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Recent Cases

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RECENT CASES

CRIMINAL LAW — HABITUAL CRIMINAL — RIGHT OF ACCUSED TO COUNSEL UNDER FOURTEENTH AMENDMENT

Petitioner, a middle-aged Negro of little education, was indicted for housebreaking and larceny. At the trial, two months after indictment, petitioner, intending to plead guilty, appeared without counsel. When his case was called for trial, he was advised by the court that he would be tried as an habitual criminal because of three alleged prior offenses.[1] Conviction as an habitual criminal carries a mandatory sentence of life imprisonment, with no possibility of parole.[2] Petitioner's prompt request for a continuance in order to obtain counsel on the habitual criminal accusation was denied, and the case immediately proceeded to trial. The jury, after hearing evidence, accepted petitioner's guilty plea to the housebreaking and larceny charge. Evidence was then introduced as to his prior convictions,[3] and the jury found him guilty of the habitual criminal charge. After serving his sentence on the housebreaking and larceny charge, petitioner sought his release through habeas corpus proceedings[4] in the Tennessee courts on the ground that the habitual criminal sentence was invalid because he had been denied counsel. His efforts in the state courts were unsuccessful and the Supreme Court granted certiorari.[5] *Held,* reversed. Petitioner is being held under an invalid sentence, as he was denied right to counsel guaranteed by the due process clause of the Fourteenth Amendment. *Chandler v. Fretag,* 75 Sup. Ct. 1 (1954).

At common law an accused had no right to the assistance of counsel —even retained counsel. Originally in England a prisoner was not permitted to be heard by counsel upon a plea of not guilty when charged with treason or a felony.[6] This rule was not relaxed for trea-

1. At the time of petitioner's conviction, the Tennessee Habitual Criminal Act permitted an oral accusation. TENN. CODE ANN. § 11863.5 (Williams Supp. 1952). It was subsequently amended so as to require inclusion of the accusation in the indictment on the substantive offense. TENN. CODE SUPP. § 11863.5 (1950).

2. TENN. CODE ANN. § 11863.2 (Williams Supp. 1952).

3. The court seems to assume that proof of prior convictions was introduced, although there was a dispute as to this. There was also a dispute as to whether petitioner pleaded guilty to the habitual criminal charge.

4. Under Tennessee law, a defendant sentenced on both a felony charge and an habitual criminal accusation must serve his term on the felony charge before he can attack the validity of his habitual criminal sentence in habeas corpus proceedings. State *ex rel.* Grandstaff v. Gore, 182 Tenn. 94, 184 S.W.2d 366 (1945).

5. Chandler v. Warden Fretag, 347 U.S. 933 (1954).

6. 1 CHITTY, CRIMINAL LAW 406 (5th Am. ed. 1847).

son until 1695,[7] and continued in full force until 1836 for felonies.[8] Constitutional provisions (state and federal) in this country were designed to abrogate this common-law rule, which denied one accused of a felony the right to be represented by counsel.[9] Thus it is generally provided that an accused in any criminal case has a right to be heard by himself or by counsel.[10] These provisions have been interpreted to include the right to assistance of counsel though the accused is without the necessary means to employ and compensate an attorney,[11] and though the accused did not request assistance of counsel in his defense.[12] However, the exercise of this right may be regulated by reasonable rules and regulations.[13] It is the usual practise, and frequently a statutory duty, to inform the accused of this right at or prior to arraignment.[14] Some courts have recognized this duty only when the accused is charged with a capital offense,[15] and others have interpreted their constitutions and statutes as imposing no duty at all on the trial judge to inform accused of his right to be represented by counsel.[16]

7. 7 WILL. 3, c. 3, § 1 (1695).
8. 6 & 7 WILL. 4, c. 114, §§ 1 & 2 (1836).
9. *See* Betts v. Brady, 316 U.S. 455, 466 (1942).
10. See BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 80-84 (1955) (differences in wording among the constitutional provisions are without significance).
11. FED. R. CRIM. P. 44; Johnson v. Zerbst, 304 U.S. 458 (1938); State *ex rel.* White v. Hilgemann, 218 Ind. 572, 34 N.E.2d 129 (1941); *see* People v. Rose, 42 Cal. App. 540, 183 Pac. 874, 879 (1919); State *ex rel.* Irvine v. District Court, 125 Mont. 398, 239 P.2d 272, 280-81 (1951); People v. Shapiro, 188 Misc. 363, 67 N.Y.S.2d 774, 776 (Ct. of Gen. Sess. 1947). Federal Rule of Criminal Procedure 44, effective in the federal courts since March 21, 1946, providing "If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceedings unless he elects to proceed without counsel or is able to obtain counsel," has settled the question of right to counsel in federal courts. It seems that this was a mere codification of what had already been established by the federal decisions. See Spevak v. United States, 158 F.2d 594 (4th Cir. 1947), *cert. denied,* 330 U.S. 821 (1947). Many states provide by statute for the appointment of counsel for indigent defendants. BEANEY, *op. cit. supra* note 10 at 84-87.
12. FED. R. CRIM. P. 44; Johnson v. Zerbst, 304 U.S. 458 (1938); Wilcoxon v. Aldredge, 192 Ga. 634, 15 S.E.2d 873 (1941); Gholson v. Commonwealth, 308 Ky. 82, 212 S.W.2d 537 (1948); *Ex parte* Cook, 84 Okla. Cr. 404, 183 P.2d 595 (1947); *see* Bradley v. State, 227 Ind. 131, 84 N.E.2d 580, 581-82 (1949).
13. United States v. Philadelphia & R. Ry., 268 Fed. 697 (E.D. Pa. 1916); City of Seattle v. Erickson, 55 Wash. 675, 104 Pac. 1128, 25 L.R.A. (N.S.) 1027 (1909).
14. See, *e.g.*, FED. R. CRIM. P. 44; Johnson v. Zerbst, 304 U.S. 458 (1938); Brandt v. Hudspeth, 162 Kan. 601, 178 P.2d 224 (1947); People *ex rel.* Harrison v. Wilson, 176 Misc. 1042, 29 N.Y.S.2d 809 (Sup. Ct. 1941); see Territory v. Hargrave, 1 Ariz. 95, 25 Pac. 475 (1873); People v. Miller, 137 Cal. 642, 70 Pac. 735, 737 (1902); State v. McDonnell, 165 Minn. 423, 206 N.W. 952, 953 (1926); State v. Cowan, 25 Wash.2d 341, 170 P.2d 653, 655 (1946); Note, 3 A.L.R.2d 1003 (1949).
15. People v. Bute, 396 Ill. 588, 72 N.E.2d 813 (1947); Commonwealth *ex rel.* Withers v. Ashe, 350 Pa. 493, 39 A.2d 610 (1944); Note, 3 A.L.R.2d 1003 (1949).
16. Weatherford v. State, 76 Fla. 219, 79 So. 680 (1918); Gatlin v. State, 17 Ga. App. 406, 87 S.E. 151 (1915); *see* Stonebreaker v. Smyth, 187 Va. 250, 46 S.E.2d 406 (1948). (Virginia has no constitutional provision with regard to counsel for accused in criminal cases).

Overshadowing the constitution and statutes of each state, with regard to the right to counsel, is the due process clause of the Fourteenth Amendment to the federal Constitution.[17] By a series of decisions beginning in 1932 with *Powell v. Alabama*,[18] the United States Supreme Court has defined the right to counsel which the due process clause guarantees to persons accused of criminal offenses in state court proceedings. There can be no doubt that an accused, in capital cases, is entitled to hired counsel, and to a reasonable opportunity to employ and consult with him.[19] Likewise, in capital cases, where the accused is unable to employ counsel of his own, he has an unqualified right to court-appointed counsel,[20] and this right is not satisfied by an assignment at such time and under such circumstances as to preclude the giving of effective aid in preparation and trial of the case.[21]

That in non-capital cases there is no express formula for determining the requisite of procedural due process was clearly indicated in *Betts v. Brady*.[22] The trial must be "fair,"[23] but fairness may be satisfied in some cases when the accused is not represented by counsel.[24] Certainly, an accused is entitled to hired counsel in non-capital cases, and to a reasonable time to prepare his case.[25] However, where the accused is indigent and unable to employ his own counsel, the right is not unqualified as in capital cases.[26] The court determines from the

17. U.S. CONST. Amend. XIV, § 1.
18. 287 U.S. 45 (1932).
19. See Powell v. Alabama, 287 U.S. 45, 69 (1932).
20. Tomkins v. Missouri, 323 U.S. 485 (1945); Hawk v. Olson, 326 U.S. 271 (1945); *see* Uveges v. Pennsylvania, 335 U.S. 437, 441 (1948). However, the right may be waived and if it is, the fact that there was no counsel to defend accused is not a deprivation of due process. Carter v. Illinois, 329 U.S. 173 (1946).
21. Hawk v. Olson, 326 U.S. 271 (1945); Avery v. Alabama, 308 U.S. 444 (1940); Powell v. Alabama, 287 U.S. 45 (1932); *cf.* House v. Mayo, 324 U.S. 42 (1945); *see* White v. Ragen, 324 U.S. 760, 764 (1945); Glasser v. United States, 315 U.S. 60, 70 (1942).
22. 316 U.S. 455 (1942).
23. See Betts v. Brady, 316 U.S. 455 (1942); Gibbs v. Burke, 337 U.S. 773 (1949). "Fairness" is tested by an "appraisal of the totality of the facts in a given situation." Betts v. Brady, *supra*, at 462-63.
24. See Foster v. Illinois, 332 U.S. 134 (1947); Gayes v. New York, 332 U.S. 145 (1947). "[T]he Fourteenth Amendment prohibits the conviction . . . of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel." Betts v. Brady, 316 U.S. 455, 473 (1942).
25. House v. Mayo, 324 U.S. 42 (1945); *Accord*, Avery v. Alabama, 308 U.S. 444 (1940); *see* White v. Ragen, 324 U.S. 760, 764 (1945); Palko v. Connecticut, 302 U.S. 319, 324-25 (1937); Powell v. Alabama, 287 U.S. 45, 68-69 (1932).
26. Betts v. Brady, 316 U.S. 455 (1942). A minority of the members of the Court disagree. They take the position that the Fourteenth Amendment incorporated all the provisions of the federal Bill of Rights (including the Sixth Amendment), thus making them applicable to the states; and therefore, a state court cannot dispense with counsel for an accused in any felony case unless the accused refuses counsel with an understanding of his rights. See Bute v. Illinois, 333 U.S. 640, 677-79 (1948) (dissenting opinion); Betts v. Brady, *supra* at 474-77 (dissenting opinion).

facts of each particular case whether the defendant has been deprived of procedural due process.[27] Where the gravity of the crime and other factors—such as age, education, intelligence and courtroom experience of the defendant,[28] the conduct of the court or the prosecuting officials,[29] and the complicated nature of the offense charged and the defense thereto[30]—render proceedings without counsel so likely to result in injustice to the accused as to make them fundamentally unfair, the accused is entitled to the assistance of counsel whether he requests it or not,[31] and whether or not he pleads guilty.[32]

In a situation where due process otherwise requires that the defendant have the assistance of counsel, it is doubtless true that this right may be waived by the defendant, providing his waiver is made with full understanding of his right.[33] The state need not force counsel on an unwilling defendant.

There can be no doubt that an accused would be entitled to a continuance, in order to obtain counsel and prepare his defense, if the state should spring upon him, at the trial, a new offense not charged in the indictment.[34] It is equally clear that when an accused is given ample pre-trial notice of an offense, with opportunity to engage counsel and prepare a defense, he is not entitled to a continuance in order to obtain counsel.[35] The instant case falls between these two extremes. Here, when confronted with the habitual criminal accusation, petitioner immediately requested a continuance in order to obtain counsel.[36] Though the Tennessee Habitual Criminal Act[37] does not create a separate offense, but only increases a defendant's punishment on being convicted of his fourth felony,[38] the hearing and trial

27. See Betts v. Brady, 316 U.S. 455 (1942).
28. See, *e.g.*, Palmer v. Ashe, 342 U.S. 134 (1951); Wade v. Mayo, 334 U.S. 672 (1948).
29. See Gibbs v. Burke, 337 U.S. 773 (1949); Townsend v. Burke, 334 U.S. 736 (1948); Smith v. O'Grady, 312 U.S. 329 (1941).
30. See Rice v. Olson, 324 U.S. 786 (1945).
31. See Gibbs v. Burke, 337 U.S. 773 (1949); Uveges v. Pennsylvania, 335 U.S. 437 (1948); Rice v. Olson, 324 U.S. 786 (1945).
32. See, *e.g.*, Palmer v. Ashe, 342 U.S. 134 (1951); Uveges v. Pennsylvania, 335 U.S. 437 (1948) Rice v. Olson, 324 U.S. 786 (1945); Williams v. Kaiser, 323 U.S. 471 (1945) (defendant pleaded guilty after request for court-appointed counsel refused).
33. Carter v. Illinois, 329 U.S. 173 (1946); *see* Uveges v. Pennsylvania, 335 U.S. 437, 441 (1948); Rice v. Olson, 324 U.S. 786, 788-89 (1945).
34. Smith v. O'Grady, 312 U.S. 329 (1941). In this case, the Court speaks of notice of the real nature of the charge as being "the first and most universally recognized requirement of due process." 312 U.S. at 334.
35. Spevak v. United States, 158 F.2d 594 (4th Cir. 1947), *cert. denied*, 330 U.S. 821 (1947).
36. The Tennessee Attorney General in the instant case contended that accused had no constitutional right to counsel, relying on Betts v. Brady, 316 U.S. 455 (1942). However, the Supreme Court rejected this argument, holding that Betts v. Brady refered only to court-appointed counsel, whereas accused wanted a continuance in order to obtain his own counsel.
37. TENN. CODE Supp. §§ 11863.1—11863.7 (1950).
38. State *ex rel.* Grandstaff v. Gore, 182 Tenn. 94, 184 S.W.2d 366 (1945); *cf.* Tipton v. State, 160 Tenn. 664, 28 S.W.2d 635 (1930).

on the felony charge and on the habitual criminal charge are essentially independent of each other,[39] though conducted in a single proceeding.[40] The trial court and the Tennessee Supreme Court reasoned that the accused, having had two months between indictment and trial to acquire counsel, waived his right by not acquiring counsel within this period. They further reasoned that waiver by the accused of his right to counsel for the housebreaking and larceny charge also constituted waiver for the habitual criminal charge, since the act does not create a separate offense, but simply increases punishment on being convicted of a fourth felony. The United States Supreme Court, while recognizing that the statute does not create a separate offense, held that, in reality, the habitual criminal charge and the felony charge were independent of each other, and that the accused must be given ample time after accusation as an habitual criminal to procure counsel. It seems clear that fundamental justice requires the result reached by this decision.

DIVORCE—ALIMONY DECREE TERMINATING UPON REMARRIAGE OF WIFE—EFFECT OF ANNULMENT OF SUBSEQUENT MARRIAGE

A separation agreement incorporated in a divorce decree required the husband to pay alimony during the wife's life "unless and until she shall remarry." The wife remarried but thereafter obtained an annulment. In an action to enforce the original alimony decree, the trial court accepted the wife's contention that the husband's alimony obligation was revived by the annulment of the remarriage. The judgment for the wife was reversed by the intermediate appellate court and the wife appealed. *Held,* affirmed. The divorced wife's ceremonial marriage to a second husband was a remarriage even though grounds for annulment existed and, in view of a statute under which the second husband may be required to support the wife after the annulment, the first husband's duty to support was not renewed by the annulment of second marriage. *Gaines v. Jacobsen,* 124 N.E.2d 290 (N.Y. 1954).

The duty imposed by law upon the husband to support his wife[1] is

39. *See* McCummings v. State, 175 Tenn. 309, 311, 134 S.W.2d 151, 152 (1939); *cf.* Tipton v. State, 160 Tenn. 664, 28 S.W.2d 635 (1930).

40. Compare, *e.g.,* the West Virginia procedure which provides for a separate hearing on the habitual criminal issue. W. VA. CODE ANN. §§ 6130, 6131, 6260 (1949). See Graham v. State of West Virginia, 224 U.S. 616 (1912). For a collection of cases interpreting habitual criminal statutes, see Notes, 116 A.L.R. 209 (1938); 82 A.L.R. 345 (1933); 58 A.L.R. 20 (1929).

1. See Bostick v. State, 1 Ala. App. 255, 55 So. 260, 262 (1911); State v. Loyacano, 135 La. 945, 66 So. 307 (1914).

the basis for the alimony awarded in divorce proceedings. Annulments, on the other hand, were conceived at common law as relating back to the ceremony and invalidating the marriage *ab initio*.[2] Thus when a marriage is annulled there remains no duty of support upon which to predicate alimony.[3] In the leading New York case of *Sleicher v. Sleicher*,[4] involving facts substantially similar to those of the instant case, the court, adopting the "relation back" fiction, had held that the first husband's alimony obligation was revived by the annulment of the wife's remarriage inasmuch as the annulment was a determination that no remarriage had occurred.[5]

Implicit in and underlying the *Sleicher* case was the inescapable corollary of the "relation back" reasoning—that the second husband could not be required to support the wife of the annulled marriage. The instant case was projected against a background different from that of *Sleicher* in one material respect—the courts had received statutory authorization to award support payments in annulment proceedings notwithstanding the logical difficulties presented by the time-honored "relation back" doctrine.[6] Thus with the underlying reason for the *Sleicher* result abrogated by statute the court in the instant case had to determine whether the "relation back" theory would nevertheless require the first husband to bear the burden of support by virtue of the fact that there had been no "remarriage" within the meaning of the original divorce decree. Recalling that it had been recognized in *Sleicher* that the "doctrine of relation [back] is a fiction of law adopted . . . solely for the purpose of justice,"[7] and that this doctrine is not without limits prescribed by policy and reason,[8] the court in the

2. Withers v. Superior Court of Los Angeles County, 91 Cal. App. 735, 267 Pac. 547 (1928) (after annulment of second marriage, status of parties was such that they could no longer be divorced, thus court no longer had power to enforce alimony under previous divorce of parties); Cohen v. Kahn, 177 Misc. 18, 28 N.Y.S.2d 847 (Sup. Ct. 1941) (after annulment, since the marriage was destroyed, wife could sue husband in tort for fraud connected with marriage).

3. Aldridge v. Aldridge, 116 Miss. 385, 77 So. 150 (1918). See also Therry v. Therry, 117 Fla. 453, 158 So. 120 (1934); Monteleone v. O'Hanlon, 159 La. 796, 106 So. 308 (1925); Kellogg v. Kellogg, 122 Misc. 734, 203 N.Y. Supp. 757 (Sup. Ct. 1924); Stewart v. Vandervort, 34 W. Va. 524, 12 S.E. 736 (1890). *Contra*, Strode v. Strode, 66 Ky. 227 (3 Bush 1867).

4. 251 N.Y. 366, 167 N.E. 501 (1929).

5. *But* cf. Lehmann v. Lehmann, 225 Ill. App. 513 (1922).

6. N.Y. CIV. PRAC. ACT § 1140-a: "When an action is brought to annul a marriage or to declare the nullity of a void marriage, the court may give such direction for support of the wife by the husband as justice requires." This statute, important in New York State where the annulment proceeding is widely used due to the fact that adultery is the only ground for divorce, recognizes the interest of the state in providing for persons unable to support themselves, and enables the court to consider the good faith of the wife in contracting the marriage, although the statute is not limited to instances in which the wife is the innocent party. See 18 N.Y.U.L.Q. REV. 610 (1941). *See* Johnson v. Johnson, 295 N.Y. 477, 68 N.E.2d 499, 500 (1946).

7. Sleicher v. Sleicher, 251 N.Y. 366, 167 N.E. 501, 502 (1929).

8. Instant Case at 293.

instant case refused to fictionalize and held that the wife's second marriage, though subsequently invalidated by annulment, was nevertheless a "remarriage within the meaning of the separation agreement incorporated into the divorce decree."

The position of the court regarding the efficacy of the annulled marriage to terminate the first husband's liability for support is not surprising in view of the trend of cases in New York and other jurisdictions, recognizing the rights of a wife who in good faith enters a void or voidable marriage. The courts of this country have modified the harsh-law rule that no rights as a wife could be acquired by a void marriage, and have effected the distribution of property upon the dissolution of void and voidable marriages by various theories,[9] such as, quasi-contractual obligation,[10] quasi partnership,[11] and grounds of equity and justice.[12] Moreover, annulled marriages have been given sufficient validity to provide valid consideration for a gift,[13] make a remarriage bigamous,[14] and, by statute, legitimize any children born of the union.[15]

This trend of relaxation from the common-law rule has caused several states in addition to New York to provide by statute for alimony in cases of void marriages.[16]

The words "unless and until she shall remarry" in the separation agreement caused some concern to the court. The dissenting judge felt the words contemplated a *valid marriage*. This problem of whether the words refer only to the ceremony of marriage or to the status or relationship created thereby has previously confronted the courts.[17] Those interpreting the words as referring to the ceremony reason: First, no one would contend that the separation agreement should be

9. *But cf.* DeFrance v. Johnson, 26 Fed. 891 (C.C.D. Minn. 1886).

10. Ah Leong v. Ah Leong, 27 F.2d 582 (9th Cir. 1928).

11. *But cf.* Schmitt v. Schneider, 109 Ga. 628, 35 S.E. 145 (1900).

12. Werner v. Werner, 59 Kan. 399, 53 Pac. 127 (1898); Chrismond v. Chrismond, 52 So.2d 624 (Miss. App. 1951); Buckley v. Buckley, 50 Wash. 213, 96 Pac. 1079 (1908).

13. American Surety Co. of New York v. Conner, 251 N.Y. 1, 166 N.E. 783 (1929) (innocent party to a voidable marriage allowed to retain what had been conveyed). *But cf.* Rubin v. Joseph, 215 App. Div. 91, 213 N.Y. Supp. 460 (2d Dep't 1926) (different result reached where party at fault was the recipient).

14. *Accord*: Jordan v. Missouri & Kansas Telephone Co., 136 Mo. App. 192, 116 S.W. 432 (1909); McCullen v. McCullen, 162 App. Div. 599, 147 N.Y. Supp. 1069 (1st Dep't 1914). *Contra*: Taylor v. White, 160 N.C. 38, 75 S.E. 941 (1912).

15. *E.g.*, N.Y. CIV. PRAC. ACT § 1135; N.C. GEN. STAT. § 50-11 (Cum. Supp. 1953); TENN. CODE ANN. § 8453 (Williams 1934).

16. See Stapleberg v. Stapleberg, 77 Conn. 31, 58 Atl. 233 (1904); Daniels v. Morris, 54 Iowa 369, 6 N.W. 532 (1880); Strode v. Strode, 66 Ky. 227 (3 Bush 1867) (divorce for bigamy); Bickford v. Bickford, 74 N.H. 448, 69 Atl. 579 (1908); Lea v. Lea, 104 N.C. 603, 10 S.E. 488 (1889) (*pendente lite*); Vanvalley v. Vanvalley, 19 Ohio St. 588 (1869).

17. *Compare* Lehmann v. Lehmann, 225 Ill. App. 513 (1922) *with* dissent of Hamiter, J., in Keeney v. Keeney, 211 La. 585, 30 So.2d 549 (1947).

revived if the marriage ended in death or divorce[18] and likewise it should not be revived in case of an annulment. Second, to hold that the divorced husband's obligation to pay alimony is terminated only by a subsequent valid marriage by the divorced wife would render the divorced husband always subject to a decree reviving his obligation to pay, even though he may have remarried and assumed other obligations.[19] There is no statute of limitations protecting the divorced husband in this type of situation.

The court stresses in the instant case that the "purpose of justice" dictates that the discharge effected by the second marriage be permanent and that the wife should not be given the opportunity to choose between the first and second husbands for the most profitable source of support.

DIVORCE—STATUTORY MODIFICATION OF DOMICILIARY JURISDICTION—CONGRESSIONAL LIMITATION OF POWER OF TERRITORIAL LEGISLATURE

Petitioner, after six weeks continuous presence in the Virgin Islands, sought a divorce there. The applicable statute[1] provided that in a divorce proceeding if a plaintiff has been within the jurisdiction for six weeks prior to filing his complaint and the defendant has been personally served or (as was the case here) enters a general appearance, the court should have jurisdiction of the action and the parties thereto without further reference to domicile. The petition was denied by the district court; the court of appeals affirmed; and the Supreme Court granted certiorari. *Held,* affirmed. The statute was designed for people outside the Virgin Islands and, therefore, exceeded the power to legislate concerning subjects of "local application" delegated to the territorial legislature by Congress. *Granville-Smith v. Granville-Smith,* 349 U.S. 1 (1955).

Traditionally domicile has been the requisite jurisdictional basis for divorce actions.[2] The case of *LeMesurier v. LeMesurier*[3] has been

18. *See* Nelson v. Nelson, 282 Mo. 412, 221 S.W. 1066, 1067 (1920); Brandt v. Brandt, 40 Ore. 477, 67 Pac. 508, 510 (1902).

19. The possibility of such a renewal of liability is contrary to public policy in that it tends to discourage marriage, the rearing of a family, and thereby strikes at the very foundation of our social and economic life. *See* Keeney v. Keeney, 211 La. 585, 30 So.2d 549, 551 (1947). *See* also 1 VAND. L. REV. 141 (1947).

1. Virgin Islands Divorce Act § 9(a). Bill No. 14, 8th Legislative Assembly of the Virgin Islands of the United States, Sess. 1944.

2. Williams v. North Carolina, 325 U.S. 226, 229 (1945); Andrews v. Andrews, 188 U.S. 14 (1903); Bell v. Bell, 181 U.S. 175 (1901); Streitwolf v. Streitwolf, 181 U.S. 179 (1901); RESTATEMENT, CONFLICT OF LAWS § 110, comment *a* (1934).

3. [1895] A.C. 517 (P.C.).

widely recognized as establishing the domicile requirement at common law.[4] A domicile of choice is acquired by intending to make a home at a given place where one is physically present.[5] Since domicile is a question of law to be determined from the circumstances, it is the intent to make a home not the intent to be domiciled which is controlling.[6] The rule that only a court at the domicile of one of the parties has jurisdiction to grant a divorce is said to result from the fact that every nation or state has the right to determine the status of its own domiciliaries.[7]

A decree entered where both parties are domiciled, of course, occasions few difficulties. When the spouses have acquired separate domicile,[8] however, problems of judicial jurisdiction have arisen.[9] The early doctrine of the Supreme Court was that a divorce was valid and entitled to full faith and credit if granted: (1) at the domicile of both spouses,[10] (2) at the domicile of either spouse with personal jurisdiction of the other through service or appearance,[11] or (3) at the matrimonial domicile[12] even without service within the state or an appearance.[13] Until the Supreme Court's decision in the first *Williams* case,[14] a divorce granted to a domiciliary without personal service on the

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4. Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study*, 65 HARV. L. REV. 193, 194 (1951).

5. Williams v. North Carolina, 317 U.S. 287, 298 n. 9 (1942); Mitchell v. United States, 88 U.S. 350, 353 (1874); Alton v. Alton, 207 F.2d 667, 671 (3d Cir. 1953); Winans v. Winans, 205 Mass. 388, 91 N.E. 394, 396 (1910); RESTATEMENT, CONFLICT OF LAWS § 15 (1934); GOODRICH, CONFLICT OF LAWS § 29 (3d ed. 1949).

6. *In re* Dorrance's Estate, 309 Pa. 151, 163 Atl. 303 (1932). *Cf.* Williamson v. Osenton, 232 U.S. 619, 625 (1914); Young v. Pollak, 85 Ala. 439, 5 So. 279, 282 (1888); McConnell v. Kelley, 138 Mass. 372, 373 (1885); GOODRICH, CONFLICT OF LAWS § 29 (3d ed. 1949).

7. Williams v. North Carolina, 317 U.S. 287, 298 (1942); Ellis v. Ellis, 55 Minn. 401, 56 N.W. 1056, 1058 (1893); Ditson v. Ditson, 4 R.I. 87 (1856); Hamm v. Hamm, 30 Tenn. App. 122, 142, 204 S.W.2d 113, 122 (1947); 1 RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 403 (1945).

8. This is made possible in the United States because of the modification of the English unitary rule of domicile. Williamson v. Osenton, 232 U.S. 619, 625-26 (1914); Tolen v. Tolen, 2 Blackf. 407 (Ind. 1831); Harding v. Alden, 9 Greenl. 140 (Me. 1832); RESTATEMENT, CONFLICT OF LAWS § 28 (1934).

9. A state's attempt to render a divorce, thereby creating interests, without jurisdiction, is invalid as contrary to due process. Alton v. Alton, 207 F.2d 667 (3d Cir. 1953); RESTATEMENT, CONFLICT OF LAWS § 43 (1934). But jurisdiction to divorce has ordinarily been questioned under the full faith and credit clause and not the Fourteenth Amendment. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 295 (2d ed. 1951).

10. Haddock v. Haddock, 201 U.S. 562 (1906); Standridge v. Standridge, 31 Ga. 223 (1860). See Harding v. Harding, 198 U.S. 317 (1905); 1 RABEL, CONFLICT OF LAWS: A COMPARATIVE STUDY 465 (1945).

11. Cheever v. Wilson, 9 Wall. 108 (U.S. 1869).

12. "Matrimonial Domicile" is used to signify: (1) The domicile of the husband at the time of the marriage of the parties, and (2) the last common domicile of husband and wife in divorce litigation. GOODRICH, CONFLICT OF LAWS § 33 (3d ed. 1949).

13. Atherton v. Atherton, 181 U.S. 155 (1901).

14. Williams v. North Carolina, 317 U.S. 287 (1942).

non-resident spouse was not entitled to full faith and credit.[15] Nevertheless, most states chose to honor such divorces.[16]

The decision in the first *Williams* case was interpreted to mean that a decree granted *ex parte* by a court finding the petitioning spouse to be a domiciliary, regardless of the length of his sojourn, is entitled to full faith and credit. Even prior to that decision there was a noticeable relaxation in the requirements for domicile to effectuate a valid divorce.[17] The second *Williams* case[18] held, however, that although an adjudication of domicile by the court granting the divorce is prima facie evidence of domicile, domicile is a jurisdictional factor which may be determined *de novo,* if the decree is questioned in a sister state. It was later held, however, that if the respondent appears in the earlier proceedings and contests jurisdiction on the ground that the plaintiff is not a domiciliary, an adverse ruling is res judicata.[19] The same is true where the respondent, though personally served, fails to appear, and also where the merits are contested in a general appearance, though the issue of domicile is not specifically raised.[20]

These relaxations in the requirements for the establishment of domicile[21] have led authorities in the field of confiict of laws to anticipate the possibility of the Supreme Court's completely negating such a requirement. The case of *Alton v. Alton,*[22] concerning the statutory provision in the instant case afforded an excellent opportunity for such a holding. The minority in the Third Circuit maintained that the domiciliary rule was a creation of nineteenth century judges and could not, therefore, be one of those fundamental ideas which must be read into the original provisions of our Constitution. This would suggest that it was within the province of a state legislature to adopt an alternative for domicile as an appropriate foundation for its divorce

15. Atherton v. Atherton, 181 U.S. 155 (1901).

16. Crimm v. Crimm, 211 Ala. 13, 99 So. 301 (1924); Beckwith v. Bailey, 119 Fla. 316, 161 So. 576 (1935); Voorhies v. Voorhies, 184 La. 406, 166 So. 121 (1936); Toncray v. Toncray, 123 Tenn. 476, 131 S.W. 977 (1910). *Contra,* People v. Baker, 76 N.Y. 78 (1879); Irby v. Wilson, 21 N.C. 568 (1837); McCreery v. Davis, 44 S.C. 195, 22 S.E. 178 (1895).

17. Arising in cases in which persons attacking the divorce either sought the divorce, appeared in the foreign proceedings asking for special relief, or remarried relying on the foreign decree. Goodloe v. Hawk, 113 F.2d 753 (D.C. Cir. 1940); Parmelee v. Hutchins, 238 Mass. 561, 131 N.E. 443 (1921); Hubbard v. Hubbard, 228 N.Y. 81, 126 N.E. 508 (1920); Starbuck v. Starbuck, 173 N.Y. 503, 66 N.E. 193 (1903); Scheper v. Scheper, 125 S.C. 89, 118 S.E. 178 (1923); Loftis v. Dearing, 184 Tenn. 474, 201 S.W.2d 655 (1947). *But cf.* Hamm v. Hamm, 30 Tenn. App. 122, 149, 204 S.W.2d 113, 125 (1947).

18. Williams v. North Carolina, 325 U.S. 226 (1945).

19. Sherrer v. Sherrer, 334 U.S. 343 (1948); Davis v. Davis, 305 U.S. 32 (1938); Note, 3 U. OF DETROIT L.J. 32 (1939).

20. Coe v. Coe, 334 U.S. 378 (1948).

21. *Cf.* Harris v. Harris, 205 Iowa 108, 215 N.W. 661 (1927) (compulsory presence of soldiers and sailors does not result in new domicile); Nugent v. Bates, 51 Iowa 77, 50 N.W. 76 (1879) (temporary absences do not affect domicile); RESTATEMENT, CONFLICT OF LAWS § 22, comment b (1934).

22. 207 F.2d 667 (3d Cir. 1953).

power. The case became moot, however, and never reached the Supreme Court. The instant case afforded a second opportunity for the Supreme Court to pass on the matter. The issue was avoided by condemning the statute in question as exceeding the scope of the powers granted to the legislature of the Virgin Islands.

Section 9(a) of the Virgin Islands' divorce statute was enacted to circumvent the decision in *Burch v. Burch*,[23] which held that the terms "inhabitant" and "residence" of its divorce statute must be interpreted to mean "domiciliary" and "domicile" respectively. To accomplish this result it was enacted that six weeks presence within the district was prima facie evidence of domicile,[24] and that if a party were personally served or entered a general appearance the court should have jurisdiction without reference to domicile.

Petitioner's failure to show her appropriate connection with the forum so as to be a rightful subject of legislation could be decisive only if domicile is held to be a requisite to seeking divorce in the Virgin Islands. The holding in the instant case cannot serve as a basis for drawing conclusions as to the necessity of a domicile in the states of the Union. The statutory provision that the legislative power of the Virgin Islands "shall extend to all subjects of local application . . . ,"[25] though a positive grant of power by Congress, is also a definite limitation.[26] "Until Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled . . . that the territory is to be governed under the power existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation."[27]

The instant case is authority, therefore, only for the proposition that the Virgin Islands, because of congressional limitations of their legislative powers, cannot acquire jurisdiction for the purpose of granting divorces over subjects not of "local application." The majority has impliedly held that personal jurisdiction without domicile cannot grant jurisdiction to the Virgin Islands, without expressing an opinion on the requirement of domicile among the states.

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23. 195 F.2d 799 (3d Cir. 1952). See Reese and Green, *That Elusive Word, "Residence,"* 6 VAND. L. REV. 561 (1952) and cases cited therein.

24. The first avenue of attack upon the "sacred cow of domicile," which the court did not discuss, was to shift the burden of going forward with the evidence on the issue of domicile by establishing a rebuttable presumption of domicile. The creation of this presumption would seem to be in accord with the *Turnispeed* doctrine. There is, conceivably, a rational connection between the proved fact of six weeks stay and the presumed fact of domicile.

25. 49 STAT. 1811 (1936), 48 U.S.C.A. § 1405r (1952).

26. See Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 COL. L. REV. 823 (1926).

27. Dorr v. United States, 195 U.S. 138, 143 (1904). See Downes v. Bidwell, 182 U.S. 244, 299 (1901).

LABOR LAW—UNFAIR LABOR PRACTICE—PRIMARY JURISDICTION IN NLRB

Respondent filed a complaint with the National Labor Relations Board alleging petitioner's strike and picketing to be an unfair labor practice under the Taft-Hartley Act since its purpose was to compel the insertion of a contract clause obligating the respondent to employ only contractors under collective bargaining agreements with the union. After filing but prior to Board action, the respondent sought an injunction in a Missouri state court. A permanent injunction was affirmed by the Missouri Supreme Court more than a year after the Board had found there to be no violation of Section 8(b) (4) (D) of the Act. The union conduct was held enjoinable as a violation of the state's restraint of trade statute. On certiorari to the United States Supreme Court, *held,* reversed. The NLRB has exclusive jurisdiction to determine in the first instance whether charges reasonably come within the prohibited or protected sections of Taft-Hartley. Thus the proceeding in the lower Missouri court was void for want of jurisdiction. *Weber v. Anheuser-Busch, Inc.,* 75 Sup. Ct. 480 (1955).

The areas of exclusive federal regulation in labor-management relations are gradually becoming defined, and yet many important questions remain unanswered.[1] A recent landmark decision indicating the scope of the congressionally occupied area was *Garner v. Teamsters Union* which held that a state court may not under its own labor statute enjoin peaceful picketing which constitutes an unfair labor practice under the Taft-Hartley Act.[2] The Court further implied that picketing uncondemned by Taft-Hartley was intended to be free from restraint.[3] Although previously predicted by labor law commentators, the *Garner* holding provoked voluminous speculation regarding the future application of the pre-emption doctrine under the federal statute.[4] Despite its apparently broad scope, the decision expressly

1. See generally the following articles: Benetar and Isaacs, *Pickets or Ballots? The New Trend in Labor Law,* 40 A.B.A.J. 848 (1954); Cox, *Federalism in the Law of Labor Relations,* 67 HARV. L. REV. 1297 (1954); Kawano, *State and Federal Jurisdiction in Labor-Management Relations,* 31 DICTA 255-66 (1954); 7 VAND. L. REV. 422 (1954).

2. 346 U.S. 485 (1953).

3. "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." 346 U.S. 485, 499-500 (1953).

4. *Cf.* Brody, *Federal Pre-emption Comes of Age in Labor Relations,* 5 LABOR L.J. 743-65 (1954); Forkosh, *Government Impact on Labor-Management Relations: Past-Present-Future,* 5 LABOR L.J. 543-48 (1954); Rose, *Garner v.*

conceded that areas remained within which states might validly regulate labor activity within interstate commerce.[5] Thus, the authority of earlier and subsequent case law—holding state regulation to be appropriate in cases of violent conduct endangering public safety,[6] unduly coercive activity neither protected nor prohibited by the federal statute,[7] and in areas where Congress expressly authorized state control[8]—remained unaffected by the *Garner* decision. Allowing for these exceptions, the federal courts and most state courts have consistently followed the *Garner* rule.[9] Some state tribunals, however, have exhibited considerable reluctance by limiting its application in many instances.[10]

Teamsters: The Supreme Court and Private Rights, 40 VA. L. REV. 177 (1954); Shute, *State versus Federal Jurisdiction in Labor Disputes: The Garner Case*, 19 Mo. L. Rev. 119 (1954); Whitney, *NLRB Jurisdictional Policies and the Federal State Relationship*, 6 LABOR L.J. 3-6, 71-80 (1955); 3 BUFFALO L. REV. 326-28 (1954); 21 BROOKLYN L. REV. 122-23 (1954); 54 COL. L. REV. 997-1002 (1954); 22 GEO. WASH. L. REV. 770-73 (1954); 7 VAND. L. REV. 422-27 (1954). For an excellent discussion of congressional proposals to define the roles assigned to the Federal and State Governments, see Roumell and Schlesinger, *The Preemption Dilemma in Labor Relations*, 18 U. DET. L.J. 135 (1955).

5. 346 U.S. 485, 488 (1953).

6. Allen-Bradley Local No. 1111 v. Wisconsin Empl. Rel. Bd., 315 U.S. 740 (1942); Algoma Plywood & Veneer Co. v. Wisconsin Empl. Rel. Bd., 336 U.S. 301 (1949).

7. International Union A.W., AFL v. Wisconsin Empl. Rel. Bd., 336 U.S. 245 (1953); Sommer v. Metal Trades Council, 40 Cal. 2d 392, 254 P.2d 559, 563 (1953). See 29 N.Y.U.L. REV. 524 (1954) commenting on the California Supreme Court construing *Briggs-Stratton* as giving the states jurisdiction over peaceful union conduct neither specifically protected nor condemned by the Taft-Hartley Act. See also 1 U.C.L.A.L. REV. 615 (1954).

8. Labor Management Relations Act [61 STAT. 136, 29 U.S.C.A. § 141, *et seq.* (Supp. 1954)]. Section 14(b) permits the states to enact laws forbidding union shop contracts, and Section 10 (a) permits the ceding of jurisdiction to state labor boards in unfair practice cases conditioned upon the requirement that the state law correspond closely enough with Taft-Hartley to insure consistency.

9. Building Trade Council v. Kinard Const. Co., 346 U.S. 933 (1954); Your Food Stores of Santa Fe, Inc., v. Retail Clerks Local No. 1564, 121 F. Supp. 339 (D.N.M. 1954); Born v. Laube, 213 F.2d 407, *rehearing denied*, 214 F.2d 349 (9th Cir. 1954); NLRB v. Thayer Co., 213 F.2d 748 (1st Cir. 1954); United Mineral & Chemical Corp., v. Katz, 118 F. Supp. 433 (E.D.N.Y. 1954); Irving Subway Grating Co. v. Silverman, 117 F. Supp. 671 (E.D.N.Y. 1953); Montgomery Bldg. & Constr. Trade Council v. Ledbetter Erection Co., 260 Ala. 382, 70 So. 2d 809 (1954); Garmon v. San Diego Bldg. Trades Council, 273 P.2d 686 (Cal. 1954); Dyer v. International Brotherhood, 124 Cal. App. 2d 778, 269 P.2d 199 (1954); Perez v. Trifiletti, 74 So. 2d 100 (Fla. 1954); Gulf Shipside Storage Corp. v. Moore, 71 So. 2d 236 (La. 1954); Busch & Sons, Inc. v. Retail Union of New Jersey, Local 108, 15 N.J. 226, 104 A.2d 448 (1954); General Teleradio, Inc. v. Manuti, 205 Misc. 655, 129 N.Y.S.2d 757 (Sup. Ct. 1954); Grimes & Hauer, Inc. v. Pollock, 119 N.E.2d 889 (Ohio 1954); Leiter Mfg. Co. v. International Ladies' Garment Workers' Union, AFL, 269 S.W.2d 409 (Tex. Civ. App. 1954); Wichita Falls & So. Ry. Co. v. Lodge No. 1476, International Ass'n of Machinists, 226 S.W.2d 265 (Tex. Civ. App. 1954); Wisconsin Empl. Rel. Bd. v. Chauffeurs, Teamsters & Helpers Local 200, 267 Wis. 356, 66 N.W.2d 318 (1954).

10. *Contra:* International Ass'n of Machinists, AFL v. Goff-McNair Motor Co., 264 S.W.2d 48 (Ariz. 1954); Coutlakis v. State, 268 S.W.2d 192 (Tex. Cr. App. 1954); 33 TEXAS L. REV. 401 (1955). See also 38 MINN. L. REV. 549 (1954) discussing the power of state courts to grant injunctive relief in common law actions when Taft-Hartley is applicable. In answer to the contention that the state court was without jurisdiction under the *Garner* decision an Oregon court said: "I am not impelled to the denial of the jurisdiction of the state

The later case of *United Construction Workers v. Laburnum Construction Corp.*[11] limited the *Garner* doctrine by holding that a state court had jurisdiction to award damages even though there existed an unfair labor practice which, under *Garner* could not have been enjoined by a state court. In the *Laburnum* case no conflict was found between federal and state remedies such as existed in the *Garner* case. The absence of conflict, noted the Court, resulted from the fact that the federal act is phrased primarily in terms of prevention and the public interest, while private suits for damages occasioned by prohibited union activity are authorized by the act, only in the case of secondary boycotts.[12] Thus, at least where actual or threatened violence is involved, the Taft-Hartley Act has not precluded traditional common law action for damages in the state courts.[13] Indeed, at least one state court has interpreted the *Laburnum* case as authorizing actions for damages even in the absence of violence.[14] According to some writers, *Laburnum* confines the exclusiveness of Board jurisdiction over unfair labor practices to preventive procedures only.[15]

In its most recent decision the Supreme Court has further defined the area within which the Board's jurisdiction is exclusive.[16] In a rather precise mandate it asserted that a state court must, in deference to the Board's primary jurisdiction, decline to hear cases where the party seeking injunctive relief alleges facts which reasonably bring the controversy within the coverage of the federal statute.[17] The rule appears to be only a logical outgrowth of the *Garner* doctrine. The question remains opens as to what relief can be obtained in a state court when the Board declines to exercise its jurisdiction.[18]

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court without some clearer, more definitive rule enunciated by higher tribunals." M. & M. Wood Working Co. v. United Brotherhood of Carpenters & Joiners, 35 L.R.R.M. 2053 (Ore. Cir. Ct. 1954), 41 VA. L. REV. 261 (1955).

11. 347 U.S. 656 (1954).

12. 61 STAT. 158 (1947), 29 U.S.C.A. § 187 (Supp. 1954).

13. United Construction Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954); Russell v. International Union, 258 Ala. 615, 64 So.2d 384 (1953). For a discussion of the question of punitive damages in the state courts, see 6 STAN. L. REV. 555 (1954).

14. Benjamin v. Foidl, 379 Pa. 540, 109 A.2d 300 (1954). *Cf.* Kuzma v. Millinery Workers Union, 27 N.J. Super. 579, 99 A.2d 833 (1953). A careful reading of the *Laburnum* case fails to disclose whether actual violence was present; at any rate that case clearly involved threates of violence. *Quaere*—Is even threatened violence necessary before the state courts can award damages?

15. See Note, 40 CORNELL L. Q. 156-63 (1954); Note, 6 HASTINGS L. J. 97-101 (1954); 29 TULANE L. REV. 155-59 (1954); 50 COL. L. REV. 1147-49 (1954); Comment, 40 VA. L. REV. 805 (1954); 18 U. DET. L. J. 211-14 (1955).

16. Weber v. Anheuser-Busch, Inc., 75 Sup. Ct. 480 (1955).

17. Instant Case at 487-88.

18. Building Trades Council v. Kinard Constr. Co., 346 U.S. 933 (1954). Some light was cast upon the question recently when it was held that in the absence of an NLRB request the federal court was powerless to enjoin an action in a state court. Amalgamated Clothing Workers v. The Richman Brothers, 75 Sup. Ct. 452 (1955).

LIFE INSURANCE — GOOD HEALTH CLAUSE — EXISTENCE OF MALADY UNKNOWN TO INSURED

Widow of insured sought proceeds of two life insurance policies, which required that insured be in good health at time of application for and delivery of the policy.[1] Insured died from cancer eight months subsequent to issuance of insurance. The cancerous condition existed prior to application for and delivery of the policies, but was unknown to either insured or insurer. Defendant insurer contended actual good health was a condition precedent to its liability. The trial court awarded judgment for the widow. *Held,* affirmed. When upon application for and delivery of insurance policies insured had no knowledge of an existing malady which might shorten his life, the good health clause did not void the insurance. *Brubaker v. Beneficial Standard Life Ins. Co.,* 278 P.2d 966 (Cal. 1955).

Life insurance contracts generally contain the so-called "good health" clause invalidating the policy unless application is made and the policy delivered while the insured is in good or sound health.[2] There is judicial agreement that the phrase must be given a reasonable interpretation—one not requiring perfect health, but voiding the policy only where the disease is of such a serious nature as to have the tendency to shorten life.[3] However, the courts are split as to whether this clause means "actual good health" thus voiding the policy if there actually exists a disease regardless of insured's knowledge,[4] or merely "apparent good health" in which case the contract is enforceable unless insured knowingly deceives the company regarding his disease.[5]

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1. "I hereby declare and agree . . . that this application . . . shall form a part of any policy of insurance issued, . . . that any policy issued shall not take effect unless and until the full first premium has been paid and the policy delivered to me during my good health, . . . and during my lifetime. . . ." Instant Case at 968.

2. The clause continues in effect only during the period when the policy is contestable. American National Ins. Co. v. Stutchman, 208 Ark. 1023, 185 S.W.2d 284 (1945).

3. Packard v. Metropolitan Ins. Co., 72 N.H. 1, 54 Atl. 287 (1903); VANCE, INSURANCE 642 (3d ed. 1951); Prosser, *Innocent Misrepresentation of Health in Insurance Applications,* 28 MINN. L. REV. 141 (1944).

4. Bankers Life Co. of Des Moines v. Sone, 86 F.2d 780 (5th Cir. 1936); Greenbaum v. Columbian Nat. Life Ins. Co., 62 F.2d 56 (2d Cir. 1932); Kelly v. John Hancock Mut. Life Ins. Co., 131 Conn. 106, 38 A.2d 176 (1944); Mutual Life Ins. Co. of Baltimore v. Willey, 133 Md. 665, 106 Atl. 163 (1919) Barker v. Metropolitan Life Ins. Co., 188 Mass. 542, 74 N.E. 945 (1905); Packard v. Metropolitan Ins. Co., 72 N.H. 1, 54 Atl. 287 (1903); Metropolitan Ins. Co. v. Howle, 62 Ohio St. 204, 56 N.E. 908 (1900); Nix v. Sovereign Camp, W.O.W., 180 S.C. 153, 185 S.E. 175 (1936); Metropolitan Life Ins. Co. v. Chappell, 151 Tenn. 299, 269 S.W. 21 (1925); American Nat. Ins. Co. v. Jarrell, 50 S.W.2d 875 (Tex. 1932); Wright v. Federal Life Ins. Co., 248 S.W. 325 (Tex. 1923); Scofield's Adm'x v. Metropolitan Life Ins. Co., 79 Vt. 161, 64 Atl. 1107 (1906); Logan v. New York Life Ins. Co., 107 Wash. 253, 181 Pac. 906 (1919).

5. Rasicot v. Royal Neighbors of America, 18 Idaho 85, 108 Pac. 1048 (1910); Service Life Ins. Co. of Omaha v. McCullough, 234 Iowa 817, 13 N.W.2d 440 (1944); Aetna Life Ins. Co. v. Rehlaender, 68 Neb. 284, 94 N.W. 129 (1903);

The "actual good health" theory, a majority rule in American courts,[6] is predicated upon the premise that actual good health is a condition precedent to insurer's liability,[7] and that the clause does not fall within statutory provisions treating all warranties as representations. The risk of untruth of the answers is placed upon the insured. The condition precedent principle thus prevents the contract from ever coming into existence, even though the insured has no knowledge of facts which would indicate a failure to satisfy the condition. The insured's actual state of health, therefore, rather than his knowledge or belief thereabout, is the determining factor.[8]

The court in the instant case, construing the good health clause as meaning the insured's state of health unimpaired by any serious malady of which he has knowledge, adopts a liberal minority view which recognizes questions of health and disease to be of such character as to call for statements of belief and opinion rather than statements of fact.[9] The good faith of the insured necessarily furnishes the criterion of truth for statements of opinion;[10] the answers constitute no more than representations that so far as the insured knows, his answers are true. The insured's reasonable interpretation of the meaning of the statement, rather than the insurer's intention as to its meaning, should be the guiding rule of construction.[11] The insurer's liability cannot be avoided without demonstrating that the insured knew of the falsity of his statements and that he made them with intent to defraud.[12]

As previously stated most courts agree that "good health" does not signify perfect health. It is submitted that this liberal interpretation should be further extended to make the phrase a representation instead of a condition precedent. If a warranty is desired by the insurance companies, they should specify and detail the requirement that

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United Ben. Life Ins. Co. v. Knapp, 175 Okla. 25, 51 P.2d 963 (1935); Suravitz v. Prudential Ins. Co. of America, 244 Pa. 582, 91 Atl. 495 (1914) (policy made all statements representations rather than warranties; the Pennsylvania rule where a warranty is involved is the strict actual-good-health rule.) There is a third rule, akin to the apparent good health rule, which holds that the phrase relates only to changes in the condition of the insured occurring after application for the policy and before its delivery: New York Life Ins. Co. v. Smith, 129 Miss. 544, 91 So. 456 (1922); National Life & Accident Ins. Co. v. Ware, 169 Okla. 618, 37 P.2d 905 (1934).

6. VANCE, INSURANCE 643 (3d ed. 1951) states the majority view to be: "The insured's good faith or his lack of knowledge of his true physical condition is immaterial. . . ." But other authority states the majority rule to be that the insured's knowledge is material. See Prudential Ins. Co. of America v. Kudoba, 323 Pa. 30, 186 Atl. 793 (1936).

7. Packard v. Metropolitan Ins. Co., 72 N.H. 1, 54 Atl. 287 (1903). But see 24 IOWA L. REV. 787 (1939).

8. Metropolitan Life Ins. Co. v. Chappell, 151 Tenn. 299, 269 S.W. 21 (1925).

9. Rasicot v. Royal Neighbors of America, 18 Idaho 85, 108 Pac. 1048 (1910).

10. United Ben. Life Ins. Co. v. Knapp, 175 Okla. 25, 51 P.2d 963 (1935).

11. Service Life Ins. Co. of Omaha, Neb. v. McCullough, 234 Iowa 817, 13 N.W.2d 440 (1944).

12. Aetna Lfe Ins. Co. v. Rehlaeder, 68 Neb. 284, 94 N.W. 129 (1903).

the policy shall be void unless delivered while insured is in actual good health, regardless of his belief or misbelief as to his health. The instant decision is more in consonance with reason and justice than is the strict majority rule; it recognizes what the ordinary layman would think the language to mean. An insured would expect to be asked only of his knowledge of his health, not for an expert medical opinion as to his actual health.

NUISANCE—LIABILITY FOR NONTRESPASSORY INTERFERENCE WITH THE USE AND ENJOYMENT OF LAND—INTENTIONAL INVASION

Plaintiffs bought a home in a mining community near the site of defendants' coal mining operations. Refuse composed of waste and reclaimable sulphurous coal was deposited on defendants' land in large dumps. These dumps emitted foul smelling hydrogen sulphide gas which pervaded plaintiffs' land and by chemical reaction discolored the paint on their dwelling house. The defendants did not know and had no reason to anticipate either the emission of the gas or the consequent damage to plaintiffs' house. In an action for damages for nuisance, the trial court entered judgment for the plaintiffs on a jury finding that the defendants' conduct and the results therefrom did not constitute a reasonable and natural use of defendants' land. This judgment was affirmed by the superior court. On appeal, the supreme court reversed, holding as a matter of law that defendants' conduct was neither intentional nor unreasonable, nor was it negligent, reckless or ultrahazardous.[1] *Waschak v. Moffat,* 109 A.2d 31 (Pa. 1954).

This case brings clearly into focus the point, overlooked in the early nuisance cases, that the basis of liability is the invasion of the plaintiff's rights in the use and enjoyment of his land by the *tortious* conduct of the defendant.[2] According to the *Restatement,* the conduct, to be tortious, must, if intentional be unreasonable, or, if unintentional, must be negligent, reckless or ultrahazardous.[3]

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1. Although unnecessary to its decision, the court held that the plaintiffs, by buying with knowledge of the surrounding circumstances, assumed the risk of all damage from the defendants' reasonable use of their land. Instant Case at 316. This holding does not appear to be sound because one does not assume the risk of a nuisance and a nuisance may exist through the negligent, reckless or ultrahazardous conduct of the defendant even though the use of the land may be reasonable. PROSSER, TORTS 425 (2d ed. 1955).

2. PROSSER, TORTS 391 (2d ed. 1955); Kenworthey, *The Private Nuisance Concept in Pennsylvania: A Comparison with the Restatement,* 54 DICK. L. REV. 109, 111 (1949-50).

3. Liability for nuisance has been imposed in a class of cases where the defendant's conduct was unintentional and neither negligent, reckless nor ultra-

The court adopts the *Restatement* rule as a complete statement of the principles governing liability for nontrespassory interference with the use and enjoyment of land. Applying this rule to the fact situation of the instant case, the court held as a matter of law that the defendants' conduct was neither negligent, nor ultrahazardous, thus disposing of any liability based on unintentional conduct.

The court then turned to the key question of whether the defendants' conduct constituted an intentional invasion. Its definition of intentional invasion appears to be that of the *Restatement* which characterizes as intentional only acts done for the purpose of causing an invasion or conduct from which the actor knows an invasion is resulting or is substantially certain to result.[4] This statement seems merely definitive of the law as enunciated in the cases. In most nuisance cases the defendant's conduct is intentional and the ensuing damage easily foreseeable.[5] In others, although the defendant's original act causing the harm may have been unintentional, the law treats a continuance of the acts, after notice of harm, as being intentional.[6] Several recent decisions have adopted the exact language of the *Restatement* definition of "intentional invasion."[7]

The court, in applying this definition, pointed out that the emission of hydrogen sulphide from culm dumps was rare and that defendants did not know and had no reason to be aware that the gas would be emitted and cause damage to the plaintiffs' house.[8] It concluded, therefore, that the invasion was not intentional. Although not dis-

hazardous. This doctrine has been variously called that of Rylands v. Fletcher, L.R. 3 H.L. 330 (1868), absolute nuisance (nuisance "per se" or nuisance "in fact"), *ultrahazardous activity*, strict liability for the keeping of dangerous animals or trespass by blasting. Dean Prosser takes the position that regardless of the name the principle of law upon which liability is imposed is the same. This principle is "that if a man takes a risk, which he ought not to take without also taking upon his shoulders the consequences of that risk, he shall pay for any damage that ensues." PROSSER, SELECTED TOPICS ON THE LAW OF TORTS 178-79 (1954). The Pennsylvania court purports to reject both the doctrine of *Rylands v. Fletcher* and that of absolute nuisance and to adopt the *Restatement* rule. Considering Dean Prosser's analysis of the decided cases it appears probable that this court will find itself following both of these rejected doctrines in applying the *Restatement* rule which imposes liability for unintentional but reckless or ultrahazardous invasion of the use and enjoyment of land. The relevant portion of the rule states: "The actor is liable in an action for damages for a non-trespassory invasion of another's interest in the private use and enjoyment of land if . . . (d) the invasion is either (i) intentional and unreasonable; or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless or ultrahazardous conduct." RESTATEMENT, TORTS § 822(d) (1939).

4. RESTATEMENT, TORTS § 825 (1939).

5. PROSSER, TORTS 392 (2d ed. 1955).

6. Rauh & Sons Fertilizer Co. v. Shreffler, 139 F.2d 38 (6th Cir. 1943); Smith v. Stasso Milling Co., 18 F.2d 736 (2d Cir. 1927); Vaughn v. Missouri Power & Light Co., 89 S.W.2d 699 (Mo. App. 1935).

7. Patterson v. Peabody Coal Co., 3 Ill. App.2d 311, 122 N.E.2d 48 (1954); Morgan v. High Penn Oil Co., 238 N.C. 185, 77 S.E.2d 682 (1953); Columbian Carbon Co. v. Tholen, 199 S.W.2d 825 (Tex. Civ. App. 1947); Soukoup v. Republic Steel Corp., 78 Ohio App. 87, 66 N.E.2d 334 (1946).

8. Instant Case at 312.

closed by the decision, it would seem desirable to assume that the burden of proof was on the defendants to show that the invasion was not intentional in view of the fact that damage was occurring and, as the dissent points out, the entire town was permeated by an odor which any high school chemistry student would immediately identify as hydrogen sulphide gas.[9]

A recent Illinois decision gives the question of intentional invasion almost identical treatment.[10] The facts were strikingly similar to those of the instant case and differ only in that defendant's coal washer emitted soot which together with noxious gases emitted by the refuse pile damaged the plantiff's property. That court, while approving the submission to the jury of the question of damages caused by the soot, held as a matter of law that the defendant was not liable for damages caused by the noxious gases because such gases, being caused by spontaneous combustion which the defendant had taken all means to prevent, were unintentionally released and were not certain to occur.[11]

It would seem that the questions of intent and reasonableness should be decided by the trier of fact unless, in the opinion of the court, they do not present questions upon which the minds of reasonable men could differ.[12] Here, the trial court deemed the question of intent immaterial in a suit for damages for nuisance but did submit to the jury what it considered the conflicting fact question of the reasonableness of the defendants' use of their property. The reviewing court, in adopting the *Restatement* rule, thereby injected into the case the element of intentional invasion. It then considered the whole record and concluded as a matter of law that the defendants' invasion of the plaintiffs' interest in the use and enjoyment of their land was unintentional. Such a holding is usual where the evidence is not conflicting but here the question of intent does not appear to have been before the trial court.[13] Thus the court is reviewing for intentional invasion a record of a trial in which it was deemed unnecessary. Possibly the better disposition of the case would have been to reverse and remand with instructions to determine the question of intent.

The court's holding that the defendants' conduct was unintentional was sufficient to preclude liability under the requirement of intentional *and* unreasonable. However, it went further and held as a matter of law that the defendants' use of their land was not unreasonable.[14] Since the facts indicate that the defendants are still dumping the objectionable refuse within the community although in a different loca-

9. *Id.* at 321.
10. Patterson v. Peabody Coal Co., 3 Ill. App.2d 311, 122 N.E.2d 48 (1954).
11. *Id.* at 52.
12. C.J.S., *Nuisances* § 153 (1950).
13. Instant Case at 312.
14. *Id.* at 317.

tion, does the decision mean that the defendants will not be liable for any future harm from the same operation?

Viewing the *Restatement* rule apart from any particular case, it appears to be no more than a fair statement of the existing law as laid down in the reported decisions with the possible exception of that group of cases where strict liability is imposed. These are covered under the *Restatement* rule as conduct that is unintentional and reckless or ultrahazardous. It may be that the requirement of reckless or ultrahazardous conduct is too narrow. However, judicial construction of the meaning of the two words could be sufficiently broad to cover the reported cases where liability has been imposed without regard to intent.

WILLS—HOLOGRAPHIC CODICIL—PUBLICATION OF AN INVALID TYPEWRITTEN WILL

Testator, a lawyer, typed an instrument directing the disposal of his property but did not sign it or have it attested by witnesses as required by Oklahoma law.[1] He later added in his own handwriting a bequest to his brother on the same sheet of paper. The testator signed and dated this bequest.[2] The lower courts would not admit this instrument to probate. *Held,* (5-3) reversed with directions to probate the will. A valid holographic codicil republishes and validates an invalid typewritten will. *Johnson v. Johnson,* 279 P.2d 928 (Okla. 1954).

A general rule subscribed to by the majority of courts is that a properly executed codicil which contains a reference to a prior invalid will republishes that will.[3] The prior will may have been invalid be-

1. "Every will, other than a noncupative will, must be in writing; and every will, other than a holographic will . . . must be executed and attested . . . ." OKLA. STAT. tit. 84 § 55 (1951).

2. "To my brother James I give ten dollars only. This will shall be complete unless hereafter altered, changed or rewritten. Witness my hand this April 6, 1947. Easter Sunday, 2:30 P.M. D. G. Johnson Dexter G. Johnson." Instant Case at 936.

3. Rogers v. Agricola, 176 Ark. 287, 3 S.W.2d 26 (1928) (typewritten will attested by only one witness republished by holographic codicil); Hurley v. Blankinship, 313 Ky. 49, 229 S.W.2d 963 (1950), 21 A.L.R.2d 817 (1952) (valid holographic codicil republished unsigned holographic will); *see In re* Welch's Estate, 272 P.2d 512 (Cal. 1954) (properly executed codicil operates as republication of a will, removing any possible taint of undue influence); *In re* Kaiser's Estate, 150 Neb. 295, 34 N.W.2d 366 (1948) (codicil correctly describing beneficiaries republished will incorrectly describing them); Stevens v. Myers, 62 Ore. 372, 121 Pac. 434 (1912) (a codicil executed with sufficient testamentary capacity republished and cured will made without sufficient capacity). For other cases see Notes, 21 A.L.R.2d 821 (1952); 87 A.L.R. 836 (1933). *Cf.* Notes, 33 A.L.R.2d 922, 925 (1954); 40 A.L.R.2d 698, 741 (1955). For a discussion of this rule see 2 PAGE, WILLS § 545 (1941). In New York a properly executed codicil does not operate as a republication of a will which was defectively executed but does validate a will originally invalid for want

cause of ineffective attestation,[4] lack of testator's signature,[5] want of testamentary capacity,[6] or undue influence.[7] Although not specifically mentioned by many courts,[8] the basic reason for this rule appears to be the applicability in such cases of the doctrine of incorporation by reference.[9] In the decisions the courts continually insist that the requirements of "incorporation by reference" be met—that the invalid will be in existence at the time the codicil is made[10] and that the codicil refer to the existing instrument.[11] This general rule is applied in the states[12] that admit holographic wills to probate[13] and in the states that admit only a formally attested will.[14]

Practically all the states permitting holographs admit to probate an invalid holographic will which is followed by a properly executed holographic codicil;[15] in such a case there is no difficulty in complying with the statutory requirement that the writing be entirely in the

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of capacity or because of undue influence. Cook v. White, 43 App. Div. 388, 60 N.Y. Supp. 153 (1899), *aff'd*, 167 N.Y. 588, 60 N.E. 1109 (1901) (will executed at time testatrix was intoxicated was republished by a codicil executed at time she was sober).

4. Rogers v. Agricola, 176 Ark. 287, 3 S.W.2d 26 (1928).

5. Hurley v. Blankinship, 313 Ky. 49, 229 S.W.2d 963 (1950).

6. Barnes v. Phillips, 184 Ind. 415, 111 N.E. 419 (1916).

7. Taft v. Stearns, 234 Mass. 273, 125 N.E. 570 (1920).

8. The instant case speaks of republication throughout the decision but mentions incorporation by reference in the last paragraph. Also see Rogers v. Agricola, 176 Ark. 287, 3 S.W.2d 26, 29 (1928); Taft v. Stearns, 234 Mass. 273, 125 N.E. 570, 572 (1920).

9. A leading authority states, "Analytically, if the first will was never valid, the subsequent instrument cannot revive or republish the former. One cannot restore that which never had life. Yet the courts often declare a revival in cases in which the first instrument was not an effective will because of incapacity, undue influence, or want of proper execution. Properly speaking, these decisions can be justified only on the theory of incorporation by reference of the earlier paper." ATKINSON, WILLS 467 (2d ed. 1953). But see Evans, *Testamentary Republication,* 40 HARV. L. REV. 71, 73 (1927) (Evans states that a will invalid because unexecuted is neither validated by incorporation or republication by a validly executed codicil on the same page, but rather there results an original execution.

10. The court in the instant case made a definite point to include testimony from the trial showing the typewritten instrument was in existence before the holographic codicil. 279 P.2d 928, 930.

11. Taft v. Stearns, 234 Mass. 273, 125 N.E. 570 (1920), 33 HARV. L. REV. 872 (1920).

15. Hurley v. Blankinship, 313 Ky. 49, 229 S.W.2d 963 (1950); *In re* Thomp- *Law of Wills,* 14 IOWA L. REV. 1, 25, 26 (1928) (Arizona, Arkansas, California, Idaho, Kentucky, Louisiana, Mississippi, Montana, Nevada, North Carolina, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wyoming).

13. Rogers v. Agricola, 176 Ark. 287, 3 S.W.2d 26 (1928); Hurley v. Blankinship, 313 Ky. 49, 229 S.W.2d 963 (1950); *see* Estate of Baird, 176 Cal. 381, 168 Pac. 561, 563 (1917) (re-execution of will by codicil disposed of any objection to the will because of undue influence).

14. Barnes v. Phillips, 184 Ind. 415, 111 N.E. 419 (1916); Taft v. Stearns, 234 Mass. 273, 125 N.E. 570 (1920).

15. Hurley v. Blankinship, 313 Ky. 49, 229 S.W.2d 963 (1950); *In re* Thompson's Will, 196 N.C. 271, 145 S.E. 393 (1928), 62 A.L.R. 288 (1929); *In re* Plumel's Estate, 151 Cal. 77, 90 Pac. 192, 193 (1907) (incorporation by reference gives effect to invalid holograph, without necessity of resorting to principle of republication); *see* Hamlet v. Hamlet, 183 Va. 453, 32 S.E.2d 729, 733 (1945).

testator's hand. The valid holographic codicil is said to republish the invalid holographic will.[16] The instant case, however, presents a distinctly different situation. Here, an invalid typewritten instrument was followed by an appendage said to be a valid holographic codicil.[17] Though the holographic codicil was held to republish the invalid formal will, authority contradicting this proposition exists.[18] The statute requires that the will be wholly in the testator's handwriting to be eligible for probate as a holographic instrument.[19] Since the codicil and the will are to be read as one,[20] the typewritten will together with the holographic codicil cannot meet the requirement of being entirely in the testator's handwriting.[21] Oklahoma, however, is not alone in deciding that such an instrument may be probated.[22] The basis for these decisions would seem to be that the handwriting in the codicil satisfies the statutory requirement that the will be entirely in the hand of the testator.[23] The original defect of the typewritten will is then cured and both instruments may be admitted to probate.[24] Some of the courts reason that it is just as permissible for a holographic will to incorporate by reference material outside the will as it is for a formally attested will.[25]

The view which does not permit the probate of the document seems much the better.[26] In all the states recognizing holographs the instru-

16. Hurley v. Blankinship, 313 Ky. 49, 229 S.W.2d 963, 965 (1950).
17. Instant Case at 931.
18. Sharp v. Wallace, 83 Ky. 584 (1886) (unattested holographic codicil cannot validate a paper neither in the handwriting of the testator nor attested). For an explanation of this holding see 2 PAGE, WILLS § 545 (1941). *Cf.* Jones v. Kyle, 168 La. 728, 123 So. 306, 307 (1929) (parts of a holograph not in testator's handwriting must be disregarded); Hewes v. Hewes, 110 Miss. 826, 71 So. 4 (1916) (holographic letter could not incorporate by reference a document not in the handwriting of the testatrix).
19. OKLA. STAT. tit. 84, § 54 (1951).
20. The Oklahoma court has previously stated that a codicil and will are to be considered as forming but one instrument. *In re* Gibbons' Estate, 192 Okla. 378, 137 P.2d 928, 929 (1943).
21. See Hewes v. Hewes, 110 Miss. 826, 71 So. 4 (1916).
22. Rogers v. Agricola, 176 Ark. 287, 3 S.W.2d 26 (1928); Barney v. Hayes, 11 Mont. 571, 29 Pac. 282 (1892); *cf. In re* Plumel's Estate, 151 Cal. 77, 90 Pac. 192 (1907) (attempted holographic will, invalid because of printed matter, incorporated by reference into a valid holographic codicil); *In re* Thompson's Will, 196 N.C. 271, 145 S.E. 393 (1928) (holographic codicil allowed to incorporate by reference printed matter (a promissory note) into a valid holographic will). Regarding incorporation by reference compare Malone, *Incorporation by Reference of an Extrinsic Document Into a Holographic Will*, 16 VA. L. REV. 571, 581-82 (1930) (no reason why holographic instruments may not incorporate by reference outside material not in the testator's handwriting) with Dobie, *Testamentary Incorporation by Reference*, 3 VA. L. REV. 583, 594 (1916) (to allow this incorporation is completely contrary to the statute on holographic wills).
23. See Rogers v. Agricola, 176 Ark. 287, 3 S.W.2d 26, 29 (1928).
24. See note 26 *supra*. (The codicil being a good holographic instrument "Operates as a republication of the original will, although imperfectly executed . . . .").
25. *In re* Soher's Estate, 78 Cal. 477, 21 Pac. 8, 9 (1889).
26. See 2 PAGE, WILLS § 545 (1941).

ment, to be admitted as a holographic will, must be wholly in the handwriting of the testator.[27] Holographic wills are allowed because it is thought that a document entirely in the testator's handwriting is a strong guarantee against fraud.[28] By allowing an additional bequest in the form of a holographic codicil to validate a typewritten instrument without attestation or signature of the testator the present court has eliminated an important safeguard against fraud. The principle that a testator's intention should be followed whenever possible is quite important,[29] but the danger of fraud must be weighed against this principle.[30] Such a broad holding—that a holographic codicil republishes an invalid typewritten will—seems a dangerous precedent.[31] Under this holding the deceased was allowed to circumvent both types of statutory regulation on wills in Oklahoma. He was able to type most of his will without having it witnessed as for a formal will and he was able to take advantage of the law regarding holographic wills without writing the entire will by hand. If this decision is followed the efficacy of the Statute of Wills as spelled out in Oklahoma law will be substantially lessened and a way will be opened for fraud in Oklahoma wills.

27. Bordwell, *The Statute Law of Wills*, 14 IOWA L. REV. 1, 25 (1928).
28. ATKINSON, WILLS 357 (2d ed. 1953).
29. Taft v. Stearns, 234 Mass. 273, 125 N.E. 570 (1920).
30. See note 28 *supra*.
31. For example, if an instrument such as that in the instant case were produced for probate, but there were no proof that the typewritten instrument was executed prior to the handwritten material, the Oklahoma Court would be embarrassed by the broad rule of the instant case—that a bequest in handwriting on the same sheet as typewritten material is a holographic codicil republishing an invalid typewritten will.