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Recent Cases

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RECENT CASES

CONFLICT OF LAWS — FULL FAITH AND CREDIT — CHARACTERIZATION OF STATUTE AS PENAL

Plaintiff, a creditor of an Arkansas corporation which had filed its articles of incorporation with the Secretary of State but had failed to file them, as required by Arkansas statute,[1] with the County Clerk of the county in which its principal office in Arkansas was located, brought action in a Tennessee state court against two Tennessee incorporators to hold them liable as partners for the corporate debt owed according to the Arkansas Stockholders Liability statute.[2] *Held,* Tennessee is not required to give full faith and credit to the Arkansas law as it is penal in nature, and the rule of comity does not apply because the Arkansas law is contrary to the law and public policy of Tennessee. *Paper Products Co. v. Doggrell,* 261 S.W.2d 127 (Tenn. 1953).

It has long been recognized that the full faith and credit clause of the Constitution requires the enforcement of foreign judgments between the states of the Union.[3] Not all judgments, however, are entitled to enforcement when sued upon in a state other than the rendering state.[4] *Huntington v. Attrill*[5] recognizes an exception in the case of judgments which are based upon the penal law of the rendering state. The authority of the *Attrill* case is somewhat dubious in light of the more recent decision in *Milwaukee County v. M. E. White Co.*[6] which establishes the rule that the full faith and credit clause requires a state to enforce judgments of a sister state based upon a revenue claim. This case may well suggest that the same rule applies to judgments based upon a penalty since the Court said that recovery on a judgment may be resisted only on the following grounds: (1) the rendering court was without jurisdiction, (2) the obligation has been discharged, (3) the state of the forum has not

1. "Upon filing with the Secretary of State of articles of incorporation, the corporate existence shall begin. Provided, however, a set of the Articles of Incorporation (bearing the filing marks of the Secretary of State) shall be filed for record with the County Clerk of the County in which the corporation's principal office or place of business in this State is located." ARK. STAT. ANN. § 64-103 (1947).
2. Whitaker v. Mitchell Mfg. Co., 219 Ark. 779, 244 S.W.2d 965 (1952).
3. Note, 5 VAND. L. REV. 203 (1952).
4. See Milwaukee County v. M. E. White Co., 296 U.S. 268, 273, 56 Sup. Ct. 229, 232, 80 L. Ed. 220, 226 (1935); Broderick v. Rosner, 294 U.S. 629, 642, 55 Sup. Ct. 589, 592, 79 L. Ed. 1100, 1107 (1935); Huntington v. Attrill, 146 U.S. 657, 683, 684, 13 Sup. Ct. 224, 234, 36 L. Ed. 1123, 1133 (1892).
5. 146 U.S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123 (1892).
6. 296 U.S. 268, 56 Sup. Ct. 229, 80 L. Ed. 220 (1935).

provided a court competent to decide the case, and possibly, (4) the judgment was procured by fraud.

It has only been in recent years that the Supreme Court has held that the full faith and credit clause is applicable to statutes.[7] Thus far the clause has been applied to only four types of statutes: stockholder's liability,[8] fraternal benefit insurance,[9] workmen's compensation,[10] and wrongful death.[11] The reasons for its application to the first three types of statutes are twofold: the desire to enable the parties to determine their rights and obligations at the time they enter the contractual relation[12] (stockholder, insured, employee-employer) and the desire for uniform results of litigation irrespective of the citizenship of the parties. In the case of a wrongful death action there often is no prior contractual relationship between the parties, and therefore, only the latter reason, that of uniformity, is applicable.[13] Notwithstanding the applicability of the clause, the statute may be denied enforcement if it is penal and there has been no judgment rendered in the foreign state on the cause of action.[14] The rule of the *Milwaukee County* case would be applicable only in the enforcement of a foreign judgment.

As the cause of action sued upon in the instant case is based upon the Arkansas statute, and as this statute is one of the types—stockholder's liability—to which the full faith and credit clause has been applied, the characterization rule established in *Huntington v. Attrill* would be controlling. The court there said that a statute may be characterized as penal in the international sense if its purpose is to punish an offense against the public justice of the state rather than to provide a remedy to the injured private person.[15] It is doubtful whether the claim in the instant case comes within this definition of a penal claim. The Arkansas law in effect withholds a privilege, that of limited liability, until the incorporators have done the acts necessary to establish a *de jure* corporation. The remedy runs in

7. Note, 5 VAND. L. REV. 203, 204 (1952).
8. Converse v. Hamilton, 224 U.S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749 (1912).
9. Order of United States Commercial Travelers v. Wolfe, 331 U.S. 586, 67 Sup. Ct. 1355, 91 L. Ed. 1687 (1947).
10. Bradford Electric Light Co. v. Clapper, 286 U.S. 145, 52 Sup. Ct. 571, 76 L. Ed. 1026 (1932).
11. Hughes v. Fetter, 341 U.S. 609, 71 Sup. Ct. 980, 95 L. Ed. 1212 (1951).
12. See Broderick v. Rosner, 294 U.S. 629, 55 Sup. Ct. 589, 79 L. Ed. 1100 (1935); Converse v. Hamilton, 224 U.S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749 (1912); *see* Hughes v. Fetter, 341 U.S. 609, 615, 71 Sup. Ct. 980, 984, 95 L. Ed. 1212, 1218 (1951) (dissenting opinion).
13. See Hughes v. Fetter, 341 U.S. 609, 71 Sup. Ct. 480, 95 L. Ed. 1212 (1951).
14. See Converse v. Hamilton, 224 U.S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749 (1912); Huntington v. Attrill, 146 U.S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123 (1892).
15. *See* Huntington v. Attrill, 146 U.S. 657, 673, 674, 13 Sup. Ct. 224, 230, 36 L. Ed. 1123, 1130 (1892).

favor of the creditor, not the state, is measured by his debt, and is to him remedial.[16] It is, therefore, doubtful if this decision would stand up upon review by the Supreme Court.[17]

The Arkansas statute did not expressly impose a partner's liability for failure to comply with its terms;[18] the liability was imposed by judicial construction of the statute.[19] Whether enforcement of this liability would amount to application of the full faith and credit clause to the statute or to the opinion which indicates the effect of the statute is a question which remains open. The extent to which decisions construing a statute ought to be regarded as part of the statute has not been determined by the Supreme Court and there is little if any authority in point.[20]

FEDERAL TORT CLAIMS ACT — EXCEPTIONS — INTENTIONAL TORTS

Plaintiff entered a veterans' hospital for an operation on his left leg; while he was under anesthesia, the hospital employees mistakenly and without consent operated on his right leg. Plaintiff brought suit under the Federal Tort Claims Act for negligence in performing the unwanted operation and causing a delay in the necessary operation. The Government moved for dismissal on the ground of lack of jurisdiction in the federal district court. *Held,* motion granted. The claim arises out of assault and battery within the specific exceptions to waiver of Government immunity. *Moos v. United States,* 22 U.S.L. WEEK 2334 (U.S.D. Minn. Jan. 15, 1954).

The Federal Tort Claims Act is a waiver of governmental immu-

16. *Id.* at 676.

17. In an action involving the same Arkansas statute, defendant and issue as the instant case, the United States District Court for Western District of Tennessee held that the statute was not penal and would be enforced by the federal courts sitting in Tennessee. The decision was affirmed by the court of appeals. Doggrell v. Great Southern Box Co., 206 F.2d 671 (6th Cir. 1953). Subsequently the Tennessee Supreme Court decided the instant case. Deferring to the state decision the court of appeals granted a petition for rehearing and reversed itself. 208 F.2d 310 (6th Cir. 1953). The reversal apparently is based on Erie R.R. v. Tompkins, 304 U.S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1938). But since the primary question is the application of the full faith and credit clause, there would seem to be a doubt whether the *Erie* rule applied.

18. See note 1 *supra.*

19. See Whitaker v. Mitchell Mfg. Co., 219 Ark. 779, 244 S.W.2d 965 (1952) (defendants held individually liable as partners for the debts of the business where, having filed articles of incorporation with the Secretary of State but not with the county clerk, they did business under a corporate name).

20. Some reference to the problem may be found in Field, *Judicial Notice of Public Acts under the Full Faith and Credit Clause,* 12 MINN. L. REV. 439, 441 (1928); Ross, *Has the Conflict of Laws Become a Branch of Constitutional Law?* 15 MINN. L. REV. 161, 170 (1931); Note, 5 VAND. L. REV. 203, 205 (1952).

nity from tort suits arising from the negligence of Government employees.[1] It grants to federal district courts exclusive jurisdiction of civil actions on claims for money damages as a result of property damage or personal injury under circumstances where the United States, if a private person, would be liable under the law of the place where the act or omission occurred.[2] Certain torts, characterized as "deliberate,"[3] have been excluded from this waiver of immunity by Section 2680(h) which provides that provisions of the Act "shall not apply to . . . (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[4] This exclusion of intentional torts is harmonious with the provision that the United States shall not be liable for punitive damages.[5]

The Federal Tort Claims Act should be given a construction which will accomplish the legislative aim of relaxation of governmental immunity from suit in negligence cases; but due regard should be given to the exceptions, and courts must include only those circumstances which are within the words and reason of the exceptions.[6] When presented with a claim, the theory of which may possibly fall within one of the specific exceptions to the Act the court has three possible alternatives: (1) to refuse to allow the claim if any possible theory of recovery falls within the exceptions, (2) to allow the claim if any valid theory can be found which does not fall within the exceptions, or (3) after closely scrutinizing the complaint in order to arrive at the gravamen or essence of the action, to dismiss the case if it arises directly out of one of the excepted torts.

As one of the latest in a recent series of cases interpreting Section 2680(h), the instant decision falls within alternative (1) above, and represents an extreme example of the construction of the exceptions to the Federal Tort Claims Act in favor of the Government. Following

1. Gilroy v. United States, 112 F. Supp. 664 (D.D.C. 1953); Jefferson v. United States, 77 F. Supp. 706 (D. Md. 1948); Englehardt v. United States, 69 F. Supp. 451 (D. Md. 1948).

2. 28 U.S.C.A. § 1346(b) (1950).

3. SEN. REP. No. 1400, 79th Cong., 2d Sess. 33 (1946); H.R. REP. No. 1287, 79th Cong., 1st Sess. 6 (1945); Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 GEO. L.J. 1, 49 (1946). *But cf.* Jones v. United States, 207 F.2d 563 (2d Cir. 1953) (misrepresentation held to mean negligent misrepresentation in light of the use in the same section of the word "deceit," which connotes intentional misrepresentation).

4. 28 U.S.C.A. § 2680(h) (1950).

5. 28 U.S.C.A. § 2674 (1950). That the exclusion was intended to be limited strictly to intentional torts, see *Hearings before Committee on the Judiciary on H.R. 5373 and H.R. 6463*, 77th Cong., 2d Sess. 34 (1942), where it was declared that "negligent assault" would not be included in 2680(h).

6. Dalehite v. United States, 346 U.S. 15, 73 Sup. Ct. 956, 97 L. Ed. 1427 (1953); Toledo v. United States, 95 F. Supp. 838 (D. Puerto Rico 1951).

Minnesota law,[7] the court found that the performance of an operation without consent of the plaintiff constituted an "assault and battery."[8] It held that although the same acts might also constitute a sufficient basis of recovery in a negligence action, "the mere existence of a severable claim in negligence does not negative the existence of assault and battery."[9] Thus it would seem that under this decision the provisions of 2680(h) would not apply if the employees of the Government were merely negligent in the intended surgery, whereas the exception would apply if the negligence went even further so as to give rise to a purely technical battery.[10] The case is questionable in that recovery for a technical intentional tort will be barred, while damages will be allowed for simple negligence; it creates an anomalous situation in which the plaintiff tries to prove a slight breach of duty while the Government attempts to show that its employees, though acting within the scope of their employment, were guilty of an intentional harm.

Duenges v. United States[11] is an example of a case where the court sought to ascertain the gravamen of the action in determining whether the theory of recovery falls under the exceptions of 2680(h). There plaintiff's complaint alleged injuries, among others, of loss of freedom, humiliation and loss of wages as a result of negligent maintenance of records by the Army. Plaintiff had been arrested and tried as a deserter when, in fact, he had received his honorable discharge. In granting the Government's motion to dismiss, the court declared that false arrest and imprisonment were the very "gist and essence" of plaintiff's cause[12] and that the claim was therefore excluded as

7. The courts are to follow the law of the site of the claim. Olson v. United States, 175 F.2d 510 (8th Cir. 1949); Foote v. Public Housing Comm'r, 107 F. Supp. 270 (W.D. Mich. 1953). But there is some doubt as to whether state or federal law controls where the courts must determine whether a specific exception will apply. See Gottlieb, *Conflicts and a Federal Common Law of Torts*, 7 VAND. L. REV. (1954).

8. Instant case, citing Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905).

9. Instant case, citing Nelson v. Nicollet Clinch, 201 Minn. 505, 276 N.W. 801 (1937). Other jurisdictions hold that an unauthorized operation performed by mistake, though amounting to an assault and battery, is held to be malpractice or negligence. Estrada v. Orwitz, 75 Cal. App.2d 54, 170 P.2d 43 (1946) (dentist removed extra teeth); Bakewell v. Kahle, 125 Mont. 89, 232 P.2d 127 (1951); Physicians' and Dentists' Bureau v. Dray, 8 Wash.2d 38, 111 P.2d 568 (1941).

10. United States v. Wilcox, 117 F. Supp. 119 (S.D.N.Y. 1953), is another case in which the court refused recovery because assault and battery were involved. Plaintiff was injured when attacked by an insane inmate over whom the hospital employees exercised negligent control. The claim was disallowed as arising out of assault and battery. See also Lewis v. United States, 194 F.2d 689 (3d Cir. 1952).

11. 114 F. Supp. 751 (S.D.N.Y. 1953).

12. Whether there was, in fact, a false arrest or imprisonment is open to some doubt. See (Blue) Star Service, Inc. v. McCurdy, 251 S.W.2d 139 (Tenn. App. 1952), commented on in Wade, *Torts*, 6 VAND. L. REV. 990, 1006-11 (1953); Wade expresses serious doubts as to whether there can be a claim for false imprisonment based on a negligent act of the defendant.

arising out of one of the excepted torts in Section 2680 (h).[13]

Since 2680 (h) states that claims *arising out of* the enumerated torts will be excluded from the operation of the Act, rather than that claims *of* assault, battery and the other enumerated torts will be excluded, it seems unlikely that any courts will go so far as to allow recovery if any possible theory can be propounded which does not fall within the expressed exceptions.[14] Perhaps the best construction of Section 2680 (h) in terms of the effectuation of the general policy of the Act[15] is to be found in the *Duenges* and similar cases. Wide acceptance of the instant decision would seem to necessitate redefinition by Congress of its purpose in passing Section 2680 (h).[16]

FEDERAL TORT CLAIMS ACT — INDEMNITY — EMPLOYEE'S LIABILITY TO GOVERNMENT

The United States was sued under the Federal Tort Claims Act for injuries resulting from the negligent operation by one of its employees of a Government automobile. The Government impleaded its servant as a third party defendant and prayed indemnity for the full amount of its liability. Judgment was entered for the claimant, and from a like judgment for the United States, the employee appealed. *Held,* reversed. The liability of a servant to his master for a judgment suffered by the latter under *respondeat superior* is quasi-

13. For cases in which the court looks to the gravamen of the action in determining the applicability of a 2680 (h) exception, see Jones v. United States, 207 F.2d 563 (2d Cir. 1953) (plaintiff sought damages for loss on sale of oil stock in reliance on misinformation by Geological Survey); United States v. Hambleton, 185 F.2d 564 (9th Cir. 1950) (plaintiff sustained mental injuries as a result of a verbal assault by Army sergeant); Fletcher v. Veterans Administration, 103 F. Supp. 654 (E.D. Mich. 1952) (plaintiffs' business harmed by V.A.'s misstatement concerning their financial status). *See* also, Mid-Central Fish Co. v. United States, 112 F. Supp. 792, 799 (W.D. Mo. 1953); Chambers v. United States, 107 F. Supp. 601, 603 (D. Kan. 1952).

14. *But cf.* Newman v. Christensen, 149 Neb. 471, 41 N.W.2d 417 (1948), in which plaintiff alleged injury as a result of defendant's act of pulling his chair out from under him in jest. Defendant claimed the action was barred by the one year statute of limitations aplying to intentional torts since the claim was one of assault and battery. The court, in applying the negligence statute, held that there was no element of "evil" intent, necessary for an assault and battery. This court, at least, is inclined to allow any valid theory which will support plaintiff's claim.

15. The concept of sovereign immunity is for the most part outmoded and as far as it relates to the Federal Tort Claims Act, such immunity is preserved only in those exceptions which the Act specifically provides. Union Trust Co. of District of Columbia v. United States, 113 F. Supp. 80, 84 (D.D.C. 1953).

16. An insertion of the word "directly" after the word "arising" so as to have Section 2680 (h) read "arising directly out of" would seem to accomplish the desired result.

contractual in nature. Since a judgment against the United States under the Tort Claims Act bars any action by the claimant against the employee, the Government, in paying the claim, is conferring no benefit upon its employee for which to be indemnified.[1] *Gilman v. United States,* 206 F.2d 846 (9th Cir. 1953).

In rejecting the Government's plea for indemnity, the court reasoned from the premise that the duty of an employee to compensate his employer for damages sustained by judgment under *respondeat superior* is founded on quasi-contract.[2] Assuming, *arguendo,* restitution to be the only possible theory of recovery, it is axiomatic that the employer, in order to prevail, must show the receipt of a benefit by his employee, the retention of which is unjust.[3] Thereupon, without reference to the assent of the employee, the law imposes the obligation to make restitution.[4] The right to compensation rests upon, and is measured by, the benefit conferred upon the obligor, rather than the damage sustained by the obligee.[5]

The principle is settled at common law that the master, upon satisfying a judgment suffered under *respondeat superior,* may recover the amount of the judgment from the servant whose negligence occa-

1. The instant case and the recent case of Burks v. United States, 116 F. Supp. 337 (S.D. Tex. 1953), raise for the first time the question of the Government's right to indemnify under the FTCA. The court in the *Burks* case, holding that the United States was entitled to indemnity from its negligent employee, said, "Where the Government, by statute, measures its primary liability by common law standards, as though it were a private employer, it does not require 'judicial legislation' to recognize and enforce other common law incidents resulting from that relationship." *Id.* at 340.

2. The dissenting judge rejects the proposition that quasi-contract is the only basis for recovery by the employer, citing Judge Cardozo's opinion in Schubert v. August Schubert Wagon Co., 249 N.Y. 253, 164 N.E. 42, 64 A.L.R. 293 (1928), in which the action is said to be founded on breach of an independent duty owed the master by the servant. The recent case of Jones v. Kinney, 113 F. Supp. 923 (W.D. Mo. 1953), like the *Schubert* case, involved a suit by a wife against the employer of her husband for injuries sustained because of the negligence of the husband within the scope of his employment. The employer impleaded the servant and judgment was recovered by the employer by way of indemnity for the amount of the judgment entered in favor of the claimant. Both cases arose in jurisdictions in which the wife could not have successfully maintained the action against her negligent husband. Clearly recovery cannot be predicated on the theory of unjust enrichment, because the master in paying the judgment confers no benefit on his servant. Recovery was based on the servant's breach of the duty to use due care in performing his master's business, a duty implicit in the master-servant relationship. See also Grand Trunk Ry. v. Latham, 63 Me. 177 (1874); Georgia S. & F. Ry. v. Jossey, 105 Ga. 271, 31 S.E. 179 (1898); 1 LABATT, MASTER AND SERVANT § 293 (2d ed. 1913); BATT, LAW OF MASTER AND SERVANT 158 (4th ed. 1950); HUFFCUT, AGENCY 361 (2d ed. 1901); MECHEM, OUTLINES OF AGENCY § 532 (4th ed. 1952); RESTATEMENT, AGENCY § 379 (1933).

3. WOODWARD, QUASI CONTRACTS § 7 (1913); RESTATEMENT, RESTITUTION § 1, comments *a, b, c* (1937).

4. WOODWARD, QUASI CONTRACTS § 3 (1913).

5. *Ibid.*

sioned his liability.[6] Similarly, if the master settles a claim arising under *respondeat superior,* without resort to litigation, he is entitled to indemnity in an amount not exceeding the actual damage sustained by the claimant.[7]

Analyzing the cases in terms of unjust enrichment, what is the nature of the benefit conferred upon the employee which is the basis for recovery in the private employer's suit for restitution? In the final analysis, it is the release from legal liability resulting from the payment by the employer of a claim for which the employee was liable.[8] The quasi-contractual action will lie, ordinarily, only after payment of the claim, since a judgment against the master does not of itself extinguish the servant's liability, and the servant, therefore, is not unjustly enriched.[9] Accordingly the cases stating the accepted rule without expressing the reason therefor, emphasize the payment of the claim as the operative fact which gives rise to a cause of action.[10] This emphasis upon payment, rather than the change in the servant's legal position resulting therefrom, is understandable since prior to the FTCA the only operative fact which would effect such a change was the payment of the claim.

The instant case involves, not the ordinary master-servant relationship, but a Government employer-employee relationship; and the

6. Fedden v. Brooklyn Eastern District Terminal, 204 App. Div. 741, 199 N.Y. Supp. 9 (2d Dep't 1923); Scotney v. Wessaw, 56 Pa. D. & C. 551 (C.P. 1946); FERSON, PRINCIPLES OF AGENCY § 131 (1954); RESTATEMENT, AGENCY § 401, comment c (1933); RESTATEMENT, RESTITUTION § 96 (1937); WOODWARD, QUASI CONTRACTS § 258 (1913); see Note, 110 A.L.R. 834 (1937).

7. Smith v. Foran, 43 Conn. 244 (1875); 1 LABATT, MASTER AND SERVANT § 287 (2d ed. 1913); 20 A. & E. ENCY. LAW 51, 52 (1902). The measure of recovery in this type of case suggests the difficulty in calling the master's suit based on unjust enrichment a suit for indemnity. The measure of damages, *i.e.,* the value of the benefit conferred, is improperly referred to as indemnity, since the latter term denotes a recovery measured by the employer's loss. The concepts, though antithetical, are often used interchangeably, and since in most cases the benefit to the employee and the loss to the employer are coequal, error seldom results.

8. "If the defendants had been prosecuted instead of the town, they must have been held liable for damages, and from this liability they have been relieved by the plaintiffs. It cannot therefore be controverted, that the plaintiff's claim is founded in manifest equity. The defendants are bound in justice to indemnify them so far as they have been relieved from a legal liability." Lowell v. Boston & Lowell R.R., 40 Mass. (23 Pick.) 24, 34 (1839), cited with approval in Washington Gaslight Co. v. District of Columbia, 161 U.S. 316, 327, 328, 16 Sup. Ct. 564, 40 L. Ed. 712 (1896). See also WOODWARD, QUASI CONTRACTS § 259 (1913).

9. See Merlette v. North & East River Steamboat Co., 13 Daly 114 (C.P. N.Y. 1885); Gaffner v. Johnson, 39 Wash. 437, 81 Pac. 859 (1905); RESTATEMENT, RESTITUTION § 96 (1937).

10. See, *e.g.,* Stulginski v. Cizauskas, 125 Conn. 293, 5 A.2d 10 (1939); Holbrook v. Nolan, 105 Ind. App. 75, 10 N.E.2d 744 (1937); Karcher v. Burbank, 303 Mass. 303, 21 N.E.2d 542 (1939); Hunter v. DeLuxe Drive-In Theaters, 257 S.W.2d 255 (Mo. App. 1953); Frank Martz Coach Co. v. Hudson Bus Transp. Co., 133 N.J.L. 342, 44 A.2d 488 (1945); Ohio Casualty Ins. Co. v. Capolino, 65 N.E.2d 287 (Ohio 1945).

difference is significant in at least one decisive respect. The federal employer, under its sovereign prerogative, has provided that a judgment against it "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim."[11] Thus, under the FTCA a new operative fact, the suffering of a judgment by the Government, will have substantially the same effect on the legal position of the Government employee as the payment of the judgment would have on the legal position of the private employee. In both instances the employee is released from a liability which as between the master and the servant rests primarily on the latter. The release in the one case is accomplished by the suffering of a judgment and in the other by the payment of a judgment. The benefit in each type of case is conferred at different stages in the proceedings, but the nature of the benefit in each case would seem to be indistinguishable.

In the final analysis, the right of the United States to indemnity must find sanction, either express or implied, in the statute[12] which authorizes Governmental liability and in the policy considerations[13] implicit therein. It may be that in finally resolving the question,[14] the Supreme Court will find support for the denial of indemnity in the intent of Congress. Absent such intent, it would seem, the decision in the *Gilman* case to the contrary notwithstanding, that there is no inadequacy in the common law dictating the result herein achieved.[15]

11. 28 U.S.C.A. § 2676 (1950).

12. The majority in the *Gilman* case offered as secondary reasons for denying recovery, inferences as to Congressional intent drawn from the legislative history of the act. The court quotes from SEN. REP. No. 1196, 77th Cong., 2d Sess. 5 (1942), to the effect that exclusive Government liability is "just and desirable" and that the employee tort-feasor should be "dealt with under the usual disciplinary controls." The quoted material relates, however, not to the 1946 Act, but to a 1942 Act concerning administrative settlement of small claims. 28 U.S.C.A. § 2672 (1950). Dalehite v. United States, 346 U.S. 15, 73 Sup. Ct. 956, 97 L. Ed. 1427 (1953), is cited for the proposition that the Congress, in passing the 1946 Act, was influenced by the 1942 reports. The court took notice of a comment made by former Asst. Att'y Gen. Shea, who, in response to an interrogatory at the Congressional hearings prior to the enactment of the 1942 Act indicated that the Government's only remedy against the employee would be discharge. Instant case, 206 F.2d at 849.

13. The dissent considered the legislative intent to be insufficiently explicit to be determinative, and found strong policy considerations for recovery in the instant case in the fact that much of the litigation under the Tort Claims Act involves automobile negligence cases in which the employee, driving his private automobile, injures the claimant. The result in such cases, under the instant decision, would frequently amount to the unjust enrichment of the employee's insuror at the expense of the taxpayer. It is also suggested that to deny indemnity is to invite carelessness by Government employees and collusion with claimants. Instant case, 206 F.2d at 850.

14. See Blanton, *Subrogation, Indemnity, Contribution and Election of Remedies Aspects of FTCA*, 7 VAND. L. REV. (1954).

15. See 3 MOORE, FEDERAL PRACTICE 514 (2d ed. 1948). See also Comment, 56 YALE L.J. 534, 560 (1947).

FEDERAL TORT CLAIMS ACT — PARTIES — IMPLEADER AND JOINDER

In an action to recover for the accidental death of a longshoreman, the defendant impleaded the United States,[1] seeking indemnity under the Federal Tort Claims Act.[2] The United States moved to dismiss the third-party complaint on the ground that the defendant third-party plaintiff had a remedy under the Suits in Admiralty Act.[3] *Held,* motion denied. Although defendant has an action over in admiralty for indemnity, he may utilize third-party practice which was designed to assure disposition in a single suit of disputes with common questions of law and fact. *Skupski v. Western Nav. Corp.,* 113 F. Supp. 726 (S.D.N.Y. 1953).

Impleader and joinder of the United States are not specifically provided for in the FTCA, although sovereign immunity is waived in sweeping language.[4] The lower courts are sharply divided as to whether the Act contemplates the United States being the sole defendant,[5] or whether there can be joinder[6] or impleader.[7] Some courts, comparing the FTCA to the Tucker Act[8] where no joinder is permitted,[9] hold that there is no jurisdiction over a private defendant; they state that an act waiving governmental immunity should be strictly construed, pointing out that the possible procedural difficulty

1. FED. R. CIV. P. 14(a).
2. 28 U.S.C.A. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412 and 2671-80 (1950).
3. 41 STAT. 525 (1920), 46 U.S.C.A. § 742 (1944).
4. "The United States shall be liable . . . in the same manner and the same extent as a private individual under like circumstances. . . ." 28 U.S.C.A. § 2674 (1950). 28 U.S.C.A. § 1346(b) (1950), provides that the district courts shall have exclusive jurisdiction "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." The liability is limited by thirteen exceptions. 28 U.S.C.A. § 2680 (1950).
5. That the United States must be the sole defendant: Sappington v. Prencipe, 87 F. Supp. 357 (D.D.C. 1948), *rev'd on other grounds,* 182 F.2d 102 (D.C. Cir. 1950); Donovan v. McKenna, 80 F. Supp. 690 (D. Mass. 1948); Drummond v. United States, 78 F. Supp. 730 (E.D. Va. 1948); Uarte v. United States, 7 F.R.D. 705 (S.D. Cal. 1948), *aff'd on other grounds,* 175 F.2d 110 (9th Cir. 1949); *see* Prechtl v. United States, 84 F. Supp. 889, 890 (W.D.N.Y. 1949).
6. Joinder permitted: Rivers v. Bauer, 79 Supp. 403 (E.D. Pa. 1948), *aff'd,* 175 F.2d 774 (3d Cir. 1949) (issue of joinder never raised; Englehardt v. United States, 69 F. Supp. 451 (D. Md. 1947); *see* Maryland v. Manor Real Estate & Trust Co., 83 F. Supp. 91, 93 (D. Md.), *rev'd on other grounds,* 176 F.2d 414 (4th Cir. 1949); Bullock v. United States, 72 F. Supp. 445 (D.N.J. 1947).
7. Impleader permitted: Howey v. Yellow Cab Co., 181 F.2d 967 (3d Cir. 1950), *aff'd sub nom.,* United States v. Yellow Cab Co., 340 U.S. 543 (1951); Newsum v. Pennsylvania R.R., 79 F. Supp. 225 (S.D.N.Y. 1948). *Contra:* Capital Transit Co. v. United States, 183 F.2d 825 (D.C. Cir. 1950), *rev'd,* 340 U.S. 543 (1951).
8. 10 STAT. 612 (1855), as amended, 24 STAT. 505 (1887). See 28 U.S.C. §§ 41(20), 250 (1946).
9. United States v. Sherwood, 312 U.S. 584, 61 Sup. Ct. 767, 85 L. Ed. 1058 (1941).

of the United States being tried by the judge[10] and the co-defendant by a jury[11] indicates that it was not the Congressional intent that there should be a co-defendant. The flexible procedures available under the Federal Rules[12] which alleviate possible procedural difficulties are held inapplicable in determining the scope of jurisdiction, since they may be applied only after jurisdiction is established.[13] Those courts permitting joinder construe the language of the FTCA to be analogous to the Suits in Admiralty Act, where joinder[14] and impleader[15] are permitted, and take jurisdiction as they would over any private litigant since the Act does not expressly prohibit joinder. Jurisdiction having been once established, the Federal Rules are available to cope with any administrative difficulties that may be encountered during the conduct of the joint trial.

Although the propriety of joinder has never been determined by the Supreme Court, impleader was permitted in *United States v. Yellow Cab Co.*[16] The Court interpreted the Act liberally in favor of waiver of the sovereign's immunity, since only under certain specific exceptions is the government unamenable under the Act for its torts.[17] The procedural difficulties in trying the United States by the court and the defendant third-party plaintiff by jury were found not to be insurmountable. The Court referred to the analogous practice of trying equitable issues by the court and legal issues by the jury,[18] and noted that the trial court could order separate trials under Rule 42(b)[19] to prevent any injustice or inconvenience. Although the *Yellow Cab* case is confined on its facts to impleader, the liberal interpretation given to the FTCA by the Court seems to indicate that joinder should be permitted.

10. "Any action against the United States under section 1346 of this title shall be tried by the court without a jury." 28 U.S.C.A. § 2402 (1950).
11. U.S. CONST. AMEND. VII; FED. R. CIV. P. 38.
12. FED. R. CIV. P. 20(b) (separate trials can be ordered), 39(c) (advisory jury).
13. FED. R. CIV. P. 82 (rules shall not be construed to extend the jurisdiction of the district courts).
14. *See* Drummond v. United States, 78 F. Supp. 730, 732 (E.D. Va. 1948). "It has been almost common practice in recent years in this court to join in a suit against the United States under the Suits in Admiralty Act, the maritime company or agency operating a merchant vessel under contract with the United States." Englehardt v. United States, 69 F. Supp. 451, 453-54 (D. Md. 1947) (no cases cited to support this proposition).
15. The Peerless, 2 F.2d 395 (S.D.N.Y. 1923); The Cotati, 2 F.2d 394 (S.D.N.Y. 1923); Hildago Steel Co. v. Moore & McCormack Co., 298 Fed. 331 (S.D.N.Y. 1923).
16. 340 U.S. 543, 71 Sup. Ct. 399, 95 L. Ed. 523 (1951).
17. 28 U.S.C.A. § 2680 (1950).
18. See Ryan Distributing Corp. v. Caley, 51 F. Supp. 377 (E.D. Pa. 1943) (claim of damage for patent infringement tried by jury, and petition for injunction passed on by the court); Ford v. Wilson & Co., 30 F. Supp. 163 (D. Conn. 1939) (legal issue to jury, equitable issue to court); see also FED. R. CIV. P. 39.
19. FED. R. CIV. P. 42(b).

Not identical, but somewhat related is the problem, not mentioned in the FTCA, of whether an insurer as subrogee may sue as a party plaintiff. The government has contended that the insurer is not the real party in interest, that the FTCA does not authorize derivative suits and that the plaintiff-insurer is barred by the Anti-Assignment statute.[20] The Supreme Court in *United States v. Aetna Casualty & Surety Co.*[21] struck down these arguments and upheld a long line of lower court decisions[22] by ruling that a subrogee is a proper party plaintiff under the Act. It was there pointed out that the Anti-Assignment statute does not apply to assignments by operation of law.

The Supreme Court has established a pattern of liberal interpretation of the rights of parties under the FTCA in the *Aetna* and *Yellow Cab* cases,[23] a trend which is followed by the instant case. Since the defendant third-party plaintiff in the instant case would have a remedy under the Suits in Admiralty Act, the decision is perhaps even more liberal in permitting impleader than is the *Yellow Cab* case.

GIFT TAX — VALUATION — SALE OR REPLACEMENT VALUE

Petitioner purchased jewelry for $49,500 including federal excise tax. She gave it to her daughter five years later, reporting its value for gift tax purposes at $50,000. Petitioner then purchased other jewelry for $240,000, including $40,000 federal excise tax,[1] and gave it to her daughter that same year, reporting a value of $121,000 for gift tax

20. 35 STAT. 411 (1908), 31 U.S.C.A. § 203 (1927).

21. 338 U.S. 366, 70 Sup. Ct. 207, 94 L. Ed. 171 (1949).

22. State Farm Mut. Liability Ins. Co. v. United States, 172 F.8d 737 (1st Cir. 1949); United States v. Chicago, R.I. & P. Ry., 171 F.2d 377 (10th Cir. 1948); National American Fire Ins. Co. of Omaha v. United States, 171 F.2d 206 (9th Cir. 1948); Old Colony Ins. Co. v. United States, 168 F.2d 931 (6th Cir. 1948); Employers' Fire Ins. Co. v. United States, 167 F.2d 655 (9th Cir. 1948); South Carolina State Highway Dep't v. United States, 78 F. Supp. 594 (E.D.S.C.), *aff'd*, 171 F.2d 893 (4th Cir. 1948) (insurance company as subrogee and insured all real parties in interest); Van Wie v. United States, 77 F. Supp. 22 (N.D. Iowa 1948) (insured real party in interest even though an insurance company was partially subrogated to the claim). *Contra:* United States v. Hill, 171 F.2d 404, *judgment modified*, 174 F.2d 61 (5th Cir. 1948).

23. "No sensible reason can be imagined why the State, having consented to be sued, should thus paralyze the remedy." United States v. Yellow Cab Co., 340 U.S. 543, 554, 71 Sup. Ct. 399, 95 L. Ed. 523 (1951), quoting Judge Cardoza in Anderson v. Hayes Const. Co., 243 N.Y. 140, 147, 153 N.E. 28, 29 (1926).

1. Revenue Act of 1940, § 210, 54 STAT. 522 (1940), as amended by Revenue Act of 1944, § 302(a), 58 STAT. 61 (1944). The present provision is contained in INT. REV. CODE § 1650.

purposes. The commissioner claimed deficiencies in petitioner's tax returns. The Tax Court rejected conflicting expert testimony as to the market value of the jewelry and used as its criterion for valuation the actual sales prices of identical property. *Held,* affirmed. The retail cost which includes federal excise tax,[2] plus appreciation in value of the first gift, is the measure of value for gift tax purposes. *Publicker v. Commissioner,* 206 F.2d 250 (3d Cir. 1953).

The Internal Revenue Code imposes a tax upon the transfer of property by gift,[3] the date of the gift being the critical date of valuation.[4] Value is best established by a supposititious sale between a willing seller and a willing buyer, both having knowledge of all relevant facts.[5] But whether value is measured by the price the donor as a vendor would be able to demand, or by the price the donor as a vendee would have to pay to replace the article, remains largely undetermined.

Although value is a guess, albeit by informed people,[6] and necessarily a matter of opinion,[7] there should be a definite method for its ascertainment. The instant decision relies heavily upon the *Guggenheim*[8] case, which held that the value of a single premium life insurance policy is the cost of the policy to the donor,[9] and upon

2. INT. REV. CODE § 2403(c).

3. "For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift." INT. REV. CODE § 1000(a).

4. "If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift." INT. REV. CODE § 1005.

5. "The value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell. The value of a particular kind of property is not to be determined by a forced sale. Such value is to be determined by ascertaining as a basis the fair market value at the time of the gift of each unit of the property." U.S. Treas. Reg. 108, § 86.19(a) (1943). This is analogous to property valuation of gross estates for estate tax purposes. U.S. Treas. Reg. 105, § 81.10(a) (1942). See Goodman v. Commissioner, 156 F.2d 218, 220 (2d Cir. 1946).

6. Meadow Land & Improvement Co. v. Commissioner, 124 F.2d 297 (3d Cir. 1941).

7. Jenkins v. Smith, 21 F. Supp. 251 (D. Conn. 1937).

8. Guggenheim v. Rasquin, 312 U.S. 354, 61 Sup. Ct. 507, 85 L. Ed. 813 (1941). *But cf.* Helvering v. Bryan, 109 F.2d 430 (4th Cir. 1940).

9. Three opinions issued the same day by the Supreme Court rejected cash surrender value as representing the measure of value of a single premium life insurance policy for gift tax purposes and accepted replacement cost as the better criterion. Guggenheim v. Rasquin, 312 U.S. 254, 61 Sup. Ct. 507, 85 L. Ed. 813 (1941); Powers v. Commissioner, 312 U.S. 259, 61 Sup. Ct. 509, 85 L. Ed. 817 (1941); United States v. Ryerson, 312 U.S. 260, 61 Sup. Ct. 479, 85 L. Ed. 819 (1941). This rationale was later extended to gifts of fully paid up policies. Houston v. Commissioner, 124 F.2d 518 (3d Cir. 1941); James H. Lockhart, 46 B.T.A. 426 (1942). It has also been applied in the estate tax field. Richard C. DuPont, 18 T.C. 1134 (1952).

the *Gould*[10] and *Duke*[11] cases which held that the value for gift tax purposes is the purchase price plus federal excise tax. The taxpayers in the latter two cases, however, did not dispute the use of cost as determinative of value, but questioned only the inclusion of the federal excise tax in the valuation. In all three cases the gifts were made within a week of the purchase, which showed intent at the time of the purchase to make a gift. Certainly when the article is purchased with the intent to make a gift, cost should be the primary criterion.[12] But should it be the sole criterion in all instances? Although cost is a factor,[13] commentators generally agree that the value of property is primarily to be determined by the price it will bring the donor,[14] or, as Judge Frank defined it, "what-you-could-have-got-for-it-in-money-if-you-had-sold-it."[15]

Valuation of property included in a decedent's gross estate is similar in principle to the valuation of property transferred by gift.[16] The amount of the estate tax is measured by the sale value of the property,[17] without suggestion that cost is the primary basis of valuation. Indeed, it would be unfair for an estate to be taxed upon cost as the value where that exceeds the current sale value. Of additional significance in analyzing value is the approval by the courts of of the "blockage" rule of gifts of stock.[18] Buying a large block of stock would raise the price to a premium; "blockage," however, recognizes that a large block of stock cannot be converted into cash as readily as a few shares and allows the donor to value his stock at a lower price than the sum of the stocks multiplied by the current exchange rate

10. Frank Miller Gould, 14 T.C. 414 (1950).
11. Duke v. Commissioner, 200 F.2d 82 (2d Cir. 1952), *cert. denied*, 345 U. S. 906 (1953).
12. Guggenheim v. Rasquin, 312 U.S. 254, 61 Sup. Ct. 507, 85 L. Ed. 813 (1941).
13. 2 PAUL, FEDERAL ESTATE AND GIFT TAXATION 1309 (1942).
14. "Some courts have apparently construed market value in substantial accordance with the orthodox definition of economists. That is to say, the value of a given property is taken to mean the highest price for which the owner could sell it. . . ." 1 BONBRIGHT, VALUATION OF PROPERTY 56 (1937). "[I]n practice, valuations are made on the basis of what such effects would bring at public sale rather than upon the basis of cost to the decedent. . . ." 2 PAUL, FEDERAL ESTATE AND GIFT TAXATION 1240 (1942). See Gordon, *What is Fair Market Value?*, 8 TAX L. REV. 35, 36 (1952).
15. Andrews v. Commissioner, 135 F.2d 314, 317 (2d Cir. 1943). See 1 BONBRIGHT, VALUATION OF PROPERTY 134 (1937).
16. U.S. Treas. Reg. 105, § 81.10(a) (1942); MONTGOMERY, 1951-52 FEDERAL TAXES—ESTATES, TRUSTS AND GIFTS 1041 (1952); 2 PAUL, FEDERAL ESTATE AND GIFT TAXATION 993 (1942).
17. Igleheart v. Commissioner, 77 F.2d 704 (5th Cir. 1935). "The purpose of the estate tax law is to tax the property passing at death at its cash equivalent which is the price it would bring if sold for cash. . . . Market value then . . . means the saleable value . . . of the taxable property." HUGHES, THE FEDERAL DEATH TAX 263 (1939).
18. 2 PAUL, FEDERAL ESTATE AND GIFT TAXATION 1282 (1942).

on the market. [19] Thus, value is measured by the money for which the donor could sell his stock.

These established rules throw doubt upon making cost synonymous with value. The retail price includes the expected profits and earnings which involve labor, expenses and time. These are not capitalized upon to the same extent when the vendee seeks to resell the article. Where property originally acquired for the personal use of the owner is subsequently given away, it seems fair and just that the value should be the price for which it can be sold rather than its replacement cost. Once the premise that cost is the primary basis of value is held inapplicable, the federal excise tax should not be considered in value, as its utility depends upon cost being the determinative factor.[20]

LIFE INSURANCE — WAR CLAUSE — KOREAN CONFLICT

Decedent's contract of life insurance with defendant company provided double indemnity for accidental death except while the insured was in the military forces of a country at war. When insured was killed in Korea, defendant company refused to pay double indemnity on the grounds that the Korean conflict was a war within the meaning of the exclusionary provision. *Held,* judgment for the defendant. The contracting parties in using the term "war" intended a "shooting war," and did not contemplate the necessity of a formal declaration by Congress. *Weissman v. Metropolitan Life Insurance Co.,* 112 F. Supp. 420 (S.D. Cal. 1953).

A large number of life insurance policies and practically all double indemnity or accidental death benefit riders contain a war clause, which is usually one of two types—a "result" clause, limiting recovery when death is the result of war, or a "status" clause by which indemnity is restricted if the insured is killed at any time while in the armed services of a country at war.[1] In either instance a definition of war is requisite to a determination of the applicability of the clause, and as a result of the traditional ambiguity in which that term is steeped, the problem has been a prolific breeding ground for litigation.[2] The courts which have thus far considered the problem

19. Groff v. Smith, 34 F. Supp. 319 (D. Conn. 1940). "Blockage" is discussed in 2 PAUL, FEDERAL ESTATE AND GIFT TAXATION 1280 (1942); see also Peters, *The Fair Market Value of Blocks of Stock,* 17 TAXES 17 (1939).

20. Duke v. Commissioner, 200 F.2d 82 (2d Cir. 1952), *cert. denied,* 345 U.S. 906 (1953).

1. See Wheeler, *The War Clause,* 370 INS. L.J. 727 (1953).

2. The meaning of war, as the term is applicable in the war clause, is particularly susceptible to ambiguity and litigation in two historic situations:

fall into two categories: those which give to war its realistic meaning, "a shooting war";[3] and those which define the term in its so-called legal sense, requiring formal declaration by Congress.[4]

The "legal" definition appears to have evolved from cases which interpreted "war" in terms of public law, wherein its existence is said to be a question for determination by political departments of government, binding on the courts in all matters of state and public

(1) When the death of the insured occurs during a period of armed hostility which has not been formally declared war; the Pearl Harbor Cases: New York Life Ins. Co. v. Bennion, 158 F.2d 260 (10th Cir. 1946); Savage v. Sun Life Assur. Co. of Canada, 57 F. Supp. 620 (W.D. La. 1944); Rosenau v. Idaho Mut. Ben. Ass'n, 65 Idaho 408, 145 P.2d 227 (1944); West v. Palmetto State Life Ins. Co., 202 S.C. 422, 25 S.E.2d 475, 145 A.L.R. 1461 (1943); Pang v. Sun Life Assur. Co. of Canada, 37 Hawaiian Rep. 208, 14 C.C.H. LIFE CAS. 496 (1945)—the cases growing out of the Korean conflict: Stanbery v. Aetna Life Ins. Co., 26 N.J. Super. 498, 98 A.2d 134 (L. 1953); Harding v. Pennsylvania Mut. Life Ins. Co., 171 Pa. Super. 236, 90 A.2d 589 (1952), 26 So. CALIF. L. REV. 328 (1953), *aff'd*, 373 Pa. 270, 95 A.2d 221 (1953); Beley v. Pennsylvania Mut. Life Ins. Co., 171 Pa. Super. 253, 90 A.2d 597 (1952), 28 N.Y.U.L.Q. REV. 899 (1953), *aff'd*, 373 Pa. 231, 95 A.2d 202 (1953); Western Reserve Life Ins. Co. v. Meadows, 1 C.C.H. LIFE CAS.2d 451 (Tex. Civ. App., Oct. 7, 1953); Grey v. Southern Aid Life Ins. Co., 15 C.C.H. LIFE CAS. 507 (Munic. Ct. D.C., June 5, 1952).

(2) When death occurs after the cessation of hostilities of a declared war and prior to a formal treaty: New York Life Ins. Co. v. Durham, 166 F.2d 874 (10th Cir. 1948); Stinson v. New York Life Ins. Co., 167 F.2d 233 (D.C. Cir. 1948); Mutual Life Ins. Vo. v. Davis, 79 Ga. App. 336, 53 S.E.2d 571 (1949); Trimble v. Western & Southern Life Ins. Co., 83 Ohio App. 102, 82 N.E.2d 548 (1948); National Life & Accident Ins. Co. v. Leverett, 215 S.W.2d 939 (Tex. Civ. App. 1948); Thompson v. New York Life Ins. Co., 13 C.C.H. LIFE CAS. 235 (Greenville County, S.C., C.P. 1947).

Other war clause cases in which the meaning of war has been the point of controversy involve deaths resulting from conflicts between two foreign nations: Vanderbilt v. Travelers Ins. Co., 112 Misc. 248, 184 N.Y. Supp. 54 (Sup. Ct. 1920), *aff'd*, 202 App. Div. 738, 194 N.Y. Supp. 986 (1st Dep't 1922); Hopkins v. Connecticut General Life Ins. Co., 225 N.Y. 76, 121 N.E. 465 (1918) (the *Lusitania* cases). See also Stankus v. New York Life Ins. Co., 312 Mass, 366, 44 N.E.2d 687 (1942) (an American ship escorting a convoy bound for England, prior to our entrance into W. W. II was torpedoed by a German submarine).

3. New York Life Ins. Co. v. Durham, 166 F.2d 874 (10th Cir. 1948); Stinson v. New York Life Ins. Co., 167 F.2d 233 (D.C. Cir. 1948); New York Life Ins. Co. v. Bennion, 158 F.2d 260 (10th Cir. 1946); Mutual Life Ins. Co. v. Davis, 79 Ga. App. 336, 53 S.E.2d 571 (1949); Stankus v. New York Life Ins. Co., 312 Mass. 366, 44 N.E.2d 687 (1942); Stanbery v. Aetna Life Ins. Co., 26 N.J. Super. 498, 98 A.2d 134 (L. 1953); Vanderbilt v. Travelers Ins. Co., 112 Misc. 248, 184 N.Y. Supp. 54 (Sup. Ct. 1920), *aff'd*, 202 App. Div. 738, 194 N.Y. Supp. 986 (1st Dep't 1922); Hopkins v. Connecticut General Life Ins. Co., 225 N.Y. 76, 121 N.E. 465 (1918); Grey v. Southern Aid Life Ins. Co., 15 C.C.H. LIFE CAS. 507 (Munic. Ct. D.C., June 5, 1952); Western Reserve Life Ins. Co. v. Meadows, 1 C.C.H. LIFE CAS.2d 451 (Tex. Civ. App., Oct. 7, 1953).

4. Savage v. Sun Life Assur. Co. of Canada, 57 F. Supp. 620 (W.D. La. 1944); Rosenau v. Idaho Mut. Ben. Ass'n, 65 Idaho 408, 145 P.2d 227 (1944); Trimble v. Western & Southern Life Ins. Co., 83 Ohio App. 102, 82 N.E.2d 548 (1948); Harding v. Pennsylvania Mut. Life Ins. Co., 373 Pa. 270, 95 A.2d 221 (1953); Beley v. Pennsylvania Mut. Life Ins. Co., 373 Pa. 231, 95 A.2d 202 (1953); West v. Palmetto State Life Ins. Co., 202 S.C. 422, 25 S.E.2d 475 (1943); National Life & Accident Ins. Co. v. Leverett, 215 S.W.2d 939 (Tex. Civ. App. 1948); Thompson v. New York Life Ins. Co., 13 C.C.H. LIFE CAS. 235 (Greenville County, S.C. C.P. 1947); Pang v. Sun Life Assur. Co. of Canada, 37 Hawaiian Rep. 208, 15 C.C.H. LIFE CAS. 496 (1945).

concern.[5] Many of these cases, however, indicate that a state of war can exist without a formal declaration thereof.[6] That a political determination of the existence of war should not be controlling in the insurance cases is further evidenced by the fact that the insurance policy is not a matter of public concern,[7] but rather a private contract, to the terms of which the parties may give any meaning inoffensive to public policy.[8]

When the intent of the parties is not clear, ambiguity is resolved by the application of appropriate rules of contract interpretation and construction. Certain of these standards have been invoked in the war clause cases in support of both the legal and the realistic interpretations. The *Restatement* suggests three categories of rules: standards, primary rules and secondary rules.[9] The "standard" generally applied to the integrated or written contract, such as the contract of insurance, is that of limited usage, *i.e.*, "the ordinary meaning of the writing to parties of the kind who contracted at the time and place where the contract was made and with such circumstances as surrounded its making."[10] Applying this standard, the court in *Mutual Life Ins. Co. v. Davis*[11] placed itself in the position of the parties and concluded that the obvious purpose of the war clause was to avoid liability under the increased hazards of a shooting war, not to designate certain legislative or executive acts which would initiate and terminate liability. If after application of the limited usage test, ambiguity subsists the standard of reasonable expectation—that meaning which the person using the words could reasonably expect the other party to give them—is to be applied.[12] Some courts, however, have considered that when the law gives to certain words an estab-

5. Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 40 Sup. Ct. 106, 64 L. Ed. 194 (1919); Verano v. De Angelis Coal Co., 41 F. Supp. 954 (D.C. Pa. 1941); Bishop v. Jones & Petty, 28 Tex. 294 (1866) (considered to be the leading case).

6. Bas v. Tingy, 4 Dall. 37, 1 L. Ed. 731 (U.S. 1800); Prize Cases, 2 Black 635, 17 L. Ed. 459 (U.S. 1862); Verano v. De Angelis Coal Co., 41 F. Supp. 954 (D.C. Pa. 1941); Hamilton v. McClaughry, 136 Fed. 445 (D. Kan. 1905); *but see* Bishop v. Jones & Petty, 28 Tex. 294 (1866).

7. That an insurance policy is a private contract, subject to the ordinary rules of contract interpretation, see 13 APPLEMAN, INSURANCE LAW AND PRACTICE § 7381 (1943) (citing cases from almost every jurisdiction).

8. To the effect that the war clause is not contrary to public policy, see Miller v. Illinois Bankers Life Ass'n, 138 Ark. 442, 212 S.W. 310, 7 A.L.R. 378 (1919); Railey v. United Life & Accident Ins. Co., 26 Ga. App. 269, 106 S.E. 203 (1921); Long v. St. Joseph Life Ins. Co., 225 S.W. 106 (Mo. App. 1920). See also 3 WILLISTON, CONTRACTS § 610 (Revised ed. 1936).

9. See RESTATEMENT, CONTRACTS § 227 (1932), which suggests six possible "standards" of interpretation which may be applied to words and other manifestations of intention in order to determine the meaning to be given them. See also 3 WILLISTON, CONTRACTS § 603 (Revised ed. 1936).

10. 3 WILLISTON, CONTRACTS § 607 (Revised ed. 1936); RESTATEMENT, CONTRACTS § 230 (1932).

11. 79 Ga. App. 336, 53 S.E.2d 571 (1949).

12. See RESTATEMENT, CONTRACTS § 231 (1932).

lished meaning, that meaning is less readily controlled by standards of interpretation otherwise applicable than is the meaning of other words.[13] This reasoning has been used to justify the legal interpretation,[14] notwithstanding war has not an established meaning in the law.

To aid in the application of the appropriate standard there are certain primary rules of interpretation which may be applied.[15] Among these rules is the one used in the instant case which justifies the "realistic" approach, *i.e.*, "the ordinary meaning of language throughout the country is given to words unless circumstances show that a different meaning is applicable."[16] It would seem that to the extent that the aplicable standard is kept in mind this rule is appropriately invoked in the war clause situation and the realistic interpretation, which is the result of the proper application of the rule, is sound. When, and only when, the primary rules fail to resolve an ambiguity, may resort be had to certain secondary rules of interpretation.[17] It is in this category that Williston and the *Restatement* place the familiar rule of strict interpretation against the insurer,[18] used all too frequently in justification of the legal definition by courts which ignore the other rules first to be applied.[19]

Although the realistic interpretation, adopted by the court in the instant case, appears sound in theory, it does, in this type of case at least,[20] work a forfeiture of the insurance, a policy feature of the rule which may well result in the continued use by many courts of the legal interpretation in cases arising out of the Korean conflict. A policy consideration, not so readily apparent in the individual case, is the fact that the tremendous losses to the insurance companies which may result from wide-spread adoption of the legal interpreta-

13. RESTATEMENT, CONTRACTS § 234 (1932); 3 WILLISTON, CONTRACTS § 614 (Revised ed. 1936).
14. Rosenau v. Idaho Mut. Ben. Ass'n, 65 Idaho 408, 145 P.2d 227 (1944).
15. See RESTATEMENT, CONTRACTS § 235 (1932); 3 WILLISTON, CONTRACTS § 618 (Revised ed. 1936).
16. RESTATEMENT, CONTRACTS § 235 (1932); see also 3 WILLISTON, CONTRACTS § 618 (Revised ed. 1936).
17. RESTATEMENT, CONTRACTS § 236 (1932).
18. RESTATEMENT, CONTRACTS § 236 (1932); 3 WILLISTON, CONTRACTS § 621 (Revised ed. 1936).
19. Rosenau v. Idaho Mut. Ben. Ass'n, 65 Idaho 408, 145 P.2d 227 (1944); Harding v. Pennsylvania Mut. Life Ins. Co., 373 Pa. 270, 95 A.2d 221 (1953); Beley v. Pennsylvania Mut. Life Ins. Co., 373 Pa. 231, 95 A.2d 202 (1953); Pang v. Sun Life Assur. Co. of Canada, 37 Hawaiian Rep. 208, 14 C.C.H. LIFE CAS. 496 (1945). "The necessity for construction arises only when, after giving the language used its ordinary and usual meaning, there still remains an ambiguity in the contract. In such cases the ambiguity is resolved . . . against the insurer and in favor of the insured." Sulzbacher v. Travelers Ins. Co., 137 F.2d 386, 391 (8th Cir. 1943).
20. In the reverse situation, when death occurs after the cessation of hostilities of a declared war and prior to a formal treaty (see note 2 *supra*), the realistic approach works in favor of the insured and the legal approach, to his detriment.

tion, must ultimately be borne by the public. So it would seem that the realistic approach may well be as sound on policy grounds as it is in theory. The whole problem, of course, suggests the need for a uniform war clause which will be given uniform construction.

TENNESSEE PROCEDURE — RIGHT TO JURY TRIAL IN CHANCERY — PURELY EQUITABLE SUIT

Complainants sued in chancery court to enjoin defendants from soliciting personal injury claims on behalf of certain attorneys. A jury, empaneled upon demand of defendants, found that defendants were not guilty of illegal solicitation; the chancellor approved the verdict and dismissed the bill. Complainants appealed, contending that as the determinative facts were undisputed, the chancellor was under a duty to withdraw the issue from the jury and upon the uncontradicted evidence should have allowed the injunction. *Held,* reversed and injunction granted. There is no right to trial by jury in chancery court of a purely equitable cause. *Doughty v. Grills,* 260 S.W. 2d 379 (Tenn. Ct. App. E.S. 1952).

In Tennessee there is no constitutional[1] or common-law right[2] to trial by jury in an equity case. However, by statute[3] Tennessee gives either party, upon timely application, a right to jury trial on all material, disputed facts "save in cases involving complicated accounting . . . and those elsewhere excepted by law or by provisions of this Code. . . ."[4] Where the right to a jury exists under this statute the trial is to be conducted as if it were a suit at law,[5] with the introduction of oral testimony and with the verdict binding upon the court.[6]

1. The constitutional provision that the right of trial by jury shall remain inviolate, refers only to actions triable at common law, not to suits brought in chancery. TENN. CONST. Art. I, § 6. See, *e.g.,* Pass v. State, 181 Tenn. 613, 617, 184 S.W.2d 1, 3 (1943); Hunt v. Hunt, 169 Tenn. 1, 10, 80 S.W.2d 666, 669 (1934); Exum v. Griffis Newbern Co., 144 Tenn. 239, 249-54, 230 S.W. 601, 603-05 (1921) (collects cases); Jackson, Morris & Co. v. Nimmo & Thornhill, 71 Tenn. 597, 613-14 (1879); Third National Bank v. American Equitable Ins. Co., 27 Tenn. App. 249, 257, 178 S.W.2d 915, 919 (M.S. 1943); Greene County Union Bank v. Miller, 18 Tenn. App. 239, 244, 75 S.W.2d 49, 52 (E.S. 1934); see also GIBSON, SUITS IN CHANCERY § 548 (4th ed., Higgins and Crownover, 1937).

2. *See* Miller v. Washington County, 143 Tenn. 488, 500, 226 S.W. 199, 202 (1920); State *ex rel.* Mynatt v. King, 137 Tenn. 17, 28, 191 S.W. 352, 354 (1917); Greene County Union Bank v. Miller, 18 Tenn. App. 239, 244, 75 S.W.2d 49, 52 (E.S. 1934) (right to jury in chancery is statutory).

3. TENN. CODE ANN. §§ 10574-80 (Williams 1934).

4. *Id.* § 10574.

5. *Id.* § 10579.

6. When under this statute a jury is granted, the fact issues are tried according to the forms of law and the jury's verdict has the same force as at law. *E.g.,* Davis v. Mitchell, 27 Tenn. App. 182, 196, 178 S.W.2d 889, 895 (W.S.

This section of the Code fails to make clear the type of case in chancery which is intended to be excepted from the operation of the statute and retained under the traditional equity procedure. When it is considered that traditionally equity allowed a jury only at the discretion of the chancellor,[7] that the jury verdict is advisory only,[8] and that on appeal the case is tried *de novo*,[9] the importance of this failure of the Code becomes apparent.

Is the statutory right to jury trial in a purely equitable cause in chancery court denied by the clause "save in cases . . . elsewhere excepted by law"? In *Hunt v. Hunt*,[10] the Supreme Court of Tennessee interpreting this statute held that constitutional provisions regarding jury trials did not apply to cases of an equitable nature, that the statute itself exempted from its operation certain cases, and that hence the chancellor has a much broader latitude in withdrawing issues from a jury than the circuit judge has in directing a verdict. That decision then is not that there is no right to a jury trial in suits of an equitable nature[11] but that when a certain quantum of evidence is required to establish an equity claim (clear and convincing evidence to establish a parol trust in land, in the *Hunt* case), it is the duty of the chancellor before submitting the case to the jury to determine if the evidence presented meets this requirement.[12] If there is clear and convincing evidence, it must be submitted to the jury even if there is other evidence, which if believed, would contradict the clear and convincing evidence.[13]

The court in the instant case interprets the *Hunt* decision as holding that cases of purely equitable cognizance are within the exception

1943); Ray v. Crain, 18 Tenn. App. 603, 608, 80 S.W.2d 113, 117 (M.S. 1934); National Life & Accident Ins. Co. v. American Trust Co., 17 Tenn. App. 516, 528, 68 S.W. 2d 971, 978 (M.S. 1933); Johnson v. Graves, 15 Tenn. App. 466, 475 (W.S. 1932). The jury's verdict was also binding under the Codes of 1858 and 1896. McElya v. Hill, 105 Tenn. 319, 332, 59 S.W. 1025, 1028 (1900).

7. *See* Greene County Union Bank v. Miller, 18 Tenn. App. 239, 244, 75 S.W.2d 49, 52 (E.S. 1934).

8. GIBSON, SUITS IN CHANCERY, § 554a (4th ed., Higgins and Crownover, 1937).

9. *Id.* § 1269d(3).

10. 169 Tenn. 1, 80 S.W.2d 666 (1934).

11. If the required quantum of evidence has been presented there is a right to a jury verdict even on a purely equitable claim. Greenwood v. Maxey, 190 Tenn. 599, 231 S.W.2d 315 (1950). Query, is the holding of the instant case consistent with this holding?

12. Under the chancery practice of submitting special issues of fact to the jury, the chancellor has an affirmative duty to withdraw from the jury all undisputed and immaterial facts. *See* Mutual Life Ins. Co. v. Burton, 167 Tenn. 606, 613, 72 S.W.2d 778, 780 (1934); Standard Life Ins. Co. v. Strong, 19 Tenn. App. 404, 409, 89 S.W. 267 (M.S. 1936); *c.f.* Hunt v. Hunt, 169 Tenn. 1, 10, 80 S.W. 2d 666, 669 (1934). "There is always room for judgment upon the part of the Chancellor as to whether the points in dispute are so free from complication that jury may decide them." GIBSON, SUITS IN CHANCERY § 548 (4th ed., Higgins and Crownover, 1937).

13. Greenwood v. Maxey, 190 Tenn. 599, 612, 231 S.W.2d 315, 320 (1950).

to the statute and that the traditional equity proceedings of chancery are to be applied. Upon this interpretation of the *Hunt* decision, the instant case further explains the "elsewhere excepted by law" clause as meaning those cases elsewhere excepted by the common law.[14] Pure equity suits within the inherent jurisdiction of chancery court, such as suits for injunctions, are thus excepted because in equity cases there is no common-law right of trial by jury. The common-law rule of no right in either party to trial by jury of a purely equitable cause in chancery, which was changed by the Act of 1846,[15] is by this decision again made the law in Tennessee.

The secondary basis for the instant decision was that no determinative fact had been disputed, hence the chancellor was under a duty to decide the facts without submission to a jury.[16] Although the defendant introduced no evidence to contradict complainant's case, he raised by skillful cross-examination of complainant's witnesses a question of credibility. If the court concedes for the sake of argument that there was a right to a jury trial, the credibility of witnesses is the type of determination to which juries are particularly adapted.[17] It is doubtful that a judge in a law court would have directed a verdict in the face of this disputed testimony.

Thus this interpretation of the *Hunt* case returns Tennessee chancery practice to its former equity procedure. However, it is doubtful that the supreme court in the *Hunt* case intended to hold that there was absolutely no right to a jury in a purely equitable cause in chancery. The importance of the instant decision is that it allows all equitable cases which are within the inherent jurisdiction of chancery to come within the statutory exception of "elsewhere excepted by law," rather than limiting that exception to those cases which fail to meet the quantum of evidence required to establish certain equitalbe claims.

14. Instant case, 260 S.W.2d at 386-87.

15. This act was the first of a series of statutes authorizing the chancellor to empanel a jury for "any issue of fact involved in any case pending in said [chancery] courts—the finding of which shall be final and conclusive. . . ." Tenn. Acts 1946, c. 122, § 14.

16. Instant case, 260 S.W.2d at 387.

17. "[T]he main reason for trial by jury [in chancery] is the . . . importance of an open and rigid cross-examination of the witnesses in the presence of the Court and jury." GIBSON, SUITS IN CHANCERY, § 548 (4th ed., Higgins and Crownover, 1937).

TRADE-MARKS — INFRINGEMENT AS UNFAIR COMPETITION — APPLICATION OF LANHAM ACT

Plaintiff, manufacturer of men's wear since 1922, had used the name "Hyde Park" as a trade-mark. Defendant, manufacturer of women's wear, had used the identical mark since 1945. Plaintiff brought suit charging infringement of a registered trade-mark and unfair competition. From a judgment for defendant, plaintiff appealed. *Held* (2-1),[1] affirmed under either state[2] or federal law;[3] the similarity has caused no confusion in the trade and the purchasing public has not been mislead into believing that plaintiff is the source or origin of defendant's merchandise. *Hyde Park Clothes, Inc. v. Hyde Park Fashions, Inc.*, 204 F.2d 223 (2d Cir.), *cert. denied*, 74 Sup. Ct. 46 (1953).

With the defects and uncertainties of prior law and the need for a uniform federal trade-mark law in mind,[4] Congress in 1946 passed the Lanham Act[5] which embodied many of the provisions of the prior statutes and much of the case law on the subject. Its stated purpose was "to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce . . . to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks. . . ."[6] These statements indicate

1. Judge Clark dissents vigorously, contending that the Lanham Act is controlling, and by the application of its test, unfair competition must be found. Instant case, 204 F.2d at 226.

2. N.Y. GEN. BUS. LAW § 360 *et seq.* See Time, Inc. v. Life Color Laboratory, Inc., 279 App. Div. 51, 106 N.Y.S.2d 957 (1st Dep't 1951), *aff'd*, 303 N.Y. 965, 106 N.E.2d 56 (1952).

3. The Trade-Mark Act of 1946, 60 STAT. 427 (1946), 15 U.S.C.A. §§ 1051 *et seq.* (1948).

4. The basic trade-mark act until 1946 was the Act of 1905. 33 STAT. 724 (1905), as amended, 52 STAT. 638 (1938), 15 U.S.C.A. §§ 81 *et seq.* (1948). This Act, in establishing a federal law of trade-marks, adopted as its criterion for trade-mark infringement a "same descriptive properties" test: "Any person who shall . . . reproduce . . . or colorably imitate any such trade-mark and affix the same to merchandise of substantially the same descriptive properties as those set forth in the registration . . . shall be liable to an action for damages therefor." 33 STAT. 728 (1905). See Moore, *Trade-Mark Problems and Trade-Mark Laws*, 7 BROOKLYN L. REV. 20 (1937); Robertson and Morey, *Desirable Changes in Trade-Mark Laws*, 5 JOHN MARSHALL L.Q. 570 (1940).

5. See note 3 *supra*.

6. 60 STAT. 444 (1946), 15 U.S.C.A. § 1127 (1948). "The purpose underlying any trade-mark statute is twofold. One is to protect the public so it may be confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product it asks for and wants to get. Secondly, where the owner of a trade-mark has spent energy, time, and money in presenting to the public the product, he is protected in his investment from its misappropriation by pirates and cheats." SEN. REP. No. 1333, 79th Cong., 2d Sess. 4 (1946). See ROBERTS, THE NEW TRADE-MARK MANUAL 267 (1947).

that Congress intended to afford to trade-marks a protection over and beyond the tests and considerations previously employed. These were: (1) palming off goods as those of another;[7] (2) tarnishing of reputation;[8] (3) false impression of a trade connection;[9] (4) bad faith diversion of customers;[10] (5) right to normal expansion of business;[11] (6) dilution of trade-mark;[12] (7) confusion of source.[13]

The test set out by Section 32(1) of the Lanham Act is whether use of the trade-mark is "likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods."[14] This section was heralded by commentators as adopting, as the sole test of infringement, the "Hand Doctrine,"[15] which extended trade-mark protection to the use of a copied mark on noncompeting goods where the

7. Hiram Walker & Sons v. Pennsylvania-Maryland Corp., 79 F.2d 836 (2d Cir. 1935); Maison Prunier v. Prunier's Restaurant & Cafe, Inc., 159 Misc. 551, 288 N.Y. Supp. 529 (Sup. Ct. 1936).

8. *Cf.* Ford Motor Co. v. C. N. Cady Co., Inc., 124 Misc. 678, 681, 208 N.Y. Supp. 574 (Sup. Ct. 1925), *modified*, 216 App. Div. 786, 214 N.Y. Supp. 838 (4th Dep't 1926).

9. *Cf.* Phillips v. Governor & Co. of Adventurers of England Trading into Hudson's Bay, 79 F.2d 971 (9th Cir. 1935); Buckspan v. Hudson's Bay Co., 22 F.2d 721 (5th Cir. 1927); Akron-Overland Tire Co. v. Willys-Overland Co., 273 Fed. 674 (3d Cir. 1921); Peninsular Chemical Co. v. Levinson, 247 Fed. 658 (6th Cir. 1917).

10. See Yale Electric Corp. v. Robertson, 26 F.2d 972, 973 (2d Cir. 1928).

11. Forsythe Co., Inc. v. Forsythe Shoe Corp., 234 App. Div. 355, 254 N.Y. Supp. 584 (1st Dep't 1932), *modified*, 259 N.Y. 248, 181 N.E. 467 (1932); Long's Hat Stores Corp. v. Long's Clothes, Inc., 224 App. Div. 497, 231 N.Y. Supp. 107 (1st Dep't 1928).

12. See Tiffany & Co. v. Tiffany Productions, Inc., 147 Misc. 679, 264 N.Y. Supp. 459 (Sup. Ct. 1932), *aff'd*, 262 N.Y. 482, 188 N.E. 30 (1933); Schecter, *Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813 (1927).

13. Some type of affirmative relief was granted in the following cases: Waterman Co. v. Gordon, 72 F.2d 272 (2d Cir. 1934) (fountain pens and razor blades); Del Monte Special Food Co. v. California Packing Corp., 34 F.2d 774 (9th Cir. 1929) (food products and oleomargarine); Duro Co. v. Duro Co., 27 F.2d 339 (3d Cir. 1928) (electrical engines and spark plugs); Wall v. Rolls-Royce of America, Inc., 4 F.2d 333 (3d Cir. 1925) (automobiles and radio tubes); Alfred Dunhill of London v. Dunhill Shirt Shop, 3 F. Supp. 487 (S.D.N.Y. 1929) (cigarettes and shirts); Standard Oil Co. v. California Peach & Fig Growers, Inc., 28 F.2d 283 (D. Del. 1928) (mineral and figs); Hudson Motor Car Co. v. Hudson Tire Co., 21 F.2d 453 (D.N.J. 1927) (automobiles and tires); Aluminum Cooking Utensil Co. v. Sargoy Bros. & Co., 276 Fed. 447 (E.D.N.Y. 1921) (cooking utensils and wash boilers); Omega Oil Co. v. Weschler, 35 Misc. 441, 71 N.Y. Supp. 983 (Sup. Ct. 1901), *aff'd*, 68 App. Div. 638, 74 N.Y. Supp. 1140 (1st Dep't 1902) (soap and liniment).

14. 60 STAT. 437 (1946), 15 U.S.C.A. § 1114 (1948).

15. This doctrine was laid down by Judge Learned Hand in Yale Electric Corp. v. Robertson, 26 F.2d 972 (2d Cir. 1928). The court refused registration of the mark "Yale" for flashlights when opposed by the owner of the same mark for locks and keys. This doctrine could not be said to represent the weight of authority prior to the passage of the Lanham Act. Walgreen Drug Stores v. Obear-Nester Glass Co., 113 F.2d 956 (8th Cir.), *cert. denied*, 311 U.S. 708 (1940); Beechnut Packing Co. v. P. Lorillard Co., 7 F.2d 967 (3d Cir. 1925); Rosenberg Bros. & Co. v. Elliot, 7 F.2d 962 (2d Cir. 1925); Atlas Mfg. Co. v. Street & Smith, 204 Fed. 398 (8th Cir. 1913); Triangle Publications, Inc. v. Rohrlich, 73 F. Supp. 74 (S.D.N.Y. 1947); Bulova Watch Co. v. Stolzberg, 69 F. Supp. 543 (D. Mass. 1947). See RESTATEMENT, TORTS §§ 715-40 (1938).

article bearing the copied symbol was a product which might reasonably be expected to have come from the original owner of the mark. The courts in applying this test recognized two rights in a trade-mark owner: (1) the right to protect his reputation which was subject to injury if another used the mark and marketed an inferior product,[16] and (2) the right to reasonable expansion of his mark to other products.[17]

From the beginning, some courts refused to apply the statutory test as broadly as Congress apparently intended. In *California Fruit Growers Exchange v. Sunkist Baking Co.*,[18] it was held that between noncompetitive products there can be no confusion of source. This conclusion was reached after a consideration of the defendant's interests and the monopoly power that would be given to the plaintiff if an injunction were granted.[19]

The instant case is the same in effect as the *Sunkist* case, although here there was never any conclusion as to "likelihood of confusion." The absence of actual confusion was apparently taken as conclusive as to the absence of likelihood of confusion. Since the policy of the Act is to increase the recognition and protection given to trademarks and to obviate confusion, the instant case would seem incongruent in that the broad statutory test of Section 32(1) is without reference to the existence of actual competition, which factor, however, may be relevant in determining likelihood of confusion.

The Supreme Court should clarify the situation so that trade-mark owners may have definite rights uniformly enforceable upon a national scale.[20] If policy considerations such as the fear of monopoly or unreasonable limitations on business opportunity are found to lead to a contrary rule, then the statute should be amended.

16. Hydraulic Press Brick Co. v. Stevens, 15 F.2d 312 (5th Cir. 1926); *see* Dwinell-Wright Co. v. White House Milk Co., 132 F.2d 822, 825 (2d Cir. 1943); Durable Toy & Novelty Corp. v. J. Chein & Co., 133 F.2d 853, 855 (2d Cir.), *cert. denied*, 320 U.S. 211 (1943).

17. *See* Dwinell-Wright Co. v. White House Milk Co., *supra* note 16, at 825; Finchley, Inc. v. Finchley Co., 40 F.2d 736, 738 (D. Md. 1929). *But see* Walgreen Drug Stores v. Obear-Nester Glass Co., *supra* note 15, at 963.

18. 166 F.2d 971 (7th Cir. 1947) (fruit products and bread).

19. *Ibid.* See also instant case, 204 F.2d at 225; Hall, *Possible Monopoly Implications in the Trade-Mark Bill*, 32 GEO. L.J. 171 (1944).

20. See Lunsford, *Trade-Mark Infringement and Confusion of Source: Need for Supreme Court Action*, 35 VA. L. REV. 214 (1949).