. The decision in the *Silas Mason* case has made it apparent that there is no difficulty in finding the use and sales taxes complementary if both appear in the same statute, *e.g.* La. Rev. Stat. 47-302 (1950). But, the fact that both taxes do not appear in the same statute does not affect the validity of the use tax. See Gregg Dyeing Co. v. Query, *supra* at 480.

14. Note 5 *supra*.

imposed on the local privilege of using the goods after the interstate journey had ended. Although *Silas Mason* was the first case dealing with the compensating use tax, the Supreme Court had much earlier approved the principle of compensating taxation, holding the tax valid where the interstate business was not discriminated against.[15] The *Silas Mason* case and later decisions have made it clear that a nondiscriminatory compensating use tax imposed on the use of chattels no longer in transit is valid under both the commerce and due process clauses.[16] The cases indicate that in order to establish a tax discrimination that cannot withstand the interdiction of the commerce clause, the taxpayer must prove that the burden imposed on the interstate transaction is greater than the burden imposed on a strictly local transaction.[17] Viewing the economic incidence of the Louisiana use tax, a case of discrimination against the out-of-state business seemingly is presented. The discrimination appears to result from the inclusion of the labor and shop overhead in the base of the use tax, to which plaintiff was subjected only because the equipment came from an extra-state source, while excluding the labor and shop overhead from the base of the sales tax which applied only to local business. Nor does it appear that local business was subjected to any other tax that would have the effect of equalizing the burdens on the local and interstate business. Therefore, plaintiff, as a multi-state producer-user bears a heavier tax burden under the use tax than a local producer-user would bear under the corresponding sales tax or any other taxes. It is suggested that the *Halliburton* tax violates the commerce clause. The fact that the tax was imposed on an event which occurred within the taxing state, *i.e.* the use of the property, and had no connection with the interstate transportation, does not answer the commerce clause objection. Not every tax that bears upon or affects commerce is valid simply because the tax is placed on some local incident that might be regarded as having no connection with the interstate transportation.[18] The Supreme Court has held that even

15. See generally Interstate Busses Corp. v. Blodgett, 276 U.S. 245 (1928); Hinson v. Lott, 75 U.S. (8 Wall.) 148 (1868); General American Tank Car Corp. v. Day, 270 U.S. 367 (1926).

16. *Accord*, General Trading Co. v. State Tax Comm'n, 322 U.S. 335 (1944); Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62 (1939); Nelson v. Sears, Roebuck & Co., *supra* note 12; Nelson v. Montgomery Ward & Co., 312 U.S. 373 (1941). The tax has been upheld even where the use within the state was composed of local installation of goods to be used in interstate eommunication and transportation. See Southern Pac. Co. v. Gallagher, 306 U.S. 167 (1939); Pacific Tel. & Tel. v. Gallagher, 306 U.S. 182 (1939).

17. See Nippert v. City of Richmond, 327 U.S. 416, 431 (1946); General American Tank Car Corp. v. Day, *supra* note 15, at 372-73; Interstate Busses Corp. v. Blodgett, *supra* note 15, at 251; Gregg Dyeing Co. v. Query, *supra* note 13, at 482; Henneford v. Silas Mason Co., *supra* note 5, at 584-85; Best & Co. v. Maxwell, 311 U.S. 454, 456 (1940).

18. West Point Grocery v. City of Opelika, 354 U.S. 390, 391 (1957); Nippert v.

though property transported interstate may be taxed after it comes to rest within the taxing state, the commerce clause is still violated unless the property is taxed "without discrimination, like other property situated within the state."[19] The problem of whether such a tax can be sustained depends on questions of constitutional policy bearing on "the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce."[20] It is easily seen that the tax in question unduly burdens commerce since it places the taxpayer engaged in a multistate business at a competitive disadvantage with the taxpayer whose business does not cross state lines, a result which has been condemned by the Supreme Court as discriminatory and violative of the commerce clause.[21]

The second question presented by the decision in the instant case is whether plaintiff has been denied equal protection of the laws. The early view of the Court as to the equal protection clause was that it had no application to revenue legislation.[22] *Bell's Gap R.R. v. Pennsylvania*[23] was the first case which held that the fourteenth amendment was a limitation on the taxing power of the states. Although the Court in the *Bell's Gap* case laid down no "iron rule" regarding equality in taxation, a rule was formulated in the later case of *Gulf, Colo. & S.F. Ry. v. Ellis* in which

City of Richmond, *supra* note 17, at 422-23; Memphis Steam Laundry v. Stone, 342 U.S. 389, 392-93 (1952).

19. American Steel & Wire Co. v. Speed, 192 U.S. 500, 520 (1904); I. M. Darnell & Son v. City of Memphis, 208 U.S. 113, 120 (1908). See also Sonnebonn Bros. v. Cureton, 262 U.S. 506, 516 (1923). For a recent case dealing with this same problem and for a good review of the authorities, see Commonwealth v. Smith, 75 Dauph. Co. Rep. 22 (Pa. C.P. 1960).

20. Nippert v. City of Richmond, *supra* note 17, at 416, 424. Where the local incident constitutes a regular and consistent course of business it can more easily be made a valid subject of a tax. *Compare* McGoldrick v. Berwind-White Coal Mining Co. *supra* note 11, *with* Nippert v. City of Richmond, *supra* note 17.

21. West Point Grocery v. City of Opelika, *supra* note 18; Bethlehem Motors Corp. v. Flynt, 256 U.S. 421, 427 (1921); Best & Co. v. Maxwell, *supra* note 17, at 457; Nippert v. City of Richmond, *supra* note 17, at 431, 434.

22. See Davidson v. New Orleans, 96 U.S. (6 Otto) 97, 106 (1877): "[W]e know of no provision in the Federal Constitution which forbids . . . unequal taxation by the states."

23. 134 U.S. 232, 237 (1890): "The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all . . . . It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition."

it was stated that the classification must "rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and never be made arbitrary and without any such basis."[24] Even though the state has been given wide discretion in determining classification for tax purposes,[25] "there is a point beyond which the State cannot go without violating the Equal Protection Clause."[26] The classification must be reasonable and not arbitrary and rest on some basic difference with a fair and substantial relation to the legislative object so that all persons in similar circumstances are treated alike.[27] A statute is not deemed arbitrary due to the fact that it discriminates in favor of a certain class if the difference in tax treatment is based on a reasonable distinction or difference in state policy,[28] encourages needed and useful industries to locate within the state by granting an exemption,[29] or can be sustained under any set of facts reasonably conceivable.[30] It appears therefore that a discriminatory tax is under certain circumstances permissible but a discriminatory tax cannot be sustained if the classification appears to be "altogether illusory,"[31] or purely arbitrary, oppressive, or capricious, and is based on differences or considerations having no possible relation with citizens as taxpayers.[32] Thus, the question is raised as to whether there was a reasonable basis for plaintiff's heavier tax burden resulting from the inclusion of the labor and shop overhead in the base of the use tax while excluding it from the base of the sales tax. The Louisiana court's reasoning does not squarely meet the issue in saying that equal protection is not denied because plaintiff was treated no differently from others in similar circumstances. Before that consideration is brought into play, there must first be a reasonable classification. This second question involves the problem of whether an extra-state manufacturer-user as opposed to an intra-state manufacturer-user is a reasonable basis of classification. It is suggested that such a classification is completely

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24. 165 U.S. 150, 155 (1897). For a criticism of this rule, see Sholley, *Equal Protection in Tax Legislation*, 24 VA. L. REV. 229, 233 (1938).
25. Henneford v. Silas Mason Co., *supra* note 5, at 587; Home Ins. Co. v. New York, 134 U.S. 594, 600 (1890); Southwestern Oil Co. v. Texas, 217 U.S. 114, 121-22 (1910).
26. Allied Stores, Inc. v. Bowers, 358 U.S. 522, 527 (1959).
27. Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183, 197 (1936); F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).
28. Stebbins v. Riley, 268 U.S. 137, 142 (1925); American Sugar Ref. Co. v. Louisiana, 179 U.S. 89, 92 (1900).
29. Allied Stores, Inc. v. Bowers, *supra* note 26; Bell's Gap R.R. v. Pennsylvania, *supra* note 24, at 237; Ohio Oil Co. v. Conway, 281 U.S. 146, 159 (1930).
30. McGowan v. Maryland, 366 U.S. 420, 426 (1961); New York Rapid Transit Corp. v. City of New York, 303 U.S. 573, 578 (1938).
31. F. S. Royster Guano Co. v. Virginia, *supra* note 27, at 415.
32. American Sugar Ref. Co. v. Louisiana, *supra* note 28. It is immaterial that the arbitrary operation results from inadvertence on the part of the state. See F. S. Royster Guano Co. v. Virginia, *supra* note 27, at 416.

unreasonable and arbitrary and based on no difference or consideration connected with citizens as taxpayers and thus is a denial of equal protection.

Torts–Negligence–Vendor of Alcoholic Beverages Held Liable for Injuries to Intoxicated Vendee Despite Contributory Negligence of Vendee

Plaintiff, noticeably inebriated, entered the defendant's tavern[1] and was served additional alcoholic beverages. As the heavily intoxicated plaintiff was leaving, the defendant undertook to instruct him in the proper steering of his automobile from the defendant's parking lot. Plaintiff was later injured in an accident while driving home. An action was brought against the tavern owner in the federal district court, based upon diversity of citizenship, for these injuries. The district court dismissed the complaint for failure to state a cause of action. On appeal to the United States Court of Appeals for the Third Circuit, *held*, reversed and remanded. Under a statute prohibiting sale of alcoholic beverages to intoxicated persons,[2] or under the common law doctrine of assumption of duty, a tavern owner who sells liquor to, or undertakes to assist, an inebriated patron is liable for injuries to the patron subsequently sustained as a result of the intoxicated condition, the patron's own contributory negligence being no bar to recovery. *Galvin v. Jennings*, 289 F.2d 15 (3d Cir. 1961).

At common law, a person injured while intoxicated generally has no right of action against a tavern owner who serves him the alcoholic beverages.[3] The reasons usually given by the courts are that the drinking of the intoxicant by the customer is a proximate cause of the injury,[4] or, that the patron is barred from recovery by his own contributory negligence in becoming inebriated.[5] In some states Dram Shop Acts or Civil Liability Acts expressly impose liability upon the operators of taverns and similar

1. Interestingly enough, the name of the tavern was "Poison Pete's."

2. Regulation No. 20, rule 1, Division of Alcoholic Beverage Control, enacted pursuant to N.J. STAT. ANN. § 33:1-39 (1937). The regulation provides that "no licensee shall sell, serve or deliver or allow, permit or suffer the sale, service or delivery of any alcoholic beverage, directly or indirectly . . . to any person actually or apparently intoxicated, or allow, permit or suffer the consumption of any alcoholic beverage by any such person in or about the licensed premises."

3. Cole v. Rush, 45 Cal. 2d 345, 289 P.2d 450 (1955); Noonan v. Galick, 19 Conn. Super. 308, 112 A.2d 892 (Super. 1955). See generally Witcher, *Common Law Liability of Liquor Vendors*, 12 BAYLOR L. REV. 388 (1960). *But see* Hitson v. Dwyer, 61 Cal. App. 2d 803, 143 P.2d 952 (Dist. Ct. App. 1943).

4. Cherbonnier v. Rafalowich, 88 F. Supp. 900 (D. Alaska 1950).

5. See Cole v. Rush, *supra* note 3.

establishments for violations of specified standards of operation.[6] Under these acts the serving of alcoholic beverages to intoxicated patrons is often prohibited.[7] However, some recent decisions have imposed liability upon a tavern keeper although there was not a controlling civil damages statute.[8] Many courts have used an assumption of duty approach when a helpless person was injured. In applying this theory a distinction is made between "nonfeasance" (passive inaction) and "misfeasance" (active misconduct).[9] Liability for nonfeasance requires the existence of a beneficial economic relationship between the injured party and the nonacting defendant.[10] Liability for misfeasance is imposed if the defendant's conduct has worsened the situation of the helpless plaintiff, either by increasing the plaintiff's danger or by misleading him.[11] Thus, courts have found defendants negligent where a sick traveler was sent off in a sleigh on a cold winter night,[12] and where an inebriated railway passenger was allowed

6. See, *e.g.*, ILL. STAT. c. 43, § 135 (1957); MINN. STAT. ANN. § 340.95 (1957). See Note, 4 VILL. L. REV. 575 (1959). However, even under these statutes few cases have gone as far as Kiriluk v. Cohn, 16 Ill. App. 2d 385, 148 N.E.2d 607 (1958) (widow recovered damages for loss of support from vendor who sold liquor to her husband, whom she killed in self-defense during one of his drunken rages).

7. See note 6 *supra*.

8. Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959), 13 VAND. L. REV. 1308 (1960). In contrast to the states which have statutes specifically providing for liability in such situations, some courts have long recognized that a statute need not *expressly* impose liability. If it is found that the statute establishes a standard of care, this may sustain a finding of liability when other elements necessary for tort liability are present. PROSSER, TORTS § 34 (2d ed. 1955).

9. See generally Bohlen, *The Moral Duty To Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 219 (1908).

10. "Liability, then, seems to be imposed as a 'price' for the benefit conferred; where there is no benefit, actual or potential, there is no duty to act." McNiece & Thornton, *Affirmative Duties in Tort*, 58 YALE L.J. 1272, 1287 (1949). Thus, persons providing services, such as innkeepers and common carriers, have been held to strict standards of duty toward helplessly intoxicated persons. McMahon v. New York, N.H. & H.R.R., 136 Conn. 372, 71 A.2d 557 (1950).

A case which is interesting in its application of the "benefit principle" is Harold's Club v. Sanchez, 70 Nev. 518, 275 P.2d 384 (1954). A 278 pound woman, heavily intoxicated, entered the defendant's club in search of her employee. The club's hostess, who was frail by comparison, warned her against using the escalator and several of the defendant's employees warned her against attempting its use. The plaintiff was injured in her attempt. *Held*, for the defendant. The club and its employees were not negligent in failing to use physical restraint.

With regard to the "benefit principle," the club received no benefit, economic or otherwise, by the plaintiff's presence, and therefore was not negligent through nonfeasance.

11. The defendant's taking control of the situation is construed as a voluntary entry into a responsible relationship. *When* the duty arises is coincident with the time at which the defendant has worsened the plaintiff's situation. PROSSER, TORTS § 38 (2d ed. 1955). The mere realization that an action may be necessary for the protection of another does not impose a duty to take that action. RESTATEMENT, TORTS § 314, comment *b* (1934).

12. Depue v. Flateau, 100 Minn. 299, 111 N.W. 1 (1907).

by the railway's employees to negotiate steps in the defendant's station for himself.[13] The defense of contributory negligence is customarily raised in such cases. Realizing the injustice which the defense may permit, some courts have refused to allow the defense on various theories. If the defendant had the last clear opportunity to avoid the accident, it has been held that the plaintiff's negligence was not a "proximate cause" of the latter's injury.[14] Others have stated that the plaintiff's recovery is not barred if the negligence of the defendant is wilful and wanton.[15] In states having statutes created for the protection of a particular class,[16] and, more specifically, in the states having Civil Liability and Dram Shop Acts, it has been held that the defense of contributory negligence is not applicable.[17]

The court, in its opinion rendered by Judge Goodrich, established the requisite negligence of the tavern owner on two grounds. First, it was held that the defendant assumed a duty of care when he undertook to instruct the helplessly intoxicated plaintiff in the proper manipulation of his steering wheel.[18] The court found support for this common law basis of negligence in the well known cases of *Black v. New York, N.H. & H.R.R.*[19] and *Depue v. Flateau.*[20] Second, the court turned to a New Jersey Alcoholic Beverage Control Regulation.[21] Recognizing that the statute itself did not make *express* provision for liability in the case of injuries resulting from the serving of alcoholic beverages to previously intoxicated patrons, the court turned to the case law for support. In *Rappaport v. Nichols & Hub Bar, Inc.*[22] the statute was described as having been enacted for the protection of minors and (by way of dictum) for the protection of intoxicated persons and the public.[23] Adopting the reasoning of that case, this court found in the regulation both a standard of care and a class to whom the care was owed.[24] Turning to the question of

13. Black v. New York, N.H. & H.R.R., 193 Mass. 448, 79 N.E. 797 (1907).

14. This is the "last clear chance" doctrine. See Black v. New York, N.H. & H.R.R., *supra* note 13. See also MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225 (1940). The "proximate cause" explanation of the last clear chance doctrine has been criticized. See PROSSER, TORTS § 52 (2d ed. 1955).

15. RESTATEMENT, TORTS § 482 (1934).

16. Osborne v. Salvation Army, 107 F.2d 929 (2d Cir. 1939) (requirement of safety devices for window cleaning); Atchison, T. & S.F. Ry. v. Paxton, 75 Kan. 197, 88 P. 1082 (1907) (liability of railroad for animals killed on unfenced track).

17. Hitson v. Dwyer, *supra* note 3; Lester v. Bugni, 316 Ill. App. 19, 44 N.E.2d 68 (1942); Lang v. Casey, 326 Pa. 193, 191 Atl. 586 (1937); RESTATEMENT, TORTS § 483 (1934). See Prosser, *Contributory Negligence as Defense to Violation of Statute*, 32 MINN. L. REV. 105 (1948).

18. Galvin v. Jennings, 289 F.2d 15, 16-17 (3d Cir. 1961).

19. Note 13 *supra.*

20. Note 12 *supra.*

21. Note 2 *supra.*

22. Note 8 *supra.*

23. 156 A.2d at 8.

24. 289 F.2d at 18. This court cites with approval Schelin v. Goldberg, 188 Pa.

the plaintiff's contributory negligence, the court cited with approval the logic employed in the *Black* case,[25] which involved a "last clear chance" situation. After recognizing that the facts in the instant case were analogous to those in the *Black* case, the court chose to phrase its decision in terms of proximate cause.[26] After deciding that the plaintiff was entitled to the benefit of this latter doctrine, the court further held that the defense of contributory negligence is not available to a defendant guilty of wilful and wanton misconduct toward a plaintiff,[27] even though the plaintiff's driving while intoxicated constituted a violation of a New Jersey statute.[28] Judge McLaughlin in dissent disagreed with the majority finding that the mere giving of instructions to the plaintiff was sufficient to establish a duty of care on the tavern owner.[29] Dissatisfaction was also expressed with regard to the court's construction of the New Jersey statute. However, Judge McLaughlin approved the majority's finding that the defense of contributory negligence was not available to a defendant guilty of wilful and wanton negligence.[30]

In the instant case the court found that the plaintiff was a member of a class (intoxicated persons) which the statute was intended to protect. In this regard the reasoning of the court is similar to that employed in *Rappaport v. Nichols & Hub Bar, Inc.*,[31] where it was found that included in this protected class were not only the parties made helpless by the effects of intoxication (minors and intoxicated persons), but also third parties who might be injured as a result of the inebriated tavern patron's actions. As an illustration of the application of the "benefit principle"[32] the case serves as an excellent example. The defendant received economic benefit through the plaintiff's patronage. This alone might justify a court's requiring the defendant to care for the helpless plaintiff. But, in addition, the defendant voluntarily attempted to "aid" his incapacitated patron.[33] By so worsening the plaintiff's condition the defendant entered into a position of responsibility for his welfare. Thus, under either line of reason-

Super. 341, 146 A.2d 648 (Super. 1958) (under a Pennsylvania statute making the sale of liquor to intoxicated persons unlawful, the court found that the purpose of the statute was not only to protect the general public but for the protection of intoxicated parties unable to take care of themselves as well).

25. Note 13 *supra.*
26. 289 F.2d at 18.
27. *Id.* at 19.
28. N.J. STAT. ANN. § 39:4-50 (1937). The statute provides for a fine of $250 to $500 or imprisonment for 30 days to 3 months, and forfeiture of the right to operate a motor vehicle in New Jersey for 2 years, on the first conviction of driving while intoxicated. For a second offense the punishment is 3 months imprisonment and forfeiture of the right to operate a motor vehicle in New Jersey for 10 years.
29. 289 F.2d at 19-20.
30. *Id.* at 20.
31. Note 8 *supra.*
32. See note 10 *supra.*
33. See note 11 *supra.*

ing the court's finding of an assumption of duty may be justified. However, this court recognizes that exceptional circumstances may minimize the is somewhat more difficult to handle. In such situations the plaintiff can usually be found negligent in placing himself in his predicament. However, this court recognizes that exceptional circumstances may minimize the importance of any negligence on the part of the plaintiff, thus proposing, in the absence of a civil liability statute, a stricter standard of care for tavern owners than the cases have imposed in the past. But with the dangers coincident to the operation of an automobile on today's crowded highways, it would seem that a stricter duty of care for persons selling intoxicants is quite in order. This case may well be one which will assist in dictating a desirable change in the present common law.