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Legeslation and Administration: Federal Rules of Civil Procedure -- Severability of Issues -- Do Separate Trials of Issues of Liability and Damages Violate the Seventh Amendment?

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LEGISLATION AND ADMINISTRATION

FEDERAL RULES OF CIVIL PROCEDURE — SEVERABILITY OF ISSUES — DO SEPARATE TRIALS OF ISSUES OF LIABILITY AND DAMAGES VIOLATE THE SEVENTH AMENDMENT? — Plaintiff brought an action for personal injuries sustained when he was struck by defendant's train. The trial court, *sua sponte,* ordered, over the objections of counsel for both parties, separate trial of the issues of liability and damages. Judgment was entered upon a verdict for defendant on the issue of liability. Plaintiff appealed on the ground, *inter alia,* that separation of the issues deprived him of a jury trial guaranteed by the seventh amendment to the United States Constitution. *Held:* affirmed. The seventh amendment does not prevent the adoption of new procedural forms as long as the essential character of trial by jury is preserved. *Hosie v. Chicago & N. W. Ry. Co.,* 282 F.2d 639 (7th Cir. 1960).

The action of the trial judge was taken under authority of the recently adopted Rule 21 of the United States District Court for the Northern District of Illinois, Eastern Division:

> Pursuant to and in furtherance of Rule 42(b), Federal Rules of Civil Procedure, to curtail undue delay in the administration of justice in personal injury and other civil litigation wherein the issue of liability may be adjudicated as a prerequisite to the determination of any and all other issues, in jury and non-jury cases, a separate trial may be had upon such issue of liability, upon motion of any of the parties or at the Court's direction, in any claim, cross-claim, counterclaim or third-party claim. . . .[1]

The rule was adopted in an effort to reduce the backlog of cases caused by the great increase, in recent years, of personal injury litigation.[2] Rule 83 of the Federal Rules of Civil Procedure empowers district courts to make rules for their practice, to the extent that such rules are not inconsistent with the Federal Rules. The local rule here is said to be consistent with rule 42(b) of the Federal Rules which provides:

> The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

The liberality of the federal rules with respect to joinder of actions and assertion of defendant's claim is complemented by this provision allowing judges to order separate trial of issues where convenient or necessary to avoid prejudice.[3]

Rule 42(b) has often been applied in actions for damages for personal injuries wherein a release is pleaded as a defense either for the sake of convenience,[4] or to avoid prejudice.[5] Motions are often made for the separate trial of the issues of jurisdiction,[6] laches,[7] and the running of the statute of limitations.[8] The separation will not be granted unless the issue sought to be separately tried can be proved apart from the other issue or issues.[9] The exercise of rule 42(b) "rests in

1 N.D. ILL. R. 21. The rule also provides that the judge may order, where liability is sustained, trial on any or all of the remaining issues before the same or a different jury.

2 See Miner, *Court Congestion: A New Approach,* 45 A.B.A.J. 1265 (1959).

3 5 MOORE, FEDERAL PRACTICE 1211 (2d ed. 1951).

4 Holt v. Granite City Steel Co., 22 F.R.D. 65 (E.D. Ill. 1957); Kiloski v. Pennsylvania R.R., 103 F. Supp. 390 (D. Del. 1952); Ross v. Service Lines, 31 F. Supp. 871 (E.D. Ill. 1940).

5 Bowie v. Sorrell, 113 F. Supp. 373 (W.D. Va. 1953); Larsen v. Powell, 16 F.R.D. 322 (D. Colo. 1954). *But see* Grissom v. Union Pac. R.R., 14 F.R.D. 263 (D. Colo. 1953).

6 Technical Tape Corp. v. Minnesota Mining & Mfg. Co., 117 F. Supp. 355 (S.D.N.Y. 1953); Carr v. Beverly Hills Corp., 237 F.2d 323 (9th Cir. 1956).

7 Greenspon v. Parke, Davis & Co., 8 F.R.D. 485 (S.D.N.Y. 1948).

8 Drake v. Ming Chi Shek, 155 F. Supp. 345 (D.N.J. 1957).

9 "There is . . . no issue of liability separate and apart from the claimed damages." McClain v. Socony-Vacuum Oil Co., 10 F.R.D. 261, 262 (S.D. Mo. 1950) (action for triple damages for conspiracy in restraint of trade).

> [T]he ground of action is fraud. . . . An indispensable element of a cause of action for fraud is damages. . . . In other words, fraud in the abstract does not give rise to a claim. It is only fraud causally connected to a claim which is the basis of an action. United States *ex. rel.* Rodriguez v. Weekly Publications Inc., 9 F.R.D. 179, 180 (S.D.N.Y. 1949).

the sound discretion of the trial judge."[10] But, it has been said, in the exercise of such discretion a trial judge should be mindful that

> [W]ithin the thought of the Rules as a whole, and as a procedural charter, there is an impalpable suggestion that, in default of controlling considerations to the contrary, a single submission of all the issues in a civil action shall be favored rather than their resolution in piecemeal trials.[11]

In *Hosie,* plaintiff, in support of his claim that the separation of the issues was a violation of the seventh amendment, relied upon general statements found in opinions of the United States Supreme Court, there being, it would appear, no cases on point. Plaintiff noted that the Court has said that there is a presumption against waiver of jury trial,[12] that "trial by jury" meant a trial as understood and applied at common law,[13] and that only in exceptional cases may distinct causes of action asserted in a case be separately tried.[14] The court was not persuaded that the statements relied upon demonstrated that the procedure followed had been forbidden by the Supreme Court. Relief might be had, however, if it could be shown that the procedure was violative of either legislative stricture or constitutional command.

Plaintiff argued that the separation, over his objection, of the issues had deprived him of the right to jury trial guaranteed by the seventh amendment which provides that:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

The meaning attached by the Founding Fathers to a particular provision is often not the most relevant consideration in constitutional interpretation. But here it is indeed relevant to ask what right it was the founders sought to *preserve.* The consideration given the issue in the Constitutional Convention seems to have been most casual. Near the end of the sessions, Hugh Williamson of North Carolina noted that, while jury trial had been guaranteed in criminal cases,[15] there was no provision for the same in civil cases. There was little discussion, and no objection to jury trial. But, it was argued, there should be no right to a jury trial in some equity and admiralty proceedings; nor was there unanimity on the matter in state practice. The problem was left to Congress, and, but for later developments, the question would have been forgotten.[16]

The matter was hardly forgotten. "The objection was at once seized hold of by the enemies of the Constitution; and it was pressed with an urgence and zeal which were well-nigh preventing its ratification."[17] It was argued that giving the Supreme Court appellate jurisdiction, "both as to Law and Fact,"[18] would destroy the institution of trial by jury in civil cases.[19] Hamilton conceded that the objection was perhaps the most successful challenge to the adoption of the Constitution.[20] In attempting to meet the arguments, Hamilton first argued that the phrase did not "necessarily imply a reexamination in the Supreme Court of facts decided by juries in the inferior courts."[21] When a case is appealed from an inferior court to a state court, the higher court can be said to have jurisdiction of the fact as well as the law, even though the facts have been ascertained by a

10 Grissom v. Union Pac. R.R., 14 F.R.D. 263, 264 (D. Colo. 1953).
11 Eichinger v. Fireman's Fund Ins. Co., 20 F.R.D. 204, 207 (D. Neb. 1957).
12 Hodges v. Easton, 106 U.S. 408 (1882).
13 Patton v. United States, 281 U.S. 276, 288 (1929).
14 Miller v. American Bonding Co., 257 U.S. 304 (1921).
15 U.S. CONST. art. III, § 2(3).
16 FARRAND, THE FRAMING OF THE CONSTITUTION 185 (1953).
17 2 STORY, COMMENTARIES ON THE CONSTITUTION 523 (4th ed. 1873).
18 U.S. CONST. art. III, § 2(2).
19 Story, *op. cit. supra* note 20, at 523.
20 THE FEDERALIST No. 83, at 538 (Mod. Lib. ed.) (Hamilton).
21 THE FEDERALIST No. 81, at 532 (Mod. Lib. ed.) (Hamilton).

jury. Nothing more is implied in the Constitution. Nor can it be said that the inclusion of the jury trial provision for criminal trials and its omission with respect to civil trials indicated an intention to abolish the institution. The power to do one thing is not removed by the command to do another, not inconsistent, thing.[22] Nor does this omission present a threat to liberty, for:

> It certainly sounds not a little harsh and extraordinary to affirm that there is no security for liberty in a Constitution which expressly establishes the trial by jury in criminal cases, because it does not do it in civil also; while it is a notorious fact that Connecticut, which has been always regarded as the most popular State in the Union, can boast of no constitutional provision for either.[23]

The fear that the right to jury trial was threatened by the adoption of the Constitution was apparently so great that the explanations of Hamilton were not persuasive. At the first session of Congress, the objection was directly met by the adoption of the seventh amendment.[24] In its historical context, therefore, the amendment meant essentially no more than that a party to a common law civil case was entitled to have a jury make all findings of fact.[25]

In *Hosie,* the court held that:

> [I]n the trial of the instant case, the essential character of a trial by jury was preserved. In our view, the Seventh Amendment does not require the retention of all the old forms of procedure; nor does it prohibit the introduction of new methods for ascertaining what facts are in issue.[26]

But the court is careful to point out that the new method approved is separate trial of the issues of liability and damages before the same jury. A "more difficult question" is posed by the order, over objection, of separate trial before different juries. The court did not reach that question.[27]

Why this is thought a more difficult question is not explained. The court cites[28] an opinion of Justice Brandeis in which he points out that the "limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with."[29] In addition, in a case relied upon[30] but not quoted, the Supreme Court said,

> [T]he Constitution is concerned, not with form, but with substance. All of vital significance in trial by jury is that the issues of fact be submitted for determination with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law.[31]

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22 THE FEDERALIST No. 83, at 540 (Mod. Lib. ed.) (Hamilton).
23 *Id.* at 554.
24 Story, *op. cit. supra* note 20, at 526.
25 [T]he Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions. Galloway v. United States, 319 U.S. 372, 392 (1943).
The aim of the Amendment . . . is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury. . . . Baltimore & C. Line, Inc. v. Redman, 295 U.S. 654, 657 (1925).
The primary purpose of the amendment was to preserve the historic line separating the province of the jury from that of the judge, without at the same time preventing procedural improvement which did not transgress this line. CORWIN, THE CONSTITUTION OF THE UNITED STATES, REVISED AND ANNOTATED 895 (1952).
26 Hosie v. Chicago & N.W. Ry., 282 F.2d 639, 643 (7th Cir. 1960).
27 *Id.* at 642.
28 *Id.* at 643.
29 *Ex parte* Peterson, 253 U.S. 300, 310 (1920).
30 Hosie v. Chicago & N.W. Ry., 282 F.2d 639, 643 (7th Cir. 1960).
31 Gasoline Prod. v. Champlin Refining Co., 283 U.S. 494, 498 (1930).

The Seventh Circuit seems to feel that the submission of the separated issues to two juries may interfere with the ultimate determination by the jury of questions of fact, or that the consideration of the issues is not such as was secured at common law. The court, however, chose not to decide that issue at this time.

In deciding whether separate trials before the same jury were to be allowed, the court seems to have confined its decision to the constitutional question raised by the seventh amendment. The opinion is not unambiguous on this point. The court notes that Congress, in giving the Supreme Court the power to establish rules of practice for the federal courts, provided that such rules "shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."[32] The Federal Rules provide that the "right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."[33]

If the statute can be read as giving a right in addition to that guaranteed by the amendment, namely "the right of trial by jury as at common law," it would seem that another, nonconstitutional issue is presented here. The court said that it "must assume that the Court had in mind the statutory admonition. . . ."[34] This hardly meets the issue. The rule (42[b]) promulgated by the Supreme Court is not challenged; the local rule is. If the local rule violates the legislative command, then the court would probably, in order to preserve the federal rule, hold that the local rule is not consistent with rule 42(b). The court does not make this determination.

If the petition for certiorari[35] is granted, the Supreme Court may consider the statutory question first so as to avoid, if possible, the constitutional question. The rule would seem to favor defendants. While some would argue that separating the issues of damage and liability would prevent the fact of the injury or the extent of the harm from being considered in determining liability, it might be thought that consideration of both issues is, in fact, contemplated by the guarantee of jury trial.

If the issues are to be separately tried by the same jury, the jury might not be willing to find liability if it knows that such a finding will necessitate additional time spent hearing the evidence as to damages. The rule may similarly prejudice plaintiffs if the jury has reason to believe that the judge has ordered the separate trial because he does not think that liability can be established.[36]

Of course, it is not at all certain that the statute guaranteeing the right to trial by jury "as declared by the Seventh Amendment" *and* "as at common law" will be held to have added anything to the Constitution. It has been said that the "right of trial by jury . . . preserved . . . [by the Seventh Amendment] . . . is the right which existed under the English common law when the Amendment was adopted."[37] If this is held to be so, the statute has added nothing.

In that event, the Supreme Court may avoid the constitutional issue either by holding that the district court has exceeded the power granted by rule 83,[38] in that the local rule is inconsistent with rule 42(b), or by deciding that the procedure adopted simply ought not be allowed. The former action might be taken if it is thought that the supposed prevention of "undue delay in the administration of justice"[39] is not such "convenience" as contemplated by rule 42(b).

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32 62 Stat. 961 (1948), as amended, 28 U.S.C. § 2072 (1958).
33 FED. R. CIV. P. 38.
34 Hosie v. Chicago & N.W. Ry., 282 F.2d 639, 643 (7th Cir. 1960).
35 *Appeal docketed,* No. 600, Dec. 24, 1960, 29 U.S.L. WEEK 3198 (U.S. Jan. 3, 1961).
36 See Brault, *Should the Issues of Liability and of Damages in Tort Cases Be Separated for the Purposes of Trial?* 1960 INS. L.J. 798.
37 Baltimore & C. Line, Inc. v. Redman, 295 U.S. 654, 657 (1935).
38 FED. R. CIV. P. 83: "Each district court . . . may . . . make and amend rules governing its practice not inconsistent with these rules. . . ."
39 N.D. ILL. R. 21.

As to the latter possibility, the Court exercises its discretion in deciding what procedures are to be followed in federal courts in the interests of securing justice.[40] In this role it might decide, for reasons, among others, noted above, that the procedure would not be fair. In this case the separation would be forbidden, not because of constitutional guarantee or legislative command, but simply because the Supreme Court will not have it.

This is not to suggest that rule 42(b) itself will be struck down. There would seem to be no objection to the separate trial of what are regarded as threshold issues.[41] Nor, it would seem, can objection be made where it is clear that the damages are unusually complicated.[42] While it might be argued that a jury would be reluctant to find liability and incur the obligation of staying to hear and decide the issue of damages, it might be thought that this is precisely the case where considerations of convenience necessitate taking such a risk.

If the decision is unfavorable to the local rule, it is likely that the practice proscribed will be that of allowing the trial judge as a matter of course to consider ordering the separation of the issues in personal injury litigation. It is not likely that the practice will be completely forbidden.

On the other hand, there are congested calendars in many federal courts. To the extent that the local rule helps to effectuate the ideal of swift justice, it is to be regarded as good. In that context, it has been suggested that there is "no reason why this procedure . . . should not be more extensively employed."[43] An end to court congestion can be had, however, in other ways. The Supreme Court may well find that the disadvantages of such a broad rule outweigh its merits.

James J. Harrington

LEGISLATION — SURRENDER OF PARTY LINE TELEPHONES IN EMERGENCY — BASIS OF CIVIL ACTION AND SOME PROBLEMS OF PROSECUTION OF CRIMINAL ACTIONS. — More than half of the states[1] have enacted penal statutes requiring a person using a party line telephone to relinquish it, when requested to do so, in order that an emergency call might be made. The first appellate interpretation of such a statute was recently made in *State v. Zelinski*.[2] The defendant was con-

40 Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958).

41 See cases cited notes 4 through 8, *supra*.

42 Hassett v. Modern Maid Packers, Inc., 23 F.R.D. 661 (D. Md. 1959) (four persons injured in truck-auto collision); Nettles v. General Acc. Fire & Assur. Corp., 234 F.2d 243 (5th Cir. 1956) (three consolidated suits in auto accident against insurers of both vehicles); Rickenbacher Transp., Inc. v. Pennsylvania R.R., 3 F.R.D. 202 (S.D.N.Y. 1942) (damages to 35 consignors of plaintiff).

43 5 MOORE, FEDERAL PRACTICE 1917 (2d ed. 1951).

1 ALASKA COMP. LAWS ANN. §§ 49-5-41 to 49-5-44 (Supp. 1958); ARIZ. REV. STAT. ANN. § 13-889 (1956); ARK. STAT. ANN. §§ 41-4603 to 41-4605 (Supp. 1959); CONN. GEN. STAT. REV. § 53-210 (1958); GA. CODE ANN. §§ 26-7327 to 26-7328 (Supp. 1960); HAWAII SESS. LAWS 1957, act 190, § 1; IDAHO CODE ANN. §§ 18-6806 to 18-6809 (Supp. 1959); ILL. ANN. STAT. ch. 134, §§ 16.6 - 16.9 (Smith-Hurd Supp. 1960); IND. ANN. STAT. §§ 10-4934 to 10-4937 (1956); IOWA CODE ANN. §§ 714.33 - 714.36 (Supp. 1960); KY. REV. STAT. ANN. § 75.270 (Supp. 1960); MD. ANN. CODE art. 27, § 557 (1957); MICH. STAT. ANN. §§ 28.808(1) - 28.808(2) (1954); MINN. STAT. ANN. §§ 614.71 - 614.74 (Supp. 1960); N.J. STAT. ANN. § 2A: 170-25.5 (Supp. 1960); N.Y. PEN. LAWS § 1424a (Supp. 1960); N.C. GEN. STAT. § 14-401.8 (Supp. 1959); N.D. CENTURY CODE ANN. §§ 49-21-17 to 49-21-20 (1960); OHIO REV. CODE ANN. § 4931.30 (Page Supp. 1960); OKLA. STAT. ANN. tit. 21, §§ 1844 - 1847 (1958); ORE. REV. STAT. § 166.710 (1959); PA. STAT. ANN. tit. 18, § 4688.1 (Supp. 1960); R.I. GEN. LAWS ANN. §§ 11-35-14 to 11-35-15 (Supp. 1960); S.D. CODE §§ 13.1628 - 13.1630 (Supp. 1960); TENN. CODE ANN. §§ 65-2120 to 65-2122 (Supp. 1960); VT. STAT. ANN. tit. 13, §§ 3801 - 3805 (1958); VA. CODE ANN. §§ 18.1-368 to 18.1-371 (1960); WASH. REV. CODE §§ 70.85.010 - 70.85.040 (Supp. 1958); WIS. STAT. ANN. § 941.35 (Supp. 1961).

2 166 A.2d 383 (N.J. 1960).

victed of refusing to relinquish a phone to a doctor during an alleged emergency. After considering questions raised by the New Jersey statute,[3] the court upheld the conviction.

The New Jersey statute, like comparable statutes in other states, applies only to the users of a party line, and only in times of emergency.[4] Despite this apparent simplicity of operation the existence of enforcement problems has been recognized;[5] it may account for the dearth of reported cases.

The state must prove that an emergency existed at the time of the request. An emergency situation within the purview of the statute construed in *Zelinski* occurs when property or human life is in jeopardy *and* the prompt summoning of aid is essential. Both conditions are prerequisites to conviction and their existence is a question of fact to be determined *post hoc* by a court or jury. The state of mind of the person making the call is not controlling. A person who refuses to relinquish a party line when asked to do so must be acquitted if the situation prompting the call is not proven emergent, regardless of the apprehension of the caller or the maliciousness of the person refusing to yield the line. Although Mr. Justice Schettino said in the *Zelinski* opinion, "The purpose of the statute is to save human lives, not to gamble with them,"[6] he spoke after the court had determined that the trial court had grounds for finding that an emergency, within the meaning of the statute, did exist. There was expert testimony from a physician that human life was in danger and an ambulance was needed immediately; this testimony, the court said, was sufficient to sustain the state's burden of proof.

Both the Minnesota and South Dakota statutes provide that there must be an "actually existing" emergency at the time the party line is requested. What purpose this provision serves is not clear. The mere definition of "emergency" in Minnesota and South Dakota, as in most states, seems to require the actual existence of a perilous situation. Idaho is the only state in which the existence of an emergency within the purview of the statute does not require that, in fact, life or property be in danger and aid essential. Instead, emergency telephone calls are defined as "calls for police, medical and fire aid." A drawback to this definition is that a call may be permitted which, in fact, and to the mind of the caller, is quite lacking in urgency.[7]

Courts, when confronted with cases involving emergency vehicles, have not looked to whether the facts show an actual emergency but, rather, whether the driver of the vehicle had reason to believe from the situation, as presented to his

3 N.J. STAT. ANN. § 2A: 170-25.5 (Supp. 1960):

> Any person who fails to relinquish a telephone party line, consisting of a subscriber line telephone circuit with 2 or more main telephone stations connected therewith each having a distinctive ring or telephone number after he has been requested so to do to permit another to place a call, in an emergency in which property or human life are in jeopardy and the prompt summoning of aid is essential, to a fire or police department or for medical aid or ambulance service, and any person who shall request the use of such a party line by falsely stating that the same is needed for any of said purposes knowing said statement to be false, shall be a disorderly person; provided such party line at the time of the request is not being used for any other such emergency call.

4 See also, N.J. STAT. ANN. § 48:17-15.1 (Supp. 1960). (The substance of the statute must be printed in every telephone directory except classified directories.) Similar provisions are made by all the other states having such statutes, with the exception of Hawaii, Idaho, Kentucky, North Carolina and South Dakota.

5 Gov. Thomas E. Dewey said, at the signing of the New York statute:

> Although the measure may pose enforcement problems, if it should save the life of one sick person or prevent a home from being burned to the ground, its enactment would be justified. N.Y. Times, Apr. 10, 1954, p. 22, col. 5.

6 State v. Zelinski, 166 A.2d 383, 386 (N.J. 1960).

7 *E.g.*, transportation of an invalid by ambulance.

mind, that an emergency existed.[8] Such cases are not analogous to the telephone situation, possibly, because the statutes involved in those cases did not define the term "emergency."

All of the statutes but Kentucky's have provided that a person who falsely states that an emergency exists in order to have the line relinquished will also be criminally liable.[9] In 15 states[10] the provision applies only where the person knows his statement to be false; the other 13 states apparently do not consider the intruder's state of mind. The question arises whether a good faith intruder may be prosecuted if, at the trial of the person he interrupted, or by some other means, it is determined that no emergency in fact existed.

The statutes should be amended to provide that "emergency" not be limited to actual jeopardous situations. When, from the potentiality of the situation confronting a person, he may reasonably believe that property or human life may be endangered, an "emergency" should exist. The party line user should not be permitted to gamble that the intruder has miscalculated the seriousness of the situation.

Another problem of prosecution is proving that the defendant was in fact using the telephone at the time of the request to relinquish it. This must be accomplished through prosecution witnesses; hence, identification and authentication of the defendant's voice is necessary. Identification by the person speaking, without more, is not sufficient to admit the evidence.[11] There must be other facts and circumstances which tend to reveal the defendant's identity. This evidence poses a question of fact as to such identity.[12] The facts and circumstances will be peculiar to each case and may arise from telephone conversations, personal contacts, or both. Where personal contact is a circumstance tending to establish identification, such contact may be subsequent as well as prior to the telephone conversation; the time of the personal meeting, though it may affect the credibility of the testimony, does not control its admissibility.[13]

When a case of pretext of emergency arises the problems of identification and authentication will also be present. Unless the complaining witness can identify the person who interrupted his conversation the prosecution will fail. Only Idaho has provided the groundwork for the facts and circumstances which will establish identity.

> Any person requesting that another person using a telephone line relinquish the use of such line for the purpose of an emergency message shall inform such person of the nature of the emergency, and their [sic] name and telephone number upon request.[14]

Violations of the statutes would be reduced if the person using a line could be certain that an interruption was necessary. A possible method to assure this is the strict enforcement of the clause in the statutes dealing with false statements of emergency. By adopting the substance of the Idaho provision and also requiring the telephone number of the emergency service (or, if the call is to the operator, that information) a state would lay a foundation for criminal proceedings against persons falsely asserting emergencies. The person who had been using the party line could check the data he received, allowing a reasonable time for the emergency

8 Gallup v. Sparks-Mundo Engineering Co., 43 Cal. 2d 1, 271 P.2d 34, 36 (1954); *see* Lakoduk v. Cruger, 296 P.2d 690 (Wash. 1956); Simkins v. Barcus, 168 Pa. Super. 195, 77 A.2d 717 (1951).

9 In 15 states (Alaska, Arizona, Georgia, Illinois, Michigan, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Tennessee, Vermont, Virginia, Washington, and Wisconsin) the mere request for the line, knowing no emergency exists, completes the offense; the other states require that the use of the line be secured.

10 Alaska, Arizona, Georgia, Illinois, Michigan, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Tennessee, Vermont, Virginia, Washington and Wisconsin.

11 Robilio v. United States, 291 Fed. 975, 982 (6th Cir. 1923).

12 Texas Candy & Nut Co. v. Horton, 235 S.W.2d 518, 521 (Tex. 1950).

13 Massey v. State, 160 Tex. Crim. 49, 266 S.W.2d 880, 883 (1954).

14 IDAHO CODE ANN. § 18-6807 (Supp. 1959).

call. Stopping the nuisance interruptions should reduce refusals to relinquish party lines.

A complete defense under seven of the statutes[15] is proof by the defendant that he himself was using the telephone to summon emergency aid. Twenty-two states have not specifically exempted such person from the operation of the law, but prosecutors will probably overlook refusals for this reason, at least in cases where the line was reopened promptly. Tennessee has added the statutory defense of lack of knowledge or lack of reason to know of the emergency. Since the statute has no bearing unless the party interrupting declares that an emergency exists, this is a most curious provision. If it permits the defendant to escape conviction by pleading that he did not think the interruption was serious, the effectiveness of the statute is destroyed. Undoubtedly this is the chief reason why people refuse to relinquish party lines and is precisely the thing which the statutes are intended to prohibit.

While the statutes are similar in purpose there are unique provisions in some which are worthy of further legislative consideration. The Kentucky statute, though limited to calls for fire assistance, extends sanctions not only to a refusal to surrender a party line, but to a refusal to allow anyone to use any telephone to report a fire. Public pay telephones are included within the provisions of the statutes of Iowa, Oregon and Tennessee, and must be surrendered when requested for emergency use. Not only is fire, police, ambulance and medical assistance included as legitimate emergency service in Arizona, but if "other aid" is sought, the party line must be relinquished.

Most of the states do not provide a mandatory time for terminating the call before guilt attaches. Hawaii, Minnesota, Pennsylvania and South Dakota have enacted that the person on the party line must hang up "immediately." The void in the New York statute was filled when a trial judge charged that "a person using a party line had to yield it at once."[16] Cases probably will not arise because of momentary delays in yielding the line, to permit a courteous termination of the call.

The trial court in the *Zelinski* case had joined as a defendant with Mrs. Zelinski the person with whom she was talking at the time of the interruption. This defendant was released because of failure of jurisdiction,[17] but it seems clear that the statute was not intended to apply to such person. He has no control over the party line; he cannot hold or relinquish *it*.

In addition to better legislation, the prosecutors and trial judges must enforce the law rigorously in order to increase its effectiveness. They should not be content with the moral and social sanctions imposed upon offenders by the public. Evidence of this light-handed policy may be seen in the reasons given for suspending a fine after a "party line case" conviction. Judge John R. Swartz, for instance, said that he was convinced the defendant would not repeat the offense and no purpose would be served by punishing her. He also thought the barn in question would have burned to the ground anyway. The prosecutor, in his argument supporting the suspension, said that conviction of the offense was punishment enough.[18]

To date, no cases have been located involving a civil action for refusal to surrender a telephone in an emergency, either as a common law tort or a violation of a statutory duty. Such cases are certain to arise and their determination is doubtful. Plaintiffs will probably rely upon cases in the field of fire protection to establish the common law duty. Interference with the rights of the public to fire protection is a common law tort in its own right.[19]

15 Georgia, New Jersey, Oregon, Tennessee, Vermont, Virginia and Wisconsin.
16 N.Y. Times, May 18, 1955, p. 1, col. 6.
17 N.Y. Times, Dec. 31, 1959, p. 22, col. 3.
18 N.Y. Times, May 25, 1955, p. 35, col. 6.
19 Cottonwood Fibre Co. v. Thompson, 359 Mo. 1062, 225 S.W.2d 702, 705 (1949).

It has been held that when those operating a train are shown to have knowledge of a fire and know that by traveling over the crossing they would impede the extinguishment of the fire the railroad has violated a duty to the injured party.[20] In the proposed telephone case, the defendant would also have knowledge of the fire, or other dangerous situation, and know that he was preventing assistance. Either the common law duty to refrain from knowingly obstructing emergency aid, or the duty imposed by statute for the benefit of the property or human life in jeopardy,[21] should suffice as a basis for maintaining suit.

A difficult burden for the plaintiff will be proof of proximate causal relation between the refusal to relinquish the telephone and subsequent injury. Courts have found that the results of fire-fighting are speculative and uncertain. Experience, they have implied, shows that even the promptest action may not prevent total destruction.[22] But there is authority for a contrary result when it appears from a later appraisal of the fire that the delay in placing the call caused further injury to the plaintiff. In such case, proximate cause is a question for the jury.[23]

Damages are subject to the same judicial scrutiny as proximate cause but they, too, have been held ascertainable. By subtracting the damages that would not have occurred had the aid been summoned when the party line was demanded, from the total damages, the amount of damages awardable may be determined.[24]

One final sanction has been proposed by the New Jersey Bell Telephone Co. They have asked the Public Utilities Commission for permission to cease service to Mrs. Zelinski, and the person with whom she was talking. The grounds, they say, are a violation of company regulations on file with the state agency.[25]

Anthony T. Bruno

WELFARE LEGISLATION — MEDICAL CARE FOR THE AGED — CONSTRUCTION OF "IMPOSE A LIEN" IN THE 1960 SOCIAL SECURITY AMENDMENTS. — Title VI of the Social Security Amendments of 1960,[1] an act passed by the post-convention session of the 86th Congress, contains a program of medical care for the aged similar to that recommended by the Eisenhower Administration. Embodied in section 601 of Title VI are the provisions which amend Title I[2] of the Social Security Act by extending additional federal matching funds to recipients of medical care under an existing state old-age assistance program and which make available funds for a new assistance category[3] termed "aid to the medically indigent."[4]

The new category provides aid to those aged persons with sufficient income

20 *Id.* at 706.
21 Guse v. Martin, 96 N.J.L. 262, 114 Atl. 316, 317 (E. & A. 1921).
22 Cottonwood Fibre Co. v. Thompson, 359 Mo. 1062, 225 S.W.2d 702, 707 (1949).
23 Jennings v. Southwestern Bell Telephone Co., 307 S.W.2d 464 (Mo. 1957).
24 *Ibid.*
25 N.Y. Times, Jan. 16, 1960, p. 23, col. 1.

1 74 Stat. 924 (1960), 42 U.S.C.A. §§ 301-06 (Supp. 1960).
2 70 Stat. 848 (1956), 42 U.S.C. §§ 301-06 (1958).
3 Other categorical assistance programs receiving Federal grants are:
a.) Unemployment Compensation, 49 Stat. 626 (1935), as amended, 42 U.S.C. §§ 501-03 (1958);
b.) Aid to Dependent Children, 49 Stat. 627 (1935), as amended, 42 U.S.C. §§ 601-06 (1958);
c. Maternal and Child Welfare, 49 Stat. 629 (1935), as amended, 42 U.S.C. §§ 701-05 (1958);
d.) Aid to the Blind, 49 Stat. 645 (1935), as amended, 42 U.S.C. §§ 1201-06 (1958);
e.) Aid to the Permanently and Totally Disabled, 70 Stat. 849 (1956), 42 U.S.C. §§ 1351-55 (1958).
4 S. REP. No. 1856, 86th Cong., 2d Sess. 120 (1960). The term has been statutorily defined in Revised Laws of Hawaii (1955) ch. 48 § 48-1: . . . "Medically indigent" means a person otherwise able to subsist, but who in the emergency of sickness is not able to care for the extra expense necessary to maintain or restore health. . . ."

to meet their daily needs, who are thereby ineligible for pension type old-age assistance benefits, yet who are unable to afford the cost of the increased medical attention which invariably accompanies the aging process.[5] In a now familiar pattern, a state, to qualify for the federal grant, must submit its plan for providing medical care for the aged to the Department of Health, Education, and Welfare for a check on its compliance with certain specified requirements. Most of the requirements[6] are substantially identical with those in the earlier public assistance programs in which the federal government participates. Others are designed to identify the intended class of recipients and to insure that the purpose of the new assistance program is accomplished.[7] One additional requirement[8] represents, however, a distinct departure from past federal policies, a specification absent from the categorical assistance programs operative during the past 25 years.

No state plan designed to provide medical care for aged persons under the new assistance category may require the imposition of a lien against property of a recipient on account of any medical assistance payments. Without attempting to explore in detail the implications which such a prohibition casts on the nature of government assistance to the needy, this comment seeks to investigate the possible impact on state legislation which this "new" policy might have.

The following table summarizes the types of state plans under which old-age assistance is presently administered.[9]

	No recovery	Claim against estate	Lien mandatory	Lien permissive
Number of states	19	29	16	5

The first group of states, those which require no repayment of assistance money by the recipient or his estate, should have no difficulty obtaining approval of plans. These states need only identify the class of persons eligible for assistance and the type and quantity of benefits to be provided. In the group which provides for a claim against the estate of a deceased recipient, 10 states need make no revision except those mentioned above, since they make no provisions for a lien. A claim against the estate of a deceased recipient after his surviving spouse dies is expressly permitted by the federal act.[10] The third and fourth group of states, those with statutes providing for either mandatory or permissive liens against the property of old-age assistance recipients, must face squarely the interpretation of the lien imposition provision in formulating a plan for submission to the federal authorities.

Since passage of the federal act in September, two states, Michigan and Massa-

5 106 CONG. REC. 15697 (daily ed. Aug. 20, 1960):
Mr. Byrd of Virginia. ". . . . (This plan) provides additional matching funds to the states, to first, establish a new or improve their existing medical care program for those on the old-age assistance rolls and second, initiate a new program designed to furnish medical assistance to those needy elderly citizens who are not eligible for old-age assistance but who are financially unable to pay for the medical and hospital care needed to preserve their health and prolong their life."

6 74 Stat. 987, 988 (1960), 42 U.S.C.A. § 302 (a) 1-10 (Supp. 1960).

7 74 Stat. 988 (1960), 42 U.S.C.A. § 302 (a)(11)A-D (Supp. 1960).

8 74 Stat. 989 (1960), 42 U.S.C.A. § 302 (a) (11) E (Supp. 1960):
(A State plan . . . for medical assistance for the aged . . . must) . . . provide that no lien may be imposed against the property of any individual prior to his death on account of medical assistance for the aged paid or to be paid on his behalf under the plan (except pursuant to the judgment of a court on account of benefits incorrectly paid on behalf of such individual), and that there shall be no adjustment or recovery (except, after the death of such individual and his surviving spouse, if any, from such individual's estate) of any medical assistance for the aged correctly paid on behalf of such individual under the plan.

9 A more complete tabulation of the characteristics of present state old-age assistance plans is set out in the chart below.

10 74 Stat. 989 (1960), 42 U.S.C.A. § 302 (a) (11) (E) (Supp. 1960).

chusetts, have taken legislative action to add the new assistance category to their present Title I programs. The two plans represent a difference of opinion over the meaning of the phrase "impose a lien," a difference which may well spread to other jurisdictions and continue until reconciled by the courts. The Michigan plan[11] clearly indicates that the legislators in that state take the phrase literally, and permit no lien on property possessed by an applicant. The state agency may file a claim against the estate of a deceased recipient, but the claim may not be presented for payment until after the death of a surviving spouse.[12] The Massachusetts plan[13] provides that there shall be no recovery of any medical assistance paid on behalf of a recipient during his lifetime,[14] or the lifetime of his surviving spouse. However, the administering agency is apparently not prohibited from obtaining a list of the recipient's property in the same manner as required for old-age assistance.[15] This instrument, although not a lien until filed, might constitute an encumbrance on such property.

The Secretary of Health, Education, and Welfare has interpreted the phrase "impose a lien" to mean that the state may have no lien on any property of a recipient of medical assistance.[16] This would indicate that a state plan providing for any encumbrance against specific property during the life of a recipient, whether or not recorded, will not qualify for federal matching funds in the medical-care-for-the-aged category. This raises the question of whether the Secretary's interpretation comports with the intention of Congress, and a possible underlying question of whether "lien" states will participate under such an interpretation.

An inquiry into the judicial attitude toward the meaning of the word "impose" bears little fruit. Most of the civil cases which turn on the interpretation of the word have dealt with the creation, assessment, and collection of taxes.[17] In the greater number of these cases, the definition has been set by the presence, or absence, within the statute of other words which were used to restrict or broaden the impact of the phrase containing the word "impose." Each opinion is replete with the principle of construction in favor of revenue collection.[18] Courts will use the word, rather carelessly, in dealing with each of the phases in the chronology of creation, filing, and foreclosing a lien. It is apparent that the word is ambiguous, and that any court must turn to materials outside the reports to find a basis for construction.

One of the most relevant sources of decisional material, the legislative history of a statute, does not seem to be conclusive in this instance. The Senate Finance Committee report states:

> A State would not be permitted as a condition for medical assistance to impose a lien on the property of a recipient during his lifetime. An enrollment fee for recipients would not be permitted. However, the bill would permit the recovery from an individual's estate after the death of his spouse if one survives him. *This provision was inserted in order to protect the individual and his spouse from the loss of their property, usually the home, during their lifetime.* (Emphasis added)[19]

If this statement expresses the intent of the Congress, then the Massachusetts plan, construed to permit an encumbrance of record, would satisfy the specified require-

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11 MICH. STAT. ANN. §§ 16.521-.531 (Supp. 5, 1960).
12 MICH. STAT. ANN. § 16.525 (Supp. 5, 1960).
13 MASS. ANN. LAWS ch. 118A, §§ 13-32 (Supp. 7, 1960).
14 MASS. ANN. LAWS ch. 118A, § 23 (Supp. 7, 1960).
15 MASS. ANN. LAWS ch. 118A, §§ 4, 4A (Supp. 1959).
16 For a similar judicial construction, see Dimke v. Finke, 209 Minn. 29, 295 N.W. 75 (1940).
17 See generally the cases compiled in 20 Words and Phrases 440-44 (1958).
18 Town of Brandon v. Harvey, 105 Vt. 435, 168 Atl. 708 (1933); Moller v. People's Nat. Bank, 258 N.Y. 373, 180 N.E. 87 (1932).
19 S. REP. No. 1856, 86th Cong., 2d Sess. 8 (1960).

ments. It is possible that such a construction might be placed on the phrase in order to induce "lien" states to participate.

Statements made during the course of the debates in both houses of Congress indicate that the provision was thought to be more prohibitive than the committee report would indicate.

> Mr. Proxmire: ". . . I should like to ask the Senator from New York whether the only eligibility criterion would be income. Would there be any property criterion whatever?
> Mr. Javits: "None whatever."
> Mr. Proxmire: "Any liens on property?"
> Mr. Javits: "None whatever."
> Mr. Proxmire: ". . . I think the Senator's test is a much more attractive test than the usual means test that the States apply with respect to property, insisting on liens and paupers oaths."[20]

The following colloquy on the floor of the House occurred between the bill's floor manager and several opponents of the bill.

> Mr. Holland: "But will he not have to turn over his assets and property if he receives such aid?"
> Mr. Mills: "We have specifically stated in the bill that a lien cannot be placed upon a man's home as long as he or his wife is living."
> Mr. Forand: "Referring to the question of the gentleman's regarding assignment of property, while I do not like this bill one iota, I must say in all frankness it provides that there shall be no lien under this new medical care program as a condition to receiving help while the recipient lives."
> Mr. Mills: "Exactly . . . ."[21]

Other factors which may influence a decision are equally indeterminate. Meanings drawn from statutes of the states comprising the group which have lien provisions lead to opposite conclusions. A former Idaho statute is the most interesting. The word "impose" appeared in one section of the statute[22] in a sentence which conferred power on the state assistance agency to file and pursue a claim against the estate of a deceased recipient of old-age assistance. The predecessor[23] of that section used the word "enforce" in the same sentence, there being no other difference in the phraseology or apparent meaning of the two versions. The New Hampshire[24] statute uses the word "impose" in the same context. In Minnesota,[25] the statutory language is to the effect that the statute itself is the instrument of imposition; the statute speaks of the "lien hereby imposed." The same language is found in the Wisconsin[26] statute. It seems evident that legislators feel that the word "impose" may refer to enforcement or to creation.

At this point, it is worthwhile to consider possible motives which induce legislators to place a lien provision in their statutes as a condition attached to the payment of old-age assistance. The fact that some states require perfected liens and others bare claims against recipient's estates, while a third group provide for no recovery at all, arises from varying concepts as to the nature of such assistance payments. Money paid to, or on behalf of, Title I old-age assistance recipients has been termed a debt[27] or a loan[28] by the "lien" states, a gratuity[29] by the "no recovery" states. The latter is a more traditional view, since at common law there was no obligation on the part of a recipient of charitable assistance to make restitu-

20 106 CONG. REC. 15717 (daily ed. Aug. 20, 1960).
21 106 CONG. REC. 16659 (daily ed. Aug. 26, 1960).
22 Idaho Acts of 1947, ch. 237, § 4. This provision has been repealed and not re-enacted.
23 Idaho Acts of 1943, ch. 119, § 2. See State v. Lindstrom, 68 Idaho 226, 191 P.2d 1009 (1948).
24 N.H. REV. STAT. ANN. § 167:13 (1955).
25 MINN. STAT. ANN. § 256.26 (6) (Supp. 1960).
26 WIS. STAT. ANN. § 49.26 (5) (Supp. 1961).
27 Los Angeles County v. Jessup, 11 Cal. 2d 273, 78 P.2d 1131, 1133 (1938).
28 State v. Lipnick, 99 N.H. 217, 108 A.2d 41, 43 (1954).
29 Potts v. Adams, 86 Ohio App. 311, 90 N.E.2d 703, 705 (1949).

tion, nor was the estate liable.[30] The middle ground between these extremes is occupied by the "claim" states, where the payment is viewed as an obligation or charge against the estate of a deceased recipient.[31]

The only difference between the "lien" and the "claim" provisions is the priority which the encumbrance of record gives the state over subsequent secured and general creditors, or any assignees or transferees. Statutory history reveals that some of the states have struck out or modified sections in their original plans which required liens or claim filing. The major reasons for such removals seem to be that the proceeds have failed to justify the procedures involved,[32] or that the policy of encumbering the estate of a recipient was repugnant to present sociological standards.

Some decisions from the "lien" states seem to reflect a more practical and somewhat more acceptable reason for requiring reimbursement from recipients of public assistance in the old age category.[33] The theory rests on the proposition that most aged persons have families or close relatives who ought to render the assistance which the applicant seeks from the state. When such persons do exist, they should not be permitted to avoid that obligation and yet collect from the estate of the deceased recipient. The lien provisions would seem to be included for the sole purpose of preventing such heirs or distributees from getting any benefit from the estate. However, the lien provisions are unnecessary. If, as one court put it,[34] the real conflicting interest is not that of the recipient, but that of the heirs or distributees, a bare claim against the estate would insure that disfavored class of beneficiaries would take after the state. It does not seem to be any more reasonable to require a lien on the property of a recipient of medical care for the aged than for those on the old-age assistance rolls. In fact, it seems less reasonable, when consideration is given to the fact that the possession of income or property is not the fundamental criterion in this new category, as it is for old-age assistance. The fact of the recipient's remaining financially able to maintain his status as self-sufficient for all but medical needs will often depend on his ability to manage low income property which contributes to his basic income. Patently, an encumbrance of any nature would make such management more difficult, if not impossible.

However inapt the language employed, the intent of Congress seems to have been that no lien would come into existence against any property in which an applicant for medical assistance has any interest. In spite of the conflicts of interpretation illustrated, the conclusion is inescapable that the word "impose" will be read in the broadest manner, to prohibit the approval of a state plan providing for encumbrances.

Ralph H. Witt

30 Alameda County v. Janssen, 16 Cal. 2d 276, 106 P.2d 11, 15 (1940).
31 Scobey v. Fair, 70 Ohio App. 51, 45 N.E.2d 139, 140 (1942).
32 Ark. Acts 1937, No. 343, § 1: Any and all liens that arose and now remain unsatisfied by virtue of the provisions of Section 11, of Act No. 322 of the Acts of 1935, are hereby declared satisfied and released; . . . § 2: By reason of the creation of liens against the property of old age pensioners under the provisions of Act No. 322 of the Acts of 1935, difficulty is sometimes experienced in transferring titles to property and much confusion results. . . .
33 Elkhart County v. Kehr, 124 Ind. App. 325, 112 N.E.2d 451 (1953).
34 State v. Lindstrom, 68 Idaho 226, 191 P.2d 1009, 1012 (1948).

RECOVERY PROVISIONS OF EXISTING STATE OLD-AGE ASSISTANCE PLANS

STATE	No Recovery	Claim Against Estate	Lien		
			Mandatory	Permissive	Foreclosure
Alabama	*				
Alaska		*		*	1
Arizona	*	rpd. '55			
Arkansas	*	rpd. '37	rpd. '37		
California	*				
Colorado	*				
Connecticut		*		*	1
Delaware	*				
D. C.		*		*	1
Florida	*				
Georgia		*			3
Hawaii		*		*	3
Idaho			*		2
Illinois		*			3
Indiana		*	*		3
Iowa		*			3
Kansas		*			3
Kentucky	*		rpd. '56		
Louisiana	*				
Maine		*			3
Maryland		*			3
Massachusetts		*	*		3
Michigan		*			2
Minnesota		*	*		2
Missouri	*				
Montana		*	*		3
Nebraska		*	*		3
Nevada	*	rpd. '57			
New Hampshire		*	*		3
New Jersey		*	*		3
New Mexico	*				
New York		*		*	2
North Carolina		*	*		1 & 3
North Dakota		*			3
Ohio		*			
Oklahoma	*				
Oregon		*			
Pennsylvania	*				
Rhode Island			*		3
South Carolina		*			3
South Dakota		*	*		3
Tennessee	*		rpd. '53		
Texas	*				
Utah		*	*		3
Vermont		*	*		3
Virginia		*	*		3
Washington	*	rpd. '53			
West Virginia		*	*		3
Wisconsin		*	*		3
Wyoming	*				

Key: 1 = While recipient alive.
2 = After recipient dies.
3 = After death of surviving spouse or dependents.
rpd. = Repealed and year.