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RECENT CASES

ATTORNEYS—REINSTATEMENT PROCEEDINGS—JURISDICTION OF DISBARRING COURT

Petitioner was disbarred in 1938 under a statutory provision providing for disbarment of an attorney who commits any infamous crime or misdemeanor involving moral turpitude.[1] The disbarment decree ordered that the petitioner be permanently disbarred, his name permanently stricken from the roll of attorneys and that he be "forever enjoined and prohibited from engaging in . . . the practice of law . . . in the State of Tennessee." Petitioner applied for reinstatement to the chancery court which had disbarred him. Respondents demurred to the petition on the grounds that the disbarment decree constituted a permanent disability and rendered petitioner forever ineligible for readmission to the bar, or, in the alternative, that the decree "at least completely deprived petitioner of the office of an attorney and left him a layman who must pursue the avenue presently provided for new applicants in order to re-enter the profession." From a decree sustaining the demurrer and dismissing the petition, petitioner appealed. *Held,* affirmed. An attorney disbarred for the commission of an infamous crime or misdemeanor involving moral turpitude may be readmitted to the bar, but he must seek readmission through the Board of Law Examiners. *Cantor v. Grievance Committees of Washington and Carter County Bar Ass'ns,* 226 S.W.2d 283 (Tenn. 1949).

It seems to be well settled that disbarment is not necessarily permanent, even though the disbarment decree is couched in terms of permanency,[2] al-

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1. "Any attorney . . . admitted to practice in the courts of the state may he disbarred or suspended from the practice of law—(1) Who shall commit or may have committed, any infamous crime or misdemeanor involving moral turpitude." TENN. CODE ANN. § 9974 (Williams 1934). [Subdivisions (2), (3), (4) and (5) provide for disbarment or suspension for other reasons].

"In cases arising under the first subdivision of the preceding section, the judgment of the court must be that the name of the attorney shall be stricken from the roll of attorneys, . . . and that he be excluded from practicing . . . in all the courts of the state; and, upon conviction, in cases under other subdivisions of the preceding section, the judgment shall be permanent or temporary deprivation of the right to practice law, or a censure or reprimand, according to the gravity of the offense." TENN. CODE ANN. § 9975 (Williams 1934).

2. *In re* Boone, 90 Fed. 793 (C.C.N.D. Cal. 1898); Wettlin v. State Bar, 24 Cal. 2d 862, 151 P.2d 255 (1944); *In re* Stump, 272 Ky. 593, 114 S.W.2d 1094 (1938); *Ex parte* Redmond, 120 Miss. 536, 82 So. 513 (1919); 5 AM. JUR., *Attorneys at Law* § 301 (1936); 7 C.J.S., *Attorney and Client* § 41 (1937); WEEKS, ATTORNEY AND CLIENT § 82 (1878). Thus in *In re* Boone, *supra,* an order perpetually disbarring an attorney was held not to preclude reinstatement; and in *Ex parte* Redmond, *supra,* the court held that a statute providing that after an attorney is disbarred "such person shall never afterward be permitted to act as an attorney or counselor in any court in this state" meant only so long as the judgment remained unchanged, and that the court could reopen the case and reinstate the lawyer.

though the language in a few cases indicates that the seriousness of the offense may be so great as to warrant forever barring the offender from the practice of law.[3] Where a statute prohibits the admission to practice of any person convicted of certain crimes,[4] it would seem that one disbarred for such a conviction would be forever ineligible for readmission.[5] In the absence of such statutes the courts, stressing their interest in the regeneration of erring attorneys, have held that a disbarred attorney might be reinstated in proper instances. Disbarment "is not properly or technically to be considered as in the nature of punishment, though it may have that practical effect. Its purpose is to exclude from the office of an attorney in the courts, for the preservation of the purity of the courts and the protection of the public, one who has demonstrated that he is not a proper person to hold such office." [6] Therefore, when an attorney can satisfy the court that he has regained that high ethical standard requisite of members of the legal profession, he should be reinstated.[7]

The court in the instant case distinguished between attorneys disbarred for the commission of a crime or misdemeanor involving moral turpitude, and those disbarred for other reasons, holding that the former must seek readmission through the Board of Law Examiners, while the latter have a right to seek reinstatement by petition to the court which disbarred them. This distinction seems not to have been previously made.[8]

A majority of the courts hold that a disbarred attorney, seeking reinstatement, must apply to the court which disbarred him.[9] The disbarring court is said to have continuing jurisdiction of the subject matter and the parties,[10]

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3. See *In re* Keenan, 314 Mass. 544, 50 N.E.2d 785, 788 (1943); Bar Ass'n of Boston v. Greenhood, 168 Mass. 169, 183, 46 N.E. 568 (1897).

4. *E.g.*, KY. REV. STAT. ANN. § 30.100 (1943) (felony); TEX. REV. CIV. STAT. ANN. art. 311 (1947) (felony). GA. CODE ANN. § 9-501 (1936) requires disbarment of an attorney convicted of crime or misdemeanor involving moral turpitude and § 9-519 prohibits such attorney's reinstatement. As to constitutionality of statutes regulating admission to the bar, see Notes, 66 A.L.R. 1512 (1930), 81 A.L.R. 1064 (1932).

5. *See In re* Stump, 272 Ky. 593, 114 S.W.2d 1094, 1098 (1938).

6. *In re* Keenan, 310 Mass 166, 37 N.E.2d 516, 519 (1941); 2 THORNTON, ATTORNEYS AT LAW § 762 (1914).

7. *E.g.*, *In re* Boone, 90 Fed. 793 (C.C.N.D. Cal. 1898); Wettlin v. State Bar, 24 Cal. 2d 862, 151 P.2d 255 (1944); *In re* Salsbury, 217 Mich. 260, 186 N.W. 404 (1922); *In re* Simpson, 11 N.D. 526, 93 N.W. 918 (1903).

8. In *Ex parte* Mitchell, 123 W. Va. 282, 14 S.E.2d 771 (1941), the court drew a distinction between statutory annulment of a license to practice law and common law disbarment, holding that by the former an attorney was relegated to the position of a layman, his license becoming totally void and incapable of subsequent revitalization. In order to practice law again the attorney must obtain a new license. But in the case of common law disbarment, the disbarring court retains jurisdiction and may terminate the disbarment at any time. In the instant case, both reasons for disbarment are statutory. *Cf. In re* Jacobsen, 209 Cal. 539, 289 Pac. 159 (1930); *In re* H—— S——, 236 Mo. App. 1296, 165 S.W.2d 300 (1942).

9. *E.g.*, *In re* Talbott, 58 Ind. App. 426, 108 N.E. 240 (1915); *In re King*, 54 Ohio St. 415, 43 N.E. 686 (1896); *In re* Margolis, 280 Pa. 296, 124 Atl. 439 (1924); Burns v. State, 129 Tex. 303, 103 S.W.2d 960 (1937), *reversing* 76 S.W.2d 172 (Tex. Civ. App. 1934); 2 THORNTON, ATTORNEYS AT LAW § 902 (1914); 5 AM. JUR., *Attorneys at Law* § 301 (1936); 7 C.J.S., *Attorney and Client* § 41 (1937).

10. *In re* King, 54 Ohio St. 415, 43 N.E. 686 (1896); Burns v. State, 129 Tex. 303, 103 S.W.2d 960 (1937), *reversing* 76 S.W.2d 172 (Tex. Civ. App. 1934).

and to have the inherent power to reinstate those whom it disbars.[11] Other courts have held that the petition for reinstatement must be treated as an application for admission and must therefore be addressed to the court having jurisdiction to admit attorneys to practice.[12] But none of these courts hold that an attorney disbarred for one reason must seek admission in the same manner as original applicants to practice, while those disbarred for other reasons must seek reinstatement through the disbarring court.[13] The position of the Tennessee Supreme Court in this respect seems to be unique.[14]

Are not all attorneys, once they are disbarred, their names stricken from the rolls, and their licenses revoked, in the same position? It would seem that each has been relegated to the position of a layman, regardless of the reason for his disbarment, and that each should pursue the same course in seeking to regain the lost privilege. True, there is a valid distinction between disbarment for the commission of an infamous crime or misdemeanor involving moral turpitude and disbarment for less serious offenses. But it would seem to be better either to adopt a uniform rule of procedure for the reinstatement of all disbarred attorneys, or to forbid entirely the reinstatement of attorneys disbarred for those reasons deemed by the court sufficiently serious to warrant their being distinguished.[15] Of these suggested alternatives, the former would appear to be more desirable.[16]

AUTOMOBILE LIABILITY INSURANCE—ESTOPPEL BY JUDGMENT—PRIOR JUDGMENT AGAINST INSURED AS BAR TO INSURER'S DEFENSE OF LACK OF COVERAGE

Plaintiff insurance company contracted to "pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages . . . because of bodily injury . . . sustained by any person or persons, caused by accident and arising out

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11. People *ex rel.* Colorado Bar Ass'n v. Essington, 32 Colo. 168, 75 Pac. 394 (1904); *In re* Talbott, 58 Ind. App. 426, 108 N.E. 240 (1915); *Ex parte* Redmond, 120 Miss. 536, 82 So. 513 (1919).

12. *In re* Lavine, 2 Cal. 2d 324, 41 P.2d 161 (1935); *In re* H—— S——, 236 Mo. App. 1296, 165 S.W.2d 300 (1942); *In re* Fleming, 36 N.M. 93, 8 P.2d 1063 (1932). *But cf. In re* Stevens, 197 Cal. 408, 241 Pac. 88 (1925).

13. See note 8 *supra*.

14. The state code does not make this distinction. It merely provides that an attorney must be disbarred when he has been guilty of a specified offense, while for other offenses he may or may not be disbarred, the seriousness of the punishment being left to the discretion of the court. TENN. CODE ANN. §§ 9974, 9975 (Williams 1934).

15. See note 4 *supra*.

16. Assuming that a statute expressly requires those attoneys disbarred for one reason to seek readmission in the manner provided for original applicants and those disbarred for all other reasons to seek reinstatement through the court that disbarred them, *quaere*, is not this an unwarranted invasion by the legislature of the power of the Judiciary over its officers? Compare this with the exclusive power of the state legislators and of Congress to determine whether their respective members shall be allowed to take their seats.

of the ownership, maintenance or use" of his automobile, and to defend any suit against the insured alleging such accidental injury. Intentional injuries were expressly excluded from the coverage of the policy. After an automobile collision with the insured, the injured parties or their personal representatives brought suit against him for damages; the insurer appeared to defend that action, but withdrew with leave of court before the trial.[1] Judgments were entered against the insured for negligence, upon which execution was returned unsatisfied; by statute,[2] the judgment creditors in such circumstances were entitled to sue the insurer directly upon the judgments so rendered. Upon the ground that the injury was intentionally caused by the insured, the insurance company brought the present action for a declaratory judgment of nonliability, and for an injunction against the institution of an action against it to collect the judgments. The federal district court held the insurer estopped to raise the issue, and granted defendants' motion for summary judgment. *Held* (2-1), reversed and remanded; "the policy in suit could not legally cover and was not intended to cover such conduct as [the insured] was guilty of. . . . [T]he binding effect of a judgment against the insured does not extend to matters outside the scope of the insurance contract." *Farm Bureau Mut. Automobile Ins. Co. v. Hammer,* 177 F.2d 793 (4th Cir. 1949), *cert. denied,* — U.S. — (1950).

Where an indemnitor has notice of and opportunity to defend an action against his indemnitee, he is bound by material facts established against the indemnitee, whether he appears in defense of the action or not.[3] The conclusiveness of the judgment as against the party obligated to make indemnity extends only to the issues necessarily determined in the prior action;[4] it does not extend to the question as to whether there is an actual obligation to indemnify, unless the facts which determine that matter were necessarily adjudicated in the prior action.[5] These general principles have frequent appli-

1. The company withdrew from the defense because, in the meantime, the insured had been convicted of second degree murder for intentionally and maliciously causing the death of one of the occupants of the other automobile.

2. VA. CODE ANN. § 4326a (1942). For this same provision in the 1950 Code, see VA. CODE ANN. § 38-238 (1950).

3. *E.g.,* Washington Gaslight Co. v. District of Columbia, 161 U.S. 316, 16 Sup. Ct. 564, 40 L. Ed. 712 (1896); E.I. Du Pont de Nemours & Co. v. Richmond Guano Co., 297 Fed. 580 (4th Cir. 1924); Drennan v. Bunn, 124 Ill. 175, 16 N.E. 100, 7 Am. St. Rep. 354 (1888). See 30 AM. JUR., *Judgments* § 237 (1940); 1 FREEMAN, JUDGMENTS § 447 (5th ed. 1925); RESTATEMENT, JUDGMENTS § 107(a) (1942). Where such notice and opportunity to defend are not given to the indemnitor, he is not bound by the judgment, but may litigate again every essential fact necessary to support the judgment. *E.g.,* Burchett v. Blackburne, 198 Ky. 304, 248 S.W. 853, 34 A.L.R. 1425 (1923).

4. *E.g.,* B. Roth Tool Co. v. New Amsterdam Casualty Co., 161 Fed. 709 (8th Cir. 1908); Estep v. Bailey, 94 Ore. 59, 185 Pac. 227 (1919); *see* Hoskins v. Hotel Randolph Co., 203 Iowa 1152, 211 N.W. 423, 428, 65 A.L.R. 1125 (1926), *cert. denied,* 275 U.S. 566 (1927).

5. *E.g.,* Harris v. Schrimper, 184 Iowa 1295, 169 N.W. 750 (1918); Pfarr v. Standard Oil Co., 165 Iowa 657, 146 N.W. 851, L.R.A. 1915C 336 (1914); J. & R. Lamb v. Norcross Bros. Co., 208 N.Y. 427, 102 N.E. 564 (1913).

cation to cases involving liability insurance.[6] Thus, under facts substantially similar to those of the present case, the Massachusetts court held that the insurer was bound by a finding in the damage suit that the injury was caused by the negligence of the insured, and that it could not subsequently assert that the act was intentional so as to show the liability to be beyond the coverage of the policy.[7] Other cases support this same view,[8] although it has not escaped criticism.[9]

The present court, apparently impressed by strong factual circumstances suggesting that the act of the insured had in fact been intentional, since he had been convicted of second degree murder, took the opposite position. Observing that it "was not possible for the company in these suits to defend the insured, and at the same time to protect its own interests," the court held that the insurer was not bound by the holding that the insured was negligent, but could now show the facts to be otherwise. The "question

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6. *E.g.*, Aetna Life Ins. Co. v. Maxwell, 89 F.2d 988 (4th Cir. 1937); International Indemnity Co. v. Steil, 30 F.2d 654 (8th Cir. 1929); B. Roth Tool Co. v. New Amsterdam Casualty Co., 161 Fed. 709 (8th Cir. 1908); Klefbeck v. Dous, 302 Mass. 383, 19 N.E.2d 308 (1939); Miller v. U.S. Fidelity & Casualty Co., 291 Mass. 445, 197 N.E. 75 (1935); Jusiak v. Commercial Casualty Ins. Co., 11 N.J. Misc. 869, 169 Atl. 551 (Sup. Ct. 1933); Stefus v. London & Lancashire Indemnity Co., 111 N.J.L. 6, 166 Atl. 339 (1933); Jackson v. Maryland Casualty Co., 212 N.C. 546, 193 S.E. 703 (1937); Campbell v. American Fidelity & Casualty Co., 212 N.C. 65, 192 S.E. 906 (1937); American Casualty Co. v. Brinsky, 51 Ohio App. 298, 200 N.E. 654 (1934).

7. Miller v. U.S. Fidelity & Casualty Co., 291 Mass. 445, 197 N.E. 75 (1935). "The grounds on which liability has been imposed upon the insured are to be determined from an investigation into the matters decided in the action which established that liability and not from facts subsequently developed in an action by the insured against the insurer. This is clear from the language of the policy itself wherein the defendant agreed to pay, not such damages as might be imposed upon the plaintiff for bodily injuries which were in fact accidental, but all sums which the assured should 'become liable to pay as damages imposed upon him by law for bodily injury accidentally sustained.' . . . Where an action against the insured is ostensibly within the terms of the policy, the insurer, whether it assumes the defense or refuses to assume it, is bound by the result of that action as to all matters therein decided which are material to recovery by the insured on an action on the policy." 197 N.E. at 77.

To determine what issues were adjudicated in the prior action, the courts look to the pleadings, the evidence, the instructions to the jury, and the verdict. *E.g.*, B. Roth Tool Co. v. New Amsterdam Casualty Co., 161 Fed. 709, 712 (8th Cir. 1908); Stefus v. London & Lancashire Indemnity Co., 111 N.J.L. 6, 166 Atl. 339 (1933); Jackson v. Maryland Casualty Co., 212 N.C. 546, 193 S.E. 703 (1937); United Services Automobile Ass'n v. Zeller, 135 S.W.2d 161 (Tex. Civ. App. 1939).

8. Jusiak v. Commercial Casualty Ins. Co., 11 N.J. Misc. 869, 169 Atl. 551 (1933); Stefus v. London & Lancashire Indemnity Co., 111 N.J.L. 6, 166 Atl. 339 (1933); *see* Jackson v. Maryland Casualty Co., 212 N.C. 546, 193 S.E. 703, 704 (1937). If the damage suit establishes facts which show the liability of the insured to be outside the scope of the insurance policy, the rights of the insured as against the insurer are thereby concluded. *E.g.*, B. Roth Tool Co. v. New Amsterdam Casualty Co., 161 Fed. 709 (8th Cir. 1908); American Casualty Co. v. Brinsky, 51 Ohio App. 298, 200 N.E. 654 (1934); RESTATEMENT, JUDGMENTS § 107(a), comment *h* (1942).

9. *See* Stefus v. London & Lancashire Indemnity Co., 111 N.J.L. 6, 166 Atl. 339, 340 (1933) (dissenting opinion). If the insurance company cannot subsequently show that the insured intentionally caused the injury, "it is at the mercy of every unscrupulous litigant who, regardless of his facts, sees fit to falsely allege a claim on which the insurance company would be liable and thereunder establish another claim on which no liability could attach, and forsooth collect because the insurer cannot show the true facts." 166 Atl. at 341.

for decision," said the court, "is not one of estoppel by judgment, but one of coverage of the contract." The insurance policy covers liability for accidental injury, and all courts agree that negligent injuries are "accidental" within the meaning of such policies.[10] Thus, if the insured was adjudged negligent, and if the insurer is bound by that judgment, then the liability would seem to be squarely within the language of the policy—"liability imposed . . . by law for damages . . . because of bodily injury . . . caused by accident." As noted by the district court,[11] the agreement of the insurance company was not to pay damages imposed for injuries which were *in fact* accidental, but to pay all sums which the insured should become obligated to pay by reason of liability imposed upon him *by law* for accidental injuries. The court is begging the question when it says that "the binding effect of a judgment against the insured does not extend to matters outside the scope of the insurance contract": the very language of the policy compels a reference to the prior judgment to determine whether the matters therein decided come within the coverage of the policy. Furthermore, the court says, in effect, that the "unscrupulous" injured parties, while alleging only negligence in the action against the insured, actually recovered for an intentional wrong. The obvious answer to such an assertion, however, was given by the court in the *Miller* case when it said that a "plaintiff cannot recover for willful and wanton conduct on a count which alleges only negligence." [12]

Actually, the present holding seeks to give effect to a very simple proposition: if the act of the insured was *in fact* willful, the insurer should have the opportunity to establish *in law* that it was willful. In view of prior holdings, however, the insurer must find its opportunity before the damage suit against the insured is adjudicated upon the very ground of its liability to the insured. Thus, if the insurer is in possession of facts tending to show that the act was intentional, it might protect itself by entering into a nonwaiver agreement with the insured before proceeding to defend the damage suit.[13] Its safest remedy would ordinarily be a declaratory judgment of nonliability secured either before or after the damage suit has been instituted against the insured,

10. *E.g.*, H.P. Hood & Sons v. Maryland Casualty Co., 206 Mass. 223, 92 N.E. 329, 30 L.R.A. (N.S.) 1192, 138 Am. St. Rep. 379 (1910); Rothman v. Metropolitan Casualty Ins. Co., 134 Ohio St. 241, 16 N.E.2d 417, 117 A.L.R. 1169 (1938).

11. Farm Bureau Mut. Ins. Co. v. Hammer, 83 F. Supp. 383, 389 (W.D. Va. 1949) (an exhaustive discussion of the authorities).

12. Miller v. U.S. Fidelity & Casualty Co., 291 Mass. 445, 197 N.E. 75, 77 (1935).

13. This method is subject to several objections, however. "[I]n certain jurisdictions, the insurer would run the danger of being estopped to controvert the policy issues, by assuming the original defense. Or, the policy holder might refuse to sign a non-waiver agreement. Under the doctrine of some states, the insurer must then either disclaim liability entirely, or accept the defense unequivocally." 8 APPLEMAN, INSURANCE LAW AND PRACTICE § 4686 (1942).

Such a nonwaiver agreement will bind the injured person also, even though he was not notified thereof by the insurer. Suydam v. Public Indemnity Co., 10 N.J. Misc. 868, 161 Atl. 499 (Sup. Ct. 1932); Laroche v. Farm Bureau Mut. Automobile Ins. Co., 335 Pa. 478, 7 A.2d 361 (1939).

but always before that suit has been prosecuted to judgment.[14] The weight of authority, contrary to the instant case, still warns the insurer that it decides at its own peril to allow the damage suit to go to judgment before it takes steps to determine its own obligation under the insurance contract.

BURGLARY INSURANCE—CRIMINAL ACT OF EMPLOYEE OF INSURED—HARM TO THIRD PERSON AS JUSTIFICATION

Plaintiff purchased comprehensive burglary insurance from defendant, covering losses not "caused or contributed to by . . . any dishonest, fraudulent or criminal act, committed by any Employee . . . of the Assured." An employee of plaintiff was ordered by armed strangers to take money from plaintiff's safe and warned that if he did not "they would take care of" his brother and his brother's wife, who were held as hostages, and that they "would not forget" him later on. The employee entered the plaintiff's office alone, obtained the money and subsequently turned it over to the strangers. Plaintiff seeks to recover on the insurance policy. *Held,* summary judgment for defendant affirmed. Plaintiff may not recover because of the criminal act of his employee. *R. I. Recreation Center, Inc. v. Aetna Casualty & Surety Co.,* 177 F.2d 603 (1st Cir. 1949).

Since burglary insurance policies frequently exclude from coverage losses caused by criminal acts of the insured or his employees, the question of whether a criminal act has been committed may be controlling in cases involving such policies.[1] In the instant case the plaintiff seeks to establish the nonexistence of a criminal act of its employee by the affirmative defense of compulsion.[2]

Compulsion as a defense in a criminal action other than murder is allowed only if the compulsion is "present, imminent and impending" and of such a nature as to induce a well grounded apprehension of death or serious bodily harm if the act is not done.[3] This standard has been strictly

14. *E.g.,* U.S. Fidelity & Guaranty Co. v. Pierson, 97 F.2d 560 (8th Cir. 1938); Associated Indemnity Corp. v. Manning, 92 F.2d 168 (9th Cir. 1937); Central Surety & Ins. Corp. v. Caswell, 91 F.2d 607 (5th Cir. 1937); Glens Falls Indemnity Co. v. Brazen, 27 F. Supp. 582 (M.D. Pa. 1939); American Motorists Ins. Co. v. Busch, 22 F. Supp. 72 (S.D. Cal. 1938); Travelers Ins. Co. v. Young, 18 F. Supp. 450 (D.N.J. 1937); Ohio Casualty Ins. Co. v. Plummer, 13 F. Supp. 169 (S.D. Tex. 1935). See also, Appleman, *Automobile Insurance and the Declaratory Judgment,* 23 A.B.A.J. 553 (1937).

1. Phoenix Assurance Co. v. Eppstein, 73 Fla. 991, 75 So. 537 (1917); Gunn v. Globe & Rutgers Fire Ins. Co., 24 Ga. App. 615, 101 S.E. 691 (1919); Miller v. Phoenix Assurance Co., 221 Ill. App. 75 (1921); Ledvinka v. Home Ins. Co., 139 Md. 434, 115 Atl. 596, 19 A.L.R. 167 (1921).

2. "In the criminal law, however, there has been a tendency to employ the word 'compulsion' for this general field, and to reserve the word 'coercion' to indicate the exercise of such influence . . . over a married woman by her husband." Perkins, *The Doctrine of Coercion,* 19 IOWA L. REV. 507 (1934).

3. Shannon v. United States, 76 F.2d 490 (10th Cir. 1935); Hall v. State, 136 Fla.

interpreted and applied,[4] with the result that the utility of the defense has been sharply limited.[5] The validity of the defense of compulsion by a threat to a third person has apparently never been tested by the appellate courts or treated by the authorities.

Applying the general rule of strict construction in the instant case, the court correctly held that there was not sufficient compulsion as to the person of the employee.[6] However, the court intimates that compulsion by a threat to a third person may be a defense to a criminal action.[7] Morally, it would seem that one would be under compulsion to the same extent if his failure to act would jeopardize the life of another as if the failure would jeopardize his own life. The doctrine of defense of others is firmly entrenched in criminal law. Generally one may defend the life of another with the same amount of force as the person attacked could use.[8] Why then should one not be allowed to defend the life of a third person by yielding to such a threat of harm to that person's life as would sustain the defense of compulsion if he himself had been so threatened?[9] Although compulsion by a threat to a third party should not be a defense to murder, the intent to protect the life of another should be sufficient to negative the *animus furandi* in larceny.[10]

The court in this case held on summary judgment that even if compulsion to a third party were a valid defense there was not a well grounded apprehension of serious bodily harm to the third person.[11] A clear holding in regard to

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644, 187 So. 392 (1939); State v. Clay, 220 Iowa 1191, 264 N.W. 77 (1935); Nall v. Commonwealth, 208 Ky. 700, 271 S.W. 1059 (1925); People v. Merhige, 212 Mich. 601, 180 N.W. 418 (1920); State v. Patterson, 117 Ore. 153, 241 Pac. 977 (1925). See 22 C.J.S., *Criminal Law* § 44 (1940).

4. People v. Villegas, 29 Cal. App. 2d 658, 85 P.2d 480 (1938); Ross v. State, 169 Ind. 388, 82 N.E. 781 (1907); State v. Clay, 220 Iowa 1191, 264 N.W. 77 (1935); People v. Repke, 103 Mich. 459, 61 N.W. 861 (1895); Bain v. State, 67 Miss. 557, 7 So. 408 (1890); Turner v. State, 117 Tex. Cr. R. 434, 37 S.W.2d 747 (1931).

5. "It is even more significant that in cases other than murder, rigorous interpretation of reasonable fear of imminent death renders compulsion a defence of highly dubious value. . . ." HALL, CRIMINAL LAW 411 (1947).

6. The danger was not imminent and a chance for relief was present.

7. In the majority opinion, Woodbury, J., states, "Perhaps a well-grounded apprehension of death or serious bodily injury to another, particularly to a close relative, may constitute coercion." 177 F.2d at 606. And Magruder, C.J., in a concurring opinion points out, "As to fear for the bodily safety of a third person, even a close relative, there is a surprising dearth of authority; but if the question were ever presented under sufficiently strong, dramatic and convincing circumstances, I am fairly sure the courts would sanction the defense of coercion." *Id.* at 606-07.

8. Suell v. Derricott, 161 Ala. 259, 49 So. 895 (1909); Stanley v. Commonwealth, 86 Ky. 440, 6 S.W. 155 (1887); State v. Francis, 152 S.C. 17, 149 S.E. 348 (1929); Wilkes v. State, 103 Tex. Crim. R. 148, 280 S.W. 787 (1926). See also MILLER, CRIMINAL LAW 214 (1934).

9. The argument that abuse of the doctrine would allow criminals to escape unpunished would probably be advanced. Yet this argument could likewise be made against such established defenses as self-defense and defense of others. The possibility of abuse should not be sufficient to invalidate a rule which is otherwise sound.

10. The defense of compulsion has generally been deemed sufficient to destroy the criminal intent and an act done under compulsion has not been considered a crime. For further discussion of the theory of compulsion see HALL, CRIMINAL LAW 377-426 (1947); Hitchler, *Duress as a Defense in Criminal Cases,* 4 VA. L. REV. 519, 520 (1917).

11. The court reasoned that "it did not suit the bandits' purposes to shoot in the

the question was thereby avoided. But perhaps if the evidence of the plaintiff had been stronger, a result favorable to the defense of compulsion by a threat to a third person would have been reached. The dictum in this case may mark the inception of the doctrine in criminal law.

CHATTEL MORTGAGES—MORTGAGEABILITY OF I.C.C. CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY—APPROVAL OF COMMISSION AS CONDITION PRECEDENT

In 1943, the Acco Transport Company sold its rights under an I.C.C. certificate of public convenience and necessity to one Jamison. A balance due on the purchase price was secured by a chattel mortgage on the certificate. Jamison entered into partnership agreements with Costello and Gregory, and in 1944, a court decree divested title out of Jamison and vested it in Costello and Gregory, subject to the mortgage. In 1947, Costello and Gregory filed a bill in chancery to have the rights of the parties in the certificate adjudicated. The court permitted a foreclosure sale and Acco became the purchaser. The chancellor decreed that the mortgage was a valid encumbrance on the certificate and that the foreclosure sale vested title in Acco. From this decree, Costello and Gregory appealed. *Held,* affirmed. An I.C.C. certificate of public convenience and necessity is transferable property and subject to mortgage, although the approval of the I.C.C. will be necessary before Acco may conduct operations under the certificate. *Costello v. Acco Transport Co.,* Tenn. App. W.S., Oct. 14, 1949 (unreported) (Anderson, P. J.).

There may be theoretical difficulties in finding common law property interests in such rights as inhere in certificates of public convenience; but the underlying concern is whether adjudication by the court of such interests would be an encroachment upon the power reserved for the regulatory body.[1] Therefore, the problem of whether they are mortgageable should be decided on the practical basis of how, in fact, the statutes and rules relating to the transferability of such certificates are applied by the Commission.

As to the theoretical problem of property interests, it is generally stated that anything which may be transferred or sold may be mortgaged.[2] It is in

public streets," and that the employee could not therefore have had a well grounded apprehension. 177 F.2d at 606.

1. The jurisdictional problem, as such, is not discussed in this casenote. The "primary jurisdiction" doctrine with respect to administrative agencies is discussed in Thompson v. Texas Mexican Ry., 328 U.S. 134, 66 Sup. Ct. 37, 90 L. Ed. 1132 (1946); see Davis, *Administrative Law Doctrines of Exhaustion of Remedies, Ripeness for Review, and Primary Jurisdiction,* 28 TEXAS L. REV. 376, 404 (1950). Also see Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 65 Sup. Ct. 1475, 89 L. Ed. 2092 (1945); Southern Broadcasting Corp. v. Carlson, 187 La. 823, 175 So. 587 (1937) (court has jurisdiction to adjudicate rights between the parties, although only the F.C.C. may approve operation by a party).

2. *E.g.,* Williamette Manufacturing Co. v. Bank of British Columbia, 119 U.S. 191,

this connection that there is the concern with "rights" in the certificate.[3] Many of the cases and writers discuss at length whether a certificate is a franchise, which is generally held to be mortgageable,[4] or a mere personal license, which has been held not to be transferable or mortgageable.[5] To pursue this distinction leads only to confusion.[6] A certificate is not, usually, an exclusive franchise; but neither is it a mere license.[7] Rather, it partakes of the natures of both;[8] and it is the successor of the franchise.[9] At any rate, a certificate is recognized as a thing of value and is taxable as property.[10]

Operating rights are clearly transferable where such transfers are au-

198, 7 Sup. Ct. 187, 30 L. Ed. 384 (1886); 10 AM. JUR., *Chattel Mortgages* § 24 (1937); 14 C.J.S., *Chattel Mortgages* § 21 (1939).

3. That the holder of a certificate possesses no contractual rights, see Roberto v. Comm'rs of Dep't of Public Utilities, 262 Mass. 583, 160 N.E. 321, 322 (1928); 60 C.J.S., *Motor Vehicles* § 84(a) (1949). That the certificate carries with it no vested property rights, see *In re* Application of Fort Crook-Bellevue B. Line, 135 Neb. 558, 283 N.W. 223, 225 (1939); Hart v. Seacoast Credit Corp., 115 N.J. Eq. 28, 169 Atl. 648, 649 (Ch. 1933) (no rights of an equitable nature), *aff'd*, 116 N.J. Eq. 573, 174 Atl. 525 (1934); Red Eagle Bus Co. v. Public Utilities Comm'n, 124 Ohio St. 625, 180 N.E. 261 (1932); Pennsylvania R.R. v. Public Utilities Comm'n, 116 Ohio St. 80, 155 N.E. 694 (1927) (not a capital asset); Southeastern Greyhound Lines v. Dunlap, 178 Tenn. 546, 552, 160 S.W.2d 418, 421 (1942); 60 C.J.S., *Motor Vehicles* § 84(a) (1949); *cf.* Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327, 331, 66 Sup. Ct. 148, 90 L. Ed. 108 (1945); F.C.C. v. Sanders Brothers Radio Station, 309 U.S. 470, 60 Sup. Ct. 693, 84 L. Ed. 869 (1940) (licenses for radio stations). *Contra*: Breeding Motor Freight Lines, Inc. v. R.F.C., 172 F.2d 416, 423 (10th Cir. 1949), *cert. denied*, 338 U.S. 814 (1949); Texas & Pacific Motor Transport Co. v. United States, 87 F. Supp. 107, 110-11 (N.D. Texas 1949); Reo Bus Lines Co. v. Southern Bus Line Co., 209 Ky. 40, 272 S.W. 18, 19 (1925); Teche Lines, Inc. v. Board of Supervisors, 165 Miss. 594, 142 So. 24, 27, *rev'd on other grounds*, 165 Miss. 594, 143 So. 486 (1932); Willis v. Buck, 81 Mont. 472, 263 Pac. 982, 984 (1928); Houston & North Texas Motor Freight Lines, Inc. v. Johnson, 159 S.W.2d 905, 907 (Tex. Civ. App. 1941), *rev'd on other grounds*, 140 Tex. 166, 166 S.W.2d 78 (1942); Public Utilities Comm'n v. Garviloch, 54 Utah 406, 181 Pac. 272, 276 (1919); Lilienthal and Rosenbaum, *Motor Carrier Regulation by Certificates of Necessity and Convenience*, 36 YALE L.J. 163, 168 (1926). Note that many of the above cases involve the granting of another certificate to a competitor. It is sometimes said that a certificate is not property because it may be revoked. Cannonball Transportation Co. v. American Stages, Inc., 53 F.2d 1051 (S.D. Ohio 1931). But see Bailey, *Motor Truck Certificates and Permits in Texas: The Certificate as a Property Right*, 21 TEXAS L. REV. 351, 367 (1943). As a practical matter, certificates are not revoked without cause. *Cf.* H.H. Enders Truck Line, Inc., 29 M.C.C. 639, 645 (1941); Blanton Trucking Co., 28 M.C.C. 731, 740 (1941). 49 U.S.C.A. § 312(a) (1949) provides that a certificate may be revoked only for wilful failure to comply with lawful orders of the Commission.

4. Williamette Manufacturing Co. v. Bank of British Columbia, 119 U.S. 191, 7 Sup. Ct. 187, 30 L. Ed. 384 (1886); 60 C.J.S., *Motor Vehicles* § 119 (1949) (as to bus franchises); *cf.* Brown v. Smith, 225 S.W.2d 91, 93 (Tenn. App. M.S. 1949).

5. *In re* Application of Fort Crook-Bellevue B. Line, 135 Neb. 558, 283 N.W. 223 (1939).

6. See Bailey, *Motor Truck Certificates and Permits in Texas: The Certificates as a Property Right*, 21 TEXAS L. REV. 351, 355 (1943).

7. *Id.* at 360-72; Note, 48 COL. L. REV. 88, 91 (1948) (as to airline certificates). *Contra: In re* Application of Fort Crook-Bellevue B. Line, 135 Neb. 558, 283 N.W. 223, 225 (1939); Red Eagle Bus Co. v. Public Utilities Comm'n, 124 Ohio St. 625, 180 N.E. 261, 263 (1932); 60 C.J.S., *Motor Vehicles* § 84(a) (1949).

8. Reo Bus Lines Co. v. Southern Bus Line Co., 209 Ky. 40, 272 S.W. 18, 19 (1925); Public Utilities Comm'n v. Garviloch, 54 Utah 406, 181 Pac. 272, 275 (1919); Lilienthal and Rosenbaum, *Motor Carrier Regulation by Certificates of Necessity and Convenience*, 36 YALE L.J. 163, 170 (1926).

9. BARNES, CASES ON PUBLIC UTILITY REGULATION 170 (1938).

10. Teche Lines, Inc. v. Board of Supervisors, 165 Miss. 594, 142 So. 24, *rev'd on other grounds*, 165 Miss. 594, 143 So. 486 (1932).

thorized by statute.[11] The statute which authorizes transfers of I.C.C. certificates limits them by the following words: "pursuant to such rules and regulations as the Commission may prescribe." [12] In accordance with the statute, the I.C.C., in 1938, set out the rule that no transfer of a certificate may be accomplished without prior approval of the Commission.[13]

Construing this rule, the United States Supreme Court held in *United States v. Resler* that such approval is a condition precedent to a valid transfer.[14] Seemingly, this means that no mortgage could be effective without prior Commission approval; but the case involved actual operations by a transferee without I.C.C. approval. Clearly, this is to be distinguished from a case involving the claims of individual litigants to rights in the certificate.[15]

That the Interstate Commerce Commission has no general policy against transferability is borne out by the records of the Commission itself.[16] Consent is refused in some cases, but not without reason.[17] Aware that its rule was being misconstrued, the I.C.C., in August of 1949, amended § 179.1(d) of Title 49 of the Code of Federal Regulations to clarify its intended meaning. This amendment, while said not to involve any change in substance, provided that the mere execution of a chattel mortgage need not have the approval of the Commission, "unless it embraces the conduct of the operation by a person other than the holder of the operating right." However, a "proposed transfer of operating rights by means of the foreclosure of a mortgage . . . shall not be effective without compliance with these rules and regulations and the prior approval of the Commission." [18] In the past, the I.C.C. has consented to a transfer where there was a foreclosure on a mortgaged certificate prior to any

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11. See generally, 60 C.J.S., *Motor Vehicles* §§ 84(a), (b), (c) (1949).

12. Interstate Commerce Act § 212(b), as amended, 54 STAT. 924 (1940), 49 U.S.C.A. § 312(b) (1949).

13. "No transfer by means of an attempted pledge of any such rights or by any action purporting to foreclose a pledge upon or lien against any such rights . . . shall be effective without compliance with these rules and regulations and the prior approval of the Commission as herein provided." 49 CODE FED. REGS. § 179.1(a) (Cum. Supp. 1944), 3 FED. REG. 2157 (1938). These rules were amended slightly, effective Dec. 1, 1943. 8 FED. REG. 12486, 12487 (1943). See 11 I.C.C. PRACT. J. 72, 74-75 (1943). Also see 49 CODE FED. REGS. §§ 179.1(d), 179.2(c) (Cum. Supp. 1944).

14. 313 U.S. 57, 61, 61 Sup. Ct. 820, 85 L. Ed. 1185 (1941); see also Zabarsky v. Flemings, 113 Vt. 200, 32 A.2d 663, 664 (1943).

15. Costello v. Acco Transport Co., at p. 31 of unpublished opinion.

16. *E.g.*, Blanton Trucking Co., 28 M.C.C. 731, 740 (1941); H.H. Enders Truck Line, Inc., 29 M.C.C. 639, 645 (1941); Wilson Truck Co., 25 M.C.C. 150 (1939). *But cf.* Gadsden Transfer Co., 32 M.C.C. 349 (1942).

17. Abco Moving & Storage Co., 47 M.C.C. 557, 580 (1947) (transferee not fit, willing, and able to operate); Oriole Trucking Corp., 44 M.C.C. 150, 151-52 (1944) (transportation of both exempt and non-exempt commodities in same vehicle would be unauthorized motor carrier operation); Gadsden Transfer Co., 32 M.C.C. 349, 352 (1942) (cessation of operations).

18. 14 FED. REG. 5049, 5050 (1949).

19. Breeding Motor Freight Lines, Inc. v. R.F.C., 172 F.2d 416, 425 (10th Cir. 1949), *cert. denied*, 338 U.S. 814 (1949). This case involved foreclosure of a mortgage on carriers by the R.F.C. which had no authority to operate the carriers, but could only transfer the rights. On December 12, 1949, the I.C.C. amended § 179.1(c) of Title 49

application for Commission approval,[19] and presumably this practice will continue.

The Commission's approval of prior mortgages and transfers is said not to be an adjudication of legal rights,[20] and such approval evidences that the transfers are not, in fact, contrary to the Commission's policy. Thus, the courts may hold such mortgages valid without encroaching on the Commission's administrative jurisdiction. And since the transferee is recognized by the Commission regardless of prior approval, valuable rights in a certificate may be transferred by means of chattel mortgages. Such mortgages should, therefore, be upheld. The holding in the instant case seems to be sound.[21]

CONSTITUTIONAL LAW—DUE PROCESS—MANDATORY MINIMUM PRICE MARK-UPS ON INTOXICATING LIQUORS

Plaintiff partnership operated a retail grocery market and, under a state license, sold alcoholic beverages for off-premises consumption. The state Alcoholic Beverage Control Board suspended plaintiff's liquor license for selling certain intoxicants at prices below the minimum mark-ups required of such retailers by statute. Plaintiff obtained a permanent injunction against

of the CODE FED. REGS., effective January 31, 1950. As amended, the rule states: "A proposed transfer of operating rights will not be approved if the Commission finds that the transferee does not intend to, or would not, engage in bona fide motor carrier operations under such operating rights, or if the Commission finds that the transferor acquired such operating rights for the purpose of profiting therefrom and has not engaged in bona fide motor carrier operations under such operating rights." 14 FED. REG. 7765 (1949). See also Riss and Co., 38 M.C.C. 563 (1942); *cf.* David C. Hall, 38 M.C.C. 529, 533-38 (1942). *But cf.* Falwell v. United States, 69 F. Supp. 71, 79 (W.D. Va. 1946), *aff'd*, 330 U.S. 807 (1947) (approval of transfer not a matter of form); Graziani v. Elder & Walters Equipment Co., 209 La. 939, 25 So.2d 904 (1946) (F.C.C. certificate may not be transferred without consent of Commission); *In re* Application of Fort Crook-Bellevue B. Line, 135 Neb. 558, 283 N.W. 223, 225 (1939) (court cannot cause an assignment of certificate; such right only in the Commission); Royal Blue Coaches, Inc. v. Delaware River Coach Lines, Inc., 140 N.J. Eq. 19, 52 A.2d 763, 764 (Ch. 1947), *appeal dismissed*, 65 A.2d 264 (1949) (assignment of certificate gave no legal title, but only the right to apply for approval); Hart v. Seacoast Credit Corp., 115 N.J. Eq. 28, 169 Atl. 648, 650 (Ch. 133), *aff'd*, 116 N.J. Eq. 573, 174 Atl. 525 (1934) (delay in seeking approval caused rights to be lost); Gadsden Transfer Co. 32 M.C.C. 349, 350 (1942).

20. *E.g.*, Brown v. Smith, 225 S.W.2d 91, 94 (Tenn. App. M.S. 1949); Riss and Co., 38 M.C.C. 563, 570 (1942). *But cf.* "After a full hearing, the Commission approved the transfer of some of the certificates of convenience and necessity. . . . By that action, the Commission gave unmistakable recognition to the validity of the note . . . and chattel mortgages given to the bank." Breeding Motor Freight Lines, Inc. v. R.F.C., 172 F.2d 416, 425 (10th Cir. 1949), *cert. denied*, 338 U.S. 814 (1949).

21. In *In re* Rainbo Express, Inc., 179 F.2d 1 (7th Cir. 1950), a result contrary to that in the instant case had been reached. On rehearing, the federal court reversed its former holding, held in accord with, and cited the instant case. See also Breeding Motor Freight Lines, Inc. v. R.F.C., 172 F.2d 416 (10th Cir. 1949); First National Bank v. Holliday, 47 F.2d 67 (5th Cir. 1931) (certificate issued by state commission); *accord*, Brown v. Smith, 225 S.W.2d 91 (Tenn. App. M.S. 1949) (mortgage executed prior to promulgation of regulations by I.C.C.); *cf.* Watson Bros. Transportation Co. v. Jaffa, 143 F.2d 340 (8th Cir. 1944); Royal Blue Coaches, Inc. v. Delaware River Coach Lines, Inc., 140 N.J. Eq. 19, 52 A.2d 763 (Ch. 1947), *appeal dismissed*, 65 A.2d 264 (1949); Lennon v. Habit, 216 N.C. 141, 4 S.E.2d 339 (1939); *see* Hart v. Seacoast Credit Corp., 115 N.J. Eq. 28, 169 Atl. 648, 649 (Ch. 1933), *aff'd*, 116 N.J. Eq. 573, 174 Atl. 525 (1934).

enforcement by the Board of its order suspending plaintiff's license, and the Board appealed. *Held,* affirmed; the statute is a denial of due process of law in that mandatory minimum mark-ups on the retail sale of liquor bear no real and substantial relation to the declared purpose of the statute to protect the economic, social and moral welfare of the people of the state. *Schwegmann Bros. v. Louisiana Board of Alcoholic Beverage Control,* 43 So.2d 248 (La. 1949).

Broadly stated, there are two distinguishable lines of approach underlying statutory price measures—the mandatory establishing of prices or price levels pursuant to statute (including unfair sales acts), and the statutory endorsement, under fair trade acts, of price-maintenance agreements. The validity of state legislative minimum price-fixing appears, at least for the present, to be practically unassailable in the Supreme Court of the United States,[1] which seldom invokes due process to limit the scope of police power. The term "police power" is often referred to as the governmental instrument of the state for effectuating those social and economic policies considered desirable for the public welfare.[2] It has been held that minimum price regulation may be a proper exercise of that power.[3] Early cases in the price-fixing field required a showing that the regulated business was one "affected with a public interest," and a considerable amount of legislation was invalidated under this test.[4] The Court, in *Nebbia v. New York,*[5] redefined this requirement so as to make it virtually meaningless[6] and thereby extended the permissible field of price regulation. Since the *Nebbia* decision, the Court has steadily maintained an attitude of non-interference with regard to state price-fixing.[7]

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1. "In no case since 1934 has it [the Supreme Court] held invalid any extension of governmental price control. . . . It is questionable whether the due process clauses of the Fifth and Fourteenth Amendments today interpose any obstacle to legislative price-fixing." ROTTSCHAEFFER, THE CONSTITUTION AND SOCIO-ECONOMIC CHANGE, 160, 161 (1948). See the broad language of Mr. Justice Douglas in Olsen v. Nebraska, 313 U.S. 236, 246, 61 Sup. Ct. 862, 85 L. Ed. 1305, 133 A.L.R. 1500 (1941).

2. For judicial definitions of police power, see language of Mr. Justice Holmes in Noble State Bank v. Haskell, 219 U.S. 104, 111, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L.R.A. (N.S.) 1062 (1911), and that of Mr. Chief Justice Taney in the License Cases, 5 How. 504, 583, 12 L. Ed. 256 (U.S. 1847).

3. Public Service Commission of Montana v. Great Northern Utilities Co., 289 U.S. 130, 53 Sup. Ct. 546, 77 L. Ed. 1080 (1933).

4. Ribnik v. McBride, 277 U.S. 350, 48 Sup. Ct. 545, 72 L. Ed. 913, 56 A.L.R. 1327 (1928), *overruled in* Olsen v. Nebraska, 313 U.S. 236, 61 Sup. Ct. 862, 85 L. Ed. 1305, 133 A.L.R. 1500 (1941); Tyson & Brother v. Banton, 273 U.S. 418, 47 Sup. Ct. 426, 71 L. Ed. 718, 58 A.L.R. 1236 (1927); Wolff Packing Co. v. Industrial Court, 262 U.S. 522, 43 Sup. Ct. 630, 67 L. Ed. 1103, 27 A.L.R. 1280 (1923).

5. 291 U.S. 502, 54 Sup. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934).

6. The Court stated that "affected with a public interest" meant no more "than that an industry, for adequate reason, is subject to control for the public good," 291 U.S. at 536.

7. See the language of the Court in Olsen v. Nebraska, 313 U.S. 236, 61 Sup. Ct. 862, 85 L. Ed. 1305, 133 A.L.R. 1500 (1941). A movement in the states since the *Nebbia* decision has brought about passage of unfair sales acts, prohibiting sales below "cost," a species of minimum price-fixing legislation the validity of which has not been passed upon by the Supreme Court. OPPENHEIM, CASES, COMMENTS, AND MATERIALS ON UNFAIR

Clearly distinct from statutes which set prices in single industries or forbid sales below cost (although frequently proceeding on much the same policy grounds—the restriction of harmful competitive practices) are the fair trade acts. These statutes legalize contractual price arrangements between producers and dealers in the vertical chain of commodity distribution,[8] and have been upheld by the Supreme Court.[9]

In the state courts, the constitutional status of both forms of minimum price regulation, mandatory and permissive, is somewhat less certain. In considering the former, some of the state courts have retained the older concept of due process and have not felt obliged to adopt the federal "hands-off" attitude evidenced in *Olsen v. Nebraska.*[10] As to the fair trade acts, it appears that they will continue to be tested in the state courts,[11] despite federal approval in the *Old Dearborn* case.[12]

Although the Louisiana statute [13] in the instant case is a resale price maintenance measure, it is not precisely analogous either to the general type of legislation mandating minimum prices or to the fair trade acts, although it is perhaps more nearly related to the former. Trade-mark alcoholic beverages may obviously come within the terms of a fair trade act, but the existence of a valid fair trade act in Louisiana [14] prior to the statute attacked in the instant case would seem to require that the two not be confused.[15] The statute bears

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TRADE PRACTICES 957 (1950). For a discussion of these acts, see Note, *Sales Below Cost Prohibitions: Private Price Fixing under State Law,* 57 YALE L.J. 391 (1948).

8. All but three American jurisdictions have enacted fair trade laws, which proceed on the rationale of the protection of property interests in trade-marked articles. The laws are permissive in character, rendering valid agreements which otherwise would be violative of antitrust legislation. For an excellent analysis of fair trade acts and related unfair sales acts, see Rose, *Resale Price Maintenance,* 3 VAND. L. REV. 24 (1949). For a more restricted consideration, see Coad, *Are Montana's Price Fixing Statutes Valid?* 11 MONT. L. REV. 21 (1950).

9. Pep Boys v. Pyroil Sales Co., 299 U.S. 198, 57 Sup. Ct. 147, 81 L. Ed. 122 (1936); Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183, 57 Sup. Ct. 139, 81 L. Ed. 109, 106 A.L.R. 1476 (1936).

10. Here the fundamental constitutional concept that the state supreme court is the final authority to interpret the state constitution is significant. Under this premise, some state courts have restricted the scope of state price regulation. Paulsen, *The Persistence of Substantive Due Process in the States,* 34 MINN. L. REV. 91, 98-100 (1950).

11. The second Florida fair trade act was overthrown in Liquor Store, Inc. v. Continental Distilling Corp., 40 So.2d 371 (Fla. 1949), but since that decision a third such act (Fla. Laws 1949, c. 25204) has been passed. See Note, 2 U. OF FLA. L. REV. 408 (1949). The Illinois Mandatory Fair Trade Act was held void for indefiniteness in Illinois Liquor Control Comm. v. Chicago's Last Liquor Store, 403 Ill. 578, 88 N.E.2d 15 (1949). See Life, Mar. 6, 1950, p. 31 for account of recent developments with respect to the New York and California fair trade acts. Several state courts have overthrown, on a variety of grounds, unfair sales acts, and their validity now seems dubious. OPPENHEIM, CASES, COMMENTS, AND MATERIALS ON UNFAIR TRADE PRACTICES 947-964 (1950); Thatcher, *The Constitutionality of the Unfair Practices Acts,* 30 MINN. L. REV. 559 (1946).

12. Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183, 57 Sup. Ct. 139, 81 L. Ed. 109, 106 A.L.R. 1476 (1936).

13. LA. GEN. STAT. ANN. § 8782.49 (Supp. 1949).

14. LA. GEN. STAT. ANN. §§ 9809.1-9809.6 (1939), upheld in Pepsodent Co. v. Krauss Co., 200 La. 959, 9 So.2d 303 (1942).

15. See the distinction made by the New York court, in Levine v. O'Connell, 88 N.Y.S.2d 672, 675 (Sup. Ct. 1949), between the New York Fair Trade Law and the

a feature not common to the bulk of price-fixing measures; namely, it pertains only to price regulation of the liquor industry. Intoxicants have long been regarded as noxious in character and properly subject to complete state prohibition,[16] or to almost any form of state regulation uniformly applied.[17] The sole reason for the invalidation of the statute in the instant case was the fact that sales by original producers, bar sales and beer were unaffected by it and that the measure was therefore not reasonably related to the legislative purpose of liquor control.[18] Under accepted constitutional theory, this conclusion will bear little scrutiny. The court appears to invoke "equal-protection" reasoning to a liquor regulation and concludes that it violates due process, with little recognition of any presumption of legislative validity.[19] It would seem that the off-premise sale of intoxicants might well have been assumed by the court to be an appropriate classification for the regulation of alcoholic beverages.[20] A result almost exactly opposite to the instant holding was reached by the Kentucky court in upholding liquor price-fixing as a proper regulation of intoxicants.[21]

It is highly doubtful that many courts would reach the result of the instant case on like facts; more probably, most state courts and the Supreme Court would conclude that since the measure went part way toward accomplishing a valid objective, the courts should not interfere.[22] The holding may bear some relation to the current shift in attitude toward the fair trade and unfair sales acts,[23] although such shift might more properly be reflected in the legislatures than in the courts. It is unlikely that the decision will have any effect on the accepted judicial doctrine of the *Nebbia* case.

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state Alcoholic Beverage Control Act (the latter held unconstitutional as delegating legislative authority). The Kentucky court, in Reeves v. Simons, 289 Ky. 793, 160 S.W.2d 149 (1942), interpreted the Kentucky Distilled Spirits and Wine Fair Trade Act as though it were a statute similar to that in the instant case and validated mandatory minimum mark-ups as proper for regulation of liquor traffic. The court in the instant case dismissed the *Reeves* case as inapplicable. 43 So.2d at 260.

16. Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138, 60 Sup. Ct. 163, 84 L. Ed. 128 (1939); Crowley v. Christensen, 137 U.S. 86, 91, 11 Sup. Ct. 13, 34 L. Ed. 620 (1890); Mugler v. Kansas, 123 U.S. 623, 657, 657, 9 Sup. Ct. 273, 31 L. Ed. 205 (1887).

17. For a good discussion of the "liquor immunity" doctrine as applied to regulation under fair trade legislation, see Note, 57 YALE L.J. 459 (1948).

18. 43 So.2d at 259.

19. *Cf.* Radice v. New York, 264 U.S. 292, 294, 44 Sup. Ct. 325, 68 L. Ed. 690 (1924). The Court states, "Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish he a fairly debatable one, it is not permissible for the judge to set up his opinion in respect to it against the opinion of the lawmaker."

20. "If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied." 264 U.S. at 298.

21. Reeves v. Simons, 289 Ky. 793, 160 S.W.2d 149 (1942). See note 14 *supra*.

22. See, *e.g.*, Otis v. Parker, 187 U.S. 606, 23 Sup. Ct. 168, 47 L. Ed. 323 (1903); Reeves v. Simons, 289 Ky. 793, 160 S.W.2d 149, 151 (1942).

23. See notes 6 and 10 *supra*.

CONSTITUTIONAL LAW—OATH OF ALLEGIANCE AND OATH OF OFFICE —POWER OF LEGISLATURE TO ENLARGE UPON CONSTITUTIONAL PROVISION

The Progressive Party and its nominees for governor and the legislature in the election of 1949 sought to enjoin the enforcement of four state statutes enacted in 1949 and to obtain a declaratory judgment that the statutes were unconstitutional. The statutes provided (1) for an oath of allegiance; (2) for an oath of office; (3) that all candidates for public office take the oath of allegiance; and (4) that candidates failing to do so suffer the penalty of having "Refused Oath of Allegiance" printed by their names on the ballots, this provision applying only to the general election of 1949. The oath of office included everything in the oath of allegiance, in addition to a provision for faithful performance of duties; both oaths contained clauses of nonbelief in forceful overthrow of the government and of disavowal of membership in organizations advocating such overthrow. From reversal of judgment for defendants, they appeal. *Held* (5-2), affirmed. The statutes are unconstitutional in that they attempt to add to the qualifications for public office as prescribed by the state constitution. *Imbrie v. Marsh*, 71 A.2d 352 (N.J. 1950).

The New Jersey constitution contains two provisions pertinent to the instant case. The first of these sets forth a specific oath for members of the legislature;[1] the other provides that every state officer shall take an oath to support the constitution and to perform faithfully his duties, but prescribes no definite wording therefor.[2] It was the decision of the court that these oaths were exclusive; thus, the statutes which attempted to enlarge upon them were declared repugnant to the constitution and void.[3] The dissenting justices urged that the statutes were valid except as applied to members of the legislature, for whom a specific oath was included in the constitution.

It is unquestionably the rule that where the constitution expressly or impliedly makes exclusive the enumeration of qualifications for public office, the legislature has no power to alter the requisites.[4] The total legislative power

1. "Members of the Legislature shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: 'I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of New Jersey, and that I will faithfully discharge the duties of Senator (or member of the General Assembly) according to the best of my ability'. Members-elect of the Senate or General Assembly are empowered to administer said oath or affirmation to each other." N.J. CONST. Art. IV, § VIII, ¶ 1.

2. "Every State officer, before entering upon the duties of his office, shall take and subscribe an oath or affirmation to support the Constitution of this State and of the United States and to perform the duties of his office faithfully, impartially and justly to the best of his ability." N.J. CONST. Art. VII, § I, ¶ 1.

3. The basis for striking down these statutes was repugnancy to the constitution of the state. No federal question nor aspect of due process was involved in the court's decision.

4. *E.g.*, Mosley v. Board of Comm'rs, 200 Ind. 515, 165 N.E. 241 (1929); Thomas

of the state, however, is inherently vested in the state legislature, subject only on limitations prescribed by the state constitution;[5] therefore, a constitutional prohibition must be found in order to deny a particular power to the legislature.[6] The constitution of New Jersey, unlike those of some states,[7] contains no express direction that the qualifications listed shall be exclusive. The court, discussing only the first two statutes, declared all four unconstitutional on the ground that the constitution impliedly excluded legislative action, relying on the maxim *expressio unius est exclusio alterius.*[8] This principle should be applied with extreme caution[9] and not be widely used in constitutional interpretation, where concise form renders prohibitive the expression of every conceivable term intended to be included.[10]

There is, moreover, convincing argument tending to sustain the validity of the first two statutes under discussion. A statutory oath of allegiance has been administered in New Jersey since 1776 and applied to members of the legislature and to public officers generally,[11] in spite of and in addition to the oath appearing in the constitution. Until the present case, the legislative power in this respect was not questioned. The legislature's long-continued interpretation of the constitution is frequently important in resolving constitutional questions.[12] In addition, a statutory oath of office has been imposed since 1799[13] and has been varied at the will of the legislature.[14] It was not until 1947 that the constitution provided for an oath of

v. Owens, 4 Md. 189 (1853); State *ex rel.* Childs v. Holman, 58 Minn. 219, 59 N.W. 1006 (1894); State *ex rel.* Brazda v. Marsh, 141 Neb. 817, 5 N.W.2d 206 (1942); Kivett v. Mason, 185 Tenn. 558, 206 S.W.2d 789 (1947); *accord,* People *ex rel.* Le Roy v. Hurlbut 24 Mich. 44, 9 Am. Rep. 103 (1871); Cameron v. Connally, 117 Tex. 159, 299 S.W. 221 (1927). *But see* M'Culloch v. Maryland, 4 Wheat. 316, 416, 4 L. Ed. 579 (U.S. 1819). See also 1 COOLEY, CONSTITUTIONAL LIMITATIONS 139-40 (8th ed., Carrington, 1927); MECHEM, PUBLIC OFFICES AND OFFICERS §§ 65, 96, 259 (1890); 1 STORY, COMMENTARIES ON THE CONSTITUTION § 625 (2d ed. 1851).

5. *E.g.,* State v. Birmingham So. Ry. 182 Ala. 475, 62 So. 77, Ann. Cas. 1915D 436 (1913); Tierney Coal Co. v. Smith's Guardian, 180 Ky. 815, 203 S.W. 731, 4 A.L.R. 1540, *modified on rehearing,* 181 Ky. 764, 205 S.W. 951, 4 A.L.R. 1540, 1551 (1918); Jenkins v. State Board of Elections, 180 N.C. 169, 104 S.E. 346, 14 A.L.R. 1247 (1920); 1 COOLEY, *op. cit. supra* note 4, at 353-55.

6. See *Ex parte* Stratton, 1 W. Va. 304 (1866).

7. *E.g.,* MICH. CONST. Art. XVI, § 2; N.Y. CONST. Art. XIII, § 1.

8. Of course, a holding that the first statute is void automatically declares the invalidity of the last two, since they relate only to the application of the oath of allegiance contained in the first statute.

9. See Industrial Trust Co. v. Goldman, 59 R.I. 11, 18, 193 Atl. 852, 855 (1937); 2 SUTHERLAND, STATUTORY CONSTRUCTION § 4917 (3d ed., Horack, 1943). Even where normally applicable, the maxim will be disregarded where there is an established custom, usage, or practice to the contrary, as is the situation in New Jersey. See cases collected, 2 *id.* § 4917, n.14.

10. JAMESON, CONSTITUTIONAL CONVENTIONS §§ 572-75 (4th ed. 1887).

11. The oath was first prescribed by N.J. Pub. Laws 1776, c.2; it has been reenacted through subsequent revisions and appeared as N.J. STAT. ANN. § 41:1-I (1940) until the present statutes attempted its enlargement.

12. People v. Stevenson, 281 Ill. 17, 117 N.E. 747 (1917); ROTTSCHAEFER, AMERICAN CONSTITUTIONAL LAW 18-19 (1939).

13. See 71 A.2d at 354.

14. By N.J. Pub. Laws 1920, c.215, the original oath was enlarged. As expanded, the oath appeared as N.J. STAT. ANN. § 41:1-3 (1940) until the attempt through the present statutes to enlarge it further.

office generally.[15] The language of the provision, in view of the fact that the delegates were aware of the existing practice of the legislature, indicates strongly an intention that it be executed by appropriate enactment rather than that the legislature be divested of the power.[16] Having set out only the substance of an oath, the people could only have intended that the legislature elaborate upon it, if any meaning whatsoever is to be attached to their action in adopting the provision. Further, since a specific oath is designated only for members of the legislature, while an oath is demanded of all state officers, the reasonable construction would appear to be that the intent was to prohibit the legislature from enacting its own oath, leaving it free to devise the oath for officers generally. Collectively, these contentions would seem to be sufficient to have supported a finding that the legislature of New Jersey was not impliedly excluded by the constitution from exacting an oath of allegiance and an oath of office.

Even if one assents to the conclusion of the court that an oath of allegiance may not be exacted from candidates or from public officers and that the oath of office may be only an oath of support to the constitution and of faithful performance of duties, it remains difficult to understand how the oath contained in the second statute in question is abusive of this test. No explanation is forthcoming as to how one can consistently promise to *support* the constitution and to discharge *faithfully* the duties of public office and at the same time be beset with the mental reservation engendered by a belief in forceful overthrow of the government or by membership in a body advocating the same. The absence of the latter is inherent in the former. Mere political belief is not the criterion of exclusion under the statutes; only one who could not truthfully subscribe to the oath required by the constitution would be barred from office by them.

Perhaps the action in this case was taken at least partially in anticipatory fear of the consequences of an unrestricted oath-making power in the legislature.[17] To recognize legislative power to prescribe in specific terms an oath required by the general language of the constitution, however, is not to admit an unlimited power in this respect. Of course the safeguards of personal liberty found in both the Constitution of the United States and that of the state cannot be infringed upon,[18] but so long as the oath required

15. The adoption of such requirement was considered and rejected by the convention of 1844. 71 A.2d at 359.

16. See note 2 *supra*. It is not directed that *the* oath be taken, so as to evidence an intent that all officers take the oath previously prescribed for members of the legislature, but *an* oath is required.

17. The language of the court indicates a belief that to acknowledge legislative power in this respect would also extend to the legislature the power to alter the other requirements for public office, such as age, citizenship and residence. See 71 A.2d at 356. Obviously, this would not be true where specific terms are employed in prescribing the qualifications, unlike the provisions for the oath.

18. *E.g.*, no oath can be upheld which violates the *ex post facto* or bill of attainder provisions of the Constitution of the United States. See Cummings v. Missouri, 4 Wall.

is a reasonable one designed to effectuate the general purpose of the constitutional requirement, its validity should be sustained. Certainly, the oath of office here required appears to be of that nature.

CONVEYANCES—CONSTRUCTION OF LIMITATIONS—ENTAILING LANGUAGE AS WORDS OF PURCHASE OR WORDS OF INHERITANCE

B owned five tracts of land. In 1917, he conveyed two of the tracts to children by his first marriage. Subsequently, they reconveyed "to *B* and his heirs by *W*" (*B's* second wife). At the time of the reconveyance, not all the children of *B* and *W* had yet been born. In 1928 *B* and *W* attempted to convey all five tracts to the children of their marriage, reserving a life estate for their joint lives. After *B's* death, *W's* children sued her for a partition. The court gave judgment for *W*, from which plaintiffs appealed. *Held*, reversed. The reconveyances of the two tracts to *B* gave him only an estate for life. The attempted reservation in the 1928 deed of a life estate to *W* in these tracts upon her surving *B* was therefore ineffective, and the land could be partitioned during her lifetime without her consent. *Johnson v. Johnson*, 224 S.W.2d 428 (Ky. 1949).

At common law prior to the Statute De Donis,[1] a conveyance "to *B* and the heirs of his body" passed a fee simple conditional,[2] an estate which is still impliedly or directly recognized in at least three American jurisdictions.[3] Subsequent to De Donis, the same language created a fee tail estate, and apparently has that effect today in four states.[4] However, the restrictions on alienation inherent in the fee tail estate have resulted in its complete abolition or extensive modification in about three-fourths of the states. In these

277, 18 L. Ed. 356 (U.S. 1867) (oath imposed by constitution of Missouri) and *Ex parte* Garland, 4 Wall. 333, 18 L. Ed. 366 (U.S. 1867) (oath imposed by act of Congress), wherein expurgatory oaths were invalidated on this basis. See Russ, *The Lawyer's Test Oath During Reconstruction*, 10 MISS. L.J. 154 (1938), for an interesting discussion of these two cases.

1. Statute De Donis Conditionalibus, 1285, 13 EDW. I, c. 1.

2. After birth of issue to *B*, the condition was fulfilled and *B* could convey a fee simple. However, if *B* died without issue, or if issue were born but predeceased *B*, the estate would revert to the grantor or his heirs upon *B's* death. BIGELOW AND MADDEN, INTRO. TO THE LAW OF REAL PROP. 23 (2d ed. 1934); see Note, 114 A.L.R. 602, 611-12 (1938).

3. See Sagers v. Sagers, 158 Iowa 729, 138 N.W. 911, 43 L.R.A. (N.S.) 562 (1912); Davis v. Strauss, 173 S.C. 99, 174 S.E. 908 (1934). In Oregon, De Donis was impliedly repealed and the fee tail abolished by ORE. COMP. LAWS ANN. § 70-105 (1940), thus reinstating the fee simple conditional. Lytle v. Hulen, 128 Ore. 483, 275 Pac. 45, 114 A.L.R. 587 (1929).

4. See Schneer v. Greenbaum, 4 Boyce 97, 86 Atl. 107 (Del. 1913); McCarthy v. Walsh, 123 Me. 157, 122 Atl. 406 (1923); Gilkie v. Marsh, 186 Mass. 336, 71 N.E. 703 (1904); Green v. Edwards, 31 R.I. 1, 77 Atl. 188 (1910). Five other jurisdictions apparently have not passed upon the question—Idaho, Louisiana, Nevada, Utah and Washington.

latter jurisdictions, entailing instruments are generally given effect in one of three ways: [5] (1) the language creates an estate tail for the lifetime of the first taker, succeeded by a fee simple in the next taker; [6] (2) the limitation gives a life estate to the first taker and a remainder in fee simple absolute to the next taker; [7] (3) it creates either a fee simple absolute in the grantee or a fee simple with reversion in the event the first taker dies unsurvived by descendants.[8]

Obviously, in a common law entailed conveyance, the intent of the grantor was to keep the property in the hands of his lineal descendants *ad infinitum*. In the United States, however, it seems reasonable that a grantor's intent in using the same language today is simply to provide for the grantee and the grantee's children. Thus, the statutes, in the first and second classifications above, in a sense give effect to the grantor's real intent by creating an interest in the grantee for his lifetime and a vested remainder in fee in the grantee's children. The third group of statutes, converting a fee tail into a fee simple in the first taker, however, runs exactly counter to the grantor's expressed desire to provide for the children of the grantee. In those jurisdictions, the courts sometimes evidence an inclination to subvert the statute by construction of the instrument so as to effect that intent.

Before they will find that a fee tail has been created which the statute would convert into a fee simple in the grantee, the courts must be satisfied that the language of the granting clause, *i.e.*, "to *B* and his bodily heirs" or "to *B* and his children," was intended to pass an estate of inheritance. The question is determined by construction of the language of the entire instrument, all its parts being read together as indicia of the intent of the grantor.[9] Sometimes a factor completely extrinsic to the conveying instrument, such as the existence of children of the grantee at the time of the execution of the deed, may shed additional light on the issue of intent.[10] The court's examination will result, expressly or impliedly, in an ascertainment as to whether the

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5. See the classification in RESTATEMENT, PROPERTY, Introductory Note to Chap. 5 (1936).

6. The donee in tail for his lifetime has an estate with characteristics very similar to those of an estate in fee simple, except that he may not bar the next taker. See discussion of further characteristics of this estate in RESTATEMENT, PROPERTY, §§ 88-96 (1936). See CONN. REV. GEN. STAT. § 7083 (1949), Rudkin v. Rand, 88 Conn. 292, 91 Atl. 198 (1914); *In re* Jones' Estate, 64 N.E.2d 609 (Ohio 1943); WYO. COMP. STAT. ANN. § 66-137 (1945), Jensen v. Jensen, 54 Wyo. 224, 89 P.2d 1085 (1939).

7. See, *e.g.*, Bibo v. Bibo, 397 Ill. 505, 74 N.E.2d 808 (1947); KAN. GEN. STAT. ANN. § 58-502 (Cum. Supp. 1947); Mo. REV. STAT. ANN. § 3498 (1939).

8. This is the effect of the statutory provisions in the majority of jurisdictions. See, *e.g.*, KY. REV. STAT. ANN. § 381.070 (1943), Sallee v. Warner, 306 Ky. 846, 209 S.W.2d 491 (1948); TENN. CODE ANN. § 7599 (Williams 1934), Scruggs v. Mayberry, 135 Tenn. 586, 188 S.W. 207 (1916); VA. CODE ANN. § 55-12 (1950).

9. Ramey v. Ramey, 195 Ky. 673, 243 S.W. 934 (1922).

10. Ewing v. Ewing, 198 Miss. 304, 22 So.2d 225, 161 A.L.R. 606 (1945).

words "heirs" or "children" in the granting clause were intended by the grantor to be words of limitation or words of purchase.[11]

At common law, "heirs" and "children" had practically incontestable connotations when used in deeds,[12] and an estate of inheritance could not be passed in the absence of the word "heirs," irrespective of the grantor's intent.[13] Even today, where there is no indication of any contrary intent, the courts will ordinarily apply the common law technical meanings of "heirs" and "children."[14] However, modern statutes no longer require technical words in the granting clause of a conveyance.[15] As the precise words of the instrument are no longer necessarily controlling, the problem of determining intent has become vastly more important.

The conveyance "to *B* and his heirs by *W*" in the instant case, in its technical sense, presumptively creates an estate of inheritance which the Kentucky statute would convert into a fee in *B*.[16] The court, however, apparently assumed that no estate of inheritance was created, but rather that the only possible construction of the instrument was either a finding of a joint estate in *B* and his children by *W* or a life estate in *B*, remainder in the children[17]—both impliedly depending upon a construction of the words in the granting clause as words of purchase (as though the conveyance had read "to *B* and his *children* by *W*"). Since some, but not all, of *B's* children by *W* were born at the time of the execution of the deed and unborn children could not take a joint interest, the life estate-remainder construction was adopted.[18] The court did not discuss the line of authority holding on very similar facts that a fee was created.[19] Authorities cited by the court are distinguishable either in that the word "children" was actually used by the grantor or in that

11. "Heirs" were held to take by purchase in Ely v. U.S. Coal & Coke Co., 243 Ky. 725, 49 S.W.2d 1021 (1932). "Children" took by inheritance in Ewing v. Ewing, *supra* note 10. *See* Campbell v. Prestonburg Coal Co., 258 Ky. 77, 79 S.W.2d 373, 376 (1935).

12. Erwin Nat. Bank v. Riddle, 18 Tenn. App. 561, 79 S.W.2d 1032 (E.S. 1934).

13. RESTATEMENT PROPERTY § 27 (1936).

14. Wilcoxen v. Owen, 237 Ala. 169, 185 So. 897, 902 (1938); Hartwick v. Heberling, 364 Ill. 523, 4 N.E.2d 965 (1936).

15. See, *e.g.*, TENN. CODE ANN. § 7597 (Williams 1934), Bost v. Johnson, 175 Tenn. 232, 133 S.W.2d 491 (1939). For a listing of other statutes, see RESTATEMENT, PROPERTY § 39 (1936).

16. KY. REV. STAT. ANN. § 381.070 (1943) provides, "All estates heretofore or hereafter created, which, in former times, would have been deemed estates entailed, shall henceforth be held to be estates in fee simple. . . ."

17. 224 S.W.2d at 430.

18. In Rice v. Klette, 149 Ky. 787, 149 S.W. 1019, L.R.A. 1917B 45 (1912), the court construed a will "to *B* and to his children" to create a joint estate in *B* and his children, on the reasoning that since other life estates were specifically provided for in the will, the absence of such language in this instance indicated an intent to pass a joint interest.

19. Jones v. Mason, 21 Ky. L. 842, 53 S.W. 5 (1899), contains facts strikingly similar to those in the instant case. When a deed "to *B* and her bodily heirs" was made, five children of *B* had been born. The court held that there was an absence of any indication in the instrument that the grantor intended the children to take as purchasers and that *B* took a fee tail, which was converted by statute into a fee simple. See also Sallee v. Warner, 306 Ky. 846, 209 S.W.2d 491 (1948); McGinnis v. Hood, 289 Ky. 669, 159 S.W.2d 1018 (1942); Simons v. Bowers, 258 Ky. 755, 81 S.W.2d 604 (1935).

other provisions of the deed clearly indicated an intention to create a life estate and remainder.[20] Thus, the legislative mandate overriding the grantor's intent was skirted in order to effectuate that intent.

CRIMINAL LAW—PRIVILEGE OF SELF-DEFENSE—DUTY OF OCCUPANT OF DWELLING HOUSE TO RETREAT FROM ATTACK BY GUEST

Defendant was convicted of first degree manslaughter. Deceased, who had been residing temporarily in defendant's home as a guest, attacked defendant in the kitchen of the home with a knife, defendant resisted the attack and killed her assailant. The prosecution alleged that she could have safely retreated from the attack by leaving the house or by fleeing to some other part of it. The court charged the jury that if she could reasonably have avoided the attack by retreating, she was bound to do so. *Held* (4-1), the charge applied the law correctly to the facts in this case; a person attacked in his dwelling house by one not an intruder must retreat if this is a reasonable means of avoiding the attack consistent with his own safety. *State v. Grierson,* 69 A.2d 851 (N.H. 1949).

In general the common law required a person attacked to retreat "to the wall" before being privileged to use deadly force against the attacker in self-defense.[1] This probably reflected a judgment as to the most effective method of insuring adherence to the element of "apparent necessity," the foundation of the privilege of self-defense. It was reasoned that since the courts are available for the redress of wrongs, the life of the assailant is more important than any dishonor associated with the idea of retreat.[2] The tendency of the American courts has been not to follow the rule of retreat "to the wall" but to allow the one attacked to stand his ground and kill if apparently necessary in self-defense.[3]

20. Ramey v. Ramey, 195 Ky. 673, 243 S.W. 934 (1922) (deed to *B* and his "children"); Baker v. Baker, 191 Ky. 325, 230 S.W. 293 (1921) (deed to grantee and her "children by *H*"; joint tenancy of grantee and children specified elsewhere in instrument); Scott v. Scott, 172 Ky. 658, 190 S.W. 143 (1916) (deed to *B* and her "bodily heirs by *A*," but in view of other language in instrument clearly indicating words intended to be words of purchase, life estate and remainder holding adopted).

1. The person claiming the privilege of self-defense must have been without fault in provoking the attack and must have reasonably believed himself to be in danger of death or great bodily harm. Henson v. State, 120 Ala. 316, 25 So. 23 (1899); State v. McKinney, 28 Del. 128, 90 Atl. 1067 (Ct. Oyer & Ter. 1914); State v. Sipes, 202 Iowa 173, 209 N.W. 458, 47 A.L.R. 407 (1926); Hill v. State, 199 Miss. 254, 24 So.2d 737 (1946); People v. Constantino, 153 N.Y. 24, 47 N.E. 37 (1897); Erwin v. State, 29 Ohio St. 186 (1876); Taylor v. Commonwealth, 185 Va. 224, 38 S.E.2d 440 (1946); Beale, *Retreat from a Murderous Assault,* 16 HARV. L. REV. 567 (1903); 1 CORNELL L.Q. 179 (1916); 3 TEMPLE L.Q. 443 (1929). For a discussion of the law of self-defense in Tennessee, see Baker, *Homicide and Self-Defense,* 15 TENN. L. REV. 288 (1938).

2. 4 BL. COMM. *185; CLARK AND MARSHALL, CRIMES 351 (4th ed., Kearney, 1940).

3. The position is justified on the grounds that one cannot be forced by a wrongdoer to yield his rights and that the American mind regards retreat as cowardly. The so-called "American rule" will not be considered in this discussion because obviously under it no retreat would have been required in the instant case. La Rue v. State, 64 Ark. 144, 41 S.W.

Regardless of the rule of self-defense followed, it has been generally agreed that a man in his dwelling house, who is without fault, may stand at bay and kill his assailant if apparently necessary even though retreat may be safely made.[4] But if he does flee from the dwelling house, he can no longer claim the protection of this exception to the general rule of retreat.[5] The rule of nonretreat in the home is a development from the time in medieval history when men lived in castles for protection from deadly attacks.[6] Retreat from the castle, which was regarded as the ultimate place of refuge and shelter, increased the danger of such attacks. Hence the idea developed that a man in his dwelling house was "at the wall" when attacked therein.[7] That is the sense in which the common law maxim "Every man's house is his castle" is understood.[8] The rule of nonretreat in the home has been extended to apply to the curtilage of the dwelling house,[9] to the office or place of business,[10] to premises not within the curtilage,[11] to clubrooms,[12] and even to an automobile.[13] A roomer or boarder in a house need not retreat when attacked in his room since it is said to constitute his castle,[14] though he must retreat to his

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53 (1897); Hammond v. People, 199 Ill. 173, 64 N.E. 980 (1902); Runyon v. State, 57 Ind. 80 (1877); Willis v. State, 43 Neb. 102, 61 N.W. 254 (1894); Fowler v. State, 8 Okla. Cr. Rep. 130, 126 Pac. 831 (1912). A third view of the privilege of self-defense would consider the possibility of retreat only as one of the considerations in determining whether the homicide was apparently necessary in self-defense. Brown v. United States, 256 U.S. 335, 41 Sup. Ct. 501, 65 L. Ed. 961, 18 A.L.R. 1276 (1921). See a discussion of all three views in 41 COL. L. REV. 733 (1941).

4. Baugh v. State, 215 Ala. 619, 112 So. 157 (1927); People v. Lewis, 117 Cal. 186, 48 Pac. 1088 (1897); State v. Leeper, 199 Iowa 432, 200 N.W. 732 (1924); People v. Tomlins, 213 N.Y. 240, 107 N.E. 496 (1914), 1 CORNELL L.Q. 179 (1916); State v. Foutch, 96 Tenn. 242, 34 S.W. 1 (1896); Palmer v. State, 9 Wyo. 40, 59 Pac. 793, 87 Am. St. Rep. 910 (1900); 1 EAST P.C. *287; 1 HALE P.C. *486; 1 WARREN, HOMICIDE § 157 (Perm. ed. 1914); 1 WHARTON, CRIMINAL LAW 867 (12th ed., Ruppenthal, 1932); Beale, *Homicide in Self-Defense*, 3 COL. L. REV. 526 (1903).

5. Martin v. State, 90 Ala. 602, 8 So. 858, 24 Am. St. Rep. 844 (1891).

6. MILLER, CRIMINAL LAW 210 (1934); 1 WHARTON, CRIMINAL LAW 867 (12th ed., Ruppenthal, 1932).

7. Baugh v. State, 215 Ala. 619, 112 So. 157 (1927); 1 WHARTON, CRIMINAL LAW 867 (12th ed., Ruppenthal, 1932).

8. Brinkley v. State, 89 Ala. 34, 8 So. 22, 18 Am. St. Rep. 87 (1890); State v. Borwick, 193 Iowa 639, 187 N.W. 460 (1922); Palmer v. State, 9 Wyo. 40, 59 Pac. 793, 87 Am. St. Rep. 910 (1900); Thompson, *Homicide in Self-Defense*, 14 AM. L. REV. 545, 554 (1880).

9. Fitzgerald v. State, 1 Tenn. Cas. 505 (1875); Fortune v. Commonwealth, 133 Va. 669, 112 S.E. 861 (1922).

10. Jones v. State, 76 Ala. 8 (1884); State v. Sipes, 202 Iowa 173, 209 N.W. 458, 47 A.L.R. 407 (1926); State v. Gordon, 128 S.C. 422, 122 S.E. 501 (1924). But when the place of business is open to the public, the rule has not been applied. Wilson v. State, 69 Ga. 224 (1882) (barroom); Hall v. Commonwealth, 94 Ky. 322, 22 S.W. 333 (1893) (grocery store).

11. Allen v. United States, 164 U.S. 492, 17 Sup. Ct. 154, 41 L. Ed. 528 (1896), *explaining* Beard v. United States, 158 U.S. 550, 15 Sup. Ct. 962, 39 L.Ed. 1086 (1895). See criticism of the application of the rule to this situation in Beale, *Homicide in Self-Defense*, 3 COL. L. REV. 526, 541 (1903).

12. State v. Marlowe, 120 S.C. 205, 112 S.E. 921 (1922), 7 MINN. L. REV. 59.

13. State v. Borwick, 193 Iowa 639, 187 N.W. 460 (1922). *Contra:* Clark v. State, 216 Ala. 7, 111 So. 227 (1927); State v. McGee, 185 S.C. 184, 193 S.E. 303 (1937).

14. Huff v. State, 23 Ala. App. 426, 126 So. 417 (1930); State v. Sorrentino, 31 Wyo. 129, 224 Pac. 420, 34 A.L.R. 1477 (1924).

room if attacked elsewhere in the house.[15] A guest in the dwelling house of another need not retreat from the attack of an intruder.[16]

Because it was regarded as axiomatic that retreat from the castle increased danger, the rule of nonretreat in the home was applied not only as to intruders but also as to those rightfully there—*i.e.,* guests and joint occupants.[17] Present justification of the rule must be that the right to remain in one's own home in safety is considered more important than the life of one who is making an attack upon an occupant. As one court expressed it, "Why, it may be inquired, should one retreat from his own house, when assailed by a partner or co-tenant, any more than when assailed by a stranger who is lawfully upon the premises? Whither shall he flee, and how far, and when may he be permitted to return?" [18]

Is it still socially desirable to deem a man to be "at the wall" when attacked in his home by a joint occupant even though a way of retreat is open? The court in the instant case answers that question in the negative, following the *Restatement of Torts,* which applies the rule of nonretreat in the home only to cases of attack by intruders and guests not residing in the home.[19] One court has even intimated that the application of the rule to invited guests is unsound.[20] The tendency of the American courts, however, has been to extend the application of the rule to places other than the dwelling house rather than to restrict it to the dwelling house or to a particular class of persons therein. The position of the New Hampshire court in the instant case is at least a minority view,[21] and perhaps an entirely novel one.

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15. State v. Dyer, 147 Iowa 217, 124 N.W. 629, 29 L.R.A. (N.S.) 459 (1910).

16. Kelley v. State, 226 Ala. 80, 145 So. 816 (1933); State v. Osborne, 200 S.C. 504, 21 S.E.2d 178 (1942).

17. Bryant v. State, 39 So.2d 657 (Ala. 1949) (wife's attack); Baugh v. State, 215 Ala. 619, 112 So. 157 (1927) (wife's attack); Brinkley v. State, 89 Ala. 34, 8 So. 22, 18 Am. St. Rep. 87 (1890) (guest's attack); People v. Tomlins, 213 N.Y. 240, 107 N.E. 496 (1914) (son's attack); Beale, *Homicide in Self-Defense,* 3 COL. L. REV. 526, 541 (1903).

18. Jones v. State, 76 Ala. 8, 16 (1884).

19. 1 RESTATEMENT, TORTS § 65 (1934); *cf.* RESTATEMENT, TORTS, COMMENTARIES § 84(c)(i), pp. 18-23 (Tent. Draft No. 2, 1926).

20. State v. Bisonnettee, 83 Conn. 261, 76 Atl. 288, 290 (1910). The court in that case held the assailant to be an intruder in defendant's dwelling house and applied the usual rule of nonretreat from such an attack.

21. Commonwealth v. Johnson, 213 Pa. 432, 62 Atl. 1064 (1906) was a case wherein a charge to the jury that the defendant must have reasonably believed that he had no other means of escape from death was approved. The homicide occurred in the home of defendant's wife, who was also the deceased's mother. It is not clear from the report that the defendant and the deceased also occupied the house. If they were guests there, the holding is not unusual. The case has been cited in support of 1 RESTATEMENT, TORTS § 65 (1934). It was intimated in Watts v. State, 177 Ala. 24, 30, 59 So. 270, 272 (1912), that when joint occupants of a dwelling house occupy separate bedrooms and the attack takes place in the assailant's bedroom, the one assailed may have a duty to retreat to his own bedroom, or at least to some other part of the house.

CRIMINAL LAW—SEARCHES AND SEIZURES—INSPECTIONS BY MUNICIPAL ADMINISTRATIVE OFFICIALS

Regulations issued by health commissioners required owners and occupants of premises to maintain them in a clean and wholesome condition. These regulations authorized inspections and made interference with the inspector a misdemeanor. On a proper complaint, a health officer went to the home of defendant to make an inspection. Defendant ascertained that the officer had no search warrant and refused to allow the inspection. She was convicted of a misdemeanor, but the conviction was reversed by the Municipal Court of Appeals. *Held* (2-1), affirmed. Unless there is an unavoidable crisis, a search without a warrant is prohibited by the Fourth Amendment to the Federal Constitution. *District of Columbia v. Little*, 178 F.2d 13 (D.C. Cir. 1949).[1]

The Fourth Amendment[2] was designed to protect the individual in his home, to spare him the ordeal endured when general warrants were in common use.[3] The extent of the protection and the circumstances under which privacy must yield are problems for the judiciary. Judicial interpretation, until recently, has been confined almost entirely to criminal cases. Ordinarily it has been held that a search without a warrant is illegal unless made as an incident to a lawful arrest.[4] A valid search warrant can be obtained only for certain purposes,[5] and a general "fishing trip" is illegal even when a warrant is obtained.[6] In any event the search must be reasonable, and reasonableness is determined by the circumstances in each case.[7]

As a means of enforcing the Fourth Amendment in criminal cases the Supreme Court has held that evidence obtained by illegal searches is inadmissible because of the privilege against self-incrimination given by the

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1. *Aff'd*, 70 Sup. Ct. 468 (1950). The Supreme Court did not pass on the constitutional question but held that the defendant's conduct did not constitute interference within the meaning of the regulation.

2. U.S. CONST. AMEND. IV. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3. Entick v. Carrington, 19 How. St. Tr. 1029 (1765); Wilkes v. Wood, 19 How. St. Tr. 1153 (1763); COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 232 (3d ed. 1898).

4. United States v. Rabinowitz, 70 Sup. Ct. 430 (1950); Harris v. United States, 331 U.S. 145, 67 Sup. Ct. 1098, 91 L. Ed. 1399 (1947); Angello v. United States, 269 U.S. 20, 46 Sup. Ct. 4, 70 L. Ed. 145 (1925). *But cf.* Trupiano v. United States, 334 U.S. 699, 68 Sup. Ct. 1229, 92 L. Ed. 1663 (1948), 2 VAND. L. REV. 116 (1949). For a complete discussion of search and seizure see CORNELIUS, SEARCH AND SEIZURE (2d ed. 1930). See Perkins, *The Tennessee Law of Arrest*, 2 VAND. L. REV. 509, 614-22 (1949).

5. Boyd v. United States, 116 U.S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746 (1886).

6. United States v. Lefkowitz, 285 U.S. 452, 52 Sup. Ct. 420, 76 L. Ed. 877 (1932).

7. Go-Bart Importing Co. v. United States, 282 U.S. 344, 51 Sup. Ct. 153, 75 L. Ed. 374 (1931); Gouled v. United States, 255 U.S. 298, 41 Sup. Ct. 261, 65 L. Ed. 647 (1921).

Fifth Amendment.[8] But the real purpose of the Fourth Amendment is to guarantee privacy to the individual.[9] In view of this it is difficult to distinguish between a search in a criminal case and an inspection under a municipal ordinance or pursuant to some regulatory law not involving criminal charges. The dissenting judge in the instant case, however, contended that the protection granted by the Amendment is only against search for and seizure of anything which might be used in a criminal action and therefore cannot be invoked to prevent a civil inspection.[10]

It is true that municipal ordinances pertaining to such matters as plumbing and sewage disposal, zoning regulations, and distribution of food and drugs could not be effectively enforced without inspection.[11] In such cases, however, the service desired is furnished by the municipality or is conducted by virtue of its permit, and the right to inspect can be said to to be a condition of enjoyment. Even in these cases, however, it would seem that an inspection of a private home could not be made over the owner's objection unless a court order was obtained.[12] Health regulations are not in tbe same category. Admittedly, the protection of health is of prime importance in the exercise of the police power [13]—so important that the right to make regulations concerning it has been held to exist as an incidental power.[14] The public authorities may therefore utilize all necessary means for promoting public health.[15] At least one authority states that the legislature may provide for inspection of premises as a health measure,[16] but the cases upholding the right to inspect have involved public or quasi-public places.[17] The power to inspect private premises without a warrant or unless pursuant to a court order does not appear to have been affirmed or denied by judicial decision prior to the instant case. On principle, it would seem that inspection against the will of the owner should be based on judicial authority complying with constitutional requirements in regard to searches,[18] and this in spite of the fact that the great majority of the

8. *E.g.*, Boyd v. United States, 116 U.S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746 (1886).
9. Wood, *The Scope of the Constitutional Immunity Against Search and Seizure*, 34 W. VA. L.Q. 1 (1927).
10. 178 F.2d at 22. The dissent is strongly supported by Stahl and Kuhn, *Inspections and the Fourth Amendment*, 11 U. OF PITT. L. REV. 256 (1950).
11. Savage v. District of Columbia, 54 A.2d 562 (D.C. Munic. App. 1947) (housing regulations); Keiper v. Louisville, 152 Ky. 691, 154 S.W. 18 (1913) (food inspection); Commonwealth v. Dougherty, 156 Pa. Super. 520, 40 A.2d 902 (1945) (water pipes and sewage conduits).
12. FREUND, THE POLICE POWER § 48 (1904).
13. Commonwealth v. Town of Hudson, 315 Mass. 335, 52 N.E.2d 566 (1943); 7 McQUILLIN, MUNICIPAL CORPORATIONS § 24.221 (3d ed. 1949).
14. Gundling v. Chicago, 176 Ill. 340, 52 N.E. 44 (1898).
15. Huffman v. District of Columbia, 39 A.2d 558 (D.C. Munic. App. 1944); People *ex rel.* Baker v. Strautz, 386 Ill. 360, 54 N.E.2d 441 (1944).
16. 25 AM. JUR., *Health* § 28 (1940).
17. Hubbell v. Higgins, 148 Iowa 36, 126 N.W. 914 (1910); State v. Normand, 76 N.H. 541, 85 Atl. 899 (1913).
18. FREUND, THE POLICE POWER 42-43 (1904).

populace would probably accede to official requests to inspect their premises pursuant to health ordinances and similar regulations.

Privacy, in the sense of freedom from arbitrary governmental interference, is one of the fundamental rights granted to the people by the Constitution. To hold that this right applies only to criminal law administration and affords no protection from official scrutiny under various regulatory laws where criminality is not involved would be strange. Equal protection should be afforded in both instances and the same rule of reasonableness applied in each case. In case of an unavoidable crisis, under threat of an epidemic, or of a pressing emergency, the rights of the public may be superior to those of the individual, but until such a situation occurs, he should be secure in the privacy of his home.

DAMAGES—BREACH OF CONTRACT TO CONVEY REALTY—EFFECT OF REFUSAL OF VENDOR'S SPOUSE TO JOIN IN CONVEYANCE

Plaintiff sought damages for defendant's breach of a contract to sell certain realty. After plaintiff had made the down payment, defendant was unable to deliver a deed because his wife, who owned an undivided half interest in the realty, refused to join in the conveyance. The defendant returned the down payment, and he and his wife subsequently conveyed to another person. Defendant was found to have acted in good faith and without positive fraud. From a judgment for only nominal damages, plaintiff appeals. *Held,* reversed. Plaintiff can recover substantial damages, irrespective of defendant's good faith. *Raisor v. Jackson,* 225 S.W.2d 657 (Ky. 1950).

The general measure of damages for breach of contract provides such compensation as will place the injured party in the position he would have enjoyed had the contract been performed.[1] In case of an executory contract to convey realty, this would mean the difference between the contract price and the fair market value of the property at the agreed date of conveyance, commonly referred to as "loss of bargain." [2]

With respect to contracts to convey realty, however, an exception to the fundamental rule of damages was introduced in England in 1776 by the case of *Flureau v. Thornhill.*[3] The so-called English rule there enunciated provided that if a vendor who acted in good faith, being previously unaware of any defect, could not make good title, the purchaser's recovery was limited to the

1. MCCORMICK, DAMAGES § 137 (1935); 1 SEDGWICK, MEASURE OF DAMAGES § 30 (9th ed., Sedgwick & Beale, 1920); 2 SUTHERLAND, DAMAGES § 566 (3d ed., Berryman, 1903).

2. Of course, any amount paid toward the purchase price is taken into account. See Note, 48 A.L.R. 12, 15-17 (1927).

3. 2 W. Bl. 1078, 96 Eng. Rep. 635 (K.B. 1776).

return of his purchase money, plus interest and costs.[4] Although English courts often followed the doctrine with reluctance,[5] it was expanded in 1874 to include instances where the seller knew at the time of the contract that his title was defective.[6]

Approximately half of the American jurisdictions have adopted the English rule of nominal damages in cases where the vendor acted in good faith and without knowledge of any defect in his title.[7] Two courts which follow the English rule, however, have narrowed it so as to prevent its application to executory contracts.[8] And most American courts have applied the rule of substantial damages where the vendor knowingly contracts to sell property in which a third person holds an interest.[9] Some courts have done so in spite of his good-faith belief that he will be able to obtain the interest in time to make the conveyance in pursuance of his contract.[10] A number of courts have specifically held that where the breach is occasioned by the refusal of the vendor's spouse to join in the conveyance, the breach itself constitutes fraud sufficient to enable the vendee to recover for loss of his bargain.[11] In recent years particularly there has been a trend away from the English position.[12]

4. This is the rule of nominal damages allowed by the trial court in the instant case. The "costs" referred to is the expense of investigation of title.

5. See Hopkins v. Grazebrook, 6 B. & C. 31, 108 Eng. Rep. 364 (K.B. 1826), drawing a very questionable distinction from the *Flureau* case.

6. "If a person enters into a contract for the sale of a real estate knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract. . . ." Bain v. Fothergill, L.R. 7 H.L. 158, 207 (1874).

7. *E.g.*, Emmert v. Jelsma & Holdebrand, 191 Iowa 424, 182 N.W. 652 (1921); Markoff v. Kreiner, 180 Md. 150, 23 A.2d 19 (1941); Kargiatly v. Provident Trust Co., 338 Pa. 358, 12 A.2d 11 (1940); Eagle Pass Lumber Co. v. The Amortibanc, 124 S.W.2d 186 (Tex. Civ. App. 1939); Horner v. Holt, 187 Va. 715, 47 S.E.2d 365 (1948). See also cases collected in Notes, 48 A.L.R. 12, 14-17, 19-21 (1927), 68 A.L.R. 137, 138-141 (1930); 55 AM. JUR., *Vendor and Purchaser* §§ 557, 558 (1946); HALE, DAMAGES § 159 (2d ed., Cooley, 1912); MCCORMICK, DAMAGES §§ 177, 179 (1935); 3 SEDGWICK, MEASURE OF DAMAGES § 1006 (9th ed., Sedgwick & Beale, 1920); 2 SUTHERLAND, DAMAGES §§ 579, 580 (3d ed., Berryman, 1903). Several states have adopted the rule by statute. CAL. CIV. CODE § 3306 (1941); MONT. REV. CODES ANN. § 17-306 (1947); N.J. STAT. ANN. § 2:45-1 (1939); OKLA. STAT. tit. 23, § 27 (1941).

8. Snodgrass v. Reynolds, 79 Ala. 452, 58 Am. Rep. 601 (1885); Matheny v. Stewart, 108 Mo. 73, 17 S.W. 1014, 1015 (1891).

9. *E.g.*, Beck v. Staats, 80 Neb. 482, 114 N.W. 633, 16 L.R.A. (N.S.) 768 (1908); McCarty v. Lingham, 111 Ohio St. 551, 146 N.E. 64 (1924). See also cases collected in 66 C.J., *Vendor and Purchaser* § 1703 (1934).

10. *E.g.*, Grosso v. Sporer, 123 Misc. 796, 206 N.Y. Supp. 227 (Sup. Ct. 1924); Matthews v. La Prade, 144 Va. 795, 130 S.E. 788 (1925).

11. *E.g.*, Greenberg v. Ray, 214 Ala. 481, 108 So. 385 (1926); Key v. Alexander, 91 Fla. 975, 108 So. 883 (1926); Puterbaugh v. Puterbaugh, 7 Ind. App. 280, 33 N.E. 808 (1893); McAdam v. Leak, 111 Kan. 704, 208 Pac. 569 (1922); Greer v. Doriot, 137 Va. 589, 120 S.E. 291 (1923) (exchange of realty); Stone v. Kaufman, 88 W. Va. 588, 107 S.E. 295 (1921). *Contra:* Gerbert v. Congregation of the Sons of Abraham, 59 N.J.L. 160, 35 Atl. 1121, 69 L.R.A. 764, 59 Am. St. Rep. 578 (Ct. Err. & App. 1896) (refusal of representatives of deceased wife); Burk v. Serrill, 89 Pa. 413, 21 Am. Rep. 105 (1876).

12. *E.g.*, Liberis v. Carmeris, 107 Fla. 352, 146 So. 220 (1933) (notice of breach preceded excuse of wife's refusal); Bulkley v. Rouken Glen, Inc., 222 App. Div. 570, 226 N.Y. Supp. 544 (2d Dep't 1928), *aff'd*, 248 N.Y. 647, 162 N.E. 560 (1928) (arbitrary refusal, knowingly contracting beyond power, fraud or bad faith); Spruill v. Shirley, 182 Va. 342, 28 S.E.2d 705 (1944) (knowingly contracting beyond power).

Thus, the prevailing American view in a case of the present type—where the vendor knowingly contracts beyond his power, but in good faith believes he will be able to secure the cooperation needed to meet his obligation—is contrary to the English rule; and the vendor must respond in substantial damages for his breach.

The English view is defended on the ground that one contracting to convey real property is bound only on condition that he has good title.[13] In America, however, an implied warranty of title is raised by the vendor's making the contract;[14] and a vendor who contracts beyond his power is not excused from liability.[15] The intricate and complex nature of English land titles has been advanced as another circumstance demanding application of the English rule.[16] The force of this argument was destroyed in America, however, by the advent of the recording system, one purpose of which was to ameliorate complications and doubts with regard to titles.[17] Further considerations pointing to the correctness of the American view are that the vendor can protect himself against failure of title by insertion of a condition within the contract and that the rule places a seller of realty on the same basis as a seller of personal property.[18]

The Kentucky court in the present case overrules a previous decision in which good faith of the vendor was held to limit the vendee's recovery.[19] The holding of the instant case is limited to instances in which the vendor knowingly contracts in excess of his power and does not preclude the application of the good-faith rule in Kentucky in cases where the vendor does not know of his inability to convey.[20] In yielding to convincing argument [21] the court has taken a forward step in clarifying the position of that jurisdiction and in bringing it into accord with the majority position.

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13. See Blackstone's opinion in Flureau v. Thornhill, 2 W. Bl. 1078, 96 Eng. Rep. 635 (K.B. 1776).

14. "[A]n executory contract for the sale of land imports an implied warranty, on the part of the vendor, that he is the owner of, and has power to convey, a good title thereto. . . ." 6 C.J., *Vendor and Purchaser* § 516 (1934).

15. "One who makes a promise which cannot be performed without the consent or cooperation of a third person is not excused from liability because of inability to secure the required consent or cooperation, unless the terms or nature of the contract indicate that he does not assume this risk." 6 WILLISTON, CONTRACTS § 1932 (2d ed., 1938).

16. HALE, DAMAGES § 159 (2d ed., Cooley, 1912).

17. SEDGWICK, ELEMENTS OF DAMAGES 320 (1896).

18. See, for additional considerations, Doherty v. Dolan, 65 Me. 87, 91, 20 Am. Rep. 677, 680 (1876).

19. "All that we have is the wife's refusal to join in the deed. The husband's dominion over the wife is not what it once was. The wife of today has asserted and established her independence. She does not always yield to the wishes or even the advice of her husband, but frequently exercises her own judgment. Because of this situation we are not inclined to hold that the refusal of the wife, without more, is sufficient to show fraud or connivance on the part of her husband." Potts v. Moran's Ex'rs, 236 Ky. 28, 32 S.W.2d 534, 536 (1930).

20. 225 S.W.2d at 660.

21. For an attack on the previous stand of the court on this question, see Carnahan, *The Kentucky Rule of Damages for Breach of Executory Contracts to Convey Realty*, 20 KY. L.J. 304 (1932).

DAMAGES—MALICIOUS PROSECUTION—REQUIREMENT THAT ACTUAL DAMAGES BE SHOWN AS A PREDICATE TO EXEMPLARY DAMAGES

Upon a complaint signed and sworn to by the defendant a warrant issued for the arrest of plaintiff and he was prosecuted for a misdemeanor. The prosecution having terminated favorably for the plaintiff, he brought an action for damages for malicious prosecution. The jury returned a verdict for the plaintiff awarding no compensatory damages but assessing exemplary damages of $2500. Defendant's motion for judgment n.o.v. was granted and plaintiff appealed. *Held,* reversed; judgment for the plaintiff in conformity with the verdict. Where actual damage has been shown, though not its money extent, entitling plaintiff to nominal damages at best, he is nevertheless entitled to have the cause submitted to the jury on the question of exemplary damages. *Fauver v. Wilkoske,* 211 P.2d 420 (Mont. 1949).

As a general proposition exemplary damages are not recoverable in a tort action unless they are predicated upon a finding of actual damages.[1] The reason generally assigned is that exemplary damages are given by way of punishment and not as compensation, and the right to their recovery is a mere incident to a cause of action brought for compensation.[2] In a number of jurisdictions, however, a contrary rule prevails, and neither actual nor nominal damages need be found.[3] Where the general rule obtains, exemplary damages may be recovered though the actual damages shown are small [4] or even where the amount is not capable of exact calculation.[5] Where a showing of actual damages is required, there is a conflict in the decisions as to whether nominal damages are sufficient to support an award of punitive damages. While the

1. Boehne v. Southwestern Bell Telephone Co., 10 F. Supp. 788 (W.D. Tex. 1935); Longinotti v. Rhodes, 220 S.W.2d 812 (Ark. 1949); Brewer v. Second Baptist Church, 32 Cal. 2d 791, 197 P.2d 713 (1948); McConathy v. Deck, 34 Colo. 461, 83 Pac. 135, 4 L.R.A. (N.S.) 358, 7 Ann. Cas. 896 (1905); Stacy v. Portland Pub. Co., 68 Me. 279 (1878); Richard v. Hunter, 151 Ohio St. 185, 85 N.E.2d 109 (1949); Allen v. Melton, 20 Tenn. App. 387, 99 S.W.2d 219 (M.S. 1936); Bizzell v. Clark, 203 S.W.2d 998 (Tex. Civ. App. 1947); Ennis v. Brawley, 129 W. Va. 621, 41 S.E.2d 680 (1946); 2 SUTHERLAND, DAMAGES § 406 (3d ed., Berryman, 1903). See Notes, 33 A.L.R. 384 (1924), 81 A.L.R. 913 (1932), 123 A.L.R. 1115, 1120 (1939).

2. Shore v. Shore, 111 Kan. 101, 205 Pac. 1027, 1028 (1922); Hoagland v. Forest Park Highlands Amusement Co., 170 Mo. 335, 70 S.W. 878, 880, 94 Am. St. Rep. 740 (1902). See McClellan, *Exemplary Damages in Indiana,* 10 IND. L.J. 275 (1935); 15 AM. JUR., *Damages* § 266 (1938).

3. Scalise v. National Utility Service, 120 F.2d 938 (5th Cir. 1941); Wardman-Justice Motors v. Petrie, 39 F.2d 512, 69 A.L.R. 648 (D.C. Cir. 1930); Press Pub. Co. v. Monroe, 73 Fed. 196 (2d Cir. 1896); Fields v. Lancaster Cotton Mills, 77 S.C. 546, 58 S.E. 608, 122 Am. St. Rep. 593, 11 L.R.A. (N.S.) 822 (1907). See 1 SEDGWICK, DAMAGES § 361 (9th ed., Sedgwick & Beale, 1920).

4. Foster v. Sikes, 202 Ga. 122, 42 S.E.2d 441, 444 (1947); International Harvester Co. v. Iowa Hardware Co., 146 Iowa 172, 122 N.W. 951, 953, 29 L.R.A. (N.S.) 272 (1909); Long v. Davis, 68 Mont. 85, 217 Pac. 667, 668 (1923). See Notes, 33 A.L.R. 384, 398 (1924), 81 A.L.R. 913, 916 (1932).

5. Clark v. McClurg, 215 Cal. 279, 9 P.2d 505, 506, 81 A.L.R. 908 (1932); Livingston v. Utah-Colorado Land & Live Stock Co., 106 Colo. 278, 103 P.2d 684, 685 (1940); Lane v. Mitchell, 153 Iowa 139, 133 N.W. 381, 383, 36 L.R.A. (N.S.) 968 (1911); State *ex rel.* St. Joseph Belt Ry. v. Shain, 341 Mo. 733, 108 S.W.2d 351, 356 (1937); Long v. Davis, 68 Mont. 85, 217 Pac. 667, 668 (1923).

majority of states consider nominal damages insufficient,[6] many jurisdictions hold that exemplary damages will be sustained although the damages are only nominal.[7]

The early cases held that an action for malicious prosecution could not be maintained unless actual damages were suffered by the plaintiff.[8] More recently, however, it has been held that such damages may be recovered though not pleaded or specially proved, on the ground that they necessarily follow from the prosecution.[9] The instant case overrules the earlier case of *Gilham v. Devereaux*,[10] one of the leading cases upholding the majority view that actual damages must be found as a predicate for the award of exemplary damages.[11] In so doing it reaffirms the rule announced in *Long v. Davis*,[12] holding that where actual damages are shown but are only nominal because their money extent is not shown, exemplary damages will be sustained.[13]

Though not expressly so stating the court in this case has gone a long way toward eliminating the necessity for actual compensatory damages to

6. Thompson v. Mutual Ben. Health & Accident Ass'n, 83 F. Supp. 656 (N.D. Iowa 1949); Alexander v. Jones, 29 F.Supp. 690, 692 (E.D. Okla. 1939); Jacob v. Miner, 67 Ariz. 109, 191 P.2d 734, 742 (1948); Longinotti v. Rhodes, 220 S.W.2d 812 (Ark. 1949; Haydel v. Morton, 8 Cal. App. 2d. 730, 48 P.2d 709, 712 (1935); McLain v. Pensacola Coach Corp., 152 Fla. 876, 13 So. 2d 221, 222 (1943); Reeda v. Tribune Co., 218 Ill. App. 45, 48 (1920); Connelly v. White, 122 Iowa 391, 98 N.W. 144 (1904); Shore v. Shore, 111 Kan. 101, 205 Pac. 1027, 1028 (1922); Stacy v. Portland Pub. Co., 68 Me. 279, 287 (1878); Meixner v. Buecksler, 216 Minn. 586, 13 N.W.2d 754, 757 (1944); McCain v. Cochran, 153 Miss. 237, 120 So. 823, 828 (1929); McClanahan v. Koviak, 62 Ohio App. 307, 23 N.E.2d 975, 977 (1939); Brown v. Higby, 191 Okla. 173, 127 P.2d 195, 196 (1942); Martin v. Cambas, 134 Ore. 257, 293 Pac. 601 (1930); Roberts v. Shaffer, 36 S.D. 551, 156 N.W. 67, 68 (1916); Allen v. Melton, 20 Tenn. App. 387, 99 S.W.2d 219, 225 (M.S. 1936); Meadows v. First Nat. Bank, 149 S.W.2d 591, 592 (Tex. Civ. App. 1941); Moore v. Duke, 84 Vt. 401, 80 Atl. 194, 197 (1911); Ennis v. Brawley, 129 W. Va. 621, 41 S.E.2d 680, 683 (1946); Barnard v. Cohen, 165 Wis. 417, 162 N.W. 480 (1917); Martel v. Hall Oil Co., 36 Wyo. 166, 253 Pac. 862, 867 (1927). See 2 SUTHERLAND, DAMAGES § 406 (3d ed., Berryman, 1903).

7. Gardella v. Log Cabin Products Co., 89 F.2d 891 (2d Cir. 1937); Wilson v. Vaughn, 23 Fed. 229 (C.C.D. Kan. 1885); Goodson v. Stewart, 154 Ala. 660, 46 So. 239 (1908); Foster v. Sikes, 202 Ga. 122, 42 S.E.2d 441 (1947); Crystal Dome Oil & Gas Co. v. Savic, 51 Idaho 409, 6 P.2d 155 (1931); Louisville & N.R.R. v. Ritchel, 148 Ky. 701, 147 S.W. 411, 41 L.R.A. (N.S.) 958 (1912); Heinze v. Murphy, 180 Md. 423, 24 A.2d 917 (1942); Edwards v. Nulsen, 347 Mo. 1077, 152 S.W.2d 28 (1941); Long v. Davis, 68 Mont. 85, 217 Pac. 667 (1923); Parris v. H. G. Fischer & Co., 221 N.C. 110, 19 S.E.2d 128 (1942); Cook v. Atlantic Coast Line R.R., 183 S.C. 279, 190 S.E. 923 (1937).

8. Gordon v. McLearn, 123 Ark. 496, 185 S.W. 803 (1916); International Harvester Co. v. Iowa Hardware Co., 146 Iowa 172, 122 N.W. 951, 29 L.R.A. (N.S.) 272 (1909); Schippel v. Norton, 38 Kan. 567, 16 Pac. 804 (1888); Roos v. Goldman, 36 La. Ann. 132 (1884); Stanford v. Grocery Co., 143 N.C. 419, 55 S.E. 815 (1906); Harris v. Finberg, 46 Tex. 79 (1876). See PROSSER, TORTS 883 (1941).

9. Parisian Co. v. Williams, 203 Ala. 378, 83 So. 122 (1919); Johnston v. Deidesheimer, 76 Colo. 559, 232 Pac. 113 (1925); Dorr Cattle Co. v. Des Moines Nat. Bank, 127 Iowa 153, 98 N.W. 918 (1904); Barnes v. Culver, 192 Ky. 10, 232 S.W. 39 (1921); Grorud v. Lossl, 48 Mont. 274, 136 Pac. 1069 (1913); Goodwin v. Marsh, 4 Tenn. App. 23 (E.S. 1926). See MCCORMICK, DAMAGES § 108 (1935).

10. 67 Mont. 75, 214 Pac. 606, 33 A.L.R. 381 (1923) (alienation of affections).

11. See notes 1, 6 *supra*.

12. 68 Mont. 85, 217 Pac. 667, 668 (1923).

13. "Where actual damages have been *shown*, though the testimony is insufficient to *show* its money extent, thus entitling plaintiff at best to no more than nominal damages, he was nevertheless entitled to have the cause submitted to the jury on the question of exemplary damages pleaded by him." 211 P.2d at 426.

sustain an action for malicious prosecution. This seems more in accordance with reason and justice than the holding of those cases which require a finding of actual damages as a predicate to an award of exemplary damages. If the necessary culpability on the part of the defendant is established, why should the plaintiff be denied recovery of exemplary damages when his actual damages are nominal or not capable of exact calculations? The purpose in awarding exemplary damages is to discourage aggravated torts.[14] Therefore, when there has been a breach of a duty giving rise to a cause of action for malicious prosecution, the monetary extent of plaintiff's injury would seem to be immaterial.[15]

EVIDENCE—BLOOD-GROUPING TESTS IN BASTARDY PROCEEDINGS—EFFECT OF JURY VERDICT CONTRARY TO RESULT OF TEST

In a bastardy proceeding against defendant, plaintiff testified that she had intercourse with defendant during the critical period and that no one but he could be the father of her twins. Defendant, pursuant to statute,[1] moved to have blood-grouping tests made, and these tests excluded him from paternity. The jury returned a verdict declaring defendant to be the father. Defendant entered a motion for a new trial. *Held,* motion sustained. A jury verdict of paternity will be set aside and a new trial granted when exclusion of paternity is shown by blood-grouping tests. *Jordon v. Mace,* 69 A.2d 670 (Me. 1949).

Blood-grouping tests excluding paternity are accepted in European courts as unanswerable proof of nonpaternity, and such tests are compulsory in every affiliation case.[2] American courts have been less impressed by the significance of this scientific discovery. In the first case involving the problem, it was held that the results of the tests were inadmissible.[3] Since then, however, most American courts have recognized that the tests have sufficient probative value to go to the jury along with other evidence.[4] Only a few courts

14. See note 2 *supra.*

15. See McClellan, *Exemplary Damages in Indiana,* 10 IND. L.J. 275 (1935); McCormick, *Some Phases of the Doctrine of Exemplary Damages,* 8 N.C.L. REV. 129, 149 (1930); 17 IOWA L. REV. 413 (1932); 16 MINN L. REV. 438 (1932); 10 TEXAS L. REV. 238 (1932); 18 U. OF CIN. L. REV. 545 (1949).

1. ME. REV. STAT. c. 153, § 34 (1944). The statute makes it mandatory upon the court to order blood-grouping tests upon the defendant's motion.

2. Schatkin, *Law and Science in Collision: Use of Blood Tests in Paternity Suits,* 32 VA. L. REV. 886, 900 (1946). For a scientific discussion of blood-grouping theories, see Denton, *Blood Groups and Disputed Parentage,* 27 CAN. B. REV. 537 (1949).

3. State v. Damm, 62 S.D. 123, 252 N.W. 7, 104 A.L.R. 430 (1933), *aff'd on rehearing,* 64 S.D. 309, 266 N.W. 667 (1936). The court pointed out that the decision was based on the fact that the tests *at the time of the first trial* were not generally accepted as reliable; hence it was within the discretion of the trial judge at that time to refuse to admit the evidence.

4. Beach v. Beach, 114 F.2d 479, 131 A.L.R. 804 (D.C.Cir. 1940); Arais v. Kalensnikoff, 10 Cal. 2d 428, 74 P.2d 1043, 115 A.L.R. 163 (1937); Schanks v. State, 185 Md. 437, 45 A.2d 85, 163 A.L.R. 931 (1945); *In re* Lentz, 247 App. Div. 31, 283 N.Y. Supp.

have gone as far as the instant case and set aside a verdict of paternity upon the basis of exclusion by glood-grouping tests,[5] and no American jurisdiction has reached the point of directing a verdict for the defendant on the results of these tests. The explanation of this may be found in the rules of trial practice; the jury is the sole judge of the credibility of witnesses and of the weight of testimony. Even when there is neither a contradiction nor an attack upon the credibility of the only witness to a given fact, it is not ordinarily a proper function of the trial judge to direct a verdict on the basis of such testimony, for it is still the jury's privilege to disbelieve the witness.[6] At first this seems somewhat inconsistent with the oath of the jury to try the case according to the evidence, but apparently implicit in the phrase "try the case" is the privilege to disbelieve the evidence presented. This leads to amazing results at times. In *Berry v. Chaplin*,[7] the court noted that blood-grouping tests were matters of common knowledge, that the results proved exclusion, and that the character and credibility of the experts were not questioned; yet, since the California statute [8] did not make the results of the tests conclusive, the court felt bound to follow the precedent of *Avais v. Kalensnikoff* [9] and to uphold a verdict of paternity.

The statutes in states having legislation on the subject are similar to that in the instant case.[10] They allow the defendant alone to request the tests, a recognition that the tests have value only in proving nonpaternity.[11] Where no statute is involved, the question sometimes arises, particularly in divorce cases, as to whether or not the test can be made if the woman concerned objects.[12] A New Jersey court has held that it would constitute an assault and battery to order an unwilling wife to submit to the tests.[13] Pennsylvania has taken the novel position that until paternity can be shown affirmatively as well as negatively it would be unreasonable to require the woman to submit

749 (2d Dep't 1935); State v. Clark, 144 Ohio St. 305, 58 N.E.2d 773 (1944); Commonwealth v. Zammarelli, 17 Pa. D. & C. 229 (1931); Euclide v. State, 231 Wis. 616, 286 N.W. 2 (1939). For a composite picture of the status of blood-grouping tests in American and foreign jurisdictions, see Galton, *Blood-Grouping Tests and Their Relationship to the Law*, 17 ORE. L. REV. 177 (1938).

5. State v. Wright, 59 Ohio App. 191, 17 N.E.2d 428 (1938), *rev'd on other grounds*, 135 Ohio St. 187, 20 N.E.2d 229 (1939); Commonwealth v. Visocki, 23 Pa. D. & C. 103 (1935); Commonwealth v. Zammarelli, 17 Pa. D. & C. 229 (1931).

6. *E.g.*, Sioux City & P.R.R. v. Stout, 17 Wall. 657, 21 L. Ed. 745 (U.S. 1873).

7. 74 Cal. App. 2d 652, 169 P.2d 442 (1946), criticized in Notes, 2 ARK. L. REV. 133 (1948), 4 WASH. & LEE L. REV. 199 (1947).

8. CAL. CODE CIV. PROC. § 1978 (1946).

9. 10 Cal. 2d 428, 74 P.2d 1043, 115 A.L.R. 163 (1937).

10. MD. ANN. CODE GEN. LAWS, art. 12, § 17 (Cum. Supp. 1947); N.J. STAT. ANN. §§ 2:99-3, 2:99-4 (Cum. Supp. 1949); N.Y. DOM. REL. LAW § 126-a; N.C. GEN. STAT. ANN. § 49-7 (Cum. Supp. 1947); OHIO CODE ANN. §§ 12122-1, 12122-2 (Supp. 1949); WIS. STAT. § 166.105 (1947).

11. State v. Brigham, 33 N.W.2d 285 (S.D. 1948).

12. Commonwealth v. Morris, 22 Pa. D. & C. 111 (1934). It is necessary, of course, in order to administer a blood-grouping test that the blood of the mother as well as that of the child and the alleged father be tested.

13. Bednarik v. Bednarik, 18 N.J. Misc. 633, 16 A.2d 80 (Ch. 1940).

to the tests.[14] The problem of constitutional rights is another barrier confronting the courts.[15] But at least one court has declared, in spite of these problems, that it has inherent power, even in the absence of a statute, to order the tests.[16]

In many other fields scientific discoveries and theories have been recognized as having a high probative value.[17] The reasoning in the instant case might well be applied in some of these fields. When the results of a test are accepted by scientists as being conclusive scientific facts, and such scientific evidence is neither contradicted nor impeached, the trial court should at least set aside a verdict contrary to such evidence. If it would not be an invasion of the province of the jury to do this, it would also seem that the trial court could direct a verdict upon the strength of such evidence. To safeguard the interests of the parties involved, the court could appoint experts to conduct the tests. Of course, if the results might vary or be incorrect, as sometimes occurs in the case of truth serums or lie detectors, the test has no value as evidence.[18]

The instant case is a step forward. Every day science affirms its faith in the correctness of the blood-grouping theory by making thousands of blood transfusions—where the very life of the patient is at stake. The defendant in a bastardy action may lose his freedom; the petitioner in a divorce case may find himself compelled to support a child not his own. Proving innocence in the one case, or adultery in the other, is a very difficult problem. The woman involved is often the only person in possession of all the facts, and she is unlikely to reveal them. By making the results of the blood-grouping tests conclusive, the law may prevent the adventuress from picking at random the father of her child, and the adulteress from hiding behind her marriage with immunity.

INCOME TAXATION—SALE OF CORPORATE ASSETS—DETERMINATION OF WHETHER SALE WAS MADE BY CORPORATION OR SHAREHOLDER

The shareholders of petitioner, a closely-held public service corporation, realizing the corporation could not compete with a newly-established TVA

14. Commonwealth v. Krutsick, 151 Pa. Super. 164, 30 A.2d 325, 326 (1943). The court stated that "the putative father would have everything to gain and nothing to lose. . . , while the mother would have everything to lose and nothing to gain [by the tests]."

15. Commonwealth v. English, 123 Pa. Super. 161, 186 Atl. 298 (1936).

16. State v. Damm, 64 S.D. 309, 266 N.W. 667 (1936), see Note, 9 Miss. L.J. 234, 235, 239 (1936).

17. *E.g.*, Hornsby v. Commonwealth, 263 Ky. 613, 92 S.W.2d 773 (1936) (fingerprints); Evans v. Commonwealth, 230 Ky. 411, 19 S.W.2d 1091 (1929) (ballistics); People v. Morse, 325 Mich. 270, 38 N.W.2d 322 (1949), 3 Vand. L. Rev. 318 (1950) (Harger Drunkometer); State v. Smith, 128 Ore. 515, 273 Pac. 323 (1929) (photographs); Maryland Casualty Co. v. Dicken, 80 S.W.2d 800 (Tex. Civ. App. 1935) (X-rays).

18. Inbau, Lie Detection and Criminal Investigation (2d ed. 1948); Despres, *Legal Aspects of Drug-Induced Statements,* 14 U. of Chi. L. Rev. 601 (1947).

cooperative, offered to sell all the corporate stock to the cooperative. The cooperative refused to buy the stock, but countered with an offer to buy directly from the corporation its transmission and distribution equipment. The corporation rejected the offer because a sale by it would have involved a heavy capital gains tax. The shareholders then proposed that they acquire the equipment from the corporation and sell it to the cooperative. The cooperative accepted. After a transfer of the equipment from the corporation to the shareholders in partial liquidation, the remaining assets were sold and the corporation dissolved. The shareholders then completed the transaction. The Commissioner assessed a capital gains tax against petitioner on the theory that the shareholders had been used as a mere conduit for effectuating what was really a corporate sale. The Court of Claims found that, although the method of sale was avowedly chosen in order to reduce taxes, the sale itself was made not by the corporation but by the stockholders. *Held,* affirmed. The findings sustained the conclusion that the sale was made by stockholders rather than the corporation. *United States v. Cumberland Public Service Co.,* 70 Sup. Ct. 280 (U.S. 1950).

When a corporation consummates a sale of its assets, any gain realized on the sale is taxable to the corporation;[1] and if the proceeds are then distributed, the stockholders may have to pay a second tax on the same profit.[2] But if the corporation first distributes the assets to its stockholders, either in partial or complete liquidation, and the stockholders thereafter sell the property, the tax on the corporation is avoided.[3] Where the corporation is closely held, the distinction between sales by the corporation and sales by the stockholders after distribution may be "particularly shadowy and artificial."[4]

It is a familiar principle of American law that a taxpayer may decrease the amount of his income tax or avoid the tax altogether by any means which the law permits, and his motive in no way changes the result.[5] But the transaction will be carefully scrutinized where such motive is shown, to determine whether it is a mere sham or subterfuge rather than what it purports to be in form;[6] and in the sale of corporate assets, although the transaction is car-

1. 26 U.S.C.A. § 22(a) (1948); U.S. Treas. Reg. 111, § 29.22(a)-18.

2. *E.g.,* if the amount received by the shareholder in distribution or liquidation exceeds the cost basis of his stock, he will be liable for a capital gains tax. On the other hand, if the direct transfer of the property by the corporation involves a loss, there may be a double deduction: the deduction of the loss to the corporation, and the deduction of the loss to the stockholder on liquidation.

3. General Utilities & Operating Co. v. Helvering, 296 U.S. 200, 56 Sup. Ct. 185, 80 L. Ed. 154 (1935); U.S. Treas. Reg. 111, § 29.22(a)-20.

4. 70 Sup. Ct. at 282 (1950).

5. *E.g.,* Gregory v. Helvering, 293 U.S. 465, 469, 55 Sup. Ct. 266, 79 L. Ed. 596 (1935); United States v. Cummins Distilleries Corp., 166 F.2d 17, 20 (6th Cir. 1948).

6. *E.g.,* Helvering v. Clifford, 309 U.S. 331, 335-37, 60 Sup. Ct. 554, 84 L. Ed. 788 (1940); United States v. Phellis, 257 U.S. 156, 168, 42 Sup. Ct. 63, 64 L. Ed. 180 (1921). See Note, 101 A.L.R. 204, 208 (1936).

ried out in two steps, with legal title passing through the stockholders, if it is a unitary plan to dispose of appreciated corporate assets, the courts may disregard the form for tax purposes.[7]

Whether a transaction under scrutiny is in reality what it appears to be in form is primarily a question of fact, and distribution-and-sale cases necessarily involve such factual disputes.[8] In this regard, the problem is no different from any other question of fact, and the findings of fact of the trial court will not be disturbed so long as supported by substantial evidence.[9] Accordingly, it is impossible to predict with certainty the outcome of a particular case, for the trier of fact may reach opposite conclusions in two cases with very similar evidentiary facts.[10]

There are, however, certain basic considerations for the determination of this factual question. In determining who actually made the sale, or on whose behalf the sale was made, it may be important whether the corporation itself at any time made plans to sell;[11] whether the corporation initiated the negotiations for the sale;[12] and whether the terms of the sale are substantially the same as the terms in the preliminary negotiations.[13] The extent of pre-sale negotiations between the corporation and the purchaser is always important and may be controlling.[14]

The cases agree that the corporation may be held taxable on a sale of its property by the stockholders after liquidation if the facts indicate that the shareholders in making the sale have acted as nominees or agents of the corporation;[15] or that the property was transferred to trustees who later

7. Wichita Terminal Elevator Co. v. Comm'r, 162 F.2d 513, 516 (10th Cir. 1947); S.A. MacQueen Co. v. Comm'r, 67 F.2d 857, 858 (3d Cir. 1933); Guinness v. United States, 73 F. Supp. 119, 131 (Ct. Cl. 1947), *cert. denied*, 334 U.S. 819 (1948), 48 COL. L. REV. 810; *cf.* Comm'r v. Transport Trading & Terminal Corp., 176 F.2d 570 (2d Cir. 1949) (doctrine of Gregory v. Helvering, *supra* note 5, invoked to hold corporation taxable). But see PAUL, SELECTED STUDIES IN FEDERAL TAXATION 200-04 (2d ser. 1938), where it is said that such attempts to distinguish form and substance have been discouragingly unsuccessful and misleading.

8. See, *e.g.*, Wichita Terminal Elevator Co. v. Comm'r, 162 F.2d 513, 515 (10th Cir. 1947); James Duggan, 18 B.T.A. 608, 625 (1930).

9. Comm'r v. Scottish American Co., 323 U.S. 119, 123, 65 Sup. Ct. 169, 89 L. Ed. 113 (1944); Dobson v. Comm'r, 320 U.S. 489, 64 Sup. Ct. 239, 88 L. Ed. 248 (1943). See 26 U.S.C.A. § 1141(a) (1948).

10. *E.g.*, John Kelley Co. v. Comm'r, 326 U.S. 521, 66 Sup. Ct. 299, 90 L. Ed. 278 (1946).

11. See United States v. Cummins Distilleries Corp., 166 F.2d 17, 21 (6th Cir. 1948); George S. Towne, 35 B.T.A. 141, 150 (1936); Nace Realty Co., 28 B.T.A. 467, 470 (1933).

12. See Kaufmann v. Comm'r, 175 F.2d 28, 30 (3d Cir. 1949); Fairfield Steamship Corp. v. Comm'r, 157 F.2d 321, 322 (2d Cir. 1946), *cert. denied*, 329 U.S. 774 (1946).

13. See Embry Realty Co. v. Glenn, 116 F.2d 682, 683, (6th Cir. 1940); Hattie W. Mackay, 29 B.T.A. 1090, 1094 (1934).

14. Kaufmann v. Comm'r, 175 F.2d 28 (3d Cir. 1949), *affirming* 11 T.C. 483 (1948), 22 So. CALIF. L. REV. 216 (1949), 35 VA. L. REV. 270 (1949); Howell Turpentine Co. v. Comm'r, 162 F.2d 319, 324 (5th Cir. 1947), 1 U. OF FLA. L. REV. 106 (1948); Fairfield Steamship Corp. v. Comm'r, 157 F.2d 321, 322 (2d Cir. 1946), *cert. denied*, 329 U.S. 774 (1946), 56 YALE L.J. 379 (1947); Conservative Gas Co., 30 B.T.A. 552, 555 (1934). *But cf.* Robert Jemison, Jr., 3 B.T.A. 780, 802 (1926).

15. Meurer Steel Barrel Co. v. Comm'r, 144 F.2d 282 (3d Cir. 1944), *cert. denied*,

sold, apparently in behalf of the stockholders, but in fact as agents of the corporation in liquidation.[16] Where the corporation in prior negotiations commits itself, legally or morally,[17] to sell specific assets which are then transferred to its stockholders who consummate the transaction, the courts will hold the corporation taxable on the ground that the stockholders are merely conduits of title.[18]

But where the courts have found that the corporation itself was not obligated to make the sale,[19] and that there were no substantial corporate negotiations prior to the liquidation,[20] they have attributed no taxable gain to the corporation. It is clear that the shareholders may contract to sell the property they expect to receive in liquidation without subjecting the corporation to taxation.[21]

The problem was passed upon by the Supreme Court for the first time in *Commissioner v. Court Holding Company*.[22] There the Court reaffirmed the proposition that the incidence of taxation depends, not on the means employed to transfer legal title, but on the substance of the transaction, which is to be viewed as a whole from the commencement of negotiations to the consummation of the sale, and every step of the transaction is relevant for this purpose. In that case, the corporation having learned of the high taxes involved, withdrew from an oral agreement to sell its real property, then transferred the property in liquidation to its two shareholders, who completed the sale on terms identical with the previous oral agreement. The Court held the corporation taxable, emphasizing that realistically viewed the sale was made before the liquidation of the corporation.

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324 U.S. 860 (1945); Trippett v. Comm'r, 118 F.2d 764 (5th Cir. 1941), *cert. denied*, 314 U.S. 644 (1941); Embry Realty Co. v. Glenn, 116 F.2d 682 (6th Cir. 1940); S.A. MacQueen Co. v. Comm'r, 67 F.2d 857 (3d Cir. 1933); Nace Realty Co., 28 B.T.A. 467 (1933); James Duggan, 18 B.T.A. 608 (1930).

16. First National Bank v. United States, 86 F.2d 938 (10th Cir. 1936); Tazewell Electric Light & Power Co. v. Strother, 84 F.2d 327 (4th Cir. 1936); Hellebush v. Comm'r, 65 F.2d 902 (6th Cir. 1933); Burnet v. Lexington Ice & Coal Co., 62 F.2d 906 (4th Cir. 1933); Taylor Oil & Gas Co. v. Comm'r, 47 F.2d 108 (5th Cir. 1931), *cert. denied*, 283 U.S. 862 (1931); Chilhowee Mills, Inc., 4 T.C. 558 (1945). See U.S. Treas. Reg. 111, § 29.22(a)-20, which provides that any sale of property made by a trustee or receiver in dissolution while winding up a corporation's affairs shall be treated as if made by the corporation.

17. Comm'r v. Court Holding Co., 324 U.S. 331, 334, 65 Sup. Ct. 707, 89 L. Ed. 981 (1945).

18. Meurer Steel Barrel Co. v. Comm'r, 144 F.2d 282, 284 (3d Cir. 1944), *cert. denied*, 324 U.S. 860 (1945); Nace Realty Co., 28 B.T.A. 467, 470 (1933); James Duggan, 18 B.T.A. 608, 626-27 (1930).

19. See Comm'r v. Falcon Co., 127 F.2d 277, 278 (5th Cir. 1942).

20. See United States v. Cummins Distilleries Corp., 166 F.2d 17, 21 (6th Cir. 1948); Ripy Brothers Distillers, Inc., 11 T.C. 326, 339 (1948); Acampo Winery and Distilleries, Inc., 7 T.C. 629, 635 (1946); Conservative Gas Co., 30 B.T.A. 552, 555 (1934); Fruit Belt Telephone Co., 22 B.T.A. 440, 441 (1931).

21. Howell Turpentine Co. v. Comm'r, 162 F.2d 319, 322 (5th Cir. 1947); Baum v. Dallman, 76 F. Supp. 410, 414 (S.D. Ill. 1948); Cooper Foundation, 7 T.C. 389, 395 (1946); George T. Williams, 3 T.C. 1002, 1011-12 (1944).

22. 324 U.S. 331, 65 Sup. Ct. 707, 89 L. Ed. 981 (1945). The problem was presented but not passed upon in General Utilities & Operating Co. v. Helvering, 296 U.S. 200, 56 Sup. Ct. 185, 80 L. Ed. 154 (1935).

Just as the *Court Holding Company* case clearly emphasizes substance, the instant case may, at first glance, seem to emphasize the form of the transaction. But the instant case should not be construed to give any comfort to the tax evader, for the factual situations of the two cases are clearly distinguishable, the facts here indicating a bona fide sale by the stockholders, and the holding specifically affirming the earlier well-settled rules of tax law.

The instant case cannot, of course, give absolute certainty to the settlement of this difficult factual question;[23] and though the application of the law to particular cases is uncertain, such uncertainty is not always a vice. It may indeed be desirable where certainty in the rules would afford opportunities for avoidance through transactions that are not substantially distinguishable in fact.[24] Where this uncertainty does exist, the taxpayer should bear in mind that his transaction may eventually face a fact-finding body, and the only safe approach is to stay as far from the dividing line as possible.

INSURANCE—WAIVER OF PREMIUMS—INSANITY AS EXCUSE FOR FAILURE TO NOTIFY INSURER OF DISABILITY

The life insurance policy under which plaintiff was beneficiary provided that if the insured should become totally disabled and proof thereof were furnished the insurer while no premium was in default, further premiums would be waived. Insured became disabled because of insanity, and the policy lapsed before notice of the disability was given. Upon the death of the insured plaintiff sued the insurer. *Held,* judgment for plaintiff affirmed. The insanity of the insured excused the failure to furnish notice as required by the terms of the policy. *Limpus v. New York Life Ins. Co.,* 226 S.W.2d 97 (Mo. App. 1949).

A condition in a contract, if it is not an essential part of the exchange, may be excused by a supervening impossibility.[1] Thus, when notice of a loss insured against is required within a specified period of time, as in the case of an accident or health insurance policy, the failure to comply with the condition is generally excused by mental incapacity of an insured after injury.[2]

23. But see Gutkin and Beck, *Sale of Assets Received on Liquidation,* 28 TAXES 328 (1950), where it is said that the instant case, by replacing the "conduit" theory with a rule of law that looks to the realities of the situation, goes far to crystallize the standards to be applied in such a case and to eliminate doubts arising out of the *Court Holding Company* case.

24. See Bowe, *Life Insurance, The Forbidden Fruit,* 2 VAND. L. REV. 212, 227 (1949). But see Magill, *Sales of Corporate Stock or Assets,* 47 COL. L. REV. 707, 721 (1947).

1. RESTATEMENT, CONTRACTS § 301 (1932); Corbin, *Supervening Impossibility of Performing Conditions Precedent,* 22 COL. L. REV. 421 (1922).

2. Continental Casualty Co. v. Matthis, 150 Ky. 477, 150 S.W. 507 (1912); Reed v. Loyal Protective Ass'n, 154 Mich. 161, 117 N.W. 600 (1908); Roseberry v. Amer-

Similar to compensations made under these policies are benefit payments during disability of an insured under a life insurance policy in which such payments are provided. A waiver-of-premiums clause is an alternative method of making premium payments which indirectly confers a benefit on the insured in that it relieves him of the necessity of remitting further premiums. These features of a life insurance policy are conditioned upon notice being furnished the insurer of the disability of the insured. And by analogy to the accident and health insurance cases, the majority of courts, apparently emphasizing the disability feature, hold that impossibility to comply with the terms of the policy because of insanity excuses the failure to notify the insurer.[3]

Although the courts are uniformly influenced by the harshness of a rule which would allow an insurer to avoid a policy when the very disability the insured must prove in order to have his premium payments excused renders such proof impossible,[4] the reasons assigned in support of this view are not harmonious and are often inconclusive. The difficulty encountered is the general rule of contract law that the expressed intent of the parties is controlling.[5] In order to circumvent this substantive rule, some courts have labeled the requirement of notice a condition subsequent.[6] Other courts hold that the clause is ambiguous and construe it to mean that the occurrence of disability is a condition precedent to the insurer's liability and the requirement of notice merely a prerequisite to recovery on the policy.[7] Still other courts have judicially written an exception into the policy on the ground that it could not have been within the contemplation of the parties that a condition which the

ican Benevolent Ass'n, 142 Mo. App. 552, 121 S.W. 785 (1909); 7 COOLEY, BRIEFS ON INSURANCE 5918 (2d ed. 1928); VANCE, INSURANCE 788 (2d ed. 1930). *Contra:* Whiteside v. North American Accident Ins. Co., 200 N.Y. 320, 93 N.E. 948, 35 L.R.A. (N.S.) 696 (1911).

3. For a collection of cases, see Bennett v. Metropolitan Life Ins. Co., 173 Ore. 386, 145 P.2d 815 (1944); Notes, 142 A.L.R. 852 (1942), 59 A.L.R. 1080 (1929), 54 A.L.R. 611 (1928). *But cf.* APPLEMAN, INSURANCE LAW AND PRACTICE § 8317 (1944); Note, 4 JOHN MARSHALL L.Q. 234 (1938).

4. For example, see the language in Mutual Life Ins. Co. v. Heilbronner, 116 F.2d 855 (8th Cir. 1941), *cert. denied,* 312 U.S. 707 (1941); McCoy v. New York Life Ins. Co., 219 Iowa 514, 258 N.W. 320 (1935); Whetstone v. New York Life Ins. Co., 182 S.C. 150, 188 S.E. 793 (1936); Swann v. Atlantic Life Ins. Co., 156 Va. 852, 159 S.E. 192 (1931).

5. 6 WILLISTON, CONTRACTS § 1931 (Rev. ed. 1938).

6. Pfeiffer v. Missouri State Life Ins. Co., 174 Ark. 783, 297 S.W. 847, 54 A.L.R. 600 (1927); Levan v. Metropolitan Life Ins. Co., 138 S.C. 253, 136 S.E. 304 (1927). The term is used in these cases as being analogous to a condition subsequent in property law, rather than in its ordinary meaning in contract law, where an existing legal duty is extinguished upon the happening of a subsequent event. VANCE, INSURANCE § 46 (2d ed. 1930). In effect it is a condition subsequent to loss or a post-causal condition. Patterson, *Supervening Impossibility of Performing Conditions in Insurance Policies,* 22 COL. L. REV. 613, 625 (1922). For a discussion of the misuse of terminology in regard to conditions in insurance contracts, see Hartnett & Thornton, *The Insurance Condition Subsequent: A Needle in A Semantic Haystack,* 17 FORD. L. REV. 220 (1948).

7. Minnesota Mut. Life Ins. Co. v. Marshall, 29 F.2d 977 (8th Cir. 1928); Franklin Life Ins. Co. v. Tharpe, 130 Fla. 546, 178 So. 300 (1938). Frequently mentioned in these cases, as well as others which support the majority rule, is the principle that the law abhors a forfeiture.

insured could not perform because of his disability should avoid the policy.[8]

A substantial number of courts, however, insist upon a literal interpretation of the waiver-of-premiums clause and hold that the requirement of notice is a material part of the contract which cannot be excused by impossibility.[9] These courts so hold on the grounds that the waiver of premiums is analogous to the payment of premiums which cannot be excused by impossibility [10] and that the very purpose of the provision is to measure the bounds of the insurer's liability.[11] Also, the fact that someone other than the insured could have supplied the notice has frequently influenced these courts in reaching this result.[12] This latter reason was the precise argument of the defendant in the instant case. The court, however, refused to so restrict the majority rule, previously affirmed in Missouri,[13] on the ground that an insane insured might be incapable of securing another to furnish notice of his condition.[14]

Ultimately, the rule which excuses the failure of an insane insured to comply with the express terms of the insurance contract is one of general policy. It is apparent in the cases upholding the excuse that the courts were more interested in finding legal methods for reaching a desired result than they were compelled by logical reasoning and legal interpretation to attain that result.[15]

MUNICIPAL CORPORATIONS—NEGLIGENCE—LIABILITY OF COUNTY FOR INJURY TO HIGH SCHOOL FOOTBALL SPECTATOR

Plaintiff paid an admission fee to witness a high school football game and was injured when the bleachers collapsed. He sued the County and County Board of Education, alleging that the bleachers were negligently

8. Marti v. Midwest Life Ins. Co., 108 Neb. 845, 189 N.W. 388 (1922); Rhyne v. Jefferson Standard Life Ins. Co., 196 N.C. 717, 147 S.E. 6 (1929); Whetstone v. New York Life Ins. Co., 182 S.C. 150, 188 S.E. 793 (1936); Texas Life Ins. Co. v. Sharp, 159 S.W.2d 951 (Tex. Civ. App. 1942); Schlintz v. Equitable Life Assur. Soc., 226 Wis. 255, 276 N.W. 336 (1937).

9. New England Mut. Life Ins. Co. v. Reynolds, 217 Ala. 307, 116 So. 151 (1928); Sherman v. Metropolitan Life Ins. Co., 297 Mass. 330, 8 N.E.2d 892 (1937); Pacific Mut. Life Ins. Co. v. Hobbs, 168 Tenn. 690, 80 S.W.2d 662 (1935); Note, 142 A.L.R. 852, 856 (1942).

10. Brown v. New York Life Ins. Co., 54 Ga. App. 471, 188 S.E. 293 (1936); Smith v. Missouri State Life Ins. Co., 134 Kan. 426, 7 P.2d 65 (1932); Iannarelli v. Kansas City Life Ins. Co., 114 W. Va. 88, 171 S.E. 748 (1933).

11. Sherman v. Metropolitan Life Ins. Co., 297 Mass. 330, 8 N.E.2d 892 (1937); Berry v. Lamar Life Ins. Co., 165 Miss. 405, 142 So. 445 (1932).

12. Egan v. New York Life Ins. Co., 65 F.2d 899 (5th Cir. 1933); Pacific Mut. Life Ins. Co. v. Hobbs, 168 Tenn. 690, 80 S.W.2d 662 (1935).

13. Shoen v. American Nat. Ins. Co., 167 S.W.2d 423 (Mo. App. 1943), *aff'd*, 180 S.W.2d 57 (Mo. 1944).

14. 226 S.W.2d at 101.

15. A Virginia court thus aptly stated, in summarizing its reasons for the rule, "It should be remembered that, if the letter killeth, the spirit giveth life." Swann v. Atlantic Life Ins. Co., 156 Va. 852, 159 S.E. 192, 195 (1931).

constructed. A default judgment against the Board was entered, but a demurrer by the County was sustained on the ground that it was engaged in a governmental function and hence could not be held liable for the negligence of its officials and employees. From a subsequent order dismissing the action as to both defendants, plaintiff appeals. *Held,* affirmed. In the operation of a school system a Board of Education is engaging in a governmental function conferring immunity from tort liability.[1] *Reed v. Rhea County,* 225 S.W.2d 49 (Tenn. 1949).

It is elementary that the federal and state governments are, in the absence of statute, immune from tort liability.[2] In regard to torts committed by local governmental units, however, two distinct common law doctrines have been developed by the courts.[3] Municipal corporations, such as voluntarily organized cities, are liable in tort while acting in a proprietary, as distinguished from a governmental, capacity.[4] Quasi-corporations such as counties, school boards and school districts, on the other hand, generally enjoy the immunity of the state and are liable in tort only if a statute so provides.[5] This immunity has been predicated primarily upon the ground that these governmental entities are involuntary statutory associations constituting mere agencies through which state functions are exercised.[6] Some states, however, have modified this doctrine by statute,[7] while others have refused to recognize judicially a

1. Although plaintiff assigned as error the sustaining of the demurrer as to Rhea County, it was stated in his brief on appeal that "the judge was correct in dismissing the suit as to Rhea County as the Board of Education is a separate and distinct entity from the County and suit must be filed against the School Board and not against the County for any claim they might have." 225 S.W.2d at 50.

2. The Western Maid, 257 U.S. 419, 42 Sup. Ct. 159, 66 L. Ed. 299 (1922); Kawananakoa v. Polyblank, 205 U.S. 349, 27 Sup. Ct. 526, 51 L. Ed. 834 (1907); Langford v. United States, 101 U.S. 341, 25 L. Ed. 1010 (1879); Railroad Co. v. Tennessee, 101 U.S. 337, 25 L. Ed. 960 (1879). See Borchard, *Governmental Liability in Tort,* 34 YALE L.J. 1 (1924); Barry, *The King Can Do No Wrong,* 11 VA. L. REV. 349 (1925).

3. For a general discussion of the rules of responsibility for tort in the United States see Blachly and Oatman, *Approaches to Governmental Liability in Tort: A Comparative Survey,* 9 LAW & CONTEMP. PROB. 181, 187 (1942).

4. *E.g.,* Carta v. Norwalk, 108 Conn. 697, 145 Atl. 158 (1929); City of Hazard v. Duff, 287 Ky. 427, 154 S.W.2d 28 (1941); Bailey v. The Mayor of New York, 3 Hill 531, 38 Am. Dec. 669 (N.Y. 1842); Ostron v. San Antonio, 94 Tex. 523, 62 S.W. 909 (1901). This is the rule in every state except South Carolina. Looper v. Easley, 172 S.C. 11, 172 S.E. 705 (1934). See generally Repko, *American Legal Commentary on the Doctrines of Municipal Tort Liability,* 9 LAW & CONTEMP. PROB. 214 (1942); Barnett, *The Foundations of the Distinction between Public and Private Functions,* 16 ORE. L. REV. 250 (1937); Harno, *Tort Immunity of Municipal Corporations,* 4 ILL. L.Q. 28 (1921); Note, 28 GEO. L.J. 526 (1940).

5. School Dist. v. Rivera, 30 Ariz. 1, 243 Pac. 609 (1926); Berrien County v. Vickers, 73 Ga. App. 863, 38 S.E.2d 619 (1946); Carr v. Jefferson County, 275 Ky. 685, 122 S.W.2d 482 (1938); Perkins v. Trask, 95 Mont. 1, 23 P.2d 982 (1933); 6 MCQUILLAN, MUNICIPAL CORPORATIONS § 2775 (2d ed. 1936); Borchard, *Government Liability in Tort,* 34 YALE L.J. 1, 41 (1924); 20 C.J.S., *Counties* § 215 (1940).

6. Stanton v. Morgan, 127 Fla. 34, 172 So. 485 (1937); O'Brien v. Rockingham County, 80 N.H. 522, 120 Atl. 254 (1923); Meliodon v. School Dist., 328 Pa. 457, 195 Atl. 905 (1938); Fry v. Albemarle County, 86 Va. 195, 9 S.E. 1004 (1889).

7. CAL. EDUC. CODE § 1008 (1944); CAL. GEN. LAWS act 5619, § 2 (1944); GA. CODE ANN. §§ 95-1001 (1937); WASH. CODE § 471-1 (Pierce, 1943); WIS. STAT. §§ 101.01, 101.06 (1947).

distinction between municipal and quasi-corporations in this regard, holding that counties can act in a proprietary capacity and allowing recovery accordingly.[8] But since the operation of a school system is generally deemed to be a governmental function, even in the latter-mentioned states, no liability attaches for injuries received by a participant in school activities.[9]

The apparent rule in Tennessee is that governmental bodies, other than municipal corporations,[10] are incapable of acting in a proprietary capacity and thus come within the governmental immunity of the state. As in the instant case, the courts have inferentially supported the proposition that a county or a county agency might act in a proprietary capacity by expressly stating that the particular function engaged in at the time of the alleged tort was "governmental." [11] But recovery has never been allowed where negligence of a county was the allegation, and in many cases it has been unequivocally stated that, in the absence of a statute, a county is not liable for torts committed by its agents.[12] At one time it was recognized that a county could act in a private capacity in the commission of a nuisance and could be held liable for damages.[13] Recently, however, the courts have usually found that the nuisance was committed while the county was acting in a governmental capacity,[14] and the earlier doctrine seems to have been overruled.[15]

In the instant case an effort was made to secure an application by the court of the municipal-corporation doctrine to the Board of Education. In Tennessee, such a board has statutory authority to act in its own behalf in

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8. Henderson v. Twin Falls County, 56 Idaho 124, 50 P.2d 597, 101 A.L.R. 1151 (1935); Hannon v. St. Louis County, 62 Mo. 313 (1876); Jacoby v. Chouteau County, 112 Mont. 70, 112 P.2d 1068 (1941); Bell v. Pittsburgh, 297 Pa. 185, 146 Atl. 567, 64 A.L.R. 1542 (1929).

9. Rhoades v. School Dist., 115 Mont. 352, 142 P.2d 890 (1943); Carlo v. School Dist., 319 Pa. 417, 179 Atl. 561 (1935). See Rosenfield, *Governmental Immunity from Tort in School Accidents,* 5 LEGAL NOTES ON LOCAL GOV'T 358 (1940); Note, 160 A.L.R. 7 (1946).

10. For examples of the application of the municipal corporation doctrine in Tennessee, see Nashville v. Mason, 137 Tenn. 169, 192 S.W. 915 (1916); Saulman v. Nashville, 131 Tenn. 427, 175 S.W. 532 (1914); Irvins v. Chattanooga, 101 Tenn. 291, 47 S.W. 419 (1898); Nashville v. Fox, 6 Tenn. App. 653 (M.S. 1928).

11. Hamilton County v. Bryant, 175 Tenn. 123, 132 S.W.2d 639 (1939); Lee v. Davidson County, 158 Tenn. 313, 13 S.W.2d 328 (1929); McAndrews v. Hamilton County, 105 Tenn. 399, 58 S.W. 483 (1900); Armitage v. Holt, 21 Tenn. App. 273, 109 S.W.2d 411 (E.S. 1937).

12. Burnett v. Maloney, 97 Tenn. 697, 37 S.W. 689 (1896); White's Creek Turnpike Co. v. Davidson County, 82 Tenn. 73 (1884); Wood v. Tipton County, 66 Tenn. 112, 32 Am. Rep. 561 (1874); Weakley County v. Carney, 14 Tenn. App. 688 (W.S. 1932).

13. Chandler v. Davidson County, 142 Tenn. 265, 218 S.W. 222 (1919).

14. Odil v. Maury County, 175 Tenn. 550, 136 S.W.2d 500 (1940); Vance v. Shelby County, 152 Tenn. 141, 273 S.W. 557 (1925); Carothers v. Shelby County, 148 Tenn. 185, 253 S.W. 708 (1922).

15. Buckholtz v. Hamilton County, 180 Tenn. 263, 174 S.W.2d 455 (1943), *overruling* Chandler v. Davidson County, 142 Tenn. 265, 218 S.W. 222 (1919); *see* Unicoi County v. Barnett, 181 Tenn. 565, 567, 182 S.W.2d 865 (1944); Note, 20 TENN. L. REV. 619 (1949).

16. That a County Board of Education can contract in its own name, see Benson v. Hardin County, 173 Tenn. 246, 116 S.W.2d 1025 (1938); Morton v. Hancock County,

certain matters,[16] but it is ordinarily considered as a mere agent of the county and its members as county officers.[17]

The single exception to the absolute immunity rule in Tennessee appears in those cases where a county or its agency is indemnified by insurance against the specific claim of an injured plaintiff.[18] This is apparently the rule regardless of whether or not the insurance is specifically provided for by statute.[19] The exception is perhaps illustrative of the attitude of the courts toward the non-responsibility doctrine, for a recovery upon an insurance policy implies the existence of legal liability. But further judicial relaxation of the immunity doctrine seems unlikely. The court in the instant case indicated this by stating that although the reasons given to support the immunity doctrine [20] may seem unjust and inequitable, any further change in the rule must be effected through legislative enactment rather than by judicial decision.[21]

An injury negligently inflicted upon an individual by a county through its agents demands a remedy as much as an injury so inflicted by a private corporation or an individual. The Federal Government has waived its immunity by statute,[22] as have many of the states.[23] The ancient theory of sovereign immunity—"The king can do no wrong"—has lost its significance

161 Tenn. 324, 30 S.W.2d 250 (1930). That a County Board of Education has power to locate schools, see Walker v. Monger, 6 Tenn. Civ. App. 261 (1915).

17. Keese v. Hamilton County, 184 Tenn. 171, 197 S.W.2d 800 (1946); Boswell v. Powell, 163 Tenn. 445, 43 S.W.2d 495 (1931); State *ex rel.* Boles v. Groce, 152 Tenn. 566, 280 S.W. 27 (1925); State *ex rel.* Milligan v. Jones, 143 Tenn. 575, 224 S.W. 1041 (1920).

18. Rogers v. Butler, 170 Tenn. 125, 92 S.W.2d 414 (1936); Marion County v. Cantrell, 166 Tenn. 358, 61 S.W.2d 477 (1932); Taylor v. Cobble, 28 Tenn. App. 167, 187 S.W.2d 648 (E.S. 1945); *cf.* 1 VAND. L. REV. 470, 472 (1948).

19. In Taylor v. Cobble and Rogers v. Butler, *supra* note 18, the court justified its holding by TENN. CODE ANN. § 2495 (Williams 1934), which gives a county board power to provide transportation for school children, and to require the driver of any vehicle to make bond for the faithful performance of these duties. Expenditures for insurance premiums were held to be within this power. But in Marion County v. Cantrell, *supra* note 18, the court made no effort to find statutory authority for the insurance policy held by the county and allowed the county to waive its immunity.

20. "One reason given as to why a governmental entity is not liable in a private action for negligence in the performance of its duties while acting in a governmental capacity is that such entity 'has no funds out of which satisfaction for damage thus inflicted can be had.' This reason is justified upon the theory that 'it is better that an individual should suffer than the public should sustain an inconvenience.'" 225 S.W.2d at 51.

21. 225 S.W.2d at 51.

22. Federal Tort Claims Act, 60 STAT. 842, 28 U.S.C.A. § 921 (Supp. 1946). Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 GEO. L.J. 1 (1946) Baer, *Suing Uncle Sam in Tort*, 26 N.C. L. REV. 119 (1948). See Notes, 42 ILL. L. REV. 344 (1947), 20 MISS. L.J. 354 (1949), 56 YALE L.J. 534 (1947).

23. ILL. REV. STAT. c. 37, § 439 (1945); MICH. STAT. ANN. §§ 27.3548(1)-27.3548 (41) (Reis Ann. Supp. 1947); W. VA. CODE ANN. §§ 1143-1147(21) (1949). For a general discussion of the various statutory provisions authorizing suits or claims against the state, see Nutting, *Legislative Practice Regarding Tort Claims against the State*, 4 MO. L. REV. 1 (1939). In Tennessee, a statute provides for a board of claims vested with power to hear and determine, among others, all claims for personal injuries or property damages caused by negligence in the construction and maintenance of state highways or other state properties, and by negligence of any state official or employee in the operation of any state-owned vehicle or other equipment. TENN. CODE ANN. §§ 1034.26 *et seq.* (Williams Supp. 1948).

in our society, for governmental bodies can and do cause actual damage, a fact which is increasingly evident as governmental activities at all levels become more extensive.

TAX TITLES—BILL BY ORIGINAL OWNER TO QUIET TITLE—REQUIREMENT THAT HE REIMBURSE PURCHASER AS CONDITION TO RELIEF

At a tax sale defendant bought land belonging to plaintiff. As the tax involved had been assessed by the county, while authority to levy it was in the state, the plaintiff claimed that the tax was void and brought suit to quiet title. Defendant claimed reimbursement as a condition to equitable relief. *Held* (3-2), reimbursement is required. *Crystal Lime & Cement Company v. Robbins,* 209 P.2d 739 (Utah 1949).

A person seeking to cancel an invalid tax title by a bill to quiet title or to remove cloud on title is seeking equitable relief. Applying the maxim, "he who seeks equity must do equity," a number of courts have required the complainant to reimburse the tax title holder in the amount of the tax.[1] But the question of whether reimbursement is required really depends upon whether the complainant has received a benefit to which he is not justly entitled. Thus, principles of restitution become relevant.[2] If the true owner has paid the tax, payment by the tax title claimant is of no benefit to him;[3] likewise, if the tax is void there was no obligation upon the owner and a later payment is consequently of no benefit to him.[4] But if the tax title fails because of an irregularity in the tax sale, the true owner has been benefited by the extinguishment of the tax and should make restitution.[5] If there is an irregular-

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1. Gage v. Pumpelly, 115 U.S. 454, 4 Sup. Ct. 136, 29 L. Ed. 449 (1885); Fordyce v. Vickers, 99 Ark. 500, 138 S.W. 1010 (1911); Holland v. Hotchkiss, 162 Cal. 366, 123 Pac. 258 (1912); Evans v. Poppie, 51 Idaho 123, 4 P.2d 356 (1931); Willard v. Ames, 130 Ind. 351, 30 N.E. 210 (1892); Buck v. Holt, 74 Iowa 294, 37 N.W. 377 (1888); Hart v. Wiley, 130 Kan. 26, 285 Pac. 548 (1930); Closser v. Hanson Land Co., 209 Mich. 517, 177 N.W. 196 (1920); Bloomstein v. Brien, 3 Tenn. Ch. 55 (1875); Oregon Short Line R.R. v. Hallock, 41 Utah 378, 126 Pac. 394 (1912). See Notes, 86 A.L.R. 1208 (1933), L.R.A. 1915C 492.

2. If the present defendant had brought a legal action in restitution to recover the amount paid, it is likely that relief would have been denied on the ground that the mistake was one of law rather than of fact. But as the action was brought in equity by the original owners the fact that the benefit was obtained by a mistake of law does not seem to be controlling. Even at law it has been held that restitution may be had for mistake of law when a set-off is possible. See Hemphill v. Moody, 64 Ala. 468 (1879); Carley v. Lewis, 24 Ind. 23 (1865); Livesey v. Livesey, 3 Russ. 287, 38 Eng. Rep. 583 (Ch. 1927).

3. Gage v. Kaufman, 133 U.S. 471, 10 Sup. Ct. 406, 33 L. Ed. 725 (1890); Glos v. Shedd, 218 Ill. 209, 75 N.E. 887 (1905); Kent v. Auditor General, 138 Mich. 605, 101 N.W. 805 (1904); see also, Note, 26 A.L.R. 622 (1923).

4. Garrett Biblical Institute v. Elmhurst State Bank, 331 Ill. 308, 163 N.E. 1 (1928); State Finance Co. v. Myers, 16 N.D. 193, 112 N.W. 76 (1907); Title Trust Co. v. Aylsworth, 40 Ore. 20, 66 Pac. 276 (1901); 4 COOLEY, TAXATION § 1505 (4th ed., Nichols, 1924).

5. Holland v. Hotchkiss, 162 Cal. 366, 123 Pac. 258 (1912).

ity in the assessment, a question then arises as to whether the tax is valid.[6] Although in such cases the tax is perhaps logically void, reimbursement should be required since a benefit has been conferred.[7] Policy considerations favoring the protection of the tax title strongly support this view.[8]

In the instant case the property of the plaintiff was exempt from taxation by the county, but was subject to taxation by the state. The assessment by the county was therefore void.[9] The court held that reimbursement was required since the proceeds of the tax, whether assessed by state or county, would be distributed in the same proportion to the same governmental units and the only variance might be the amount assessed.[10] The case was distinguished from those in which the land was not subject to taxation at all and those in which the taxes had been paid, because here the property was subject to taxation although by different authority. The court preferred to treat this situation as analogous to those cases requiring reimbursement where the difficulty is only an irregularity in the assessment.

It is pointed out in the dissent that the original title holder may be required to reimburse the purchaser for a sum that will never be properly levied against his property. But as the tax title holder can neither join the county as a party nor sue the county to recover taxes paid by mistake,[11] some provision for reimbursing him should be made in such cases, if it may be made without prejudice to the plaintiff. The court offers as a solution that if there was any likelihood that assessment by the state might be less than the amount paid, then the trial court might "exact from defendants assurance that the defendants would repay to the plaintiffs the difference." [12] By such a pro-

6. The general rule is said to be that a tax is void if the assessment is void. In some cases the assessment has been declared void for slight irregularities. State Finance Co. v. Myers, 16 N.D. 193, 112 N.W. 76 (1907); Eaton v. Bennett, 10 N.D. 346, 87 N.W. 188 (1901); Title Trust Co. v. Aylsworth, 40 Ore. 20, 66 Pac. 276 (1901). *But cf.* Squires v. Estey, 33 Cal. App. 287, 165 Pac. 34 (1871) (reimbursement will not be refused for a mere irregularity in the assessment). That assessment by improper authority voids the tax see, Chicago, M. & St. P. Ry. v. Kootenai County, 33 Idaho 234, 192 Pac. 562 (1920).

7. Even though the tax is void, a set-off of the taxes paid may be allowed when a later proper assessment has been made.

8. "If it were understood that a purchaser at a sale of lands for delinquent taxes is a mere volunteer, and not entitled to the protection of equitable principles in case of the invalidity of the sale because of some mere irregularity attending it, there would probably be few purchasers, and, as a result, the machinery of the state for securing its revenue would be seriously crippled." Whitehead v. Farmers' Loan & Trust Co., 98 Fed. 10, 13 (8th Cir. 1899). See Notes, *The Current Status of Tax Titles: Remedial Legislation v. Due Process,* 62 HARV. L. REV. 93 (1948), *How Secure Is Your Tax Foreclosure Title?* 23 WASH. L. REV. 132 (1948).

9. Chicago, M. & St. P. Ry. v. Kootenai County, 33 Idaho 234, 192 Pac. 562 (1920).

10. 209 P.2d at 742.

11. In the absence of statutory authority the purchaser at a tax sale may not recover from the taxing authority. The rule of *caveat emptor* is said to apply. Restitution is not available, because the mistake is one of law. See Notes, 77 A.L.R. 824 (1932), 116 A.L.R. 1408 (1938); RESTATEMENT, RESTITUTION § 45 (1936).

12. 209 P.2d at 744. The provision as presented leaves open the question of the duty of the defendant in case the tax is never assessed by the state. It should also be required that if the tax is not assessed by a set date, perhaps the running of the statute of limitations, the defendant must repay the plaintiff.

vision the court has assured the plaintiff that the benefit which otherwise is dubious is certain to accrue.

In the absence of a statute permitting recovery by a tax title claimant who had paid by mistake,[13] the decision of this case is both equitable and practical. A condition to reimbursement as recommended by this court prevents both a forfeiture by the defendant and unfairness to the plaintiff.

TORTS—MALICIOUS PROSECUTION—COMPROMISE OF THE CRIMINAL PROCEEDING AS A BAR

Defendant had caused the plaintiff to be arrested for an alleged fraudulent breach of trust. Plaintiff paid the defendant $415 to have the criminal charge dismissed, protesting at the time that he was innocent, that he was being "held up," and that he had to be at a nearby airfield the next day to obtain a position. He subsequently brought this action for malicious prosecution. There was a jury verdict for the plaintiff, and the defendant appealed. *Held* (2-1), reversed. Having voluntarily compromised the criminal case for a substantial sum, the plaintiff is estopped from contending that defendant instituted the criminal action without probable cause. *Leonard v. George,* 178 F.2d 312 (4th Cir. 1949).

It is important that all citizens be encouraged "to seek the protection of their interests and the interests of the community in the courts without fear of being themselves subjected to the hazards of litigation." [1] On the other hand, there is the equally cogent need to afford a remedy to those who have sustained injury to their reputation, person or property by the improper use of the criminal processes.[2] From a balancing of these social factors there evolved the action of malicious prosecution, an action which the courts have circumscribed with numerous restrictions.

To maintain a malicious prosecution suit it must be proved that the defendant instituted a criminal proceeding with malice,[3] without probable

13. A statute allowing an action for restitution by the defendant against the county would prevent the necessity of the condition in the instant case. The defendant in such instance has a remedy and it would therefore be inequitable to require the plaintiff to shoulder the burden of the unjust enrichment of the state.

1. GREEN, JUDGE AND JURY 338 (1930); Harper, *Malicious Prosecution, False Imprisonment and Defamation,* 15 TEXAS L. REV. 157 (1937); *cf.* Walsh v. Segale, 70 F.2d 698 (2d Cir. 1934); Kershmer v. F. W. Woolworth Co., 133 Me. 519, 180 Atl. 322 (1935).

2. COOLEY, TORTS 381 (4th ed. 1932); Note, 22 GEO. L.J. 343 (1934); 16 N.C.L. REV. 277 (1938).

3. Commencing a legal proceeding against another for any purpose other than to bring an offender to justice is generally considered malicious; hatred, spite or ill will need not be shown. Griswold v. Horne, 19 Ariz. 56, 165 Pac. 318 (1917); Foltz v. Buck, 89 Kan. 381, 131 Pac. 587 (1913); Metropolitan Life Ins. Co. v. Miller, 114 Ky. 954, 71 S.W. 921 (1903); Downing v. Stone, 152 N.C. 525, 68 S.E. 9 (1910).

cause,[4] and that it terminated in favor of the plaintiff.[5] A judicial determination of the accused's innocence is not necessary; all that is required is the absence of a judicial determination of his guilt.[6] By the overwhelming weight of authority, where the prior proceeding was ended by a compromise or settlement, voluntarily and understandingly consummated by the accused, there is not such a favorable termination as will support the action.[7] But if the accused was under duress or coercion in entering a compromise, the action will lie.[8] Many of the courts take the position that a compromise is tantamount to an admission of probable cause.[9] The more realistic explanation would seem to be that the accused consented to the termination and cannot later take advantage of it, since, but for the settlement, the accuser would probably have continued the prosecution.[10]

The court in the principal case stated that the "validity" of the compromise was immaterial.[11] This is not entirely accurate. A *valid* compromise is one to which the accused consented freely and voluntarily, and any payment of money or property was understandingly made for the purpose of satisfying a conceded indebtedness.[12] The maxim *in pari delicto potior est conditio defendentis* has not been applied in tort actions to the same extent as where restitution is sought.[13] If payment was made to the accuser in order to thwart

4. *E.g.*, Brodrib v. Doberstein, 107 Conn. 294, 140 Atl. 483 (1928); Jordon v. James & H. Piano Co., 140 Md. 207, 117 Atl. 366 (1922); Torsch v. Dell, 88 Md. 459, 41 Atl. 903 (1898) (such reasonable grounds to suspect the accused as would warrant a cautious man in believing him guilty); Rankin v. Crane, 104 Mich. 6, 61 N.W. 1007 (1895); McCoy v. Kalbach, 242 Pa. 123, 88 Atl. 879 (1913); Munger v. Cox, 146 Va. 574, 131 S.E. 841 (1926) (probable cause, a mixed question of law and fact).

5. *E.g.*, Snead v. Jones, 169 Ala. 143, 53 So. 188 (1910); Wilson v. Lapham, 196 Iowa 745, 195 N.W. 235 (1923); Singer Mfg. Co. v. Bryant, 105 Va. 403, 54 S.E. 320 (1906); Note, 26 GEO. L.J. 165 (1937).

6. See Jaffe v. Stone, 18 Cal. 2d 146, 114 P.2d 335, 135 A.L.R. 775 (1941); See v. Gosselin, 133 Conn. 158, 48 A.2d 560 (1946); SALMOND, TORTS 626 (10th ed., Stallybrass, 1945).

7. Woodson v. McLaughlin, 153 Ark. 151, 239 S.W. 735 (1922); Eustace v. Dechter, 53 Cal. App. 2d 726, 128 P.2d 367 (1942); Bell Lumber Co. v. Graham, 74 Colo. 149, 219 Pac. 777 (1923); Schwartz v. Schwartz, 366 Ill. 247, 8 N.E.2d 668, 112 A.L.R. 325 (1937); Davis v. Brady, 218 Ky. 384, 291 S.W. 412 (1927); Friedman v. Goffstein, 182 Minn. 396, 234 N.W. 596 (1931); Jones v. Donald Co., 137 Miss. 602, 102 So. 540 (1925); Zebrowski v. Bobinski, 278 N.Y. 332, 16 N.E.2d 355 (1938); Bristol v. Eckhardt, 254 Wis. 297, 36 N.W.2d 56 (1949); Note, 3 ARK. L. REV. 445 (1949).

8. Smith v. Markensohn, 29 R.I. 55, 69 Atl. 311 (1908) (accused paid under protest to secure freedom); Lyons v. Davy-Pocahontas Coal Co., 75 W.Va. 739, 84 S.E. 744 (1915) (agreement not to sue accuser if prosecution dismissed will not bar a malicious prosecution suit).

9. Nelson v. National Casualty Co., 179 Minn. 53, 228 N.W. 437, 67 A.L.R. 509 (1929); Saner v. Bowker, 69 Mont. 463, 222 Pac. 1056 (1924); PROSSER, TORTS 869 (1941).

10. "Although the accused by his acceptance of a compromise does not admit his guilt, the fact of compromise indicates that the question of his guilt or innocence is left open. Having bought peace the accused may not thereafter assert that the proceedings have terminated in his favor." RESTATEMENT, TORTS § 660, comment *c* (1938); PROSSER, TORTS 869 (1941).

11. 178 F.2d at 314.

12. White v. International Text-Book Co., 156 Iowa 210, 136 N.W. 121 (1912).

13. Shattuck v. Watson, 53 Ark. 147, 13 S.W. 516 (1890); Haynes v. Rudd, 102 N.Y. 372, 7 N.E. 287 (1886); Owens v. Owens, 21 Tenn. App. 104, 106 S.W.2d 227

a criminal prosecution, the cases are not clear whether the illegality of the compromise will bar a suit in malicious prosecution. However, where the facts show that the accused was under duress at the time of the tainted compromise, the courts sometimes hold that a remedial action in the nature of restitution or quasi-contract is not lost.[14] To hold otherwise would tend to clothe with immunity those who utilize the criminal processes to force payment of either real or illusory debts, and successfully compromise.[15] Moreover, in cases not involving a compromise, if the motive of the accuser in resorting to the criminal courts was to collect a debt, enforce a claim, or recover property, a majority of the jurisdictions hold that the jury may properly find a want of probable cause from which it may likewise infer malice.[16]

The court in the instant case held that there was insufficient evidence of duress,[17] and that reasonable minds could not differ as to the compromise or settlement of the prior criminal proceeding, so that the trial court should have directed a verdict for the defendant.[18] The existence and the validity of a compromise is usually considered a question of fact for the jury.[19] In view of the exigencies of the plaintiff's situation in the instant case, the court rigidly limited the generally recognized scope of duress.[20] Many courts under these facts would probably have upheld a jury finding of duress. It seems not unlikely that the court's personal opinion concerning the plaintiff's guilt of the prior criminal charge influenced its decision.[21]

(M.S. 1937); Wade, *Restitution of Benefits Acquired Through Illegal Transactions,* 95 U. OF PA. L. REV. 261 (1947).

14. New York Ins. Co. v. Talley, 72 F.2d 715 (8th Cir. 1934); May v. Draper, 220 Ala. 214, 124 So. 89 (1929); Birney v. Birney, 217 Cal. 353, 18 P.2d 672 (1933); Barton v. McMillian, 52 Fla. 469, 42 So. 849 (1906); Adrico Realty Corp. v. City of N.Y., 250 N.Y. 29, 164 N.E. 732, 64 A.L.R. 1 (1928); Wade, *Benefits Obtained Under Illegal Transactions,* 25 TEXAS L. REV. 31 (1946).

15. White v. International Text-Book Co., 156 Iowa 210, 136 N.W. 121 (1912); Scovera v. Armbruster, 257 Mich. 340, 241 N.W. 231 (1932).

16. Pritchett v. Northwestern Mutual Ins. Co., 228 Mo. App. 661, 73 S.W.2d 815 (1934); Ross v. Langworthy, 13 Neb. 492, 14 N.W. 515 (1882); Curley v. Automobile Finance Co., 343 Pa. 280, 23 A.2d 48, 139 A.L.R. 1082 (1941); Graham v. Fidelity Mutual Life Ass'n, 98 Tenn. 48, 37 S.W. 995 (1896); Morgan v. Duffy, 94 Tenn. 686, 30 S.W. 735 (1895).

17. 178 F.2d at 313. That the courts should recognize "economic duress" in those tort actions where consent is material, see Dawson, *Economic Duress—An Essay in Perspective,* 45 MICH. L. REV. 253, 289 (1947).

18. 178 F.2d at 315.

19. Fadner v. Filer, 27 Ill. App. 506 (1888); Lamprey v. H. P. Hood & Sons, 73 N.H. 384, 62 Atl. 380 (1905); Robbins v. Robbins, 133 N.Y. 597, 30 N.E. 977 (1892); Jennings v. Clearwater Mfg. Co., 171 S.C. 498, 172 S.E. 870 (1934).

20. "[T]he gravamen [of duress] is a coercion of the will by physical or mental restraint, so that the victim does not act as a free moral agent in respect to the matter at stake." Cox v. Edwards, 120 Minn. 512, 139 N.W. 1070, 1072 (1913). The will is constrained when unlawful compulsion requires a choice between comparative evils. Harris v. Cary, 122 Va. 362, 71 S.E. 551 (1911); Bratberg v. Advance-Rumely Thresher Co., 61 N.D. 452, 238 N.W. 552 (1931); Williamson-Halsell, Frazier Co. v. Ackerman, 77 Kan. 502, 94 Pac. 807 (1908) (duress is tested by state of mind of victim, not by the nature of acts or threats); Dalzell, *Duress by Economic Pressure,* 20 N.C.L. REV. 341, 366 (1942).

21. See PROSSER, TORTS 869 (1941); Wade, *Legal Status of Property Transferred Under an Illegal Transaction,* 41 ILL. L. REV. 487, 506 (1946).

WILLS—HOLOGRAPHIC WILLS—INTEGRATION AND DATING REQUIREMENTS

At decedent's request three witnesses affixed their signatures to an envelope which contained three papers written in decedent's handwriting. Decedent was unable to speak but nodded affirmatively when asked if the envelope contained her will. The first of the three pages was dated and signed, and was by itself a valid testamentary instrument in that it named executors and provided for the payment of debts. The only further reference to the disposition of property was the statement, "The following bequests are to be given my friends herein named." The other two sheets, written nine years after first, contained a list of bequests which filled the second and was continued and completed on the third where decedent's signature again appeared. Neither of the latter pages was dated. All three sheets were folded together but there was no mechanical attachment. The three sheets were admitted to probate as a valid will, and contestants appealed. *Held,* affirmed. Testatrix adopted the date of the first page by her signature on the last and thus satisfied the dating requirement. *In re Dumas' Estate,* 210 P.2d 697 (Cal. 1949).

Two questions which commonly arise in connection with holographic wills are presented by the facts of this case. The first is the validity of execution where the expressed date is not factually correct because of alterations or additions made after the date of the original execution. In states which require by statute that holographic wills be dated, the courts have been strict in requiring that there be a legible date,[1] entirely in the testator's handwriting,[2] but have been less insistent that the date be correct.[3] It would appear that they are attempting to balance the necessity of compliance with the statute with the prevailing policy against involuntary intestacy.[4] Once it is decided that a date is a mere formal requirement satisfied by the appearance of any date, it is but a short step to the proposition that the writing as altered by interlineations and modifications made by the testator in his own writing is valid, because, by virtue of his adopting the date and signature

1. Succession of Beird, 145 La. 756, 82 So. 881, 6 A.L.R. 1452 (1919) (date "9-8-18" —not possible to tell whether September 8 or August 9 intended); Heffner v. Heffner, 48 La. Ann. 1088, 20 So. 281 (1896) (designation of month and year only held insufficient as date); Montague v. Street, 59 N.D. 618, 231 N.W. 728 (1930) (same); *In re* Love's Estate, 75 Utah 342, 285 Pac. 299 (1930) (year only insufficient); *see* Succession of Curtis, 149 La. 487, 89 So. 629, 630 (1921) (last digit of year not clear). *But cf. In re* Hail's Estate, 106 Okla. 124, 235 Pac. 916 (1923).

2. *In re* Plumel's Estate, 151 Cal. 77, 90 Pac. 192, 121 Am. St. Rep. 100 (1907) (use of printed "190-" as part of date not valid); *In re* Noyes' Estate, 40 Mont. 190, 105 Pac. 1017, 26 L.R.A. (N.S.) 1145, 20 Ann. Cas. 366 (1909) (same).

3. *In re* Clisby's Estate, 145 Cal. 407, 78 Pac. 964 (1904); *In re* Fay, 145 Cal. 82, 78 Pac. 340, 104 Am. St. Rep. 17 (1904) (30-year error).

4. *In re* Hail's Estate, 106 Okla. 124, 235 Pac. 916 (1923); Cowherd v. Fleming, 84 W. Va. 227, 100 S.E. 84 (1919).

already appearing, it still fulfills the dating and signing requirements.[5] The use of substitute pages is a type of alteration but one which presents the the second problem involved in the instant case—that of integration.

Wills may be written on more than one page if there is satisfactory evidence that the several papers offered for probate were intended by decedent to operate as a single document. Mechanical attachment,[6] internal coherence and adaptation,[7] and interreference between pages [8] strongly tend to prove integration, but they are not indispensable and courts have not hesitated to uphold wills where none of those circumstances existed.[9] Thus the court in the present case considered evidence of the sheets having been folded together and enclosed in an envelope, and of the nodded affirmation of testatrix herself that the papers in the envelope were her will, as warranting a finding that those papers were intended to operate as a single testamentary document.

The modern trend in states where holographic wills are recognized has been to be less insistent on formalities because that insistence would be detrimental to the policy favoring testamentary disposition of property.[10] It appears that the court in the instant case has reflected this attitude in upholding the will.

5. The original date and signature are a part of the altered document just as are all of the other words not erased or cancelled. *In re* Finkler's Estate, 3 Cal. 2d 584, 46 P.2d 149 (1935); Stanley v. Henderson, 139 Tex. 166, 162 S.W.2d 95 (1942); Triplett's Ex'r v. Triplett, 161 Va. 906, 172 S.E. 162 (1934); LaRue v. Lee, 63 W. Va. 388, 60 S.E. 388, 14 L.R.A. (N.S.) 968, 12 Am. St. Rep. 978 (1908).

6. Succession of Drysdale, 124 La. 256, 50 So. 30 (1909).

7. *In re* Johnston's Estate, 64 Cal. App. 197, 221 Pac. 382 (1923).

8. *In re* Miller's Estate, 128 Cal. App. 176, 17 P.2d 181 (1932); Hays v. Marschall, 243 Ky. 392, 48 S.W.2d 540 (1932).

9. Merryfield v. Fox, 167 Cal. 729, 141 Pac. 259 (1914); *In re* Swendsen's Estate, 43 Cal. App. 2d 551, 111 P.2d 408 (1941); Cole v. Webb, 220 Ky. 817, 295 S.W. 1035 (1927); Appeal of Sleeper, 129 Me. 194, 151 Atl. 150, 71 A.L.R. 518 (1930); Alexander v. Johnston, 171 N.C. 468, 88 S.E. 785 (1916).

10. CAL. PROB. CODE ANN. § 53 (1944); *In re* Parsons' Will, 207 N.C. 584, 178 S.E. 78 (1935). "[T]he safeguards of our statute of wills are designed to prevent forgery and imposition; they are not designed to make the execution of wills a mere trap and pitfall, and their probate a mere game." Bell v. Timmius, 58 S.E.2d 55, 59 (Va. 1950); Mechem, *The Integration of Holographic Wills,* 12 N.C.L. REV. 213, 221 (1934).