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RECENT CASES

CONSTITUTIONAL LAW — DUE PROCESS — USE IN STATE PROSECUTION OF EVIDENCE OBTAINED BY ILLEGAL INVASION OF PRIVACY

While the defendant was away, police officers, suspecting him of bookmaking, made a key to his home, entered, concealed a microphone in the hall, bored a hole through the roof and attached the phone to a wire which ran to a nearby garage where officers listened in relays. They used the key again to move the phone into the bedroom and later into a bedroom closet. After listening for over twenty-five days and hearing some incriminating statements, the officers used their key to enter, arrested defendant and, without a search warrant, ransacked the house. Defendant objected to the admission of the testimony on the grounds that it was obtained by methods which violate the due process clause of the Fourteenth Amendment. The testimony was admitted and defendant was found guilty. His conviction was affirmed by the California Supreme Court and the United States Supreme Court granted certiorari. *Held* (5-4),[1] affirmed. The use of this illegally obtained evidence does not violate the due process clause of the Fourteenth Amendment. *Irvine v. California,* 74 Sup. Ct. 381 (1954).

Effective protection of basic civil liberties often conflicts with society's interest in efficient law enforcement. This is especially true with respect to the freedom from unreasonable search and seizure guaranteed by the Fourth Amendment[2] of the United States Constitution. The substantive content of this freedom, the conduct which courts have held to be proscribed by the Amendment, represents a compromise between the concern for individual liberty and the desire for vigorous law enforcement.[3] Sanctions to prevent certain police activities have been developed under the stress of this clash of policies. In 1914 the federal courts resolved the conflict in favor of the aggrieved defendant and excluded from evidence the fruits of an illegal search conducted by federal officers,[4] in a belief that this was the only effective way to make the Amendment meaningful.[5] A similar rule of

1. Jackson, J., delivered the opinion of the court; Black, Burton, Douglas and Frankfurter, JJ., dissented.
2. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. AMEND. IV.
3. See Carroll v. United States, 267 U.S. 132, 149, 45 Sup. Ct. 280, 283, 69 L. Ed. 543, 549 (1925).
4. Weeks v. United States, 232 U.S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652 (1914). The rule that such evidence is to be excluded is now embodied in the FED. R. CRIM. P. 41(e).
5. *Id.* at 393.

inadmissability is accepted in only about one-third of the states,[6] notwithstanding the appearance of provisions similar to the Fourth Amendment in all state constitutions.[7]

In 1949, in *Wolf v. Colorado*,[8] the Supreme Court was faced with the question of the extent to which the sanctions of the Fourth Amendment were to be enforced against the states through the Fourteenth Amendment.[9] The Court reasoned that the right of privacy against the arbitrary intrusion by police, basic to a free society and protected by the Fourteenth Amendment, is enforceable against the states through the due process clause, so that "affirmative sanction" by a state of such illegal search would violate that clause. However, the federal rule which would exclude evidence obtained through an unreasonable search by federal officers from use in a federal prosecution is a rule of procedure for the federal courts only. Not an intrinsic part of the Fourth Amendment, the rule is not applicable to the state courts.[10]

Three years later the Court interjected a new element into the problem of the propriety of the use of illegally obtained evidence. The standards of due process embodied in the Fourteenth Amendment were held in *Rochin v. California*[11] to require the reversal of a conviction based upon evidence of capsules containing narcotics which state officers observed the accused swallow after they illegally forced their way into his room, and which they recovered by forcibly carrying him to a hospital and pumping his stomach against his will. Speaking for the majority, Justice Frankfurter said that due process of law was not heedless of the means by which evidence was obtained and concluded that the conduct shown did more than offend "fastidious squeamishness or private sentimentalism,"[12] it amounted to methods which were shocking to the judicial conscience. Analogizing the confession cases,[13] the Court held that a state cannot resort to methods that offend civilized standards of decency and fair play.[14]

6. See Appendix to Wolf v. Colorado, 338 U.S. 25, 33, 69 Sup. Ct. 1359, 1364, 93 L. Ed. 1782, 1788 (1949).

7. *E.g.*, "The people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures. . . ." DEL. CONST. Art. I, § 6. "That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures. . . ." TENN. CONST. Art. I, §7. The constitutional provisions are collected in CORNELIUS, SEARCH AND SEIZURE § 2 (2d ed. 1930).

8. 338 U.S. 25, 69 Sup. Ct. 1359, 93 L. Ed. 1782 (1949).

9. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. AMEND. XIV, § 1.

10. The rule of the *Wolf* case was reaffirmed in Stefanelli v. Minard, 342 U.S. 117, 73 Sup. Ct. 118, 96 L. Ed. 138 (1951).

11. 342 U.S. 165, 72 Sup. Ct. 205, 96 L. Ed. 183 (1952).

12. *Id.* at 172.

13. Brown v. Mississippi, 297 U.S. 278, 56 Sup. Ct. 461, 80 L. Ed. 682 (1936).

14. Deprecating the vagueness of the test of due process set up by the majority, Justices Black and Douglas, concurring in separate opinions, expressed the view that the Fifth Amendment protecting against self-incrimination should be enforced against the states, and that the use of the capsules forcibly taken

The majority distinguished the instant case from the *Rochin* case on the ground that physical coercion and brutality to the person were the factors requiring exclusion of the evidence there.[15] Although the Court found the conduct "incredible," as the factors of coercion and brutality were absent, the *Wolf* decision was controlling. The dissenters believed that *Rochin's* requirement — "States in their prosecutions [must] respect certain decencies of civilized conduct"[16] — had not been met.

The Supreme Court, realizing that the chief burden of administering criminal justice rests upon the states, has consistently refused to interfere except in the most extreme cases, and in this situation has drawn the line at brutality or physical coercion. In arriving at this more definite standard the majority seems to be slighting its duty to protect the civil liberties necessary to the free society which the Bill of Rights envisaged.

CONSTITUTIONAL LAW—UNLAWFUL SEARCH AND SEIZURE —ADMISSIBILITY OF EVIDENCE FOR IMPEACHMENT PURPOSES

Pursuant to the federal Anti-Narcotics Act,[1] defendant was indicted for selling heroin. On direct examination defendant asserted he had never possessed or sold narcotics. On cross examination defendant denied an unlawful seizure of other heroin suppressed under an earlier federal indictment against defendant. Over his objection evidence of this prior possession of heroin obtained by the unlawful search and seizure was admitted solely to impeach his credibility. The court of appeals affirmed the district court's conviction of defendant. On certiorari, *held,* affirmed. Unlawfully seized evidence of prior possession of heroin may be used to impeach the defendant's credibility as a witness when he asserts on direct examination that he has never possessed narcotics. *Walder v. United States,* 347 U.S. 62, 74 Sup. Ct. 354 (1954).

It is well-settled in the federal courts that evidence obtained from a defendant in contravention of the Fourth Amendment[2] is inadmissible to aid in the establishment of guilt.[3] The instant case pre-

in this case amounted to self-incrimination under that amendment. 342 U.S. at 174, 177.

15. See instant case, 74 Sup. Ct. at 383.

16. Rochin v. California, 342 U.S. 165, 173, 72 Sup. Ct. 205, 210, 96 L. Ed. 183, 190 (1952).

1. 26 U.S.C.A. §§ 2550(a), 2554(a) (1946).

2. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. Const. Amend. IV.

3. For the historical development of this rule, see Boyd v. United States, 116 U.S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746 (1886); Weeks v. United States,

sents the problem of whether the defendant's testimony may necessitate the admission of illegally obtained evidence for impeachment purposes. The probative value of evidence obtained by an unlawful search and seizure is impaired only by the method of obtention.[4] Since suppression of the evidence is contingent upon a violation of the Fourth Amendment, the right to suppress the evidence is a personal privilege possessed only by the aggrieved party.[5] Moreover, the defendant must be aggrieved by an unlawful search and seizure involving federal agency,[6] and the right of suppression may be waived.[7] Under Rule 41(e) the normal procedure for suppression is by motion before trial.[8] The Government has been precluded from using illegally obtained evidence affirmatively in its case in chief[9] and in rebuttal to questions answered on cross examination;[10] nor may it use knowledge gained through the unlawful search and seizure.[11]

232 U.S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L.R.A. 1915B 834, Ann. Cas. 1915C 1177 (1914); Gouled v. United States, 255 U.S. 298, 41 Sup. Ct. 261, 65 L. Ed. 647 (1921); Johnson v. United States, 333 U.S. 10, 68 Sup. Ct. 367, 92 L. Ed. 436 (1948). See appendix of Justice Frankfurter's dissent in Harris v. United States, 331 U.S. 145, 175, 67 Sup. Ct. 1098, 91 L. Ed. 1399 (1947), for an analysis of cases involving unlawful searches and seizures.

4. Evidence obtained by an unlawful search and seizure is reliable. Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 COL. L. REV. 11, 12 (1925). It does not bear the taint of coerced confessions. Cowen, *The Admissibility of Evidence Procured Through Illegal Searches and Seizures* in *British Commonwealth Jurisdictions*, 5 VAND. L. REV. 523, 527 (1952).

5. Scoggins v. United States, 202 F.2d 211 (D.C. Cir. 1953); Harvey v. United States, 193 F.2d 928 (D.C. Cir.), *cert. denied*, 343 U.S. 927 (1952); Ingram v. United States, 113 F.2d 966 (9th Cir. 1940); Connolly v. Medalie, 58 F.2d 629 (2d Cir. 1932). *But cf.* United States v. Jeffers, 342 U.S. 48, 72 Sup. Ct. 93, 96 L. Ed. 59 (1951).

6. If not obtained by an agency of the Federal Government, the evidence will be admitted. See, *e.g.*, Burdeau v. McDowell, 256 U.S. 465, 41 Sup. Ct. 574, 65 L. Ed. 1048, 13 A.L.R. 1159 (1921) (evidence obtained by private individuals); Lotto v. United States, 157 F.2d 623 (8th Cir.), *cert. denied*, 330 U.S. 811 (1946) (evidence obtained by state police); Robinson v. United States, 292 Fed. 683 (9th Cir.), *cert. denied*, 264 U.S. 580 (1923) (evidence obtained by state officials); Hirata v. United States, 290 Fed. 197 (9th Cir. 1923) (evidence obtained by city officers); Kanellos v. United States, 282 Fed. 461 (4th Cir. 1922) (evidence obtained by state constable). *But cf.* Gambino v. United States, 275 U.S. 310, 48 Sup. Ct. 137, 72 L. Ed. 293, 52 A.L.R. 1381 (1927); Byars v. United States, 273 U.S. 28, 47 Sup. Ct. 248, 71 L. Ed. 520 (1927).

7. Segurola v. United States, 275 U.S. 106, 48 Sup. Ct. 77, 72 L. Ed. 186 (1927); Butler v. United States, 153 F.2d 993 (10th Cir. 1946); Moore v. Aderhold, 108 F.2d 729 (10th Cir. 1939); United States v. Edmonds, 100 F. Supp. 862 (D.D.C. 1951).

8. "The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing." FED. R. CRIM. P. 41(e).

9. Johnson v. United States, 333 U.S. 10, 68 Sup. Ct. 367, 92 L. Ed. 436 (1948); Amos v. United States, 255 U.S. 313, 41 Sup. Ct. 266, 65 L. Ed. 654 (1921).

10. Agnello v. United States, 269 U.S. 20, 46 Sup. Ct. 4, 70 L. Ed. 145, 51 A.L.R. 409 (1925).

11. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319, 24 A.L.R. 1426 (1920).

The Fourth Amendment is a protection of the right of privacy, and in effect is a refusal to subjugate the liberty of citizens to the discretion of federal agents.[12] As a matter of effective law enforcement, the Supreme Court has asserted that the requisite of a valid search warrant is not unreasonable when the fundamental right to be secure against unlawful obtrusion is at stake.[13] The federal courts destroy the immediate utility of evidence obtained from a defendant by an unlawful search and seizure in order to preserve the efficacy of the Fourth Amendment.[14] The majority of the states,[15] many of which have constitutional provisions similar to the Fourth Amendment, follow the common law[16] and refuse to inquire into how evidence of probative value was obtained. The conflict is between the exigencies of providing the courts with the truth and protecting the right of privacy.[17]

The Court in the instant case was faced with the dilemma of either admitting uncontradicted the perjurious testimony of the defendant[18] or impeaching his testimony by evidence normally inadmissible. Incentive to diverge from the rule of exclusion was afforded by the fact that the defendant voluntarily created the necessity of using the illegally obtained evidence.[19] If the defendant had not testified on direct examination as to prior possession of heroin, the evidence would have been inadmissible for any purpose.[20] The Court in the

12. For the historical background and interpretation of the Fourth Amendment, see LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT (1937); Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361 (1921); Trimble, *Search and Seizure Under the Fourth Amendment as Interpreted by the United States Supreme Court*, 41 KY. L.J. 196, 388 (1953), 42 KY. L.J. 197 (1954).

13. Johnson v. United States, 333 U.S. 10, 68 Sup. Ct. 367, 92 L. Ed. 436 (1948). "No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate." *Id.* at 15.

14. Weeks v. United States, 232 U.S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L.R.A. 1915B 834, Ann. Cas. 1915C 1177 (1914). "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment . . . is of no value, and . . . might as well be stricken from the Constitution." *Id.* at 393.

15. For a summary of state decisions favoring and disfavoring the federal rule, see appendix to Wolf v. Colorado, 338 U.S. 25, 33, 69 Sup. Ct. 1359, 93 L. Ed. 1782 (1949); Atkinson, *Prohibition and the Doctrine of the Weeks Case*, 23 MICH. L. REV. 748, 764-74 (1925).

16. Commonwealth v. Dana, 43 Mass. (2 Metc.) 329 (1841); 1 GREENLEAF, LAW OF EVIDENCE § 254(a) (16th ed. 1899).

17. The impact of the federal rule is clearly shown in contraband cases where frequently dismissal or conviction is determined by the legality of the search and seizure. For a critical examination of the federal rule, see 8 WIGMORE, EVIDENCE §§ 2183, 2184 (3d ed. 1940).

18. The defendant in one proceeding asserted he was unlawfully dispossessed of heroin and in the instant case denied the occurrence of the same transaction. Instant case, 347 U.S. at 64.

19. "[T]he defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the sweeping claim that he had never dealt in or possessed any narcotics." Instant case, 347 U.S. at 65.

20. The evidence was of no value to aid in the establishment of guilt. The

instant case recognizes the fact that a defendant by his testimony on direct examination may waive the right to object to the admission of evidence obtained in violation of the Fourth Amendment. In *Agnello v. United States*,[21] the Supreme Court said, "In his direct examination, Agnello . . . did not testify concerning the can of cocaine. . . . He did nothing to waive his constitutional protection."[22]

A defendant who willingly takes the witness stand is subject to cross examination concerning statements made on direct examination[23] and may be impeached as any other witness.[24] Therefore, the questions asked on cross examination by the Government in the instant case were proper, and the defendant was subject to impeachment if the questions were falsely answered. The fact that the impeachment evidence was unlawfully obtained could not be objected to by the defendant since his testimony on direct examination impelled the use of the evidence and amounted to a waiver of the right to suppress the evidence obtained in contravention of the Fourth Amendment. It seems that the holding in the instant case would be valid even where the evidence admitted for impeachment purposes was of probative value in the establishment of guilt.[25] The instant case would seem to place a desirable limitation on the protection afforded defendants under the Fourth Amendment.

Government could not use the evidence to discredit the defendant's testimony on cross examination without his testimony on direct examination. Agnello v. United States, 269 U.S. 20, 46 Sup. Ct. 4, 70 L. Ed. 145, 51 A.L.R. 409 (1925).

21. 269 U.S. 20, 46 Sup. Ct. 4, 70 L. Ed. 145, 51 A.L.R. 409 (1925).

22. *Id.* at 35. It is important to note that the defendant in the instant case did not waive the Fourth Amendment but merely the right to object to the admission of the evidence obtained in violation of the Amendment. The defendant had this right to object since he successfully exercised it in the former proceeding. Instant case, 347 U.S. at 62, 63. But the defendant's testimony on direct examination caused the waiver of his right to object which was effectuated by this testimony being a contradiction of the defendant's assertions in the former proceeding.

23. Raffel v. United States, 271 U.S. 494, 497, 46 Sup. Ct. 566, 70 L. Ed. 1054 (1926); Powers v. United States, 223 U.S. 303, 314, 32 Sup. Ct. 281, 56 L. Ed. 448 (1912); Fitzpatrick v. United States, 178 U.S. 304, 315, 20 Sup. Ct. 944, 44 L. Ed. 1078 (1900); Reagan v. United States, 157 U.S. 301, 305, 15 Sup. Ct. 610, 39 L. Ed. 709 (1895).

24. Reagan v. United States, 157 U.S. 301, 305, 15 Sup. Ct. 610, 39 L. Ed. 709 (1895); 3 WIGMORE, EVIDENCE § 890 (3d ed. 1940).

25. The practical effect on the jury under these circumstances would be the same.

EVIDENCE—RADAR EVIDENCE OF SPEED—COINCIDENCE OF RADAR AND SPEEDOMETER READINGS AS HEARSAY

The defendant was prosecuted for speeding. The evidence consisted only of the recording of a radar machine installed in a police car parked along the edge of the road. The machine had been tested several times earlier in the day by an arrangement whereby *A*, a police officer, drove past *B*, in the radar car, and reported by radio to *B* his speedometer reading and *B* told *A* the reading on the radar dial. *A* testified that his speed on these occasions, concurred with the speedometer dial reading as reported to him by *B*. *B* also testified that the radar dial reading agreed with the speed as reported to him by *A*. The prosecution, in an additional effort to establish the accuracy of the machine, offered the testimony of *C*, a third police officer, who had installed the machine. *C* had no formal training in engineering or electronics. The trial court was not satisfied with the qualification of *C*. Both sides moved for an adjournment in order to produce an expert. The motions were denied and the court then permitted *C* to testify over objections of the defendant. *C*'s testimony included an opinion as to the accuracy of the machine. The defendant was convicted, and appealed. *Held*, reversed. The hearsay elements vitiated the testimony of *A* and *B*. The failure to adjourn was an abuse of discretion since the judge had voiced his displeasure at the ability of *C* to qualify as an expert witness and there was no new discovery of any previously latent qualification in *C*. *People v. Offermann*, 125 N.Y.S.2d 179 (Sup. Ct. 1953).

The testimony includes an assertion by *A* that he correctly reported his speedometer reading to *B* and also an assertion by *B* that he correctly reported the machine reading to *A*. *A* is not testifying as to the truth of *B*'s assertion nor is *B* as to the truth of *A*'s assertion, but rather their testimony concerns their respective present memory of a past event. Several tests were made but neither *A* nor *B* purported to divulge the exact speed recorded. Their memory is only concerned with the fact of coincidence. The reliable element in each of the tests was the fact that both *A* and *B* perceived, by a nexus between their auditory and visual sensations, that there was an exact similarity. This perception is the subject of their testimony and both can be cross-examined as to it. Therefore, it could be argued that such testimony is not hearsay evidence[1] and would not be subject to the

1. Notice how such testimony would not come within the following definition. "Hearsay is defined so as to include evidence of all conduct of a person, verbal or nonverbal, when (1) intended to operate as an assertion and offered either to prove the truth of the matter asserted or to prove that the asserter believed the asserted matter to be true, unless the assertion is subject to cross-examination by the party against whom it is offered at the trial at which it is offered, or (2) not intended to operate as an assertion and offered

proscriptions generally incumbent upon hearsay.

Practically all courts would hold that *A*'s testimony concerning the dial reading was hearsay[2] and should be inadmissible unless it falls within a recognized exception to the rule.[3] One of these exceptions is based on the theory of spontaneous contemporaneous declarations.[4] Thayer supported this exception by emphasizing the strong argument for authenticity due to the contemporaneousness of the statement involved.[5] Wigmore's theory of spontaneous declarations demands that the statement be made while the declarant is still under the influence of a startling occasion.[6] But in accord with Thayer it has been advanced that spontaneity,[7] coupled with the facility and possibility of cross-examining the witness as to the original occurrence, should be sufficient to bring the declaration in as an exception.[8] It has been held that it need only be "sufficiently spontaneous to save it from the suspicion of being manufactured evidence. There was no time for a calculated statement."[9] In the present case since neither

either to prove both his belief and the external event or condition which caused him to have that belief or to prove that such conduct truly reflected his belief." Morgan, *Hearsay and Non-Hearsay*, 48 HARV. L. REV. 1138, 1158 (1935).

2. "Hearsay has been defined as evidence which derives its value, not solely from the credit to be given to the witness upon the stand, but in part from the veracity and competency of some other person." 20 AM. JUR., *Evidence* § 451 (1939). "The theory of the Hearsay rule is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of Cross-examination." 5 WIGMORE, EVIDENCE § 1362 (3d ed. 1940).

3. For a general discussion see 5 WIGMORE, EVIDENCE §§ 1420-27 (3d ed. 1940).

4. This relates to the circumstantial probability of trustworthiness "[W]here the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed." 5 *id.* § 1422.

5. "The leading notion in the doctrine . . . seems to have been that of withdrawing from the operation of the hearsay rule declarations of fact which were very near in time to that which they tended to prove, fill out, or illustrate,—being at the same time not narrative, but importing what was then present or but just gone by, and so was open, either immediately or in the indications of it, to the observation of the witness who testifies to the declaration, and who can be cross-examined as to these indications." Thayer, *Bedingfield's Case,—Declarations are Part of the Res Gestae*, 15 AM. L. REV. 71, 107 (1881), reprinted in LEGAL ESSAYS 207, 302 (1927).

6. WIGMORE, EVIDENCE § 1750 (3d ed. 1940). See also National Life & Accident Ins. Co. v. Follett, 168 Tenn. 647, 80 S.W.2d 92 (1935); Garrison v. State, 163 Tenn. 108, 40 S.W.2d 1009 (1931).

7. "The general rule is that the declarations must be substantially contemporaneous with the litigated transaction, and be the instinctive spontaneous utterances of the mind while under the active, immediate influences of the transaction; the circumstances precluding the idea that the utterances are the result of reflection or design to make false or self-serving declarations." State v. McDaniel, 68 S.C. 304, 47 S.E. 384, 386, 102 Am. St. Rep. 661 (1904).

8. See Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 236-37 (1922). See also Hart v. Atlantic Coast Line R.R., 144 N.C. 91, 56 S.E. 558 (1907); Marks v. I. M. Pearlstine & Sons, 203 S.C. 318, 26 S.E.2d 835, 838 (1943); State v. Long, 186 S.C. 439, 195 S.E. 624 (1938); Missouri Pac. Ry. and I. & G.N. Ry. v. Collier, 62 Tex. 318 (1884).

9. Houston Oxygen Co. v. Davis, 139 Tex. 1, 161 S.W.2d 474, 476, 140 A.L.R. 868 (1942).

A nor *B* could see what the other was observing, their testimony would not be admissible under a strict construction of Thayer's theory. But the courts have at times ignored the fact that the testifying witness could not observe the thing declared.[10] The testimony of a bystander who heard another call out a license number has been held admissible.[11]

Another pertinent species of contemporaneous declarations is that type of direct declaration[12] of a mental condition existing at the moment, where there are no surrounding circumstances that would lend credence to suspicion.[13] In the principal case, at the time the declarations were made, neither *A* nor *B* had a motive to deceive, but rather had a special motive to report accurately; nor did either have time to plan an incorrect statement. Setting aside the possibility of deceit it can be pointed out that the accuracy of the declarations would be assured by their contemporaneity. It thus appears that the declarations in question would not be to any great extent subject to the hearsay dangers of vocabulary, sincerity, memory and perception.[14]

Another pertinent phase of the case at hand revolves around the problem of establishing the accuracy of the electronic device by expert witness testimony.[15] The method involving expert witnesses is best illustrated for purposes of the present case by turning to other modern machines and systems employed in police work. The qualification of expert's opinion in the lie detector situation is highly controversial. The expert involved there needs to be highly proficient.[16] An expert in the field of ballistics is generally held to be one who is well qualified by benefit of both his experience and training.[17] These rules as to the ability prerequisite to qualify as an expert are brought to the fore in cases involving fingerprint classification.[18]

10. *See* Britton v. Washington Water Power Co., 59 Wash. 440, 110 Pac. 20, 22, 33 L.R.A. (N.S.) 109 (1910).

11. Chalmers v. Anthony, 8 N.J. Misc. 775, 151 Atl. 549 (Sup. Ct. 1930); Rathbun v. Brancatella, 93 N.J.L. 222. 107 Atl. 279 (1919).

12. See Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 233-36 (1922).

13. For situations in which the circumstances were not suspicious and the evidence was admitted, see Brannen v. Bouley, 272 Mass. 67, 172 N.E. 104 (1930); Elmer v. Fessenden, 151 Mass. 359, 24 N.E. 208 (1889); Swartz v. Kay, 89 W. Va. 641, 109 S.E. 822 (1921). See 6 WIGMORE, EVIDENCE § 1729(2) (3d ed. 1940).

14. For a discussion of hearsay dangers see Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948).

15. "A witness is an expert witness and is qualified to give expert testimony if the judge finds that to perceive, know or understand the matter concerning which the witness is to testify requires special knowledge, skill, experience or training, and that the witness has the requisite special knowledge, skill, experience or training." MODEL CODE OF EVIDENCE, Rule 402 (1942).

16. See Wicker, *The Polygraphic Truth Test and the Law of Evidence*, 22 TENN. L. REV. 711, 726-27 (1953).

17. See Note, 66 A.L.R. 373 (1929).

The problem involved in qualifying electronic speed detection devices can be solved by securing witnesses who are more than installers[19] and can testify in detail as to construction, operation and purpose of the machine.[20] In the future the necessity of establishing the accuracy of such devices by expert witnesses may be dispensed with by an act of the legislature or by gaining such recognition as to come within the purview of judicial notice.[21]

FEDERAL COURTS — STATE NONRESIDENT MOTORIST STATUTE — WAIVER OF FEDERAL VENUE PRIVILEGE

Plaintiff, an Illinois corporation, brought action against Indiana residents in the United States District Court for the Western District of Kentucky for damages caused by the collision of defendant's truck with plaintiff's railroad overpass in Kentucky. Defendant's motion to dismiss for improper venue was overruled on the ground that venue had been waived under the Kentucky nonresident motorist statute.[1] Judgment for plaintiff was affirmed by the Court of Appeals for the Sixth Circuit.[2] The Supreme Court granted certiorari. *Held*

18. See Leonard v. State, 18 Ala. App. 427, 93 So. 56, 57 (1922) (five years practical experience in such identification); Moon v. State, 22 Ariz. 418, 198 Pac. 288, 290-91, 16 A.L.R. 362 (1921); Hopkins v. State, 174 Ark. 391, 295 S.W. 361, 362 (1927) (witness identified members of jury by their fingerprints).

19. The court in the instant case felt that the trial court abused its discretion in not granting a motion for adjournment to secure experts. Instant case, 125 N.Y.S.2d at 183.

20. "[I]t was established by proof of high quality that the device used fulfilled the function for which it was designed and was mechanically sufficient at the time it was used in connection with appellant's apprehension." Carrier v. Commonwealth, 242 S.W.2d 633, 635 (Ky. 1951). "The State produced an expert who testified in detail regarding the construction, the operation and the purpose of the Speed Meter, its margin of error if properly functioning, and the ways and means of testing its accuracy." State v. Moffitt, 100 A.2d 778, 779 (Del. 1953).

21. "If the common law is to grow through adaptation to changing conditions by means of judicial decision, the device by which knowledge of the changed conditions becomes part of the court's working equipment is judicial notice." Morgan, *Judicial Notice*, 57 Harv. L. Rev. 269, 289 (1944).

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1. "Any nonresident operator or owner of any motor vehicle who accepts the privilege extended by the laws of this state to nonresidents to operate motor vehicles or have them operated within this state shall, by such acceptance and by the operation of such motor vehicle within this state, make the Secretary of State his agent for the service of process in any civil action instituted in the courts of this state against the operator or owner arising out of or by reason of any accident or collision or damage occurring within this state in which the motor vehicle is involved." Ky. Rev. Stat. Ann. § 188.020 (Baldwin 1943). For a collection of nonresident motorist statutes of other states, see 4 Vand. L. Rev. 698, 699 (1951).

2. 201 F.2d 582 (6th Cir. 1953).

(7-2),[3] reversed. The federal venue privilege[4] is not waived by the operation of a motor vehicle in a state which by statute designates an agent to accept service of process on nonresident motorists. *Olberding v. Illinois Central R.R.*, 346 U.S. 338, 74 Sup. Ct. 83 (1953).

Since the famous case of *Hess v. Pawloski*[5] there is no doubt of the constitutional validity of nonresident motorist statutes.[6] Nor is there any question that federal courts have jurisdiction in those cases[7] where the requirements of diversity and jurisdictional amount are satisfied. When both parties are nonresidents, however, and the action is brought in a federal court of the situs of the accident, the federal venue statute creates a serious problem.

Prior to the instant case, many lower federal courts had concluded that a nonresident motorist waived his federal venue privilege[8] by the voluntary act of driving on the state's highways. The motorist was presumed to have knowledge of the consequent designation of an agent to accept service of process.[9] These courts have found the distinction between express and implied appointment of an agent unsubstantial, particularly in view of *Kane v. New Jersey*,[10] which upheld a penal statute forbidding the use of the state's highways by nonresident motorists until formal appointment of a process agent was made. They also regard as unsubstantial the distinction between a corporate de-

3. Opinion by Mr. Justice Frankfurter; dissent by Mr. Justice Reed, with Mr. Justice Minton concurring.

4. "A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside." 28 U.S.C.A. § 1391(a) (1950). But it is a personal privilege which a party may assert or may waive at his election. It may be lost by failure to assert it seasonably, by formal submission in a cause or by submission through conduct. Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 60 Sup. Ct. 153, 84 L. Ed. 167 (1939).

5. 274 U.S. 352, 47 Sup. Ct. 632, 71 L. Ed. 1091 (1927).

6. 9 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW § 5913 (Perm. ed. 1941); GOODRICH, CONFLICT OF LAWS 200-04 (3d ed. 1949); 15-16 HUDDY, CYCLOPEDIA OF AUTOMOBILE LAW § 82 (9th ed. 1931); RESTATEMENT, CONFLICT OF LAWS § 84 (Supp. 1948); Notes, 138 A.L.R. 1464 (1942), 99 A.L.R. 130 (1935). The statute must provide a reasonable means of communicating the service of summons to the defendant, however, or it will be unconstitutional. Wuchter v. Pizzutti, 276 U.S. 13, 48 Sup. Ct. 259, 72 L. Ed. 446, 57 A.L.R. 1230 (1928). See RESTATEMENT, JUDGMENTS § 23, comment c (1942).

7. 28 U.S.C.A. § 1332 (1949).

8. Burke v. Greer, 114 F. Supp. 671 (M.D. Ga. 1953), 39 VA. L. REV. 985; Falter v. Southwest Wheel Co., 109 F. Supp. 556 (W.D. Pa. 1953), 38 CORNELL L.Q. 624, 28 NOTRE DAME LAW. 567; Archambeau v. Emerson, 108 F. Supp. 28 (W.D. Mich. 1952); Jacobson v. Schuman, 105 F. Supp. 483 (D. Vt. 1952); Garcia v. Frausto, 97 F. Supp. 583 (E.D. Mo. 1951); Kostamo v. Brorby, 95 F. Supp. 806 (D. Neb. 1951); Burnett v. Swenson, 95 F. Supp. 524 (W.D. Okla. 1951); Thurman v. Consolidated School Dist., 94 F. Supp. 616 (D. Kan. 1950); Urso v. Scales, 90 F. Supp. 653 (E.D. Pa. 1950); Morris v. Sun Oil Co., 88 F. Supp. 529 (D. Md. 1950); Blunda v. Craig, 74 F. Supp. 9 (E.D. Mo. 1947); Steele v. Dennis, 62 F. Supp. 73 (D. Mo. 1945); Krueger v. Hider, 48 F. Supp. 708 (E.D.S.C. 1943).

9. See Kostamo v. Brorby, 95 F. Supp. 806 (D. Neb. 1951), 4 ALA. L. REV. 127, 39 GEO. L.J. 648, 27 N.D.L. REV. 352.

10. 242 U.S. 160, 37 Sup. Ct. 30, 61 L. Ed 222 (1916).

fendant, doing business with a state, and an individual's act of driving through the state,[11] and rely upon *Knott Corp. v. Furman*[12] as authority for finding that consent to be sued in the courts of a state carries with it a consent to be sued in the federal courts within the state if the elements of federal jurisdiction are present. In that case a state statute provided that a corporation doing business within the state should be deemed to have appointed a process agent; the statutory appointment of an agent resulting from the doing of business was held to constitute a waiver of federal venue.

Extensive reasoning has been advanced to substantiate the holding that federal venue is not waived by mere operation of a motor vehicle in a state having a nonresident motorist statute.[13] There is no express consent to be sued in federal court, and the concept of implied consent is considered "fictive."[14] The true basis for state jurisdiction in these cases is not consent at all, but the doing of a dangerous act within the state.[15] Therefore, it is reasoned, consent is immaterial, and there is no waiver of federal venue. To hold otherwise would allow state legislation to modify or repeal a Congressional statute on the venue of federal courts.[16] Yet even under this theory a waiver may be found where, as in *Neirbo Co. v. Bethlehem Shipbuilding Corp.*,[17] there has been a formal express authorization of a process agent within the state. Decisions in accord with the instant case make a distinction between express and implied designation of an agent. One is a consensual act which will constitute a waiver; the other is a nonconsensual act from which no waiver will be found.

In saying that the defendant as a nonresident has a personal privilege which may not be lost by implied authorization of a process agent, the majority of the Court in the instant case would seem to be correct in stating that the nonresident motorist statute "has nothing whatever

11. *See* Urso v. Scales, 90 F. Supp. 653, 655 (E.D. Pa. 1950); Krueger v. Hider, 48 F. Supp. 708, 710 (E.D.S.C. 1943).
12. 163 F.2d 199 (4th Cir. 1947), *cert. denied*, 332 U.S. 809 (1947), 61 HARV. L. REV. 723, 33 VA. L. REV. 812, 51 W. VA. L.Q. 195 (1948).
13. McCoy v. Siler, 205 F.2d 498 (3d Cir. 1953), 3 BUFFALO L. REV. 148; Martin v. Fishbach Trucking Co., 183 F.2d 53 (1st Cir. 1950), 39 GEO. L.J. 143 (1950), 19 GEO. WASH. L. REV. 559 (1951), 13 GA. B.J. 491 (1951), 26 IND. L.J. 285 (1951), 36 IOWA L. REV. 705 (1951), 49 MICH. L. REV. 1072 (1951), 35 MINN. L. REV. 404 (1951), 24 SO. CALIF. L. REV. 498 (1951), 3 STAN. L. REV. 347 (1951), 36 VA. L. REV. 1102 (1950); Waters v. Plyborn, 93 F. Supp. 651 (E.D. Tenn. 1950), 4 VAND L. REV. 698 (1951), 39 ILL. B.J. 383 (1951), 29 TEXAS L. REV. 964 (1951).
14. Instant case, 346 U.S. at 341. See McCoy v. Siler, 205 F.2d 498, 499 (3d Cir. 1953); Scott, *Jurisdiction of Nonresident Motorists*, 39 HARV. L. REV. 563, 573 (1926).
15. See GOODRICH, CONFLICT OF LAWS 200-04 (3d ed. 1949); RESTATEMENT, JUDGMENTS § 23 (1942).
16. See McCoy v. Siler, 205 F.2d 498, 499 (3d Cir. 1953).
17. 308 U.S. 165, 60 Sup. Ct. 153, 84 L. Ed. 167 (1939), 19 CHI-KENT REV. 135 (1940), 53 HARV. L. REV. 660 (1940), 38 MICH. L. REV. 1047 (1940), 88 U. OF PA. L. REV. 485 (1940), 7 U. OF CHI. L. REV. 397 (1940), 49 YALE L.J. 724 (1940). See also 2 VAND. L. REV. 481 (1949).

to do with his rights under . . . 28 U.S.C.A. § 1391 (a)."[18] The distinction resorted to by the Court, however, between the two courses of conduct — express designation of a process agent in the *Neirbo* case and operation of a motor vehicle in the instant case — seems somewhat tenuous. In neither situation is there an express waiver of the federal privilege, merely a submission to suit in the courts of the state.[19]

Perhaps some policy considerations are involved. The practical value of laying venue at the situs of the accident in automobile negligence cases is apparent; the expense and inconvenience of taking depositions may reduce the efficiency of trial. While one of the purposes behind Section 1391 (a) was to save the defendant from inconvenience,[20] it does not seem that any undue advantage was intended. In strictly applying the venue statute the Court has left to Congress the question of whether nonresident motorists should continue to receive more favorable treatment than foreign corporations.[21]

FEDERAL JURISDICTION — DIVERSITY OF CITIZENSHIP — RETROACTIVE EFFECT OF AMENDMENTS TO PERFECT JURISDICTION

Plaintiff, a Texas resident, brought action in the state court against two foreign insurance companies and their Texas agent. The insurance companies removed the case to the federal court on the basis of diversity of citizenship, and plaintiff's motion to remand was overruled. The trial resulted in a verdict against the present defendant which then asserted a lack of federal jurisdiction. On certiorari, the Supreme Court held there was no diversity jurisdiction.[1] After allowing plaintiff to dismiss the agent and the other insurance company and to amend the pleadings, the district court held that prior to the amendment it had been wholly without jurisdiction and ordered a new trial.

18. Instant case, 346 U.S. at 341. See also Lied Motor Car Co. v. Maxey, 208 F.2d 672 (8th Cir. 1953) (follows the instant case).

19. In the *Neirbo* case the defendant had designated "William J. Brown as the person upon whom a summons may be served within the state of New York." Compare the form of the designation in the Kentucky nonresident motorist statute, note 1 *supra*. In the absence of independant information it seems quite unlikely that the defendant made a conscious waiver of federal venue.

20. *See* Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 168, 60 Sup. Ct. 153, 84 L. Ed. 167 (1939).

21. A corporation is now subject to suit in any judicial district in which it is doing business. 28 U.S.C.A. § 1391 (c) (1950).

1. Finn v. American Fire & Casualty Co., 341 U.S. 6, 71 Sup. Ct. 534, 95 L. Ed. 702 (1951), 40 Calif. L. Rev. 317 (1952), 46 Ill. L. Rev. 335 (1951), 35 Marq. L. Rev. 308 (1952), 49 Mich. L. Rev. 1236 (1951), 23 Miss. L.J. 150 (1952), 3 Syracuse L. Rev. 177 (1951), 30 Tex. L. Rev. 372 (1952), 20 U. of Cin. L. Rev. 522 (1951), 100 U. of Pa. L. Rev. 277 (1951). Because of the expense of a second trial the court was criticized for not ordering a direct appeal of jurisdiction before trial. 50 Mich. L. Rev. 475 (1952).

Plaintiff appealed contending that judgment should have been awarded on the original virdict. *Held,* reversed and remanded with instructions to enter judgment on the original verdict. Federal jurisdiction was retroactively perfected by the amended pleading, and the district court had discretion to order a new trial or to enter judgment on the original verdict. *Finn v. American Fire & Casualty Co.,* 207 F.2d 113 (5th Cir. 1953).

When a diversity case is filed in the federal court, the jurisdiction of the court can be later perfected by a dismissal of parties who are not indispensable.[2] In a situation like that in the instant case, either of two courses of action is within the discretion of a federal court. It may grant a new trial,[3] or it may award judgment on the original verdict in the absence of prejudice at the trial to the remaining defendant because of the presence of those parties subsequently dismissed.[4]

Awarding judgment on the original verdict is patently a logical inconsistency. The action of a court without jurisdiction to act is null and void.[5] Thus, in a case in the federal court based on diversity of citizenship jurisdiction, when after trial and verdict, it is determined that the federal court did not have jurisdiction because of a lack of the necessary diversity, the result of the trial is void. But when the court thereafter dismisses the parties who are not indispensable[6] and allows amendments to the pleadings,[7] its jurisdiction is thereby perfected retroactively to the filing of the complaint.[8] The purpose of the retroactive effect of amendments is to toll the statutes of limitation on the theory that "a party who is notified of litigation concerning a given transaction or occurrence is entitled to no more protection from statutes of limitation than one who is informed of the precise legal

2. Horn v. Lockhart, 17 Wall. 570, 21 L. Ed. 657 (1873); Mason v. Dullagham, 82 Fed. 689 (7th Cir. 1897); Weaver v. Marcus, 165 F.2d 862, 175 A.L.R. 1305 (4th Cir. 1948); O'Neal v. National Cylinder Gas Co., 103 F. Supp. 720 (N.D. Ill. 1952); States v. John F. Daly, Inc., 96 F. Supp. 479 (E.D. Pa. 1951); Kassner v. United States Pictures, 82 F. Supp. 633 (S.D.N.Y. 1948).

3. Dollar S.S. Lines, Inc. v. Merz, 68 F.2d 594 (9th Cir. 1934).

4. Alderman v. Elgin, J. & E. Ry., 125 F.2d 971 (7th Cir. 1942); International Ladies' Garment Workers' Union v. Donnelly Garment Co., 121 F.2d 561 (8th Cir. 1941); Levering and Garrigues Co. v. Morrin, 61 F.2d 115 (2d Cir.), *cert. granted,* 287 U.S. 590 (1932), *aff'd,* 289 U.S. 103 (1933). *Contra:* Dollar S.S. Lines, Inc. v. Merz, *supra* note 3.

5. Coleman Bros. Corp. v. City of Franklin, 58 F. Supp. 551 (D.N.H.), *aff'd and rev'd in part on other grounds,* 152 F.2d 527 (1st Cir. 1945), *cert. denied,* 328 U.S. 844 (1946); State *ex rel.* Callahan v. Hess, 348 Mo. 388, 153 S.W.2d 713 (1941); Corey v. Hardison, 236 N.C. 147, 72 S.E.2d 416 (1953); *Ex parte* Hart, 186 S.C. 125, 195 S.E. 253 (1938).

6. Parties who are not indispensable are denominated "formal" or "necessary" parties. DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE 214 (1928).

7. FED. R. CIV. P. 15.

8. Levering v. Garrigues Co. v. Morrin, 61 F.2d 115 (2d Cir.), *cert. granted,* 287 U.S. 590 (1932), *aff'd,* 289 U.S. 103 (1933); Interstate Refineries, Inc. v. Barry, 7 F.2d 548 (8th Cir. 1925); O'Neal v. National Cylinder Gas Co., 103 F. Supp. 720 (N.D. Ill. 1952); States v. John F. Daly, Inc., 96 F. Supp. 479 (E.D. Pa. 1951); Gate-Way, Inc. v Hillgren, 82 F. Supp. 546 (S.D. Cal. 1949), *aff'd,* 181 F.2d 1010 (9th Cir. 1950); 66 HARV. L. REV. 928 (1953).

description of the rights sought to be enforced."[9] Once the concept of the retroactive effect of amendments has been recognized, it follows that amendments to correct jurisdictional defects may be said to make jurisdiction retroactive to the time the case reaches the federal court.[10] Logically, that permits giving effect to a trial which theretofore had been a nullity.

The more expeditious method of settling the rights of the parties would be to grant judgment on the verdict if no prejudice is found because of the presence at the trial of those subsequently dismissed. If prejudice is found, a new trial would be mandatory. Though this might appear to be a bandying of the concept of jurisdiction, practical considerations of promptness and dispatch in the administration of justice come to the fore. The doctrine of retroactive jurisdiction comes, finally, to be a device employable for the reduction of the workload of federal courts in these cases by making possible the elimination of a second trial and a saving of time, effort and expense.

The unusual facts of the instant case are of interest in that the plaintiff had not sought federal jurisdiction and had opposed it until the trial was had and a favorable verdict delivered. Thereupon, the defendant insurance company against whom the verdict was found reversed its position and questioned federal jurisdiction and was not estopped from so doing. After a final determination that the federal court had no jurisdiction in the case, the plaintiff was free to determine whether to seek to cure the jurisdictional defect or to have the case remanded to the state court. A second trial was in fact conducted with a less favorable verdict for plaintiff. The court of appeals, finding that the second trial was ordered because of a mistake of law, exercised the discretion of the district court and determined that the second trial was unnecessary and awarded judgment on the verdict reached at the first trial.

The inference from the instant case may be that entry of judgment on the verdict at the first trial in the absence of prejudice to the remaining defendant is required. That such is the inference of the case is the thesis of the dissenting opinion.[11] No case can be found which supports such a doctrine which, in effect, would carry the concept of retroactive jurisdiction to its logical conclusion. The better view, and the holding of the court in the instant case, *inter alia,* is to leave the decision to grant a new trial or to enter judgment on the original verdict to the sound discretion of the trial court.[12] Review can be had for an abuse of discretion or if the decision were based on a mistake

9. 3 MOORE, FEDERAL PRACTICE 851 (2d ed. 1948).
10. FED. R. CIV. P. 15(c); see note 8 *supra.*
11. Instant case, 207 F.2d at 117.
12. See note 4 *supra.*

of law.[13] This would afford maximum protection to the parties. In any event, an order for a new trial would not be entirely outside the bounds of reason. A new trial would obviously be necessary in a state court if federal jurisdiction could not be attained.

INCOME TAXATION — DEDUCTIONS — PERIODIC ALIMONY PAYMENTS

Taxpayer's divorce settlement provided, *inter alia,* that he would pay his wife $300 per month for 5 years, but if she remarried or either party died, payments were to cease. The Tax Court held that since the sum total was mathematically calculable, these payments were not periodic within the meaning of Internal Revenue Code Section 22 (k).[1] *Held,* reversed. The contingency of the wife's remarriage or the death of either party rendered taxpayer's promise incapable of mathematical calculation and the payments were, therefore, periodic within the meaning of Section 22 (k). *Estate of Smith v. Commissioner of Internal Revenue,* 208 F.2d 349 (3d Cir. 1953).

Congress provided in 1942[2] that periodic alimony payments received by a divorced wife are to be included in her gross income[3] and deducted from the husband's gross income[4] if paid pursuant to a divorce decree[5] or under a written instrument incident thereto. If, however, the husband is ordered to pay a specified amount to the wife in installments, the installments are not periodic payments unless they are to continue for more than ten years.[6] The ten year requirement was designed to prevent the husband from obtaining deductions for lump

13. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 Sup. Ct. 811, 84 L. Ed. 1129 (1940); Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 53 Sup. Ct. 252, 77 L. Ed. 439 (1933); 3 AM. JUR., *Appeal and Error* § 981 (1936).

1. The husband cannot deduct alimony payments unless they are included in wife's gross income under § 22(k). INT. REV. CODE § 23(u). But see Seligmann v. Commissioner, 207 F.2d 489 (7th Cir. 1953) (wife need not include alimony payments although husband allowed a deduction).

2. Prior to 1942 alimony payments were generally taxed to the husband. Douglas v. Willcuts, 296 U.S. 1, 56 Sup. Ct. 59, 80 L. Ed. 3 (1935); Gould v. Gould, 245 U.S. 151, 38 Sup. Ct. 53, 62 L. Ed. 211 (1917).

3. "In the case of a wife who is divorced or legally separated from her husband under a decree of divorce . . . periodic payments . . . received subsequent to such decree in discharge of . . . a legal obligation which . . . is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce . . . shall be includible in the gross income of such wife. . . ." INT. REV. CODE § 22(k).

4. INT. REV. CODE § 23(u).

5. On January 18, 1954 the House Ways and Means Committee voted to give the same treatment to periodic payments made by the husbands to a wife under a separation agreement where they are living apart and have not yet filed a joint return for the year even though they are not yet separated under a court decree. 4 P-H 1954 FED. TAX SERV. ¶ 66,520 (1954).

6. INT. REV. CODE § 22(k).

sum settlements through the obvious device of spreading the lump sum over a relatively short term of years.

In the leading case of *J. B. Steinel*[7] the taxpayer agreed to pay his wife $100 monthly until $9,500 had been paid, but if she died or remarried before the full amount had been paid, payments were to cease. It was contended by the taxpayer that the obligation to pay a specific amount must be unconditional before the payments were installments on a lump sum, rather than periodic indefinite payments. While conceding the taxpayer had a plausible argument, the Tax Court held the payments nondeductible, since there was nothing in the statute itself or in its legislative history requiring the obligation to pay a specified sum to be unconditional. It was but a small step for the Tax Court to next hold the payments were installments and not periodic when the lump sum was not specified in the decree, but only a mathematical calculation was needed to determine it.[8] It was to no avail that one ingenious taxpayer persuaded the divorce court to enter a *nunc pro tunc* order altering the divorce decree to read that the payments were periodic and not installments. The Tax Court held that since the payments were otherwise within the *Steinel* rule, they were taxable to the husband and the *nunc pro tunc* order had no effect in determining his tax liability.[9] But if the amount of alimony is contingent upon the husband's earnings, the sum total is not mathematically calculable and the payments are periodic within the meaning of Section 22(k).[10]

It was in the face of this background that the *Baker*[11] case went contra to all prior Tax Court decisions and held that the obligation to pay a specified amount must be unconditional, else the payments are periodic and deductible by the husband. The Commissioner in the instant case relied upon the previous Tax Court decisions and could only argue that the *Baker* case was decided incorrectly. In rejecting the Commissioner's contentions and holding the contingencies of remarriage and death sufficient to render agreements to pay a specified amount incapable of mathematical calculation, the instant case opens up hitherto unobtainable deductions for the alimony-paying husband. But when it is remembered that Congress denied deduction of installment payments in order to deter the bunching of alimony payments in a short period of time it seems the instant case follows the letter and not the spirit of Section 22(k).

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7. 10 T.C. 409 (1948); see Lemuel Alexander Carmichael, 14 T.C. 1356 (1950).
8. Estate of Orsatti, 12 T.C. 188 (1949); Benjamin Davidson, P-H 1952 TC MEM. DEC. ¶ 52,326; Edwin T. Heath, P-H 1952 TC MEM. DEC. ¶ 52,141; Horace M. Read, P-H 1951 TC MEM. DEC. ¶ 51,124; Harold M. Fleming, 14 T.C. 1308 (1950).
9. Frank R. Casey, 12 T.C. 224 (1949).
10. John H. Lee, 10 T.C. 834 (1948); Roland Keith Young, 10 T.C. 724 (1948).
11. 205 F.2d 369 (2d Cir. 1953).

LABOR LAW—PRE-EMPTIVE EFFECT OF TAFT-HARTLEY—SCOPE OF STATE JURISDICTION

Respondent union was enjoined by a Pennsylvania equity court from peacefully picketing petitioners' premises for the purpose of coercing petitioners to compel their employees to join the union. The state supreme court reversed on the ground that the NLRB had jurisdiction of petitioners' trucking business and that the federal remedy was exclusive. On certiorari to United States Supreme Court, *held*, affirmed. The union activity here in question fell within an area pre-empted by Congressional legislation; the Federal Board's primary jurisdiction to vindicate the public right supersedes the power of the state to enforce any private right involved. *Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776 (AFL)*, 74 Sup. Ct. 161 (U.S. 1953).

The narrow holding in the *Garner* case represents another positive limitation on the power of the states to adjudicate controversies arising out of labor relations affecting interstate commerce.[1] The decision that the state courts may not enjoin peaceful picketing which amounts to an unfair labor practice under the Taft-Hartley Act had been anticipated by commentators in the field of Labor Law.[2] The decision is in harmony with the trend of modern Supreme Court decisions widening the field within which Congressional legislation is held to have precluded state regulation.[3] Indeed, the result reached in the *Garner* case was presaged by numerous lower court decisions to the

1. See generally on federal-state jurisdiction. Cox and Seidman, *Federalism and Labor Relations*, 64 HARV. L. REV. 211 (1950); Feldblum, *Jurisdictional "Tidelands" in Labor Relations*, 3 LABOR L.J. 114 (1952); Forrester, *The Jurisdiction of Federal Courts in Labor Disputes*, 13 LAW & CONTEMP. PROB. 114 (1948); Hall, *The Taft-Hartley Act v. State Reulation*, 1 J. PUBLIC LAW 97 (1952); Handler, *The Impact of the Labor-Management Relations Act of 1947 upon the Jurisdiction of State Courts over Union Activities*, 26 TEMP. L.Q. 111 (1952); Hornbein, *The Extent to which Taft-Hartley Has Superseded State Labor Laws*, 28 DICTA 47 (1051); Meyers, *The Taft-Hartley Act and States' Rights*, 3 LABOR L.J. 325 (1952); Petro, *State Jurisdiction to Regulate Violent Picketing*, 3 LABOR L.J. 3 (1952); Petro, *State Jurisdiction to Control Recognition Picketing*, 2 LABOR L.J. 883 (1951); Petro, *Participation by the States in the Enforcement and Development of National Labor Policy*, 28 NOTRE DAME LAW. 1 (1952); Ratner, *Problems of Federal-State Jurisdiction in Labor Relations*, 3 LAB. L.J. 750 (1952); Rice, *A Paradox of Our National Labor Law*, 34 MARQ. L. REV. 233 (1951); Rose, *The Labor Management Relations Act and the States' Power to Grant Relief*, 39 VA. L. REV. 765 (1953); Smith, *The Taft-Hartley Act and State Jurisdiction over Labor Relations*, 46 MICH. L. REV. 593 (1948); Teller, *The Taft-Hartley Act and Government by Injunction*, 1 LABOR L.J. 40 (1949); Wallace, *The Contract Cause of Action under the Taft-Hartley Act*, 16 BROOKLYN L. REV. 1 (1949); Note, 27 N.Y.U.L.Q. REV. 468 (1952); Comment, 20 U. OF CHI. L. REV. 109 (1952).

2. Hall, *The Taft-Hartley Act v. State Regulation*, 1 J. PUBLIC LAW 97 (1952); Ratner, *Problems of Federal-State Jurisdiction in Labor Relations*, 3 LABOR L.J. 750 (1952); Handler, *The Impact of the Labor-Management Relations Act of 1947 upon the Jurisdiction of State Courts over Union Activities*, 26 TEMP. L.Q. 111, 121-22 (1952).

3. Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v.

same effect.[4] It is well-settled that when Congress, in the exercise of its commerce power, embarks upon a comprehensive program of regulation with the intention that such regulation shall be exclusive, the states may not through their legislative or judicial departments, act "in coincidence with, as complementary to, or as in opposition to" such federal regulation.[5] The instant case is an authoritative determination that, as to ordinary peaceful picketing which falls within the union unfair labor practice provisions of the Taft-Hartley Act, Congress has so acted.[6]

Although there is no Supreme Court decision squarely in point,[7] dicta in recent decisions sustain the power of the states to protect the person and property rights of their citizens from unlawful conduct, notwithstanding that such conduct is the subject of federal legislation.[8] Likewise, in the instant case, the Court carefully dis-

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Wisconsin Emp. Rel. Bd., 340 U.S. 383, 71 Sup. Ct. 359, 95 L. Ed. 364 (1951); International Union. UAW, CIO v. O'Brien, 339 U.S. 454, 70 Sup. Ct. 781, 94 L. Ed. 978 (1950); Plankington Packing Co. v. Wisconsin Emp. Rel. Bd., 338 U.S. 953, 70 Sup. Ct. 491, 94 L. Ed. 588 (1950); La Crosse Telephone Corp. v. Wisconsin Emp. Rel. Bd., 336 U.S. 18, 69 Sup. Ct. 379, 93 L. Ed. 463 (1949); Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 67 Sup. Ct. 1026, 91 L. Ed. 1234 (1947); Hill v. Florida *ex rel.* Watson, 325 U.S. 538, 65 Sup. Ct. 1373, 89 L. Ed. 1782 (1945). *But cf.* International Union UAW, AFL v. Wisconsin Emp. Rel. Bd., 336 U.S. 245, 69 Sup. Ct. 516, 93 L. Ed. 651 (1949); Algoma Plywood & Veneer Co. v. Wisconsin Emp. Rel. Bd., 336 U.S. 301, 69 Sup. Ct. 584, 93 L. Ed. 691 (1949); Allen-Bradley Local No. 1111 v. Wisconsin Emp. Rel. Bd., 315 U.S. 740, 62 Sup. Ct. 820, 86 L. Ed. 1154 (1942).

4. Capital Service, Inc. v. NLRB, 204 F.2d 848 (9th Cir. 1953), *cert. granted,* 346 U.S. 936 (1954); Gerry of California v. Superior Court, 32 Cal.2d 119, 194 P.2d 689 (1948); McNish v. American Brass Co., 139 Conn. 44, 89 A.2d 566 (1952), *cert. denied,* 344 U.S. 913 (1953); Norris Grain Co. v. Nordaas, 232 Minn. 91, 46 N.W.2d 94 (1950); Costaro v. Simons, 302 N.Y. 318, 98 N.E.2d 454 (1951); Alonzo v. Industrial Container Corp., 193 Misc. 1008, 85 N.Y.S.2d 835 (Sup. Ct. 1949). *But cf.* Sommer v. Metal Trades Council, 40 Cal.2d 392, 254 P.2d 559 (1953); Goodwins, Inc. v. Hagedorn, 303 N.Y. 673, 102 N.E.2d 833 (1951).

5. Missouri Pacific R.R. v. Porter, 273 U.S. 341, 345-46, 47 Sup. Ct. 383, 71 L. Ed. 672 (1927); Charleston & Western Carolina Ry. v. Varnville Furn. Co., 237 U.S. 597, 604, 35 Sup. Ct. 715, 59 L. Ed. 1137 (1915); Houston v. Moore, 5 Wheat. 1, 20-23, 5 L. Ed. 19 (U.S. 1820).

6. Montgomery Bldg. & Const. Trades Council v. Ledbetter Erection Co., 33 LRRM 2659 (Ala. 1954).

7. In Allen-Bradley Local No. 1111 v. Wisconsin Emp. Rel. Bd., 315 U.S. 740, 62 Sup. Ct. 820, 86 L. Ed. 1154 (1942), a state court injunction against mass picketing and threatened violence was upheld, but the significance of the holding is weakened perhaps by the fact that it was rendered prior to Taft-Hartley when coercion and restraint of non-strikers was not a union unfair labor practice. Handler, *The Impact of the Labor-Management Relations Act of 1947 upon the Jurisdiction of State Courts over Union Activities*, 26 TEMP. L.Q. 111, 112 (1952); Cox and Seidman, *Federalism and Labor Relations*, 64 HARV. L. REV. 211, 231 (1950).

8. NLRB v. International Rice Milling Co., 341 U.S. 665, 71 Sup. Ct. 961, 95 L. Ed. 1277 (1951); International Union, UAW, AFL v. Wisconsin Emp. Rel. Bd., 336 U.S. 245, 69 Sup. Ct. 516, 93 L. Ed. 651 (1949). *Cf.* NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 59 Sup. Ct. 490, 83 L. Ed. 627 (1939) (sit-down strike in context of violence held to be outside the protection of the rights conferred by Section 7 of Wagner Act).

tinguished the *Garner* facts from those presenting actual or threatened breaches of the peace, interferences with the use of public thoroughfares or picketing of private domiciles.[9] State courts have exhibited no hesitation in assuming jurisdiction over mass picketing and picketline videnc.[10] Although such conduct is frequently an 8(b)(1) violation,[11] state jurisdiction can be justified on the ground that the Taft-Hartley Act represents Congressional regulation only in the field of labor relations. Although states are thereby precluded from applying their labor law in controversies affecting interstate commerce, their power to preserve the peace remains intact even though it be invoked in connection with a labor dispute.[12] The principle is firmly entrenched in our constitutional law that Congressional intent to suspend the "police power" of the states is not to be lightly inferred.[13] This principle is significant in the labor field in light of the fact that under the present Federal law union activity is unlawful only as it is engaged in for one of the *purposes* enumerated in Section 8(b) of Taft-Tartley.[14] It would seem that state controls directed as confirming union activity within the standards of conduct required of all citizens rather than at outlawing the objectives of such activity, encounter no problem of federal pre-emption.[15] Any argument for invalidating state action curtailing violence in a given situation must allege as its basis a conflict between such action and the broad policy statements found in Sections 1 and 7 of the Federal Act, a conflict seldom likely to exist.

9. Instant case, 74 Sup. Ct. at 164.

10. Russell v. International Union, UAW, 258 Ala. 615, 64 So.2d 384 (1953); Oil Workers International Union v. Superior Court, Contra Costa County, 103 Cal. App.2d 512, 230 P.2d 71 (1951); Williams v. Cedartown Textiles, Inc., 208 Ga. 659, 68 S.E.2d 705 (1952); Art Steel Co. v. Velazquez, 109 N.Y.S.2d 788 (Sup. Ct. 1952); Erwin Mills, Inc. v. Textile Workers Union, 234 N.C. 321, 67 S.E.2d 372 (1951); Wortex Mills, Inc. v. Textile Workers Union, 369 Pa. 359, 85 A.2d 851 (1952); United Construction Workers v. Laburnum Construction Corp., 194 Va. 872, 75 S.E.2d 694 (1953), *cert. granted*, 346 U.S. 936 (1954). See also Irving Subway Grating Co. v. Silverman, 117 F. Supp. 671 (E.D.N.Y. 1953); Cortlandt Co. Dep't Store, Inc. v. Cohen, 127 N.Y.S.2d 261 (N.Y. Sup. Ct. 1953).

11. "(b) It shall be an unfair labor practice for a labor organization or its agents: (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157. . . ." 61 STAT. 141 (1947), 29 U.S.C.A. § 158(b)(1)(A) (Supp. 1953).

12. Ratner, *Problems of Federal-State Jurisdiction in Labor Relations*, 3 LABOR L.J. 750, 761-62 (1952).

13. Maurer v. Hamilton, 309 U.S. 598, 614, 60 Sup. Ct. 726, 84 L. Ed. 969 (1940); Kelly v. Washington, 302 U.S. 1, 9-12, 58 Sup. Ct. 87, 82 L. Ed. 3 (1937); Napier v. Atlantic Coast Line R. Co., 272 U.S. 605, 611, 47 Sup. Ct. 207, 71 L. Ed. 432 (1926); Savage v. Jones, 225 U.S. 501, 533, 32 Sup. Ct. 715, 56 L. Ed. 1182 (1912); Reid v. Colorado, 187 U.S. 137, 148, 23 Sup. Ct. 92, 47 L. Ed. 108 (1902).

14. 61 STAT. 141, 29 U.S.C.A. § 158(b) (1947).

15. Cox and Seidman, *Federalism and Labor Relations*, 64 HARV. L. REV. 211, 236 (1950); Petro, *State Jurisdiction to Regulate Violent Picketing*, 3 LABOR L.J. 3 (1952); Ratner, *Problems of Federal-State Jurisdiction in Labor Relations*, 3 LABOR L.J. 750, 761-62 (1952).

State regulation of peaceful concerted activity outside the unfair practice provisions of the Federal Act, on the other hand, seems considerably less justifiable. The Court in the instant case intimates that the same result would have obtained had the conduct not been an 8(b) violation, on the theory that picketing uncondemned by LMRA is Congressionally sanctioned activity beyond the scope of permissible state regulation.[16] It is this aspect of the *Garner* decision which promises to be most provocative of future litigation. In the *Briggs-Stratton* case a state court injunction forbidding recurrent brief work stoppages unattended by intimidatory activity was affirmed on the ground that "This conduct is governable by the State or it is entirely ungoverned."[17] This result was reached in the face of several determinations by the Federal Board that such conduct was "concerted activity" and within the protection of the Act.[18] Unlike the *Allen-Bradley*[19] decision, the *Briggs-Stratton* case was decided after Taft-Hartley when the Court could have relied upon the union unfair practice sections as indicative of pre-emption.[20] Instead, the Court, utilizing the objectives-means dichotomy reminiscent of the common law, spoke in terms of conflict and determined that such was impossible because Congress had not purported to regulate the "methods" of concerted activity.[21] It is significant that the Court found the *type* of activity involved in *Briggs-Stratton* to be without the ambit of protection afforded by the Federal Act, thus apparently preserving to the states a limited power to prohibit unduly coercive and arbitrary methods of economic pressure, even though such conduct falls short of actual or threatened violence.[22]

Perhaps the most litigious question raised by the *Garner* decision relates to the power of the states to condemn concerted activity directed toward the accomplishment of purposes not outlawed by

16. Instant case, 74 Sup. Ct. at 170-71.
17. International Union UAW, AFL v. Wisconsin Emp. Rel. Bd., 336 U.S. 245, 254, 69 Sup. Ct. 516, 93 L. Ed. 651 (1949).
18. Mount Clemens Pottery Co., 46 N.L.R.B. 714 (1943); Cudahy Packing Co., 29 N.L.R.B. 837 (1941); Armour & Co., 25 N.L.R.B. 989 (1940); The Good Coal Co., 12 N.L.R.B. 136 (1939); Harnischfeger Corp., 9 N.L.R.B. 676 (1938); American Manufacturing Concern, 7 N.L.R.B. 753 (1938). The court distinguished these cases on the ground that they were isolated work stoppages.
19. Allen-Bradley Local No. 1111 v. Wisconsin Emp. Rel. Bd., 315 U.S. 740, 62 Sup. Ct. 820, 86 L. Ed. 1154 (1942).
20. Prior to LMRA the sanctions of federal legislation were directed only against employer unfair labor practices. Handler, *The Impact of the Labor-Management Relations Act of 1947 upon the Jurisdiction of State Courts over Union Activities*, 26 TEMP. L.Q. 111, 112 (1952).
21. International Union, UAW, AFL v. Wisconsin Emp. Rel. Bd., 336 U.S. 245, 253-54, 69 Sup. Ct. 516, 93 L. Ed. 651 (1949). This proposition is challenged by commentators on the ground that violence directed toward non-strikers or replacements is a recognized 8(b)(1)(A) violation. Petro, *State Jurisdiction to Regulate Violent Picketing*, 3 LABOR L.J. 3 (1952).
22. *Cf.* NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 59 Sup. Ct. 490, 83 L. Ed. 627 (1939) (sit-down strike held to be unprotected activity).

Taft-Hartley. The typical example is that of peaceful picketing engaged in for the purpose of forcing recognition where there is no certified union. The states have tenaciously asserted power to prohibit such organizational activity.[23] The sweeping language of the *Garner* decision,[24] however, would seem to preclude state regulation in this area. The rationale runs thus: Section 7 of the NLRA confers upon employees the right to engage in concerted activities for the purpose of collective bargaining.[25] Congress has itself qualified that right by expressly spelling out, in the Taft-Hartley Act, certain union unfair labor practices.[26] Congressional silence as to union conduct not remediable under Taft-Hartley amounts to an expression that the rights guaranteed in Section 7 shall not be further limited.[27] The Supreme Court has repeatedly invalidated state action which "impairs, dilutes, qualifies . . . [or] subtracts from . . . the rights guaranteed by the federal Act."[28] Thus, states seeking to enlarge the scope of illegal objectives of union pressure will apparently be precluded even though such conduct might be neither condemned nor expressly protected by the literal language of the federal legislation.

In summary, notwithstanding a reaffirmation in the instant case that the Taft-Hartley Act "leaves much to the states"[29] it appears that the only areas of labor relations affecting interstate commerce in which the states may confidently act are those involving violence or such unduly coercive conduct as may be brought within the nebulous bounds of the *Briggs-Stratton* doctrine.

At the root of the federal-state jurisdictional problem are the conflicting interests of (1) the need for uniform substantive and procedural regulation in labor relations affecting interstate commerce and, ultimately, the economic and social welfare of the nation; and (2) the desire of the individual employer or group of employees for the speedy adjudication of grievances in local common-law and

23. Sommer v. Metal Trades Council, 40 Cal.2d 392, 254 P.2d 559 (1953); Goodwins v. Hagedorn, 303 N.Y. 673, 102 N.E.2d 833 (1951); Hayes Freight Lines, Inc. v. Teamsters Union, 33 LRRM 2671 (Tenn. Ct. App. 1954).

24. "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." (Instant case, 74 Sup. Ct. at 171.

25. 49 STAT. 452 (1935), as amended, 61 STAT. 140 (1947), 29 U.S.C.A. § 157 (Supp. 1953).

26. 61 STAT. 141 (1947), 29 U.S.C.A. § 158(b) (Supp. 1953).

27. Houston v. Moore, 5 Wheat. 1, 20-23, 5 L. Ed. 19 (U.S. 1820).

28. Allen-Bradley Local No. 1111 v. Wisconsin Emp. Rel. Bd., 315 U.S. 740, 62 Sup. Ct. 820, 86 L. Ed. 1154 (1942). See also Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Wisconsin Emp. Rel. Bd., 340 U.S. 383, 71 Sup. Ct. 359, 95 L. Ed. 364 (1951); International Union, UAW, CIO v. O'Brien, 339 U.S. 454, 70 Sup. Ct. 781, 94 L. Ed. 978 (1950); Plankington Packing Co. v. Wisconsin Emp. Rel. Bd., 338 U.S. 953, 70 Sup. Ct. 491, 94 L. Ed. 588 (1950); Hill v. Florida *ex rel.* Watson, 325 U.S. 538, 65 Sup. Ct. 1373, 89 L. Ed. 1782 (1945).

29. Instant case, 74 Sup. Ct. at 164.

equity courts. In preserving to the states the power to protect their citizens from labor violence, but subjecting non-belligerent labor controversies to the slower administrative process, the relevant Supreme Court decisions seem to have effected an allocation of jurisdiction calculated to assure the fullest possible protection to both interests involved.

TORTS — DOG BITE — OWNER'S SCIENTER

Plaintiff brought an action to recover for injuries sustained by her infant daughter, attacked without provocation by defendant's dog. Several witnesses testified that defendant had warned them of the dog's tendency to fight with another dog, thereby creating a risk that children would be bitten. On appeal from a judgment for plaintiff, *held* (3-2), affirmed. The owner had knowledge of the dog's propensity to attack children without provocation. *Perkins v. Drury*, 57 N.M. 269, 258 P.2d 379 (1953).

In general a dog owner, in the absence of negligence, is not answerable for its acts of viciousness unless he can be shown to have scienter, that is knowledge, actual or constructive, of the dog's vicious propensities.[1] Where scienter is present, however, liability is generally said to be imposed without fault[2] although there is authority to the contrary.[3]

The instant case concerns the particular propensities of the dog upon knowledge of which liability will be based in the event of a particular type of injury. The authorities seem to agree that there must be a showing of scienter of the dog's tendency to do the particular kind of act which caused the injury.[4] At common law, when the injury was an attack on a human being, knowledge of a previous attack was apparently necessary; hence arose the oft-repeated addage "every dog is entitled to one bite."[5] This is no longer the law;[6] today the theory

1. 3 C.J.S., *Animals* § 145 (1936); 2 AM. JUR., *Animals* §§ 48, 49 (1936); PROSSER, TORTS 438 (1941).

2. Where the animal possesses known vicious propensities there is generally thought to be negligence in keeping the animal at all, hence strict liability is imposed. 3 C.J.S., *Animals* § 146 (1936); 2 AM. JUR., *Animals* §§ 48, 49 (1936); PROSSER, TORTS 438 (1941).

3. Some cases take the view that negligence in failure to confine the animal properly is requisite to the cause of action, but that a rebuttable presumption to this effect is raised where injury follows the keeping of the animal of known viciousness. 3 C.J.S., *Animals* § 146 (1936).

For an excellent review of the theory of the owner's liability under various situations see McNeely, *A Footnote on Dangerous Animals*, 37 MICH. L. REV. 1181 (1939). It is there suggested that where the injury occurs on the premises of the owner, as in the instant case, negligence is essential. *Id.* at 1191.

4. 3 C.J.S., *Animals* § 148d(1) (1936); 2 AM. JUR., *Animals* §§ 48, 83 (1936); PROSSER, TORTS 439 (1941); RESTATEMENT, TORTS § 509, comment *g* (1938).

5. The statement is attributed to "the dog has the privilege of one worry," in Burton v. Moorhead, 8 Sess. Cas., 4th Ser., 892 (1881).

6. 3 C.J.S., *Animals* § 148d(1) (1936); 2 AM. JUR., *Animals* § 48 (1936); PROSSER, TORTS 440 (1941).

is that only such knowledge of the dog's propensities to do a particular injury is required as would put a reasonable man on guard.[7] Whatever the reasonable man test may mean in a given situation, it has been uniformly held that knowledge of the dog's propensity to fight with dogs or other animals is not sufficient to show knowledge of a propensity to attack human beings.[8]

Although the plaintiff in the instant case is, by virtue of defendant's failure to put on evidence, entitled to every reasonable inference,[9] the only knowledge in evidence was of the dog's propensity to fight with another dog. The inference of knowledge of a propensity to attack children from knowledge of a propensity to fight another dog seems to be a clear departure from previous authorities. It represents a trend in the common law toward making the owner an insurer of the dog's malfeasance, the desirability of which is evidenced by the increasing amount of legislation to this effect.[10]

WORKMEN'S COMPENSATION — ACCIDENT ARISING OUT OF EMPLOYMENT — PRE-EXISTING HEART DISEASE

On the morning of a working day an employee with a pre-existing heart condition suffered an attack while in bed at his home. Notwithstanding the attack, the employee reported to his employer's place of business where, engaged in his usual duties, he carried a twelve to twenty-two pound skid some thirty feet when he collapsed

7. 3 C.J.S., *Animals* § 148d(1) (1936); 2 Am. Jur., *Animals* § 48 (1936); Prosser, Torts 440 (1941).

8. Hensley v. McBride, 112 Cal. App. 50, 296 Pac. 316 (1931); Keightlinger v. Egan, 65 Ill. 235 (1872); Norris v. Warner, 59 Ill. App. 300 (1894); Fowler v. Helck, 278 Ky. 361, 128 S.W.2d 564 (1939); Twigg v. Ryland, 62 Md. 380 (1884).

But knowledge that the dog will attack other dogs is sufficient where the dog bites a person holding another dog. Hartman v. Aschaffenburg, 12 So.2d 282 (La. App. 1943).

9. Perkins v. Drury, 57 N.M. 269, 258 P.2d 379, 382 (1953).

10. See Smith and Prosser, Cases and Materials on Torts 674 (1952). The statutes provide, in varying terms, that the owners or keepers of dogs shall be liable for all injuries caused by the dog to another's person or property unless the person who sustained the injury was committing a trespass or a tort. *E.g.*, N.H. Rev. Laws c. 180, § 23 (1942); Mass. Ann. Laws c. 140, § 155 (1950). Some states explicitly negative the necessity of proving viciousness and scienter in order to recover damages. *E.g.*, Wis. Stat. § 174.02 (1951). In any case, such statutes are usually construed as creating a strict liability of owners for the injuries caused by their dogs. Ingeneri v. Kluza, 129 Conn. 208, 27 A.2d 124, 142 A.L.R. 434 (1942); Canavan v. George, 292 Mass. 245, 198 N.E. 270 (1935). A minority, however, hold that it merely eliminates the necessity of proving scienter when the dog commits a vicious act and that the owner still will not be liable for nonvicious or innocent acts causing injury. Koetting v. Conroy, 223 Wis. 550, 270 N.W. 625 (1936). *Contra:* Bevin v. Griffiths, 44 Ohio App. 94, 184 N.E. 401 (1932).

and died. Expert medical testimony established the cause of death as coronary thrombosis, and rendered the opinion that any activity, short of complete relaxation, would have aggravated his diseased condition to the point of death. The lower court affirmed the award of the Industrial Commission holding the death to be a compensable injury under the statute.[1] *Held,* reversed. The death of the employee did not result from injury by accident arising out of and in the course of employment. *Price v. B. F. Shaw Co.,* 77 S.E.2d 491 (S.C. 1953).

Workmen's compensation statutes were enacted to protect an employee by bestowing benefits[2] upon him when he is the victim of an "injury by accident arising out of his employment." Today the "by accident" requirement is generally held to be satisfied either if the cause was of an accidental character, as normally understood, or if the injurious effect was the unexpected result of the employee's performance of his routine duties.[3] Injuries also are now generally held compensable under the "arising out of employment" requirement[4] if the employment aggravated or accelerated a disease producing the death or disability. At least one state has seen fit to allow compensation only for the percentage of disability directly attributable to the accident.[5]

Much litigation has understandably arisen concerning the interpretation of the words "injury by accident" where the victim has succumbed to a heart attack. The battle has been pitched largely upon either the unusual exertion doctrine[6] or the unexpected result doctrine.[7] The minority unusual exertion doctrine is founded upon the presumption that death from a pre-existing heart disease results from that disease; the burden of proof is on the claimant[8] to show an un-

1. "*'Injury'* and *'personal injury'* shall mean only that injury by accident arising out of and in the course of the employment and shall not include a disease in any form, except when it results naturally and unavoidably from the accident. . . ." S.C. Code § 72-74 (1952). Statutes with similar language are found in many states. TENN. CODE ANN. § 6852(d) (Williams 1934); VA. CODE §65-7 (1950).

2. 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION § 1 (1952); 1 SCHNEIDER, WORKMEN'S COMPENSATION LAW § 1 (1941).

3. 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION § 38 (1952).

4. *Id.* § 12.20.

5. CAL. LAROR CODE § 4663 (1937).

6. Cleary Bros. Const. Co. v. Nobles, 156 Fla. 408, 23 So.2d 525 (1945); Rue v. Kentucky Stone Co., 313 Ky. 568, 232 S.W.2d 843 (1950); Rose v. City of Fairmont, 140 Neb. 550, 300 N.W. 574 (1941); Lohndorf v. Peper Bros. Paint Co., 134 N.J.L. 156, 46 A.2d 439 (Sup. Ct. 1946); *cf.* Franklin v. United States Bronze Powder Works, 6 N.J. Super. 320, 71 A.2d 226 (App. Div. 1950).

7. McGregor & Pickett v. Arrington, 206 Ark. 921, 175 S.W.2d 210 (1943); Lumbermen's Mut. Cas. Co. v. Kitchens, 81 Ga. App. 470, 59 S.E.2d 270 (1950); Gulf Oil Corp. v. Rouse, 202 Okla. 395, 214 P.2d 251 (1951). "The basic and indispensable ingredient of 'accident' is unexpectedness." 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION § 37.20 (1952).

8. Lohndorff v. Peper Bros. Paint Co., 134 N.J.L. 156, 46 A.2d 439 (Sup. Ct. 1946); See 6 RUTGERS L. REV. 629 (1952). "This [coronary thrombosis] is a condition that ordinarily ensues from coronary schlerosis or other morbid state. At all events, the presumption is that it was due solely to disease; and

usual strain in order to rebut the presumption. The English courts[9] and the majority of the American courts[10] have tended to interpret the statutes liberally so as to make compensable the injuries arising out of an employee's usual duties, once these are established to be the precipitating element[11] of th collapse. One court [12] has held heart failure to be accidental even where the exertion was lighter than usual but actually precipitated the attack.

The South Carolina court in the instant case[13] clearly adopted the minority rule by holding a disclosure of unusual exertion necessary to recovery for an accidental injury to an employee afflicted with a pre-existing heart disease. The dissenting opinion[14] properly stated the majority view that there is a compensable accident when conditions of employment accelerate the disabling or fatal condition which results. The courts of New Jersey[15] and New York[16] had been the

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the onus is on claimant to establish that the asserted accident was at least a contributory cause without which the occlusion would not have occurred." Schlegel v. H. Baron & Co., 130 N.J.L. 611, 34 A.2d 132 (Sup. Ct. 1943).

9. Fenton v. Thorley & Co., Ltd., [1903] A.C. 443. "If in any employment to which the Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer is . . . liable to pay compensation in accordance with the provisions of the Act. . . ." 34 HALSBURY, LAWS OF ENGLAND § 1136 (2d ed., Hailsham, 1940). See 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION § 38.10 n.12 (1952).

10. Willis v. Aiken County, 203 S.C. 96, 26 S.E.2d 313 (1943) (an officer with pre-existing heart disease died as a result of accident by overexertion in raiding a still which was performance within the scope of his employment). Griggs v. Lumbermen's Mut. Cas. Co., 61 Ga. App. 448, 6 S.E.2d 180, 182 (1939) (claimant with pre-existing high blood pressure and a diseased condition of small arteries lifted a sack of cement; he recovered for a paralysis of his left arm resulting from a ruptured blood vessel). "The 'by accident' requirement is now deemed satisfied in most jurisdictions either if the cause was of an accidental character or if the effect was the unexpected result of routine performance of the claimant's duties. Accordingly, if the strain of claimant's usual exertions causes collapse from heart weakness, back weakness, hernia and the like, the injury is held accidental. A very substantial minority of jurisdictions require a showing that the exertion was in some way unusual, or make other reservations, but this line of decision causes difficulty because of the constant necessity of drawing distinctions between usual and unusual strains." 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION § 38 (1952).

11. McGregor & Pickett v. Arlington, 206 Ark. 921, 175 S.W.2d 210 (1943); Maryland Cas. Co. v. Dixon, 83 Ga. App. 172, 63 S.E.2d 272 (1951); Gulf Oil Corp. v. Rouse, 202 Okla. 395, 214 P.2d 251 (1950); Willis v. Aiken County, 203 S.C. 96, 26 S.E.2d 313 (1943); *cf.* Patterson Transfer Co. v. Lewis, 260 S.W.2d 182 (Tenn. 1953). *Contra:* Rue v. Kentucky Stone Co., 232 S.W.2d 843 (Ky. 1950); State *ex rel.* Hussman-Ligonier Co. v. Hughes, 348 Mo. 319, 153 S.W.2d 40 (1940). *Cf.* Lohndorff v. Peper Bros. Paint Co., 134 N.J.L. 156, 46 A.2d 439 (Sup. Ct. 1946).

12. Lumbermen's Mut. Cas Co. v. Kitchens, 81 Ga. App. 470, 59 S.E.2d 270 (1950).

13. Instant case, 77 S.E.2d at 496.

14. *Id.* at 497.

15. "The net result amounts to this: New York, beginning with an emphatic requirement of unusual and even catastrophic cause, has, by a gradual diminution of the 'unusualness' of the unusual cause required, reached a point where, in effect, any heart attack contributed to by the employment seems to be held accidental. New Jersey . . . continues to fill the reports with finely balanced distinctions on what exertions are usual and what unusual in heart cases." 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION § 38.64 (1952).

16. *Ibid.*

outstanding leaders in the minority position of adhering to the antiquated unusual exertion doctrine. It is significant that New York has essentially abandoned the unusual exertion test[17] and New Jersey is beginning to retreat from its position.[18]

The humane spirit implicit in workmen's compensation statutes does not justify an extension of the statutes beyond their scope, but it appears that the position taken by the majority of courts is desirable in that it keeps within the primary objectives of the statutes, which are "to improve the economic status of the worker; to obviate the uncertainties, delay, expense, and hardship attendant upon the enforcement of common-law remedies. . . ."[19] Being remedial in nature the statutes in general have properly received liberal construction of their terms to achieve the enumerated objectives. Technical considerations of fortuitousness and cause have not been allowed to defeat claims of employees in substantially similar situations. Unfortunately, the South Carolina Supreme Court missed an excellent opportunity to place that state among those following the unexpected result rule which appears to be in keeping with the statutory objectives of workmen's compensation legislation.[20]

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17. Broderick v. Liebmann Breweries, Inc. 277 App. Div. 422 100 N.Y.S.2d 837 (3d Dep't 1950). For a complete collection of cases that have developed New York's present position and a discussion thereof see 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION § 38.64(a) (1952).

18. Carpenter v. Calco Chemical Division of American Cynamid Co., 4 N.J. Super. 53, 66 A.2d 177 (App. Div. 1949). *Contra:* Schroeder v. Arthur Sales Co. 5 N.J. Super. 287, 68 A.2d 878 (App. Div. 1949). See 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION § 38.64(b) (1952).

19. 58 AM. JUR., *Workmen's Compensation* § 2 (1948).

20. See note 7 *supra.*