Recent Decisions

CORPORATIONS—FUNDS AVAILABLE FOR PAYMENT OF DIVIDENDS—UNDISTRIBUTED PROFITS TAX

A Virginia corporation, having paid a surtax on its undistributed profits as required by the 1936 Federal Revenue Act, sought a refund under a 1942 amendment to the Act which allowed credits retroactively to corporations which were restricted by state law from paying dividends during the existence of a deficit in accumulated earnings. *Held,* district Court reversed, refund denied. The Virginia statute, VA. CODE ANN. § 3870 (1942), (dividends may be paid out of net earnings, or out of net assets in excess of capital) did not prohibit payment of dividends despite a capital deficit, where there were current net earnings. *United States v. Riley,* 169 F. 2d 542 (4th Cir. 1948).

A month later, in a similar case involving Michigan dividend law (from earned surplus or from net earnings) a refund was denied a Michigan corporation, following the Riley case. *Grand Traverse Hotel Co. v. United States,* 79 F. Supp. 860 (W.D. Mich. 1948). This Michigan statute has now been amended, authorizing payment of dividends, only from "surplus."

The Virginia and Michigan statutory provisions regulating dividends are by no means unusual. Similar provisions are found in Arkansas, Florida, Nevada, and Tennessee; and with but slight variations in Connecticut (net profits or actual surplus), Indiana (surplus earnings or net profits or surplus paid in cash), and North Carolina, Oregon, Rhode Island, New Jersey (surplus or net profits).

The problem presented in the interpretation of such statutes is twofold: (1) do they give an alternative fund for dividends? (2) if so, what is meant by "net profits" or "net earnings."

Although at first glance it would appear that an alternative fund is provided, neither the courts nor the text writers agree that such is the case. Ballentine suggests that the terms "surplus or net profits" even when combined are simply part of a description of surplus and concludes that the history of the New Jersey statute conclusively shows an intention to create alternative funds. Ballentine and Hill, *Corporate Capital and Restrictions upon Dividends under Modern Corporation Laws,* 23 CALIF. L. REV. 229, 241 (1935); BALLENTINE, CORPORATIONS 583 (1946); BALLENTINE AND KEHL, CORPORATE DIVIDENDS 60 (1941).

Assuming that an alternative fund is created, the problem remains as to what is meant by "net profit" or "net earnings."

Profits, without specifying some particular period, has not been considered to mean current profits. BALLENTINE, CORPORATIONS 575 (Rev. ed. 1946). Some courts seek to distinguish between "net profits" and "net earnings." *Mengel Co. v. Glenn,* 50 F. Supp. 765, 769 (W.D. Ky. 1943). Though the terms may possess different shades of meaning, it is doubtful whether there is any substantial disagreement. Rain, *The Fund Available for Corporate Dividends in Texas,* 26 TEX. L. REV. 273, 285 (1948). There seems to be no settled usage regarding these terms in commerce, and in view of this ambiguity their incorporation in the statutes render the law extremely vague. Weiner, *Theory of Anglo-American Dividend Law,* 29 COL. L. REV. 461, 474 (1929).

The North Carolina statute allowing payment of dividends out of "surplus or net profits," has been construed by the supreme court of the state to mean "that which remains after deducting from present value of all assets the amount of all liabilities, including capital stock." *Cannon v. Wiscasset Mills Co.,* 195 N.C. 119, 125, 141 S.E. 344, 348 (1928). But it is argued that the North Carolina statute legally permits dividends out of current net profits, even though a capital deficit exists. Sparger, *Profits, Surplus and the Payment of Dividends,* 8 N.C. L. REV. 14, 21 (1929).

In the construction of provisions to be included in a prospective preferred stock issue, the court held that "net profits" meant the accumulated profits, and that current earnings were not available for distribution in view of previous operating losses. *National Newark and Essex Banking Co. v. Durant Motor Co.,* 124 N.J. Eq. 213, 1 A. 2d 316 (Ch. 1938); *aff'd* 125 N.J. Eq. 435, 5 A. 2d 767 (Ct. Err. & App. 1939); *accord, Lich v. U. S. Rubber Co.,* 39 F. Supp. 675 (D. N.J. 1941), *aff'd without opinion,* 123 F. 2d 145 (3d Cir. 1941); *Mengel Co. v. Glenn, supra. Contra, Borg v. Int. Silver Co.,* 11 F. 2d 147, 150 (2d Cir. 1945).

The Delaware statute which was similar to that of New Jersey was held to be insufficient to permit payment out of current earnings where a deficit existed. *Wittenberg v. Federal Mining & Smelting Co.,* 15 Del. Ch. 147, 133 Atl. 43 (1926).

Thus it has frequently been held that the apparent alternative fund for dividends does not allow dividends in the face of a capital deficit, and that accumulated net earnings are required. This is in accord with the general concept of corporation law which precludes payment of dividends from current earnings in face of capital impairment, failing explicit statutory provisions therefore. Weiner, *Amount Available for Dividends Where No Par Shares Have Been Issued,* 29 COL. L. REV. 906, 909 (1929).

In a suit for a tax refund, as in the principal case, a refund was granted a Michigan corporation, the court pointing out that had the

legislature intended to limit net earnings to a particular year it would have been a simple matter to do so by the insertion of the words "annual" or "current." *Senior Investment Co. v. Commissioner*, 2 T.C. 124, 143 (1943). A number of states have so provided, among them Delaware and Minnesota.

The wisdom of allowing corporations to pay dividends when their capital is impaired is much debated. Ballentine and Hill, *Corporate Capital and Restrictions Upon Dividends Under Modern Corporation Law*, 23 CALIF. L. REV. 229, 247 (1935); Rain, *supra*, at 236. It is significant that in the states where current net earnings are expressely available for dividends despite a deficit, provisions are made for the protection of preferred stockholders, and creditors, whereas such protection is lacking in the Michigan and Virginia statutes as interpreted in the principal case.

The surtax imposed during the depression to prevent accumulation of funds was bitterly opposed even after the tax was removed. The result was the extraordinary amendment providing retroactive refunds, the purpose being to relieve the dilemma resulting from the imposition of the federal tax on profits nondistributable as dividends under state law. The directors of the corporations in Michigan and Virginia were certainly faced with this problem, and by the decisions in the principal case the corporations were penalized for failure to declare dividends when a capital deficit existed. By the interpretation of the state law in the principal case the court has in effect stimulated a defunct tax law, the ill effects of which Congress expressly remedied by amendment.

C. Stanley Taylor

CRIMINAL LAW—TAKING OF SEPARATELY-OWNED PROPERTY AS MULTIPLE OFFENSES

Defendant "hijacked" a truck containing property severally owned. The indictment charged eight violations of the National Stolen Property Act, 37 STAT. 670 (1913), as amended, 18 U.S.C. sec. 409 (now 659), naming different property and a different owner in each count. The defendant was convicted on all counts and sentences were imposed to run concurrently on some counts and consecutively on others. Defendant moved to vacate the sentences imposed which were to be served consecutively. *Held*, motion denied. The taking of merchandise belonging to different owners and constituting independent shipments, though contained in one vehicle, may be regarded as separate offenses for which separate punishment can be imposed. *Oddo v. United States*, 171 F. 2d 854 (2d Cir. 1949).

The court said, "The intention of congress, we believe, in enacting section 409 was to protect each and every interstate shipment

of goods against felonious taking." The statute construed in the principal case was enacted in 1913 and, as the court points out, there is no controlling authority for the proposition it finds. The lack of indictments charging separate offences, during the thirty-six years of enforcement, indicates that there is no clear manifestation of congressional intent to protect several ownership. "Penal statutes are to be strictly construed and statutes will not be read to create crimes, or new degrees or classes of crimes unless the purpose so to do is plain." *United States v. Noveck,* 271 U.S. 201, 204 (1926). "A law creating a crime ought to be explicit and any ambiguity and uncertainty about the meaning of the criminal statute ought to be resolved by a strict interpretation in favor of the liberty of the citizen." *Ex Parte Webb,* 225 U.S. 663, 689 (1911). "General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence." *United States v. Kirby,* 7 Wall 482, 486 (U.S. 1868).

The courts have struggled with the problem presented here since early times. The common law of England dictates the proposition that the stealing of goods, at one and the same time, belonging to different persons is but one larceny. *United States v. Beerman,* 24 Fed. Cas. 1065 (1838) (dissent). Citing the dissent in that case a court held, to divide one larceny into several offences because there were several owners of the property is contrary to the constitutional guaranty against double jeopardy and the spirit of the common law. *Hoiles v. United States,* 3 MacArthur 370, 36 Am. Rep. 106 (Ga. 1881); *Chanock v. United States,* 267 F. 612 (App. D.C. 1920).

In the principal case the court cited *Morgan v. Devine,* 237 U.S. 632 (1915); *United States v. Bush,* 64 F. 2d 27 (2d Cir. 1933); and *Carpenter v. Hudspeth,* 112 F. 2d 126 (10th Cir. 1940) for the proposition that the test of the identity of offenses, when double jeopardy is set up, is whether the evidence sustaining one indictment or count would have proved the other indictment or count. In those cases a distinct act was charged in each count. The only difference in the counts in the principal case is the ownership of the property. The federal court and the majority of states have held that the taking at the same time and place of the property of different persons is but one offense. The federal court said, "The commission of a crime is an offense against the public, and is punished, not to protect the property rights of injured individuals, but rather as a vindication of the public law. The name of the owner appears in a proper indictment for the purpose of identifying the ownership of the property stolen or converted. The particular ownership of the property which is the subject of larceny does not fall within the definition and is not of the essence of the crime. The

gist of the offense consists in feloniously taking the property of another, and neither the legal nor the moral quality of the act is at all effected by the fact that the property stolen, instead of being owned by one, or by two or more jointly, is the several property of different persons." *Henry v. United States,* 263 F. 459 ,463 (App. D.C. 1919). *Clemm v. State,* 154 Ala. 12, 45 So. 212 (1907); *Sweek v. The People,* 85 Colo. 479, 277 Pac. 1 (1929); *State v. Paul,* 81 Iowa 597, 47 N.W. 539 (1891); *Furnace v. The State,* 153 Ind. 93, 54 N.E. 441 (1899); *People v. Israel* 269 Ill. 284, 109 N.E. 969 (1915); *State v. Nelson,* 29 Me. 329 (1849); *Jacobs v. Commonwealth,* 260 Ky. 142, 84 S.W. 2d 84 (1935); *Ward v. State,* 90 Miss. 249, 43 So. 466 (1907); *State v. Wagner,* 118 Mo. 626, 24 S.W. 178 (1893); *State v. Warren,* 77 Md. 121, 26 Atl. 500 (1893); *People v. Johnson,* 81 Mich. 573, 45 N.W. 1119 (1890); *State v. Mjelde,* 29 Mont. 490, 75 Pac. 87 (1904); *State v. Douglas,* 26 Nev. 196, 65 Pac. 802 (1901); *State v. Cooper,* 13 N.J.L. 361 (1833); *State v. Klasner,* 19 N.M. 474, 145 Pac. 679 (1915); *Smith v. State,* 59 Ohio St. 350, 52 N.E. 826 (1898); *State v. Clark,* 46 Ore. 140, 80 Pac. 101 (1905); *Folmer v. Commonwealth,* 97 Pa. 503 (1881); *Wilson v. State,* 45 Tex. 76 (1876); *State v. Mickel,* 23 Utah 507, 65 Pac. 484 (1901); *State v. Baker,* 100 Vt. 380, 138 Atl. 736 (1927); *Alexander v. Commonwealth,* 90 Va. 809, 20 S.E. 782 (1894); *Ackerman v. State,* 7 Wyo. 504, 54 Pac. 162 (1898); *State v. Bliss,* 27 Wash. 463, 68 Pac. 87 (1902).

The most frequent cases cited in this area come under the Mann Act and the Mail Statute. It is a single offense to transport in interstate commerce several prostitutes in the same vehicle at one time. *Caballero v. Hudspeth,* 114 F. 2d 545 (10th Cir. 1940); *Robinson v. United States,* 143 F. 2d 276 (10th Cir. 1944). But more recent cases hold the transportation of more than one woman on the same trip in the same vehicle constitutes a separate offense for each woman. *Crespo v. United States,* 151 F. 2d 44 (1st Cir. 1945); *United States v. St. Clair,* 62 F. Supp. 795 (W.D. Va. 1945). *Habeas Corpus denied,* 83 F. Supp. 585 (N.D. Ga. 1949). These cases are predicated on the idea that the introduction into the car of each woman is an act in itself and therefore a separate crime. Thus they are distinguishable from the principal case. The statute says any woman or any women and the court points to that language as authority for holding separate offenses.

It was held that cutting into each of several mail bags (separate acts) in a railway postal car constituted separate crimes for which the defendant could be separately punished. *Ebeling v. Morgan,* 237 U.S. 625 (1914). But where the defendant was charged with abstracting three different parcels from a mail pouch the court held the charge to be of but one crime. *Johnston v. Lagomarsino,* 88 F.

2d 86 (9th Cir. 1937), and where the indictment charged in separate counts the taking of several mail bags, identifying each bag in a separate count by giving the lock number, the court held one offense. *Colson c. Johnston,* 35 F. Supp. 317 (N.D. Cal. 1940); *Kerr v. Squier,* 151 F. 2d 308 (9th Cir. 1945).

It would seem that the taking in the principal case was a single act. The ownership of the property taken is material only in that it is necessary that the property taken is owned by someone other than the accused. The intent and moral culpability would have been the same had the property been owned by one individual. Trespass to the possession is the gist of the crime and in this case the transportation company had possession as bailee.

John G. McCune

EVIDENCE—ADMISSIBILITY OF CONFESSIONS

The defendant was arrested without a warrant on suspicion of grand larceny. He was held for thirty hours before being brought before a committing magistrate, the detention being admittedly for the purpose of furnishing an opportunity for further interrogation. Confessions of guilt elicited from him during this 30-hour period, without which he could not have been convicted, were admitted in evidence by the District Court for the District of Columbia against his objections that they had been illegally obtained. His conviction of grand larceny was affirmed by the Court of Appeals and the case went to the Supreme Court on certioari. *Held,* reversed (5-4). A confession is inadmissible if made during illegal detention due to a failure to promptly carry a prisoner before a committing magistrate, regardless of whether the confession is the result of torture, physical or psychological. *Upshaw v. United States,* 335 U. S. 410 (1948).

The court rested its decision on Rule 5(a) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., which provides that "An officer making an arrest . . . shall take the arrested person without unnecessary delay before the nearest available" committing magistrate, and its holding in *McNabb v. United States,* 318 U.S. 332 (1943), that the obvious purpose of the above requirement of prompt production was to check resort by officers to "secret interrogations of persons accused of crime." In the *McNabb* case, confessions obtained during a longer period of illegal detention than existed in the principal case and with some degree of coercion present were held inadmissible. No mention was made of *Anderson v. United States,* 318 U.S. 350 (1943), decided the same day as the *McNabb* case, where a confession was excluded that resulted from merely two hours' questioning, but *United States v. Mitchell,* 322 U.S. 65 (1944), where an illegal eight-day detention subsequent to

the obtaining of a voluntary confession was held not to render the confession inadmissible, was distinguished on the basis that the Mitchell confession had been obtained before the illegal detention commenced.

The court asserts in the principal case that its intention in formulating the *McNabb* rule was to exercise its power of control over the admissibility of evidence in an effort to impose an effective sanction upon police officers for failure to effect "prompt production." Prior to this assertion, a state of confusion persisted in the lower federal courts as to the function and scope of the rule. See Note, 47 COL. L. REV. 1214 (1947). It was uncertain whether the exclusion of confessions on the theory of the *McNabb* rule should be regarded as a sanction or as an extension of the constitutional prohibition against coerced confessions and, consequently, whether the basis of exclusion to be applied should be the mere illegal detention, in which case the voluntary nature of the confession would be immaterial to its exclusion, *United States v. Hoffman,* 137 F. 2d 416 (2d Cir. 1943), or a coercion test, in which case the illegal detention would have to amount to a physical or psychological pressure destroying the voluntary nature of the confession before it would be excluded, *Ruhl v. United States,* 148 F. 2d 173 (10th Cir. 1945), *Brinegar v. United States,* 165 F. 2d 512 (10th Cir. 1947).

With the adoption of the rule of the principal case, the mere illegal detention becomes the sole criterion governing the exclusion of confessions under this rule. Since only "unnecessary delays" are made illegal by Rule 5(a), *supra,* the obvious answer of *necessity* would meet any challenge on this ground; but, as the court points out in the principal case, any detention made for the purpose of eliciting a confession cannot be considered necessary, so any confession obtained during such a detention would be excluded.

In distinguishing the *Mitchell* case, *supra,* on the basis of a "subsequent illegal detention" argument, the court has denied the applicability of the trespass *ab initio* doctrine to this area, although protection of the individual from abuses by public officers was one of the few logical arguments accepted in support of the doctrine. At the same time, the court imposes a test involving the intent of the arresting or detaining officer as an essential consideration in the determination of the necessity of the delay. Carried to its logical conclusion, the latter test could result in just as grave an abuse of justice as application of the trespass *ab initio* doctrine; any confession, notwithstanding its voluntary nature, made after or during the slightest delay following an arrest should be held inadmissible if the requisite intent can be established as the delay would be rendered unnecessary and, therefore, illegal. The length of the detention period is significant only as a possible aid to the confessor

in establishing lack of necessity for the delay in production. It cannot be contended that the confession must be the result of the illegal detention as this would compel a consideration of physical or psychological pressure which the Court has said is immaterial. It is improbable that any application of the rule which would provide an avenue for the abuse of justice was intended in its formulation. However, where the line will be drawn is a matter of conjecture only.

With the propostion that protection of the individual from delay in presentment before a committing magistrate is a desirable end, no issue is taken. That this protection can best be effected through the imposition of an effective sanction upon police officers for failure to effect prompt production is also accepted. However, in view of the indefiniteness of scope of the rule of the principal case and its possible employment as an abuse of justice, it is doubtful whether the exclusion of confessions in this manner is the best solution to the problem. It is submitted that Congress should develop some appropriate sanctioning device that would effect the desired protection of the individual from illegal detention through means more susceptible of definite application.

Bernard P. Bernardo

EVIDENCE—TESTIMONY OF JUROR TO IMPEACH VERDICT

In an action to recover damages for injuries claimed to have been the result of stepping into a hole in the pavement of a safety zone, the jury returned a unanimous verdict for the defendant. The plaintiff moved for a new trial contending that one of the jurors had visited the scene of the accident and reported to the others that no such hole existed. The plaintiff offered testimony of the jurors to prove this alleged misconduct. It was held inadmissible by the trial court. Plaintiff appealed. *Held,* affirmed. In the absence of evidence *aliunde,* the verdict of a jury may not be impeached by the testimony of a juror concerning the alleged misconduct of a member thereof. *Wicker v. City of Cleveland,* 150 Ohio St. 434, 83 N.E. 2d 56 (1949).

Excepting the phrase "In the absence of evidence *aliunde,*" the court's holding expresses the weight of authority in this country and in England. *McDonald v. Pless,* 238 U.S. 264 (1914); *Johnson v. Hunter,* 144 F. 2d 565 (10th Cir. 1944). This rule, first suggested by Lord Mansfield in 1785 in the case of *Vaise v. Delaval,* 1 T.R. 11 (K.B.), is founded on considerations of public policy. The courts have theorized that to permit such testimony would encourage "tampering" with jurors, would prolong litigation, would permit a juror to prove his own reprehensible conduct, would upset supposedly settled verdicts, and would interfere with the privacy of

jury deliberation thus exposing jurors to public criticism. *McDonald v. Pless, supra; State v. Adams,* 141 Ohio St. 423, 48 N.E. 2d 861 (1943).

To this rule the Supreme Court of Ohio early ingrafted an extension permitting such testimony of jurors if there existed evidence *aliunde, i.e.,* evidence other than that to be had from the jurors, concerning the misconduct. *Farrar v. State,* 2 Ohio St. 54, 1 Ohio Dec. Rep. 428 (1853). The court also adopted another extension which has had almost universal acceptance in other jurisdictions, and which permits jurors to testify concerning the misconduct of third parties such as court officers. *Emmert v. State,* 127 Ohio St. 235, 187 N.E. 862 (1933); *State v. Adams, supra.* In remanding a case to the lower court, the Supreme Court also implied that criminal cases *may* be outside the rule. Speaking of criminal cases the court said in dictum that there was "doubt as to whether there may not be found a carefully guarded exception" to the rule. *Goins v. State,* 46 Ohio St. 457, 21 N.E. 476 (1889). With these changes, the Ohio court has followed the majority doctrine. *Hulet v. Barnett,* 10 Ohio 459 (1841); *Hohman v. Riddle,* 8 Ohio St. 384 (1858); *Kent v. State,* 42 Ohio St. 426 (1884); *Long v. Cassiero,* 105 Ohio St. 123, 136 N.E. 888 (1922); *Schwindt v. Graeff,* 109 Ohio St. 404, 142 N.E. 736 (1924).

Applying this majority rule, courts have refused to admit the testimony of jurors to show that the verdict was the result of chance, *Schwindt v. Graeff, supra;* of consideration of evidence not produced at the trial, *Kent v. State, supra;* of coercion, *Johnson v. Hunter, supra;* and of a quotient method, *McDonald v. Pless, supra.* This result insofar as the quotient method is concerned is probably desirable in jurisdictions such as Ohio where the court has refused to instruct the jury that the figure reached through the quotient method must be expressly agreed upon *after* it has been determined; and that if this is not done, the use of this method would be improper. *Estridge v. Cinn. Street Ry. Co.,* 76 Ohio App. 220, 63 N.E. 2d 823 (1945). This rigid exclusion of what is generally the only available evidence to show such misconduct has provoked condemnatory opinions which are exceedingly persuasive. See *Schwindt v. Graeff, supra* (dissenting opinion); *Wright v. Telegraph Co.,* 20 Iowa 195 (1866). The authors of these attacks reason that the danger of tampering with jurors is no greater than would ordinarily exist if one of the parties was so inclined; that the courts do not flinch at the prospect of prolonged litigation which would ensue if evidence *aliunde* were admitted; that as is the practice with criminals, a repentant juror should be allowed to reveal his misconduct; and that the ends of justice would be rightly served if a settled, but unjust, verdict were disturbed. Desiring more

flexibility, some jurisdictions have adopted the so-called "Iowa rule" which continues to exclude a juror's testimony concerning matters inherent in the verdict, matters involving the motives which were the basis for the verdict, but allows testimony involving overt and extrinsic acts which may be observed and proved, or disproved, by all the jurors. *Southern Pacific Co. v. Klinge,* 65 F. 2d 85 (10th Cir. 1933); *Wright v. Telegraph Co., supra; Dallas Ry. & Terminal Co. v. Bishop,* 203 S.W. 2d 651 (Tex. Civ. App. 1947); *Turner & Sons v. Great Northern Ry. Co.,* 67 N.D. 347, 272 N.W. 489 (1937); *City of Miami v. Bopp,* 117 Fla. 532, 158 So. 89 (1934).

This approach is substantive rather than procedural and the trial court must necessarily consider the type of evidence sought to be introduced by a juror's testimony to determine its admissibility. *Clawans v. Newman,* 135 F. 2d 833 (D.C. Cir. 1943). Attempting to do this, the courts have had considerable difficulty, inasmuch as there is often only a slight and imperceptible difference between the "inherent" and the "overt." 8 WIGMORE, EVIDENCE § 2354 (3d ed. 1940).

The federal court decisions vary. Some have followed the Iowa rule. *Mattox v. United States,* 146 U.S. 140 (1892); *Jorgenson v. York Ice Machinery Corp.,* 160 F. 2d 432 (2d Cir. 1947), *cert. denied,* 332 U.S. 764 (1947); *City of Amarillo v. Emery,* 69 F. 2d 626 (5th Cir. 1934). Others represent the majority view. *McDonald v. Pless, supra; Johnson v. Hunter, supra; Bateman v. Donovan,* 131 F. 2d 759 (9th Cir. 1942).

Some states have enacted statutes permitting the testimony of jurors in cases where the misconduct consists of arriving at the verdict by chance. CAL. CODE CIV. PROC. ANN. § 657(2) (1941); IDAHO LAWS ANN. § 10-602(2) (1948); CARROLL'S KY. CODE, CRIM. PRAC. § 272 (1948); N. D. REV. CODE § 28-1902(2) (1943); S. D. CODE § 33.1605(2) (1939); UTAH CODE ANN. § 104-40-2(2) (1943). Texas statutes allow jurors to testify concerning any misconduct which prevents a fair trial. TEX. CODE CRIM. PROC. ANN. § 753(8) (1925); TEX. RULES CIV. PROC. § 327 (1942). The Supreme Court of Ohio on two occasions applied the majority rule with admitted reluctance stating that because this rule had become the settled law of Ohio it was not within the province of the court, but of the legislature, to effect a change. *Schwindt v. Graeff, supra; Kent v. State, supra.* It should be noted, however, that in other situations the court has declared and utilized its power to overrule prior decisions. *Mead v. McGraw,* 19 Ohio St. 55 (1869); *Fowler v. City of Cleveland,* 100 Ohio St. 158, 126 N.E. 72 (1919).

J. Robert Donnelly

FEDERAL COURTS—REMOVAL UNDER THE JUDICIAL CODE

Plaintiff, resident of Iowa, employee of defendant railroad, was injured in an accident in Iowa. Under the Federal Employers' Liability Act, 45 U.S.C. § 56 (1946) he filed an action to recover for injuries in the District Court for the Southern District of New York. Defendant moved to transfer the case to the District Court for the Southern District of Iowa, pursuant to Section 1404(a) of the new Judicial Code, 28 U.S.C. CONG. SERV. § 1404(a). *Held,* motion granted. *Nunn v. Chicago, Milwaukee, St. P. & P. R. Co.,* 80 F. Supp. 745 (S.D.N.Y. 1948).

The FELA provides, "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. . . ." 45 U.S.C. § 56 (1946). The Supreme Court has held that this statute creates a privilege of venue which could not be defeated by considerations of convenience or expense, and that a state court could not enjoin an action begun in a distant federal court in accordance with the provisions of the Act. *Baltimore & Ohio R. Co. v. Kepner,* 314 U. S. 44 (1941); *Miles v. Illinois Central R. Co.,* 315 U.S. 698 (1942). In *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 505 (1947) while holding the doctrine of forum non conveniens applicable to cases governed by the general venue statutes, declared, "It is true that in cases under the Federal Employers' Liability Act we have held that plaintiff's choice of a forum cannot be defeated on the basis of forum non conveniens."

To defend the action in the principal case, the railroad would have to bring twelve witnesses from Des Moines to New York. In an earlier hearing in the *Nunn* case, 71 F. Supp. 541 (S.D.N.Y. 1947), before the enactment of the new Judicial Code, the railroad's motion to dismiss on the grounds that the action in that forum constituted an unlawful burden on interstate commerce was denied. Citing the *Miles* and *Kepner* cases, *supra,* the court held that it could not interfere as long as the statutory requirements of venue were met. *Accord: Butts v. Southern Pacific Co.,* 69 F. Supp. 895 (S.D.N.Y. 1947).

Section 1404(a) of the new Judicial Code, 28 U.S.C. CONG. SERV. § 1404(a) (1948), the basis of the decision in the principal case, provides, "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Despite the broad language of the statute, "any civil action," the plaintiff contended that it was not intended to apply to actions where the choice of forum was authorized by a special venue statute. The court overruled the contention, citing the revisor's note as

indicative of the Congressional intent in enacting the section. "Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper. As an example of the need of such a provision, see *Baltimore & Ohio R. Co. v. Kepner.* . . . The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so." 28 U.S.C. CONG. SERV. 1853 (1948). For examples of abuse of the venue privilege under the FELA, see Barrett, *The Doctrine of Forum Non Conveniens,* 35 CALIF. L. REV. 380, 382 (1947).

Prior to the enactment of the new Judicial Code, the Supreme Court had held that the doctrine of forum non conveniens was not applicable to civil actions under the Clayton Act where venue is chosen pursuant to Section 12, 15 U.S.C. § 22 (1946). *United States v. National City Lines,* 334 U.S. 573 (1948). Upon remand, District Judge Yankwich held that Section 1404(a) applied, and transferred the action to a more suitable district. "In so doing, I did not weigh the convenience of the defenants only, but that of the Government also. The conclusion was arrived at after a balancing of conveniences." *United States v. National City Lines,* 80 F. Supp. 734 (S.D. Cal. 1948). Similarly, in *Hayes v. Chicago, R. I. & P. R. Co.,* 79 F. Supp 821 (D. Minn. 1948) actions by eight persons under the FELA were transferred to district courts in Texas, Oklahoma, and Illinois under Section 1404(a) on the grounds that the convenience of parties and witnesses and the interests of justice would be best served by such transfer.

Two cases recently argued together before the Supreme Court consider the effect of Section 1404(a) on the special venue provisions of the FELA and the Clayton Act. The opinion of the Court in these cases, announced May 31, 1949, held that the language of Section 1404(a) was clear and that "any civil action" applies to all civil actions. Accordingly, it upheld the transfer of these cases by the District Court. *Kilpatrick v. Texas Pacific Ry. Co.; United States v. National City Lines,* 17 U.S. L. WEEK, 4458 (1949). *Accord:* Ex parte *Collett,* 17 U.S. L. WEEK, 4453 (1949).

Adherence to the rule of the principal case will not defeat the considerations that prompted the granting of the choice of venue to this class of plaintiffs. The plaintiff's initial choice of venue remains as broad as before the 1948 revision; the action may still be brought in any district in which the defendant may be served. Under this streamlined concept of forum non conveniens the court is not authorized to dismiss the action, but merely to transfer it to a more convenient district if the interests of all parties will be better served. Such a discretion vested in the federal judiciary would appear to be in safe hands. *Ralph N. Mahaffey*

SALES—IMPLIED WARRANTY—SELF-SERVICE STORES

Plaintiff was injured in a self-service store when a bottle containing a carbonated beverage exploded as she transferred it to her basket. In an action against the bottler for breach of implied warranty, *held*, for defendant. Plaintiff must establish a sale or contract of sale to come within the protection of Section 15 of the Uniform Sales Act. In a self-service store, there is no contract or sale until the goods are paid for. *Loch v. Confair*, 361 Pa. 158, 63 A. 2d 24 (1949).

Sales in early England were regulated by the Church and the State to protect the community, penalties being imposed on delinquent sellers. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L. J. 1133 (1931). By Blackstone's time, there was an implied warranty that food was wholesome, with a remedy in case for deceit. 3 BL. COMM. 165. Not until the nineteenth century, however, was implied warranty given a contract basis. *Gardiner v. Gray*, 4 Camp. 144 (1815); *Shepherd v. Pybus*, 3 M. & G. 868 (1842). In this country, even before the adoption of the Uniform Sales Act, the rule was that sales of food carry an implied warranty of quality. *Hoover v. Peters*, 18 Mich. 51 (1869); *Rabb v. Covington*, 215 N. C. 572, 2 S.E. 2d 705 (1939). At common law, the subpurchaser had no cause of action against the manufacturer, privity of contract being required. *Hood v. Warren*, 205 Ala. 332, 87 So. 524 (1921). States with the Uniform Sales Act have the same requirement. *Vaccarino v. Cozzubo*, 181 Md. 614, 31 A. 2d 316 (1943); *Chysky v. Drake Bros. Co.* 235 N. Y. 468, 139 N. E. 576 (1923). Although there is much support for the older rule, many courts have had no difficulty in finding a basis for recovery, on the theory of public policy, *Jacob E. Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 164 S.W. 2d 828 (1942); *Boyd v. Coca Cola Bottling Works*, 132 Tenn. 23, 177 S.W. 80 (1915); or that the consumer is a third party beneficiary of the contract between the bottler and retailer, *Coca Cola Bottling Co. of Fort Worth v. Smith*, 97 S.W. 2d 761 (Tex. Civ. App. 1936); *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 161 N. E. 557 (1928); or that the warranty runs with the product, *Patargias v. Coca Cola Bottling Co. of Chicago*, 332 Ill. App. 117, 74 N.E. 2d 162 (1947); *Griffin v. Asbury*, 196 Okla. 484, 165 P. 2d 822 (1945). In the instant case, the court, *sub silentio*, espoused the view that privity was not required.

Even where the privity requirement is not an impediment, other difficulties arise. Does the implied warranty extend to the bottle? The court in the principal case did not have to answer that question. Since the implied warranty of a restaurant extends to the tableware, *Sartin v. Blackwell*, 200 Miss. 579, 28 So. 2d 222 (1946), it can be argued that the warranty of quality includes the

bottle. It could also be argued that the broad language of Section 15–1 of the Uniform Sales Act includes the bottle, since after the bottle has exploded, it is not fit for the particular purpose for which it was purchased. It has been held that the warranty includes the bottle. *Naumann v. Wehle Brewery Co.*, 127 Conn. 44, 15 A. 2d 181 (1940); *Haller v. Rudmann*, 249 App. Div. 831, 292 N. Y. Supp. 586 (2d Dep't 1937). There is, however, authority to the contrary. *Anheuser-Busch, Inc. v. Butler*, 180 S.W. 2d 996 (Tex. Civ. App. 1944).

Does the sale come within the prohibition of Section 15–4 of the Uniform Sales Act, which provides that there is no implied warranty where the sale is of a specified article by its trade name? Notwithstanding this section, recovery has been allowed where the food was purchased by trade name, on the basis of Section 15–2 of the Act—that there is an implied warranty of merchantability in sales by description, although the goods were purchased by trade name. *Ryan v. Progressive Grocery Stores, Inc.*, 255 N. Y. 388, 175 N.E. 105 (1931); *Botti v. Venice Grocery Co.*, 309 Mass. 450, 35 N. E. 2d 491 (1941); *D'Onofrio v. First National Stores, Inc.*, 68 R.I. 144, 26 A. 2d 758 (1942).

The action against the bottler in the principal case may be explained by the fact that a recent similar case, against the retailer on implied warranty, failed for the same reasons. *Lasky v. Economy Grocery Stores*, 319 Mass. 224, 65 N.E. 2d 305 (1946). The logical cause of action would be tort for negligence against the bottler. However, although it is possible to get the issue before the jury, *Patargias v. Coca Cola Bottling Co. of Chicago, supra*, the burden of proving negligence is usually prohibitive. A possible basis of recovery is that plaintiff is a business invitee, there being a duty to use reasonable care to make the premises safe. PROSSER, TORTS, § 79 (1941). Although the definition of business invitee has been broadened, *Crane v. Smith*, 23 Cal. 2d 288, 144 P. 2d 356 (1943), the question of foreseeability which remains would be difficult to prove in the case of an exploding bottle. At this point res ipsa loquitur should be a boon to injured plaintiffs. Res ipsa loquitur has been a vehicle for getting to the jury in exploding bottle cases against the manufacturer. *Joly v. Jones*, 115 Vt. 174, 55 A. 2d 181 (1947); *Benkendorfer v. Garrett*, 143 S.W. 2d 1020 (Tex. Civ. App. 1940). However, where the control by defendant has long since ceased, it has been held necessary to prove that the explosion could not have been brought about by any intervening cause. *Piacun v. Louisiana Coca Cola Bottling Co.*, 33 So. 2d 421 (La. App. 1947); *Payne v. Rome Coca Cola Bottling Co.*, 10 Ga. App. 762, 73 S.E. 1087 (1912). The burden of this requirement is commensurate with that of proving negligence, and res ipsa loquitur being only a means

of relying on the vacillations of jurors, a more concrete basis of recovery is needed. (It should be noted that the possibilities of an action against the owner of the premises, based on res ipsa loquitur, have not been explored. Should there be any difference between an exploding bottle and a falling cornice?)

More cogent is the argument that the sale is one by description, the warranty of merchantability of Section 15–2 applying. *Botti v. Venice Grocery Co., supra; D'Onofrio v. First National Stores, supra; Ryan v. Progressive Grocery Stores, supra.* Those cases, however, did not involve self-service markets so the question of sale or contract of sale remains.

The most suitable basis of recovery is by the implied warranty of the Uniform Sales Act. Recovery on implied warranty has not been limited to sales, but has been extended to bailment for hire, *The White Company v. Francis,* 95 Pa. Super. 315 (1928), and to the furnishing of food to customers by restaurants. *Cushing v. Rodman,* 82 F. 2d 864 (D.C. Cir. 1936); *Friend v. Childs Dining Hall Co.,* 231 Mass. 65, 120 N.E. 407 (1918). Nevertheless, it is not necessary to resort to tenuous extensions of present rules. The principal case can well come within the confines of the Uniform Sales Act. In the old-fashioned grocery store, offer by the customer and acceptance by the storekeeper was a single, simple transaction. It can well be argued that the revolution in sales technique through the self-service store, with its concomitant benefits to owners and dangers to customers, has affected a change in the contractual relation. To a customer who has put the last can of cherries in his basket, can the manager say there is no contract of sale and give the can to another? The owner, by inviting customers into his store to select their own articles, offers them to those customers. The offer is accepted when the goods are picked up, creating a contract of sale. The fact that the article may be returned to the shelf if of no moment. Right of customers to return an article does not preclude a contract of sale. WILLISTON, SALES § 270 (1948). There being a contract of sale, plaintiff should come within Section 15 of the Uniform Sales Act.

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