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Recent Cases

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RECENT CASES

CONSTITUTIONAL LAW—RACIAL RESTRICTIVE COVENANTS —ALLOWANCE OF DAMAGES FOR BREACH

Plaintiff and other property owners in the same block entered into a written covenant that no owner, his heirs or assigns should sell, lease or give away any property in the block to any person of the Negro or African race. The defendant owners conveyed to a financially irresponsible person who conveyed to Negroes. Plaintiffs allege a conspiracy to impair the value of their property and ask that the sale be cancelled and damages to the extent of $10,000.00 be awarded. The trial court sustained general demurrers to the petition and dismissed the action. *Held,* reversed. Although the trial court was correct in refusing to nullify the transfers, it should have allowed a trial to determine plaintiffs' damages because of defendants' breach of the covenant. *Correll v. Earley,* 237 P.2d 1017 (Okla. 1951).

Since the *Civil Rights Cases*[1] it has become well established that the Fourteenth Amendment is a prohibition on state action of every kind which denies to any citizen the equal protection of the laws.[2] However, it was recognized that the Amendment was no barrier to action by private individuals.[3] For nearly three-quarters of a century the majority view of the federal and state courts has been to allow the enforcement of covenants between individual land owners restricting the use, occupancy and sale of property to minority groups.[4] Thus, only state and municipal legislation permitting segregation was objectionable as violating the Fourteenth Amendment.[5]

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1. 109 U.S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835 (1883).

2. United States v. Harris, 106 U.S. 629, 639, 1 Sup. Ct. 601, 27 L. Ed. 290 (1882); *Ex parte* Virginia, 100 U.S. 339, 25 L. Ed. 676 (1879); Virginia v. Rives, 100 U.S. 313, 25 L. Ed. 667 (1879). See Crooks, *The Racial Covenant Cases,* 37 GEO. L.J. 514 (1949).

3. Civil Rights Cases, 109 U.S. 3, 11, 3 Sup. Ct. 18, 27 L. Ed. 835 (1883).

4. *E.g.,* Chandler v. Zeigler, 88 Colo. 5, 291 Pac. 822 (1930); Lee v. Hansbury, 372 Ill. 369, 24 N.E.2d 37 (1939); United Cooperative Realty Co. v. Hawkins, 269 Ky. 563, 108 S.W.2d 507 (1937); Swain v. Maxwell, 355 Mo. 448, 196 S.W.2d 780 (1946). *Contra:* Gandolfo v. Hartman, 49 Fed. 181 (C.C.S.D. Cal. 1892). See Baker, *Restrictive Covenant Cases Reviewed,* 3 S.C.L.Q. 351 (1950).

5. *E.g.,* City of Richmond v. Deans, 281 U.S. 704, 50 Sup. Ct. 407, 74 L. Ed. 1128 (1930); Harmon v. Tyler, 273 U.S. 668, 47 Sup. Ct. 471, 71 L. Ed. 831 (1927); Buchanan v. Warley, 245 U.S. 60, 38 Sup. Ct. 16, 62 L. Ed. 149 (1917); Glover v. Atlanta, 148 Ga. 285, 96 S.E. 562 (1918); Note, 3 A.L.R.2d 474 (1949).

In 1948 the restrictive covenant cases[6] were decided, and resulted in a repudiation of most of the views previously expressed by the Court. In the historic case of Shelley v. Kraemer[7] the Supreme Court held that the enforcement of racial restrictive covenants by state courts in the form of injunctive relief was unconstitutional as state action. The court recognized the validity of the agreement as between the individual parties but rendered it unenforceable.[8] The question of enforcement of such a covenant by an allowance of damages for the breach thereof was not before the Court. Consequently there has been some uncertainty since this decision as to its effect on the right to maintain an action for damages.

There have been only a few decisions since the *Shelley* case in which the question has been raised,[9] and their inconsistencies indicate that the matter has not been clarified. In *Roberts v. Curtis*[10] the court gave a broad interpretation of the *Shelley* case. The view was that "although the actions involved . . . were suits for injunctions, the ruling is broad enough to cover actions for damages as well."[11] It was decided that "judicial assistance" of any kind for the enforcement of racial restrictive covenants was prohibited by the *Shelley* case. In *Weiss v. Leaon*[12] the Missouri Supreme Court construed the *Shelley* case to have a limited effect. Although the court refused to grant injunctive relief, it did allow enforcement of the covenants by an action for damages. The court reasoned that though one remedy, specific performance, is ruled out because of constitutional reasons, that need not necessarily affect the remedy by way of damages unless it is also unconstitutional under the circumstances.[13]

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6. Shelley v. Kraemer, 334 U.S. 1, 68 Sup. Ct. 836, 92 L. Ed. 1161, 3 A.L.R.2d 441, 2 VAND. L. REV. 119 (1948); Hurd v. Hodge, 334 U.S. 24, 68 Sup. Ct. 847, 92 L. Ed. 1187 (1948). These decisions probably attracted as much public attention and interest as any in recent years. See Ming, *The Restrictive Covenant Cases,* 16 U. OF CHI. L. REV. 203 (1949).

7. 334 U.S. 1, 68 Sup. Ct. 836, 92 L. Ed. 1161, 3 A.L.R.2d 441 (1948).

8. It has been suggested that this decision raises the question of whether or not the enforcement of all private acts of discrimination is forbidden by the Fourteenth Amendment since they ultimately depend upon state sanction. Hyman, *Segregation And The Fourteenth Amendment,* 4 VAND. L. REV. 555, 565 (1951). "In holding that a covenant is valid and yet unenforceable, the court overlooked the case of *Van Hoffman v. City of Quincy* (4 Wallace 535), [18 L. Ed. 403 (1866)] holding that a right without a remedy is as if it were not; that the inability to enforce a contract leaves nothing but an abstract right of no practical value and renders the protection of the Constitution a shadow and a delusion." Askew, *Restrictive Covenant Cases,* 12 GA. B.J. 277, 283 (1948).

9. Roberts v. Curtis, 93 F. Supp. 604 (D.D.C. 1950), 3 BAYLOR L. REV. 584, 13 GA. B.J. 372, 2 SYRACUSE L. REV. 367 (1951); Weiss v. Leaon, 359 Mo. 1054, 225 S.W.2d 127 (1949), 30 B.U.L. REV. 273, 18 GEO. WASH. L. REV. 417, 63 HARV. L. REV. 1062, 21 TENN. L. REV. 141 (1950).

10. 93 F. Supp. 604 (D.D.C. 1950).

11. *Ibid.*

12. 359 Mo. 1054, 225 S.W.2d 127 (1949).

13. This reasoning appears to be subject to debate in that the *Shelley* case does not object to the manner of enforcement, but to enforcement *per se.*

The instant case follows the view adopted by *Weiss v. Leaon.* The court reasoned that since the *Shelley* case did not declare restrictive covenants invalid, an owner who conveyed to a Negro purchaser acted at his peril by subjecting himself to a suit for damages for breach of a valid contract between himself and other lot owners.[14] The court recognized that the *Shelley* case precluded it from rendering "judicial enforcement" in the form of an injunction, but it saw no constitutional inhibition against utilizing the judicial machinery for the assessment and collection of damages. It has been suggested that the distinction between these two forms of coercion is too slight to justify different conclusions when two types of relief are sought separately.[15] The threat of a suit for damages would probably be a sufficient deterrent to prevent most land owners from selling or leasing their property in violation of restrictive covenants. Thus, if damages are allowed, the covenants may be enforced by indirect means.[16] It should be noticed, however, that the instant case was reversed and remanded not to determine the question of damages for breach of the contract, but to determine damages for the alleged conspiracy. The defendant sought to evade liability on the contract by first conveying to a financially irresponsible white person, who was to convey to Negroes. The court held that such conduct amounted to a conspiracy to violate a valid and binding contract.[17]

The underlying question appears to be whether or not enforcement by allowing damages is "state action" within the purview of the Fourteenth Amendment.[18] Ultimately it will take a decision of the United States Supreme Court to resolve the conflict on this question. As to how the Supreme Court will handle the problem one can only speculate. A comment on the *Shelley* case four years ago in this *Review* discussed various legal devices which might be considered in an effort to attain the result previously accomplished by racial covenants and concluded that "it is

14. Another question raised by the instant case is whether in fact any monetary damage was actually caused by the sale of property to a Negro. Plaintiffs alleged that their property was reduced in value by $10,000 because of the presence of Negroes, but it is questionable whether such a claim could be sustained in a court of law.

15. Hyman, *Segregation And The Fourteenth Amendment,* 4 VAND. L. REV. 555, 568 (1951).

16. See 63 HARV. L. REV. 1062 (1950). In 18 GEO. WASH. L. REV. 417, 418 (1950), it is said that "The Missouri Court [Weiss v. Leaon] is seeking to do with its left arm what the Supreme Court has forbidden it to do with its right."

17. The court, by finding liability in tort, appears to have adopted an effective means of preventing parties to such a contract from escaping liability by conveying to insolvent third parties.

18. For cases defining state action see Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 680, 50 Sup. Ct. 451, 74 L. Ed. 1107 (1930) (legislative, executive or administrative acts); Twining v. New Jersey, 211 U.S. 78, 90, 29 Sup. Ct. 14, 53 L. Ed. 97 (1908) (judicial acts); Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 233-235, 17 Sup. Ct. 581, 41 L. Ed. 979 (1897) (all the instrumentalities of the state—legislative, executive and judicial).

reasonable to assume that court enforcement of any device adopting a similar policy of racial exclusion will not be upheld".[19] Developments since that time have given no occasion to alter that conclusion. It seems likely that the Supreme Court will not approve the distinction drawn in the instant case, although there is basis for making a distinction if the Court is so inclined.

CORPORATIONS—PARENT AND SUBSIDIARY—SUBSIDIARY AS INSTRUMENTALITY OF PARENT WHEN USED TO CARRY ON UNFAIR TRADE PRACTICES

General Motors Acceptance Corporation was engaged in the business of buying conditional sales contracts from automobile dealers "with recourse," which meant the dealer had to make good to GMAC any losses sustained if the buyer failed to make payment. Nonrecourse companies were established, thus causing keen competition among the finance companies for the dealers' business. In order to combat these companies, GMAC from time to time remitted to the dealers certain sums known as "dealer participation." The legislature passed a statute delegating power to the Banking Commission to regulate these practices. The Banking Commission promulgated rules defining "dealer participation" to include any amount collected from any retail purchaser as a finance or insurance charge which shall come to or be retained by a dealer. The rules also set out minimum and maximum amounts allowed for "dealer participation," and declared exceeding these limits to be an unfair trade practice. The Motors Insurance Corporation (MIC) was incorporated as a wholly owned subsidiary of GMAC and wrote the insurance required by GMAC on all vehicles sold under conditional sales contracts. MIC appointed the dealers as its agents and paid them a commission on each premium. The Commission included these insurance commissions received from MIC in its computation of the "dealer participation" chargeable to GMAC. GMAC brought an action for a declaratory judgment on the validity of the rule of the Banking Commission. *Held,* the rule is valid. The Motors Insurance Corporation and the General Motors Acceptance Corporation are in substance only separate names for a single entity. *General Motors Acceptance Corporation v. Commissioner of Banks,* 258 Wis. 56, 45 N.W.2d 83 (1950).

19. 2 VAND. L. REV. 119, 123 (1948).

There is a great deal of confusion in the law as to the legal responsibility of parent companies for their subsidiaries.[1] Generally a parent and its subsidiaries are, without more, considered as separate and distinct entities with each being held responsible only for its own acts and obligations.[2] But if the subsidiary is a mere department or subdivision of a unified economic enterprise, there may be no compulsion to give the subsidiary recognition as a separate concern for all purposes. Thus, convenience or fairness toward a particular claimant may indicate that liability should be imposed on the parent.[3]

In formulating a basis for predicating liability the courts have variously used the "agency,"[4] "identity,"[5] or "instrumentality"[6] theories. All of these,

1. "The whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor." Berkey v. Third Avenue Ry., 244 N.Y. 84, 155 N.E. 58 (1926). See 6A FLETCHER, CYC. CORP. § 2821 (Perm. ed., Jones, 1950).

2. STEVENS, CORPORATIONS § 17 (2d ed. 1949); Ballentine, *Separate Entity of Parent and Subsidiary Corporations,* 60 AM. L. REV. 19 (1926).

3. Consolidated Rock Products Co. v. Du Bois, 312 U.S. 510, 61 Sup. Ct. 675, 85 L. Ed. 982 (1941); Taylor v. Standard Gas & Eelectric Co., 306 U.S. 307, 59 Sup. Ct. 543, 83 L. Ed. 669 (1939); Industrial Research Corporation v. General Motors Corporation, 29 F.2d 623 (N.D. Ohio 1928); United States v. United Shoe Machinery Co., 234 Fed. 127 (E.D. Mo. 1916); United States v. Milwaukee Refrigerator Transit Co., 142 Fed. 247 (C.C.E.D. Wis. 1905); People v. Michigan Bell Telephone Co., 246 Mich. 198, 224 N.W. 438 (1929).

4. The use of the term "agent" seems unfortunate as it may tend to confuse; an express agency is not meant in this article. As to actual agency, express or implied, as basis, see Pacific Can Co. v. Hewes, 95 F.2d 42 (9th Cir. 1938). For "agency" as used in the context here, see New York Trust Co. v. Carpenter, 250 Fed. 668 (6th Cir. 1918).

5. In the "identity" theory the separate corporate entity of the subsidiary is disregarded and the parent and subsidiary are regarded as one. This theory is exemplified in United States v. Lehigh Valley R.R. Co., 220 U.S. 257, 31 Sup. Ct. 387, 55 L. Ed. 458 (1911), and also in Minifie v. Rowley, 187 Cal. 481, 202 Pac. 673 (1921). Other terms variously used by the courts which connote the same meaning are: "adjunct," "branch," "dummy," "buffer," "tool," "creature," "mouthpiece," "alias," "device," "corporate double," "business conduit" and "alter ego."

6. As to the instrumentality doctrine see Taylor v. Standard Gas & Electric Co., 306 U.S. 307, 59 Sup. Ct. 543, 83 L. Ed. 669 (1939); Fish v. East, 114 F.2d 177 (10th Cir. 1940); Douglas and Shanks, *Insulation from Liability Through Subsidiary Corporations,* 39 YALE L.J. 193 (1929). In Fish v. East, *supra,* at 191, the court said: "The determination as to whether a subsidiary is an instrumentality is primarily a question of fact and degree. The following determinative circumstances are recognized: (1) The parent corporation owns all or majority of the capital stock of the subsidiary. (2) The parent and subsidiary corporations have common directors or officers. (3) The parent corporation finances the subsidiary. (4) The parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation. (5) The subsidiary has grossly inadequate capital. (6) The parent corporation pays the salaries or expenses or losses of the subsidiary. (7) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation. (8) In the papers of the parent corporation, and in the statements of its officers, 'the subsidiary' is referred to as such as a department or division. (9) The directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take direction from the parent corporation. (10) The formal legal requirements of the subsidiary as a separate and independent corporation are not observed."

however, have essentially the same meaning: under the circumstances the parent corporation so dominates and controls the subsidiary that the acts or obligations of the latter will be chargeable to the parent.[7] Evidentiary factors considered by the courts are: (1) underfinancing of the subsidiary;[8] (2) separate or joint accounts;[9] (3) joint officers;[10] (4) common directors;[11] (5) the parent's treating the assets of the subsidiary as its own;[12] (6) direct control by the officers of the parent;[13] (7) intervention of directors of the parent with the directors of the subsidiary;[14] and (8) any general intermingling of management or confusion of the affairs of the parent with the subsidiary corporation.[15] The courts will also usually look to see if the subsidiary is being used by the parent to perpetrate a fraud, to evade a statute, or to do some illegal or unjust act.[16] Generally no one of the above factors by itself is sufficient evidence to declare the subsidiary an instrumentality of the parent, but this does not mean that a court would always require more than one to reach an equitable result. For example, ownership by the parent of a majority or even all of the stock of the subsidiary and the existence of common officers and directors have frequently

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7. Madden v. Mac Sim Bar Paper Co., 103 F.2d 974 (6th Cir. 1939), *cert. denied*, 308 U.S. 556 (1939); Universal Oil Products Co. v. Derby Oil & Refining Corp., 19 F. Supp. 821 (D.N.J. 1937); Lowendahl v. Baltimore & O.R.R., 247 App. Div. 144, 287 N.Y. Supp. 62 (1st Dep't), *aff'd*, 272 N.Y. 360, 6 N.E.2d 56 (1936).

8. Luckenbach S.S. Co. v. W.R. Grace & Co., 267 Fed. 676 (4th Cir. 1920); Wallace v. Tulsa Yellow Cab Taxi & Baggage Co., 178 Okla. 15, 61 P.2d 645 (1936).

9. Joseph R. Foard Co. v. Maryland, 219 Fed. 827 (4th Cir. 1914); *In re* Muncie Pulp Co., 139 Fed. 546 (2d Cir. 1905); see *In re* Watertown Paper Co., 169 Fed. 252 (2d Cir. 1909).

10. Taylor v. Standard Gas & Electric Co., 306 U.S. 307, 59 Sup. Ct. 543, 83 L. Ed. 669 (1939); Fish v. East, 114 F.2d 177 (10th Cir. 1940); Henry v. Dolley, 99 F.2d 94 (10th Cir. 1938); *In re* Burntside Lodge, Inc., 7 F. Supp. 785 (D. Minn. 1934).

11. Cases cited note 8 *supra*. Also see Jenkins Petroleum Process Co. v. Western Oil Corp., 21 F. Supp. 550 (D. Del. 1937).

12. Edward Finch Co. v. Robie, 12 F.2d 360 (8th Cir. 1926); Ross v. Pennsylvania R.R., 106 N.J.L. 536, 148 Atl. 741 (1930); *accord*, Wenban Estate, Inc. v. Hewlett, 193 Cal. 675, 227 Pac. 723 (1924).

13. Costan v. Manila Electric Co., 24 F.2d 383 (2d Cir. 1928); The Willem Van Driel, Sr., 252 Fed. 35 (4th Cir. 1918).

14. Fish v. East, 114 F.2d 177 (10th Cir. 1940); *see* Trustees System Co. of Pennsylvania v. Payne, 65 F.2d 103, 105 (3d Cir. 1933).

15. Costan v. Manila Electric Co., 24 F.2d 383 (2d Cir. 1928); Westinghouse Electric Manufacturing Co. v. Radio-Craft Co., 291 Fed. 169 (D. N.J. 1923); *accord*, Keokuk Electric Ry. & Power Co. v. Weismann, 146 Iowa 679, 126 N.W. 60 (1910). See also BALLENTINE, CORPORATIONS §§ 133-37 (1946); Notes, 24 CALIF. L. REV. 447 (1936), 26 IOWA L. REV. 350 (1941).

16. United States v. Lehigh Valley R.R., 220 U.S. 257, 31 Sup. Ct. 387, 55 L. Ed. 458 (1911); J.J. McCaskill Co. v. United States, 216 U.S. 504, 30 Sup. Ct. 386, 54 L. Ed. 590 (1910); Palmolive Co. v. Conway, 43 F.2d 226 (W.D. Wis. 1930); United States v. Milwaukee Refrigerator Transit Co., 142 Fed. 247 (E.D. Wis. 1905). *Contra:* Federal Gravel Co. v. Detroit & M. Ry., 248 Mich. 49, 226 N.W. 677 (1929); Beale v. Kappa Alpha Order, 192 Va. 382, 64 S.E.2d 789 (1951).

been held insufficient for the subsidiary to be considered as an instrumentality of the parent.[17]

In the instant case the court considered the following factors as tending to show that the MIC was an instrumentality of GMAC: (1) the MIC was a wholly-owned subsidiary; (2) MIC did not write complete automobile coverage but only the insurance required by GMAC on vehicles sold on its time sales plan; (3) no separate application for insurance was made to MIC; (4) GMAC advertised the insurance as part of a "one package plan"; and (5) in the various documents used in the GMAC plan the insurance charges were referred to as "territorial charges."[18] The fact that MIC is a wholly-owned subsidiary is not sufficient, in and of itself, to indicate unity with GMAC, but along with the other four factors enumerated it clearly shows that MIC's business was obtained from GMAC and run in its behalf. This case presents another situation in which a court, having considered the evidentiary factors of close association, has declared the subsidiary corporation to be a mere instrumentality of a parent corporation. In the light of the complexities of our corporate enterprise system and of the possibilities of injury to innocent parties which result from its abuses, this extension of the instrumentality rule seems wise and expedient as applied to cases involving unfair trade practices.

EVIDENCE—ADMISSIBILITY OF CONFESSION—SCOPE OF REVIEW OF COURT-MARTIAL BY COURT OF MILITARY APPEALS

Petitioner, a private in the United States Army, was suspected of having stolen money in various camp barracks. At 4:00 a.m. he was pulled from his bed, forced to lie on the floor and, with a bayonet at his back, was questioned by an acting platoon sergeant and a military policeman. While he was being questioned in this manner, a search of his clothing disclosed a large sum of money. Petitioner then confessed that he had stolen the money. He was then confined and eleven hours later was again questioned by agents of the Criminal Investigation Department and was warned that any statements he made could be used against him. Petitioner thereupon made a written statement admitting his guilt. Four days later, after the same warning, he made a similar confession. Upon these later confessions he was found guilty

17. Shepherd v. Banking & Trust Co. of Jonesboro, 79 F.2d 767 (6th Cir. 1935); Kingston Dry Dock Co. v. Lauke Champlain Transportation Co., 31 F.2d 265 (2d Cir. 1929); Majestic Co. v. Orpheum Circuit, Inc., 21 F.2d 720 (8th Cir. 1927); Owl Fumigating Corp. v. California Cyanide Co., 24 F.2d 718 (D. Del. 1928), *aff'd*, 30 F.2d 812 (3d Cir. 1929).

18. 45 N.W. 2d at 87.

by a general court-martial and the conviction was affirmed by the Board of Review. Defendant appealed to the United States Court of Military Appeals. *Held,* affirmed. The court is bound by the finding of the court-martial that the subsequent confessions were not rendered inadmissible by the prior coerced confession. *United States v. Monge,* U.S. Ct. Mil. App. No. 9, Jan. 8, 1952 (Mim. release).

As between state and federal courts several distinctions exist in the rules of evidence and procedure applicable to the admission of confessions. The most important involves the scope of appellate review in each system. In the state courts final determination of admissibility is largely a matter for the trial court to decide.[1] Whether that decision is by judge, jury, or both,[2] the state appellate courts will rarely review it unless it reveals a gross abuse of discretion or is clearly contrary to the evidence.[3] On the other hand, the scope of review by the United States Supreme Court of procedure in lower federal courts is entirely different. The Supreme Court, despite the lower court's conclusion, reserves the right to inquire independently into the facts to determine the producing cause of a confession.[4] In determining whether the reception of a confession by a lower federal court or by a state court violated due process, the Supreme Court will accept the findings of the lower court as to what actually occurred in securing the confession; that is, the objective facts, but it will draw its own conclusion as to whether these facts

1. See 3 WIGMORE, EVIDENCE §§ 861-62 (3d ed. 1940); McCormick, *Some Problems and Developments in the Admissibility of Confessions,* 24 TEXAS L. REV. 239 (1946). For an interesting look into the historical aspects of involuntary confessions in general, see Morgan, *The Privilege Against Self-Incrimination,* 34 MINN. L. REV. 1 (1949).

2. In a number of jurisdictions, including federal courts, the jury is instructed to disregard evidence of a confession unless they find the requisite preliminary facts, and in a very few there is an indication that the judge need not pass upon the preliminary questions if the evidence is conflicting. United States v. Carignan, 342 U.S. 36, 45, 72 Sup. Ct. 97, 102 (1951); Commonwealth v. Polian, 288 Mass. 494, 498, 193 N.E. 68, 70 (1934); State v. Custer, 336 Mo. 514, 80 S.W.2d 176 (1935); Yarbrough v. State, 95 Tex. Cr. 36, 252 S.W. 1069 (1923).

3. See Galas v. State, 32 Ariz. 195, 256 Pac. 1053 (1927); State v. DiBattista, 110 Conn. 549, 148 Atl. 664 (1930); State v. Dowell, 47 Idaho 457, 276 Pac. 39 (1929); People v. Barber, 342 Ill. 185, 173 N.E. 798 (1930); Mack v. State, 203 Ind. 355, 180 N.E. 279 (1932); People v. Mummiani, 258 N.Y. 394, 180 N.E. 94 (1932); Commonwealth v. Farrell, 319 Pa. 441, 181 Atl. 217 (1935); 3 WIGMORE, EVIDENCE § 861 (3d ed. 1940). Since Brown v. Mississippi, 297 U.S. 278, 56 Sup. Ct. 461, 80 L. Ed. 682 (1936) there is a possibility of review by the United States Supreme Court where the accused claims a violation of due process under the Fourteenth Amendment. The trend is toward a close surveillance in these cases. See Harris v. South Carolina, 338 U.S. 68, 69 Sup. Ct. 1354, 93 L. Ed. 1815 (1949); Turner v. Pennsylvania, 338 U.S. 62, 69 Sup. Ct. 1352, 93 L. Ed. 1810 (1949); Watts v. Indiana, 338 U.S. 49, 69 Sup. Ct. 1347, 93 L. Ed. 1801 (1949); Haley v. Ohio, 332 U.S. 596, 68 Sup. Ct. 302, 92 L. Ed. 224 (1948); Chambers v. Florida, 309 U.S. 227, 60 Sup. Ct. 472, 84 L. Ed. 716 (1940).

4. See, *e.g.,* Watts v. Indiana, 338 U.S. 49, 69 Sup. Ct. 1347, 93 L. Ed. 1801 (1949); Ashcraft v. Tennessee, 322 U.S. 143, 64 Sup. Ct. 921, 88 L. Ed. 1192 (1944); Lyons v. Oklahoma, 322 U.S. 596, 64 Sup. Ct. 1208, 88 L. Ed. 1481 (1944) (notice especially Justice Murphy's dissent at 605); Lisenba v. California, 314 U.S. 219, 62 Sup. Ct. 280, 86 L. Ed. 166 (1941); Chambers v. Florida, 309 U.S. 227, 60 Sup. Ct. 492, 84 L. Ed. 716 (1940).

amount to such coercion as to make reception of the evidence a violation of due process. The decisions reveal that a confession must be completely free from coercion to be admissible in a federal court under the Fifth Amendment or in a state court under the Fourteenth Amendment.[5]

Another definite distinction between the state and federal rules stems from the question of whether or not facts discovered as the result of a coerced confession may be put in evidence. Generally in the state courts such evidence has been held admissible.[6] Whether the reception of such evidence as a basis for conviction in a state court would violate the Fourteenth Amendment has not been decided, however. In the federal courts the decisions on coerced confessions and cases under the Fourth Amendment and the Federal Communications Act tend to show that facts discovered as the result of a coerced confession cannot be put in evidence.[7] Although the Supreme Court's policy in this respect has been criticized as control of police activity by indirect action,[8] it is reasonable to assume that its effect will be to cut down the use of "third degree" methods by excluding evidence obtained as a result of such practices.

Under the Uniform Code of Military Justice, the Court of Military Appeals serves the same function in the administration of military justice as the United States Supreme Court serves in the civilian system.[9] The rules of evidence and procedure applied by the military courts are those used in the federal district courts except where changed by presidential regulation.[10] Consequently, the decisions of the Supreme Court on the admissibility of confessions would seem to furnish a safe guide for this court to follow. In effect, the Court of Military Appeals should apply the same rule in excluding coerced confessions in military proceedings as the Supreme Court applies in

5. Upshaw v. United States, 335 U.S. 410, 69 Sup. Ct. 170, 93 L. Ed. 100 (1948); Ashcraft v. Tennessee, 322 U.S. 143, 64 Sup. Ct. 921, 88 L. Ed. 1192 (1944); Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442 (1948); see also, Note, 4 RUTGERS L. REV. 669 (1950). It must be remembered that the United States Supreme Court in its supervisory capacity requires the rejection of confessions obtained during illegal detention whether coerced or not, because of the violation of a federal statute. In the instant case the mere questioning by the acting sergeant was a violation of the Code.

6. See, *e.g.*, State v. Tonn, 195 Iowa 94, 191 N.W. 530 (1923); People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926); State v. Cocklin, 109 Vt. 207, 194 Atl. 378 (1937); Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 COL. L. REV. 11 (1925).

7. See, *e.g.*, Weeks v. United States, 232 U.S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652 (1914); Bram v. United States, 168 U.S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568 (1897); United States v. Nardone, 127 F.2d 521 (2d Cir.), *cert. denied*, 316 U.S. 698 (1942).

8. Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 COL. L. REV. 11 (1925); Waite, *Evidence—Police Regulations by Rules of Evidence*, 42 MICH. L. REV. 679 (1944).

9. UNIF. CODE OF MIL. JUST. art. 67, 64 STAT. 129 (1950), 50 U.S.C.A. 654 (1951).

10. *Id.* art. 36.

the federal courts. The *Manual for Courts-Martial* provides them with the authority to do so.[11]

In the instant case there appears to be no dispute as to the facts. The first confession was extracted from the accused in flagrant violation of his rights under military law.[12] The validity of the second confession was therefore the issue before the court. The determination of this issue under both state and federal decisions would depend upon whether the influence of the "third degree" technique which produced the first confession had worn off.[13] The presumption would be that it had not, until rebutted by the prosecution.[14] So far as the opinion in this case reveals, the prosecution had not overcome that presumption. From the opinion it appears that the accused, after apparently improper questioning, was placed under arrest and confined. He had no opportunity to consult counsel while so confined and since he was only eighteen years old and was of rather low intelligence, it seems doubtful that he was aware of his rights. Eleven hours later, when the confession in question was obtained, he was apprised of his rights, but was not told that the first confession could not be used against him. With these facts before them the law officer, the court-martial and the Board of Review concluded that the effects of the first confession had worn off during the eleven-hour confinement. In affirming the lower court's decision, the Court of Military Appeals seemed to apply the rule used in the state courts of refusing to review the decision of the lower tribunal that the influence of the prior coercion had worn off.[15] Under similar circumstances the Supreme Court has reserved that function to itself.[16]

The result of the instant decision and paragraph 140(a) of the *Manual for Courts-Martial,*[17] which allows the admission in evidence of facts resulting from a coerced confession, is to give military prosecutors almost unlimited

11. MANUAL FOR COURTS-MARTIAL ¶ 140(a) (1951).

12. UNIF. CODE OF MIL. JUST. art. 31.

13. See Harris v. South Carolina, 338 U.S. 68, 69 Sup. Ct. 1354, 93 L. Ed. 1815 (1949); Turner v. Pennsylvania, 338 U.S. 62, 69 Sup. Ct. 1352, 93 L. Ed. 1810 (1949); Watts v. Indiana, 338 U.S. 49, 69 Sup. Ct. 1347, 93 L. Ed. 1801 (1949); Haley v. Ohio, 332 U.S. 596, 68 Sup. Ct. 302, 92 L. Ed. 224 (1948); McNabb v. United States, 318 U.S. 332, 63 Sup. Ct. 608, 87 L. Ed. 1819 (1943); Chambers v. Florida, 309 U.S. 227, 60 Sup. Ct. 472, 84 L. Ed. 716 (1940); State v. Force, 69 Neb. 162, 95 N.W. 42 (1903); Lang v. State, 178 Wis. 114, 189 N.W. 558 (1922). In the federal courts, Upshaw v. United States, 335 U.S. 410, 69 Sup. Ct. 170, 93 L. Ed. 100 (1948); Anderson v. United States, 318 U.S. 350, 63 Sup. Ct. 599, 87 L. Ed. 829 (1942); 1 GREENLEAF, LAW OF EVIDENCE § 221 (16th ed. 1899); 2 WHARTON, CRIMINAL EVIDENCE § 601 (11th ed. 1935); WIGMORE, CODE OF EVIDENCE § 1103 (3d ed. 1942); Note, 22 So. CALIF. L. REV. 300 (1949).

14. See note 12 *supra.* See also, Smith v. State, 74 Ark. 397, 85 S.W. 1123 (1905); People v. Sweetin, 325 Ill. 245, 156 N.E. 354 (1927); State v. Chaves, 27 N.M. 504, 202 Pac. 694 (1921); Lang v. State, 178 Wis. 114, 189 N.W. 558 (1922).

15. See notes 1 and 3 *supra.*

16. See notes 4 and 5 *supra.*

17. MANUAL FOR COURTS-MARTIAL ¶ 251 (1951).

possibilities of obtaining convictions which stem from coerced confessions. To offset this danger, the Court of Military Appeals should reserve for itself the final determination of whether or not Article 31 of the Uniform Code of Military Justice has been violated. If such a violation is found, the court may then reverse, even if there is evidence independent of the coerced confession which would be sufficient to convict.[18]

In United States v. Clay[19] the Court of Military Appeals asserts: "Previously adjudicated federal court cases are a source from which we can test the prejudicial effect of denying an accused the rights we have set out as our pattern of 'military due process'."[20] In view of this statement, the decision in the instant case should not be construed as setting up a fundamentally different due process standard for civilian and military courts.[21] Nor does this decision necessarily prevent the Court, in its position as a supreme military court and under the federal court precedents, in scrutinizing rulings on the admissibility of confessions, from applying the technique of the United States Supreme Court.[22]

EVIDENCE—CONFLICT OF LAWS—APPLICATION OF DOCTRINE OF RES IPSA LOQUITUR

Plaintiff, a passenger on defendant's plane which crashed in Indiana, brought suit for his injuries in a New York federal court. The trial court held the rule of *res ipsa loquitur* applicable and instructed the jury that a presumption of negligence existed which the defendant could overcome by showing no negligence. Defendant appealed from a judgment for plaintiff. *Held,* reversed. The New York conflict of laws rule is applicable[1] and New York holds *res ipsa loquitur* to be a procedural rule of evidence governed by the law of the forum; under this law, *res ipsa loquitur* is a matter of inference

18. See Malinski v. New York, 324 U.S. 401, 404, 65 Sup. Ct. 701, 89 L. Ed. 1029 (1945).

19. 1 U.S.M.C.A. 74 (Case No. 49, Nov. 27, 1951).

20. *Id.* at 78.

21. Even conceding the view that the due process clause of the Fifth Amendment has no application to courts-martial—a very debatable concession—the Uniform Code of Military Justice makes it clear that the reception of a coerced confession would violate a fundamental right of the accused, granted by congressional mandate. UNIF. CODE OF MIL. JUST. art. 31. See Stein, *Judicial Review of Determinations of Federal Military Tribunals,* 11 BROOKLYN L. REV. 30 (1941).

22. McNabb v. United States, 318 U.S. 332, 63 Sup. Ct. 608, 87 L. Ed. 1819 (1943) (where it is said that principles governing the admissibility of evidence in federal criminal trials are not restricted to those derived solely from the Constitution, the Supreme Court can set its own standard.)

1. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 Sup. Ct. 1020, 85 L. Ed. 1477 (1941); Griffin v. McCoach, 313 U.S. 498, 61 Sup. Ct. 1023, 85 L. Ed. 1481 (1941).

rather than presumption and does not shift the burden of proof to the defendant in any way. *Lobel v. American Airlines,* 192 F.2d 217 (2d Cir. 1951).

The rule of conflict of laws that matters of substance are governed by the law of the locus and matters of procedure by the law of the forum is uniformly accepted.[2] The rationale of the rule is that to require the courts of the forum to know or ascertain and apply the procedural rules of foreign states would impose an intolerable burden on them.[3] Thus, the *lex fori* determines the proper court, the form of action, the time the action was commenced, and matters pertaining to the execution of judgment.[4]

It is generally stated that questions of evidence are procedural matters to be determined by the *lex fori.*[5] Questions of competency of witnesses[6] and admissibility of evidence[7] are almost always governed by the law of the forum, although under some circumstances it might be argued otherwise.[8] On the other hand, it is everywhere recognized that conclusive presumptions are matters of substantive law and determined by the *lex loci.*[9]

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2. 3 BEALE, CONFLICT OF LAWS § 584.1 (1935); GOODRICH, CONFLICT OF LAWS 227 (3d ed. 1949); STUMBERG, CONFLICT OF LAWS 134 (2d ed. 1951); Morgan, *Choice of Law Governing Proof,* 58 HARV. L. REV. 153 (1944); Note, 43 HARV. L. REV. 1134 (1930).

3. 3 BEALE, CONFLICT OF LAWS § 584.1 (1935); GOODRICH, CONFLICT OF LAWS 227 (3d ed. 1949); RESTATEMENT, CONFLICT OF LAWS, Introductory Note, c. 12 (1934). The *Restatement* includes under procedure all matters making the application of the foreign law "impracticable, inconvenient, or violative of local policy." See Morgan, *Choice of Law Governing Proof,* 58 HARV. L. REV. 153, 156 (1944) for a critical analysis of the rule as thus states.

4. 3 BEALE, CONFLICT OF LAWS §§ 586.1-591.1 (1935); GOODRICH, CONFLICT OF LAWS § 82 (3d ed. 1949); RESTATEMENT, CONFLICT OF LAWS §§ 586-91 (1934). For an excellent analysis of the law governing function of judge and jury, see Morgan, *Choice of Law Governing Proof,* 58 HARV. L. REV. 153 (1944).

5. *E.g.,* Central Vermont Ry. v. White, 238 U.S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433 (1915); Broderick v. McGuire, 119 Conn. 83, 174 Atl. 314, 94 A.L.R. 890 (1934); Shepard & Gluck v. Thomas, 147 Tenn. 338, 246 S.W. 836 (1922); Bain v. Whitehaven & Furness Junction Ry., 3 H.L. Cas. 1, 10 Eng. Rep. 1 (1850); 3 BEALE, CONFLICT OF LAWS § 597.1 (1935).

6. *E.g.,* Jones v. Chicago, St. P., M. & O. Ry., 80 Minn. 488, 83 N.W. 446, 49 L.R.A. 640 (1900); Shepard & Gluck v. Thomas, 147 Tenn. 338, 246 S.W. 836, 839 (1922); 3 BEALE, CONFLICT OF LAWS § 596.1 (1935).

7. *E.g.,* Scudder v. Union National Bank, 91 U.S. 406, 23 L. Ed. 245 (1875); Sirgany v. Equitable Life Assurance Soc., 173 S.C. 120, 175 S.E. 209 (1934); 3 BEALE, CONFLICT OF LAWS § 597.1 (1935); STUMBERG, CONFLICT OF LAWS 142 (2d ed. 1951). RESTATEMENT, CONFLICT OF LAWS § 597, comment *a* (1934) suggests a situation in which the *lex loci* should control.

8. See Sims v. Sims, 75 N.Y. 466 (1878) in which a New York statute declaring incompetent as a witness a person convicted of a felony was held not applicable where the conviction was in another state.

Should the law of the forum apply as to privileged communications? An effective argument can be made that the law of the place where the communication was made should govern. The reason for giving the privilege is to encourage freedom of communication between the parties involved without fear of disclosure. The state with the greatest interest in this regard is the state where the communication takes place, rather than a state where a suit is later brought.

9. *E.g.,* Interstate Life & Accident Co. v. Pannell, 169 Miss. 50, 152 So. 635 (1934); Inter State Motor Freight Co. v. Johnson, 32 Ohio App. 363, 168 N.E. 143 (1929). See 3 BEALE, CONFLICT OF LAWS § 595.2 (1935); GOODRICH, CONFLICT OF LAWS 238 (3d ed. 1949); STUMBERG, CONFLICT OF LAWS 138 (2d ed. 1951).

There is some disagreement regarding normal presumptions and burden of proof, but a decided majority of the courts follow the rule that they are governed by the *lex fori*.[10] Usually, these courts first classify these matters as procedural and then apply the traditional rule of substance and procedure.[11] But there is on the part of some courts a definite, and perhaps growing, inclination to look behind the traditional terminology and inquire as to the nature and effect of the rule of the locus.[12] A few courts have ruled that such questions, when they affect the very existence of the right, are themselves substantive.[13] Thus it has been held that a comparative negligence statute of the locus is a matter of substance and should prevail over the rule of the forum which placed the burden of proving due care on the the plaintiff.[14] A provision of the Workmen's Compensation Act of the locus, in cases of a nonaccepting employer, creating a presumption of negligence and probable cause of the employee's injury and requiring the employer to rebut the presumption to escape liability, was held by the Utah court to be substantive and therefore controlling.[15] Another court followed the *lex loci*, which held that acceptance by the shipper of a contract limiting the carrier's liability did not give rise to a presumption of assent, and that the carrier must present other evidence to show such assent, although its own rule was to the contrary.[16] The New Hampshire court, while recognizing that burden of

10. Helton v. Alabama Midland Ry., 97 Ala. 275, 12 So. 276 (1893); *In re* Winder's Estate, 98 Cal. App.2d 78, 219 P.2d 18 (1950); Hamilton v. Metropolitan Life Ins. Co., 71 Ga. App. 784, 32 S.E.2d 540 (1944); Kingery v. Donnell, 222 Iowa 241, 268 N.W. 617 (1936); Gregory v. Maine Central R.R., 317 Mass. 636, 59 N.E.2d 471, 159 A.L.R. 714 (1945); Smith v. Brown, 302 Mass. 432, 19 N.E.2d 732 (1939); Levy v. Steiger, 233 Mass. 600, 124 N.E. 477 (1919); Clark v. Harnischfeger Sales Corp., 238 App. Div. 493, 264 N.Y. Supp. 873 (2d Dep't 1933); Wright v. Palmison, 237 App. Div. 22, 260 N.Y. Supp. 812 (2d Dep't 1932); Collins v. McClure, 63 Ohio App. 312, 26 N.E.2d 780 (1939); Carroll v. Godding, 155 Pa. Super. 490, 38 A.2d 720 (1944); Richardson v. Pacific Power & Light Co., 11 Wash. 2d 288, 118 P.2d 985 (1941).

11. *E.g.*, Helton v. Alabama Midland Ry., 97 Ala. 275, 12 So. 276 (1893); *In re* Winder's Estate, 98 Cal. App. 2d 78, 219 P.2d 18 (1950); Hamilton v. Metropolitan Life Ins. Co., 71 Ga. App. 784, 32 S.E.2d 540 (1944); Levy v. Steiger, 233 Mass. 600, 124 N.E. 477 (1919); Clark v. Harnischfeger Sales Corp., 238 App. Div. 493, 264 N.Y. Supp. 873 (2d Dep't 1933); Richardson v. Pacific Power & Light Co., 11 Wash.2d 288, 118 P.2d 985 (1941). But note the language in Helton v. Alabama Midland Ry., *supra*, where the court recognizes that some matters of procedure "so attach to the act or contract as to become a part of the right or obligation itself." 12 So. at 285.

12. Hiatt v. St. Louis-S.F. Ry., 308 Mo. 77, 271 S.W. 806 (1925); Hartmann v. Louisville & Nashville R.R., 39 Mo. App. 88 (1890); Precourt v. Driscoll, 85 N.H. 280, 157 Atl. 525, 78 A.L.R. 874 (1931); Fitzpatrick v. International Ry., 252 N.Y. 127, 169 N.E. 112, 68 A.L.R. 801 (1929); Buhler v. Maddison, 109 Utah 267, 176 P.2d 118, 168 A.L.R. 177 (1947).

13. *E.g.*, Hiatt v. St. Louis-S.F. Ry., 308 Mo. 77, 271 S.W. 806 (1925); Hartmann v. Louisville & Nashville R.R. 39 Mo. App. 88 (1890); Fitzpatrick v. International Ry., 252 N.Y. 127, 169 N.E. 112, 68 A.L.R. 801 (1929); Buhler v. Maddison, 109 Utah 267, 176 P.2d 118, 168 A.L.R. 177 (1947); 11 AM. JUR., *Conflict of Laws* § 203 (1937). *See* Helton v. Alabama Midland Ry., 97 Ala. 275, 12 So. 276, 285 (1893).

14. Fitzpatrick v. International Ry., 252 N.Y. 127, 169 N.E. 112, 68 A.L.R. 801 (1929).

15. Buhler v. Maddison, 109 Utah 267, 176 P.2d 118, 168 A.L.R. 177 (1947).

16. Hartmann v. Louisville & Nashville R.R., 39 Mo. App. 88 (1890).

proof and presumptions relate to the remedy, held the rule of the locus applicable for the reason that the foreign remedy was so inseparable from the cause of action that it should be enforced to preserve the integrity and character of the substantive right.[17]

Although the cases on the precise point are few, the applicability of the rule of *res ipsa loquitur* is generally regarded as a matter of procedure to be determined by the law of the forum,[18] which seems entirely proper when the effect of the doctrine is that the jury may draw an inference of negligence, but is not required to draw it. But where the doctrine is held to create a presumption of negligence, whether or not it shifts the burden of persuasion to the defendant, there is authority for treating it as a matter of substance since in such case it is so closely related to the right.[19] Under this view it would have been appropriate in the instant case to determine the nature of the *res ipsa* rule in Indiana.

One of the paramount ends of a system of conflict of laws is to assure that the result of litigation shall not be different because of the forum in which the suit is brought.[20] While the rule that the *lex fori* governs matters of procedure is grounded on valid reasons of practical convenience and public policy, it should be recognized that its mechanical application often produces results inconsistent with this fundamental purpose.[21] Where questions of

17. Precourt v. Driscoll, 85 N.H. 280, 157 Atl. 525, 78 A.L.R. 874 (1931), 16 MINN. L. REV. 586 (1932), 80 U. OF PA. L. REV. 911 (1932).

In cases arising under the Federal Employers' Liability Act and in admiralty cases, the burden of proof is on the defendant, even where the state court follows the opposite rule. Central Vermont Ry. v. White, 238 U.S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433 (1915); Garrett v. Moore-McCormack Co., 317 U.S. 239, 63 Sup. Ct. 246, 87 L. Ed. 239 (1942); Intagliata v. Shipowners & Merchants Towboat Corp., 26 Cal.2d 365, 159 P.2d 1 (1945). In diversity of citizenship cases, the federal courts hold burden of proof to be governed by the rule of the state in which they are sitting, finding uniformity of result between federal and state courts more desirable than uniformity between the locus and the forum. Palmer v. Hoffman, 318 U.S. 109, 63 Sup. Ct. 477, 87 L. Ed. 645 (1943); Sampson v. Channell, 110 F.2d 754 (1st Cir. 1940), *cert. denied*, 310 U.S. 650, 60 Sup. Ct. 1099, 84 L. Ed. 1415 (1940); Note, 26 WASH. U.L.O. 244 (1941). The Supreme Court has abandoned the dichotomy of substance and procedure in deciding the applicable law in diversity cases. Guaranty Trust Co. v. York, 326 U.S. 99, 65 Sup. Ct. 1464, 89 L. Ed. 2079 (1945) (statute of limitations of state of forum held applicable); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 69 Sup. Ct. 1233, 93 L. Ed. 1520 (1949) (holding state law determines when suit was commenced); Woods v. Interstate Realty Co., 337 U.S. 535, 69 Sup. Ct. 1235, 93 L. Ed. 1524 (1949); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 Sup. Ct. 1221, 93 L. Ed. 1528 (1949).

18. In addition to the instant case, see Clodfelter v. Wells, 212 N.C. 823, 195 S.E. 11 (1938); see Morgan, *Choice of Law Governing Proof*, 58 HARV. L. REV. 153, 177 (1944). *Accord*, Sierocinski v. E. I. Du Pont De Nemours & Co., 118 F.2d 531 (3d Cir. 1941).

19. See Lachman v. Pennsylvania Greyhound Lines, Inc., 160 F.2d 496 (4th Cir. 1947); Smith v. Pennsylvania Central Airlines Corp., 76 F. Supp. 940, 6 A.L.R.2d 521 (D.D.C. 1948).

20. 3 BEALE, CONFLICT OF LAWS § 584.1 (1935); RESTATEMENT, CONFLICT OF LAWS, Introductory Note, Ch. 12 (1934).

21. See Precourt v. Driscoll, 85 N.H. 280, 157 Atl. 525, 78 A.L.R. 874 (1931), 16 MINN. L. REV. 586 (1932), 80 U. OF PA. L. REV. 911 (1932); COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 163-67 (1942).

presumptions and burden of proof closely affect the outcome of litigation, its application is justifiable only when the burden of resorting to the *lex loci* is so great as to be impracticable, or when public policy of the forum is violated. The exception to the general rule appears based on sound reasoning and is entirely consonant with the basic philosophy of conflict of laws.

EVIDENCE—DUE PROCESS—USE IN STATE PROSECUTION OF EVIDENCE FORCIBLY OBTAINED BY STOMACH PUMP

Three sheriffs, suspecting defendant of selling narcotics, entered his room without a warrant, and upon seeing two capsules on a table inquired of their nature. Defendant thrust these capsules in his mouth and a vain struggle to obtain the pills from his mouth enused. He was then taken to a hospital where, at the direction of the officers, the capsules were forced from him by the use of a stomach pump. The pills, containing morphine, were admitted in evidence over the objection of defendant and on appeal the state supreme court held the illegally obtained evidence admissible. The United States Supreme Court granted certiorari. *Held,* reversed. The conduct of the officers in obtaining the evidence violated due process of law, offending the canons of decency and fair play. *Rochin v. California,* 72 Sup. Ct. 205 (1952).

In federal prosecutions any evidence obtained in violation of the Fourth and Fifth Amendments (unreasonable search and seizure, self-incrimination) is inadmissible.[1] On the other hand, these amendments are not imposed on the states by the Fourteenth Amendment.[2] The Supreme Court consistently refuses to apply the federal exclusionary rule to state procedure,[3] and it is even held that evidence improperly obtained by state officers is admissible

1. Byars v. United States, 273 U.S. 28, 47 Sup. Ct. 248, 71 L. Ed. 520 (1926); Agnello v. United States, 269 U.S. 20, 46 Sup. Ct. 4, 70 L. Ed. 145 (1925); Gouled v. United States, 255 U.S. 298, 41 Sup. Ct. 261, 65 L. Ed. 647 (1921); Weeks v. United States, 232 U.S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652 (1914) (papers taken from room of defendant by a United States marshal). *But cf.* Olmstead v. United States, 277 U.S. 438, 48 Sup. Ct. 564, 72 L. Ed. 944 (1928) (wire tapping held not to violate Fifth Amendment).

2. Wolf v. Colorado, 338 U.S. 25, 69 Sup. Ct. 1359, 93 L. Ed. 1782 (1949) (admissibility of illegally obtained evidence); Adamson v. California, 332 U.S. 46, 67 Sup. Ct. 1672, 91 L. Ed. 1903 (1947) (privilege against self-incrimination not vital to a fair trial); Palko v. Connecticut, 302 U.S. 319, 58 Sup. Ct. 149, 82 L. Ed. 288 (1937) (double jeopardy); Twining v. New Jersey, 211 U.S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97 (1908) (privilege against self-incrimination).

3. See note 2, *supra.* Twenty-nine states have refused to adopt the federal exclusionary rule; 17 have adopted it. See, *e.g.,* McIntyre v. State, 190 Ga. 872, 11 S.E.2d 5 (1940); State v. Alexander, 83 A.2d 441 (N.J. Sup. Ct. 1951); State v. Cram, 176 Ore. 577, 160 P.2d 283 (1945). *Contra:* Rickards v. State, 77 A.2d 199, 205 (Del. 1950); Apodaca v. State, 140 Tex. Cr. 493, 146 S.W.2d 381 (1941).

in a federal proceeding.[4] The view of the Supreme Court is that the states should be allowed in most cases to determine their own procedural rules on obtaining evidence. Although criticized by a minority of the Court as failing adequately to protect the accused,[5] this view was recently reaffirmed by *Wolf v. Colorado*[6] and is reiterated in the instant case.[7]

Instead of the federal exclusionary rule the Supreme Court applies to state law enforcement the less restrictive test of due process. The illegal conduct must violate "a principle so rooted in the conscience of our people as to be ranked fundamental."[8] It is in connection with the admission of confessions that this test has been most widely applied, beginning with *Brown v. Mississippi*,[9] a clear case of torture where the confession was obtained by brutal beating. The Supreme Court in reversing the state court there held that this evidence was inadmissible as a violation of due process but that the "privilege against self-incrimination was not involved."[10] This reasoning has been gradually extended to conduct other than physical coercion.[11] For example, 36 continuous hours of questioning,[12] early morning interrogation plus a denial of counsel,[13] and periodic questioning in five- and six-hour sessions[14] have all been held violations of due process. These situations involve a degree of coercion that could affect the truthworthiness of the statements. The Court through a series of many cases has to some extent filled out the law on confessions, indicating what conduct will render them inadmissible regardless of their corroboration.[15]

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4. See, *e.g.*, Feldman v. United States, 322 U.S. 487, 64 Sup. Ct. 1082, 88 L. Ed. 1408 (1944); Burdeau v. McDowell, 256 U.S. 465, 41 Sup. Ct. 574, 65 L. Ed. 1048 (1921).

5. A minority of the Court have consistently dissented in recent years. The strongest and most complete statement of the viewpoint that the Fourteenth Amendment incorporates all the provisions of the first eight is in Mr. Justice Black's famous dissent in Adamson v. California, 332 U.S. 46, 68, 67 Sup. Ct. 1672, 91 L. Ed. 1903 (1947). See the answer to this, in Fairman, *Does the Fourteenth Amendment Incorporate The Bill of Rights?* 2 STAN. L. REV. 5 (1949). See, in general, Curtis, *A Modern Supreme Court in a Modern World*, 4 VAND. L. REV. 427 (1951); Farrelly, *Searches and Seizures During the Truman Era*, 25 So. CALIF. L. REV. 1 (1951); Frank, *The United States Supreme Court: 1948-49*, 17 U. OF CHI. L. REV. (1949); Green, *The Bill of Rights, The Fourteenth Amendment and The Supreme Court*, 46 MICH. L. REV. 869 (1948).

6. 338 U.S. 25, 39 Sup. Ct. 1359, 93 L. Ed. 1782 (1949).

7. 72 Sup. Ct. at 207, 212 (Black and Douglas, JJ., concurring).

8. Palko v. Connecticut, 302 U.S. 319, 325, 58 Sup. Ct. 149, 82 L. Ed. 288 (1937).

9. 297 U.S. 278, 56 Sup. Ct. 461, 80 L. Ed. 682 (1936).

10. *Id.* at 285.

11. See Sanders, *Criminal Law Administration Prior to Trial: Recent Developments*, 4 VAND. L. REV. 781-86 (1951).

12. Ashcraft v. Tennessee, 322 U.S. 143, 64 Sup. Ct. 921, 88 L. Ed. 1192 (1944). *But cf.* Lisenba v. California, 314 U.S. 219, 62 Sup. Ct. 280, 86 L. Ed. 166 (1941).

13. Haley v. Ohio, 332 U.S. 596, 68 Sup. Ct. 302, 92 L. Ed. 224 (1948) (accused was questioned five hours early in the morning and later held incommunicado).

14. Watts v. Indiana, 338 U.S. 49, 69 Sup. Ct. 1347, 93 L. Ed. 1801 (1949).

15. See Wicker, *Some Developments in the Law Concerning Confessions, supra* p. 507.

In the instant case the court is confronted with a situation where the method of obtaining evidence is by illegal search and seizure of physical objects, and where the evidence is not testimonial as in confessions. This case is the first to hold this type of evidence inadmissible under the due process test.[16] In determining what state-police conduct will invalidate the illegally obtained evidence, the court first reiterates the principle of fair play and decency embodied in due process, then sets for itself the two-fold function of deciding what at the moment constitutes fair play and whether the police violated it. In establishing these standards the court indicates that the conduct would offend even the most hardened sensibilities. The combination of relevant events here is illegally breaking in on the privacy of the accused, the use of force in trying to open his mouth and the use of the stomach pump. The stomach pumping, conduct almost equal to torture, seems the vital factor. It is what would cause pain to anyone, not just to the fastidious. There apparently must be conduct that is degrading in itself, forcing a person to submit to humiliating, extremely embarrassing treatment, that would be such regardless of its accusatory aspect or its relevance.

How the principle of the instant case will apply to other types of physical evidence obtained by some element of coercion or illegal search and seizure remains to be seen. Rulings of state courts will not be in point on the due process issue, but they may at least suggest some of the factual problems which will arise. Being compelled to remove a visor,[17] place one's foot in a print,[18] or put on a bullet-riddled shirt[19] clearly does not involve any element of torture under the above-described standard. The taking of blood[20] or urine[21] samples probably would not affect the average person in any way comparable to stomach pumping, nor would removing an object from the accused's mouth.[22] A physical examination of a woman for venereal disease[23] and the use of an enema to regain rings swallowed by the accused[24] are closer to the facts of the instant case.[25]

16. Wolf v. Colorado, 338 U.S. 25, 69 Sup. Ct. 1359, 93 L. Ed. 1082 (1949), though holding the privilege against illegal search and seizure to be a part of due process stated that a violation of this privilege by state officers did not render the evidence inadmissible in a state court.

17. As in People v. Clark, 18 Cal.2d 449, 116 P.2d 56 (1941) (admissible in state court).

18. As in State v. Oschou, 49 Nev. 194, 242 Pac. 582 (1926).

19. As in State v. Graham, 74 N.C. 646 (1876); State v. Smith, 133 S.C. 291, 130 S.E. 884 (1925) (admissible in state court).

20. As in State v. Cram, 176 Ore. 577, 160 P.2d 283 (1945) (admissible).

21. As in State v. Duguid, 50 Ariz. 276, 72 P.2d 435 (1937) (admissible).

22. As in United States v. Ong Sin Hong, 36 P.I. 735 (1917) (admissible).

23. McManus v. Commonwealth, 264 Ky. 240, 94 S.W.2d 609 (1936) (inadmissible). *Contra:* United States v. Tan Teng, 23 P.I. 145 (1912) (admissible).

24. As in Ash v. State, 139 Tex. Cr. 420, 141 S.W.2d, 341 (1940) (admissible).

25. For a general discussion of what has been held admissible see INBAU, SELF INCRIMINATION (1950).

When *Brown v. Mississippi* was decided the application of due process to confessions was unsettled and indefinite. That case involved an obvious instance of torture; since then less obvious conduct has been held to violate due process as the Court by a gradual development established a clearer, more restrictive standard. It will be interesting to observe whether by the same empiric process there will develop a broader exclusionary standard in the type of situation involved in the instant case.

EVIDENCE—ENTRIES IN THE REGULAR COURSE OF BUSINESS—TEST FOR EXTENT OF ADMISSIBILITY UNDER FEDERAL JUDICIAL CODE

Plaintiff, a ticket collector for defendant railroad, through the negligence of defendant was injured in the course of his employment, and brought this action under the Federal Employers' Liability Act. He was treated by the company doctor and by two specialists to whom he was sent by the company doctor. The trial court, over the objection of defendant, allowed the introduction in evidence of copies of letters from the specialists to the railroad claim department and the company physician, the letters to the company having been "furnished" to plaintiff from defendant's files. Although offered an opportunity to subpoena the specialists, defendant was content to stand on its formal objection that the letters were purely hearsay and not reports made in the regular course of its business and now appeals from the judgment for plaintiff. *Held* (2-1),[1] affirmed. The letters were admissible as entries in the regular course of the doctors' business. *Korte v. New York, N.H. & H.R.R.*, 191 F.2d 86 (2d Cir. 1951), *cert. denied*, 342 U.S. 868 (1951).

The strict common law exception to the hearsay rule under which business entries are admissible includes (1) the shop book doctrine,[2] which grew up to allow the plaintiff, incompetent as a witness and without a clerk, to prove claims in a restricted field of business transactions by his account book;[3] and (2) the rule involving entries in the regular course of business,[4] which makes admissible writings made in the regular course of business by a person dead at the time

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1. Majority opinion by Clark, J. (Frank, J., concurring); dissenting opinion by Chase, J.

2. 5 WIGMORE, EVIDENCE §§ 1517-18, 1536-44 (3d ed. 1940); MORGAN *et al.*, THE LAW OF EVIDENCE 51 (1927).

3. When parties became competent as witnesses, this part of the exception was rendered anachronistic, but it still survives, though more in name than in spirit.

4. 5 WIGMORE, EVIDENCE §§ 1521-33; MORGAN *et al.*, THE LAW OF EVIDENCE 51 (1927).

of trial.[5] The utility of the "regular entry" branch of the exception has been seriously curtailed by technicalities[6] and two types of statutes have been evolved to abolish the unnecessary common law restrictions[7]—*viz.*, the Uniform Business Records as Evidence Act (the Uniform Act)[8] and statutes based on The Commonwealth Fund Committee report[9] and embodied in the American Law Institute Model Code of Evidence (the Model Act).[10] The Model Act, substantially adopted for the federal courts,[11] makes trustworthiness of an otherwise qualified entry a question for the jury, whereas the Uniform Act requires the judge to consider both the sources of information and the circumstances of making before allowing reception of the entry.[12]

Apparently fearful of the liberalizing tendency of these acts, some courts have continued to circumscribe admissibility of business entries.[13] They have

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5. A third subdivision of the exception is employed to allow the use of memoranda made in the course of business by an available witness who has no adequate recollection of the matter. Jackson v. Pioneer Adhesive Works, Inc., 132 N.J.L. 397, 40 A.2d 634 (1945); Morgan, *The Law of Evidence, 1941-1945,* 59 HARV. L. REV. 481 (1946).

6. 5 WIGMORE, EVIDENCE §§ 1521-33; VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 348 (1949).

7. The English statute, Evidence Act, 1938, 1 & 2 GEO. 6, c. 28, which admits records made in the performance of a duty to record, whether or not the entrant has personal knowledge of the facts, is entirely different in scope from the narrower American business entry statutes. It is phrased to admit all documentary statements, though the declarant is available as a witness, unless the statement was "made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish." See Jarman v. Lambert and Cooke (Contractors), Ltd., [1951] 2 K.B. 937, [1951] 2 All E.R. 255 (C.A.) Carter, *Evidence Act, 1938: Problems of Interpretation,* 68 L.Q. REV. 106 (1952). See note 14, *infra.*

8. "A record of an act, condition or event shall . . . be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act . . . and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." 9 U.L.A. 387 (1951); VANDERBILT, *op. cit. supra* note 5, at 348.

9. MORGAN *et al.,* THE LAW OF EVIDENCE 51 (1927).

10. MODEL CODE OF EVIDENCE, Rule 514 (1942). The history and scope of the statutes are fully discussed in Note, 11 BROOKLYN L. REV. 78 (1941).

11. 62 STAT. 945 (1948), *as amended,* 28 U.S.C.A. § 1732(a) (Supp. 1951). "[A]ny writing or record, . . . made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such . . . if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act . . . or within a reasonable time thereafter. All other circumstances of the making . . . including lack of personal knowledge by the entrant or maker, may . . . affect its weight, but . . . shall not affect its admissibility."

12. In Stella Cheese Co. v. Chicago, St.P., M. & O. Ry., 248 Wis. 196, 21 N.W.2d 655, 657 (1946), the court describes qualifications of the federal statute by saying "The statutory conditions being fulfilled . . . the question of untrustworthiness would have to be advanced affirmatively by [the party objecting]." See Notes, 48 COL. L. REV. 920 (1948), 46 MICH. L. REV. 802 (1948).

13. Contrast discussions of legislative history of the federal statute in Palmer v. Hoffman, 318 U.S. 109, 63 Sup. Ct. 477, 87 L. Ed. 645, 144 A.L.R. 719 (1943) and New York Life Ins. Co. v. Taylor, 147 F.2d 297 (D.C. Cir. 1944-1945), with the interpretation of the statute by Judge Wyzanski in United States v. United Shoe Machinery Corp., 89 F. Supp. 349, 354 (D. Mass. 1950). See Note, 46 MICH. L. REV. 802 (1948) for types of entries affected by the statutes.

been timorous when confronted with such chimeras as hearsay on hearsay[14] and inclusion of extraneous matter in the record.[15] The Supreme Court, in *Palmer v. Hoffman*,[16] held that a written statement of an unavailable eye-witness railroad employee made during the course of an accident investigation by the company was inadmissible because not made in the regular course of business. The Court thought that admission of entries only partially related to the business, but made in the regular course of conduct, was not justified by the statute;[17] if such entries were admissible, regularity of preparation would become the test without regard to "earmarks of reliability . . . acquired from their source . . . and the nature of their compilation."[18] In this it gave some support to the opinion of the Court of Appeals for the Second Circuit, which had rejected the report as "dripping with self interest."[19] Later, on the ground that the *Palmer* case confined admissible entries to those which are trustworthy because they represent routine reflections of day to day operations,[20] the

14. Fuller v. White, 33 Cal.2d 236, 201 P.2d 16 (1949) (letter from insurance agent quoting decedent's statement as to reason why policy was originally taken out held inadmissible as double hearsay although identified as a business record, court implying that the original application might have been admissible because it was contemporaneous); Kelly v. Ford Motor Co., 280 Mich. 378, 273 N.W. 737 (1937) (in workmen's compensation case the only evidence of cause of injury, decedent's statement on company hospital record, held inadmissible as double hearsay). *But cf.* Jarman v. Lambert and Cooke (Contractors), Ltd., [1951] 2 K.B. 937, [1951] 2 All E.R. 255 (C.A.) (statement by deceased as to cause of otherwise unwitnessed injury in application for workmen's compensation admitted as evidence in common law action of negligence instituted by his widow, court construing the Evidence Act, 1938, broadly to admit documentary evidence by deceased who was undoubtedly interested but did not "anticipate" litigation in the disqualifying sense of the statute).

15. Green v. City of Cleveland, 150 Ohio St. 441, 83 N.E.2d 63 (1948) (hospital record offered by defendant to contradict plaintiff's position at trial not admissible as a regular entry since it pertained to the cause of the accident as well as to medical treatment); Flemming v. Thorson, 231 Minn. 343, 43 N.W.2d 225 (1950) (notation "Hold for Police" on hospital record rendered the record inadmissible as not relating to hospital business, since the record was offered only as tending to show plaintiff's contributory negligence). *But cf.* Watts v. Delaware Coach Co., 44 Del. 283, 58 A.2d 689 (Del. 1948); Freedman v. Mutual Life Insurance Co., 342 Pa. 404, 21 A.2d 81, 135 A.L.R. 1249 (1941).

16. 318 U.S. 109, 63 Sup. Ct. 477, 87 L. Ed. 645, 144 A.L.R. 719 (1943).

17. Followed in Clainos v. United States, 163 F.2d 593 (D.C. Cir. 1947) (police notations of convictions on back of accused's file picture not within statutory exception because, while the record was kept in the regular course of business, the events described were outside the business); Gaynor v. Atlantic Greyhound Corp., 86 F. Supp. 284 (E.D. Pa. 1949), *rev'd on other grounds*, 183 F.2d 482 (3d Cir. 1950) (WSA record of physical examination held not a report made for the systematic conduct of the business of war shipping).

18. 318 U.S. at 114.

19. Hoffman v. Palmer, 129 F.2d 976 (2d Cir. 1942), criticized in Note, 56 HARV. L. REV. 458 (1942). Presence or absence of motive to misrepresent was the controlling factor in the admissibility of entries in United States v. Moran, 151 F.2d 661, 167 A.L.R. 403 (2d Cir. 1945) (no motive to falsify telephone memorandum); Buckminster's Estate v. Commissioner of Internal Revenue, 147 F.2d 331 (2d Cir. 1944) (no motive to misrepresent in hospital records, refusing to follow New York Life Ins. Co. v. Taylor, 147 F.2d 297 (D.C. Cir. 1944); United States v. Northwest Airlines, 69 F. Supp. 482 (D. Minn. 1946) (memorandum made when there was no reason to believe it would be used in litigation). *But cf.* Ulm v. Moore-McCormack Lines, 115 F.2d 492 (2d Cir. 1940), *cert. denied*, 313 U.S. 567 (1941). See Hardman, *Hearsay "Self-Serving" Declarations*, 52 W. VA. L.Q. 81 (1950).

20. 318 U.S. at 114.

majority of another court of appeals[21] rejected hospital records concerning condition, including psychiatric diagnosis, and treatment of a patient, though made in the regular course of conduct of the hospital.[22] This court argued that otherwise the act would make all records admissible; the dissent replied that it might as well be contented that the *Palmer* doctrine would exclude all records which are ultimately intended for external use.

On the other hand, the Court's language in the *Palmer* case gave the Second Circuit an opportunity in *Pekelis v. Transcontinental & Western Air*[23] to conclude that the Supreme Court was aiming at the evils of introducing evidence built up to support the self interest of the entrant,[24] and that its doctrine would not be applicable to reports which were against the interest of the entrant when made.[25] In *Masterson v. Pennsylvania R.R.*,[26] the Third Circuit held that admission of letters similar to those in the instant case was error, though harmless. Basic identification requirements apparently were not met in the *Masterson* case.[27] The opinion, however, pointed out the instant court's method for escaping from the shackles of the *Palmer* doctrine by indicating that if the original letters had been identified as having been written by the doctors or under their direction, as a normal part of professional routine, they might fall within the statutory exception.

In the principal case, physicians' reports made to the railroad were held to be entries in the regular course of their business[28] and admissible under a

21. New York Life Ins. Co. v. Taylor, 147 F.2d 297 (D.C. Cir. 1944).

22. The majority argued that to admit opinion in the entry was to deprive the opponent of the right to cross-examine, *id.* at 306; the dissent points out that this is true of all exceptions to the hearsay rule, *id.* at 309. See Morgan, *The Law of Evidence, 1941-1945*, 59 HARV. L. REV. 481, 564 (1946) for a review of this opinion. *Contra:* Moran v. Pittsburgh-Des Moines Steel Co., 183 F.2d 467 (3d Cir. 1950) (admitting conclusions of experts in Bureau of Mines report); Buckminster's Estate v. Commissioner, 147 F.2d 331 (2d Cir. 1944).

23. 187 F.2d 122 (2d Cir. 1951).

24. In Slifka v. Johnson, 161 F.2d 467 (2d Cir. 1947), letters of an agent were admitted against the estate both as vicarious admissions and also as entries under the regular entry statute. The concurring opinion insists that this is not a repudiation of *Palmer v. Hoffman* because the letters were against the interest of the estate, while in the *Palmer* case "the alleged 'course of business' was such as obviously to make for (not against) untrustworthiness." *Id.* at 469.

25. Accident investigation reports made by boards set up by the company indicated negligence by defendant's servants and obviously would not be relied on by defendant in litigation. But the language of the *Pekelis* opinion would exclude from the *Palmer* doctrine accident investigation reports made under regulations applicable to conducting the business. The authority of the *Pekelis* case, however, is somewhat weakened by the fact that the business entry was admitted primarily as an adopted admission.

26. 182 F.2d 793 (3d Cir. 1950).

27. The court found that the letters were not routine records, but were written as aids in resolving a controversy about legal responsibility. They were not confined to a record of objective acts or conditions. *Accord*, Gilbert v. Gulf Oil Corp., 175 F.2d 705 (4th Cir. 1949); Gordon v. United States, 164 F.2d 855 (6th Cir. 1947).

28. The court explains that "It is true that no one got on the witness stand to say that a doctor commissioned to make an examination would make some sort of report of what he was employed to do. . . . [I]t is surely implicit in the nature of the transaction involved. . . ." 191 F.2d at 90.

straight interpretation of the statute. But the court went further and also admitted them under the *Pekelis* interpretation, saying that the doctors were acting for the company; and under *Pekelis* construction, their reports may be received against the company.[29] Thus the reports would be moved into the category of vicarious admissions if the proponent showed their adoption by the company.[30]

Until the Supreme Court recognizes the misapprehension apparent in its limitation of the statute, other federal courts may well continue to construe that limitation into harmlessness in order to apply the broad principle of admissibility conceived by the statute.[31]

EVIDENCE—HEARSAY—ADOPTION OF LIBERAL ADMISSION RULES OF ADMINISTRATIVE TRIBUNALS IN ANTITRUST COURT ACTION

In a civil antitrust suit tried without a jury the government offered in evidence thousands of intracorporate documents and office memoranda taken from the files of the defendant corporation and not previously revealed to third parties. The defendant objected to the admission of these papers as hearsay. *Held,* the material is admissible. Much of it may be received under recognized exceptions to the hearsay rule,[1] but all of the relevant documents are admissible without the benefit of these exceptions. *United States v. United Shoe Machinery Corp.,* 89 F. Supp. 349 (D. Mass. 1950).

The hearsay rule, with its technicalities and exceptions, is one of the most complex and misunderstood of the exclusionary rules of evidence. It is often said to be a product of the jury system,[2] although it is generally applied in nonjury actions.[3] The right of a party to have evidence excluded

29. While a litigant cannot introduce evidence built up to promote self-interest or contrived litigation, "the Pekelis case is clear authority for the admission of business entries from these doctors when offered by the plaintiff and not by the entrants or the company for whom they were—temporarily—acting." 191 F.2d at 90.

30. See United States v. United Shoe Machinery Corp., 89 F. Supp. 349, 352 (D. Mass. 1950); Morgan, *The Rationale of Vicarious Admissions,* 42 HARV. L. REV. 461 (1929). pointing out that when the agent merely transmits information to his superior, his report cannot be viewed as if the superior were speaking.

31. See dissent by Clark, J., in Hoffman v. Palmer, 129 F.2d 976, 998-1002 (2d Cir. 1942).

1. Where it could be shown that the corporation based its conduct upon these documents, they may be received as extra-judicial admissions. See 4 WIGMORE, EVIDENCE §§ 1048, 1073 (3d ed. 1940). Many of the papers came within the business entry statute. 62 STAT. 945 (1948), 28 U.S.C.A. § 1732 (1950). See 5 WIGMORE, EVIDENCE § 1520 (3d ed. 1940)); Ginsburg, *The Admissibility of Business Records in Evidence,* 29 NEB. L. REV. 60 (1949).

2. Morgan and Maguire, *Looking Backward and Forward at Evidence,* 50 HARV. L. REV. 909, 918 (1937).

3. McCormick, *Tomorrow's Law of Evidence,* 24 A.B.A.J. 507, 508 (1938).

as hearsay has been attributed to several factors, among which are: (1) the declarant is not under oath; (2) the declarant is not subject to cross-examination; and (3) the jury is incapable of properly evaluating testimony of this nature.[4] Most of the commentators have recommended limitations on the use of the hearsay rule,[5] and the ever-increasing importance of administrative tribunals with their comparatively informal rules of procedure by which all relevant evidence is generally admitted has made clearer the obstructions to intelligent investigation which the application of this rule produces.[6]

This suit could have been entertained by the Federal Trade Commission.[7] The court, with a clear realization of the significance of its action, has rejected the old rule by admitting hearsay of intrinsic trustworthiness over the objections of the defendant. Several reasons are given by the court for the decision. In an antitrust suit no penalty is imposed on the defendant such as the duty to pay damages; only the future conduct of the corporation is affected.[8] The reception of hearsay in a case tried without a jury is rarely reversible error; in the absence of a showing to the contrary, the appellate courts assume that the trial judge has sifted the evidence offered and in reaching a decision has considered only that which could have been admitted in the trial under the exclusionary rules.[9] Moreover, the Federal Trade

4. MORGAN AND MAGUIRE, CASES AND MATERIALS ON EVIDENCE 502-04 (3d ed. (1951).

5. See, *e.g.*, Green, *Evidence and the Federal Rules*, 55 HARV. L. REV. 197, 225 (1941); Maguire, *Heresy About Hearsay*, 8 U. OF CHI. L. REV. 621 (1941); McCormick, *Tomorrow's Law of Evidence*, 24 A.B.A.J. 507, 580 (1938); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 219 (1948).

6. DAVIS, ADMINISTRATIVE LAW §§ 141 *et seq.* (1951); Davis, *Evidence Reform: The Administrative Process Leads the Way*, 34 MINN. L. REV. 581 (1950). Most administrative tribunals are not restricted to the rules of evidence used in jury trials. See Vanderbilt, *The Technique of Proof Before Administrative Bodies*, 24 IOWA L. REV. 464 (1939); Wigmore, *Administrative Boards and Commissions: Are the Jury-Trial Rule of Evidence in Force for Their Inquiries?* 17 ILL. L. REV. 263 (1922). These rules must of necessity be flexible. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364 (1941). Generally the tendency is to admit all relevant evidence which is of the kind on which responsible persons will rely in serious affairs. DAVIS, ADMINISTRATIVE LAW § 140 (1951). "Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence." Federal Administrative Procedure Act § 7(c), 60 STAT. 241 (1946), 5 U.S.C.A. § 1006(c) (1950). For a discussion of the procedure before various federal commissions and a comparison with procedure in the courts, see STEPHENS, ADMINISTRATIVE TRIBUNALS AND THE RULES OF EVIDENCE (1933).

7. Antitrust suits may be brought in the district court by the Department of Justice or before the Federal Trade Commission on its own initiative. See Federal Trade Commission v. Cement Institute, 33 U.S. 683, 68 Sup. Ct. 793, 92 L. Ed. 1009 (1948).

8. See, *e.g.*, United States v. Cooper Corp., 312 U.S. 600, 61 Sup. Ct. 742, 85 L. Ed. 1071 (1941).

9. "One who is capable of ruling accurately upon the admissibility of evidence is equally capable of sifting it accurately after it has been received, and, since he will base his findings on the evidence which he regards as competent, material and convincing, he cannot be injured by the presence in the record of testimony which he does not consider

Commission receives hearsay in these actions,[10] and the court argues that a judge is as competent as the commission to weigh such evidence.

There are definite advantages resulting from the admission of hearsay in antitrust actions. It is a tremendous time-saver.[11] Naturally the evidence cannot be admitted sight unseen; examination to determine relevancy will continue to be necessary to prevent a prolonged trial and an endless record in case of appeal. However, the judge need no longer hear arguments and make rulings on the hearsay question itself. Uniformity in decisions is another probable outcome. Although there are certain differences in the effects of the decisions of the Federal Trade Commission and of the district courts,[12] the basic result of both is the regulation of future conduct, and the Government should not be allowed to control the outcome of antitrust cases to any extent by its selection of a forum.[13] Perhaps the most important advantage attained is the increased opportunity for a decision based on all of the facts. The antitrust cases are invariably complex.[14] Corporate policies and activities are often buried deep within their files. Consequently, hearsay may be highly relevant and even more enlightening than direct testimony.[15]

Judge Wyzanski suggests in his opinion the belief, prevelant in most courts today, that restrictive rules of procedure are depriving the courts of their legitimate business.[16] Although there is some feeling that cases of this type require treatment that only a specialist can give, it is equally important that big business, as well as other activities regulated by these boards, be controlled in the light of our over-all social policies. The courts with their

competent or material." Donnelly Garment Co. v. National Labor Relations Board, 123 F.2d 215, 224 (8th Cir. 1942). See, *e.g.*, Hedrick v. Perry, 102 F.2d 802, 808 (10th Cir. 1939); Kauk v. Anderson, 137 F.2d 331, 334 (8th Cir. 1943); Erceg v. Fairbanks Exploration Co., 95 F.2d 850 (9th Cir. 1938). Reversal is much more likely to result from the exclusion of evidence which should be admitted. See, *e.g.*, Builders Steel v. Commissioner, 179 F.2d 377 (8th Cir. 1950).

10. See, *e.g.*, Federal Trade Commision v. Cement Institute, 333 U.S. 683, 68 Sup. Ct. 793, 92 L. Ed. 1009 (1949); Phelps Dodge Refining Corp. v. Federal Trade Commission, 139 F.2d 393, 397 (2d Cir. 1943).

11. See McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 HARV. L. REV. 27, 42 (1950), for a discussion of the time element in the case; 15,000 objections were raised to the admission of the documents. And see PROCEDURE IN ANTITRUST AND OTHER PROTRACTED CASES (Adm. Office of U.S. Courts 1951).

12. See 64 HARV. L. REV. 340 (1950).

13. See note 7 *supra*.

14. "[I]t is clear that in antitrust litigation the sprawling charges, the elastic rules of substantive law, the case by case approach and rules of evidence that set no effective limits to what may be offered and received in court pose a serious problem of judicial administration." McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 HARV. L. REV. 27, 28 (1950).

15. See Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 219 (1948).

16. 89 F.Supp. at 355.

broader range of experience would appear to be better equipped to handle such problems.

This decision has not been unanimously approved. It has been suggested that all of the material admitted came within the basic requisites of an exception to the hearsay rule, trustworthiness and necessity,[17] and that a new exception would have been a better solution.[18] However, to add to the already overwhelming list of exceptions would only serve to further complicate the rules of evidence.[19] Furthermore, the courts have been reluctant to create new exceptions save where provided for by statute.[20] Where there is no jury, all of the relevant evidence not excluded by public policy should be admitted so long as it is logically probative.[21]

What will be the effect of this decision? There are other types of controversies which are triable before both the courts and administrative tribunals; other cases may be tried by a judge without a jury. There seems to be no logical reason why the admission of hearsay should not be extended to either or both of these situations. Nor is there any reason why other liberal evidentiary rules applied by the administrative tribunals should not be adopted by the courts in these cases. In time this procedure might even extend to all actions maintained in the courts. This case may well offer a technique by which the courts may attain a much-needed reform in the rules of evidence.

EVIDENCE—IMPEACHMENT OF ONE'S OWN WITNESS—USE OF PRIOR INCONSISTENT STATEMENTS

The state produced a witness to prove defendant had admitted the use of narcotics. The witness testified that defendant had made no such admission to her. After laying a proper foundation the state, over defendant's objection, was allowed to introduce a prior contradictory statement of its witness, and defendant assigns error thereon. *Held,* affirmed. The witness unexpectedly gave testimony against the party who produced her, and that party may in-

17. See Note, 60 YALE L.J. 363, 369 (1951), citing 5 WIGMORE, EVIDENCE §§ 1420-22 (3d ed. 1940).

18. See 25 So. CALIF. L. REV. 139 (1951).

19. See Morgan, *The Hearsay Rule,* 12 WASH. L. REV. 1 (1937), discussing the rule and its exceptions.

20. See generally on written statements as hearsay, Note, 10 A.L.R.2d 1035 (1950), for cases upholding the rule.

21. THAYER, A PRELIMINARY TREATISE ON EVIDENCE 530 (1898); Davis, *Evidence Reform: the Administrative Process Leads the Way,* 34 MINN. L. REV. 581 (1950); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept,* 62 HARV. L. REV. 177 (1948).

troduce her prior contradictory statements for impeachment purposes. *People v. LeBeau*, 235 P.2d 850 (Cal. App. 1951).

The origin of the rule against impeaching one's own witness[1] as well as any justification for its continued existence defies reasonable analysis.[2] Whether it is derived from the ancient process of compurgation,[3] or from the fact that permitting a party to present pertinent data to a jury through chosen witnesses was regarded as a matter of favor in the earliest adversary proceedings, is the subject of dispute among commentators.[4] Yet the doctrine that a party guarantees the credibility of his witness persists today, although no one supposes that a party has a free choice in the selection of witnesses.[5] The basis given for the rule by some courts is that a party should not be allowed to coerce his witnesses by threats of impeachment or degradation,[6] reasoning which does not fit the rule. There is little logic in allowing a party to coerce his opponent's witnesses by threats of degradation while denying him the right to impeach his own hostile witness, at least by evidence showing mistake in observation or memory if not by degrading evidence. To enforce this policy properly, and allow *any* impeachment of the witness' character, the court should require both parties to put on evidence impeaching his moral character before the witness has given material testimony.

A party has never been so far bound by his witness' testimony as to prevent contradiction by other admissible evidence.[7] Courts allow the jury

1. In Tennessee the witness must be interrogated on a material matter to become examining party's witness. Elliot v. Shultz, 29 Tenn. 234 (1849) (witness belonged to party examining him, not to party who summoned but did not examine); Young v. Gregory Bus Line, 1 Tenn. App. 282 (W.S. 1925) (party not bound by testimony of witness because of having taken deposition before trial). *But cf.* Story v. Saunders, 27 Tenn. 663 (1848) (neither party taking deposition of witness allowed to impeach). A witness the party is compelled to call may be impeached. Alexander v. Beadle, 47 Tenn. 126 (1869) (subscribing witness to will may be impeached). See CARUTHERS, HISTORY OF A LAWSUIT § 356 (7th ed., Gilreath, 1951); LEE, TENNESSEE EVIDENCE § 213 (1949).

2. People v. De Martini, 213 N.Y. 203, 107 N.E. 501, 503 L.R.A. 1915F 601 (1914); Ladd, *Impeachment of One's Own Witness—New Developments*, 4 U. OF CHI. L. REV. 69 (1936).

3. Crago v. State, 28 Wyo. 215, 202 Pac. 1099 (1922); 3 WIGMORE, EVIDENCE § 896 (3d ed. 1940).

4. MODEL CODE OF EVIDENCE 20 (1942); MORGAN & MAGUIRE, CASES AND MATERIALS ON EVIDENCE 244-48 (3d ed. 1951); Ladd, *supra* note 2.

5. People v. Johnson, 314 Ill. 486, 145 N.E. 703 (1924); State v. Wolfe, 109 W. Va. 590, 156 S.E. 56 (1930); 3 WHARTON, CRIMINAL EVIDENCE § 1389 (11th ed. 1935); 3 WIGMORE, EVIDENCE § 898 (3d ed. 1940); Note, 9 TENN. L. REV. 207 (1931).

6. People v. Miky, 227 N.Y. 94, 124 N.E. 126, 128 (1919) (enough to fear impeachment from adverse party); Cox v. Eayres, 55 Vt. 24, 27 (1883) (citing BULLER, NISI PRIUS); 3 WIGMORE, EVIDENCE § 899 (3d ed. 1940).

7. This is the Tennessee rule. Record v. Copperage Co., 108 Tenn. 657, 69 S.W. 334 (1902) (allowed to contradict witness by any admissible testimony); Bank of Hendersonville v. Dozier, 24 Tenn. App. 178, 142 S.W.2d 191 (M.S. 1940) (could contradict but not impeach opponent called as your witness). *But cf.* Hale v. Johnston, 140 Tenn. 182, 203 S.W. 949, 954 (1918) (court failed to recognize admissibility of the evidence). He may contradict himself if the facts are not peculiarily within his knowledge. Ritchie v. Reo Sales Corp., 272 Mich. 684, 262 N.W. 321 (1935) (verdict based on plaintiff's other evidence contrary to his testimony). *But cf.* Vondrashek v. Dignan, 200 Minn. 530, 274

to determine creditability and overlook the incidental impeachment. Generally, today, if a party shows genuine surprise, he may interrogate his own witness concerning previous inconsistent statements.[8] Some courts allow the witness to be so questioned merely as a means of refreshing his recollection, risking incidental impeachment.[9] Others, either by statute or by judicial decision, allow impeachment by evidence of prior contradictory statements if the court finds that the proponent is taken by surprise by the testimony of his witness;[10] though none allow impeachment under ordinary circumstances. A foundation must be laid before the impeaching testimony is admitted. The jury has the right to believe or reject the substantive testimony of the witness,[11] but it should not consider the prior inconsistent statements as evidence of the truth of the matter stated.[12] If a witness has merely failed to give the expected testimony, and has testified to nothing that can harm the proponent, there is no occasion to impeach him.[13] In such a case evidence of prior inconsistent statements would only serve the illegitimate purpose of having the jury misuse

N.W. 609 (1937), 36 MICH. L. REV. 688 (1938). See also Horneman v. Brown, 286 Mass. 65, 190 N.E. 735, 48 HARV. L. REV. 139 (1934) (party impeached himself under statute allowing impeachment of your witnesses). See 3 WIGMORE, EVIDENCE §§ 897, 907 (3d ed. 1940).

8. *Compare* Kuhn v. United States, 24 F.2d 910 (9th Cir. 1928), *cert. denied,* 278 U.S. 605 (1928) (reason to believe witness would decline to testify as desired), *with* Sullivan v. United States, 28 F.2d 147 (9th Cir. 1928), 14 IOWA L. REV. 366, 38 YALE L.J. 678 (1929) (only first of three witnesses signing same deposition could surprise party). *Contra:* Witort v. Chicago & N.W.R.R., 170 Minn. 482, 212 N.W. 944 (1927) (allowed surprise on same facts).

9. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 Sup. Ct. 811, 84 L. Ed. 1129 (1940) (allowing use of transcript before grand jury to refresh recollection of hostile witness); Hickory v. United States, 151 U.S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170 (1894). Notes, 74 A.L.R. 1042 (1931), 117 A.L.R. 326 (1938). Tennessee takes this view. Record v. Copperage Co., 108 Tenn. 657, 69 S.W. 334 (1902) (frequently cited); 9 TENN. L. REV. 207 (1931).

10. Virginia Electric & Power Co. v. Hall, 184 Va. 102, 34 S.E.2d 382 (1945); MORGAN AND MAGUIRE, CASES AND MATERIALS ON EVIDENCE 244-48 (3d ed. 1951); Note, 34 W. VA. L.Q. 306 (1928). For Tennessee requirement see Turner v. State, 188 Tenn. 312, 219 S.W.2d 188 (1949) (hostile witness did not give prejudicial testimony); King v. State, 187 Tenn. 431, 215 S.W.2d 813 (1948), 20 TENN. L. REV. 780 (1949) (party calling hostile witness was allowed to impeach him).

11. United States v. Michener, 152 F.2d 880 (3d Cir. 1945); Note, 56 YALE L.J. 583 (1947). *But cf.* Young v. United States, 97 F.2d 200, 205 (5th Cir. 1938), 17 TEX. L. REV. 373 (1939); State v. Hogan, 137 N.J.L. 497, 61 A.2d 70 (Sup. Ct. 1948), *aff'd,* 1 N.J. 375, 63 A.2d 886 (Sup. Ct. 1949).

12. Ellis v. United States, 138 F.2d 612, 616 (8th Cir. 1943); Hammond v. Schuermann Building & Realty Co., 352 Mo. 418, 177 S.W.2d 618 (1944). *Contra:* Pulitzer v. Chapman, 337 Mo. 298, 85 S.W.2d 400, 409 (1935), 1 MO. L. REV. 89 (1936); State v. Jolly, 112 Mont. 352, 116 P.2d 686, 687 (1941); Note, 8 MONT. L. REV. 39 (1947). See MODEL CODE OF EVIDENCE, Rule 106(1) (1942); 3 WIGMORE, EVIDENCE §§ 1017-19 (3d ed. 1940); McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence,* 25 TEX. L. REV. 573 (1947); 1949 ANNUAL SURVEY OF AMERICAN LAW 978; Note, 14 MO. L. REV. 291 (1949) (proposed Missouri Code incorporated Professor McCormick's view).

13. Young v. United States 97 F.2d 200 (5th Cir. 1938), 7 FORD. L. REV. 452, 17 TEX. L. REV. 373 (1939). *But cf.* State v. Noel, 66 N.D. 676, 268 N.W. 654 (1936), 21 MINN. L. REV. 603 (1937); 3 WIGMORE, EVIDENCE § 905 (3d ed. 1940); Note, 11 OHIO ST. L.J. 364 (1950). For state stautes see 1949 ANNUAL SURVEY OF AMERICAN LAW 987-82; Callahan and Ferguson, *Evidence and The New Federal Rules of Civil Procedure,* 47 YALE L.J. 194, 203 (1937); Ladd, *supra* note 2.

it as being true.[14] This is generally recognized in judicial opinions, but the tendency is to relax these requirements, as is indicated by the principal case.[15]

The orthodox rule is still applied to exclude any evidence of the witness' bad moral character, and generally to exclude that of bias, interest or corruption.[16] Its unreasonableness is most apparent where the adverse party is called as a witness,[17] and it may exercise an unfortunate influence in connection with the matter of presumptions arising from a failure to produce a witness.[18] It may also possibly operate to prevent an otherwise desirable consolidation of actions.[19] Although the commentators do not agree on its past, they agree that the rule should have no future.

EVIDENCE—PRIVILEGE OF ACCUSED NOT TO TAKE THE STAND—"COMMENT" BY PROSECUTOR ON ACCUSED'S CONDUCT DURING TRIAL AS UNFAIR INTERFERENCE WITH PRIVILEGE

Defendant was being tried for murder. During the closing argument the prosecutor called the attention of the jury to the manner in which the defendant had allegedly discussed certain photographs of the scene of the crime with his attorney in the courtroom as tending to show the familiarity of the defendant with the scene of the crime. The defendant was convicted and appealed. *Held,* reversed.[1] The prosecutor's action infringed

14. Fournier v. United States, 58 F.2d 3 (7th Cir. 1932), *cert. denied,* 286 U.S. 565 (1932); People v. Johnson, 333 Ill. 469, 165 N.E. 235 (1929). In Tennessee the rule is relaxed where witness is necessary. King v. State, 187 Tenn. 431, 215 S.W.2d 813 (1948).

15. 235 P.2d at 853; *cf.* People v. Newson, 37 Cal.2d 34, 230 P.2d 618 (1951).

16. See 3 WIGMORE, EVIDENCE §§ 900, 901 (3d ed. 1940).

17. Webber v. Jackson, 79 Mich. 175, 44 N.W. 591, 592 (1890) (incongruous to claim that plaintiff, putting defendant on to show his fraud, gives him credit for honesty). *But cf.* Mississippi Glass Co. v. Franzen, 143 Fed. 501 (3d Cir. 1906) (vouches for adversary's veracity); American Smelting & Refining Co., v. Hyman, 16 F.2d 39 (6th Cir. 1926), 16 GEO. L.J. 269 (1928); Bank of Hendersonville v. Dozier, 24 Tenn. App. 178, 142 S.W.2d 191 (M.S. 1940) (could not discredit adversary's truthful character). Prior inconsistent statements are admissible as admissions regardless of the rule. People v. Michaels, 335 Ill. 590, 167 N.E. 857 (1929). *But cf.* Hale v. Johnston, 140 Tenn. 182, 203 S.W. 949, 954 (1918). For a discussion of statutes see Note, 21 COL. L. REV. 815 (1921).

18. Stewart v. Herrin Transportation Co., 37 So.2d 30 (La. App. 1948) (court permitted the inference from plaintiff's failure to produce a hostile witness); People v. Riley, 191 Misc. 888, 83 N.Y.S.2d 281 (Co. Ct. 1948), 62 HARV. L. REV. 1234 (1949) (conviction reversed for failure to call witness); McGehee v. Perkins, 188 Va. 116, 49 S.E.2d 304 (1948). For a discussion of the presumptions see 2 WIGMORE, EVIDENCE §§ 286-88 (3d ed. 1940).

19. *Cf.* Brown v. United States, 56 F.2d 997 (9th Cir. 1932); State v. Crooker, 123 Me. 310, 122 Atl. 865 (1923), 22 MICH. L. REV. 734, 37 HARV. L. REV. 780 (1924).

1. Although the vote for reversal was six to one, only three judges agreed that the prosecutor's statement constituted infringement of defendant's privilege against

the defendant's constitutional right not to take the stand since the statement could be contradicted only by direct testimony of the defendant which would constitute a waiver of his privilege. This infringment could not be cured by instructions from the court. *State v. Hoover,* 219 La. 872, 54 So.2d 130 (1951).

The privilege of an accused to refuse to testify against himself is aided by statutes or holdings that the exercise of this privilege shall not be the subject of comment by the prosecutor or the court and that it shall not create a presumption that his testimony would be prejudicial to his cause,[2] But for several years there has been a trend toward abolishing these restrictions.[3]

Granting, however, that comment by the prosecutor is forbidden, the question still remains: what kind of statement by a prosecutor in his argument to the jury constitutes a comment upon defendant's exercise of his privilege? Obviously, the comment may be so direct and unambiguous that no real question is presented.[4] Thus in the classic case of *State v. Marceaux,*[5] relied on by the court in the instant case,[6] the prosecutor asked, "Why did not [defendant] go on the stand and testify in his own behalf, if he was not guilty? He had the right to do so."[7]

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self-incrimination. The dissent was on the ground that this was no comment on defendant's failure to testify, and that comment, itself, is not an infringement of defendant's privilege. One justice concurred without opinion and another in a concurring opinion reasoned that, while there was no infringment of the privilege here, the prosecutor's statement was reversible error since it was an expression of belief not based on evidence adduced at the trial. On a petition for rehearing and the refusal thereof, another member of the court dissented on substantially the same ground as the concurring opinion in the main decision.

2. Ford v. State, 184 Tenn. 443, 201 S.W.2d 539 (1945); Hutchins v. State, 172 Tenn. 108, 110 S.W.2d 319 (1937); Hays v. State, 159 Tenn. 388, 19 S.W.2d 313 (1929). For representative statutes see, *e.g.,* 62 STAT. 833 (1948), 18 U.S.C.A. § 3481 (1951) (no presumption from failure to testify); FLA. STAT. ANN. § 918.09 (1944) (comment by prosecutor forbidden); TENN. CODE ANN. § 9783 (Williams 1934) no presumption. For complete citations of English, Dominion and American cases, see 8 WIGMORE, EVIDENCE § 2272 (3d ed. 1940).

3. See, *e.g.,* 8 WIGMORE, EVIDENCE 412 (3d ed. 1940). This trend was retarded somewhat by the actions of the highest courts of Massachusetts and South Dakota in the late thirties when they declared statutes allowing comment to be in conflict with state constitutional provisions granting the privilege against self-incrimination. *In re* Opinion of the Justices, 300 Mass. 620, 15 N.E.2d 662 (1938); State v. Wolfe, 64 S.D. 178, 266 N.W. 116 (1936). A contrary view was taken, however, in the more recent case of State v. Baker, 115 Vt. 94, 53 A.2d 53, 57 YALE L.J. 145 (1947).

4. Keifer v. State, 204 Ind. 454, 184 N.E. 557 (1933); State v. Richardson, 175 La. 823, 144 So. 587 (1932); State v. Sinigal, 138 La. 469, 70 So. 478 (1915); State v. Robinson, 112 La. 939, 36 So. 811 (1904); State v. Marceaux, 50 La. Ann. 1137, 24 So. 611 (1898); Seattle v. Hawley, 13 Wash.2d 357, 124 P.2d 961 (1942). *But cf.* Langford v. United States, 178 F.2d 48 (9th Cir. 1949); Arant v. State, 232 Ala. 275, 167 So. 540 (1936); Riley v. State, 57 Okla. Cr. 313, 49 P.2d 813 (1935).

5. 50 La. Ann. 1137, 24 So. 611 (1898).

6. 54 So.2d at 131.

7. 24 So. at 613.

A problem is presented where the comment is less direct. In the instant case, the prosecutor's statement was not strictly a comment upon defendant's exercise of the privilege, but rather it had the effect of forcing the defendant to go on the stand in order to rebut the argument presented. Nevertheless, the result is the same in each case; the value of the defendant's privilege is insufficiently protected.[8] The court held that the prosecutor's statement deprived the defendant of his privilege and was reversible error necessitating a new trial.

Mr. Wigmore has indicated that the prohibition against presumption from failure to testify and comment thereon conflicts with the general proposition that "a party's failure to produce evidence which, if favorable, would naturally have been produced, is open to the inference [and presumably the comment thereon] that the facts were unfavorable to his cause."[9] It becomes necessary then to distinguish "the boundary of the prohibited inference."[10] Many cases have held that an otherwise innocent statement accompanied by a gesture toward the defendant can be considered a comment on his refusal to testify.[11] Other cases treat as reversible error a comment by the prosecutor that certain evidence is "uncontradicted" where the evidence which is so described could, in the final analysis, be contradicted only by the defendant.[12]

On the other hand, the dissent in the instant case presents a forceful argument that since defendant's voluntary conduct in the courtroom is not subject to the privilege, the prosecutor may comment upon it.[13] A number

8. *Cf.* 8 WIGMORE, EVIDENCE 424 (3d ed. 1940).

9. *Id.* at 426. For cases illustrating this conflict, see: United States v. Brothman, 191 F.2d 70 (2d Cir. 1951); Slakoff v. United States, 8 F.2d 9 (3d Cir. 1925); People v. Birger, 329 Ill. 352, 160 N.E. 564 (1928); People v. Paisley, 299 Ill. 576, 132 N.E. 822 (1921); State v. Bryan, 175 La. 422, 143 So. 362 (1932); State v. Glauson, 165 La. 270, 115 So. 484 (1928); State v. Lewis, 101 So. 386 (La. 1924); Riley v. State, 57 Okla. Cr. 313, 49 P.2d 813 (1935); Miller v. Commonwealth, 153 Va. 890, 149 S.E. 459 (1929); *cf.* Keifer v. State, 204 Ind. 454, 184 N.E. 557 (1933); *see* State v. Marceaux, 50 La. Ann. 1137, 24 So. 611, 614 (1898). *But cf.* State v. Carr, 25 La. Ann. 407 (1873).

10. 8 WIGMORE, EVIDENCE 427 (3d ed. 1940).

11. See, *e.g.*, State v. Sinigal, 138 La. 469, 70 So. 478 (1915); State v. Robinson, 112 La. 939, 36 So. 811 (1904); State v. Paschall, 182 Wash. 304, 47 P.2d 15 (1935).

12. Barnes v. United States, 8 F.2d. 832 (8th Cir. 1925); Linden v. United States, 296 Fed. 104 (3d Cir. 1924); State v. Robinson, 184 S.W.2d 1017 (Mo. 1945); State v. Paschall, 182 Wash. 304, 47 P.2d 15 (1935); *see* Langford v. United States, 178 F.2d 48, 55 (9th Cir. 1949); State v. Conner, 142 La. 631, 77 So. 482, 483 (1917). *Contra:* People v. Birger, 329 Ill. 352, 160 N.E. 564 (1928); *cf.* Arant v. State, 232 Ala. 275, 167 So. 540 (1936); Roberts v. State, 122 Ala. 47, 25 So. 238 (1899); People v. Paisley, 299 Ill. 576, 132 N.E. 822 (1921); State v. Zemple, 196 Minn. 159, 264 N.W. 587 (1936); Riley v. State, 57 Okla. Cr. 313, 49 P.2d 813 (1935); *see* State v. Glauson, 165 La. 270, 115 So. 484, 488 (1928); Miller v. Commonwealth, 153 Va. 890, 149 S.E. 459, 462 (1929).

13. 54 So.2d at 133 *et seq.*

of cases have so held.[14] Certainly, the defendant's familiarity with the scene of the crime was a relevant factor in the case. Yet there is an element of unfairness about the prosecutor's statement here which distinguishes it from mere derogatory comments upon the defendant's appearance and demeanor in court.[15] The concurring opinion[16] and the dissent[17] to the refusal to grant a rehearing indicate a realization of this unfairness, though neither is willing to follow the "majority's"[18] rather tenuous reasoning that the prosecutor's statement constituted comment upon the defendant's failure to take the stand. It would seem, moreover, that the proposition that a prosecutor may comment upon the defendant's actions in the courtroom without infringing the privilege against self-incrimination is inconsistent with the theory that a prosecutor may not comment upon the defendant's failure to contradict testimony where the only method of overcoming such testimony would be for defendant to take the stand himself. The inconsistency becomes apparent in the instant case if it is granted that the prosecutor's statement did tend to force defendant to take the stand.[19]

Although there was not a majority of the Supreme Court of Louisiana willing to predicate its decision upon the theory that the prosecutor had commented upon the defendant's exercise of his privilege against self-incrimination, the majority of the court was equally unwilling by judicial decision to abolish the prohibition against comment.[20]

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14. Brothers v. State, 236 Ala. 448, 183 So. 433 (1938); State v. Serna, 69 Ariz. 181, 211 P.2d 455 (1949); State v. McKinnon, 158 Iowa 619, 138 N.W. 523 (1912); Armstrong v. Commonwealth, 190 Ky. 217, 227 S.W. 162 (1921); Norris v. State, 64 S.W. 1044 (Tex. Crim. App. 1901); *cf.* State v. Black, 150 Ore. 269, 42 P.2d 171 (1935). A related problem is the extent to which the accused may be *required* to perform certain acts in the courtroom. See Note, 171 A.L.R. 1144 (1947).

15. See, *e.g.*, the prosecutor's language in Norris v. State, 64 S.W. 1044, 1045 (Tex. Civ. App. 1901): "Through all of this trial, during the testimony and argument, the defendant has sat in his seat without any sign of emotion or change in his countenance. Look at him, gentlemen [pointing finger at defendant],—the size of his hands and how he crouches in his chair like some wild animal . . . You have a right to look at him, and judge of his action."

16. 54 So.2d at 135.

17. *Id* at 136.

18. See note 1 *supra.*

19. Compare the dissenting opinion to the refusal to grant a rehearing in the instant case: "But not in evidence, and about which the jury had no knowledge whatever, was the essence of the discussion or conversation carried on between the accused and his counsel. . . . Surely it eannot be concluded that such conversation, inaudible to the jury, necessarily concerned the actual scene of the crime. It might well be that the parties were agreeing that the photograps were perfect likenesses of a place in New York or Boston or Chicago. *No one knows, except them, exactly what they were saying to each other.*" 54 So.2d at 137 (emphasis supplied).

20. *Cf.* State v. Bentley, 219 La. 893, 54 So.2d 137 (1951), decided the same day as the instant case, in which Chief Justice Fournet unequivocally rejected the contentions of Justice Hawthorne (concurring at 142) that comment on defendant's failure to take the stand is not reversible error. This refusal to allow comment was based on statutory interpretation. *Compare* State v. Banks, 78 Me. 490, 7 Atl. 269 (1886), where there was no constitutional privilege against self-crimination and legislation was passed forbidding comment, after some years experience with a statute allowing comment, *with*

FULL FAITH AND CREDIT—APPLICATION TO WRONGFUL DEATH STATUTE—REFUSAL TO ENFORCE FOREIGN STATUTE WHEN SUIT COULD BE BROUGHT WHERE CAUSE OF ACTION AROSE

Decedent was killed in an airliner crash in Utah. This is an action under the Utah wrongful death statute in the United States district court of Illinois, by his executor, an Illinois bank, against the airlines company, a Delaware corporation doing business in Illinois. The district court held for the defendant on the basis of an Illinois statute providing that no action under a foreign wrongful death statute could be brought within the state when it was possible to maintain an action in the state where the cause of action arose.[1] The court of appeals affirmed. *Held* (5-2-2),[2] reversed. Full faith and credit must be given to the Utah statute. *First National Bank of Chicago v. United Air Lines, Inc.*, 72 Sup. Ct. 421 (1952).

In *Hughes v. Fetter*,[3] decided last June, the Supreme Court held that the full faith and credit clause may apply to state statutes and that this clause was violated by the refusal of the State of Wisconsin to enforce any cause of action for wrongful death arising outside the state. This holding was distinguished by the court below on the ground that the Illinois statute permits the bringing of a foreign action if it could not be brought in the state where it arose. The Supreme Court regards this distinction as "not crucial."

A note on the *Hughes* case in the preceding issue of this *Review* gives a detailed analysis of the problems involved.[4] The pendency of the instant case before the Court was noted and it was predicted that it would be reversed.[5] To what was then said it may now be added that this holding does not necessarily prevent a proper application of the doctrine of *forum non conveniens*.[6]

State v. Ferguson, 226 Iowa 361, 283 N.W. 917 (1939), where the reverse situation took place in the absence of a constitutionally granted privilege. The majority opinion in State v. Bentley, *supra*, indicates in a dictum that a statute allowing comment might be unconstitutional, 54 So.2d at 141. In 1912 Ohio amended its constitution to allow comment, thus avoiding the problem of unconstitutionality of legislation forbidding comment. OHIO CONST. Art. 1 § 10. Connecticut allows comment by the court only, in the face of a rather ambiguous statute. CONN. GEN. STAT. § 6480 (1930), construed in State v. Heno, 119 Conn. 29, 174 Atl. 181 (1934). The same is true in England, see The Queen v. Rhodes, [1899] 1 Q.B. 77, construing 61 & 62 VICT., c. 36, § 1 (1898). See also 8 WIGMORE, EVIDENCE § 2272 (3d ed. 1940) for complete citations.

1. "[N]o action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death arises under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place." ILL. STAT. ANN. c. 70, § 2 (Smith-Hurd 1936).

2. Opinion by Black, J.; concurring opinion by Jackson, J. (Minton, J., concurring); dissents by Frankfurter and Reed, JJ.

3. 341 U.S. 609, 71 Sup. Ct. 980, 95 L. Ed. 822 (1951).

4. Note, *State Statutes and The Full Faith and Credit Clause—Hughes v. Fetter*, 5 VAND. L. REV. 203 (1952).

5. *Id.* at 210.

6. *Cf. id.* at 210-11.

INCOME TAXATION—PRIZE CONTEST AWARDS—MUSICAL COMPOSITION PRIZE AS INCOME

In 1945, a philanthropist, who was also president of the Detroit Orchestra, Inc., offered three awards for the best symphonic compositions written by native-born composers of North, Central and South America. The underlying purpose of the awards was to further a spirit of understanding among the Pan-American nations and to bring to the public the best new music written in the Americas. Upon learning of the awards the taxpayer submitted a symphonic work which he had composed prior to the announcement of the awards. In 1947 he was awarded first prize. He reported the amount in his tax return for that year, and a petition for a refund having been refused, he brought suit in the district court, which held that the award was a gift and therefore not taxable as income. *Held,* reversed. When a person submits the product of his skill and training in a contest and receives a prize, the necessary elements of a "gift" are not present. *United States v. Robertson,* 190 F.2d 680 (10th Cir. 1951).

Income has been broadly defined as gain derived from capital, labor or both combined, including profit through the sale or conversion of capital assets.[1] Under section 22(a) of the Internal Revenue Code a tax is levied on "income derived from any source whatever."[2] However, under section 22(b)(3) Congress has expressly excluded the value of property acquired by gift from the determination of gross income.[3]

The payment of prize money or awards falls into one of two categories: it is either compensation or a gift. What factors have the courts considered in determining whether the sum is to be treated as a gift or whether it is compensation within the meaning of the act? The traditional approach has been to define a gift as a voluntary transfer of one's property to another without consideration or compensation therefor.[4] This places the emphasis

1. See, *e.g.,* Eisner v. Macomber, 252 U.S. 189, 40 Sup. Ct. 189, 64 L. Ed. 521 (1919); Drier v. Helvering, 72 F.2d 76 (D.C. Cir. 1934); Chicago & N.W. Ry. v. Commissioner, 66 F.2d 61 (7th Cir. 1933); Wells v. Commissioner, 63 F.2d 425 (8th Cir. 1933).

2. INT. REV. CODE § 22(a).

3. *Id.* § 22(b)(3).

4. This definition seems to have first appeared in Gray v. Barton, 55 N.Y. 68 (1873). It has been adopted either in substance or by word in most jurisdictions today. Blair v. Rosseter, 33 F.2d 286 (9th Cir. 1929); Noel v. Parrott, 15 F.2d 669 (4th Cir. 1926); *Ex parte* Barefoot, 201 N.C. 393, 160 S.E. 365 (1931); Saba v. Cleveland Trust Co., 23 Ohio App. 163, 154 N.E. 799 (1926). Another definition frequently used by the courts is that if the award was received gratuitously and in exchange for nothing, it is a gift. Helvering v. American Dental Co., 318 U.S. 322, 63 Sup. Ct. 577, 87 L. Ed. 785 (1943). "[T]here is an evident trend in the decisions towards tightening the definition of a gift so as to throw the receipt of the property into a taxable category rather than into the nontaxable category of gifts." 1 MERTENS, LAW OF FEDERAL TAXATION 233 (1942). It should be noticed that the mere fact that a payment is voluntary does not establish it as a gift. Smith v. Manning, 189 F.2d 345 (3d Cir. 1951).

upon the motivation of the donor.[5] Whether such a donative motive existed at the time of the transfer is a question of fact to be determined by the trier of the facts.[6] Circumstances evidencing the requisite donative intent are: (1) lack of consideration;[7] (2) an act of spontaneous generosity;[8] (3) a personal motive, such as love and affection, as contrasted with a commercial or financial motive;[9] (4) absence of legal or moral obligation to pay;[10] and (5) philanthropic, charitable or educational objectives which will benefit the general public.[11] On the other hand, courts have considered the following factors as tending to negate a donative intent: (1) that the payor received consideration, for example, past services rendered by payee;[12] (2) that there was a benefit to the payor such as furthering its advertising or commercial purposes;[13] (3) that the entries became the property of the payor;[14] and (4) that the payor claimed the amount of the award as a business deduction.[15]

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5. A gift always involves the intention of the donor. Green v. Sutherland, 40 Misc. 559, 82 N.Y. Supp. 878 (Sup. Ct. 1903); Farleigh v. Cadman, 159 N.Y. 169, 53 N.E. 808 (1899). However, the instant case has taken a diametrically opposed view by adopting a rule which disregards the donor's intent.

6. Schall v. Commissioner, 174 F.2d 893 (5th Cir. 1949); see Bogardus v. Commissioner, 302 U.S. 34, 45, 58 Sup. Ct. 61, 82 L. Ed. 32 (1937) (dissenting opinion).

7. Bogardus v. Commissioner, 302 U.S. 34, 58 Sup. Ct. 61, 82 L. Ed. 32 (1937); McDermott v. Commissioner, 150 F.2d 585 (D.C. Cir. 1945); Schumacher v. United States, 55 F.2d 1007 (Ct. Cl. 1932); Washburn v. Commissioner, 5 T.C. 1333 (1945); Knowles v. Commissioner, 5 T.C. 525 (1945); Martin v. Martin, 202 Ill. 382, 67 N.E. 1 (1903).

8. Bogardus v. Commissioner, 302 U.S. 34, 58 Sup. Ct. 61, 82 L. Ed. 32 (1937); United States v. Merriam, 263 U.S. 179, 44 Sup. Ct. 69, 68 L. Ed. 240 (1923). "An important characteristic of gifts is that, unlike many sorts of 'income,' they cannot be counted on in advance . . . ." McDermott v. Commissioner, 150 F.2d 585, 588 (D.C. Cir. 1945).

9. Simpkinson v. Commissioner, 89 F.2d 397 (5th Cir. 1937); Bass v. Hawley, 62 F.2d 721 (5th Cir. 1933); Marshall Drug Co. v. United States, 95 F. Supp. 820 (Ct. Cl. 1951); *cf.* Washburn v. Commissioner, 5 T.C. 1333 (1945).

10. Bogardus v. Commissioner, 302 U.S. 34, 58 Sup. Ct. 61, 82 L. Ed. 32 (1937); Dewling v. United States, 101 F. Supp. 892 (Ct. Cl. 1952); Washburn v. Commissioner, 5 T.C. 1333 (1945). *But cf.* United States v. McCormick, 67 F.2d 867 (2d Cir. 1933), *cert. denied*, 291 U.S. 662 (1934), where it is stated that mere absence of a legal consideration or duty to pay does not make a payment a gift within the meaning of the Revenue Act.

11. McDermott v. Commissioner, 150 F.2d 585 (D.C. Cir. 1945); Simpkinson v. Commissioner, 89 F.2d 397 (5th Cir. 1937); Bass v. Hawley, 62 F.2d 721 (5th Cir. 1933); Amirikian v. United States, 100 F. Supp. 263 (D. Md. 1951); 31 VA. L. REV. 959 (1945); 14 FORD L. REV. 249 (1945). *Contra:* the instant case, 190 F.2d 680.

12. Bausch's Estate v. Commissioner, 186 F.2d 313 (2d Cir. 1951); Roberts v. Commissioner, 176 F.2d 221 (9th Cir. 1949); Baboquivari Cattle Co. v. Commissioner, 135 F.2d 114 (9th Cir. 1943); Noel v. Parrott, 15 F.2d 669 (4th Cir. 1926). A number of courts holding contrary to this maintain that a payment is none the less a gift because inspired by gratitude for past faithful service of the recipient. Bogardus v. Commissioner, 302 U.S. 34, 58 Sup. Ct. 61, 82 L. Ed. 32 (1937); Schall v. Commissioner, 174 F.2d 893 (5th Cir. 1949).

13. Stein v. Commissioner, 14 T.C. 494 (1950); Waugh v. Commissioner, 19 P-H 1950 TC Mem. Dec. ¶ 50,095 (1950). *But cf.* Washburn v. Commissioner, 5 T.C. 1333 (1945), where the Tums Co. gave $900 on a commercial radio program and the amount was held to be a gift.

14. Stein v. Commissioner, 14 T.C. 494 (1950). See note 17 *infra*, for the rights received in the instant case. *Contra:* McDermott v. Commissioner, 150 F.2d 585 (D.C. Cir. 1945); Amirikian v. United States, 100 F. Supp. 263 (D. Md. 1951).

15. Bausch's Estate v. Commissioner, 186 F.2d 313 (2d Cir. 1951); Noel v. Parrott, 15 F.2d 669 (4th Cir. 1926); Dasteel v. Rogan, 41 F. Supp. 836 (S.D. Cal. 1941); Stein

In the instant case the court departed from the traditional test by placing the emphasis upon the acts of the recipient saying that: "The taxability of the prize or award is to be determined in accordance with the law applicable to the person receving it."[16] While the court could have justified its holding on a theory that would be entirely consistent with the traditional view, it refused to base its decision upon the narrow ground that the relinquishment of certain performance and publication rights by the winner was a consideration sufficient to refute a donative intent.[17] Rather it held that when a person submits the product of his skill and training in a contest and receives a prize, the necessary elements of a gift are not present.[18]

Thus, the question arises as to how far this shift away from the traditional test will be carried. Relying on the theory of the instant case, the Commissioner of Internal Revenue has issued a ruling which has created uncertainties as to the tax status of grants, fellowships and scholarships. In it he has ruled that when the recipient of a grant or fellowship applies his skill and training to advance research, creative work or some other project or activity, the amount received is includible in gross income; but, when the grant or fellowship is made for the training and education of an individual, no services being rendered therefor, the amount is to be considered as a gift.[19] This ruling, like the instant case, places the emphasis on the recipient's acts rather than the donor's intent. It would seem to make the typical college scholarship taxable. Such awards are either given in recognition of past attainment of superior grades or have, as a condition of continuance, minimum grade requirements. In either case the award is predicated upon the results of the applicant's "skill and training". But to treat such awards as taxable income runs counter to the long standing rulings on this subject. Furthermore, it appears socially undesirable and is without justification under what was heretofore the traditional approach of the courts, under which the motivation of the donor was the decisive factor.

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v. Commissioner, 14 T.C. 494 (1950). *But cf.* Washburn v. Commissioner, 5 T.C. 1333 (1945).

16. 190 F.2d at 683.

17. *Ibid.* A condition required by the contest rules was that each composition receiving a cash award, honorable mention or a certificate of merit would remain the property of the composer except that he would be required to grant to the Detroit Orchestra, Inc., all synchronization rights as applied to motion pictures and all mechanical rights as applied to phonograph recordings, electrical transcriptions and music rolls. The Orchestra was also granted the exclusive rights to authorize the first performance and to designate the publishers of the winning compositions. See 190 F.2d at 681 n.2. The relinquishment of these rights would seem to be a sufficient consideration to negative a donative intent. If the court had so held, it would have reached the same result but upon a sounder basis which would be consistent with the traditional view.

18. 190 F.2d at 683.

19. I.T. 4056, 1951 INT. REV. BULL. No. 17 at 2 (1951). *Contra:* McDermott v. Commissioner, 150 F.2d 585 (D.C. Cir. 1945); Amirikian v. United States, 100 F. Supp. 263 (D. Md. 1951). Also see 14 FORD L. REV. 249 (1945); 31 VA. L. REV. 959 (1945).

REAL PROPERTY—WATER RIGHTS—PUBLIC RIGHTS OF FISHING AND NAVIGATION OVER FLOODED LANDS

Plaintiffs are the lessees of a flooded tract of land on which the public has been boating and fishing. The land was used for residential and agricultural purposes until 1938. In that year a river levee broke, flooding the tract with up to six feet of water, the land remaining flooded ever since. Plaintiffs leased the land in 1947, with the intention of charging a fee for the privilege of fishing in the waters over the land and attempted to bar the public from fishing on the tract. Plaintiffs obtained an injunction prohibiting defendants and other members of the public from fishing in the flooded tract, and defendants appealed. *Held,* reversed. Although the title to the land remains in the owner, the public, because of the navigability of the waters, has a right to use the water above the tract for boating and fishing, provided they do so without trespassing on plaintiffs' land. *Bohn v. Albertson,* 238 P.2d 128 (Calif. App. 1951).

At English common law, the king held title to the beds of all watercourses in which there was an ebb and flow of the tide;[1] the rights of navigation and fishing were in the public.[2] The title to the beds of all other streams was in the riparian owners,[3] who had the exclusive right of fishery, but subject to a public easement of navigation.[4] In the United States, some courts have followed this common law classification in determining bed ownership,[5] but others have held that the state has title to the bed of all streams capable of navigation.[6] One court draws a distinction

1. See Shively v. Bowlby, 152 U.S. 1, 11, 12, 14 Sup. Ct. 548, 38 L. Ed. 331 (1893); 1 FARNHAM, WATERS AND WATER RIGHTS § 38 (1904); Note, TEXAS L. REV. 72 (1933). After the Revolution, title to lands under tide waters which had been vested in the king became vested in the states in which they were situated. People v. New York and Staten Island Ferry Co., 68 N.Y. 71 (1877).

2. Smith v. Andrews, [1891] 2 Ch. 678. The king's proprietary interest in the tidelands is known as the *jus privatum,* which could be granted to private individuals. However, the public's easement of fishing and navigation, the *jus publicum,* could not be abridged by the king; hence all grants of tidal waters were subject to the public rights. See 27 MICH. L. REV. 84 (1928). For historical treatment, see 1 FARNHAM, WATERS AND WATER RIGHTS §§ 36 *et seq.* (1904).

3. See Ewing v. Colquhoun, [1877] 2 A.C. 839. Where there are two riparian owners, each owns to the "thread" or center line of the stream, irrespective of the location of the channel. Farris v. Bentley, 141 Wis. 671, 124 N.W. 1003 (1910); 2 TIFFANY, REAL PROPERTY § 661 (3d ed., Jones, 1939).

4. Smith v. Andrews, [1891] 2 Ch. 678. For a discussion of the historical origin of the public easement of navigation, see 1 FARNHAM, WATERS AND WATER RIGHTS § 23 (1904).

5. See, *e.g.,* Hendrick v. Cook, 4 Ga. 241 (1848); Lorman v. Benson, 9 Mich. 237, 77 Am. Dec. 435 (1860); New Orleans, M. & C. R.R. v. Fredric, 46 Miss. 1 (1871); Day v. Pittsburgh, Y. & C. R.R., 44 Ohio St. 406, 7 N.E. 528 (1886).

6. See, *e.g.,* Bullock v. Wilson, 2 Port. 436 (Ala. 1835); St. Louis, I.M. & S. Ry. v. Ramsey, 53 Ark. 314, 13 S.W. 931 (1890); People v. Gold Run Ditch & Mining Co., 66 Cal. 155, 4 Pac. 1150 (1884); Flanagan v. Philadelphia, 42 Pa. 219 (1862). The usual explanation for these decisions is that in England the only rivers of importance were tidal, whereas in this country the great rivers of commerce are non-tidal, so that public policy required that title be in the state to preserve free

between those streams navigable in fact and those which are commercially navigable, holding title to the former to be in the riparian owner.[7] Ownership of non-navigable watercourses is universally held to be in the riparian owner.[8]

It seems well settled that once title to land is acquired, it is not affected by the fact that the property later becomes submerged under navigable waters by avulsion.[9] This is true even in those states where title to the bed of navigable streams is in the state.[10] Furthermore, the landowner in such cases has a right to drain or reclaim the land if possible.[11] However, since a public right of way exists in all navigable waters, whether or not title is in the state, the public has an easement of navigation in the waters covering the submerged property.[12]

In those states where the riparian owners of non-tidal streams own the bed, a strict application of common law principles would give them the exclusive right to fish in the stream.[13] This is not always the case, however. The fact that, at common law, the public right of fishing was coextensive with the right of navigation in tidal waters owned by the state, has led some American jurisdictions to disregard the separate nature of these rights.[14] In these states, the public right of fishing is held to extend to all ordinary navigable waters, regardless of who owns the stream bed,[15]

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navigation. See Carson v. Blazer, 2 Binn. 475 (Pa. 1810); Town of Ravenswood v. Fleming, 22 W. Va. 52, 46 Am. Rep. 485 (1883). For a discussion of the various tests by which navigability is determined, see 1 FARNHAM, WATERS AND WATER RIGHTS § 23 (1904); 65 C.J.S., *Navigable Waters* §§ 1-9 (1950).

7. State v. West Tennessee Land Co., 127 Tenn. 575, 158 S.W. 746 (1913); Stuart v. Clark's Lessee, 32 Tenn. 1 (1852).

8. See People v. Grand Rapids-Muskegon Power Co., 164 Mich. 121, 129 N.W. 211 (1910), and cases collected in 2 TIFFANY, REAL PROPERTY 706 n.73 (3d ed., Jones, 1939).

9. See *e.g.*, Wheeler v. Spinola, 54 N.Y. 377 (1873); State v. West Tennessee Land Co., 127 Tenn. 575, 158 S.W. 746 (1913); Fisher v. Barber, 21 S.W.2d 569 (Tex. Civ. App. 1929). In this connection, avulsion, the sudden subsidence or tearing away of land, must be distinguished from erosion, the gradual tearing away. As a general rule where land is inundated by erosion, title is lost to the state. See 65 C.J.S., *Navigable Waters* §§ 86-87 (1950).

10. See, *e.g.*, Clement v. Watson, 63 Fla. 109, 58 So. 25 (1912) (tide water).

11. Schwartzstein v. B. B. Bathing Park, Inc., 203 App. Div. 700, 197 N.Y. Supp. 490 (2d Dep't 1922).

12. Schulte v. Warren, 218 Ill. 108, 75 N.E. 783 (1905); Sterling v. Jackson, 69 Mich. 488, 37 N.W. 845 (1888); State v. West Tennessee Land Co., 127 Tenn. 575, 158 S.W. 746 (1913).

13. At common law the rights of fishing and navigation were separate and distinct, and the exclusive right of fishing followed the ownership of the stream bed. See Holyoke Co. v. Lyman, 15 Wall. 500, 21 L. Ed. 133 (1873) and cases cited note 12 *supra*.

14. See Note, 12 TEXAS L. REV. 72, 75 (1933).

15. Forestier v. Johnson, 164 Cal. 24, 127 Pac. 156 (1912); Winous Point Shooting Club v. Slaughterbeck, 96 Ohio St. 139, 117 N.E. 162 (1917); Willow River Club v. Wade, 100 Wis. 86, 76 N.W. 273 (1898). In this connection there is no distinction drawn between fishing and hunting from a boat. See Bodi v. Winous Point Shooting Club, 57 Ohio St. 226, 48 N.E. 944 (1897).

the courts regarding fishing as "incident to the right of navigation."[16] But a majority of American courts do recognize the common law distinctions on this point, holding that the right to fish and hunt is an incident of land ownership, exclusive in the riparian owner.[17]

Cases, other than the instant one, have been unanimous in allowing the owner a private right of fishing wherever property, formerly dry land or covered by shallow water, is inundated by navigable waters, as in the instant case.[18] This is true even in states which do not normally recognize private fishing rights in such waters.[19] In the present case the California court has departed from this usual view by extending public fishing rights to all public waters, regardless of the fact that the land was flooded after acquisition by the owner. Although at variance with the traditional concepts of land ownership,[20] this result is consistent with the essentially public nature of inland fishing in this country,[21] generally regulated and supported through public funds.

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16. Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816, 819 (1914). In Michigan the same result is reached, but on a sounder basis. "I do not think that it can be said that fishing is an incident of navigation. The navigability of a stream or lake, however, fixes its public character . . . and the right of fishing in public waters is a public right. . . ." Collins v. Gerhardt, 237 Mich. 38, 211 N.W. 115, 119 (1926).

17. See, *e.g.*, Holyoke Co. v. Lyman, 15 Wall. 500, 21 L. Ed. 133 (1873); Clement v. Watson, 63 Fla. 109, 58 So. 25 (1912); Schulte v. Warren, 218 Ill. 108, 75 N.E. 783 (1905); State v. West Tennessee Land Co., 127 Tenn. 575, 158 S.W. 746 (1913); Fisher v. Barber, 21 S.W.2d 569 (Tex. Civ. App. 1929); Knudson v. Hull, 46 Utah 114, 148 Pac. 1070 (1915).

18. See cases cited note 17 *supra*.

19. *Compare* Sterling v. Jackson, 69 Mich. 488, 37 N.W. 845 (1888) (right of private fishing upheld on land flooded by navigable waters), *with* Collins v. Gerhardt, 237 Mich. 38, 211 N.W. 115 (1926) (public right of fishing held to extend to all navigable waters).

20. See 27 HARV. L. REV. 750 (1914); 16 MICH. L. REV. 37 (1917).

21. See Note, 12 TEXAS L. REV. 72 (1933). When in England and this country fishing was generally done by traps affixed to the stream bed, the policy of private fishing rights in the riparian owner was in the public interest. But it has been suggested that where, as is now the practice in this country, inland fishing is done for sport with hook and line there is really no property interest attached to the right of fishing. See 1 FARNHAM, WATERS AND WATER RIGHTS 171 (1904).