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Discussion of Recent Decisions

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DISCUSSION OF RECENT DECISIONS

AUTOMOBILES—INJURIES FROM OPERATION, OR USE OF HIGHWAY—
WHETHER A PARENT WHO PURCHASES AN AUTOMOBILE FOR AN ALLEGED IN-
COMPETENT ADULT CHILD IS LIABLE TO A THIRD PERSON INJURED BY THE
NEGLIGENT OPERATION THEREOF—Through the medium of the recent case
of *Estes v. Gibson*,¹ the courts of Kentucky were presented with an issue

1 — Ky. —, 257 S. W. (2d) 604 (1953). Justice Duncan wrote a dissenting opinion,
concurring in by Stewart and Milliken, JJ.

of first impression concerning the right of an injured person to recover against a mother who had purchased an automobile for her adult son, alleged to be a known inebriate and drug addict, as well as against the son, who held title to the car, for those damages suffered when the son drove the automobile into a gasoline pump and caused it to explode. Plaintiff, charging that the mother carelessly and negligently purchased the automobile and permitted her son to drive it although she knew, by reason of his insobriety and addiction to narcotics, that he was a careless, reckless, and incompetent operator of a motor vehicle, relied on the legal principle that one who "supplies . . . a third person [with] a chattel whom the supplier knows . . . [would] be likely because of his youth, inexperience or otherwise, to use it in a manner involving unreasonable risk of bodily harm to himself and others . . . is subject to liability for bodily harm caused thereby."² The trial court, sustaining the mother's demurrer to the complaint, dismissed the suit as to her. On appeal from such order, a majority of the Court of Appeals of Kentucky affirmed the decision, holding that the mother was not chargeable with such primary negligence as would render her liable but, even assuming she was, then the chain of causation was too tenuous and the result too remote to create liability. A dissent was registered on the basis that one who gives a car to a known incompetent or reckless driver, regardless of his age, should be held liable for the natural and probable consequence of such act.

Some years ago, a California judge, while holding a father concurrently liable for injuries caused by his adult incompetent son, made the statement that, if an owner were to entrust his car to a person whom he "knew to be insane or intoxicated or utterly incompetent to run a car, it would certainly shock the common understanding to hold that he was not chargeable with negligence."³ The ruling of the majority in the instant case, therefore, projects the valid question as to whether or not the mere transfer of title of an automobile by a parent to an incompetent adult child should be of sufficient weight to prevent a decision of the kind there achieved from producing a similar or even more intense shock to the common understanding. The issue being one of novel impression, with only limited and disputed legal precedent available upon which to ground a decision, an intelligent evaluation of the decision achieved by the majority of the court in the Kentucky case cannot be reached without taking into consideration those principles and theories which have been applied in order to hold owners liable for the negligence of incompetent drivers to whom they have rented, loaned, or entrusted their cars.

Generally, in the absence of a statute imposing liability, the owner

² Restatement, Torts, Vol. 2, § 390.

³ *Rocca v. Steinmetz*, 61 Cal. App. 102 at 109, 214 P. 257 at 260 (1923).

who entrusts his automobile to another is not liable for the latter's negligence,⁴ but there is a well-recognized exception to the effect that liability may arise if the owner entrusts his automobile to one whom the owner knows is,⁵ or in the exercise of ordinary care should be known to be, an incompetent person.⁶ The liability in these cases arises not from ownership or agency but from the combined negligence of the owner in entrusting the vehicle to the incompetent driver and of the driver in carelessly operating the same.⁷ Liability, in these cases, may arise from the entrusting of an automobile to an incompetent adult,⁸ to an incompetent minor,⁹ to an intoxicated person,¹⁰ or to one who, from known habit, is likely to become intoxicated.¹¹

⁴ *Dean v. Ketter*, 328 Ill. App. 206, 65 N. E. (2d) 572 (1946). See also *Blashfield*, *Cyclo. of Automobile Law and Practice*, Vol. 5, § 2924, p. 57.

⁵ *Cunningham v. Bell*, 149 Ohio St. 103, 77 N. E. (2d) 918 (1948); 5 *Am. Jur.*, *Automobiles*, § 355; *Huddy*, *Encyclo. Automobile Law*, 9th Ed., Vol. 3, § 42, p. 79.

⁶ *Saunders Drive-It-Yourself Co. v. Walker*, 215 Ky. 267, 284 S. W. 1088 (1926).

⁷ *Parker v. Wilson*, 179 Ala. 361, 60 So. 150, 43 L. R. A. 87 (1912); *Chaney v. Duncan*, 194 Ark. 1076, 110 S. W. (2d) 21 (1937); *Krausnick v. Haegg Roofing Co.*, 236 Iowa 985, 20 N. W. (2d) 432, 163 A. L. R. 1414 (1945); *Priestly v. Skourup*, 142 Kan. 127, 45 P. (2d) 852 (1935); *Somerville v. Keeler*, 165 Miss. 244, 145 So. 721 (1933); *Saunders v. Prue*, 235 Mo. App. 1245, 151 S. W. (2d) 478 (1941); *Williamson v. Eclipse Motor Lines*, 145 Ohio St. 467, 62 N. E. (2d) 339, 168 A. L. R. 1356 (1945); *Wilcox v. Wunderlich*, 73 Utah 1, 272 P. 207 (1928); *Dicranian v. Foster*, 114 Vt. 372, 45 A. (2d) 650 (1946); *Mitchell v. Churches*, 119 Wash. 547, 206 P. 6 (1922). See also *Berry*, *The Law of Automobiles*, 7th Ed. Vol. 4, § 4406, at p. 712; *Blashfield*, *op. cit.*, § 2924, at p. 59; *Huddy*, *op. cit.*, § 42, at p. 80.

⁸ *Salvation Army v. Security Roofing Co.*, 255 Ala. 349, 51 So. (2d) 513 (1951); *Sanders v. Walden*, 214 Ark. 523, 217 S. W. (2d) 357 (1949); *McCalla v. Grosse*, 42 Cal. App. (2d) 546, 109 P. (2d) 358 (1941); *Greeley v. Cunningham*, 116 Conn. 515, 165 A. 878 (1933); *Graham v. Cleveland*, 58 Ga. App. 810, 200 S. E. 184 (1938); *Saunders v. Prue*, 235 Mo. App. 1245, 151 S. W. (2d) 478 (1941); *Halla v. Worthington*, 136 N. J. Law 162, 31 A. (2d) 844 (1943); *Schneider v. Van Wyckhouse*, 54 N. Y. S. (2d) 446 (1945); *Downtown Chevrolet Co. v. Lehman*, 191 Okla. 319, 129 P. (2d) 578 (1942); *Guedon v. Rooney*, 160 Ore. 621, 87 P. (2d) 209 (1939).

⁹ *Lane v. Bing*, 202 Cal. 590, 262 P. 318 (1927); *Anderson v. Daniel*, 136 Miss. 456, 101 So. 498 (1924); *Dinger v. Burnham*, 360 Mo. 465, 228 S. W. (2d) 696 (1950); *Moran v. Moran*, 124 Neb. 379, 246 N. W. 711 (1933); *Devitt v. Continental Casualty Co.*, 245 App. Div. 115, 281 N. Y. S. 336 (1935), reversed on other grounds in 269 N. Y. 474, 199 N. E. 765 (1936); *Coker v. Moose*, 180 Okla. 234, 68 P. (2d) 504 (1937); *Gossett v. Van Egmond*, 176 Ore. 134, 155 P. (2d) 304 (1945); *Bock v. Sellers*, 66 S. D. 450, 285 N. W. 437 (1939); *Russell Construction Co. v. Ponder*, 143 Tex. 412, 186 S. W. (2d) 233 (1945); *Reid v. Owens*, 92 Utah 432, 69 P. (2d) 265 (1937). See also 60 C. J. S., *Motor Vehicles*, § 434.

¹⁰ *McGowin v. Howard*, 246 Ala. 553, 21 So. (2d) 683 (1945); *Powell v. Langford*, 58 Ariz. 281, 119 P. (2d) 230 (1941); *Crisp v. Wright*, 56 Ga. App. 338, 192 S. E. 390 (1937); *Krausnick v. Haegg Roofing Co.*, 236 Iowa 985, 20 N. W. (2d) 432, 163 A. L. R. 1414 (1945); *Owensboro Undertaking & Livery Ass'n v. Henderson*, 273 Ky. 112, 115 S. W. (2d) 563 (1938); *Slaughter v. Holsomback*, 166 Miss. 643, 147 So. 318 (1933).

¹¹ *Chaney v. Duncan*, 194 Ark. 1076, 110 S. W. (2d) 21 (1937); *Brady v. B. & B. Ice Co.*, 242 Ky. 138, 45 S. W. (2d) 1051 (1931); *Levy v. McMullen*, 169 Miss. 659, 152 So. 899 (1934); *McIlroy v. Akers Motor Lines*, 229 N. C. 509, 50 S. E. (2d) 530 (1948); *V. L. Nicholson Construction Co. v. Lane*, 177 Tenn. 440, 150 S. W. (2d) 1069 (1941); *Crowell v. Duncan*, 145 Va. 489, 134 S. E. 576 (1926). But see *Fisher*

The attendant liability may rest on one or more of a variety of theories such as the negligent entrustment of a potentially dangerous instrument,¹² the conversion of a non-dangerous instrumentality into a potentially dangerous one by placing it in the hands of an incompetent person,¹³ or one likely to become incompetent;¹⁴ or else for fault in not taking active steps to prevent use of the automobile,¹⁵ particularly by a reckless minor child.¹⁶ Some courts, including those of Kentucky,¹⁷ have seized upon the "family purpose" doctrine with its fictional agency concept¹⁸ as a means of attaching liability,¹⁹ but that theory is apt to prove unavailable in cases involving adult children²⁰ or those not living at home.²¹ Only one state, Florida, has developed anything like a truly "dangerous instrumentality" rule,²² but others have achieved a similar result by the adoption of "strict liability" statutes.²³ Before returning to

v. Fletcher, 191 Ind. 529, 133 N. E. 834, 22 A. L. R. 1392 (1922), where it was held that mere knowledge of a driver's habit of becoming intoxicated would not impose liability on the owner if, at the time the driver was given possession of the vehicle, the driver did not appear to be intoxicated or otherwise unable to exercise care.

¹² Rocca v. Steinmetz, 61 Cal. App. 102, 214 P. 237 (1923).

¹³ Owensboro Undertaking & Livery Ass'n v. Henderson, 273 Ky. 112, 115 S. W. (2d) 563 (1938); Krausnick v. Haegg Roofing Co., 236 Iowa 985, 20 N. W. (2d) 432, 163 A. L. R. 1414 (1945).

¹⁴ V. L. Nicholson Company v. Lane, 177 Tenn. 440, 150 S. W. (2d) 1069 (1941). See also annotation in 168 A. L. R. 1376.

¹⁵ Dicranian v. Foster, 114 Vt. 372, 45 A. (2d) 650 (1946); Crowell v. Duncan, 145 Va. 489, 134 S. E. 576 (1926).

¹⁶ Bock v. Sellers, 66 S. D. 450, 285 N. W. 437 (1939). But see Union Bank of Chicago v. Kalkhurst, 265 Ill. App. 254 (1932), to the effect that parental liability had to be predicated on a showing that the minor, a sixteen-year old girl, was incompetent. See also Bensman v. Reed, 299 Ill. App. 531, 20 N. E. (2d) 910 (1939), which recapitulates the rules under consideration.

¹⁷ Wells v. Lockhart, 258 Ky. 698, 81 S. W. (2d) 5 (1935).

¹⁸ In King v. Smythe, 140 Tenn. 217 at 226, 204 S. W. 296 at 298 (1918), the court said: "We think the practical administration of justice between the parties is more the duty of the court than the preservation of some esoteric theory concerning the law of principal and agent."

¹⁹ The opinion in McDowell v. Hurner, 142 Ore. 611, 20 P. (2d) 395 (1933), lists the states which have accepted or rejected the doctrine. See also cases cited in annotations in 64 A. L. R. 844, 88 A. L. R. 601, 100 A. L. R. 1021, 132 A. L. R. 981, and in note in 33 Ky. L. J. 156.

²⁰ United States Fidelity & Guaranty Co. v. Hall, 237 Ky. 393, 35 S. W. (2d) 550 (1931). But see contra, Hubert v. Harpe, 181 Ga. 168, 182 S. E. 167 (1935).

²¹ Creaghead v. Hafele's Administrator, 236 Ky. 250, 32 S. W. (2d) 997 (1930).

²² Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629 (1920), noted in 5 U. of Fla. L. Rev. 414. Rossman, J., in a specially concurring opinion in McDowell v. Hurner, 142 Ore. 611, 20 P. (2d) 395 (1933), commended the Florida court for applying the doctrine it did instead of resorting to the agency camouflage upon which the family purpose doctrine rests.

²³ D. C. Code Ann. 1951, Tit. 40, Ch. 4, § 40-403; Deering Cal. Vehicle Code Ann. 1948 (1951 Supp.), Div. VII, Ch. 1, § 402; Ida. Code Ann. 1948 (1951 Supp.), Vol. 9, Tit. 49, Ch. 10, § 1004; Iowa Code Ann. 1946 (1952 Supp.), Vol. 15, Ch. 321, § 321.493; Mich. Rev. Stats. Ann. 1952, Vol. 8, Tit. 9, Ch. 75b, § 9.2101; Minn. Stats. Ann. 1945 (1952 Supp.), Vol. 12, Ch. 170, § 170.54; McKinney's Const. Laws N. Y. Ann. 1952, Vol. 62A, Ch. 71, § 59; R. I. Gen. Laws Ann. 1938, Ch. 98, § 10.

the instant case, it might also be noted that courts confronted with a vast number of suits seeking recovery for death and injuries occasioned by the negligent operation of automobiles have not been unwilling to extend common law principles regarding the agency relationship beyond their normal scope in order to facilitate a recovery.²⁴

Kentucky law being what it was, the plaintiff in the instant case was forced to rely heavily on language to be found in the Restatement of Torts, as quoted above,²⁵ but was met by an assertion that the suggested rule was to be limited in its application to cases of agency and bailment. The basis for this limitation was said to lie in the fact that the explanatory illustrations accompanying the text were believed to be similarly confined. Actually, one of the cases considered, that of *Rounds v. Phillips*,²⁶ held that title to the automobile was not conclusive but that a father who had power to permit or prohibit the use of an automobile could be held concurrently liable for damage caused by an incompetent minor son although the title thereto had been transferred from the incompetent to his mother before the accident. In another case, that of *Toole v. Morris-Webb Motor Company*,²⁷ the court applied the Restatement principle to a dealer who had loaned his license plates to a buyer of a car whom he knew was incompetent to drive it. The charge there made against the dealer necessarily rested on his antecedent negligence in giving the license plates to the vendee rather than on a bailment or agency relationship for there could be no valid loan or bailment of the plates and the vendee was the *sui juris* owner in full control and possession of the car at the time the accident occurred. The majority of the court in the instant case also apparently ignored a statement there made to the effect that one who makes it "possible for another to drive an automobile through the streets of a populous city knowing that he is incapable of doing so is, at least, as culpable as one who rents an automobile to a drunken driver."²⁸

The New York law, as expressed in *Golembe v. Blumberg*,²⁹ also appeared, at one time, to follow the Restatement principle for it was there decided that a complaint against a father charging that he had knowingly bought an automobile for his epileptic adult son stated a cause of action for damages which ensued as a result of the son's negligent driving. In the later case of *Bugle v. McMahon*,³⁰ however, one which reversed a trial

²⁴ See, for example, *Parotto v. Standard Paving Company*, 345 Ill. App. 486, 104 N. E. (2d) 102 (1952), noted in 30 CHICAGO-KENT LAW REVIEW 370.

²⁵ See note 2, ante.

²⁶ 166 Md. 151, 170 A. 532 (1934), affirmed in 168 Md. 120, 177 A. 174 (1935).

²⁷ 180 So. 431 (La. App., 1938), reversed on other grounds in 195 So. 863 (La. App., 1940).

²⁸ 180 So. 431 at 434.

²⁹ 262 App. Div. 759, 27 N. Y. S. (2d) 692 (1941).

³⁰ 265 App. Div. 830, 37 N. Y. S. (2d) 540 (1942, reversing 35 N. Y. S. (2d) 193 (1942)).

court ruling based on the Golembe decision, the suit was directed against a father who had given a car, or funds with which to purchase a car, to a son known to be reckless and to have an inclination to overindulge in intoxicating liquor, but the cause of action was said to be defective in that it failed to allege any causal connection between the accident and the conduct of the father-appellant and also because the fact of gift to, or purchase by, the other defendant was equally consistent with liability or non-liability.

On the basis of this conflict, the majority of the court concerned with the instant case preferred to follow the holding in the case of *Shipp v. Davis*,³¹ one which supports the proposition that a person who is not in actual control of property is not liable for negligent injury arising from the use thereof, except in specific instances such as the sale and delivery of machinery with latent defects. It was there ruled that a father who had bought a car for an adult son, knowing at the time of the purchase and at the time of the accident that the son drank intoxicants to excess, was not liable for damages incurred as a result of the son's negligent operation of the automobile inasmuch as the father had no legal control over the son as to bring into action the doctrine of *respondeat superior* or to call for an application of the maxim *qui facit per alium*.

But the validity of this approach, one making ownership a matter of crucial importance, is not one to be sustained in principle for the authorities generally are in accord with the proposition that the owner's liability is not based upon the fact of his ownership but upon his concurrent negligence in entrusting his car to an incompetent driver.³² If, then, liability is not to be based upon ownership *per se*, the conclusion of the majority in the instant case to the effect that the mother absolved herself from liability by transferring ownership to her incompetent son seems to be a conclusion unsupported by logic or reason. Since the habit of drink produces the most dangerous sort of incompetence, and the delivery of an automobile into the hands of an incompetent driver converts it into an instrument of the most dangerous kind, it appears unreasonable to conclude that a mere transfer of title to a child, of whatever age, should excuse a parent's negligence in placing an automobile in the hands of one who is not only a user of intoxicating liquor to excess but who is, in addition, a narcotic addict.³³

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³¹ 25 Ala. App. 104, 141 So. 366 (1932).

³² See cases listed in note 7, ante.

³³ If there can be justification for the decision reached in the instant case, it could rest only in the fact that there was no allegation that the driver, at the time of the accident, was under the influence of liquor or narcotics. The record also failed to show the interval of time between the gift of the car and the accident. As a consequence, the issue relating to causal connection was not sharply defined.

BILLS AND NOTES—PAYMENT AND DISCHARGE—WHETHER INTENTIONAL DESTRUCTION OF VALUABLE BONDS UPON MISTAKEN BELIEF OF WORTHLESSNESS OPERATES TO DISCHARGE THE DEBT EVIDENCED THEREBY—The undisputed facts in the case of *State Street Trust Company v. Muskogee Electric Traction Company*¹ posed a highly significant question in the field of negotiable instruments law. It appeared therein that Mrs. Twombly had been the holder of certain bearer bonds of the defendant corporation which bonds had been in default, both as to principal and interest, for six years. Upon being advised by a representative of the plaintiff² that the bonds were valueless, Mrs. Twombly burned them. Ten years later, while the defendant was in process of reorganization, it was discovered that the bonds actually possessed value so an application was made for the payment thereof, pursuant to the terms of the reorganization, which application was accompanied by the tender of an indemnity bond. When defendant refused to make payment in the absence of a court order on the point, suit was brought to recover the value arising under the corporate reorganization. The trial court, on the theory that the evidence relating to the intentional destruction raised a presumption with regard to an intentional cancellation of the indebtedness which plaintiff had not rebutted, found for the defendant. Upon appeal to the United States Court of Appeals for the Tenth Circuit, the judgment was there affirmed.

Determination of the effect to be given to an intentional destruction of a negotiable instrument by the holder thereof calls into play certain portions of the Uniform Negotiable Instruments Act³ as well as a consideration of the cases arising thereunder. Three provisions in particular are controlling.⁴ The first states that "a negotiable instrument is discharged by the intentional cancellation thereof by the holder."⁵ While, in the Tennessee case of *Hensen v. Hensen*,⁶ where notes were burned by an agent of the payee, it was held that the mere intentional destruction of an instrument was enough to discharge, many of the earlier cases would appear to require a coupling of the act of destruction with an intention on the part

¹ 204 F. (2d) 920 (1953). Pickett, J., wrote a dissenting opinion.

² After institution of suit, the trust company, as conservator of Mrs. Twombly's estate, was substituted as plaintiff.

³ While the instant case dealt with corporate bonds, the principles expressed would apply to other forms of negotiable paper. For the extent to which the Uniform Negotiable Instruments Act has been adopted, see 5 U. L. A. xiii. The British Bills of Exchange Act, 45 & 46 Vict., c. 61, is comparable thereto. As to whether state court decisions interpreting the statute have controlling effect on federal courts, see *Clearfield Trust Co. v. United States*, 318 U. S. 363, 63 S. Ct. 573, 87 L. Ed. 838 (1943).

⁴ 5 U. L. A., Part 2, §§ 119(3), 122, and 123. An identical text is reproduced in Ill. Rev. Stat. 1953, Vol. 2, Ch. 98, §§ 118(3), 143, and 144.

⁵ 5 U. L. A., Part 2, § 119(3); Ill. Rev. Stat. 1953, Vol. 2, Ch. 68, § 118(3).

⁶ 151 Tenn. 137, 268 S. W. 378, 37 A. L. R. 1131 (1925).

of the holder to make a gift to the debtor.⁷ Since the adoption of this provision, however, the element of gift seems to have disappeared from the law, the voluntary destruction alone being sufficient to discharge the debt. Such, at least, was the view taken in the Michigan case of *McDonald v. Loomis*,⁸ an action brought by the executor of the payee against the maker where the notes could not be found and there was some evidence they had been destroyed, and this position has been reaffirmed in other cases on the theory that a negotiable instrument is to be regarded as something more than the mere evidence of a debt,⁹ it often being regarded as the debt itself.

Although it might seem to be an extremely harsh position to take that the destruction of the physical *res* should operate to destroy the legal relation which it induces,¹⁰ there would appear to be ample reason for this position. That reason was succinctly stated, in the New Jersey case of *Vanauken v. Hornbeck*,¹¹ where the court said: "To permit a party intentionally to destroy his bond, note, or other security, and then come into court, in any form of action, and recover the debt or demand, of which the destroyed instrument was the best and proper evidence, would open a door to frauds without number—there may be memorandums, indorsements, attesting witnesses, or matters apparent on the face of the instrument very important to the rights of the other party; and to get rid of which may be the motive for carelessness or destruction."¹² It would, then, appear to be the law, under Section 119(3), that the act of voluntarily destroying an instrument which is the highest type of evidence serves to establish an intention to discharge and cancel the debt, any other purpose or intent, beyond the intent to destroy, being immaterial.¹³

The next question to be considered is whether other portions of the Uniform Negotiable Instruments Act may operate to withdraw from a

⁷ See, for example, *District of Columbia v. Cornell*, 130 U. S. 655, 9 S. Ct. 694, 32 L. Ed. 1041 (1888); *Sullivan v. Shea*, 32 Cal. App. 369, 162 P. 925 (1916); *Ross v. Walker*, 44 Fla. 704, 32 S. 934 (1902); *Conner v. Martin*, 46 Ind. App. 143, 92 N. E. 3 (1910); *Darland v. Taylor*, 52 Iowa 503, 3 N. W. 510, 35 Am. Rep. 285 (1879); *Denunzio v. Schlotz*, 117 Ky. 182, 77 S. W. 715 (1903); *Montgomery v. Schwald*, 177 Mo. App. 75, 166 S. W. 831 (1914); *Kester v. Kester*, 33 Ore. 10, 62 P. 635 (1900). It should be noted that a majority of these cases were decided before the enactment of the uniform statute.

⁸ 233 Mich. 174, 206 N. W. 348 (1925).

⁹ *Booth v. Smith*, 2 Fed. Cas. No. 1,649 (1876); *Norton v. Smith*, 130 Me. 58, 153 A. 886 (1931); *Larkin v. Hardenbrook*, 90 N. Y. 333, 43 Am. Rep. 176 (1882).

¹⁰ *Larkin v. Hardenbrook*, 90 N. Y. 33, 43 Am. Rep. 176 (1882). But see *Gardner v. Rutherford*, 57 Cal. App. (2d) 874, 136 P. (2d) 48 (1943), where it was held that the physical destruction of a note did not operate to discharge the debt when, by agreement of the parties, the debt was carried on the books as an account.

¹¹ 14 N. J. L. 178, 25 Am. Dec. 509 (1833).

¹² 14 N. J. L. 178 at 182, 25 Am. Dec. 509 at 512.

¹³ *Larkin v. Hardenbrook*, 90 N. Y. 333, 43 Am. Rep. 176 (1882). See also *In re Lock's Will*, 187 Misc. 535, 64 N. Y. S. (2d) 206 (1946).

voluntary destruction the effect given to it by Section 119(3). In that connection, Section 122 purports to require a delivery of the instrument to the primary debtor, or an express renunciation in writing, before there is a discharge of the obligation.¹⁴ It has been said, however, that these requirements are not to be construed so as to exclude other methods of discharge.¹⁵ As this view is borne out in the applicable decisions,¹⁶ it would follow that a discharge in the fashion contemplated by Section 119(3) is not affected by anything contained in Section 122.

The third section, being Section 123, states in substance that an unintentional cancellation, or one made under a mistake, is inoperative but the burden is on the holder to overcome the presumption arising from an apparent cancellation of the instrument sued upon.¹⁷ Serving to illustrate the meaning of this section is the Virginia case of *Jones Administrators v. Coleman*¹⁸ where it appeared that the date and the signature of the maker of a note had been obliterated by fire, the same means used to destroy the bonds in the instant case. The presumption being that the burning had been intentional in character and done for the purpose of cancelling the instrument,¹⁹ the burden was placed on the holder to prove the contrary.²⁰ In the event sufficient proof can be offered to overcome the presumption of cancellation, the unintentionally cancelled instrument is removed from the effect of Section 119(3) and the debt is not discharged.²¹

No doubt the problem which confronted the court in the case at hand was a difficult one. Unquestionably, the holder did not intend to produce a discharge of the debt when she burned the bonds. But the destruction was intentional and the case was not one in equity, so the court had no choice but to apply the prevailing law. So doing, it reached the only logical conclusion possible on the facts before it.

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¹⁴ 5 U. L. A., Part 2, § 122; Ill. Rev. Stat. 1953, Vol. 2, Ch. 98, § 143.

¹⁵ 10 C. J. S., Bills and Notes, § 475, pp. 1035-6; 8 Am. Jur., Bills and Notes, § 787, p. 442.

¹⁶ *Wilkins v. Skoglund*, 127 Neb. 589, 256 N. W. 31 (1934); *Hensen v. Hensen*, 151 Tenn. 137, 268 S. W. 373, 37 A. L. R. 1131 (1925).

¹⁷ 5 U. L. A., Part 2, § 123; Ill. Rev. Stat. 1953, Vol. 2, Ch. 98, § 144.

¹⁸ 121 Va. 86, 92 S. E. 913 (1917).

¹⁹ There was no question, in the instant case, over the point as to whether or not the fire was deliberately, rather than accidentally, applied to the bonds, hence Section 123 was regarded as being inapplicable.

²⁰ See also the related cases of *Clarendon County v. Curtis*, 46 F. (2d) 888 (1931); *Black v. Meyer*, 204 Cal. 504, 269 P. 173 (1928); *Morris v. Reyman*, 55 Ind. App. 112, 103 N. E. 423 (1913); *In re Philpott's Estate*, 169 Iowa 555, 164 N. W. 167, Ann. Cas. 1917B 839 (1917); *Alger v. Stewart*, 222 Mo. App. 1003, 7 S. W. (2d) 470 (1928); *McCormick v. Shea*, 50 Misc. 592, 99 N. Y. S. 467 (1906).

²¹ The case of *Molsons Bank v. Berman*, 224 Mich. 606, 195 N. W. 75, 35 A. L. R. 1289 (1923), holds that an accidental or unintentional loss or destruction of an instrument does not change the obligation of the parties thereto as the note is but evidence of the debt, which still exists despite the loss.

COURTS — UNITED STATES COURTS — WHETHER TERMS OF FEDERAL VENUE STATUTE ARE WAIVED BY NON-RESIDENT MOTORIST SERVED WITH PROCESS PURSUANT TO APPLICABLE STATE LAW—The relationship existing between a state statute providing for service on a non-resident motorist and a federal statute relating to venue became the question for adjudication in the recent United States Supreme Court case of *Olberding v. Illinois Central Railroad Company, Inc.*¹ The action was one brought by an Illinois railroad corporation against a resident of Indiana for damage arising out of the operation of defendant's truck on temporary business in Kentucky, where the accident occurred. Suit was begun in a federal district court sitting in Kentucky on the ground of diversity of citizenship and service was obtained on the defendant in accordance with the terms of a Kentucky statute.² Despite defendant's special appearance and motion to dismiss on the ground of improper venue,³ the case went to trial and resulted in a verdict and judgment for plaintiff, which judgment was affirmed by the Court of Appeals for the Sixth Circuit. Noting a conflict on the point between certain of the circuits,⁴ the Supreme Court granted certiorari and thereafter reversed the lower court holdings. It conceded that a non-resident who gives actual consent to service of process, as by way of designating a personal agent upon whom summons might be served, may thereby be waiving any right to question venue,⁵ but it refused to extend the doctrine to cases arising under the typical non-resident motorist statute. In that connection, the court said jurisdiction was neither predicated on actual consent nor on the fiction of implied consent but rather rested on a foundation sufficient to satisfy due process requirements regardless of consent. Such being the case, there was no basis for any inference that, by operating a vehicle, the defendant consented to waive federal venue requirements.⁶

1 — U. S. —, 74 S. Ct. 83, 98 L. Ed. (adv.) 7 (1953), reversing 201 F. (2d) 582 (1953). Mr. Justice Reed, with whom Mr. Justice Minton joined, wrote a dissenting opinion.

2 Ky. Rev. Stat. 1953, § 188.020 et seq. The provisions thereof are comparable to Ill. Rev. Stat. 1953, Vol. 2, Ch. 95½, § 23.

3 Defendant relied on 28 U. S. C. A., § 1391(a), which confines suits based on diversity of citizenship to "the judicial district where all plaintiffs or all defendants reside."

4 Compare the instant case with the holding of the Third Circuit in *McCoy v. Siler*, 205 F. (2d) 498 (1953), and that of the First Circuit in *Martin v. Fishbach Trucking Co.*, 183 F. (2d) 53 (1950).

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

6 Mr. Justice Reed, on the other hand, said he could see no substantial difference between the signing of a paper designating an agent for service of process and the acceptance of the Secretary of State as agent for the same purpose arising from the non-resident's action in driving a motor car or in using the highways of a foreign state. He relied, for analogy, on the case of *Knott Corp. v. Furman*, 163 F.

The question as to whether a non-resident waives the federal venue privilege could only be resolved by a determination of the basis for jurisdiction under a non-resident motorist statute. As the Supreme Court of the United States has determined that a non-resident waives objection to venue where jurisdiction is based on his actual consent to service of process by designating a personal agent therefor,⁷ venue would of necessity be deemed waived if jurisdiction were to be predicated on the fiction of implied consent.⁸ Such result would flow from the fact that jurisdiction in diversity cases is reserved to the district of residence of either plaintiff or defendant purely as a matter of convenience to the litigant, hence may be waived by him either expressly or impliedly.⁹ On the other hand, as indicated in the instant case, if such jurisdiction were to have as its foundation the power of the state to enact reasonable legislation in order to protect the rights of its citizens, no implication of waiver could arise.

It is clear that, at the outset, the "consent" concept played an important part in supporting service statutes of the kind here considered. The first break came with the case of *Hess v. Pawloski*¹⁰ wherein the mere operation of a motor vehicle by a non-resident was treated as the equivalent of an appointment of the registrar of motor vehicles as attorney for service of process in accordance with the terms of a Massachusetts statute.¹¹ Prior thereto, the Supreme Court had found constitutional a cumbersome statute making registration by non-resident motorists mandatory,¹² but the *Hess* case provided the first occasion to determine the validity of a statute providing for jurisdiction over the non-resident by reason of the mere operation of a motor vehicle within the state by him. The court, while acknowledging that a state could not exclude non-resident individuals under the Fourteenth Amendment, upheld the right of the state to regulate the use of its highways in the public interest so as to promote care on the part of residents and non-residents alike, thereby creating an equality between them. The court, emphasizing the adherence given to due process

(2d) 199 (1947), involving a suit by a Massachusetts resident against a Delaware corporation, begun in a federal court sitting in Virginia, where the cause of action arose, in which service was obtained in a fashion consonant with Ill. Rev. Stat. 1953, Vol. 1, Ch. 32, § 157.111.

⁷ *Neirbo Co. v. Bethlehem Corp.*, 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167 (1939).

⁸ See *Steele v. Dennis*, 62 F. Supp. 73 (1945), and *Krueger v. Hider*, 48 F. Supp. 708 (1943).

⁹ In *Commercial Casualty Ins. Co. v. Consolidated Stone Co.*, 278 U. S. 177, 49 S. Ct. 98, 73 L. Ed. 252 (1929), a failure to assert the venue privilege accorded by 28 U. S. C. § 112 within the time allotted for entering a general appearance and challenging the merits was held to constitute a waiver of objection to venue. See also *Camp v. Gress*, 250 U. S. 308, 39 S. Ct. 478, 63 L. Ed. 997 (1919).

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

¹¹ Mass. Acts 1923, Ch. 431, § 2. See Mass. Ann. Laws 1946, Ch. 90, § 3A.

¹² *Kane v. State of New Jersey*, 242 U. S. 160, 37 S. Ct. 30, 61 L. Ed. 222 (1916).

requirements by provision for notice¹³ and reasonable opportunity to establish a defense, gave credence to the fiction of implied consent.

From then on, the principal issues dealt more with construction and scope rather than constitutionality. Thus, the broad term "non-resident," employed in the typical non-resident motorist statute, made the question of coverage one of interpretation. In a suit against the personal representative of a deceased non-resident motorist,¹⁴ the court held that the jurisdiction of the state court was acquired by the consent of the decedent and that he had made that consent binding upon his administrator. This utilization of the fiction of consent has met with opposition,¹⁵ but it appears that, in the event a statute should expressly provide that the action may be instituted against the personal representative, such a provision would be valid.¹⁶ It might also be noted that, in the case of *Jones v. Pebler*,¹⁷ the Illinois Supreme Court interpreted the Illinois statute¹⁸ so as to prevent it being limited to non-resident natural persons by saying that it extended to every non-resident, individual or corporate, owner or non-owner, using and operating a motor vehicle over the state highways.

A shift in emphasis may have been indicated at the time of the decision in the case of *International Shoe Company v. State of Washington*.¹⁹ The question there was one as to whether or not a Delaware corporation had established sufficient contacts with the State of Washington to render it amenable to proceedings in the courts of that state to recover unpaid contributions to the state unemployment compensation fund. The court was of the opinion that in some cases, where the legal fiction of consent was attributed to corporations, the authorized acts were such as to justify the fiction.²⁰ It might be argued that the nature of the act of operating a

¹³ See *Wuchter v. Pizzuti*, 276 U. S. 13, 48 S. Ct. 259, 72 L. Ed. 446 (1928), wherein, for failure to provide for notice, the statute was held unconstitutional, and annotations in 99 A. L. R. 130, 57 A. L. R. 1239, and 35 A. L. R. 951.

¹⁴ *Leighton v. Roper*, 300 N. Y. 434, 91 N. E. (2d) 876, 18 A. L. R. (2d) 537 (1950), noted in 28 CHICAGO-KENT LAW REVIEW 347.

¹⁵ In *Knoop v. Anderson*, 71 F. Supp. 832 (1947), the court held that personal service upon a foreign executor or administrator, while in a state other than the one of his appointment, would not give jurisdiction since an executor or administrator who happens to be personally present in another state is not in that state in his representative capacity.

¹⁶ In *State ex rel. Ledin v. Davidson*, 216 Wis. 216, 256 N. W. 718, 96 A. L. R. 589 (1934), the court, while not actually considering the validity of such an enactment, prescribed a method the legislature could have utilized in expressing its intention to extend substituted service to personal representatives.

¹⁷ 371 Ill. 309, 20 N. E. (2d) 592, 125 A. L. R. 451 (1939), noted in 17 CHICAGO-KENT LAW REVIEW 69.

¹⁸ Ill. Rev. Stat. 1953, Vol. 2, Ch. 95½, § 23.

¹⁹ 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A. L. R. 1057 (1945).

²⁰ *Smolik v. Philadelphia & Reading Coal & Iron Co.*, 222 F. 148 (1915).

vehicle capable of inflicting serious injury and death would also warrant the fiction of consent. The argument loses force, however, if one considers the relationship of the foreign corporation to the state in which it performs the acts. Speaking with respect to this relationship, Mr. Justice Holmes, when upholding a decision from Illinois rejecting the fiction as being applicable to partnerships doing business within the state, declared that the consent "is a mere fiction, founded upon the accepted doctrine that the states could exclude foreign corporations altogether, and therefore could establish this obligation as a condition to letting them in."²¹ The instant case now appears to have carried the sweep of the pendulum to the other extreme, for it declares that attention to the fiction of consent is no longer required.

While service statutes of the kind in question may or may not rest on fictions, it is now clear that any fictional consent manifested thereby will be confined to the element of service, leaving the matter of venue, or other procedural requirements, to be determined by other applicable provisions. Such being the case, a question then arises whether a decision of the kind reached in the instant case may not work to engender other hardships on the plaintiff. Clearly, if neither party to the suit is a resident,²² there is no reason to fear any element of prejudice from recourse to a state court at the place where the events occurred. The converse might be true, however, where the plaintiff is a non-resident and the several defendants include both residents and non-residents²³ for the plaintiff is faced with alternatives, all of which might be productive of dire consequences. He might, for example, sue the non-resident defendants in a federal court of the state in which they reside and maintain a separate suit against the resident defendants in a federal court at the *locus delicti*, yet end up with two adverse verdicts, particularly if the two juries each felt that his true case was against the other group of defendants. On the other hand, if he should choose to sue all of the defendants in a state court located at the scene of the wrong, to have the advantage of local venue provisions, he would forfeit the protection given by the diversity statute, one intended to safeguard him from local prejudice.

Much as the instant decision may have set to rest perplexing problems of enduring quality with regard to service of process on non-residents, it cannot be said to be an entirely helpful one to plaintiffs. If, on the basis of diversity of citizenship, plaintiffs hereafter elect to use federal courts, they must abide by federal rules concerning venue. No state statute could

²¹ Flexner v. Farson, 248 U. S. 289 at 293, 39 S. Ct. 97, 63 L. Ed. 250 at 253 (1919).

²² McCoy v. Siler, 205 F. (2d) 498 (1953). An appeal therein is pending.

²³ Burke v. Greer, 114 F. Supp. 671 (1953).

be validly enacted to overcome this limitation, for a state would be powerless to change federal law.²⁴ Is there not, then, some occasion to consider a change in the federal venue rule itself?

J. F. SHEEN, JR.

CRIMINAL LAW—EVIDENCE—WHETHER EVIDENCE ELICITED BY A FORCEFULLY ADMINISTERED DRUNKOMETER TEST IS ADMISSIBLE IN A CRIMINAL CASE—An energetic drive against intoxicated motorists appears to have given the courts of Arizona a new problem bearing on the admissibility of proof obtained by the use of drunkometer tests. The defendant, in *State v. Berg*,¹ had been arrested by police officers on the belief that he had been operating an automobile while intoxicated. Shortly after the arrest, a breath specimen was forcibly extracted from the defendant² tending to show the presence of a high concentration of alcohol in defendant's blood. An information charging defendant with operating an automobile while under the influence of intoxicating liquor and with reckless driving was thereupon filed and, on trial thereon, the result of the drunkometer test was admitted as the only evidence bearing on the intoxication of the defendant. The trial court then certified questions of law³ requesting that an advisory opinion be rendered (1) on the point of whether or not the result of the drunkometer test was admissible, and (2) whether the manner of acquiring the evidence violated federal and state constitutional rights guaranteed to a defendant.⁴ For answer thereto, the Arizona Supreme Court indicated that the result of the drunkometer test was admissible in evidence, even though the specimen of breath was forcibly taken from the defendant over his objection, provided the force was used to capture exhaled breath after it had passed the lips and nose of the defendant. It also indicated that no violation of constitutional guarantees would be involved as the force thereof was directed against testimonial compulsion extracted from the defendant's own lips, hence was inapplicable to physical demonstrations in the nature of drunkometer tests.

A substantial number of jurisdictions favor the admission of the re-

²⁴ *Murphree v. Mississippi Pub. Corp.*, 326 U. S. 438, 66 S. Ct. 242, 90 L. Ed. 185 (1946).

¹ — *Ariz.* —, 259 P. (2d) 261 (1953).

² It was stipulated that, if certain police officers testified, they would show that the defendant was placed in restraining straps and his head was held at the time the breath specimen was obtained.

³ *Ariz. Code Anno.* 1939, § 44-2401. It is doubtful whether the provision for the certification of a question to the Supreme Court of the state is the same thing as the seeking of an advisory opinion pursuant to constitutional provisions found in some states. For a discussion of this topic, see *Douglas Oil Co. v. State*, 81 S. W. (2d) 1064 (Tex. Civ. App., 1935), and note in 31 *CHICAGO-KENT LAW REVIEW* 141.

⁴ *Ariz. Const.* 1912, Art. II, § 10, is in substance the same as U. S. Const., Amend. 5.

sults of scientific tests to determine the presence of intoxication, whether taken by chemical analysis of blood, urine, or breath, and whether taken voluntarily⁵ or involuntarily administered,⁶ but the increasing popularity⁷ of the drunkometer test⁸ has been due to the measure of convenience in its operation.⁹ As a consequence, the particular test has been used frequently enough to have reached a degree of standardization and general acceptance entitling it to be admitted into evidence,¹⁰ especially since this test not only serves to convict persons under the influence of liquor but also because it operates to free the innocent. A drunken driver may, as the result of an auto crash, be jolted into sobriety, but a crash may also produce stupor, tremors, and other symptoms of intoxication¹¹ on the part of a sober person. Common tests based on simple observation, such as de-

⁵ As to blood tests, see *State v. Duguid*, 50 Ariz. 276, 72 P. (2d) 435 (1936); *People v. Frederick*, 109 Cal. App. (2d) 897, 241 P. (2d) 1039 (1952); and *State v. Werling*, 234 Iowa 1109, 13 N. W. (2d) 318 (1944). Urine tests have been approved in *State v. Slater*, 242 Iowa 958, 48 N. W. (2d) 877 (1951); *City of Columbus v. Glenn*, 60 Ohio L. Abst. 449, 102 N. E. (2d) 279 (1950); *Bovey v. State*, 197 Misc. 302, 93 N. Y. S. (2d) 560 (1949); and *State v. Lopez*, 154 Tex. Crim. App. 227, 225 S. W. (2d) 852 (1949).

⁶ Blood tests were taken while the accused was unconscious, and held admissible over defendant's objection, in *People v. Haeussler*, 41 Cal. (2d) 252, 260 P. (2d) 8 (1953); *Block v. People*, 125 Colo. 36, 240 P. (2d) 512 (1952), cert. den. 343 U. S. 978, 72 S. Ct. 1076, 96 L. Ed. 1370 (1952); *Touchnon v. State*, 154 Fla. 547, 18 So. (2d) 752 (1944); *State v. Ayres*, 70 Ida. 18, 211 P. (2d) 142 (1949); and *State v. Cram*, 176 Ore. 577, 160 P. (2d) 283, 164 A. L. R. 952 (1945).

⁷ A 1951 report by the National Safety Council reveals that law enforcement agencies in forty-two states used chemical tests to take the guess-work out of judging whether or not a driver was under the influence of liquor. See McKinney's N. Y. Sess. Law Service 1953, No. 4, at p. A-169.

⁸ Developed by Dr. R. H. Harger, in 1938, and described in 35 J. of Crim. Law and Criminology 202 (1944). See also note entitled "A Rapid Chemical Test for Intoxication Employing the Breath," in 110 J. Am. Med. Ass'n 779 (1938).

⁹ The suspected person is not required to perform any voluntary act. As the breath leaves the mouth or nose, the apparatus draws the expelled air into a rubber bladder. The air is then forced through a solution of potassium in the presence of sulphuric acid. If an alcoholic content is present, a change in color results. For a scientific discussion, see Harger, "Debunking the Drunkometer," 40 J. of Crim. Law and Criminology 497 (1949).

¹⁰ In general, see annotations in 159 A. L. R. 209, particularly p. 225, and in 127 A. L. R. 1519. But see contra, *People v. Morse*, 325 Mich. 270, 38 N. W. (2d) 322 (1949), where the court, in a prosecution for negligent homicide, held the breath test, as applied by the Harger Drunkometer, would not afford an accurate index of the alcoholic content of the blood. Similar results have been achieved in *State v. Toms*, 239 P. (2d) 820 (Okla., 1952); *Halloway v. State*, 146 Tex. Crim. App. 353, 175 S. W. (2d) 258 (1943); *Omohundro v. Arlington County*, 149 Va. 773, 75 S. E. (2d) 499 (1953). In a Canadian civil case, where an insurance company attempted to prove intoxication on the part of the assured so as to avoid liability on a policy on his life, the court expressed doubt as to the weight to be given to an analytical test showing alcohol in the blood in the absence of proof of outwardly recognizable symptoms of intoxication: *Earnshaw v. Dominion of Canada Gen. Ins. Co.* [1943], Ont. Rep. 385, 3 D. L. R. 163 (1943).

¹¹ Approximately sixty pathological conditions may evidence the possible presence of alcoholism, yet an apparent alcoholic condition might not be due to alcohol at all. A diabetic, for example, in need of, or suffering from an overdose of, insulin may act as if he were intoxicated.

tecting an odor on the breath,¹² impairment of speech and locomotion, or glassiness in the appearance of the eyes, are uncritical tests at best so that judges and juries are hesitant to convict on the basis thereof. The problem of proof thus involved is cured by the obtaining of scientific data, except as constitutional questions may become involved in the admission of the results of such tests.

There appears to be no constitutional problem when the accused person consents to the taking of the test, as in *Spitler v. State*,¹³ for the accused may waive his constitutional protection against self-incrimination.¹⁴ A similar holding was reached by the Appellate Court of Illinois in *State v. Bobczyk*¹⁵ but the court there, basing its decision on a lack of unanimity on the part of the medical profession as to whether or not the presence and degree of intoxication could be determined from a person's breath, raised a question as to the weight rather than the admissibility of the expert testimony.

When issues of compulsion in the administration of intoxication tests have arisen, most courts have tended to evade the question. In *State v. Cram*,¹⁶ for example, a blood test rested on a blood specimen taken from the accused while he was unconscious. The Supreme Court of Oregon held that the taking of the blood sample did not violate a constitutional privilege against self-incrimination as the sample had not been gained by the use of any process directed against the accused as a witness and his testimony was not required to establish the authenticity, identity, or origin of the blood.¹⁷ The court, relying on statements made by Professor Wigmore,¹⁸

¹² This test is particularly unsatisfactory because breath odor is the product of flavoring matter in the liquor consumed and the strength of the odor reveals only the nature of the particular beverage imbibed, not the quantity of alcohol consumed. Recent experiments with chlorophyll indicate that it is possible to produce intoxicating beverages which can be imbibed without leaving a breath odor.

¹³ 221 Ind. 107, 46 N. E. (2d) 591 (1943). This appears to have been the first case of significance arising after the invention of the Harger Drunkometer. The defendant, testifying in his own behalf, admitted that he had not been abused by police officers in any way. The holding therein was followed in *Willennar v. State*, 228 Ind. 248, 91 N. E. (2d) 178 (1950). Parallel cases, waiving the privilege against self-incrimination as to blood tests, are *People v. Frederick*, 109 Cal. App. (2d) 897, 241 P. (2d) 1039 (1952); *Kallnbach v. People*, 125 Colo. 144, 242 P. (2d) 222 (1952); *State v. Sturtevant*, 96 N. H. 99, 70 A. (2d) 909 (1950); *Brown v. State*, 240 S. W. (2d) 310 (Tex. Crim. App., 1951).

¹⁴ The Fifth Amendment privilege against self-incrimination is applicable only in federal proceedings: *Twining v. New Jersey*, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908). Most states, however, have enacted similar provisions except for the states of Iowa and New Jersey.

¹⁵ 343 Ill. App. 504, 99 N. E. (2d) 567 (1951), noted in 30 CHICAGO-KENT LAW REVIEW 188. See also *McKay v. State*, 155 Tex. Crim. 416, 235 S. W. (2d) 173 (1950).

¹⁶ 176 Ore. 577, 160 P. (2d) 283, 164 A. L. R. 952 (1945).

¹⁷ Parallel cases are listed in note 6, ante.

¹⁸ Wigmore, *Evidence*, 3d Ed., Vol. 8, § 2263.

noted that the constitutional privilege was limited to testimonial utterances and to disclosures sought by use of legal processes directed against the accused as a witness. Documents, chattels, or other forms of evidence obtained from a person's control without the use of legal process against him as a witness were said not to be within the scope of the privilege, although they might be protected under other constitutional restraints. Since the privilege against self-incrimination is designed to protect the person from the employment of legal process intended to extract an admission of guilt from the person's own lips, this protection does not extend to cover "real" evidence taken from the accused.¹⁹

While the material basis for the scientific data registered on the drunkometer issues from the lips and nose of the suspected person, it can hardly be placed in the same category as a testimonial utterance from the same lips. This restrictive tendency was confirmed by Mr. Justice Holmes when he wrote: "The prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material."²⁰ It is clear, therefore, that no violation of constitutional right occurred in the instant case if the constitutional issue be confined to questions of self-incrimination.

A seemingly stronger objection to a forcible compulsion in the taking of a drunkometer test, or other chemical test, for the presence of intoxication might appear to lie in the constitutional guarantee against an unreasonable search and seizure.²¹ State cases have held, however, that a forcible search and seizure does not require the exclusion of evidence secured by a compulsory physical examination of the person of the accused, particularly if obtained at the time of a lawful arrest, and so long as the evidence is otherwise relevant and competent such evidence may be

¹⁹ *Block v. People*, 125 Colo. 36, 240 P. (2d) 512 (1952), cert. den. 343 U. S. 978, 72 S. Ct. 1076, 96 L. Ed. 1370 (1952); *State v. Ayres*, 70 Ida. 18, 211 P. (2d) 142 (1949); *State v. Alexander*, 7 N. J. 585, 83 A. (2d) 441 (1951).

²⁰ *Holt v. United States*, 218 U. S. 245 at 252-3, 31 S. Ct. 2, 54 L. Ed. 1021 at 1022 (1910). But see *Apodaca v. State*, 140 Tex. Crim. 593, 146 S. W. (2d) 381 (1941), where a defendant was required to walk, make sudden turns, hold out his hand, make an effort to touch his nose, and also to furnish a urine sample for analysis. He was convicted for murder without malice but the Texas court held error had been committed in admitting evidence of these tests, saying: "Demonstration by an act which tends to self-incrimination is as obnoxious to the immunity guaranteed by the constitution as one by words."

²¹ In *Wolf v. People*, 338 U. S. 25, 69 S. Ct. 1369, 93 L. Ed. 1782 (1949), the applicability of the due process clause of the Fourteenth Amendment to the prohibition contained in the Fourth Amendment was considered. Freedom from unlawful intrusion being there deemed basic to a free society, implicit in the concept of ordered liberty, the Fourth Amendment was declared binding on the states through the due process clause. See also Allen, "The Wolf Case: Search and Seizure, Federalism and the Civil Liberties," 45 Ill. L. Rev. 1 (1950).

admitted without inquiring into its source.²² The rationale for such holdings rests upon the idea that the provision against unlawful search and seizure is designed to protect a person from having his home invaded against his will and without a proper warrant. As this protection deals with things which an individual might possess in the privacy of his home rather than with a prohibition on a disclosure of his personal make-up or physical condition, a blood test or other physical examination of his person would not come within the privilege.

For that matter, in the administration of the drunkometer test, the suspect is not forced to exhale breath from his lungs but rather exhales it voluntarily, in fact of necessity in order to survive. The moment the breath passes his lips, it is no longer his to control but becomes a part of the surrounding atmosphere, equally free for use by anyone present within the orbit of immediate circulation. So long, then, as officers limit their operations to capturing the breath after it leaves the body, they make no invasion of the suspect's person and therefore do not come within the perimeter of the privilege.²³ Furthermore, as the accused would normally be under lawful arrest, a search and seizure of the kind in question would not violate any constitutional guarantee.²⁴

A new type of constitutional objection may, however, have been developed by the decision of the United States Supreme Court in the case of *Rochin v. People of the State of California*.²⁵ In that case, an emetic solution was forced through a tube into the stomach of a defendant, producing vomiting. In the regurgitated matter, two capsules of narcotics were found which capsules were used at the trial to convict the defendant of the crime of possessing narcotic drugs illegally. The question was one as to whether the use of this force in an effort to obtain evidence violated the due process clause. The court, reversing the conviction, described the conduct of the officers as shocking to the conscience, offending even hardened sensibilities. Despite this, the majority, speaking through Mr. Justice Frankfurter, said: "In deciding this case we do not heedlessly bring into question decisions in many States dealing with essentially dif-

²² Annotations on the point appear in 25 A. L. R. (2d) 1407, 159 A. L. R. 209, 127 A. L. R. 1513, 82 A. L. R. 782, and 74 A. L. R. 1387.

²³ By contrast, however, see *State v. Weltha*, 288 Iowa 519, 292 N. W. 148 (1940), where a defendant, indicted for manslaughter while driving in an intoxicated condition, was taken to the hospital while unconscious and not under lawful arrest. An attending physician removed a blood sample which was found to contain alcohol and the product of this act was later admitted in evidence. Held: the removing of the blood sample amounted to an improper search and seizure.

²⁴ *People v. Edge*, 406 Ill. 490, 94 N. E. (2d) 359 (1950); *People v. Tabet*, 402 Ill. 93, 83 N. E. (2d) 329 (1949), cert. den. 336 U. S. 970, 69 S. Ct. 933, 93 L. Ed. 1121 (1949); *People v. Exum*, 382 Ill. 204, 47 N. E. (2d) 56 (1943); *People v. Scaramuzzo*, 352 Ill. 248, 185 N. E. 578 (1933).

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

ferent, even if related, problems. We therefore put to one side cases which have arisen in the State courts through the use of modern methods and devices for discovering wrongdoers and bringing them to book. It does not fairly represent these decisions to suggest that they legalize force so brutal, and so offensive to human dignity in securing the evidence from a suspect, as is revealed by this record.²⁶ It could be said, then, that the forceful administration of a drunkometer test, since it would not smack of the brutality revealed in the Rochin case, would not be open to objection on this score as the individual need only breathe into the instrument.

Still another objection may lie on a claim of physician-patient privilege but the cases differ as to the application of that privilege to this situation. The Supreme Court of Wisconsin, in *City of Racine v. Worteshak*,²⁷ has held that no claim to such a privilege could exist where the physician merely administers the test and, in *Halon v. Woodhouse*,²⁸ the Supreme Court of Colorado rejected the claim of privilege even though the physician who administered the test also provided the accused with other medical relief. These cases were based on the premise that the extrinsic information so gained was not necessary to the successful discharge of the physician's duties to his patient. It is unlikely, therefore, that this objection will prevail to the point where proof of the result of a drunkometer test would have to be excluded.

In an effort to combat the difficulty experienced by police officers and courts on this general subject, a number of states have enacted statutory provisions relating to the employment of chemical tests in cases involving motor vehicles. Of the fifteen states which have enacted such measures,²⁹ six have followed the suggested provisions of Act V of the Uniform Vehicle Code³⁰ while the others vary in some particular. No one of these statutes provides for a compulsory taking of the test, except for

²⁶ 342 U. S. 165 at 174, 72 S. Ct. 205, 96 L. Ed. 183 at 191. Mr. Justice Black, on the other hand, while concurring in the result, wrote: "I think a person is compelled to be a witness against himself not only when he is compelled to testify, but also when, as here, incriminating evidence is forcibly taken from him by a contrivance of modern science." See 342 U. S. 165 at 175, 72 S. Ct. 205, 96 L. Ed. 183 at 191.

²⁷ 251 Wis. 404, 29 N. W. (2d) 752 (1947).

²⁸ 113 Colo. 504, 160 P. (2d) 998 (1945). See also *Richter v. Hoglund*, 132 F. (2d) 748 (1943).

²⁹ The list includes Arizona, Indiana, Maine, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Washington, and Wisconsin. See notes in 51 Mich. L. Rev. 1195 and in 1953 Wis. L. Rev. 351 and 560.

³⁰ These regulations were recommended by the National Committee on Uniform Traffic Laws and Ordinances to take the place of the Uniform Motor Vehicle Act, which has been withdrawn. A bill based thereon, introduced at the 1953 session of the Illinois General Assembly, failed to pass.

a recent New York statute,³¹ but each, rather, directs that no specimen shall be taken without the consent of the accused, and each specifies that a failure to give consent shall not be made known in either civil or criminal cases. Absent such statutes, it would seem, on recapitulation of what has been stated, that the conclusion reached in the instant case is not one that is unsound in law nor one open to violent objection.

L. E. BALOUN

TAXATION—LEGACY, INHERITANCE AND TRANSFER TAXES—WHETHER BENEFITS PAID TO A BENEFICIARY FROM A PENSION FUND ARE SUBJECT TO AN INHERITANCE TAX AS A TRANSFER TAKING EFFECT AT OR AFTER DEATH—By means of the recent case of *In re Daniels*,¹ the courts of Ohio were confronted with an issue of first impression, and one of novel consideration, in that it affected a comparatively new development of the law, to-wit: the profit-sharing and pension trust.² The issue grew out of a probate proceeding and involved the taxability of an amount paid to a decedent's widow from a company profit-sharing and pension trust in which the decedent was a participant. The trust agreement, among other things provided for contributions to be made solely by, and relinquishment of all rights of ownership therein on the part of, the employer. Payments under the trust were to be made to the participating employees on reaching retirement age. In case of death, payments were to go to a designated beneficiary, changeable at will by the participant, or, in absence of designation, to the estate of the participant. The widow, as designated beneficiary, contended that there was no property in the decedent, no transfer, and nothing passing by reason of his death, hence there was nothing to tax. The trial court nevertheless, held that an inheritance tax was due upon the amount paid from the pension fund to the decedent's widow. On her appeal, the Ohio Court of Appeals affirmed the decision, holding that the situation involved a taxable succession under the Ohio inheritance tax statute.³

The court, in order to reach this decision, had to determine two things, to-wit: (1) whether the decedent had a vested property right in the pro-

³¹ New York Motor Vehicle Operators Law, § 71-a, effective July 1, 1953. It provided that any person who operated a motor vehicle should be deemed, by virtue thereof, to have given consent to the taking of an intoxication test. A refusal to submit to the test, when requested, was declared to be a ground for revocation of the license or permit to drive. The statute was declared to be unconstitutional in *Schutt v. MacDuff*, — Misc. —, 127 N. Y. S. (2d) 116 (1954).

¹ 93 Ohio App. 123, 112 N. E. (2d) 56 (1953). Ross, J., wrote a dissenting opinion. Leave to appeal has been granted.

² See Rowe, "Profit-Sharing Plans in Industry," 27 Harv. Bus. Rev. 559 (1949), and Donovan, "A New Approach to the Profit-Sharing Trust," 32 CHICAGO-KENT LAW REVIEW 107 (1954).

³ Ohio Rev. Code 1953, Ch. 5731, § 5731.01 et seq. Compare with Ill. Rev. Stat. 1953, Vol. 2, Ch. 120, § 375.

ceeds of the pension trust so that the passing of this property right to the beneficiary designated by the decedent was, under the taxing statute, a transfer intended to take effect in possession or enjoyment at or after death; and (2) whether the taxing statute in question made provision for the taxing of such benefits from an employee's pension trust. It answered the first question in the affirmative, stating that the designation of a beneficiary by the participant to receive his interest in the fund maturing on his death was ambulatory in character since the participant could change the designation, revoke it entirely, or, in default of designation, be entitled to have the participant's share included as a part of his estate. Having at all times a vested interest in the fund, postponed only as to enjoyment pursuant to the terms of the pension trust, the postponed rights of the participant were to become fixed on death at which time the prior designation of a beneficiary would lose its ambulatory character. Such being the case, the payment to the beneficiary of the participant's interest in the pension fund was regarded as a taxable succession, that is a transfer effective at or after death. On the second point, the court decided that the clear intent of the legislature was to tax all transfer other than those specifically excluded and, there being no such exclusion as to the particular transaction involved, there was no clear reason why it should be classified in any other manner than as a taxable transfer.

A state inheritance tax is not, generally, regarded to be a tax upon property,⁴ as is a real estate or personal property tax, but is considered, instead, to be a tax upon the right to succession or transfer.⁵ In that connection, it has been said that the right of a distributee to the property of a decedent benefactor does not become absolute until such property has first yielded to the state its share of the legacy or inheritance in the form of an inheritance tax.⁶ The basic concept utilized in determining the tax is the transfer of property,⁷ to-wit: some passing of property, or an interest therein, in possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, bargain, sale, or gift by reason of, or upon the death of, the owner.⁸ Included therein would be a transfer intended to take effect, in disposition or enjoyment, at or after death, provided the disposition was one in which the donor retained the economic interest or enjoyment of the property during his life.⁹ By contrast, a bona fide gift

⁴ *State v. Hamlin*, 86 Me. 495, 30 A. 76 (1894).

⁵ *Kocherspeger v. Drake*, 167 Ill. 122, 47 N. E. 321 (1897); *State ex rel. Schwartz v. Ferris*, 53 Ohio St. 314, 41 N. E. 579 (1895).

⁶ *In re Harkness*, 83 Okla. 107, 204 P. 911 (1921).

⁷ *People v. Flanagan*, 331 Ill. 203, 162 N. E. 848 (1928).

⁸ *In re Dolan*, 279 Pa. 582, 124 A. 176 (1924).

⁹ *People v. McCormick*, 327 Ill. 547, 158 N. E. 861 (1928); *In re Atkins*, 129 N. J. Eq. 186, 18 A. (2d) 45 (1941).

or transfer *inter vivos*, not made in contemplation of death, provided it had become completed and immediately effective and no beneficial enjoyment has been reserved to the donor, would not be subject to tax under the statute.¹⁰ The issue advanced in the instant case, therefore, was one as to whether or not the decedent had retained any such interest or enjoyment in the property involved as would make its passage to the beneficiary into a taxable transfer.

Where the participant, as here, retains the right to change the beneficiary, it would appear that the payment of benefits at death to the beneficiary, would be a taxable transfer to take effect in possession and enjoyment at or after death to the same extent as would be the case of a transfer under a revocable trust.¹¹ It might be said that the benefits could be considered as part of the estate of the decedent passing to the beneficiary.¹² But there is some difficulty in bringing transfers effected by pension trusts within the purview of the statute. Where, as in the instant case, the statute refers to a passing of property by deed, grant, or gift made or intended to take effect in possession or enjoyment at or after death, the point could be made that there was no passing of property in that fashion. Instead, all that passed to the beneficiary was a contract right, one which passed at once upon the making of the contract or at the time of designation.¹³ The receipt of the benefits would, on this basis, be by reason of a contract right vested in the beneficiary,¹⁴ involving no current transfer of property or, if a transfer existed, it ran between the beneficiary and the trustees of the pension fund.¹⁵

An additional objection to the imposition of the tax might have been advanced on the theory that the proceeds of a pension trust fund could be assimilated with the insurance situations. When not specifically exempted from taxation, life insurance proceeds payable to a named beneficiary have been held not to be taxable¹⁶ on the basis that the beneficiary of an insurance contract possesses a vested right in the proceeds, which right was acquired at the time the policy was taken out.¹⁷ Applying such reason-

¹⁰ *People v. Moses*, 363 Ill. 423, 2 N. E. (2d) 724 (1936).

¹¹ *Gregg v. Commissioner of Corporations & Taxation*, 315 Mass. 704, 54 N. E. (2d) 169 (1944).

¹² *In re Reed*, 243 N. Y. 169, 153 N. E. 47 (1926).

¹³ See, for example, *In re Estate of Greiner*, 412 Ill. 591, 107 N. E. (2d) 836 (1952), as to money passing by way of settlement in lieu of dower and other property rights adjusted at time of divorce but payable upon death, and *Toulouse v. New York Life Ins. Co.*, 40 Wash. (2d) 538, 245 P. (2d) 205 (1952), noted in 31 CHICAGO-KENT LAW REVIEW 161, as to proceeds of a matured endowment policy assigned to a beneficiary after maturity of the policy.

¹⁴ *Tyler v. Treasurer & Receiver General*, 226 Mass. 306, 115 N. E. 300 (1917).

¹⁵ *Ford v. Mutual Life Insurance Company*, 283 Ill. App. 325 (1938).

¹⁶ See annotation on this point in 118 A. L. R. 324.

¹⁷ *Bullen's Estate*, 143 Wis. 512, 128 N. W. 109 (1910).

ing to situations like the one in the instant case, it could be said that a share in a profit-sharing trust is a form of annuity insurance in which the beneficiary acquires all rights at the time of being designated as beneficiary so that, at the participant's death, there would be no occasion for the imposition of a tax.

The foregoing analogies may appear to be somewhat superficial but this is, in part, due to the paucity of judicial decisions on the point for only one state tribunal has previously adjudicated upon a somewhat similar situation. The Pennsylvania Supreme Court, in the case entitled *In re Dorsey's Estate*,¹⁸ dealt with the levy of a state inheritance tax upon payments made under a pension plan. The decedent had contributed part of his salary to the plan and the employer had made a matching contribution. The fund was invested in the stock of the employing corporation and, at the death of the employee, approximately 1000 shares of stock had been credited to the employee's account under the plan. The decedent had named his sister to be beneficiary to receive the proceeds payable in the event of his death. The court sustained the imposition of an inheritance tax on the ground that, as the decedent had the right, in his lifetime, to withdraw the total amount of the fund credited to him, he had substantial ownership over the shares. By contrast, the decedent in the instant case, prior to retirement, lacked a right to withdraw the funds credited to him. This should have been a distinguishing factor but the court in the instant case failed to see that it was.

There is a possibility that, in view of the state law on the subject, pension benefits or the proceeds of a profit-sharing trust may become subject to a federal estate tax¹⁹ although again there exists a like state of uncertainty. The General Counsel of the Internal Revenue Bureau had, at one time, ruled that benefits to be paid by a company pursuant to a death benefit plan would not be includible in the gross estate of the decedent²⁰ in the event the company had the right to withdraw or modify the plan at any time up until the death of the employe.²¹ The fact that the employee had the right to name and change the beneficiary at any time was not considered important as the decedent was said to have nothing more than an expectancy, which expectancy was not a property right. This ruling was followed in the case of *Dimock v. Corwin*²² where a plan similar to the one in the instant case was presented but with an added feature that

¹⁸ 366 Pa. 557, 79 A. (2d) 259 (1951).

¹⁹ 26 U. S. C. A. § 800 et seq.

²⁰ *Ibid.*, § 811 (a).

²¹ G. C. M. 17817; CB 1937-1, 281.

²² 19 F. Supp. 56 (1937), affirmed in 306 U. S. 363, 59 S. Ct. 551, 83 L. Ed. 763 (1939).

no benefits were to be paid unless the currently designated beneficiary survived the participating employee.

There seems, however, to have been a complete reversal of this position under a new ruling²³ which, stated succinctly, directs that where the employee has the right to designate the beneficiary, the employee, at the time of his death, is to be regarded as being in possession of such rights as would constitute property within the meaning of Section 811(a) of the Internal Revenue Code. There would be fair reason to suppose that the courts will follow that ruling, particularly since, to secure income tax benefits, the property placed in the pension or profit-sharing trust must never be permitted to revert to the employer.

Some justification for the stand taken by the court in the instant case may be said to exist in the light of this recent administrative ruling, but it seems unfortunate that a tax should be imposed when the only connection between the tax and the participant's death is that such death constitutes the temporal point which marks the beginning of the enjoyment of the beneficiary. Could it be said that this is a sufficient connection to justify the imposition of the tax in question? It is hoped that the Supreme Court of Ohio, having the opportunity, will readily supply an answer to this question for the feasibility of many pension and profit-sharing trusts will depend on the answer so given.

R. H. JURCZAKIEWICZ

²³ G. C. M. 27242; CB 1952-1, 160.