Vanderbilt Law Review

Volume 13
Issue 4 *Issue 4 - October 1960*

Article 27

10-1960

Recent Cases

Law Review Staff

RECENT CASES

CONSTITUTIONAL LAW—DUE PROCESS—DUTY OF NON-RESIDENT VENDOR TO COLLECT USE TAX

Scripto, Incorporated, a Georgia corporation, sought to enjoin the attachment of certain of its accounts receivable for satisfaction of use taxes[1] which had been assessed against it by the comptroller of Florida. The alleged liability for this tax arose out of certain activities of an advertising specialty division, known as Adgif Corporation, owned and operated by Scripto, which sells the mechanical writing devices manufactured by Scripto. Sales made by Adgif are not for resale purposes but are made to businesses using the instruments as a method of advertising by lettering printed thereon. Adgif employs no salesmen in Florida;[2] the sales are made on a commission basis by brokers, known as solicitors or jobbers, who also sell products of other manufacturers.[3] Neither Scripto nor Adgif owns, leases or maintains any office, distribution center, warehouse or other place of business in Florida, nor do they maintain or own any bank account or stock of merchandise there.[4] The Florida[5] court sustained the tax and upon review by the Supreme Court of the United States, *held,* affirmed. Florida could require the foreign vendor, soliciting sales in the taxing state through independent wholesalers or jobbers, to collect its use tax without violating either the commerce clause or due process clause of the Constitution. *Scripto, Inc. v. Carson,* 362 U.S. 207 (1960).

The use and enjoyment of goods as a taxable event is now well established,[6] and the validity of use taxes has been virtually removed from the area of debate.[7] The tax is said to be levied against the consumer but an out of state vendor may be required to act as col-

1. FLA. STAT. ANN. § 212.05 (1958).
2. One salesman was employed by Scripto in Florida; however, he had no connection with the Adgif operation. The Florida courts found that his presence in Florida was not relevant, and this Court accepts this finding without passing upon it. See 362 U.S. at 209 n. 2.
3. The contract set forth the intention "to create the relationship of independent contractor."
4. Scripto, Inc. v. Carson, 105 So. 2d 775 (Fla. 1958).
5. Probable jurisdiction noted, 361 U.S. 806 (1959).
6. In Henneford v. Silas Mason Co., 300 U.S. 577 (1937), a general use tax, which was complementary to a sales tax, was attacked as being a burden upon interstate commerce. The Court there held that the use tax was not an interstate commercial activity but upon the local event or privilege of using or consuming the goods after such commerce had ended.
7. General Trading Co. v. State Tax Comm'n, 322 U.S. 335 (1944); Henneford v. Silas Mason Co., 300 U.S. 577 (1937); Gaulden v. Kirk, 47 So. 2d 567 (Fla. 1950); Continental Supply Co. v. People, 54 Wyo. 185, 88 P.2d 488 (1939).

lector or may be assessed for the amount of tax for failure to collect it from the vendee.[8] The foreign vendor's liability for the tax must, however, meet the due process requirements.[9] It is not difficult to find the nexus required to satisfy due process where the out of state vendor is qualified to do business and maintains agents, offices, stock, or the like within the taxing state.[10] In such a situation the corporation has pretty clearly submitted to the power of the taxing state. However, if none of these connections with a state exist and the only business transacted within the taxing state is accomplished through solicitation by salesmen, there is more clearly a basis for questioning the power of a state to make the vendor serve as a collector. In *General Trading Co. v. State Tax Comm'n,*[11] the vendor, a Minnesota corporation, had not qualified to do business in Iowa, maintained no office, branch, or warehouse there, but sent travelling salesmen into Iowa to solicit orders which were subject to acceptance in Minnesota. The Court held that there were sufficient contacts between the vendor and the taxing state to justify imposing the duty of collection of the tax upon the vendor. This power to impose the duty of collection upon a foreign vendor has not gone without limitation. In *Miller Brothers Co. v. Maryland,*[12] the duty to collect was challenged by a Delaware corporation that made over-the-counter sales to Maryland residents. There was no solicitation by salesmen in this case; purchases were made in the Delaware store. The connections of Miller Brothers with the taxing state consisted of newspaper and radio advertising, the mailing of circulars into Maryland, and the occasional delivery of goods to Maryland customers by truck or common car-

8. General Trading Co. v. State Tax Comm'n, 322 U.S. 335 (1944); Henneford v. Silas Mason Co., 300 U.S. 577 (1937); Monamotor Oil Co. v. Johnson, 292 U.S. 86 (1934); Thompson v. Rhodes-Jennings Furniture Co., 223 Ark. 682, 268 S.W.2d 376 (1954); Topps Garment Mfg. Corp. v. Maryland, 128 A.2d 595 (Md. 1957).

9. One of the first cases to question the constitutionality of requiring an out of state vendor to collect a use tax was Monamotor Oil Co. v. Johnson, 292 U.S. 86 (1934). In upholding the device the Court said:
"The statute obviously was not intended to reach transactions in interstate commerce, but to tax the use of motor fuel after it had come to rest in Iowa, and the requirement that the appellant as the shipper into Iowa shall, as agent of the state, report and pay the tax on gasoline thus coming into the state for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant [the out of state vendor]." 292 U.S. at 95.
In subsequent cases, courts used the above excerpt to uphold collection devices or summarily dismissed the question by stating that making "the distributor the tax collector for the state is a familiar and sanctioned device." General Trading Co. v. State Tax Comm'n, 322 U.S. 335, 338 (1944). See Hartman, *Sales Taxation in Interstate Commerce,* 9 VAND. L. REV. 138, 173 (1956); Comment, 8 VAND. L. REV. 124 (1954).

10. Nelson v. Montgomery Ward, 312 U.S. 373 (1941); Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941); Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62 (1939); Monamotor Oil Co. v. Johnson, 292 U.S. 86 (1934).

11. 322 U.S. 335 (1944).

12. 347 U.S. 340 (1954).

rier.[13] The Court in this case held that the requisite minimum connection did not exist between the taxing state and the out of state vendor.

In the instant case, the Court concluded that the "'minimum connections' not present in *Miller* are more than sufficient here."[14] This holding narrows the gap between activities that are sufficient to satisfy due process and those which will not. In *General Trading* the out of state vendor had no office within the taxing state; however, the Court found the requisite contact in the activity of salesmen who solicited orders within the state. In *Miller Brothers* there were no salesmen actively soliciting orders within Maryland to furnish the "minimum connections"; in the instant case there was active solicitation by the jobbers within Florida.[15] The taxpayer, however, attempted to circumvent *General Trading* by establishing an independent contractual relationship[16] with the jobbers rather than having its own agents solicit orders in Florida. The Court stated that "the contractual tagging of the salesman as 'independent' neither results in changing his local function of solicitation nor bears upon the effectiveness in securing a substantial flow of goods into Florida . . . . The test is simply the nature and extent of the activities of the appellant [Scripto] in Florida."[17] Local personal solicitation on behalf of the vendor, rather than the precise legal relationship between the jobbers and vendor, was emphasized as the Court's basis for imposing the duty of collector upon the foreign vendor.

The Court seems to have fully justified its position in not permitting the contract to circumvent the real relation of the jobbers or solicitors to taxpayer by stating: "To permit such formal 'contractual shifts' to make a constitutional difference would open the gates to a stampede of tax avoidance."[18] This seems to be the only practical view which the Court could have adopted.[19]

---

13. 347 U.S. at 341-42.
14. 362 U.S. at 213.
15. The Court uses this active solicitation within the taxing state as a basis for distinguishing the *Miller Bros.* case. In 8 VAND. L. REV. 124, it is suggested that the *General Trading* rule is "that in the absence of a branch within the taxing state, the requisite connection will be found only in activity within the taxing state which is an inducing cause of the out-of-state sale." It seems that the Court has applied this rule in the instant case.
16. 362 U.S. at 208.
17. *Id.* at 211-212.
18. *Id.* at 211, citing Powell, *Sales & Use Taxes: Collection from Absentee Vendors,* 57 HARV. L. REV. 1086, 1090 (1957).
19. Two companion bills have been presented to Congress in an attempt to prohibit states from requiring an out of state vendor to collect a use tax where vendor's only connection with the taxing state is that of soliciting sales within the taxing state. S. 3549, H.R. 12,235, 86th Cong., 2d Sess. (1960). See Hartman, *State and Local Taxation—1960 Tennessee Survey,* 13 VAND. L. REV. 1257, 1260 (1960).

EVIDENCE—CRIMINAL LAW—CIRCUMSTANTIAL EVIDENCE SUFFICIENT TO ESTABLISH CORPUS DELICTI

Defendant's wife, without notice to any of her several intimate friends, disappeared under questionable circumstances in May 1955.[1] After her disappearance the defendant acted in such a manner as to indicate that he did not anticipate her immediate return.[2] Upon his being charged with the mishandling of his wife's finances in October 1956, Mr. Scott tried unsuccessfully to flee the country. He was apprehended on the Canadian border and indicted for his wife's murder. The prosecution was unable to produce a scintilla of direct proof that Mrs. Scott was deceased, much less murdered.[3] On the other hand, the defense produced witnesses who testified that they had actually seen the alleged victim alive after the date of her supposed death.[4] There were no statements attributed to the defendant, who never took the stand,[5] that would have indicated that he did not expect his wife to reappear. Mr. Scott was sentenced to life imprisonment upon his conviction of murder in the first degree. On appeal, *held,* affirmed. Circumstantial evidence, relied upon to establish the elements of the corpus delicti, can be sufficient to supply proof of guilt so convincing as to preclude every reasonable hypothesis of innocence. *People v. Scott,* 176 Cal. App. 2d 504, 1 Cal. Rptr. 600 (1959).

The question presented by the instant case has long haunted the common law system;[6] and persons unversed in jurisprudence have labored under the misconception that there can be no conviction of murder until after the production of a body.[7] Faint attempts to adopt

1. People v. Scott, 176 Cal. App. 2d 504, 1 Cal. Rptr. 600, 624-25. The court points out the facts that cast suspicion on the wife's absence. (1) She was in unusually good health for a person of her age. (2) Her close circle of friends had been in daily contact with her for many years, and she had not indicated any plans for taking a trip in the near future. (3) If she had departed of her own accord she would not have left behind such articles as clothing, glasses, dentures, and money.

2. *Ibid.* The defendant had persuaded his wife to convert her extensive holdings into cash, which was later to facilitate his conversion of her property. The defendant had no income and was dependent upon his wife for support. In addition, he was involved in an illicit love affair. One would gather from the defendant's actions that he was certain his wife would not return. (1) He was bold in his forgeries. (2) He personally cancelled all of his wife's appointments and her life insurance. (3) He gave away many of his wife's belongings, particularly to women having questionable relationships with him. (4) His lack of concern at his wife's disappearance and his conflicting explanations thereof cast much suspicion.

3. 1 Cal. Rptr. at 603.

4. *Id.* at 618.

5. The trial judge had allowed the prosecution to comment on the fact that defendant did not take the stand. The court here stated that such was in keeping with the rule in California, based on Adamson v. California, 332 U.S. 46 (1947).

6. See 1 WHARTON, CRIMINAL LAW § 352 (12th ed. 1932); *accord,* 7 WIGMORE, EVIDENCE § 2081 (3d ed. 1940).

7. See People v. Cullen, 37 Cal. 2d 614, 234 P.2d 1 (1951), which presents

the above rule may be perceived in the early English cases,[8] and were bottomed in Lord Matthew Hale's statement: "I would never convict any person of murder or manslaughter, unless the fact were to be done, or at least the body were found dead."[9] Today this is not generally recognized as a rule of common law, but is regarded as only a cautionary guide indicating that extreme care is to be exercised in such cases.[10] A few states, however, have adopted the limitation by codification.[11] In a homicide case the matter of death is the first of the two elements of proof required to establish corpus delicti.[12] The modern view is that any of the elements of the corpus delicti may be proven by either direct or circumstantial evidence, but cases and writers alike temper this rule with a plea for extreme caution.[13]

---

an excellent example of this point. Here the defendant spoke to relatives at considerable length concerning the murders, but refused to tell where the bodies were discarded for fear that this would ruin his defense.

8. 7 WIGMORE, EVIDENCE § 2081 at 421 (3d ed. 1940).

9. 2 *Pleas of the Crown* 290 (1680). This statement was based on two cases referred to as "one mentioned in my lord Coke's P.C. cap. 104, p. 232, a Warwickshire case, another that happened in my remembrance in Staffordshire." In the first of these the defendant was hanged for the murder of his niece who was his ward. He explained that he had persuaded another girl to impersonate his niece after she had run off, so that he could continue to exercise his dominion over her inheritance. In truth the ward had run away after being beaten, only to return later to accept her inheritance when she became of age.

The second case dealt with a situation in which the defendant had sent the alleged victim beyond the seas whence he did not return until shortly after the defendant was hanged. For a discussion of these and other cases see, Coaker, *Corpus Delicti: Murder With No Trace of a Body,* 73 S.A.L.J. 181 (1956).

10. Warinke v. Commonwealth, 297 Ky. 649, 180 S.W.2d 872 (1944); Williams v. State, 75 N.C. 134 (1876); Foster v. State, 180 Tenn. 164, 172 S.W.2d 1003 (1943); *see* 3 WARREN, HOMICIDE § 270 (1938); 3 WHARTON, CRIMINAL EVIDENCE § 980 (12th ed. 1955). *Contra,* People v. Bennett, 49 N.Y. 137 (1872); Ruloff v. People, 18 N.Y. 179 (1858); Pitts v. State, 43 Miss. 472 (1871). These latter cases all require at least one of the elements of the corpus delicti to be proved by direct evidence. The rules in the New York cases were later codified.

11. COLO. REV. STAT. ANN. § 40-2-3 (1953); MONT. REV. CODES ANN. § 94-2510 (1947); N.Y. PEN. LAW § 1041; N.D. REV. CODE § 12-2728 (1943); TEX. PEN. CODE art. 1204 (1952).

12. Dean Wigmore considered the orthodox view to be that the corpus delicti involved only the proof of the specific loss or injury sustained, but he accepted the fact that most courts add to this the requirement of the proof of somebody's criminality as the source of the loss. Wigmore feels that the additional burden placed upon the trier of fact is too much for it to consider at one time. 7 WIGMORE, EVIDENCE § 2072 (3d ed. 1940).

Some courts even go so far as to add a third element. They require evidence that the accused was the perpetrator of the crime. The absurdity of this idea is readily apparent in that the proof of the corpus delicti would be synonymous with the entire charge. People v. Manske, 339 Ill. 176, 77 N.E.2d 164 (1948).

13. United States v. Di Orio, 150 F.2d 938 (3d Cir. 1945); Bolden v. State, 30 Ala. App. 393, 6 So. 2d 525 (1942); People v. Cullen, 37 Cal. 2d 614, 234 P.2d 1 (1951); Deiterle v. State, 101 Fla. 79, 134 So. 42 (1931); People v. Rife, 382 Ill. 588, 48 N.E.2d 367 (1943); Laughlin v. Commonwealth, 18 Ky. L. Rep. 640, 37 S.W. 590 (1896); Commonwealth v. Williams, 171 Mass. 461, 50 N.E. 1035 (1898); State v. Bowman, 294 Mo. 245, 243 S.W. 110 (1922); Barrett v. State, 57 Okla. Crim. 259, 47 P.2d 613 (1935); State v. Barnes, 47 Ore. 592,

The homicide cases applying this rule can be grouped as follows: (1) direct evidence of the means of death upon the body of the person, as in cases of death at sea,[14] (2) production of a mutilated body or part thereof that can be identified as the alleged victim,[15] or (3) an existing situation sufficient to prove the corpus delicti and an admission or confession of the fact of death.[16]

Although without precedent in the United States,[17] the instant case is not without counterparts in the courts of the Commonwealth. Both the English and the New Zealand courts have handed down verdicts of guilty when confronted with similar situations. There is some indication, however, that the present decision, while abiding by the established legal principles of its British predecessors, is not as strong on its factual implications. In *King v. Horry*,[18] great weight was given to the defendant's statements to the effect that he had knowledge of the victim's death, and in *Regina v. Onufrejczyk*,[19] an extraordinary explanation as to the victim's disappearance coupled with unexplainable "blood spots" were considered indicative of guilt. Although the court tried to draw analogies to the incriminating circumstances in the cases previously referred to,[20] clear guilt-producing evidence was lacking in the *Scott* case.[21] The importance of the factual situation in a case of this character is emphasized by the court's allotting fifteen pages of its opinion to facts alone.[22] Only after a careful reading of the court's astute analysis of these facts can one

85 P. 998 (1906); Commonwealth v. Puglise, 276 Pa. 235, 120 Atl. 401 (1923); Foster v. State, 180 Tenn. 164, 172 S.W.2d 1003 (1943); Bonner v. Commonwealth, 141 Va. 395, 126 S.E. 198 (1924); State v. Anderson, 10 Wash. 2d 167, 116 P.2d 346 (1941).

14. United States v. Gibert, Fed. Cas. No. 15,204 (1834).

15. People v. Watts, 198 Cal. 776, 247 Pac. 884 (1926); People v. Hales, 23 Cal. App. 731, 139 P. 667 (1914); People v. Alviso, 55 Cal. 230 (1880).

16. People v. Cullen, 37 Cal. 2d 614, 234 P.2d 1 (1951); People v. McMonigle, 29 Cal. 2d 730, 177 P.2d 745 (1947); People v. Watters, 202 Cal. 154, 259 Pac. 442 (1927); People v. Clark, 70 Cal. App. 531, 233 Pac. 980 (1925).

17. "The case in hand is without precedent in this country. There is no reported case from our state or federal courts that in its facts bears close resemblance to the present one." 1 Cal. Rptr. at 603.

18. [1952] N.Z.L.R. 111. See for a contemporary discussion of this case: Morris, *Corpus Delicti and Circumstantial Evidence*, 68 L. Q. REV. 391 (1952); Comment, 15 MODERN L. REV. 348 (1952). In this case the defendant made several statements to parties that the victim was dead, although he never hinted that he took her life. Eleven years had lapsed between the time of death and the trial.

19. 1 Q.B. 388, 1 All E.R. 242, 2 WEEKLY 273 (1955). See Coaker, *Corpus Delicti: Murder With No Trace of a Body*, 73 S.A.L.J. 181 (1956). In this case the defendant was in debt. He cast suspicion upon himself by trying to set up an alibi, and by asking persons to perjure themselves to sustain it. These events took place before his indictment. It is to be noted that after the conviction in this case the defendant was reprieved. The defendant in this case claimed that the victim had been captured by Polish authorities and carried off against his will.

20. 1 Cal. Rptr. at 620, 623.

21. *Id.* at 623, 625.

22. The transcript of the testimony in this particular case ran to 6000 pages.

justify the decision. The charge to the jury, in accordance with the earlier decisions, cautioned the trier of fact that the evidence and inferences drawn from it must prove the "nonexistence of any reasonable hypothesis of innocence."[23]

The energizing forces underlying the present case are of great import, for herein exists the decision's philosophical justification. This holding has an advantageous effect in that it will provide a deterrent to a criminal's adopting modern means of destruction to obliterate his crime. On the other hand, the ruling will not provide an entrapment for innocent parties. While criticism of such a holding would have been justified at an earlier time, it is a logical decision in line with modern advancements. With the intervention of mass communication there is little, if any, possibility of the circumstances that produced Lord Hale's reflections repeating themselves.[24] Technical skills of criminal investigation have increased to a point where minute evidence is all that is needed to associate the criminal with the crime. There is, however, one element that still casts doubt upon the wisdom of such a decision, and that is the opportunity for human error. A procedure capable of an extremely exacting inspection of the evidence at both the trial and appellate levels must exist in such instances. Another point to be considered, though theoretically inapplicable, is the punishment to be prescribed. If it is set at life imprisonment rather that at death, there is at least room for error and reclamation. Although the facts fully justify a decision of the present character, in one's subconscious the thought remains: what if the alleged victim is suffering from amnesia and does not recover until after the execution?[25]

23. In the *Onufrejczyk* case the court had stated: "Before he can be convicted, the fact of death should be proved by such circumstances as render the commission of the crime morally certain and leave no ground for possible doubt . . . ." 1 All E.R. at 248.

24. It would require a person of exceptionally hardened disposition to ignore the news of his own murder and somebody's being tried for it. But nevertheless, this possibility still exists as a means for destroying ones enemies.

25. The comment of the defense counsel in the *Onufrejczyk* case holds true in all cases of this nature. If the alleged victim were suddenly to appear in the courtroom during the sentencing of the defendant, none of the evidence relied on by the state would be proven wrong.

EVIDENCE—PRESUMPTIONS—REBUTTABLE PRESUMPTION PERSISTS UNTIL TRIER OF FACT FINDS NONEXISTENCE OF PRESUMED FACT AS PROBABLE AS ITS EXISTENCE

The beneficiary of a life insurance policy, a minor, sued for award of double indemnity under the policy for death of the insured, his father, by accidental means.[1] A wound inflicted by the firing of a revolver held in contact with the skin of the insured's temple was the cause of death.[2] The defendant insurance company maintained that the deceased had committed suicide.[3] Plaintiff's undisputed evidence showed that death was caused by violent external means, but was insufficient to sustain a finding of accident.[4] For this he relied upon the presumption against suicide, although his evidence tended to show that the insured's death resulted from an intentional self-inflicted wound. The court declared that an affirmative presumption of death by accidental means arises from the negative presumption against suicide.[5] After the jury awarded the plaintiff double indemnity, the Supreme Judicial Court of Maine on review, *held,* that defendant's motion for a new trial would be granted unless plaintiff remitted half of the double indemnity award. A disputable pre-

1. It was agreed that under the policy the insured was entitled to recover the ordinary death benefit. The insurance company contested only the double indemnity benefit payable in the event the death of the insured was caused by bodily injuries sustained solely through "violent, external and accidental means." Hinds v. John Hancock Mut. Life Ins. Co., 155 A.2d 721, 724 (Me. 1959).

2. The plaintiff presented competent medical and other testimony establishing the following: The insured was found unconscious, slumped in a chair at his kitchen table. He died at a hospital without gaining consciousness. The bullet had passed through the head of the deceased in approximately a horizonal course. On a table beside him was a revolver and an open package of bullets. No gun cleaning equipment was present, and there was no visible evidence of any scuffle or other disturbance on the premises. Empty whiskey bottles were nearby. First to arrive on the scene was the family doctor who found the wife of the deceased holding her husband's head. She appeared to be in a state of shock and confused. Friends of the deceased testified that there was no apparent motive for suicide. An analysis of the decedent's blood shortly after death revealed alcoholic content of .267% by weight. A medical expert testified that a person in such a state of intoxication "would be confused, with his reactions markedly slow and his pain sensation diminished; that he would be able to 'navigate' although not very steadily." 155 A.2d at 724.

3. See Richardson & Breyfogle, *Problems of Proof in Distinguishing Suicide from Accident,* 56 YALE L. J. 482, 494-99 (1947).

4. Plaintiff did not call as a witness the deceased's widow, although she was either present when the shooting occurred or arrived on the scene before anyone else. When called as a defense witness she refused, on grounds of self-incrimination, not only to answer a specific question, but to testify at all. At the beginning of the examination, when asked if she was the deceased's widow, she stated her refusal to testify and her grounds for such refusal. After a colloquy of the counsel before the court while the jury was retired, the judge ruled that all questions of this witness were excluded because of her claim of privilege. The defense took no exception to this ruling. 155 A.2d at 724-25.

5. 155 A.2d at 725.

sumption persists until the factfinder is persuaded by the evidence that it is as probable that the presumed fact does not exist as that it does exist. *Hinds v. John Hancock Mutual Life Ins. Co.*, 155 A.2d 721 (Me. 1959).

Although there are at least eight various views on the effect of rebuttable presumptions,[6] the majority of jurisdictions have endorsed the Thayer theory of rebuttal, under which disputable presumptions as a matter of law become totally ineffective when evidence has been introduced which would support a finding that the presumed fact does not exist.[7] Whether the evidence supporting the non-existence of the presumed fact is believed or disbelieved by the judge or jury is irrelevant under this view.[8] Therefore the only effect of the presumption is to shift the burden of going forward with the evidence to the party asserting the non-existence of the presumed fact. This

6. Morgan, *Foreword* to MODEL CODE OF EVIDENCE at 54-65 (1942). See also Morgan, *Instructing the Jury upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59 (1933). The opinion in the instant case cites Professor Morgan's analysis of four of these views. 155 A.2d at 727-28. Professor Morgan has made the following observation on presumptions: "Every writer of sufficient intelligence to appreciate the difficulties of the subject-matter has approached the topic of presumptions with a sense of hopelessness and has left with a feeling of despair." Morgan, *Presumptions*, 12 WASH. L. REV. 255 (1937). Apparently presumptions have been recognized as a difficult portion of the law of evidence for a long time. Thayer quoted Alciatus, a sixteenth century Italian lawyer and humanist who noted that the subject of presumptions was in almost inextricable confusion. THAYER, PRELIMINARY TREATISE ON EVIDENCE 313 (1898).

7. *Id.* at 336. Although Thayer cited various court decisions in support of this view, his influence and that of Wigmore, who accepted and popularized this view in his first two editions, led to its widespread acceptance by the courts. The rule incorporated the advantages of being both simple and workable. Prior to the wholesale adoption of the Thayerian rule, juries were commonly instructed on the effect of presumptions. Thayer maintained that the court should not attempt to instruct the jury on the weight to be accorded presumptions because of the difficulty in phrasing language about presumptions which would not be confusing. *Id.* at 337-39. Wigmore, however, in his third edition acknowledged the importance of instructing the jury "that they could give special weight to the course of experience as embodied in the presumption." 9 WIGMORE, EVIDENCE § 2498 (3d ed. 1940).

The following cases are typical of the many decisions supporting the Thayerian rule: New York Life Ins. Co. v. Gamer, 303 U.S. 161 (1938); Jefferson Standard Life Ins. Co. v. Clemmer, 79 F.2d 724 (4th Cir. 1935); Moroni v. Brawders, 317 Mass. 48, 57 N.E.2d 14 (1944); Ryan v. Metropolitan Life Ins. Co., 206 Minn. 562, 289 N.W. 557 (1939); Jodoin v. Baroody, 95 N.H. 154, 59 A.2d 343 (1948); Carson v. Metropolitan Life Ins. Co., 165 Ohio St. 238, 135 N.E.2d 259 (1956); Hill v. Cabral, 62 R.I. 11, 2 A.2d 482 (1938); Tyrrell v. Prudential Ins. Co. 109 Vt. 6, 192 Atl. 184 (1937). See Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195 (1953).

8. Professor Morgan called this the pure Thayerian rule. Morgan, *Foreword* to MODEL CODE OF EVIDENCE at 55 (1942). In contrast with this pure Thayerian rule is the view that the presumption continues to exist until " 'substantial evidence' of the non-existence of the presumed fact has been introduced." *Id.* at 56. Some courts set forth the doctrine that the presumption exists until the evidence for non-existence of the presumed fact has some persuasive effect on the mind of the trier. See Clark v. Diefendorf, 109 Conn. 507, 147 Atl. 33 (1929); Gillett v. Michigan United Traction Co., 205 Mich. 410, 171 N.W. 536 (1919); Ryan v. Metropolitan Life Ins. Co., 206 Minn. 562, 289 N.W. 557 (1939).

rule was adopted by the American Law Institute *Model Code of Evidence*.[9] At the opposite pole from the Thayer rule is the so-called "Pennsylvania" rule,[10] under which the existence of the presumed fact is assumed until the jury finds that there is greater probability that the presumed fact does not exist than that it does exist. The effect of this rule is to shift to the party alleging non-existence of the presumed fact both the burden of going forward with the evidence and the burden of persuasion of the non-existence. This view was

9. MODEL CODE OF EVIDENCE, rule 704 (1942). The adoption of this Thayerian rule resulted only after considerable disagreement between the views of two factions within the Institute. In 1939 the American Law Institute appointed a committee on evidence to draft the proposed MODEL CODE OF EVIDENCE. A dozen distinguished law teachers and judges composed the committee with Professor Morgan as reporter. In addition there were some seventy consultants headed by Professor Wigmore. In considering the rule in respect to presumptions, the reporter advocated the "Pennsylvania" rule. (See discussion of this rule, note 10 *infra*). A draft was made incorporating the "Pennsylvania" rule, which was approved by the advisors and counsel, but by a vote of 59 to 42 the Institute in 1941 rejected the draft. Leaders among the opponents of the "Pennsylvania" rule were Judge Lummus of the Supreme Judicial Court of Massachusetts, and Judges Learned Hand and Augustus Hand of the United States Court of Appeals, Second Circuit. The reporter was directed to draft a rule based on the pure Thayerian doctrine. This became rule 704. Morgan, *Foreword* to MODEL CODE OF EVIDENCE at 60 (1942). For a more detailed description of the conflict with extensive quotations from the transcript of proceedings see Helman, *Presumptions*, 22 CAN. B. REV. 118 (1944).

For criticisms of the Thayerian rule see: MORGAN, BASIC PROBLEMS OF EVIDENCE 30 (1954); MORGAN, PRESUMPTIONS: THEIR NATURE, PURPOSE AND REASON (1949); Bohlen, *The Effect of Rebuttable Presumptions of Law upon the Burden of Proof*, 68 U. PA. L. REV. 307 (1920); Gausewitz, *Presumptions*, 40 MINN. L. REV. 391 (1956); Gausewitz, *Presumptions in a One-Rule World*, 5 VAND. L. REV. 324 (1952); McBaine, *Burden of Proof: Presumptions*, 2 U.C.L.A. L. REV. 13 (1954); Morgan, *Presumptions*, 10 RUTGERS L. REV. 512 (1956); Morgan, *The Law of Evidence, 1941-1945*, 59 HARV. L. REV. 481, 495-505 (1946); Morgan, *Further Observations on Presumptions*, 16 So. CAL. L. REV. 245 (1943); Morgan, *Techniques in the Use of Presumptions*, 24 IOWA L. REV. 413 (1939); Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 910-13 (1937); Morgan, *Presumptions*, 12 WASH. L. REV. 255 (1937); Morgan, *Instructing the Jury upon Presumption and the Burden of Proof*, 17 HARV. L. REV. 59 (1933); Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906 (1931).

Note that the MODEL CODE OF EVIDENCE rule 703 in the case of one exception, the presumption of legitimacy, departed from the Thayerian rule and for this one presumption established the "Pennsylvania" rule. In respect to the presumption of legitimacy, the "Pennsylvania" rule is well rooted in common law.

10. There is considerable doubt as to whether the "Pennsylvania" rule is still followed today in Pennsylvania. Although the rule was well precedented prior to 1934, *e.g.*, Doud v. Hines, 269 Pa. 182, 112 Atl. 528 (1921); Holzheimer v. Lit Bros., 262 Pa. 150, 105 Atl. 73 (1918); Vuille v. Pennsylvania R.R., 42 Pa. Super. 567 (1910), the seemingly pro-Thayerian decision of Watkins v. Prudential Ins. Co., 315 Pa. 497, 173 Atl. 644 (1934) has left confusion in its wake. See Levin, *Pennsylvania and the Uniform Rules of Evidence: Presumptions and Dead Man Statutes*, 103 U. PA. L. REV. 1, 12-20 (1954); Note, *The Effect of Rebuttable Presumptions in Pennsylvania*, 57 DICK. L. REV. 234 (1953). Decisions from other jurisdictions approving jury instructions in accord with the "Pennsylvania" rule: Lewis v. New York Life Ins. Co., 113 Mont. 151, 124 P.2d 579 (1942); Banks v. Metropolitan Life Ins. Co., 142 Neb. 823, 8 N.W.2d 185 (1943); Wyckoff v. Mutual Life Ins. Co., 173 Ore. 592, 147 P.2d 227 (1944).

incorporated in the *Uniform Rules of Evidence*[11] as applicable when the facts from which the rebuttable presumption is derived have any probative value as evidence of the existence of the presumed fact. The "Pennsylvania" rule has been followed in few jurisdictions,[12] and some opponents have questioned its constitutionality.[13] The "equal probabilities" rule adopted in the instant case has been previously suggested as a compromise between the extremes of "Thayer" and "Pennsylvania."[14]

---

11. UNIFORM RULE OF EVIDENCE 14:—*"Effect of Presumptions.* Subject to Rule 16, and except for presumptions which are conclusive or irrefutable under the rules of law from which they arise, (a) if the facts from which the presumption is derived have any probative value as evidence of the existence of the presumed fact, the presumption continues to exist and the burden of establishing the non-existence of the presumed fact is upon the party against whom the presumption operates, (b) if the facts from which the presumption arises have no probative value as evidence of the presumed fact, the presumption does not exist when evidence is introduced which would support a finding of the non-existence of the presumed fact, and the fact which would otherwise be presumed shall be determined from the evidence exactly as if no presumption was or had ever been involved."

UNIFORM RULE OF EVIDENCE 16:—*"Burden of Proof Not Relaxed as to Some Presumptions.* A presumption, which by a rule of law may be overcome only by proof beyond a reasonable doubt, or by clear and convincing evidence, shall not be affected by Rules 14 or 15 and the burden of proof to overcome it continues on the party against whom the presumption operates."

Rule 14 (a) incorporates the "Pennsylvania" rule in respect to those presumptions derived from facts which operate as evidence of the presumed fact. Rule 14 (b) adopts the Thayerian rule in respect to those presumptions arising from facts having no value as evidence of the presumed fact. For the reasons considered by the drafters in recommending this rule see *Comment* following UNIFORM RULE OF EVIDENCE 14. Apparently the drafters considered that the jury's need for guidance by the court outweighed the simplicity and widespread acceptance by the courts of the Thayerian rule.

The UNIFORM RULES OF EVIDENCE were drafted by a committee of the National Conference of Commissioners on Uniform State Laws in cooperation with the American Law Institute. The objective was revision of the MODEL CODE OF EVIDENCE. The American Law Institute appointed an advisory committee headed by Professor Morgan. Judge Learned Hand, who had promoted the Thayerian view in opposition to the Morgan-sponsored Pennsylvania view when the MODEL CODE OF EVIDENCE was under consideration, was one of the advisory committee members. Subsequent to the adoption of the UNIFORM RULES OF EVIDENCE by the National Conference of Commissioners on Uniform State Laws, they were approved by the American Bar Association and the American Law Institute.

12. See cases, *supra,* note 9.

13. The Supreme Court approved the Thayer rule in New York Life Ins. Co. v. Gamer, 303 U.S. 161 (1938). Tot v. United States, 319 U.S. 463 (1943) has raised doubts about the constitutionality of the "Pennsylvania" rule. Although the Court's language in *Tot* is somewhat confusing, it appears that due process is violated only by those presumptions which shift the burden of proof to the defendant while the facts from which the presumption is derived have no logical or probative value as evidence of the presumed fact. See criticisms of *Tot:* 56 HARV. L. REV. 1324-30 (1943); 17 So. CAL. L. REV. 48 (1943); 22 TEXAS L. REV. 75 (1943).

UNIFORM RULE OF EVIDENCE 14 (b) was designed to side-step the constitutional question by adhering to the Supreme Court-approved Thayer rule in cases of *Tot*-type presumptions.

14. "[M]ost presumptions should, where applicable at all, continue to operate unless and until the evidence persuades the trier at least that the non-existence of the presumed fact is as probable as its existence. This would not interfere with the accepted dogma prohibiting the shifting of the burden

In the instant case the court first held that presumptions are not evidence, although they serve a procedural purpose.[15] Next the court undertook the troublesome question of determining to what extent a rebuttable presumption persists in the face of contrary evidence. After weighing the merits of the Thayer and "Pennsylvania" rules, the court adopted an intermediate position designed to "give to the presumption itself maximum coercive force short of *shifting the burden of persuasion.*"[16] Although recognizing that the rule that the burden of persuasion never shifts has been the subject of severe criticism, the court found no compelling reason to overthrow unbroken Maine precedent for upholding the rule.[17] The court found that after the defense presented its evidence the plaintiff had lost the benefit of the presumption and failed to carry the burden of going forward with the evidence.[18] At the close of the evidence the trial court should have directed a verdict for the defendant.[19]

Although the "equal probabilities" rule of presumptions adopted by the Maine court is an improvement over the established Thayer rule, which American courts generally have been reluctant to abandon, the preferred rule is the one expressed by the Uniform Rule of Evidence 14, which would apply the "Pennsylvania" rule to the instant case. The court's reluctance to overthrow precedent deterred its adoption of the "Pennsylvania" rule. Whereas the Thayer rule gives so little procedural effect to presumptions that their usefulness is impaired, the rule applied here allows presumptions at least the minimum desirable effectiveness. It is hoped that eventually a trend will be established toward adoption of Uniform Rule of Evidence 14, when courts grow willing to discard the unreasonable old shibboleth of a fixed and immovable burden of proof.[20]

---

of persuasion. It is suggested that that dogma has not the slightest foundation in reason when applied to situations where a presumption is involved, and should be entirely disregarded where the question arises as to the effect of evidence upon the persistence of a presumption. And in situations where a presumption owes its origin to an important social policy, it should operate to fix the burden of persuasion." Morgan, *Instructing the Jury upon Presumptions and Burden of Proof,* 47 HARV. L. REV. 59, 83 (1933). Substantially the same rule as that in the instant case has been employed in California and Ohio. See Diller v. Northern Cal. Power Co., 162 Cal. 531, 123 Pac. 359 (1912); Klunk v. Hocking Valley Ry., 74 Ohio St. 125, 77 N.E. 752 (1906).

15. 155 A.2d at 727. There are no Maine statutes or precedents making rebuttable presumptions evidence. *Id.* at 726. The court concluded that the election of the defense to go forward with evidence after the plaintiff's evidence was submitted, resulted from the uncertainty of the evidentiary status of presumptions in the jurisdiction. *Id.* at 724.

16. *Id.* at 730.

17. *Id.* at 731. See note 14 *supra* for example of criticism.

18. *Id.* at 733.

19. *Ibid.* The jury verdict which was contrary to the evidence resulted in part, the court explained, from the improper inference drawn from the widow's refusal to testify. *Id.* at 733-34.

20. Although it is frequently stated that the burden of proof never shifts, this rule has its exceptions. See, for example, the presumption of legitimacy. MODEL CODE OF EVIDENCE rule 703 and comment (1942).

RESTRAINT OF TRADE—SHERMAN ACT—REFUSAL TO SELL AS UNLAWFUL MEANS OF EFFECTING PRICE MAINTENANCE

The United States brought this action under section 4[1] of the Sherman Act to enjoin defendant, a manufacturer of pharmaceutical products, from violating sections 1[2] and 3[3] of that act. In 1956 certain retailers in non-fair trade areas[4] ignored defendant's minimum price policy;[5] they advertised and sold Parke, Davis products at prices re-

1. "The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations . . . [of this Act]; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. . . ." 26 Stat. 209 (1890), 15 U.S.C. § 4 (1959).

2. "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal . . . . Every person who shall make any contract or engage in any combination or conspiracy declared . . . to be illegal shall be deemed guilty of a misdemeanor . . . ." 26 Stat. 209 (1890), 15 U.S.C. § 1 (1959).

3. Section 3 of the Sherman Act applies the provisions of § 2 to the District of Columbia. 26 Stat. 209 (1890), 15 U.S.C. § 3 (1959).

4. The offending distributors were in the District of Columbia and Virginia, neither of which had enacted fair trade laws. Congress has never legalized resale price maintenance in the District of Columbia, but it has provided that price-fixing agreements made pursuant to state fair trade laws shall not be held illegal under the Sherman Act. The typical fair trade law permits fixing of resale prices for commodities which are identified by a trade-mark, brand name, or the name of a producer or distributor and which commodities are in free and open competition with commodities produced or distributed by others; but it does not authorize horizontal price-fixing agreements. The highest courts of the following seventeen states have held fair trade statutes unconstitutional insofar as they bind distributors who have not signed a contract to maintain resale prices: Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, New Mexico, Ohio, Oregon, South Carolina, Utah, Washington, and West Virginia. Among the leading cases are Liquor Store v. Continental Distilling Corp., 40 So. 2d 371 (Fla. 1949); Bissell Carpet Sweeper Co. v. Shane Co., 237 Ind. 188, 143 N.E.2d 415 (1957). The following cases, among others, sustain fair trade acts: Lionel Corp. v. Grayson Robinson Stores, 15 N.J. 191, 104 A.2d 304 (1954); Raxor Corp. v. Goody, 307 N.Y. 229, 120 N.E.2d 802 (1954). See Bates, *Constitutionality of State Fair Trade Acts*, 32 IND. L.J. 127 (1957).

5. Parke, Davis published its price policy to the trade. It was announced to retailers in these words: "The mimimum Retail Prices herein set forth or in Price Change Supplements applying thereto are in conformity with the provisions of the Fair Trade Laws of the States having such laws and are suggested for use also in those states which have not enacted Fair Trade Laws. Minimum Retail Prices applying to Consumers shall be 10% less than the published List Prices applying on unit stock packages in this Catalog and Supplements applicable unless otherwise specified. Such prices are exclusive of sales and other excise taxes, which are to be added thereto." Government Exhibit No. 1; Record, pp. 58, 301, United States v. Parke, Davis & Co., 362 U.S. 29 (1960). (Heremafter cited as Record, p. —.)

Parke, Davis announced its policy to the wholesale drug trade in these words: "It is the continuing policy of Parke, Davis and Company in dealing with wholesalers to sell its products to wholesalers who observe the net price selling schedule in this Parke, Davis and Company Wholesale Drug Trade Billers' Price List and supplements and who confine their distribution of Parke, Davis products, whether Rx legend or non-Rx legend, to customers authorized by law to fill or dispense prescriptions." Government Exhibit No. 13; Record, pp. 135, 310B.

flecting quantity discounts granted them by defendant on their large direct purchases.[6] Defendant sought adherence to its suggested resale prices. It instructed wholesalers that it would refuse to sell, not only to wholesalers who cut prices, but also to wholesalers who sold to retailers who cut prices.[7] All the wholesalers assented to this new policy.[8] Then defendant warned the retailers that it would refuse to sell directly to those who cut price, and that censured retailers would be unable to procure its products through any wholesaler.[9] When several retailers continued to sell at reduced prices from their stocks on hand, defendant persuaded them to cease advertising the products at cut prices; after they complied, defendant and its wholesalers resumed sales to retailers even though they continued to sell at the reduced prices.[10] The Government contended that this program of refusing to sell to wholesalers who resold defendant's products to price-cutting or discount-advertising retailers while it was refusing to sell directly to such retailers, when acquiesced in by the wholesalers, created a combination in restraint of trade which violated sections 1 and 3 of the Sherman Act.[11] The district court held that the

6. 362 U.S. 32. "Wholesalers were not authorized to grant similar discounts." *Ibid.*; Record, pp. 132, 142, 162-63, 196.

7. The testimony of Mr. Levin, Vice President of District Wholesale Drug is representative:

> *Q.* You have to observe their [Parke, Davis] net resale price?
> *A.* That is correct.
> *Q.* Do you also observe the policy of selling only to recognized drug outlets?
> *A.* That is correct.
> *Q.* Have you ever heard of a Parke Davis policy on the wholesale level which says that you cannot sell to retailers who are cutting prices?
> . . .
> *Q.* Until the year 1956, had you ever heard of it?
> *A.* No, sir.

Record, pp. 196-97.

8. See Record, pp. 125, 136-37, 162-64, 196-97, 204-05.

9. 362 U.S. 33-34. Mr. Gilbert Rosenthal, merchandising manager of Standard Drug Company testified: "[The local manager] informed me that the prices of Parke-Davis products in the area were being cut, so much so that they thought that they were being hurt by the price-cutting, and that they wanted us to discontinue price-cutting on Parke-Davis products, and they felt it so strongly that if we did not discontinue price cutting on Parke-Davis products, they would discontinue selling us. In addition to which not only would they discontinue selling us, but they would do everything they could to see that we did not get Parke-Davis products.

In other words, they would cut the wholesalers off, or instruct the wholesalers to cut us off from buying." Record, p. 151. See also Record, pp. 60, 147, 157-59. *Cf.* Record, pp. 101, 118.

10. 362 U.S. 35-36; Record, pp. 64-76, 101, 106, 110, 112, 119-20, 147-48, 154, 221, 224-25, 227-30, 232-35, 253-54, 264-65 (testimony on direct examination). As was stated in the Court's opinion, there is some evidence that "a reason for . . . [abandoning its price maintenance efforts] was that the Department of Justice . . . had begun an investigation of possible violation of the antitrust laws." 362 U.S. 36; *e.g.*, Record, pp. 174, 257.

11. "The principal alleged terms of the conspiracy were (1) that certain retail drug stores in Washington agreed with PD (a) not to sell PD's products at less than the resale prices which it fixed and (b) not to advertise such products at discount prices; and (2) that five wholesale druggists . . .

evidence did not show such a violation inasmuch as defendant's conduct was unilateral and therefore sanctioned by the *Colgate* doctrine.[12] On direct appeal[13] the Supreme Court *held,* reversed. A manufacturer-wholesaler creates an unlawful "contract, combination . . . or conspiracy" within the meaning of the Sherman Act when he both refuses to sell to direct-purchasing retailers and employs "refusal to sell" as a means of cutting off direct-purchasing retailers from wholesalers who would be alternate sources of supply to effect general compliance with his price-maintenance policy. *United States v. Parke, Davis & Co.,* 362 U.S. 29 (1960).[14]

The notion that a trader has an unqualified privilege of refusal to sell is identified with the troublesome criminal case, *United States v. Colgate & Co.*[15] There Colgate was arraigned for an unlawful combination in restraint of trade under an indictment which alleged that the defendant had combined with wholesalers and retailers to

---

agreed with PD not to sell PD products to retail druggists who sold or advertised such products at discount prices . . . ." Jurisdictional Statement for the United States, p. 4, United States v. Parke, Davis & Co., 359 U.S. 903 (1959).

"To establish the allegations of combination and conspiracy to fix prices and eliminate competitive advertising in the complaint the Government . . . must rely upon oral agreements established by the testimony of witnesses and implied agreements inferred from the defendants' course of conduct in their business dealings with the co-conspirator wholesalers and retailers." Trial Brief for the United States, p. 24, United States v. Parke, Davis & Co., 164 F. Supp. 827 (1958).

12. 164 F. Supp. 827 (1958); Comment, 56 MICH. L. REV. 426 (1958); 27 GEO. WASH. L. REV. 260 (1958); 45 VA. L. REV. 119 (1959). In the criminal case prosecuted prior to institution of the civil proceeding under discussion, Judge Tamm granted a motion for judgment of acquittal under Rule 29-A of the Federal Rules of Criminal Procedure because in his opinion there was a lack of evidence indicating any conspiracy or agreement, although the record in the case showed "uncontradicted testimony from the retailers that they had 'agreed' not to advertise at cut prices and from wholesalers that they had 'agreed' not to sell to price-cutting retailers." Comment, 56 MICH. L. REV. 426, 427 n.9 (1958). His opinion treated only the manufacturer-wholesaler facet of Parke, Davis' relationship to the independent wholesalers, and only the vendor-vendee facet of its relationship to the direct-purchasing retailers; it did not relate these facets to each other, or consider the boycott potential inhering in Parke, Davis' dual position in the channel of distribution. United States v. Parke, Davis & Co., Crim. No. 444-57, D. D.C. November 14, 1957.

13. Statutory authority for direct appeals is 62 Stat. 989 (1948), 15 U.S.C. § 29 (1959): "In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is a complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

14. The majority and dissenting opinions in this case are not clear because they do not sharply distinguish the relationship of Parke, Davis as a manufacturer dealing with its customers, wholesale and retail, from its relationship as a wholesaler combining with independent wholesalers. Because Parke, Davis is both a manufacturer and a wholesaler, its conduct may be out of *Colgate's* bounds in two respects. As a manufacturer, the methods by which it enforces its resale policy may imply agreement. As a wholesaler, the cooperative efforts among wholesalers to enforce the resale policy may imply boycott. *Colgate* protects neither price-fixing agreements nor group refusals to deal.

15. 250 U.S. 300 (1919).

maintain uniform resale prices.[16] In dismissing the suit the district court ruled the indictment inadequate because "no averment is made of any contract or agreement having been entered into whereby the defendant, the manufacturer, and his customers, bound themselves to enhance and maintain prices . . . ."[17] Although the trial judge's construction of the indictment flatly contradicted it, his interpretation bound the Supreme Court on appeal.[18] "Notwithstanding some serious doubts," the Supreme Court interpreted his equivocal opinion to say that the indictment alleged only that Colgate was refusing to sell its goods to price-cutters; viewed from that premise, the Court agreed the indictment was insufficient.[19]

The *Colgate* decision engendered confusion about the legality of vertical resale price maintenance. Lawyers and judges who overlooked *Colgate*'s procedural basis could not rationalize it with *Dr. Miles Medical Co. v. John D. Park & Sons*,[20] which held that written contracts between a manufacturer and his customers fixing minimum resale prices are void.[21] On the one hand, advocates of resale price

16. The indictment alleged the "means by which the combination was formed and carried out . . . namely: (1) Distributing telegrams, lists, etc., of uniform resale prices; (2) urging the dealers to adhere to those prices; (3) informing them that defendant would refuse to sell to those who did not so adhere; (4) requesting them to inform it of sales at other prices; (5) discovering and investigating sales of that character; (6) placing the names of dealers who made such sales on 'suspended lists'; (7) requesting those dealers to give assurances and promises to adhere in future to the indicated prices; (8) refusing to sell to those dealers until they gave such assurance and promises; (9) selling to such dealers upon their giving such assurances and promises; (10) requesting such assurances from new dealers when opening accounts; and (11) freely selling to those dealers who observed the indicated prices." United States v. Colgate & Co., 253 Fed. 522, 523 (E.D. Va. 1918).

17. *Id.* at 527.

18. " 'We must accept that court's interpretation of the indictments and confine our review to the question of the construction of the statute involved in its decision.' United States v. Carter, 231 U.S. 492, 493; United States v. Miller, 223 U.S. 599, 602. . . . Our problem is to ascertain, as accurately as may be, what interpretation the trial court placed upon the indictment—not to interpret it ourselves; and then to determine whether, so construed, it fairly charges violation of the Sherman Act." 250 U.S. at 301-02, 306.

19. "The [Colgate] decision merely stood for an unsound abstraction based upon the Supreme Court's questionable construction of the district court's ambiguous misconstruction of the district attorney's technical reconstruction of the facts." McLaughlin, *Fair Trade Acts*, 86 U. PA. L. REV. 803, 810 (1938).

20. 220 U.S. 373 (1911).

21. Three cases were litigated in the district courts after the Supreme Court decided *Colgate* and before it decided *Beech-Nut*. Two district courts hesitantly concluded that if a manufacturer obtained the cooperation of its customers through written contracts, that method of business was unlawful under *Dr. Miles;* but if their cooperation were obtained through tacit understandings, that method of business was lawful under *Colgate*. Beech-Nut Packing Co. v. Federal Trade Commission, 264 Fed. 885, 889 (2d Cir. 1920); Cudahy Packing Co. v. Frey & Son, 261 Fed. 65, 67 (4th Cir. 1919). In *Cudahy* the court held that general acquiescence of jobbers and wholesalers in manufacturer's requests to maintain fixed resale prices was not such cooperation between seller and purchasers as amounted to a combination in restraint of trade under *Colgate*, even though purchasers knew that disobedience to the suggestion would result in a failure to be able to buy further from the manufacturer. A third district judge seems to have concluded that *Dr.*

maintenance gave the decision an expansive interpretation; *viz.*, while a manufacturer may not effect general observance of his price policy through written agreements, still he may specify resale prices, announce in advance that he will refuse to deal with customers who will not sell at suggested prices, supply only customers who agree to sell at those prices, and retain only those customers who do adhere to that policy. On the other hand, in each of the three pertinent decisions subsequent to *Colgate* the Supreme Court asserted that its decision in *Dr. Miles* was unmodified.[22] In the third action, *Federal Trade Commission v. Beech-Nut Packing Co.*,[23] no express or implied contract to maintain prices was involved; nevertheless, the Supreme Court held that systematic discovery of dealers who had not observed the suggested resale prices and refusal to sell to them, for the purpose of maintaining standard resale prices, implied such tacit understandings and mutual cooperation between the manufacturer and his distributors concerning price as to violate the Sherman Act.[24]

The focus of resale price maintenance cases under section 1 of the Sherman Act is the conduct of the defendant-manufacturer and its distributing customers; the focus of other price-fixing cases is the

Miles was implicitly overruled. His lucid statement explains why the suggested dichotomy is untenable: "Personally, and with all due respect, permit me to say that I can see no real difference upon the facts between the Dr. Miles Medical Co. Case and the Colgate Co. Case. The only difference is that in the former the arrangement for marketing its product was put in writing, whereas in the latter the wholesale and retail dealers observed the prices fixed by the vendor. This is a distinction without a difference. The tacit acquiescence of the wholesalers and retailers in the prices thus fixed is the equivalent for all practical purposes of an express agreement, and as has already been observed, the mere fact that there were some retailers who did not uniformly acquiesce in and observe the prices thus fixed does not amount to a distinguishing consideration, for a combination or conspiracy in restraint of trade results, if at all, whenever two or more of the wholesalers or retailers thus agree by an express or implied contract to observe certain prices in a competitive territory." United States v. A. Schrader's Son, 264 Fed. 175, 183 (N.D. Ohio 1919).

22. United States v. A. Schrader's Son, 252 U.S. 85 (1920); Frey & Son v. Cudahy Packing Co., 256 U.S. 208 (1921); Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441 (1922). In each of these cases the Supreme Court emphasized that the essential agreement need not be express; consensus could be inferred from "a course of dealing or other circumstances."

23. 257 U.S. 441 (1922).

24. The narrow holding of *Beech-Nut* is that the respondent engaged in unfair methods of competition. But the Court implied that the conduct interdicted would also be condemned under the Sherman Act: "The Sherman Act . . . shows a declaration of public policy to be considered in determining what are unfair methods of competition . . . . The facts found show that the Beech-Nut system goes far beyond the simple refusal to sell goods to persons who will not sell at stated prices, which in the *Colgate Case* was held to be within the legal right of the producer." 257 U.S. 441, 453, 454.

The parties had stipulated that resale prices were not fixed, maintained, or enforced by contract. Nevertheless, the Court said: "The specific facts found show suppression of the freedom of competition by methods in which the company secures the coöperation of its distributors and customers, which are quite as effectual as agreements express or implied intended to accomplish the same purpose." *Id.* at 455. The "methods" used are enumerated in the Commission's findings of fact in the Court's opinion. *Id.* at 446-51.

conduct of manufacturers or wholesalers or retailers, *i.e.*, sellers on the same functional level in the channel of distribution. Courts have seldom explicitly compared conduct of vertically-related sellers evidencing an agreement to maintain resale prices with conduct of horizontally-situated competitors evidencing an agreement to coerce third parties to adhere to fixed prices.[25] In deciding *Parke, Davis* the Supreme Court has indicated that both perspectives are material in assessing the defendant's conduct. Parke, Davis & Co. is both a manufacturer and a wholesaler.[26] As a manufacturer refusing to deal with independent wholesalers and as a wholesaler refusing to sell directly to retailers its conduct would be governed by the *Colgate* doctrine; yet if there were an express understanding to maintain resale prices, or if the course of dealings would support an inference of a tacit understanding to maintain resale prices, such an arrangement would be condemned by *Dr. Miles* and *Beech-Nut*.[27] Likewise, conceding its individual right to refuse to deal with another upon any other grounds it might consider sufficient,[28] if the natural consequence

25. *Cf.*, United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956).

26. The independent wholesalers regarded Parke, Davis as a competitor; each sold to the same customers when the customers bought in large quantities. Record, pp. 132, 134, 163, 196.

27. When a manufacturer announces his resale policy individually but in equal terms to all his distributors a court might conclude that the arrangements were in fact the product of a conspiracy among the dealers in which the manufacturer participated. *Cf.*, United States v. Masonite Corp., 316 U.S. 265 (1942). So as a practical matter the antitrust risk of cutting off a price-cutting distributor is great, particularly where most of the other dealers—as will normally be the case—follow the price policy suggested by the seller.

It is very interesting to note in this connection that in the instant case Parke, Davis was named as a co-conspirator and a defendant, while the distributors were named as co-conspirators but not as defendants; by the doctrines of conspiracy one could not hold the manufacturer as a conspirator and let the others off the hook on policy. WILLIAMS, CRIMINAL LAW 537-38 (1953); see United States v. Colgate & Co., 253 Fed. 522, 528 (D.C. Va. 1918). If the dealers individually agree to adhere to the price maintenance scheme knowing the manufacturer has approached the others, each participates in a conspiracy to restrain trade. The individual conspiracies could be aggregated into one so that each individual trader would be liable as a conspirator. But the courts rightly have not imputed this knowledge to the individual distributor. They have implied the essential conspiracy among competing sellers where each has refused to sell to the same would-be buyer, but they have required proof from surrounding business circumstances of collaboration or knowing participation to buttress the inference to be drawn from simultaneous coincidence, *e.g.*, Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939); and absent such proof have failed to find conspiracy, *e.g.*, Franchon & Marco, Inc. v. Paramount Pictures, Inc., 215 F.2d 167 (9th Cir. 1954), *cert. denied*, 348 U.S. 912 (1955). Common sense and judicial regard for the requirements of business can probably be relied on to exclude from the impact of the price maintenance cases those situations where a refusal to sell to a price-cutting distributor is nothing more than a warranted shift in distribution arrangements. See generally, Robinson, *Restraints on Trade and the Orderly Marketing of Goods*, 45 CORNELL L.Q. 254 (1960); Kessler & Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L.J. 1, 86 (1959).

28. For example, a seller may refuse to deal with a distributor because of the distributor's general business ineptitude; or because he is a poor credit risk; or because he does not adequately represent the seller; or because there

of its conduct with other suppliers of retail outlets would support an inference of a gentleman's agreement to use a group refusal to deal to narrow the sources from which retailers could buy,[29] such an arrangement would be condemned by *Eastern States Lumber Dealers Ass'n v. United States*[30] and *Fashion Originators Guild v. Federal Trade Commission*.[31]

In the instant case, Mr. Justice Brennan, writing for the majority,[32]

is a history of unsatisfactory business relations; or because the seller's contract obligations to a third person require termination of their business relations; or just because there is a clash of personalities. These reasons would represent the legitimate development of the seller's business through selection of distribution outlets. Refusing to deal with another is like any ordinary commercial act; it is unexceptionable unless it is used as an instrument for antitrust violation. See generally Barber, *Refusals To Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847 (1955); Note, 69 YALE L.J. 168 (1959).

29. The Record contains evidence of a concerted refusal to deal with price-cutting retailers. The strongest statement to that effect is the testimony of Mr. Levin of the Wholesale Drug Company:

> *A.* [The Parke, Davis representatives] . . . asked me not to sell a group of retailers until a price situation was straightened out.
>
> . . .
>
> *Q.* What did you tell them, sir?
>
> *A.* I asked them if they were requesting it of me alone, or would they go to other wholesalers. And they said they would visit the local wholesalers. And then I agreed to abide by . . . [their request]. Record, p. 198. See also Record, pp. 126, 138, 202, 206.

30. In Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914) the appellant-associations refused to purchase lumber from wholesalers who competed with participants by selling directly to the retail trade. There was no express agreement among the retailers to thus boycott the wholesalers, but the Supreme Court inferred a conspiracy from the natural consequences of the concerted activity. Mr. Justice Day, writing for a unanimous court, said: "A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade. . . . [But] when the retailer goes beyond his personal right, and, conspiring and combining with others of like purpose, seeks to obstruct the free course of interstate trade and commerce and to unduly suppress competition by placing obnoxious wholesale dealers under the coercive influence of a condemnatory report circulated among others, actual or possible customers of the offenders, he exceeds his lawful rights, and such action brings him and those acting with him within the condemnation of the [Sherman Act] . . ." 234 U.S. 600, 614. See also, *e.g.*, United States v. First National Pictures, Inc., 282 U.S. 44 (1930); Grenada Lumber Co. v. Mississippi, 217 U.S. 433, 440 (1910).

31. Fashion Originators' Guild v. Federal Trade Commission, 312 U.S. 457 (1941) interdicted a concerted refusal to deal by designers, manufacturers and distributors of women's garments with retailers who dealt with "designer pirates." The Supreme Court said the concerted refusal to deal violated the Sherman Act because "it narrows the outlets to which garment and textile manufacturers can sell and the sources from which retailers can buy . . . ." *Id.* at 465. Group boycotts were declared illegal per se in Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

32. Warren, Ch.J., and Justices Black, Brennan, Clark and Douglas. Mr. Justice Stewart filed a short opinion concurring in the judgment but adding: "[T]he present record shows an illegal combination to maintain prices. I therefore find no occasion to question, even by innuendo, the continuing validity of the *Colgate* decision. . . ." 362 U.S. at 49. The dissenting opinion of Justices Frankfurter, Harlan and Whittaker, written by Mr. Justice Harlan, said both the district court and the Supreme Court measured the defendant's conduct by the same standard. Accordingly, either the *Colgate* doctrine has been overruled or the trial judge's findings of fact are over-

held that the trial court erred in assuming the Government was not entitled to judgment unless the evidence evinced "contractual arrangements" between Parke, Davis and its customers. Justice Brennan refused to dispose of the case under Federal Rule 52,[33] but instead took this occasion to clarify the line of cases since *Dr. Miles* regarding unilateral refusals to deal.[34] He concluded that under *Colgate* a simple refusal to sell to others who do not maintain the first seller's fixed resale price is lawful; but "when the manufacturer's actions . . . go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices . . . he has put together a combination" violative per se of the Sherman Act.[35] In his view the defendant in this case exceeded the limits of the *Colgate* doctrine in two respects. First, it used its privilege of refusal to sell to persuade the wholesalers not to supply Parke, Davis products to non-complying retailers until they also adhered to defendant's resale policies.[36] Second, it used its privilege of refusal to sell and the economic power of the wholesalers' concurrence to induce a concurrence among the retailers not to advertise cut prices. Each of these resulting combinations was illegal per se.[37]

The *Parke, Davis* opinion clarifies the limits of unilateral refusals to deal in two ways. First, that because of the relationships between manufacturer and wholesaler and retailer, a manufacturer creates an illegal combination within the meaning of section 1 of the Sherman Act when he successfully uses "refusal to sell" as part of a larger program to police retail prices by isolating his former customer from indirect sources which could supply the manufacturer's goods. Second, that arrangements to suppress advertising of competitive prices are illegal per se. It is submitted that both holdings are correct.

---

turned as "clearly erroneous"; the majority opinion disclaims the latter, so the Court must be doing the former.

33. As indicated in note 11 *supra*, this action carries two themes: boycott and price-fixing. With respect to the charge of fixing retail prices, the Supreme Court does seem to be overturning the district court's findings of fact. With respect to the alleged agreement with retailers to cease advertising and the concerted refusal-to-deal combination with wholesalers, the statement "we are reviewing a question of law, namely whether the District Court applied the proper standard to essentially undisputed facts," *id.* at 44, is subject to less criticism. So it is arguable that the Supreme Court is saying in effect, the findings of fact are clearly erroneous. The record would support such a straightforward opinion; but if that is the force of the decision the Court should have clearly said so.

34. Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373 (1911); United States v. Colgate & Co., 250 U.S. 300 (1919); United States v. A. Schrader's Son, 252 U.S. 85 (1920); Frey & Son v. Cudahy Packing Co., 256 U.S. 208 (1921); Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441 (1922); United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944).

35. 362 U.S. at 44.

36. *Id.* at 45.

37. *Id.* at 46-47.

This holding does not deny the legality of a seller's refusal to deal grounded upon business reasons unrelated to price maintenance; but it is clear that customer selection cannot be made the basis of a scheme to police resale prices. Building upon its previous decisions, the Supreme Court has virtually declared that refusing to sell to price-cutting dealers in non-fair trade areas is not justifiable customer selection.

Insofar as this decision strikes down as illegal per se agreements not to advertise reduced prices it is congruent with the policy of encouraging price competition which underlies the Sherman Act, for it is through advertising that consumers most often learn of prevailing prices.[38] Direct[39] or indirect[40] efforts to affect the process of price determination are unlawful, and working toward that end by refusing to deal further with a customer because he has not maintained resale prices or because he has advertised his reduced prices is unprotected by *Colgate*.

As a wholesaler combining with other wholesalers, the defendant used its privilege of refusing to sell its products to other wholesalers as a lever to narrow the alternate sources from which retailers could obtain its products. So this decision goes no further than what has been recognized in previous resale price maintenance cases, *viz.*, a seller may not refuse to deal with some of his customers because their vendees do not adhere to suggested resale prices.[41] For this reason one may not conclude, as the dissenting justices did, that to thus limit a seller's privilege of "refusal to sell" to selecting his own

38. Those that were trying to control the price war in Parke, Davis products acted on the hypothesis that if they could control advertising of reduced prices they would stabilize the market. Record, pp. 221-23.

Legislation requiring gasoline prices to be posted only at the pump, directed against price wars carried on by means of large roadside signs, has been held to deprive the dealer of his liberty without due process of law. State v. Miller, 126 Conn. 373, 12 A.2d 192 (1940); Gambone v. Commonwealth, 375 Pa. 547, 101 A.2d 634 (1954); *cf.* State v. Hobson, 46 Del. 381, 83 A.2d 846 (1951). *Contra*, Merit Oil Co. v. Director of Div. of Necessaries, 319 Mass. 301, 65 N.E.2d 529 (1946).

39. United States v. Trenton Potteries Co., 273 U.S. 392 (1927). Vertical price control through refusals to deal conflicts with this established policy, for the essence of a resale price maintenance program is to eliminate competition between distributors with reference to the price of distribution services upon the article whose resale price has been established.

40. American Column & Lumber Co. v. United States, 257 U.S. 377 (1921) (members of a trade association affected prices by restricting their production); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (price stabilization through purchase of "distress" oil). The REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 26 (1955) concludes, on the basis of principle and lower court cases, that market division agreements should also be and are treated like price control arrangements.

41. The rationale justifying this limit on refusals to sell is that to allow a seller to directly affect prices in the product markets served by his vendees' customers interferes too much with the subvendee's right to select his own customers, and penalizes the efficient distributor by subsidizing the inefficient marginal seller, and deprives the consumer of the benefits of efficient distribution of goods.

customers "is to throw the Colgate doctrine into discard"; only the unwarranted inference that restrictive schemes implemented by refusals to sell are immune from the antitrust laws has been cut away. There is no inconsistency in recognizing the privilege of refusal to sell in general, while denying it can be used in an unlawful way, or as a means to achieve an unlawful end. The logical difficulty lies in the unqualified support of *Colgate* and the inference from that case that a manufacturer has a privilege to exercise his own discretion as to those with whom he would deal, and to announce in advance the circumstances under which he would refuse to sell[42] even though the "circumstance" announced be the failure to comply with specified resale prices.

In this case the defendant was both vertically and horizontally related to its wholesalers. The dissenting justices apparently did not realize the significance of this circumstance, for they did not understand "how such unilateral action, permissible in itself, becomes any less unilateral because it is taken simultaneously with similiar unilateral action at the retail level."[43] The very question to be answered is whether the action is, in point of fact, unilateral. Simultaneous action of itself is ambiguous; but the record of this case revealed a consensus derived from conference and coercion. In *Colgate* terms, Parke, Davis had not acted unilaterally.[44]

TORTS—NEGLIGENCE—VENDOR OF ALCOHOLIC BEVERAGE TO INTOXICATED MINOR LIABLE TO THIRD PARTY FOR INJURIES INFLICTED BY VENDEE

Plaintiff's decedent was killed in an automobile collision which resulted from the negligent driving of an intoxicated minor. In an action to recover for the death of decedent plaintiff alleged that shortly before the accident defendants, tavern keepers, sold alcoholic beverages to the minor with knowledge that he was a minor and

42. United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

43. 362 U.S. at 55.

44. George W. Warner & Co. v. Black & Decker Mfg. Co., CCH Trade Reg. Rep. ¶ 69707 (2d Cir. May 3, 1960), decided after *Parke, Davis,* is probably an indication of the path ahead for resale price maintenance controversies. In deciding that the complaint sufficiently alleged a resale price-fixing violation, the court said: "Of course, it will be necessary for plaintiff to sustain the allegations by the necessary proof because it would appear from the concurring opinion of Mr. Justice Stewart in the *Parke, Davis* case that the *Colgate* principles have not been completely destroyed. The Supreme Court has left a narrow channel through which a manufacturer may pass even though the facts would have to be of such Doric simplicity as to be somewhat rare in this day of complex business enterprise." *Id.* at 76787.

intoxicated; that defendants' conduct constituted violations of statutes prohibiting the sale of alcoholic beverages to minors[1] and intoxicated persons.[2] Defendants were granted summary judgment on the ground that the complaint failed to state a cause of action. On appeal, *held,* reversed. Tavern keepers who sell alcoholic beverages, in violation of prohibitory statutes, to an already intoxicated minor may be liable to a third person for the injuries subsequently inflicted by the vendee. *Rappaport v. Nichols,* 156 A.2d 1 (N.J. 1959).

The traditional common law rule has been that tavern keepers who sell alcoholic beverages to patrons are not liable for injuries inflicted by the intoxicated customer.[3] The reason most commonly advanced for denying liability is that the intentional drinking of the liquor by the consumer and not the sale by the vendor is the proximate cause of the injury.[4] It is said that the intentional drinking and resulting intoxication which in turn causes the consumer to become negligent are independent intervening causes sufficiently great to cut off the liability of the vendors.[5] Many state legislatures have felt, however, that it is desirable to impose liability on the tavern keepers in order to compensate the innocent victims for the resulting injuries.[6] This has led to the enactment of many civil damage or "dram shop" acts which impose liability upon tavern keepers in favor of patron's dependents and tort victims.[7] Occasional dicta[8] and dissenting opinions[9] have expressed dissatisfaction with adherence to the common law rule. In 1959, this dissatisfaction culminated in the case of *Waynick v. Chicago's Last Dep't Store*[10] when the court held that

1. N. J. STAT. ANN. § 33:1-17 (1937).
2. Regulation No. 20, Rule 1, Division of Alcoholic Beverage Control, enacted pursuant to N. J. STAT. ANN. § 33:1-32 (1937).
3. Fleckner v. Dionne, 94 Cal. App. 2d 246, 210 P.2d 530 (1949); Cowman v. Hansen, 92 N.W.2d 682 (Iowa 1958); Joyce v. Hatfield, 197 Md. 249, 78 A.2d 754 (1951); Note, 4 VILL. L. REV. 575, 576 (1959).
4. Cherbonnier v. Rafalovich, 8 F. Supp. 900, 901 (D. Alaska 1950); Hitsan v. Dwyer, 61 Cal. App. 2d 803, 143 P.2d 952, 955 (1944); Henry Grady Hotel Co. v. Sturgis, 70 Ga. App. 379, 28 S.E.2d 329, 333 (1943); Beck v. Grae, 245 Minn. 28, 70 N.W.2d 886, 891 (1955).
5. Cole v. Rush, 45 Cal. 2d 345, 289 P.2d 450, 457, 54 A.L.R.2d 1137 (1955); Seibel v. Leach, 233 Wis. 66, 233 N.W. 774, 775 (1939). See Moran, *Theories of Liability,* 1958 U. ILL. L.F. 191, 192.
6. See Osburn, *Liquor Statutes in the United States,* 2 HARV. L. REV. 125, 134 (1889).
7. For a list and discussion of such statutes see Note, 4 VILL. L. REV. 575 n. 43 (1959).
8. Pratt v. Daly, 55 Ariz. 535, 104 P.2d 151 (1940); Peck v. Gerber, 154 Ore. 126, 59 P.2d 675, 106 A.L.R. 996 (1936); Manning v. Yokas, 389 Pa. 136, 132 A.2d 198, 199 (1957); Rommel v. Schambacher, 120 Pa. 579, 11 Atl. 779 (1888) (allowed recovery on the basis of common law negligence, but there was a statute on which liability could have been predicated); Tarwater v. Atlantic Co., 176 Tenn. 570, 14 S.W.2d 746 (1940).
9. Cole v. Rush, 45 Cal. 2d 345, 289 P.2d 450, 451, 54 A.L.R.2d 1137 (1955) (Carter, J., dissenting); Fleckner v. Dionne, 94 Cal. App. 2d 246, 210 P.2d 530 (1949) (Dooling, J., dissenting).
10. Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959). In this case the defendant tavernkeeper sold alcoholic beverages to an in-

in such a situation liability could be imposed against a tavern keeper although there was no applicable civil damages statute.

The court in the instant case recognized that the vast majority of the courts passing upon the issue presented here had held in favor of the tavern keeper. However, the result of the *Waynick* case was thought to be more desirable and could be reached without departing from traditional tort principles. Since the hearing was on the sufficiency of the complaint to state a cause of action, the court assumed that the defendants' conduct had been unlawful and negligent and that the conduct had been a cause in fact of decedent's death. The court cited cases which had imposed liability where the defendant had unlawfully and negligently sold an air rifle to a minor,[11] loaned an automobile to one who was apparently intoxicated,[12] and allowed a thief to steal his automobile by leaving the key in the ignition.[13] It concluded that in each of these situations the intervening negligent or criminal conduct of the third person was as great, if not greater, than the negligence of the intoxicated minor in this case. It was held that a jury could reasonably find that the intervening cause here was a "normal incident of the risk they [defendants] created, or an event which could reasonably have been foreseen."[14] As an alternative approach to the problem, the court looked at the legislative purpose behind the statutes which had been violated. It was decided that the statutes were intended to benefit not only minors and intoxicated persons but the traveling public as well.[15]

The violation of a statute makes the actor liable for the resulting injury if the plaintiff is a member of the class which the statute was designed to protect and the harm suffered is one which the statute was intended to prevent.[16] While it might be argued that the statute prohibiting the sale of alcoholic beverages to minors was intended primarily to protect only minors, it seems reasonably clear that the regulation prohibiting sales to already intoxicated persons was enacted for the protection of the traveling public. Plaintiff's decedent was a member of that class and the harm suffered here—injury or

toxicated motorist in Illinois. The motorist immediately crossed over into Michigan where he negligently injured the plaintiff. Even though both Illinois and Michigan had civil damage statutes, the court assumed that neither was applicable and held the defendant liable for common law negligence. 269 F.2d at 326.

11. Semeniuk v. Chentis, 1 Ill. App. 2d 508, 117 N.E.2d 883 (1954).

12. Deck v. Sherlock, 162 Neb. 86, 75 N.W.2d 99 (1956); Mitchell v. Churches, 199 Wash. 547, 206 Pac. 6, 36 A.L.R. 1132 (1922).

13. Ross v. Hartman, 139 F.2d 14, 158 A.L.R. 1370 (D.C. Cir. 1943), *cert. denied*, 321 U.S. 790 (1944); Ney v. Yellow Cab. Co., 2 Ill. 2d 74, 117 N.E.2d 74, 76, 51 A.L.R.2d 624 (1954); Kinsley v. Von Atzingen, 20 N.J. Super. 378, 381, 90 A.2d 37, 38 (1952).

14. 156 A.2d at 9.

15. *Id.* at 8.

16. RESTATEMENT, TORTS § 286 (1934).

death by automobile collision with an intoxicated motorist—was the very interest intended to be protected. The application of this doctrine to the problem, although novel, seems entirely proper and is likely to be adopted by other courts in the future.

However, even if the traditional approach to the problem is applied —was the injury to the plaintiff so remote from the selling of the liquor that liability will be cut off on the basis of proximate cause—it is still possible to find liability. The intervening negligence or unlawful act of another will not relieve a defendant of liability for his negligence if the intervening act is one which "common sense tells us is likely to occur."[17] When the common law rule denying recovery against tavern keepers in this type of situation was formulated, it was, perhaps, unlikely that the intoxicated vendee would negligently injure others. Today, when almost every patron travels to the tavern in an automobile, the foreseeable danger is great enough to warrant imposing liability. The difference in the danger presented by an intoxicated person walking or riding a horse and that presented by a drunken motorist is too apparent for discussion. Thus, this case provides an excellent illustration of the ability of the common law to adapt itself to changing conditions without distorting its fundamental principles.

17. Interview with Professor Warren A. Seavey at Nashville, Tennessee, March 29, 1960. See also PROSSER, TORTS § 49 (2d ed. 1955).