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NOTES

Constitutional Law

THE THORNHILL DOCTRINE AND CONSTITUTIONAL ALCHEMY

At the turn of the last decade, Justice Murphy delivered the majority opinion in *Thornhill v. Alabama*,¹ a decision which recognized peaceful picketing as a constitutional right. He said: ²

The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. . . .

In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. . . .

Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under the circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion. We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in [the Alabama statute].

Within the short span of ten years, the sanctity of the right of free discussion by means of peaceful picketing has been largely disregarded. The present state of the law is reflected by a decision of a lower New York court, where it was stated: ³

. . . "a state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual, notwithstanding the guaranty by the Fourteenth Amendment of the right to 'free speech.'" . . . Clearly congregating in front of plaintiff's premises and interfering with her business cannot by any stretch of the imagination be deemed to be the exercise of defendant's constitutional right of free speech.

In a recent Ohio case ⁴ the court stated that peaceful picketing is subject to reasonable restriction and may be enjoined if it is carried on for an unlawful objective or if it lacks a rational connection with the labor dispute. To the same effect is a 1950 decision of the Supreme Court of Florida.⁵

1 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940).

2 *Id.*, 310 U. S. at 101-5.

3 *Fay Loevin Apparel Shops, Inc. v. Harlem Labor Union, Inc.*, Misc., 92 N. Y. S. (2d) 776, 779-80 (Sup. Ct. 1949).

4 *Dummermuth et al. v. Hykes et al.*, Ohio App., 95 N. E. (2d) 32, 38 (1950).

5 *Local Union No. 519 v. Robertson*, Fla., 44 So. (2d) 899, 903-4 (1950).

A trilogy of case, *Building Service Employees International Union, Local 262 v. Gazzam*,⁶ *Hughes v. Superior Court of California*,⁷ and *International Brotherhood of Teamsters, Local 309 v. Hanke*,⁸ all decided on May 8, 1950, have contributed significantly to the confusion surrounding the *Thornhill* doctrine. In the *Gazzam* case, the Court concluded that the picketing was in reality an attempt to compel the employer to violate a state statute, and that the picketing could be enjoined without encroaching upon rights protected from state abridgment by the Fourteenth Amendment. In other words, a restraint based upon an important and widely accepted public policy is constitutional. In the *Hughes* case the Court upheld an injunction of peaceful picketing where its sole object was to compel the hiring of a proportionate share of Negro employees. The picketing subverted the public policy of the state as expressed by the state's courts. Similarly, in the *Hanke* decision, the Court declared that picketing, even though peaceful, could be enjoined if an unlawful objective was its sole aim. Here the picketing was against a self-employer to force a union shop upon him. These cases demonstrate that picketing which violates the public policy of a state may be enjoined.

The irony of the entire situation is that the *Thornhill* doctrine is still the law. At least it never has been expressly repudiated.

I.

The Evolution of Free Speech

In order to fully comprehend the importance of this paradox, it is necessary to survey briefly the evolution of "free speech." Before World War I the Blackstonian principle prevailed that there must be no "previous restraint" upon expression.⁹ Harsh realities such as grave national dangers proved this theory to be impracticable, and the Espionage Acts of 1917 and 1918¹⁰ completely obliterated it.

6 339 U. S. 532, 70 S. Ct. 784, 94 L. Ed. 1045 (1950).

7 339 U. S. 460, 70 S. Ct. 718, 94 L. Ed. 985 (1950).

8 339 U. S. 470, 70 S. Ct. 773, 94 L. Ed. 995 (1950).

9 4 BL. COMM. *151-2: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity."

10 40 STAT. 219 (1917), as amended, 40 STAT. 553 (1918). The 1918 statute provided: "Whoever, when the United States is at war, shall willfully make . . . false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its

The courts during and after the war seized upon two tests for determining whether an individual had violated the Espionage Acts: *conspiracy*, involving presumptive intent, and *dangerous tendency*.¹¹ No speech repugnant to these subjective criteria was tolerated. It became evidence of a violation of these Acts to discourage the purchase of bonds;¹² to state that conscription was unconstitutional, though the Supreme Court had not yet held it valid;¹³ or to state that war was contrary to the teachings of Christ.¹⁴ Men were convicted for saying that "this is a capitalists' war,"¹⁵ and that "the government is for profiteers."¹⁶ In Minnesota it was held to be supporting evidence of deterring assistance to the United States in the prosecution of the war to discourage women from knitting by the remark, "no soldier ever sees these socks."¹⁷ It was unnecessary that these expressions of opinion be addressed to soldiers or men on the point of enlisting or being drafted; it was sufficient if the words might conceivably reach them.¹⁸

These vague and indeterminate tests were aptly criticized by Ernst Freund:¹⁹

So long as we apply the notoriously loose common law doctrines of conspiracy and incitement to offenses of a political character, we are adrift on a sea of doubt and conjecture. To know what you may do and what you may not do, and how far you may go in criticism, is the first condition of political liberty; to be permitted to agitate at your own peril, subject to a jury's guessing at motive, tendency and possible effect, makes the right of free speech a precarious gift.

enemies . . . and whoever, when the United States is at war, shall willfully cause or attempt to cause, or incite or attempt to incite, insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States . . . shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both. . . ."

¹¹ Freund, *The Debs Case and Freedom of Speech*, 19 NEW REPUBLIC 13 (1919). Freund pointed out that the courts stressed the *dangerous tendency* of the words uttered in order to find the defendant guilty of obstructing the military effort under the Espionage Acts during World War I. He criticized this by arguing that acts provoked by words and not words alone were required to effect an obstruction.

¹² United States v. Frerichs, U. S. Justice Dept., Interpretation of War Statutes, Bulletin No. 85.

¹³ United States v. Kirchner, U. S. Justice Dept., Interpretation of War Statutes, Bulletin No. 69.

¹⁴ Shaffer v. United States, 255 Fed. 886 (9th Cir.), *cert. denied*, 251 U. S. 552, 40 S. Ct. 57, 64 L. Ed. 410 (1919).

¹⁵ United States v. Pierce, U. S. Justice Dept., Interpretation of War Statutes, Bulletin No. 52.

¹⁶ United States v. Stokes, U. S. Justice Dept., Interpretation of War Statutes, Bulletin No. 106.

¹⁷ State v. Freerks, 140 Minn. 349, 168 N. W. 23, 24 (1918).

¹⁸ Kirchner v. United States, 255 Fed. 301 (4th Cir.), *cert. denied*, 249 U. S. 595, 39 S. Ct. 260, 63 L. Ed. 794 (1918).

¹⁹ Freund, *supra* note 11, at 14.

In 1925, the decision in *Gitlow v. New York*²⁰ was symptomatic of the fact that the Supreme Court was experiencing deep concern in attempting to discover a solution for the problem caused by state abridgment of civil rights. This decision clearly established that the guaranty of free speech in the First Amendment was included in the word "liberty" in the Fourteenth—free speech was endowed with a dignity that had to be respected by both the Federal Government and the states. Chafee remarked:²¹

A profit and loss account of the Gitlow case immediately after it was decided showed one big gain, the possibility of federal protection against state suppression. Now that the Court's power to protect liberty of speech under the Fourteenth Amendment had been decisively established, that power was bound to be exercised sooner or later to reverse convictions. And so a more liberal Court could prevent the United States from becoming a checkerboard nation, with ultra-conservative states into which moderately radical Americans would come at peril of imprisonment for sedition.

*Lovell v. Griffin*²² held that liberty of the press is not confined to newspapers and periodicals, but embraces pamphlets and leaflets as well. In this case, the Supreme Court struck down an ordinance which forbade the distribution of advertisements or other literature without prior permission from the city manager, thus incorporating freedom of the press into the concept of liberty of the Fourteenth Amendment. *Near v. Minnesota*²³ confirmed this addition with cogeneity. In *Cantwell v. Connecticut*,²⁴ the Court incorporated freedom of religious expression; in *Hague v. C. I. O.*²⁵ and in *De Jonge v. Oregon*,²⁶ it added freedom of assembly. It thus became apparent that the Court viewed the liberty guaranteed by the Fourteenth Amendment as including all of the rights necessary for the uninhibited cultivation of the faculties of self-expression.²⁷

II.

The Thornhill Doctrine—Recognition of a Personal Economic Right

In 1940, with the introduction of the *Thornhill* doctrine into the judicial drama, the Supreme Court added another link to the civil liberty chain, for it there recognized that an individual has an eco-

²⁰ 268 U. S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1923).

²¹ CHAFEE, *FREE SPEECH IN THE UNITED STATES* 324 (1946).

²² 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (1938).

²³ 283 U. S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931).

²⁴ 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940).

²⁵ 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423 (1938).

²⁶ 299 U. S. 353, 57 S. Ct. 255, 81 L. Ed. 278 (1937).

²⁷ See *Milk Wagon Drivers Union of Chicago, Local 753, et al. v. Meadowmoor Dairies, Inc.*, 312 U. S. 287, 293, 61 S. Ct. 552, 85 L. Ed. 836 (1941).

conomic right to use forms of speech to secure improved working conditions, and that this *personal* civil right takes precedence over mere property rights.

The philosophy underlying the *Thornhill* case is relatively simple, and is not nearly as drastic as many critics claim. Whatever views one may entertain toward this decision, it must be admitted that it is a logical *sequitur* in light of the previous civil liberty cases. The Court undoubtedly felt that the liberties protected by the First Amendment and woven to a certain extent into the texture of the Fourteenth were, to a great degree, illusory in modern industrial society unless the individual is guaranteed the economic right to maintain a reasonable level of subsistence in order to be able to realize his constitutional liberties. In the inevitable clash between property rights and personal economic rights, the former must give way.²⁸

It must be realized that the methods used by the pickets did not differ materially from those which were allowed in the previous civil liberty cases. The only real distinction is in the effect which these methods have upon the public. Picketing oftentimes evokes severe emotional reactions from the public while other civil liberty demonstrations generally do not; at least any public response is on a much smaller scale. The emotional stress created by picketing presents a serious obstacle to the courts in the calm and logical determination of the issues. The unfortunate result is that the tribunal will often fail to recognize the right to communicate the facts of a labor dispute by picketing as a constitutional right, but instead will give controlling consideration to the effect of the picketing upon the public. If peaceful picketing is a constitutional right, it should be accorded all the protective enforcement that surrounds the other constitutional rights.²⁹ If it is free speech, the protection which should be extended to it should be broad and sweeping, for free speech is the matrix and necessary condition of all constitutional liberties.

III.

The Perversion of the Thornhill Doctrine

By its decision in 1942 in *Carpenters and Joiners Union of America, Local 213 v. Ritter's Cafe*,³⁰ the Supreme Court served notice that no one, including itself, understood the precise nature of the right of free speech. The Court upheld a ban on picketing though

²⁸ *Thornhill v. Alabama*, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940).

²⁹ See *Schneider v. New Jersey*, 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155 (1939); *Palko v. Connecticut*, 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937).

³⁰ 315 U. S. 722, 62 S. Ct. 807, 86 L. Ed. 1143 (1942).

there was no showing of violence, past, present, or threatened. The union had picketed a restaurant because it was then engaged in a dispute with a contractor employed by the restaurant owner to erect a building which was in no way connected with the restaurant. Speaking for the Court, Justice Frankfurter emphasized the fact that the person picketed was not involved in the labor dispute and maintained that Texas had a right to declare it contrary to its public policy for a union "to conscript neutrals having no relation to either the dispute or the industry."³¹ The decision in effect outlawed all secondary picketing. The Court said:³²

As a means of communicating the facts of a labor dispute, peaceful picketing may be a phase of the constitutional right of free utterance. But recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that *directly related* to the dispute. [Emphasis supplied.]

Contemporaneously with the *Ritter* decision, the doctrine of illegal objective appeared as a limitation on the right to picket. It was held in *Bakery & Pastry Drivers & Helpers, Local 802 v. Wohl* that peaceful picketing may be enjoined if it is carried on for an illegal purpose.³³ A forceful re-emphasis of this proposition was made in *Giboney v. Empire Storage and Ice Co.*,³⁴ in which the union was picketing an ice manufacturer to compel it to refuse to sell ice to peddlers with whom the union had a dispute. The injunction enjoining the picketing was sustained on the ground that were the ice manufacturer to do as the union wished, it would have to violate the state antitrust law. After reviewing a number of cases,³⁵ including the *Thornhill* decision,³⁶ the Court stated that none of them established the constitutional right of picketers ". . . to violate valid laws designed to protect important interests of society."³⁷

These cases reveal that the Court returned to the states power to enjoin not only the picket line itself, but also picketing in undesir-

³¹ *Id.*, 315 U. S. at 728.

³² *Id.*, 315 U. S. at 727.

³³ 315 U. S. 769, 62 S. Ct. 816, 86 L. Ed. 1178 (1942).

³⁴ 336 U. S. 490, 69 S. Ct. 684, 93 L. Ed. 834 (1949).

³⁵ *Carpenters and Joiners Union of America, Local 213 et al. v. Ritter's Cafe et al.*, 315 U. S. 722, 62 S. Ct. 807, 86 L. Ed. 1143 (1942); *Bakery and Pastry Drivers and Helpers, Local 802 v. Wohl*, 315 U. S. 769, 62 S. Ct. 816, 86 L. Ed. 1178 (1942); *Carlson v. California*, 310 U. S. 106, 60 S. Ct. 746, 84 L. Ed. 1104 (1940) (ordinance void under Fourteenth Amendment for depriving employees and union members of right of free speech); *Senn v. Tile Layers Protective Union*, 301 U. S. 468, 57 S. Ct. 857, 81 L. Ed. 1229 (1937) (refusal sustained of injunction against picketing which kept a self-employed person from his work).

³⁶ 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940).

³⁷ *Giboney et al. v. Empire Storage and Ice Co.*, 336 U. S. 490, 501, 69 S. Ct. 684, 93 L. Ed. 834 (1949).

able places, at objectionable times, and for illegal purposes. The two basic tests which the Court established in these cases are the illegal objective test of the *Wohl* and *Giboney* cases, and the unity of interest test found in the *Ritter's Cafe* decision. These two tests are reminiscent of the conspiracy and dangerous tendency standards applied under the 1917-18 Espionage Acts. Upon close examination it seems that the *Wohl-Giboney* illegal objective test is in substance the conspiracy test, and that the *Ritter's Cafe* unity of interest test is merely a restatement of the dangerous tendency test.

Until the *Ritter's Cafe* case, the Court had consistently applied the clear and present danger test to peaceful picketing. In this case, however, the emphasis was upon the unlawful aspect, the dangerous tendency of the secondary boycott, rather than upon the clear and present danger created by the words or speech. The Court in so holding decided that an individual's right to pursue economic relations with those of his choosing, whether union or non-union, is sometimes superior to a union's unrestrained right of free speech. This is direct refutation of the *Thornhill* doctrine which apparently placed the personal right of free speech in economic matters above all property rights. In the *Ritter's Cafe* case the Court declared:³⁸

In forbidding such conscription of neutrals, in the circumstances of the case before us, Texas represents the prevailing, and probably the unanimous, policy of the states. We hold that the Constitution does not forbid Texas to draw the line which has been drawn here. To hold otherwise would be to transmute vital constitutional liberties into doctrinaire dogma. We must be mindful that "the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants."

With the exception of the sedition prosecutions,³⁹ no case has been found that has given to the courts and legislatures the power to prohibit the exercise of civil rights by declaring certain objectives illegal. If this power is recognized, the issuance of injunctions will depend in a great part on the fluctuating boundaries of legislative and judicial policy. If picketing is a form of free speech it should not be enjoined although employed for an improper purpose.⁴⁰ If, however, it is urged that the *Thornhill* doctrine has been overruled by the *Ritter's Cafe* case and its successors, and that peaceful picketing is

³⁸ *Carpenters and Joiners Union of America, Local 213 et al. v. Ritter's Cafe et al.*, 315 U. S. 722, 728, 62 S. Ct. 807, 86 L. Ed. 1143 (1942).

³⁹ *Kirchner v. United States*, 255 Fed. 301 (4th Cir.), *cert. denied*, 249 U. S. 595, 39 S. Ct. 260, 63 L. Ed. 794 (1918); *United States v. Frerichs*, U. S. Justice Dept., Interpretation of War Statutes, Bulletin No. 85.

⁴⁰ CHAFEE, *op. cit. supra* note 21, at 14.

not a constitutionally protected right by incorporation of the First Amendment into the Fourteenth, then the Supreme Court has no right to interfere with state control of picketing. This dilemma has yet to be solved by the Court.

Conclusion

Today there is an urgent need for a reformulation of the relationship between the individual and the state, for a modern definition of civil rights, and for a clarification of the test to determine when these individual rights must be subordinated to those of society as a whole. The unfortunate results evoked from the application of the subjective tests of conspiracy and dangerous tendency under the Espionage Acts serve as a grim warning to all who fear an encroachment upon personal liberties. A revival of this doctrine is seen today in the conflict between labor and capital—as illustrated by the *Ritter's Cafe*, *Giboney* and *Wohl* cases.

The constitutional alchemy practiced by the Supreme Court in the picketing cases has succeeded in producing a hybrid constitutional right. It is allegedly founded in the Constitution, but depends for its survival on the will of judges and legislators expressed in policy declarations, the constitutional justification of which lies within the broad limits of the reasonable exercise of the police power. The danger lies in the possibility that other civil liberties will be trodden in a similar pattern.

It is suggested that the courts and the legislatures refrain from interfering with constitutional liberties unless a clear and present danger of substantive evils exists. This test should be applied with caution and only when extraordinary circumstances warrant. It must not be confused with public policy.⁴¹ Of course, criticism of this test or standard has come from certain judges,⁴² but as Antieau has reminded:⁴³

Because the formula assumes a constant societal interest in expression, it is avoided by judges inclined to project their personal values into the task of delimiting freedom of expression. It is noteworthy that the worst decisions of the Supreme Court have been those in which it avoided application of the concept and permitted projection of their own actions of ideational worth.

⁴¹ See *United States v. Strong*, 263 Fed. 789 (W. D. Wash. 1920).

⁴² Justice Frankfurter viewed the clear and present danger test as only a felicitous phrase. See *Bridges v. California*, 314 U. S. 252, 295, 62 S. Ct. 190, 86 L. Ed. 192 (1941) (dissenting opinion).

⁴³ Antieau, "Clear and Present Danger"—*Its Meaning and Significance*, 25 NOTRE DAME LAW. 603, 644 (1950).

If the Constitution is to retain any real meaning in this era of fluctuating economic and political philosophies, the recognition and protection of constitutional liberties must be uniform and objective. If our American framework of government is to survive, we must be vigilant in preventing the legislatures and courts from projecting their personal ideologies into the Constitution.

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TAXATION

CAPITAL GAINS TAXATION OF COPYRIGHTS AND SIMILAR PROPERTY

Not yet delimited but very real is a growing pattern¹ in the Internal Revenue Code to subject all income, in the economic or accounting connotation, to ordinary income tax rates. Adhering to this pattern is the Revenue Act of 1950,² which excludes from the definition of capital assets “. . . a copyright; a literary, musical, or artistic composition; or similar property . . .” when held by one whose “personal efforts” created the property, his donee, or the recipient from him in a tax free exchange.³

The immediate cause of this so-called loophole elimination were the two widely publicized transactions occurring in 1948. The first was the sale by amateur writer, professional soldier Dwight Eisenhower of his war memoirs, which the Bureau, it was reported, ruled was the sale of a capital asset.⁴ Equally startling to the public was the treatment of the sale of the “Amos 'n Andy” radio show by its creators to the Columbia Broadcasting System for a reputed \$2,000,000.⁵ This

¹ The beginning of this trend may have had its starting point in the Revenue Act of 1934, which amended the then inventory exclusion to read: “. . . held primarily for sale to *customers* in the *ordinary* course of . . . trade or business.” 48 STAT. 714 (1934). [Emphasis supplied.] This was designed to make securities held for sale by a floor trader ordinary assets.

Other examples of this pattern are the several short sale amendments of the past decade, and the collapsible corporation provisions of the 1950 Act. See Pub. L. No. 814, 81st Cong., 2d Sess. § 212 (Aug. 22, 1950).

² Pub. L. No. 814, 81st Cong., 2d Sess. (Aug. 22, 1950).

³ *Id.*, § 210(a).

⁴ J. S. Seidman, *Eisenhower Book Sale Illustrates Ordinary-Capital Gain Taxation*, N. Y. Herald Tribune, Oct. 3, 1948, as it is quoted and cited in SURREY & WARREN, *FEDERAL INCOME TAXATION: CASES & MATERIALS* 515 (1950); N. Y. Times, June 2, 1948, p. 31, col. 1; p. 29, col. 5.

⁵ Kiplinger Tax Letter, Sept. 11, 1948, p. 3.

program was declared property and a capital asset by another unreported Bureau opinion.⁶ Without embarking upon a detailed analysis⁷ of the two transactions, the one element they obviously have in common is that the value of the property in them was created by the personal efforts of their owners. The gain from transfers such as these Congress has found fit to tax at ordinary rates regardless of concepts of amateur or professional, property or non-property in the classical sense, or whether or not the property was created in business activity.

The 1950 amendment thus excludes from capital assets—and consequently from the advantageous capital gains rates—copyrights and similar property when in the hands of their creator, or one in whose hands “. . . the basis of such property is determined . . . in whole or in part by reference to the basis of such property in the hands . . .” of its creator.⁸ As previously stated, this includes the creator’s donee or the recipient from him (or from his donee) in a tax free exchange.

Does this mean that this genus of property is absolutely eliminated from being a capital asset? Not absolutely. A purchaser of a copyright, or one who receives it by inheritance or bequest can hold the property as a capital asset. These holders would not be excluded because the basis of the property in their hands is not computed in whole or in part by reference to the basis in the hands of its creator.⁹ Also, once the property is sold or passes by death, a donee or the recipient of it in a tax free exchange can hold it as a capital asset. It goes without saying that the other exclusions of section 117(a)(1) apply, and that a copyright will be precluded from being a capital asset if it is depreciable property used in the trade or business,¹⁰ or property held for sale to customers in the ordinary course of the taxpayer’s trade or business.¹¹ So long as copyrights, radio shows, musical compositions, and similar property are sold, and incidentally inherited or received by bequest, the problem of capital gains taxation of this property will continue to exist, though in a much more restricted area than previously. With this in mind an examination of the capital gains taxation of copyrights and similar property is in order.

⁶ *Ibid.*

⁷ An exhaustive analysis of the “Amos ’n Andy” transaction appears in Mintz, *Entertainers and the Capital Gains Tax*, 4 *TAX L. REV.* 275 (1949). See also Fulda, *Copyright Assignments and the Capital Gains Tax*, 58 *YALE L. J.* 245 (1948).

⁸ *INT. REV. CODE* § 117(a)(1)(C)(ii).

⁹ The basis for a purchaser is cost. *INT. REV. CODE* § 113(a). For one taking by inheritance or bequest it is the fair market value at the time of acquisition. *INT. REV. CODE* § 113(a)(5); *Treas. Reg.* 111, § 29.113(a)(5)-1.

¹⁰ *INT. REV. CODE* § 117(a)(1)(B).

¹¹ *INT. REV. CODE* § 117(a)(1)(A).

I.

The 1950 Amendment

The expressed intent¹² of the 1950 amendment was to close the leak in the dike that permitted income derived from personal efforts of amateur artists and authors to be taxed at capital gains rates. The House of Representatives sought to plug the hole completely, for it included in the original bill not only copyrights and similar property, but also inventions, patents, and designs.¹³ The Senate rejected the exclusion of this property stating that it “. . . believes that the desirability of fostering the work of such inventions outweighs the small amount of revenue which might be obtained. . . .”¹⁴ This legislative distinction may be more significant than it first appears. Admittedly it is based upon the collateral policy of encouraging amateur inventors, but nevertheless, is it not sufficient to at least hint that the basis of decision in patent and copyright cases is not identical? For the most part patent decisions have had compelling influence upon the reasoning of copyright cases. It is suggested that the similarity of these two types of monopolies in general law should not be carried over unmitigated into tax law. Of course, the customary analogies drawn from the cases deciding whether a patent was held primarily for sale to customers in the ordinary course of the taxpayer-inventor's business will no longer be applied to determine the same question for amateur writers and artists.¹⁵

The 1950 Act brings into focus several problems, of which the most evident is what is “similar property.” From the terms of the Act, the Congressional reports, and the commonly known purposes for which the Act was enacted, it is reasonable to list two categories of property that were meant to be excluded: (1) copyrightable creations; (2) similar property which, though not copyrightable under the statute, is accorded common law protection.¹⁶ These classes are broad enough to say the least. Do they prescribe the ultimate limits of the property excluded? It would seem so, for the Senate Finance Committee expressly rejected any implication that *all* the fruits of personal efforts

¹² SEN. REP. No. 2375, 81st Cong., 2d Sess. (1950), 1950 U. S. CODE CONG. SERV. 3097, 3140; CONFERENCE REPORT, Pub. L. No. 814, 81st Cong., 2d Sess. (1950), 1950 U. S. CODE CONG. SERV. 3230.

¹³ SEN. REP. No. 2375, 81st Cong., 2d Sess. (1950), 1950 U. S. CODE CONG. SERV. 3097.

¹⁴ *Id.* at 3097-8.

¹⁵ An article bringing out these analogies is Casey, *Sale of Patents, Copyrights and Royalty Interests*, 7 N. Y. U. FED. TAX INST. 383 (1949).

¹⁶ A good example is the protection afforded trade-marks by the common law irrespective of trade-mark registration statutes. See 1 NIMS, UNFAIR COMPETITION AND TRADE MARKS §§ 36-43 (4th ed. 1947). Also see CALLMANN, UNFAIR COMPETITION, AMERICAN BAR ASSOCIATION GENERAL PRACTICE SERIES (1946).

are to be denied capacity to be capital assets. After alluding to a radio show as being embraced by the exclusionary definition, the Committee stated:¹⁷

The interest of a sole proprietor in such a business enterprise as a photographic studio is not "similar property" even though the value of the business may be largely attributable to the personal efforts of the sole proprietor.

Thus goodwill,¹⁸ a trade name,¹⁹ or the interest in a partnership,²⁰ the value of which arise from personal efforts, are not excluded from capital asset classification.

It seems that a single test of "personal efforts" is inadequate to define "similar property." Rather a dual criterion of "personal" and "artistic" effort has been established. The artistic aspect contains a negative element which can be described as "non-business." To elaborate, where the artistic contribution approaches identity with a business enterprise, the resultant goodwill created is associated more with the business activity than the personal artistic endeavor. If a particular activity tends to be a business or commercial activity in the traditional sense—not merely a money-making enterprise, as a radio show—the fruit of the personal effort can still be a capital asset. On the other hand, if the activity is primarily artistic, the fruit of the personal effort is to be taxed as income. The Committee's example of a photographic studio points up this distinction excellently. Another illustration is the business of a wedding director.

Neatly curtailed by the amendment is the procedure by which an amateur author or composer could transfer his copyright to a newly created corporation in exchange for its stock, and then sell the stock at capital gain rates. The Senate report points out²¹ that this is precluded by the concurrently enacted collapsible corporation provisions.²² Ostensibly unappreciated is the fact that the copyright exclusion also aids in preventing an avoidance of the spirit of the enactment. Under the collapsible corporation provisions the author or composer could transfer his copyright to the newly formed corporation, which in turn could transfer the copyright and hold the proceeds for the three year period²³ after which the collapsible corporation provisions are inappli-

¹⁷ SEN. REP. NO. 2375, 81st Cong., 2d Sess. (1950), 1950 U. S. CODE CONG. SERV. 3140.

¹⁸ See *e.g.*, Aaron Michaels, 12 T. C. 17 (1949).

¹⁹ See *e.g.*, Rainier Brewing Co., 7 T. C. 162 (1946), *aff'd per curiam*, 165 F. (2d) 217 (9th Cir. 1948); Seattle Brewing & Malting Co., 6 T. C. 856 (1946), *aff'd per curiam*, 165 F. (2d) 216 (9th Cir. 1948).

²⁰ Commissioner v. Shapiro, 125 F. (2d) 532 (6th Cir. 1942).

²¹ SEN. REP. NO. 2375, 81st Cong., 2d Sess. (1950), 1950 U. S. CODE CONG. SERV. 3140-1.

²² Pub. L. No. 814, 81st Cong., 2d Sess., § 212 (Aug. 22, 1950); INT. REV. CODE § 117(m).

²³ INT. REV. CODE § 117(m)(3)(C).

cable. But under the copyright exclusion the copyright would remain an ordinary asset, because the corporation, being a recipient of it in a tax free exchange, would hold the copyright with the same basis as the author or composer. Thus, the seller of the copyright could not avoid taxation at ordinary rates. This double barreled sanction makes virtually any transfer to a dummy corporation result in a tax loss; the copyright cannot be converted to a capital asset by the transfer, and the proceeds of a subsequent assignment are subject to the added corporation tax.

A concurrent amendment²⁴ to section 117(j) eliminates the possibility that a copyright could be construed to be a 117(j) asset if used in the business and held over six months.²⁵

The question has been posed whether a contract for contingent payment received for the sale of a copyright can be a capital asset. If a composer, for instance, sold his copyright receiving a contract for payment according to the volume of sales of sheet music, and he in turn sold this contract after substantial amounts had accrued on it, would the sale of the contract be of a capital asset? It has been suggested that it would.²⁶ The doctrine of *Herman M. Rhodes*²⁷ appears to this writer to prevent such a circumvention. That case, following the reasoning of *Helvering v. Horst*,²⁸ held that the right to receive declared dividends was not a capital asset; although it might be property, it predominantly was simply the *right to receive income*.

Despite the thorough closing of the pre-1950 loophole the ultimate ramifications of the spirit of the law can still be circumvented. For example, although a donee of the copyright takes it as an ordinary asset, the gift can appreciably reduce tax liability. This will occur if the income of the donee is substantially less than that of the donor.

²⁴ Pub. L. No. 814, 81st Cong., 2d Sess. § 210(b) (Aug. 22, 1950); INT REV. CODE § 117(j)(1)(C).

²⁵ See SEN. REP. No. 2375, 81st Cong., 2d Sess. (1950), 1950 U. S. CODE CONG. SERV. 3140.

²⁶ The royalty contract was likened to a lease, which if not used in the trade or business, can be a capital asset. See Walter H. Sutliff, 46 B. T. A. 446 (1942). This idea appears in Casey, *supra* note 15, at 385.

²⁷ 43 B. T. A. 780, 784 (1941), *aff'd per curiam*, 131 F. (2d) 50 (6th Cir. 1942), in which the court said: ". . . the exercise of his power to sell or assign his right to receive the declared dividend constituted a realization of income by petitioner taxable to him as ordinary income." This case is followed by E. Blakeney Gleason, P-H 1942 BTA MEM. DEC. ¶ 42,572 (1942); Leslie M. Stratton, P-H 1942 BTA MEM. DEC. ¶ 42,331 (1942). Also see Fred W. Warner, 5 B. T. A. 963 (1926).

²⁸ 311 U. S. 112, 118, 61 S. Ct. 144, 85 L. Ed. 75 (1940), in which the Court considering section 22(a) stated: "The power to dispose of income is the equivalent of ownership of it. The exercise of that power to procure the payment of income to another is the enjoyment, and hence the realization, of the income by him who exercises it."

Under the rule of *Blair v. Commissioner*²⁹ there must be an actual and complete transfer of the property itself; an assignment of income will not do. This would require an assignment, under the indivisible rights theory to be subsequently discussed, of all the rights of the copyright.

II.

Copyrights as Capital Assets

As has been seen, only a purchaser, or one who receives by inheritance or bequest, or their transferees can hold a copyright as a capital asset. Even then the asset is subject to the other exclusions of section 117(a)(1). The cases concerning these exclusions as they operated on copyrights before the 1950 Act are still of general applicability, but the emphasis on the principles contained in them must be completely shifted. For example, prior to the amendment, the question often was whether the author or composer was a professional, *i.e.*, did he hold his copyright primarily for sale to customers in the ordinary course of his business,³⁰ or did he use the copyright, subject to depreciation, in his trade or business.³¹ This occasioned an investigation of prior sales of similar property by the taxpayer,³² how he characterized himself on income tax returns and other formal papers,³³ and whether he conducted his activities in such a manner as to indicate that he was in the business of exploiting his creative talents.³⁴ As he can no longer hold a copyright as a capital asset, these tests do not apply to the taxpayer-artist. Except for the fact of previous sales, they seldom will be applied to his purchaser, or one receiving by inheritance or bequest, because usually these persons will not also be creative artists. The problem will be to determine whether a purchaser—who subsequently sells and asserts that he sold a capital asset—is in the business of dealing in copyrights. To decide this, resort to the reasoning of the real estate dealer cases will be most appropriate, because the frequencies of sales of real property and copyrights are near enough to render these cases

²⁹ 300 U. S. 5, 57 S. Ct. 330, 81 L. Ed. 465 (1937).

³⁰ *Goldsmith et al. v. Commissioner*, 143 F. (2d) 466 (2d Cir.), *cert. denied*, 323 U. S. 774, 65 S. Ct. 135, 89 L. Ed. 619 (1944); *Joseph A. Fields*, 14 T. C. 1202, P-H 1950 TC SERV. ¶ 14.136 (1950).

³¹ This question is brought up in *Joseph A. Fields*, *supra* note 30, but is not decided.

³² *Goldsmith et al. v. Commissioner*, 143 F. (2d) 446 (2d Cir.), *cert. denied*, 323 U. S. 774, 65 S. Ct. 135, 89 L. Ed. 619 (1944); *see Joseph A. Fields*, *supra* note 30.

³³ *See* note 30 *supra*. Characterizing oneself as a playwright, author, inventor, and the like has had a remarkable conclusiveness upon the courts in deciding that the taxpayer was dealing in ordinary assets.

³⁴ *Goldsmith et al. v. Commissioner*, 143 F. (2d) 446 (2d Cir.), *cert. denied*, 323 U. S. 774, 65 S. Ct. 135, 89 L. Ed. 619 (1944). Also *see Herman Shumlin*, 16 T. C. No. 51, P-H 1951 TC SERV. ¶ 16.51 (1951).

suitable for comparison.³⁵ Again the axiom must be repeated that every case necessarily is to be decided primarily upon its particular facts.³⁶

The purchaser of a copyright will be also confronted with the exclusion of depreciable property used in the trade or business. If he exploits the intangible he will be using it in his trade or business. There is no dispute that the property would be subject to depreciation.³⁷ If he does not actively exploit it, he will have to sell it in order to recoup his investment. Very few sales would be consummated before copyrights held by him would be deemed to be held primarily for sale. Possibly he could lease or assign partial rights in the copyrights without establishing himself as holding the property for sale.³⁸ Then a single sale might not be held to be the disposal of property held primarily for sale. From all this it appears that only in the very rare case can a purchaser hold a copyright as a capital asset.

Admittedly it also will be unusual for one to inherit or receive by bequest a valuable copyright free from restrictions imposed upon its use or transfer. When it does occur, the recipient can sell it and assert with success that the asset is capital, unless he commences to enter into a systematic attempt to sell the property in a manner approximating a business venture,³⁹ or proceeds to exploit it in an actual business. If he simply sells it he most probably will be disposing of a capital asset.⁴⁰

A copyright, then, can still be a capital asset, but it will be such only infrequently. The principal incidence will occur when the property is received by reason of the death of the owner.

³⁵ See Allison, *When and How to Be a Dealer Rather Than an Investor for Tax Purposes*, 86 JOUR. OF ACCOUNTANCY 38 (1948); Clark, *Distinguishing Between Dealer and Investor Sales by the Same Taxpayer*, 8 N. Y. U. FED. TAX INST. 855 (1950); Marks, *Buying and Selling Real Estate*, 5 N. Y. U. FED. TAX INST. 416 (1947).

³⁶ "To determine whether the activities of a taxpayer are 'carrying on a business' requires an examination of the facts of each case." Higgins v. Commissioner, 312 U. S. 212, 217, 61 S. Ct. 475, 85 L. Ed. 783 (1941).

³⁷ Associated Patentees, 4 T. C. 979 (1945); International Textbook Co. v. United States, 44 F. (2d) 254 (Ct. Cl. 1930).

³⁸ In Lester P. Barlow, P-H 1943 TC MEM. DEC. ¶43,237 (1943), an inventor who had previously leased and licensed patents was found not to be holding the patents primarily for sale to customers.

³⁹ The Commissioner failed to prove that the activities of the taxpayer amounted to a business enterprise in R. Foster Reynolds, P-H 1945 TC MEM. DEC. ¶45,276 (1945), *aff'd*, 155 F. (2d) 620 (1st Cir. 1946), in which the property was jewelry received by bequest.

⁴⁰ Minerva King Patch, P-H 1941 BTA MEM. DEC. ¶41,552 (1941). In this case a rancher received cattle by a residuary legacy. He did not wish to keep these animals with his herd, so he sold them in bulk. It was held that this was the sale of a capital asset.

III.

Sales or Exchanges of Copyrights

Coordinate with the requirement that property be a capital asset is that it must be sold or exchanged in order that a capital transaction occur. Whether a sale has taken place is the most perplexing question in capital gains taxation of copyrights.

Settling conflicting holdings of the second⁴¹ and fourth⁴² Circuit Courts of Appeal, the Supreme Court in 1949 held in *Wodehouse v. Commissioner*⁴³ that “. . . lump sum payments made in advance for *limited* rights under copyrights . . .” were royalties within the meaning of section 211(a), taxable as gross income of a nonresident alien. Without discussion, but alluding to two previous circuit court decisions,⁴⁴ the Court found that there had not been any sale of a capital asset, but only a license. The license consisted of the assignment by the author of all the rights in several stories to publishing companies under an agreement that the publishers would procure copyrights and then reassign all rights to the author except the exclusive serial rights for the United States, Canada, and South America.⁴⁵ Assuming that the Court believed the arrangement to be an exclusive licensing of the serial rights, it impliedly sanctioned the “indivisible right” or “bundle of rights” theory.⁴⁶

Before continuing it should be emphasized that the decision of the Court concerned sections 211(a) and 143(b), and not 117(a)(1). The first two deal with the taxation of gross income of nonresident aliens, and they exclude from gross income proceeds from capital transactions. They are founded in view of, and in addition to, the established concepts of the Code.⁴⁷ Therefore, the concept of capital assets within their provisions should be identical to that of section 117(a)(1). It is with this understanding that the *Wodehouse* and other cases will be discussed. More will be said of this problem later.

⁴¹ Rohmer et ux. v. Commissioner, 153 F. (2d) 61 (2d Cir.), *cert. denied*, 328 U. S. 862, 66 S. Ct. 1367, 90 L. Ed. 1632 (1946).

⁴² *Wodehouse v. Commissioner*, 166 F. (2d) 986 (4th Cir. 1948), *reversed*, 337 U. S. 369, 69 S. Ct. 1120, 93 L. Ed. 1419 (1949).

⁴³ 337 U. S. 369, 392, 69 S. Ct. 1120, 93 L. Ed. 1419 (1949).

⁴⁴ Rohmer et ux. v. Commissioner, 153 F. (2d) 61 (2d Cir.), *cert. denied*, 328 U. S. 862, 66 S. Ct. 1367, 90 L. Ed. 1632 (1946); *Sabatini v. Commissioner*, 98 F. (2d) 753 (2d Cir. 1938).

⁴⁵ 8 T. C. 637, 649 (1947).

⁴⁶ See generally Fulda, *supra* note 7; Fincke, *An Analysis of the Income Aspects of Patents, Copyrights, and Their Analogues*, 5 TAX L. REV. 361, 371 (1950).

⁴⁷ See *Wodehouse v. Commissioner*, 337 U. S. 369, 401, 418 *et seq.*, 69 S. Ct. 1120, 93 L. Ed. 1419 (1949) (dissenting opinion); *Wodehouse v. Commissioner*, 166 F. (2d) 986, 989 (4th Cir. 1948); Fulda, *supra* note 7, at 263 *et seq.*

The indivisible rights theory has variations,⁴⁸ but the theme of each is that a copyright is an indivisible aggregate of rights.⁴⁹ Unless all the rights are transferred no sale of property has been effected, only a license given.

The source of this theory is twofold. One is evolution from decisions in infringement suits in general copyright law concerning partial assignments. Possibly the clearest expression of the doctrine is in *Witmark & Sons v. Pastime Amusement Co.*,⁵⁰ an infringement suit. A copyright in a composition of Victor Herbert was owned by the plaintiff who had made an assignment of the exclusive right of public performance for profit. The plaintiff was allowed to maintain his suit against the infringer of the assignee's exclusive right on the grounds that the copyright was an indivisible thing which cannot be assigned as to rights ". . . less than the sum of all [the] rights comprehended in the copyright." The decision is solidly supported by earlier authority,⁵¹ but like these prior cases, it involved a procedural problem—who may sue for infringement. In fact, all the cases that have been discovered which ascribe to the indivisible rights theory deal with procedural questions.⁵² Thus, a rule which was designed to remedy adjective difficulties has been transposed to decide substantive questions of a totally alien nature. To complete the picture it must be remarked that even in the procedural cases, there is authority rejecting the doctrine.⁵³

The second source of the theory has been from analogy to the patent decisions. As early as 1850, the Supreme Court declared that a patent monopoly was entire; that it granted the three exclusive rights of making, using, and selling; that the assignment of anything less than all three (for a geographical area) was only a license.⁵⁴

⁴⁸ The principal variation is the "substantiality" doctrine promulgated in *Rohmer et ux. v. Commissioner*, 153 F. (2d) 61, 64 (2d Cir.), *cert. denied*, 328 U. S. 862, 66 S. Ct. 1367, 90 L. Ed. 1632 (1946). See text at note 68 *infra*.

⁴⁹ *Sabatini v. Commissioner*, 98 F. (2d) 753 (2d Cir. 1938).

⁵⁰ 298 Fed. 470 (E. D. S. C. 1924), *aff'd per curiam*, 2 F. (2d) 1020 (4th Cir. 1924).

⁵¹ See *e.g.*, *Goldwyn Pictures Corp. v. Howells Sales Co.*, 282 Fed. 9 (2d Cir. 1922); *New Fiction Publishing Co. v. Star Co.*, 220 Fed. 994 (S. D. N. Y. 1915).

⁵² *Witmark & Sons v. Pastime Amusement Co.*, *supra* note 50; *Goldwyn Pictures Corp. v. Howells Sales Co.*, *supra* note 51; *New Fiction Publishing Co. v. Star Co.*, *supra* note 51; *Empire City Amusement Co. v. Wilton*, 134 Fed. 132 (C. C. D. Mass. 1903); *Black v. Henry G. Allen Co.*, 42 Fed. 618 (C. C. S. D. N. Y. 1890); *Keene v. Wheatley*, 14 Fed. Cas. 180, No. 7, 644 (C. C. E. D. Pa.).

⁵³ *Roberts v. Myers*, 20 Fed. Cas. 898, No. 11,906 (C. C. D. Mass. 1860); a copyright is divisible to the extent that separate rights are recognized by the copyright statute, *Public Ledger Co. v. New York Times*, 275 Fed. 562 (S. D. N. Y. 1921), *aff'd* 279 Fed. 747 (2d Cir. 1922); *Fitch v. Young*, 230 Fed. 743 (S. D. N. Y. 1911); *Ford v. Charles E. Blaney Amusement Co.*, 148 Fed. 642 (C. C. S. D. N. Y. 1906).

⁵⁴ *Gayler v. Wilder*, 10 How. 477, 494, 495, 13 L. Ed. 504 (U. S. 1850).

This has been reasserted by the Court,⁵⁵ and adopted by the patent statute.⁵⁶ It has been accepted without hesitation by the courts in patent tax cases.⁵⁷ Then, as is universally done, the likeness of copyrights to patents was announced, and the rule similarly applied, without evaluation, to the copyright tax litigations.⁵⁸

Originally the Bureau did not adhere to the indivisible rights theory,⁵⁹ but in 1933 it reversed its position.⁶⁰

Two distinct factual situations are contained in the cases. One involves the problem whether there has been a sale within the meaning of section 117, the capital gains provisions. The other is whether the assignment is a sale of property (amounting to a capital asset), or is only a license giving rise to ordinary income in the form of royalties within the comprehension of sections 211(a) and 143(b), which deal with the taxation of gross income of non-resident aliens. Although the second circuit court has stated that the reasoning applicable to section 117 is not apropos to section 211(a),⁶¹ as previously stated⁶² there is no sound conceptual basis for this distinction. The underlying issues are identical—the concepts of “capital asset” and “sale.” Only after these preliminary matters have been disposed of do the differences arise. Then, if it is found that a particular receipt has been from a capital transaction, as customarily conceived by the Code, the gain is excluded from the gross income of the nonresident alien recipient. Finally, it must be noted that most of the cases⁶³ do not recognize the distinction in citations of controlling authority, and Justice Frankfurter in his dissent⁶⁴ in the *Wodehouse* case expressly rejected it.

*Sabatini v. Commissioner*⁶⁵ was the first tax decision adopting the indivisible rights theory. Here a nonresident alien granted the exclusive right for ten years to produce motion pictures from several

⁵⁵ *Waterman v. Mackenzie*, 138 U. S. 252, 11 S. Ct. 334, 34 L. Ed. 923 (1891).

⁵⁶ 35 U. S. C. § 40 (1946).

⁵⁷ See e.g., *Parke Davis & Co.*, 31 B. T. A. 427 (1934).

⁵⁸ See *Sabatini v. Commissioner*, 98 F. (2d) 753 (2d Cir. 1938).

⁵⁹ O. D. 998, 5 CUM. BULL. 117 (1921).

⁶⁰ I. T. 2735, XII-2 CUM. BULL. 131, 135 (1933).

⁶¹ *Rohmer et ux. v. Commissioner*, 153 F. (2d) 61, 65 (2d Cir.), cert. denied, 328 U. S. 862, 66 S. Ct. 1367, 90 L. Ed. 1632 (1946).

⁶² See text at note 47 *supra*.

⁶³ *Irving Berlin*, 42 B. T. A. 668 (1940), involving section 117, expressly follows the *Sabatini* decision without distinction. Neither do the cases following the *Berlin* case mention any difference between the two sections. See *Herman Shumlin*, 16 T. C. No. 51, P-H 1951 TC SERV. ¶ 16.51 (1951); *Joseph A. Fields*, 14 T. C. 1202, P-H 1950 TC SERV. ¶ 14.136 (1950).

⁶⁴ 337 U. S. 369, 401 *passim*, 69 S. Ct. 1120, 93 L. Ed. 1419 (1949).

⁶⁵ 98 F. (2d) 753 (2d Cir. 1938).

of his novels. In reversing the Board of Tax Appeals,⁶⁶ the court declared that there had not been a sale (in England exempt from American taxation, as found by the Board), but only a license to use the property. The rationale was that partial rights in a copyright could not be sold; they only could be licensed. However, the Court did not rely on the copyright decisions; in fact it cited only one case in which the issue was whether a sale of cotton to the Confederacy passed title.⁶⁷

Prior to the *Wodehouse* decision, the other leading case was *Rohmer v. Commissioner*, in which the Court of Appeals for the Second Circuit, in a nonresident alien litigation, stated the rule:⁶⁸

Where a copyright owner transfers to any particular transferee *substantially* less than the entire "bundle of rights" conferred by the copyright, then payment therefore, whether in one sum or in several payments, constitutes royalties within the meaning of § 211(a)(1)(A). For such a transfer is the grant of a license. [Emphasis supplied.]

Here the court enunciated the substantiality test, a variation of the indivisible rights doctrine. This variation was forced upon the court as it was confronted by two patent cases⁶⁹ in which not all of the rights had been transferred, but nevertheless in which it was held that the patents had been sold and not merely licensed. By footnote the court warns that what is "substantial" must be decided on a case-to-case basis.⁷⁰

The *Sabatini* rule has been extended, without a reappraisal of its validity, to be applicable to a perpetual license rather than a limited term as in the *Sabatini* case;⁷¹ to situations involving section 117 directly;⁷² to assignments of not just one right, but several, although not all;⁷³ and to partial assignments coupled with a bailment of limited duration.⁷⁴

Only one case has re-evaluated the *Sabatini* doctrine. The fourth circuit court, in *Wodehouse v. Commissioner*,⁷⁵ cogently pointed out that the theory of the *Sabatini* case was untenable on at least three grounds. Primary among these was that it did not take into account

⁶⁶ 32 B. T. A. 705 (1935).

⁶⁷ That was *Whitfield v. United States*, 92 U. S. 165, 23 L. Ed. 705 (1876).

⁶⁸ 153 F. (2d) 61, 63 (2d Cir. 1946).

⁶⁹ *Commissioner v. Celanese Corp. of America*, 140 F. (2d) 339 (D. C. Cir. 1944); *General Aniline & Film Corp. v. Commissioner*, 139 F. (2d) 759 (2d Cir. 1944).

⁷⁰ 153 F. (2d) 61, 64 n.15 (2d Cir. 1946).

⁷¹ *Rohmer et ux. v. Commissioner*, 153 F. (2d) 61, 63 (2d Cir.), *cert. denied*, 328 U. S. 862, 66 S. Ct. 1367, 90 L. Ed. 1632 (1947).

⁷² *Irving Berlin*, 42 B. T. A. 668 (1940).

⁷³ *Sax Rohmer*, 14 T. C. 1467, P-H 1950 TC SERV. ¶ 14.171 (1950).

⁷⁴ *Ehrlich v. Higgins*, 52 F. Supp. 805 (S. D. N. Y. 1943).

⁷⁵ 166 F. (2d) 986 (4th Cir. 1948), *reversing*, 8 T. C. 637 (1947), *rev'd*, 337 U. S. 369, 69 S. Ct. 1120, 93 L. Ed. 1419 (1949).

the realities of the "literary market," where copyright rights are sold separately as independent property rights. The court traced the authority for the indivisible theory showing that it arose from procedural requirements, but that even these requirements in their proper setting were not demanding enough to compel a unanimous acceptance of the doctrine.⁷⁶ Furthermore, the court added that the very foundation of the theory—the inability of the assignee to sue for infringement of his right—has been swept away in both patent⁷⁷ and copyright cases.⁷⁸ The court concluded that what amounted to a sale of exclusive serial rights was a sale of a capital asset. Unfortunately a majority of the Supreme Court saw differently, and reversed the circuit court in this case.⁷⁹

Reluctance to accept the doctrine has appeared elsewhere. In *Goldsmith v. Commissioner*⁸⁰ Judge Learned Hand, speaking for the majority in dictum, believed that an exclusive license of one of the

. . . various kinds of reproductions . . . of a copyright is for most purposes treated as "property." I think that it is "property" within § 117(a)(1); that its grant is a "sale." . . .

It does not unduly strain the meaning of "sale" to make it include an exclusive license. . . .

In the *Wodehouse* case the Supreme Court carefully sidestepped the essence of the controversy by substantially confining itself to the issue of whether the nonresident alien had received income within the meaning of section 211(a)(1)(A) under the 1936 Act. It assumed that the assignment was not a sale, but did not discuss the question, contenting itself with citations to the *Sabatini* and *Rohmer* cases. Justice Frankfurter, joined by two other justices, dissented,⁸¹ assailing the opinion of the majority with all of the previously outlined arguments. He commented that the majority had failed to decide the essential point in issue—whether there had been a sale.

Although one cannot be absolutely sure, this decision, citing with approval the *Sabatini* and *Rohmer* cases, has apparently conclusively determined that a copyright is not sold unless all of its rights are assigned. This adherence to the indivisible rights theory is unwarranted on several grounds. It is a procedural rule that has been

⁷⁶ See note 53 *supra*.

⁷⁷ *Independent Wireless Tel. Co. v. Radio Corp. of America*, 269 U. S. 459, 46 S. Ct. 166, 70 L. Ed. 357 (1926).

⁷⁸ *L. C. Page & Co. v. Fox Film Corp.*, 83 F. (2d) 196 (2d Cir. 1936); *Stephens v. Howells Sales Co.* 16 F. (2d) 805 (S.D. N.Y. 1926); *Fed. R. Civ. P.* 19(a).

⁷⁹ 337 U. S. 369, 69 S. Ct. 1120, 93 L. Ed. 1419 (1949).

⁸⁰ 143 F. (2d) 466, 467, 468 (2d Cir. 1944), *affirming on different grounds*, 1 T. C. 711 (1943), *cert. denied*, 323 U. S. 774, 65 S. Ct. 135, 89 L. Ed. 619 (1944).

⁸¹ 337 U. S. 369, 401, 69 S. Ct. 1120, 93 L. Ed. 1419 (1949).

injected into unrelated substantive matters. Even as a procedural rule it was subject to objection, was not universally accepted,⁸² and has been fundamentally upset by another decision of the Supreme Court.⁸³ But primarily it is objectionable because it controverts business reality.⁸⁴ It is universal practice to assign specific rights under a copyright. These are bought and sold as property by those frequenting the marketplace. If taxation is to serve its proper role in the economic system, with a minimum of friction, it must operate according to the established practices of the business world.⁸⁵

A far better test would be the "economic interest" criterion applied in the mineral lease cases.⁸⁶ In these cases a capital asset is equated with an economic interest of a durable nature, regardless of the form the interest takes in the mineral. A test such as this would lead to uniformity and greater predictability in copyright "sale" litigations, and would make them compatible with the rationale of other capital asset decisions.⁸⁷

The "sale" question will arise much less frequently in the future since the ambit of copyrights as capital assets has been drastically limited by the 1950 Act. It will continue to arise in nonresident alien cases if the courts accept the statement in the *Rohmer* case that section 211(a) is distinct from section 117(a).⁸⁸ Even if this fallacious assumption is accepted, litigation will be more sparse—disregarding the fact that the Supreme Court has spoken—because the 1950 Act has subjected nonresident aliens, at least in part, to taxation on their capital gains.⁸⁹

IV.

Conclusion

The 1950 copyright and similar property exclusion has made it impossible for the creator of this type of property to hold it as a capital asset; neither can his donee or the recipient of it from him

⁸² See note 53 *supra*.

⁸³ *Independent Wireless Tel. Co. v. Radio Corp. of America*, 269 U. S. 459, 46 S. Ct. 166, 70 L. Ed. 357 (1926).

⁸⁴ See note 47 *supra*.

⁸⁵ See a statement of principle to this effect in *Helvering v. Hallock*, 309 U. S. 106, 116-8, 60 S. Ct. 444, 84 L. Ed. 604 (1940).

⁸⁶ See *e.g.*, *Burton-Sutton Oil Co. v. Commissioner*, 328 U. S. 25, 29, 35, 66 S. Ct. 861, 90 L. Ed. 1062 (1946).

⁸⁷ Among these are *Jones v. Corbyn*, 186 F. (2d) 450 (10th Cir. 1950) (an exclusive territorial insurance agency held to be a capital asset); *Elliot B. Smoak*, 43 B. T. A. 907 (1941) (an exclusive license to sell milk vending machines in a restricted territory held to be a capital asset); I. T. 3873, 1947-2 CUM. BULL. 82 (a liquor license held to be a capital asset).

⁸⁸ See note 61 *supra*.

⁸⁹ Pub. L. No. 814, 81st Cong., 2d Sess. § 213 (Aug. 22, 1950); INT. REV. CODE § 211(a)(1)(B).

(or his donee) in a tax free exchange so hold it. The operation of the other exclusions of section 117 makes it practically impossible for a purchaser to hold it other than as an ordinary asset. Generally it can be said that the only one who receives this type of property as the result of the death of the previous owner can obtain capital asset advantages.

One question remains. Does the "personal" and "artistic" effort qualifications apply to tangible property such as paintings or statues? Usually these either will be found to be held for sale to customers, or the hired artist will be deemed to be rendering personal services. Even though the work is a casual effort by an amateur, it is personal and artistic, and is not of the nature of a business enterprise.⁹⁰ Clearly it is within the scope of the exclusion.

Subject to the status of the holder of the asset, what is excluded from the capital asset definition by the 1950 amendment is any property, tangible or intangible, copyrightable or non-copyrightable, which is created by the personal efforts of the taxpayer, is predominantly artistic, and is not an element of a business enterprise in any substantial way. All of these elements must exist for the property to be excluded. When the copyright itself is not a capital asset, neither is a contract for contingent royalty payments arising from its sale.

In evaluating the present law, the 1950 Act certainly has imposed income rates upon a significant portion of what is income in the economic and accounting connotation. Assuming equitable taxation to be the object of the Code,⁹¹ the amendment is a worthwhile and effective addition to the Code.

Mark Harry Berens

Torts

LIABILITY OF THE DRUGLESS HEALER FOR MALPRACTICE

While the art of healing may be subdivided and analyzed in many ways, the law recognizes, for the purpose of malpractice liability, the classification based upon the use or nonuse of drugs, medicine and surgery. Those utilizing these means of cure are termed physicians and surgeons, and are qualified to practice in the general field of medicine. All others engaged in the art of healing are classified as drugless healers, who may or may not belong to a recognized school.

Numerous controversies have arisen with the healing professions as to the best methods and cures to utilize. The rivalry which exists today

⁹⁰ See text at and following note 17 *supra*.

⁹¹ See generally, Peters, *Tax Law and Natural Law*, 26 NOTRE DAME LAW. 29 (1950).

between regular physicians and the chiropractor, the osteopath, the naturopath, the Christian Science healer, and the clairvoyant physician is but a repetition of the rivalry between the allopath and the homeopath, the physio-medic, the eclectic, and the botanic physician of 175 years ago. It is still more symbolic of the competition during earlier centuries between the physician and the apothecary, and the surgeon and the barber.¹

The fact that many healing methods do not prove successful led to early recognition by the law of the doctrine of malpractice. At common law, any person was at liberty to practice medicine, subject only to the civil responsibilities that grew out of his relation to those whom he treated.² He was bound to discharge his duties with the learning, skill and diligence usually possessed and exercised by physicians similarly situated.³ Thus, the door of the profession was open to all, but those who entered could not escape the common law responsibility for their acts.⁴

It soon became apparent that the protection afforded the public by the common law was inadequate. The states, therefore, in the exercise of their police power to preserve and protect the public health, legislated to regulate and control the practice of medicine.⁵ Today this includes supervision of the related sciences as well, for the power of a state to regulate the special branches of the art, apart from the general practice of medicine, is beyond question.⁶

The statutes, however, have followed the common law.⁷ Every physician has been made answerable for injury to his patient resulting from want of requisite knowledge and skill, from omission of reasonable care and diligence, or from failure to exercise his best judgment.⁸ The doctrine of malpractice has been applied by the courts not only to regularly licensed physicians and surgeons, but also to all others who hold themselves out professionally as being able to treat the human body and cure disease.⁹

What shall here be attempted is to determine the civil (and incidentally, criminal) liability of drugless healers for malpractice. The general principles that apply to these practitioners in malpractice ac-

1 See Caldwell, *Early Legislation Regulating the Practice of Medicine*, 18 ILL. L. REV. 225 (1923).

2 State et al. v. Borah, 51 Ariz. 318, 76 P. (2d) 757 (1938).

3 Nelson v. Harrington, 72 Wis. 591, 40 N. W. 228 (1888).

4 State et al. v. Borah, 51 Ariz. 318, 76 P. (2d) 757 (1938).

5 State *ex rel.* Burroughs v. Webster, 150 Ind. 607, 50 N. E. 750 (1898). See Hutchins, *Characteristics and Constitutionality of Medical Legislation*, 7 MICH. L. REV. 295 (1909).

6 Baker v. State, 91 Tex. Crim. Rep. 521, 240 S. W. 924 (1921).

7 Delahunty v. Finton, 244 Mich. 226, 221 N. W. 168 (1928).

8 Mangiameli v. Ariano, 126 Neb. 629, 253 N. W. 871 (1934).

9 Jacob Musser's Executor v. Melvina Chase, 29 Ohio St. 577 (1876).

tions are determined by their status of belonging or not belonging to a recognized school. On this basis, their duties and liabilities will be examined.

I.

Recognized Schools

The special or limited schools of healing, and the practitioners of these schools, are usually defined both by court decisions and statutes in terms of the methods, media, or instrumentalities used by them to accomplish the relief and cure of patients.¹⁰ Within the classification of recognized schools of drugless healing are chiropractic,¹¹ osteopathy,¹² chiropraxy,¹³ optometry,¹⁴ naturopathy,¹⁵ and Christian Science.¹⁶

The principles of law which govern the relation of a regular physician to his patient also govern the relation of the drugless healer of a recognized school to his patient.¹⁷ He is bound to exercise the reasonable skill and care possessed and exercised by others of his school in the same community or area.¹⁸ He must have knowledge of the advanced learning of the school, and of the latest methods of treatment at the time the treatment is rendered.¹⁹ The correctness of the treatment and the professional skill employed are to be tested by the principles and practices of his school, and not by those of other schools.²⁰ A person professing to follow one system of healing cannot be expected

¹⁰ *McNaughton v. Johnson et al.*, 242 U. S. 344, 37 S. Ct. 178, 61 L. Ed. 352 (1917); *People v. Love*, 298 Ill. 304, 131 N. E. 809 (1921); *Keiningham v. Blake*, 135 Md. 320, 109 Atl. 65 (1919).

¹¹ See *Spears Free Clinic & Hospital for Poor Children v. State Board of Health et al.*, Colo., 220 P. (2d) 872 (1950).

¹² Osteopathy was founded in 1874 by Andrew T. Still, who theorized that disease was caused by physiological discord and deviation from the normal—a structural maladjustment that could be cured by manipulation—and by impeded circulation of the blood. BOOTE, *HISTORY OF OSTEOPATHY AND TWENTIETH CENTURY MEDICAL PRACTICE* 398-9 (1924). See *State v. MacKnight*, 131 N. C. 717, 42 S. E. 580 (1902); Comment, *Physicians and Surgeons—Status of Osteopaths—Limitations on Practice*, 47 MICH. L. REV. 565 (1949).

¹³ See *State v. Armstrong*, 38 Idaho 493, 225 Pac. 491 (1924).

¹⁴ See *Kahn v. Shaw*, 65 Ga. App. 563, 16 S. E. (2d) 99 (1941); *New Jersey State Board of Optometrists v. S. S. Kresge Co.*, 113 N. J. L. 287, 174 Atl. 353 (S. Ct. 1934).

¹⁵ Naturopathy traces its lineage to German healers of the last century who believed that nature and natural agents—sunlight, water, air, etc.—were the greatest and most effective healing agents. REED, *THE HEALING CULTS* 63 (1932).

¹⁶ See *Spead v. Tomlinson*, 73 N. H. 46, 59 Atl. 376 (1904).

¹⁷ *Mitchell v. Atkins*, 36 Del. 451, 178 Atl. 593 (Super. Ct. 1935); *Treptau et al. v. Behrens Spa Inc.*, 247 Wis. 438, 20 N. W. (2d) 108 (1945).

¹⁸ *Kuechler v. Volgmann*, 180 Wis. 238, 192 N. W. 1015 (1923).

¹⁹ *State v. Smith*, 25 Idaho 541, 138 Pac. 1107 (1914).

²⁰ *Simms v. Gafney*, Tex., 227 S. W. (2d) 848 (1950); *Wilkins v. Brock et al.*, 81 Vt. 332, 70 Atl. 572 (1908). See also *Bowles et al. v. Bourbon et al.*, 147 Tex. 608, 219 S. W. (2d) 799 (1949).

by his patient to practice any other. He is not negligent because a member of another school, including a licensed physician or surgeon, would have used a different—and possibly more effective—method of treatment.²¹ The limited practitioner is not an insurer, nor does he warrant favorable results.²² If he possesses ordinary skill, used ordinary care, and utilizes his reasonable judgment, he is not liable even for mistakes in judgment.²³ Of course, he can be held liable, under the doctrine of *respondeat superior*, for the negligence of an assistant, when the assistant is under his control and is acting within the scope of authority.²⁴

If a drugless physician knows, or reasonably should know, that the treatment that he employs will be of no benefit to the patient, he is under a duty to so advise the patient. Similarly, should there be another mode of treatment that is more likely to be successful, he has a duty to send the patient to the appropriate doctor. Failure to do so when the situation calls for it renders the healer liable for malpractice.²⁵ As malpractice may consist of a lack of skill or care in diagnosis, as well as in treatment,²⁶ it is apparent that if the disease is one that reasonably should be detected by a skillful healer, he may be liable for a breach of the duty to detect the disease and advise the patient to seek the proper medical or surgical treatment.²⁷

In a malpractice action the burden of proof is on the patient to establish, by a preponderance of the evidence, that the drugless physician has not exercised the requisite care and skill.²⁸ The proof must also establish, as in every negligence action, the causal connection between the negligence and the injury. In this regard there must be a showing of more than a possibility of causal connection.²⁹ It has been held that the drugless healer is not answerable for any inconvenience, pain, suffering, or other damages that proximately resulted from the initial injury, unless he has aggravated it by improper treatment.³⁰

Although proof of negligence properly may be inferred from the facts of a particular case,³¹ the general rule is that the doctrine of *res*

21 Hilgedorf v. Bertschinger, 132 Ore. 641, 285 Pac. 819 (1930).

22 Josselyn v. Dearborn et al., Me., 62 A. (2d) 174 (1948).

23 *Ibid.*

24 Olsen et al. v. McAtee, 181 Ore. 503, 182 P. (2d) 979 (1947).

25 Carney et ux. v. Lydon et ux., Wash., 220 P. (2d) 894 (1950).

26 Cook v. Moats, 121 Neb. 769, 238 N. W. 529 (1931).

27 Hampton v. Brackin's Jewelry & Optical Co., 237 Ala. 212, 186 So. 173 (1939).

28 Williams v. Marini, 105 Vt. 11, 162 Atl. 796 (1932).

29 Simms v. Gafney, Tex., 227 S. W. (2d) 848 (1950). See Annotation, *Proximate Cause in Malpractice Cases*, 13 A. L. R. (2d) 11, 144 (1950).

30 Walkenhorst v. Kesler, 92 Utah 312, 67 P. (2d) 654 (1937). *But see* Brooks v. Herd, 144 Wash. 173, 257 Pac. 238 (1927).

31 Janssen v. Mulder, 232 Mich. 183, 205 N. W. 159 (1925).

ipsa loquitur does not apply to malpractice actions.³² The reason assigned is that to apply the doctrine would do away with the necessity of expert testimony which is required to fully explain the cause of the injury, and thus adequately determine whether there is legal responsibility.³³ However, at least one court has held that the fact of the accident itself can be sufficient evidence to support a recovery in the absence of any explanation by the defendant tending to show that the injury was not due to his want of care.³⁴ In considering the evidence necessary to prove negligence in malpractice actions, the rule has been declared that ". . . the care required must be in proportion to the danger to be avoided and the consequence that might reasonably be anticipated."³⁵

Negligence in failing to take due care to avoid injury to the undiseased parts of the patient's body may be proved without resort to expert testimony.³⁶ The ready explanation for this rule is that the injury to the parts not being treated is not caused by medical treatment; consequently expert testimony is not needed.

The defendant in a malpractice action is entitled to the testimony of competent practitioners of his own school as to the theories of that school, and of his conformity to them in his treatment of the patient.³⁷ This rule does not exclude the testimony of physicians of another school where the principles of the schools do or should concur.³⁸ This qualification has been most frequently applied to cases dealing with improper diagnosis.³⁹

A variation of the rule is recognized by the California courts, which do not preclude a physician in one school from testifying as to the treatment rendered by a practitioner of another school, on *matters of common observation* within the experience of every physician and surgeon.⁴⁰

³² See *e.g.*, *Ewing et al. v. Goode*, 78 Fed. 442 (C.C. S.D. Ohio 1897); *SEAIN, RES IPSA LOQUITUR, PRESUMPTIONS AND BURDEN OF PROOF*, 467-70 (1945).

³³ *SEAIN, op. cit. supra* note 32, at 467-8.

³⁴ *Hansen v. Isaak*, 70 S. D. 529, 19 N. W. (2d) 521 (1945).

³⁵ *Crowe et al. v. McBride*, 25 Cal. (2d) 318, 153 P. (2d) 727, 728 (1944).

³⁶ *Morrison v. Lane*, 10 Cal. App. (2d) 519, 52 P. (2d) 530 (1935).

³⁷ *Treptau et al. v. Behrens Spa Inc.*, 247 Wis. 438, 20 N. W. (2d) 108 (1945).

³⁸ *Grainger v. Still*, 187 Mo. 197, 85 S. W. 1114 (1905). Also see 21 R. C. L. 383 (1918).

³⁹ See *e.g.*, *Grainger v. Still, supra* note 38.

⁴⁰ See the following California cases: *Hutter v. Hommel*, 213 Cal. 677, 3 P. (2d) 554 (1931); *Heslar v. California Hospital Co. et al.*, 178 Cal. 764, 174 Pac. 654 (1918); *Wallace v. LaVine*, 36 Cal. App. (2d) 450, 97 P. (2d) 879 (1940); *Abos v. Martyn*, 31 Cal. App. (2d) 705, 88 P. (2d) 797 (1939); *Ellinwood v. McCoy et al.*, 8 Cal. App. (2d) 590, 47 P. (2d) 796 (1935); *Howe et ux. v. McCoy*, 113 Cal. App. 468, 298 Pac. 530 (1931).

In *Hutter v. Hommel*, where a homeopathic physician was allowed to testify against an allopathic practitioner in a malpractice case, the court stated:⁴¹

. . . we are cited to no rule obtaining in this jurisdiction and know of none which would preclude a physician trained in one medical school from testifying in a proper case as to the treatment rendered by a physician or surgeon trained in a different school . . . where the alleged malpractice is based upon general charges of negligence relating largely to matters of almost common observation within the experience of every physician and surgeon.

Of course both practitioners here were within the medical profession.

If a drugless healer steps outside the limits of his licensed field and invades the general practice of medicine, the rule which confines the inquiry to rules and principles of his particular school no longer applies. The testimony of practitioners of other schools is then admissible to judge the drugless healer by the standards of a medical doctor, because he acted as one.⁴²

Most states require the drugless healer to be licensed.⁴³ Although the failure to comply with the licensing statute will subject the violator to criminal penalties in most jurisdictions,⁴⁴ it is not malpractice per se. The plaintiff must always allege and prove that the injury complained of was due to negligent unskilled treatment.⁴⁵

Punitive damages will be awarded where the defendant's conduct was reckless, or where he knew of the danger to the patient but proceeded with gross indifference to the consequences.⁴⁶ Criminal liability may ensue if the healer is found guilty of gross and wanton negligence in administering treatment.⁴⁷ Prosecution for manslaughter has resulted when the drugless healer exhibited gross incompetency, inattention, or wanton indifference to his patient's welfare.⁴⁸

The inclusion of some groups within the organized school classification is highly questionable. Naturopathy is recognized by statute in

⁴¹ 213 Cal. 677, 3 P. (2d) 554, 556 (1931).

⁴² *Janssen v. Mulder*, 232 Mich. 183, 205 N. W. 159 (1925); *Kelly v. Carroll et ux*, Wash., 219 P. (2d) 79 (1950).

⁴³ IND. ANN. STAT. §§ 63-1312, 63-1316, 63-1402 (Burns 1933); OHIO GEN. CODE ANN. §§ 1274-1, 1288 (1938); W. VA. CODE ANN. §§ 2950, 2975, 2998 (1949).

⁴⁴ See e.g., *People v. Mangiagli*, Cal., 218 P. (2d) 1025 (1950); *People v. Allcutt*, 117 App. Div. 546, 102 N. Y. Supp. 678 (1st Dep't 1907); *People v. Knightlinger et al.*, 194 Misc. 607, 89 N. Y. S. (2d) 755 (N. Y. County Ct. Gen. Sess. 1949). Also see *State ex rel. Board of Medical Registration and Examination v. Hayes*, Ind., 91 N. E. (2d) 913 (1950), in which an injunction was granted.

⁴⁵ *Monohan v. Deviny et al.*, 131 Misc. 248, 225 N. Y. Supp. 601 (S. Ct. 1927); *Hansen v. Isaak*, 70 S. D. 529, 19 N. W. (2d) 521 (1945).

⁴⁶ *Olsen et al. v. McAtee*, 181 Ore. 503; 182 P. (2d) 979 (1947).

⁴⁷ *State v. Karsunky*, 197 Wash. 87, 84 P. (2d) 390 (1938).

⁴⁸ *State v. Lester*, 127 Minn. 282, 149 N. W. 297 (1914).

only a few states today.⁴⁹ It embraces over sixty different varieties of healing methods,⁵⁰ from ordinary dietetic and gymnastic fads to such mouth-filling therapeutic titles as biodynamochromatic diagnosis. The justification of the continued recognition of this school is open to criticism.

On the other hand, osteopathy has approached nearest to the borderline separating drugless healing from medicine. Osteopaths have gradually accepted the principal tenets of physicians, until in some respects it has become a specialized branch of medicine. In this sense, the continuance of osteopathy as a distinct school of healing is also doubtful.⁵¹

In summary, it is seen that the practitioner of a recognized school of drugless healing is subjected to the same legal rules as medical men—*i.e.*, the practitioner must diagnose and treat his patients with that degree of learning and skill, and with such care and judgment that is generally possessed and employed by practitioners in his locality. The standard of learning and care, of course is different from the physician or surgeon, as each school is judged according to its individual standards and degree of advancement and competence. There is one exception to the rule that each school is tested by its own standards. That is when a practitioner usurps the realm of practice of another school. Then he is judged according to the standards of the school whose practice he invaded. Finally, as in all negligence actions, the injury must be proximately caused by the negligence treatment.⁵²

II.

Nonrecognized Schools

The rule that the skill required of a drugless healer is to be measured by the principles of his school of practice is contingent upon the status of that school as one recognized and in good standing. It must have principles of practice, embracing diagnosis and remedies, for the guidance of its members, which each member must observe.⁵³ Schools which do not possess standards or principles of practice are termed non-recognized—which appellation is more or less repugnant.

⁴⁹ See the following statutes: D. C. CODE § 2-106 (1940); CONN. GEN. STAT. § 4390 (1949); FLA. STAT. § 462.01 (1949); ORE. COMP. LAWS ANN. § 54-501 (1940); S. C. CODE ANN. §§ 5231-19 to 5231-28 (1942).

⁵⁰ Comment, 6 FORD. L. REV. 438, 446 (1937). See *Millsap v. Anderson et al.*, 63 Cal. App. 518, 219 Pac. 469 (1923); *State v. Wheaton*, 130 Conn. 544, 36 A. (2d) 118 (1944).

⁵¹ See REED, *op. cit. supra* note 15, at 11-7.

⁵² *Bowles v. Bourbon et al.*, 147 Tex. 608, 219 S. W. (2d) 779 (1949).

⁵³ *Hansen v. Pock*, 57 Mont. 51, 187 Pac. 282 (1920). See 21 R. C. L. 383 (1918).

One who holds himself out to be a clairvoyant physician, where there is no recognized school designated as clairvoyant, is held to the standard which is applicable to ordinary physicians in the vicinity, and not merely to the usual skill of a clairvoyant—whatever that may be.⁵⁴ If he represents himself as a medical expert, and accepts employment as a healer of disease, but relies for diagnosis and treatment upon some occult influence, he takes the risk inherent in his use of intuition.⁵⁵

The Supreme Court of Missouri, in *Longen v. Weltmer*,⁵⁶ held that a magnetic healer was liable to a patient to whom he had administered treatment. In this case, ordinary physicians were allowed to testify that the treatment could not be justified by the rules of recognized schools, although they admitted that they knew nothing of the principles of magnetic healing. Similarly, in Montana, regular physicians were permitted to testify against a Chinese herb doctor. His own testimony failed to disclose any established rules or methods of practice, but simply revealed that he was a charlatan, without skill or scientific knowledge.⁵⁷ In California, physicians have been permitted to testify in an action against a beauty doctor who performed a surgical operation on the plaintiff's lip.⁵⁸ A farmer who held himself out as a doctor having skill and experience in the treatment and cure of cancer, came within this rule. He was required to exercise the skill and care usually possessed and employed by the general physician in the treatment of this malady.⁵⁹

Of interest is the status of the spiritual healers. In New Jersey these healers do not engage in the practice of medicine so as to violate any of the state laws,⁶⁰ but merely propound the triumph of mind over ills of the body and do not prescribe drugs or material remedies. Conversely, in Iowa, a drugless healer who professed to have power to heal vested in him by the "silent invisible God," and gave treatment by rubbing his fingertips lightly over the body of the patient, was held to be practicing without a license and was enjoined from further practice.⁶¹

A defendant in a malpractice action cannot interpose a defense that his treatment conformed to the standard of care usually exercised by others of his school, if that school has no definite principles or

⁵⁴ *Nelson v. Harrington*, 72 Wis. 591, 40 N. W. 228 (1888).

⁵⁵ *Ibid.*

⁵⁶ 180 Mo. 322, 79 S. W. 655 (1904).

⁵⁷ *Hansen v. Pock*, 57 Mont. 51, 187 Pac. 282 (1920).

⁵⁸ *Hall v. Steele*, 193 Cal. 602, 226 Pac. 854 (1924).

⁵⁹ *Jacob Musser's Executor v. Melvina Chase*, 29 Ohio St. 577 (1876).

⁶⁰ *State Board of Medical Examiners v. Maxwell*, 13 N. J. Misc. 855, 181 Atl. 694 (S. Ct. 1935).

⁶¹ *State ex rel. Bierring v. Robinson*, 236 Iowa 752, 19 N. W. (2d) 214 (1945).

tenets governing its members. Accordingly he will be held accountable to the standard of care usually possessed by regular practitioners of the recognized school which he invaded.

III.

Concluding Observations

The exponents of healing cults have succeeded in winning the confidence and loosening the pursestrings of a substantial number of persons. Medical men profess scorn for their competitors' techniques,⁶² and apprehension of the results of their treatments. The drugless practitioners, secure in the legislative recognition which has been accorded them in almost all states, continue to flourish without appreciable signs of abatement. Prohibition, assuming it to be constitutionally possible, is not desirable. Drugless practitioners have a right to practice within reasonable limits, and it is extremely doubtful whether any attempt to legislate them out of existence would reflect the popular will. Doubtless, many of their pseudo-scientific theories are absurd and fallacious; but medical men are beginning to realize that they have much to learn from the healers, especially in the fields of physical therapy⁶³ and psychotherapy.⁶⁴

In the courts today an action for malpractice is difficult to maintain. Practitioners are usually reluctant to testify against members of their own school, and the public at large is for the most part unable to distinguish between good and bad practice. These elements, combined with the conflicting and troublesome rules of evidence concerning expert testimony, result in a difficult entanglement for both the plaintiff and the courts to overcome.

Educational standards governing the physician and surgeon have been steadily raised through the years, with results that have been beneficial to both the profession and the public. Attempts have also been made to regulate the recognized drugless healers. Even though the standards formulated for the drugless healer have been far less stringent than those established for the physician, the attempted supervision of the drugless healer has not been successful.

Even less successful have been attempts to control the nonrecognized schools. This is because the techniques and methods are generally pe-

⁶² Dr. Morris Fishbein, former editor of the *Journal of the American Medical Association*, and *Hygeia*, has analyzed the tenets of the healing cults at some length. His conclusions bespeak only scorn for their theories and dogmas. See in particular his *FADS AND QUACKERY IN HEALING* (1932).

⁶³ *Id.* at 9.

⁶⁴ Christian Science, New Thought, and other types of faith healing have done important ground work in the science of psychotherapy, *i.e.*, the treatment of the accompanying mental illness which is a very important factor in all disease. See JANET, *PSYCHOLOGICAL HEALING* 97 (1925).

cular to the particular healer. The subjectivity inherent in these techniques prevents effective scientific analysis, and militates against the formulation of sound rules to govern them. It is submitted, therefore, that those practitioners adhering to nonrecognized schools are for the most part detrimental to society. If they persist in their unorthodox, and often fraudulent treatments, the courts must continue to judge them according to the standards of the fields of medicine they purport to practice.

At present civil remedies for malpractice are available against all who hold themselves out as healers of the human body. The legal rules applicable to members of non-medical, but recognized schools of healing are the same as those applied to physicians and surgeons, with the qualification, that each school is judged according to its particular standards. On the other hand, practitioners of nonrecognized systems are held exactly to orthodox medical standards. Whether these civil remedies are sufficient is open to serious doubt. It appears that they are not, especially in view of the serious evidentiary problems confronting the injured patient. Whether the solution is more effective criminal sanctions or more stringent civil penalties is yet to be decided.

Robert C. Enburg

James J. Haranzo

Torts

SOME CURRENT PROBLEMS CONCERNING THE FEDERAL RAILROAD LIABILITY ACTS

One of the most fruitful sources of litigation in the United States Supreme Court at the present time¹ is the Federal Employers' Liability Act² and its concomitants, the Safety Appliance Act³ and the Boiler Inspection Act.⁴ These statutes were enacted in an effort to eliminate the difficulties impeding recovery by railroad employees for industrial injuries.

The first legislation in point of time was the Safety Appliance Act which became law in 1893 (amended in 1903). It is a remedial statute designed to effect greater safety in the operation of railroads by requiring the use of designated safety devices. These devices included couplers that operate automatically on impact; power brakes

¹ See *Wilkerson v. McCarthy et al.*, 336 U. S. 53, 76, 69 S. Ct. 413, 93 L. Ed. 497 (1949).

² 35 STAT. 65 *et seq.* (1908), as amended, 45 U. S. C. §§ 51 *et seq.* (1946).

³ 27 STAT. 531 *et seq.* (1893), as amended, 45 U. S. C. §§ 1 *et seq.* (1946).

⁴ 36 STAT. 913 *et seq.* (1911), as amended, 45 U. S. C. §§ 22-9 (1946).

that are effective to stop the cars operated on any train; grab irons and secure handholds on cars; drawbars of standard specifications; and secure sillsteps, ladders and running boards.

The requirements of the Safety Appliance Act still did not prevent the unending toll of death and injury that plagued railroad men. Congress next passed the Federal Employers' Liability Act in 1906,⁵ but this was declared unconstitutional in 1907 on the ground that it encroached upon the reserved powers of the states.⁶ The Act as finally passed in 1908, and amended in 1939,⁷ is substantially in force today. It attempts to reduce the uncertainty of a common law recovery for death or injury suffered by an employee by limiting the defenses available to the railroad, *e.g.*, it eliminates the defense of assumption of risk, the fellow servant doctrine, and makes contributory negligence a partial instead of an absolute defense. It was explained by Justice Douglas that:⁸

The purpose of the Act was to change that strict rule of liability, to lift from employees the "prodigious burden" of personal injuries which that system had placed upon them, and to relieve men "who by the exigencies and necessities of life are bound to labor" from the risks and hazards that could be avoided or lessened "by the exercise of proper care on the part of the employer in providing safe and proper machinery and equipment with which the employee does his work."

The Boiler Inspection Act is similar in form to the Safety Appliance Act in that it establishes minimum safety standards for boilers, locomotives, tenders and appurtenances. This statute, enacted in 1911 and amended several times, gives broad authorization to the Interstate Commerce Commission to establish standards by prescribing "rules and regulations by which fitness for service shall be determined,"⁹ provided the Commission finds that such rules are required to eliminate unreasonable safety risks.¹⁰

These three Acts are independent, although their subject matter is in many instances the same. This independence, without an adequate dovetailing of the Acts, has caused an overflow of litigation testing the limits of each Act and searching the twilight zone between the provisions.¹¹ In one instance the Supreme Court in dicta stated¹²

⁵ 34 STAT. 232 (1906).

⁶ *Howard v. Illinois Central Ry.*, 207 U. S. 463, 28 S. Ct. 141, 52 L. Ed. 297 (1907).

⁷ 53 STAT. 1404-5 (1939), 45 U. S. C. §§ 51, 54, 56, 60 (1946).

⁸ *Wilkerson v. McCarthy et al.*, 336 U. S. 53, 68, 69 S. Ct. 413, 93 L. Ed. 497 (1949), citing *H. R. REP. No. 1386*, 60th Cong., 1st Sess. 2 (1908).

⁹ *Napier v. Atlantic Coast Line R. R.*, 272 U. S. 605, 612, 47 S. Ct. 207, 71 L. Ed. 432 (1926).

¹⁰ *United States et al. v. Baltimore & Ohio R. R. et al.*, 293 U. S. 454, 55 S. Ct. 268, 79 L. Ed. 587 (1935).

¹¹ *Wilkerson v. McCarthy et al.*, 336 U. S. 53, 66, 69 S. Ct. 413, 93 L. Ed. 497 (1949).

that the Safety Appliance Act and Boiler Inspection Act are substantially, if not in form, amendments to the Federal Employers' Liability Act because they dispense with the necessity of proving that violations of the safety statutes constitute negligence.

This triumvirate of legislation was enacted by Congress under its plenary powers over interstate and foreign commerce.¹³ Like Topsy, the coverage "just grew and grew" and the confusion is reflected in the decisions of the courts, the hazy pleadings of the lawyers in railroad injury cases,¹⁴ and the injustice done to railroad workers in attempting to secure redress for industrial injuries.¹⁵ These defects have been assailed on the ground that the whole system of railroad liability legislation is a throwback to the more barbarous days of trial by fire and wager of law. The leader of this crusade on the Supreme Court is Mr. Justice Frankfurter, who in *Urie v. Thompson*,¹⁶ an action based on the FELA and Boiler Inspection Act, while concurring in part, said:

At the risk of wearisome reiteration it is relevant to say again that the common law concept of negligence is an antiquated and uncivilized basis for working out rights and duties for disabilities and deaths inevitably due to the conduct of modern industry. In the conscious or unconscious endeavor not to have the human cost of industry fall with cruel injustice upon workers and their families, the law of negligence gives rise to endless casuistry. So long as the gamble of an occasional heavy verdict is not replaced by the security of a modern system of insurance, courts must continue to apply the notion of negligence in situations for which it was never intended.

Other decisions have been enlivened by similar judicial attacks on the application of negligence theories in a complex industrial society.¹⁷ The epitome was reached when negligence and proximate cause in these actions were compared to catching butterflies without a net.¹⁸

¹² *Urie v. Thompson*, 337 U. S. 163, 189, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949).

¹³ *Gibbons v. Ogden*, 9 Wheat. 1, 196, 6 L. Ed. 23 (U. S. 1824).

¹⁴ See *O'Donnell v. Elgin, J. & E. Ry.*, 338 U. S. 384, 392, 70 S. Ct. 200, 94 L. Ed. 187 (1949), where Mr. Justice Jackson stated: "We no longer insist upon technical rules of pleading, but it will ever be difficult in a jury trial to segregate issues which counsel do not separate in their pleading, preparation or thinking."

¹⁵ See *e.g.*, *Missouri ex rel. Southern Ry. v. Mayfield*; *Missouri ex rel. Atchison, T. & S. F. Ry. v. Murphy*, 340 U. S., 71 S. Ct. 1, 95 L. Ed. (1950) (proceedings in their third year in court and again remanded for a new trial); *Mazula v. Delaware & Hudson R. R.*, 90 F. Supp. 966 (S. D. N. Y. 1950) (extended delay in commencing trial in district court).

¹⁶ 337 U. S. 163, 196, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949).

¹⁷ *Wilkerson v. McCarthy et al.*, 336 U. S. 53, 65, 69 S. Ct. 413, 93 L. Ed. 497 (1949).

¹⁸ *Carter v. Atlanta & St. A. B. Ry.*, 338 U. S. 430, 437, 70 S. Ct. 226, 94 L. Ed. 236 (1949).

I.

Persons Covered

The three Acts protect different classes of people. The FELA covers employees only; the plain wording of the Safety Appliance and Boiler Inspection Acts make them applicable to both employees and travelers, and by implication to employees of independent contractors injured by failure of a railroad to comply with the provisions of the Acts. In one case,¹⁹ the Safety Appliance Act was construed to cover travelers on a highway who were injured in a collision with a train which did not have the required power brakes. It was averred by the Court that the title of the Act does not state its sole purpose, but is an aid to construction of ambiguous provisions. Since Congress surely would have in mind the safety of all persons affected by the use of these devices, the Court reasoned that travelers on highways which intersect railroad right of ways were also protected. To confine the benefits to employees and passengers alone would be to impute to Congress an intention to ignore the equally important safety of other travelers. Under a recent decision, the Safety Appliance Act has been extended to cover all persons who need protection from dangerous situations created by the maintenance or operation of prohibited defective appliances.²⁰

The limits of this liberal trend do not extend to those employees who work on defective equipment withdrawn from use, nor do they apply to any passengers or third parties who conceivably might be injured by railroad equipment withdrawn from service. The strict requirement of the statute that the car or engine be "in use" at the time of the injury has been upheld in several cases. If a car is found defective and reaches a place of repair, the Safety Appliance Act no longer applies. By express provision of the 1910 amendment,²¹ the railroad is exempted from the penal sum²² exacted for violation of the Act while the defective car is being removed to a place of repair, but during the movement the railroad is still liable for any injury

¹⁹ *Fairport, P. & E. R. R. v. Meredith*, 292 U. S. 589, 54 S. Ct. 826, 78 L. Ed. 1446 (1934). See also *Brady v. Terminal R. R. Ass'n*, 303 U. S. 10, 58 S. Ct. 426, 82 L. Ed. 614 (1938).

²⁰ *Coray v. Southern Pacific Co.*, 335 U. S. 520, 69 S. Ct. 275, 93 L. Ed. 208 (1949).

²¹ The Act itself does not provide a cause of action for recovery for injuries, but rather provides for the recovery of a penal sum for its violation. However, the courts have generally followed an early case that held that a recovery could be had under the Act, and that the existence of the right of private action, even without legislation, had never been doubted. *Texas & Pacific Ry. v. Rigsby*, 241 U. S. 33, 36 S. Ct. 482, 60 L. Ed. 874 (1916). See also *Swinson v. Chicago, St. P., M. & O. Ry.*, 294 U. S. 529, 55 S. Ct. 517, 79 L. Ed. 1041 (1935).

²² 36 STAT. 299 (1910), as amended, 45 U. S. C. § 13 (1946).

to an employee caused by the defect. Once repairs have been commenced, use or movements of the car incidental to repair are outside the provisions of the Act. This rule is clearly illustrated in *New York, C. & St. L. R. R. v. Kelly*,²³ where the circuit court held that after a defective car reaches a place of repair, the Safety Appliance Act is inapplicable because the car has been withdrawn from service, is not in use, and any incidental shifting does not put it in use. In *Baltimore & Ohio R. R. v. Hooven*,²⁴ the Safety Appliance Act was held not to apply to a locomotive withdrawn from service and undergoing minor repairs in preparation for an early return to service. In one attempted defense, a railroad sought to show that a car was not in use because it was motionless, even though it had become so because a coupling had broken. The court decided that the car was in use even though standing.²⁵ *Brady v. Terminal R. R. Ass'n*²⁶ held that a car remained in use although it was awaiting inspection to determine whether it met the requirements of the regulations. However, despite these distinctions, generally it can be said that repair men employed by railroads are not covered by the Safety Appliance Act while making repairs.

The Boiler Inspection Act similarly recognizes the necessity for actual use of the equipment. In *Lyle v. Atchison, T. & S. F. Ry.*,²⁷ it was held that a locomotive was not being "used" when the run had ended and the engine had been turned over to a hostler's helper for servicing. The recent trend in FELA decisions towards granting recovery to "backshop" workers would provide a right of action if negligence could be shown and if interstate commerce were affected.²⁸ The Boiler Act would do away with any necessity to prove negligence, but if this Act does not apply, a finding of negligence would warrant a recovery under FELA. Apparently the repair workers can be said to have "assumed the risk" of working with defective cars. Their only compensating advantage is the application by the FELA of the common law doctrine that the more dangerous the place, the greater the care required of the employer to provide a safe place and safe tools,²⁹ but even so, these workers have no recourse to the Appliance Act or the Boiler Act while making repairs.

Under the FELA, coverage is extended to employees of interstate railroads only while engaged in interstate activities and, since 1939,

²³ 70 F. (2d) 548 (7th Cir. 1934).

²⁴ 297 Fed. 919 (6th Cir. 1924).

²⁵ Minneapolis, St. P. & S. S. M. Ry. v. Goneau, 269 U. S. 406, 46 S. Ct. 129, 70 L. Ed. 335 (1926).

²⁶ 303 U. S. 10, 58 S. Ct. 426, 82 L. Ed. 614 (1938).

²⁷ 177 F. (2d) 221 (7th Cir. 1949).

²⁸ See Note, *Employees in Interstate Commerce and the Federal Employers' Liability Act*, 25 NOTRE DAME LAW. 711 (1950).

²⁹ *Pitt v. Pennsylvania R. R.*, 66 F. Supp. 443 (E. D. Pa. 1946); *Handy v. Reading Co.*, 66 F. Supp. 246 (E. D. Pa. 1946).

in activities closely and substantially affecting such commerce. The injuries must be incurred through negligence of the railroad, its officers, agents, or employees, or through negligently caused defects or insufficiencies in its cars, engines, appliances, machinery, track, roadbed, works, wharves, boats and other equipment. So the essentials of the employee's case are: first, employee status, secondly, employment in interstate commerce, and lastly, injury due to the negligence of the railroad.

The employment status of the injured worker under the FELA has recently been considered by several courts. The term "employee" in the Act has been interpreted by the Supreme Court to describe the conventional relation of master and servant.³⁰ This relation is usually dependent upon the "right to direct the manner in which the business should be done";³¹ or stated differently, its existence is determined by ascertaining whose work was being performed at the time of the injury.³² In *Pennsylvania R. R. v. Roth*³³ and *Pennsylvania R. R. v. Barlion*,³⁴ the Sixth Circuit Court of Appeals held employees of an independent contractor to be employees of the railroad within the purview of the FELA, since the railroad retained the right to direct the work of the contractor. The railroad had agreed with the Federal Government to provide a storage yard on its line, and had entered into a contract with a third party to unload cars, to stencil, mark, and store inbound shipments, and to remark and reload outbound shipments. The railroad retained direction of the movement of cars and authority to change the unloading, storing and shipping operations. The employees injured were engaged by different independent contractors at different times, but the contracts were essentially the same. Piercing the independent contractor status, the court found that the railroad had retained the right to control the employees; thus the employees were held to be covered by the Act.

A different result was obtained by the Seventh Circuit Court of Appeals in *Miles v. Pennsylvania R. R.*,³⁵ where the employee of an independent contractor was not permitted to recover under the FELA. There, the railroad entered into an agreement with the contractor for the construction of new and additional trackage. At the time of

³⁰ *Hull v. Philadelphia & Reading Ry.*, 252 U. S. 475, 40 S. Ct. 358, 64 L. Ed. 670 (1920); *Robinson v. Baltimore & Ohio R. R.*, 237 U. S. 84, 35 S. Ct. 491, 59 L. Ed. 849 (1915).

³¹ *Chicago, R. I. & P. R.R. v. Bond*, 240 U. S. 449, 456, 36 S. Ct. 403, 60 L. Ed. 735 (1916).

³² *Linstead v. Chesapeake & Ohio Ry.*, 276 U. S. 28, 34, 48 S. Ct. 241, 72 L. Ed. 453 (1928).

³³ 163 F. (2d) 161 (6th Cir. 1947).

³⁴ 172 F. (2d) 710 (6th Cir. 1949).

³⁵ 182 F. (2d) 411 (7th Cir. 1950).

the injury the actual construction had been 90 percent completed, and the workers were engaged in the normal maintenance tasks of railroad employees.

To claim benefits under the Act it is necessary to show actual employment by a railroad, or an intervening contract between the railroad company and a third party which would be void as an attempt to escape liability under the FELA (as provided in Section 5 of the Act).³⁶ It would appear from the cases that the better test is *control* by the railroad; if there is control, the employee will be entitled to recover for negligent injury under the FELA.

One case,³⁷ involving a student trainee serving without pay in order to qualify himself for the position of yard clerk, was decided by application of the coordinate tests of the right to control the manner in which the work should be done, and whose work was being performed. The fact that the employee received no compensation was not determinative.

This problem will occupy a greater share of attention as the railroads attempt to hire out the more hazardous construction or operational jobs. The independent contractor relationship must be decided on its peculiar facts and in ordinary cases no one feature of the relationship is controlling, although, as stated above, the "right to control" test is the most significant at the present time.

The foregoing outline of railroad liability under federal legislation indicates the various requirements for bringing an action for a particular injury under one or the other of the Acts. While these Acts operate concomitantly in many instances and cannot be considered apart from one another, it is manifest that they are not uniform in scope and operation. This absence of integration may be readily observed from the following comparison.

	<i>Appliance and Boiler Acts</i>	<i>Employers' Liability Act</i>
Persons Covered	Employees, travelers, independent contractors, and strangers.	Railroad employees, independent contractors <i>only</i> if working under direct control of the railroad.
When Covered	When equipment is in use.	At all times whether the equipment is in use or not, stationary or moving.
Where Covered	Interstate or intrastate (except interurban railroads and street cars).	Interstate or closely affecting interstate commerce.

³⁶ 35 STAT. 66 (1908), as amended, 45 U. S. C. § 55 (1946).

³⁷ *Watkins v. Thompson*, 72 F. Supp. 953 (E. D. Mo. 1947).

	<i>Appliance and Boiler Acts</i>	<i>Employers' Liability Act</i>
Duty Imposed on Carrier	Absolute duty to have required appliances in safe condition.	Observance of the standard of care of the reasonable man.
Source of Action	Common law action for breach of a statutory duty.	Statutory right of action.
Cause of Action	Damages resulting from breach of a required duty.	Damages resulting from negligence.
Place of Bringing Action	State or federal district where the railroad is doing business.	State or federal district where the railroad is doing business.
Defenses Available to Carrier	(1) Equipment not in use. (2) Injury not proximately caused by the defective equipment.	(1) Due care. (2) Lack of employment status. (3) Not in or closely affecting interstate commerce. (4) Contributory negligence is available to diminish damages.
Defenses Not Available to Carrier	(1) Assumption of risk. (2) Contributory negligence.	Assumption of risk.

II.

Evidentiary Problems Under the Safety Appliance Act

The courts, in dealing with the question of railroad liability under the Safety Appliance Act, need concern themselves with only two considerations: first, whether there has been a violation of the Act; and secondly, whether that violation was a contributing factor to the injury complained of. Questions of contributory negligence, assumption of risk, and due care are inappropriate, the only defenses available to the employer being the absence of any violation of the safety provisions of the statute, or the lack of a causal relationship between the violation and the injury.³⁸ Observed in this light the operation of the statute appears to be simple and without many of the nebulous aspects which have hindered the efficient administration of the Federal Employers' Liability Act.³⁹

³⁸ ". . . the duty under the Acts is not based on the negligence of the carrier but is an absolute one requiring performance 'on the occasion in question.'" *Affolder v. New York C. & St. L. R. R.*, 339 U. S. 96, 98, 70 S. Ct. 509, 94 L. Ed. 683 (1950).

³⁹ See Note, *Employees in Interstate Commerce and The Federal Employers' Liability Act*, 25 NOTRE DAME LAW. 711 (1950).

It is surprising then to find the Safety Appliance Act being continually involved in a quantity of litigation in which the courts experience no little difficulty in resolving commonplace problems. The question of proximate cause, among others, has received questionable treatment on more than a single occasion. In *Carter v. Atlanta & St. A. B. Ry.*,⁴⁰ the court directed the jury to find that a violation of the Act was not the cause of the injury sustained by the complainant in the action. It appeared in evidence that there had been a separation in a string of railroad cars due to the failure of a coupler to connect properly upon impact as required by the statute. The plaintiff, a workman, upon noticing the separation, jumped on the uncoupled car in an effort to stop it. He succeeded in his effort, but was injured by a second impact which occurred when the engineer, who was unaware of the failure to couple on the first impact, backed the train into the car stopped by the plaintiff. The effect of the trial court's ruling, as above stated, was to deny the jury the right to find that the violation was a contributing factor to the plaintiff's injury. This position is difficult to support inasmuch as a finding of liability would have some basis in tort law,⁴¹ and the liability under the Act is unquestionably of a more stringent nature. Approving the narrow view taken by the district court, the circuit court of appeal found that the defect in the coupler was the "remote, not the proximate cause of plaintiff's injuries,"⁴² and thereupon it affirmed. The Supreme Court dealt more directly with the phantom proposition of proximate cause,⁴³ and speaking through Justice Clark, ascertained that the ruling of the trial court was erroneous. It remanded the case for a new trial, stating in the course of the opinion:⁴⁴

Certainly there was evidence upon which a jury could find a causal relation between the failure to couple, the action of petitioner in running and stopping the rolling car, the engineer's justified assumption that the car had coupled when in fact it had failed to do so, and the continued movement of the train into the standing car, thus causing injury.

It seems that personal sentiments and conservative attitudes are the only explanation for the restricted application which the Act received in the lower courts. Certainly these are not in keeping with the treatment which was intended to be given this social legislation.

In *Meyers v. Reading Co.*,⁴⁵ the court refused a motion for a directed verdict upon application of the defendant employer and submitted the case together with special interrogatories to the jury. The

⁴⁰ 170 F. (2d) 719 (5th Cir. 1948).

⁴¹ *Scott v. Shepherd*, 3 Wils. 403, 95 Eng. Rep. 1124 (1773).

⁴² 170 F. (2d) 719, 721 (5th Cir. 1948).

⁴³ 338 U. S. 430, 70 S. Ct. 226, 94 L. Ed. 236 (1949).

⁴⁴ *Id.*, 338 U. S. at 435.

⁴⁵ 63 F. Supp. 817 (E. D. Pa. 1945).

jury specifically found that there had been a failure to comply with the provisions of the statute and that the plaintiff's injury was a result of the violation. The court thereafter granted the defendant a motion for judgment notwithstanding the verdict stating:⁴⁶

From the paucity of proof offered by the plaintiff the jury might logically draw the inference that the brake was inefficient and might have just as logically drawn the inference that the brake reacted normally and efficiently under the circumstances. Since the evidence supports equally two inconsistent inferences of fact, it establishes neither.

The plaintiff in this case asserted that he was injured when a hand-brake failed to operate properly, causing him to be thrown to the ground. During the course of the trial he testified that the brake did not react in a normal fashion and that it was this failure to operate that caused his injury.⁴⁷ The court held in effect that from the evidence presented only one conclusion was legally permissible—that nothing was established. The statement of the court that the evidence supported “equally two inconsistent inferences of fact”⁴⁸ was not wholly correct because the plaintiff explicitly testified that the brake did not operate as a normal brake and that this abnormality was the cause of his injury. The district court's ruling was affirmed by the circuit court⁴⁹ but reversed by the Supreme Court.⁵⁰ Quoting from *Tennant v. Peoria & P. U. Ry.*,⁵¹ Justice Burton, speaking for the Court, said:⁵²

“Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. ‘The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.’ *Galloway v. United States*. . . .”

After finding that there was some evidence on which the jury could, if they believed it, rest a verdict for the plaintiff, the Court went on to hold that the action of the trial court could not be permitted under the Federal Constitution as it invaded the plaintiff's right of trial by jury. The meager quantity of the plaintiff's evidence appears to have been the basis of the decision of the district court. It evidently

⁴⁶ *Id.* at 821.

⁴⁷ *Id.* at 819 n.3: “Q. With the ordinary brake wheel, do you have the difficulty that you had with this wheel? A. Not ordinarily. Q. What was the difference between this wheel and the ordinary wheel? A. It was kind of stiff, and like a spring,—like a shoe kicking back. Q. And you started to try to set it? A. That is right. . . . Q. What happened to the wheel on the hand-brake while you were holding the wheel? A. That kicked back. . . . Q. Could you hold it? A. No, I couldn't. . . . Q. What happened to you? A. Down I went.”

⁴⁸ *Id.* at 821.

⁴⁹ 155 F. (2d) 523 (3rd Cir. 1946).

⁵⁰ 331 U. S. 477, 67 S. Ct. 1334, 91 L. Ed. 1615 (1947).

⁵¹ 321 U. S. 29, 32, 64 S. Ct. 409, 88 L. Ed. 520 (1944).

⁵² 331 U. S. 477, 485, 67 S. Ct. 1334, 91 L. Ed. 1615 (1947).

did not consider too seriously, the rule which has been reiterated by the Supreme Court that it is for the jury to pass on the credibility of the evidence, it being "immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."⁵³

The Court of Appeals of the Seventh Circuit faced a similar difficulty when it reversed a judgment of a district court and ordered judgment for the defendant notwithstanding the verdict in favor of the plaintiff.⁵⁴ The finding of the circuit court was that the plaintiff was not making a proper effort to operate a brake which was alleged to have been defective and therefore no inference of a defect was permissible:⁵⁵

Certainly the fact that it did not operate while he was awkwardly positioned on the car is no proof of defect, and we think the fact that it operated so readily after he was properly positioned dispels any inference of defect that might arise from his previous unsuccessful efforts.

On the authority of *Meyers v. Reading Co.*, discussed at length above, the Supreme Court reversed without opinion.⁵⁶ These cases indicate that, unless the statute is to be rendered ineffective, courts must permit juries to pass on even meager evidence.

Another factor contributing to the large volume of litigation under the Safety Appliance Act is the inability of trial courts to instruct properly the jury as to the nature of the liability which is placed upon the railroads when there has been a violation of the statute. All too frequently negligence theories creep into the issues, or are intermingled with instructions concerning the Act when general negligence causes are joined with statutory causes.⁵⁷ For example, the following instruction resulted in a verdict for the defendant railroad:⁵⁸

"Now, as I have told you in the beginning, the fact of an accident carries with it no presumption of negligence on the part of the defendant. That is an affirmative fact for the plaintiff to prove. Plaintiff must prove that the defendant has been guilty of negligence as alleged in the plaintiff's complaint, one of these three things that I have been enumerating to you. It is not sufficient for the plaintiff to show that the defendant may possibly have been guilty of negligence."

⁵³ *Lavender v. Kurns*, 327 U. S. 645, 653, 66 S. Ct. 740, 90 L. Ed. 916 (1946).

⁵⁴ *Penn v. Chicago & N. W. R. R.*, 163 F. (2d) 995 (7th Cir. 1947).

⁵⁵ *Id.* at 997.

⁵⁶ 335 U. S. 849, 69 S. Ct. 79, 93 L. Ed. 398 (1948).

⁵⁷ See *e.g.*, *Long v. Union R. R.*, 175 F. (2d) 198, 201 (3rd Cir. 1949), where the following instruction was quoted: "Now the first question, above all, for you to determine is the matter of the negligence. Has the Plaintiff, by the fair preponderance of the evidence, established that *this was a car unfit for use* by reason of failure of its brakes, or did he not? If you find by the fair preponderance that it was such a car, and was put in use by the Defendant for operation, that in itself would constitute negligence on the part of the Defendant." [Emphasis supplied.]

⁵⁸ *O'Donnell v. Elgin, J. & E. Ry.*, 171 F. (2d) 973, 978 (7th Cir. 1948).

The court of appeals found these instructions to be an adequate and proper explanation of the law. Justice Minton, then sitting on the circuit court, was not convinced of the clarity of the instructions and dissented: "The court's instructions, in effect, told the jury that it could not infer negligence from the happening of the accident, namely, the breaking of the coupler. . . . This was error."⁵⁹ The Supreme Court later reversed with Justice Jackson speaking for the Court in an opinion which properly stated the rule without any reference to the law of negligence:⁶⁰

As to the claim based on the Safety Appliance Act, we hold that the plaintiff was entitled to a peremptory instruction that to equip a car with a coupler which broke in the switching operation was a violation of the Act, which rendered defendant liable for injuries proximately resulting therefrom, and that neither evidence of negligence nor of diligence and care was to be considered on the question of this liability.

Negligence theories are unnecessarily alluded to by counsel in their pleadings, and by courts in instructions to juries and in opinions. This improper use of legalistic terminology has only served to further hinder the efforts of railroad workers and their employers in the quest for justice under the Act.

III.

Conclusion

As has been seen, these independent, but somewhat concomitant Acts, were primarily designed to give the railroad worker adequate protection and redress for industrial injuries. The Boiler Inspection and Safety Appliance Acts have even been extended to travelers or anyone else injured as the result of a violation of the Acts. As an attempt at social reform the Acts have done away with the common law defense of assumption of risk, and for the most part with contributory negligence. Even though they are designed to effect social justice, the Acts still are intimately connected with the doctrine of negligence. The Employers' Liability Act makes it the basis of recovery; the other two Acts attempt to do away with it and impose liability absolutely, but the legislative effort has been stymied by both lawyers and courts which insist upon injecting questions of negligence into the litigations.

With this in mind, and recalling that the Acts overlap and at the same time leave gaps in their coverage, the question arises whether they have fulfilled the purposes for which they were created. It seems obvious that they have failed to empower the courts to give efficient and desirable relief to those suffering the effects of industrial acci-

⁵⁹ *Ibid.*

⁶⁰ 338 U. S. 384, 394, 70 S. Ct. 200, 94 L. Ed. 187 (1949).

dents. The remedies which are provided for railroad workers have become outmoded and archaic in a highly industrialized society which has accepted more comprehensive compensation laws as a proper means of effecting social justice. It is only by giving to railroad workers the remedies which have been accorded millions in other industries that a satisfactory solution will be achieved. Requiring negligence to exist before recovery can be had serves only to impose unnecessary burden and expense on the hapless plaintiff. The elimination of this penumbral theory would do much to make social justice a reality in the trade of railroading.⁶¹

F. Richard Kramer

George J. Murphy, Jr.

Trade Regulation

MISBRANDING OF FOOD UNDER THE FEDERAL
FOOD, DRUG AND COSMETIC ACT

The Federal Food, Drug and Cosmetic Act¹ has for its purpose the protection of the consuming public from the ill effects, both physical and financial, resulting from the distribution of impure and unfit products. In enacting this statute, Congress also intended to safeguard the interests of the honest individuals engaged in the food and drug trade who might be injured by the stigma drawn upon them by the unscrupulous conduct of the few who would defraud the public. These ends are accomplished by the enforcement of definitions and standards of identity, quality, and quantity established by the Act and effectuated in regulations promulgated by the Federal Security Administrator.

The Act in effect today was enacted in 1938. It superseded the Pure Food and Drug Act of 1906.² Though they are technically separate and distinct, the similarity of some of the provisions found in both permits the current use of some of the case law decided under the old statute. Unless specific reference is made to another statute, when the term "Act" is used here it will refer to the present statute.

⁶¹ See Note, *Employees in Interstate Commerce and The Federal Employers' Liability Act*, 25 NOTRE DAME LAW. 711, 721 (1950).

¹ 52 STAT. 1040 *et seq.* (1938), 21 U. S. C. §§ 301 *et seq.* (1946).

² 34 STAT. 768 *et seq.* (1906).

The great bulk of litigation concerning food arises under two sections of the Act: the section on adulteration³ and the section on misbranding.⁴ Only the misbranding of food⁵ will be considered here.

False and Misleading Labeling

Section 403(a)⁶ of the Act states that a food shall be deemed to be misbranded if its labeling⁷ “. . . is false or misleading in any particular.”⁸ This disjunctive wording allows a wide latitude in dealing with situations where the label of a product is misleading although the statements contained on it are entirely true. The clever labeler who accomplishes this deception is nevertheless subject to prosecution under the Act.⁹ Section 403(a) is designed to apply to all types of misrepresentations whether they be misstatements of origin, identity, quality or effect; whether made as averments of fact or statements of opinion; and whether conveyed directly or by implication.

Misbranding may also result from the omission of certain facts which are required on the label. Section 201(n)¹⁰ of the Act faces this problem by providing that the failure to include necessary facts in the labeling is to be taken into account in determining the ques-

³ 52 STAT. 1046 (1938), 21 U. S. C. § 342 (1946).

⁴ 52 STAT. 1047 (1938), 21 U. S. C. § 343 (1946). False or misleading advertising in circulars and newspapers, one of the major problems of consumer protection, is more properly within the jurisdiction of the Federal Trade Commission. The Federal Trade Commission Act, 38 STAT. 717 *et seq.* (1914), as amended, 15 U. S. C. §§ 41 *et seq.* (1946), authorizes the Federal Trade Commission to cope with false and misleading advertising. The Federal Food, Drug and Cosmetic Act is applicable only to labels and labeling, which includes all written or graphic matter placed upon any article, the container or wrapper, or accompanying literature. 52 STAT. 1041 (1938), 21 U. S. C. § 321(m) (1946).

⁵ 52 STAT. 1041, 21 U. S. C. § 321 (1946), states: “The term ‘food’ means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.”

⁶ 52 STAT. 1047 (1938), 21 U. S. C. § 343(a) (1946).

⁷ While the terms “label” and “labeling” will be used interchangeably in this article for reasons of practical convenience and to avoid repetition, the Act distinguishes them. A label is written or graphic matter appearing on the article or on the container enclosing the article. 52 STAT. 1041 (1938), 21 U. S. C. § 321(k) (1946). “Labeling” includes labels as defined above and also may be used to describe written or graphic matter which accompanies but does not enclose the article. 52 STAT. 1041 (1938), 21 U. S. C. § 321(m) (1946).

⁸ See 21 CODE FED. REGS. § 1.7 (1949), for specific examples.

⁹ *United States v. 95 Barrels, More or Less, Alleged Apple Cider Vinegar, Douglas Packing Co.*, 265 U. S. 438, 442, 44 S. Ct. 529, 68 L. Ed. 1094 (1924), *reversing* 289 Fed. 181 (6th Cir. 1923). The statute is plain and direct. Its comprehensive terms condemn every statement, design and device which may mislead or deceive. Deception may result from the use of statements not technically false which even may be literally true.

¹⁰ 52 STAT. 1041 (1938), 21 U. S. C. § 321(n) (1946).

tion of misbranding, and is to weigh equally with positive misstatements. Also, where ingredients are stated on the label but found in only negligible quantities in the product, the item is deemed misbranded.¹¹

If the label makes a misleading comparison between the food so labeled and another product, the food has been held to be misbranded. An example of this is *United States v. Ninety-Five Barrels of Vinegar*,¹² where the Supreme Court held that vinegar processed from dried apples to which water had been added equivalent in amount to that removed during the drying and fermenting process, was not the same as vinegar produced from fresh apple cider. Even though equally wholesome, the Court felt that it was misleading to label the product "Apple Cider Vinegar Made from Selected Apples."

The language of section 403(a) and the illustrations contained in the Code of Federal Regulations¹³ clearly show that a consumer need not be actually deceived,¹⁴ and no actual intent to deceive need exist in order to subject the labeler to prosecution. The test as far as the manufacturer's intent is concerned, is restricted to an analysis of the label itself;¹⁵ the actual intent of the labeler or manufacturer is immaterial.

Offer for Sale under False Name

An effective protection for the honest manufacturer whose product has a fine reputation is provided by section 403(b).¹⁶ This subsection states that a food shall be deemed misbranded if ". . . it is offered for sale under the name of another food." In addition, of course, the consumer is protected from purchasing inferior goods foisted upon him by misleading labeling.

Labeling a food which contains two or more ingredients with the names of some but not all of them constitutes a violation of this subsection.¹⁷ This is true even though all of the ingredients are listed elsewhere on the label.¹⁸ Beans were found to be misbranded because they were offered for sale as "White Kidney Beans" when

¹¹ *United States v. Roma Packing Co. and Richard Catalanotti*, Food, Drug and Cosmetic Act Notice of Judgment No. 15241, May, 1950.

¹² 265 U. S. 438, 44 S. Ct. 529, 68 L. Ed. 1094 (1924), *reversing*, 289 Fed. 181 (6th Cir. 1923).

¹³ 21 CODE FED. REGS. §§ 1.7(a),(b) (1949).

¹⁴ Compare the common law doctrine of misrepresentation which requires a showing of actual deception before damages were awarded. *E.g.*, *Ellis v. Newbrough et al.*, 6 N. M. 181, 27 Pac. 490 (1891).

¹⁵ *McDermott v. Wisconsin*, 228 U. S. 115, 132-3, 33 S. Ct. 431, 57 L. Ed. 754 (1913).

¹⁶ 52 STAT. 1047 (1938), 21 U. S. C. § 343(b) (1946).

¹⁷ 21 CODE FED. REGS. § 1.7(b) (1949).

¹⁸ *Ibid.*

in fact they were Great Northern beans.¹⁹ The same result obtained where the food product consisted of coffee and ground cereal and was offered for sale under the name "Coffee."²⁰

'Imitation of Another Food

While dishonesty is discouraged and truthful labeling is the *raison d'être* of the Act, it does not follow that all imitations are prohibited. Section 403(c)²¹ expressly permits the marketing of foods which are imitations of other products if the label on the imitation food contains the word "imitation" in type of uniform size and prominence. Congress obviously did not intend to prohibit the sale of wholesome imitations of expensive food products to an economy conscious public.

This subsection clearly allows the marketing of properly labeled imitations. But does it permit a manufacturer to imitate a food for which a standard of identity has been established by the Federal Security Administrator?²² This has been answered recently by the Supreme Court in *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*.²³ The Court held that the marketing of "imitation jam" was not forbidden merely because the Administrator had prescribed a standard of identity for jam, nor merely because the imitation jam did not meet the standard. The controversy centered upon conflicting paragraphs of section 403 of the Act. Subsection (c) is from the original Pure Food and Drug Act of 1906²⁴ while subsection (g) was added in 1938. The latter condemns as misbranded a product which purports to be a food the ingredients of which the Administrator has standardized and which does not conform to the standards prescribed.²⁵ The Government sought to condemn the 62 cases of jam, labeled as "Delicious Brand Imitation Jam," insisting that the product purported to be fruit jam and that

¹⁹ United States v. 47 Cases . . . , Food, Drug and Cosmetic Act Notice of Judgment No. 16333, November, 1950.

²⁰ United States v. 120 Bags . . . , Food, Drug and Cosmetic Act Notice of Judgment No. 15851, July, 1950.

²¹ 52 STAT. 1047 (1938), 21 U. S. C. § 343(c) (1946).

²² Section 401 of the Act states: "Whenever in the judgment of the Secretary [the Secretary of Agriculture has been replaced by the Federal Security Administrator as administrator of the Act. See Reorganization Plan IV, § 12, 54 STAT. 1237 (1940), effectuated by 54 STAT. 231 (1940), 5 U. S. C. § 133(u) (1946)] such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, and/or reasonable standards of fill of container. . . ." 52 STAT. 1046 (1938), 21 U. S. C. § 341 (1946).

²³ 340 U. S. . . . , 71 S. Ct. 515, 95 L. Ed. . . . (1951).

²⁴ 34 STAT. 768 (1906).

²⁵ 52 STAT. 1047 (1938), 21 U. S. C. § 343(g) (1946).

it failed to meet the standards established by the Administrator.²⁶ The Court, however, found that the product was in fact what it purported to be, imitation jam, and that it was so labeled. It did not purport to be genuine jam for which the Administrator had promulgated standards.

Section 403(c) requires the word imitation to be placed on the label in type of uniform size and prominence. In practice, the type or print must be large enough to attract the attention of purchasers. This means that a purchaser need not minutely inspect the label to determine whether or not the product is an imitation. To avoid any controversy the word imitation should be the same size as the other words describing the product.²⁷

Deceptive Containers

The 1906 Act guarded against positive misstatements or omissions concerning quantity,²⁸ but it failed to prevent the use of deceptively shaped, or filled containers. Section 403(d)²⁹ of the 1938 Act remedied this by describing a food as misbranded "if its container is so made, formed, or filled as to be misleading." Whether the container is filled so as to be misleading is a question of fact, turning on whether the ordinary buyer, who is not particularly attentive or prudent, would be misled.³⁰ The judgment of ". . . experts or men of peculiar training, experience, shrewdness or sophistication . . ." ³¹ is not the criterion. The expectations of a person who has an average familiarity with our industrial civilization furnish the standard which Congress intended to apply. Therefore, this subsection does not require maximum filling of packages, but rather a packaging which relates reasonably to efficient methods of mass packaging by machine.³²

Further, as it is stated in the Act, the Administrator in prescribing standards of fill for containers must consider the natural shrink-

²⁶ 21 CODE FED. REGS. § 29.0 (1949).

²⁷ No reported federal cases have been found illustrating the provision under section 403(c) of the Act requiring that the word "imitation" be of the same prominence. However, see *People v. Treichler*, 178 App. Div. 713, 165 N. Y. Supp. 453 (4th Dep't 1917), where the word "compound" was printed in type so small as not to attract ordinary attention; a finding of misbranding within the meaning of section 201 of the New York Agricultural Law of 1909, now N. Y. AGRICULTURE AND MARKETS LAW § 201, was made.

²⁸ 34 STAT. 771 (1906). Under the 1906 Act a food was deemed misbranded if the contents were not stated in terms of weight and measure on the outside of the package.

²⁹ 52 STAT. 1047 (1938), 21 U. S. C. § 343(d) (1946).

³⁰ *United States v. 116 Boxes, etc. Arden Assorted Candy Drops*, 80 F. Supp. 911, 913 (D. Mass. 1948).

³¹ *Ibid.*

³² *Ibid.*

age of fresh food in storage and transit, and the need for protective packing material.³³ According to the Senate Committee on Commerce, "this provision [Section 403(d)] is not intended to authorize action against packages of food which are filled as full as practicable in good manufacturing practice, even though shrinkage may occur after the products are shipped."³⁴

In one case arising under subsection (d), it was held that machine-filled packages of lozenges containing 18 or 19 pieces of candy were not misbranded although they had an airspace equal to 33 per cent of the total volume of the packages.³⁵ Similarly, it was held that an article which filled only 55 percent of its container, excluding space taken by a removable inner liner, was not misbranded, as the container was sanitary, convenient, and of a type reasonably necessary to properly package and handle the product.³⁶ On the other hand, in a proceeding for condemnation of a quantity of frozen strawberries, they were held misbranded although the packages were 75 percent full.³⁷

This apparent conflict should not be disturbing. As one court aptly phrased it:³⁸

There is no hard and fast rule as to what would constitute slack-filling. Whether or not over 50 per cent space in a particular package of candy was slack-filling is a question of fact for the district court to decide. . . . Moreover, the court held that it could not as a matter of law say either that the product has been misbranded or that its "containers are so made, formed or filled as to be misleading."

Package Form

A food shall be deemed misbranded, according to section 403(e):³⁹

If in package form unless it bears a label containing (1) the name and place of business of the manufacturer, packer, or distributor; and (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided*, That under clause (2) of this paragraph reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the [Administrator]. . . .

The obvious purpose of part (1) is to compel manufacturers, packers, and others, who would not freely acknowledge their products, to place

³³ 52 STAT. 1046 (1938), 21 U. S. C. § 341 (1946).

³⁴ SEN. REP. No. 361, 74th Cong., 1st Sess. 9 (1935).

³⁵ *United States v. 116 Boxes, etc.*, Arden Assorted Candy Drops, 80 F. Supp. 911 (D. Mass. 1948).

³⁶ *United States v. 738 Cases . . .*, 71 F. Supp. 279 (D. Ariz. 1946).

³⁷ *United States v. 31 Cases . . .*, Food, Drug, and Cosmetic Act Notice of Judgment No. 14934, March, 1950.

³⁸ *United States v. Cataldo*, 157 F. (2d) 802, 804 (1st Cir. 1946).

³⁹ 52 STAT. 1047 (1938), 21 U. S. C. § 343(e) (1946).

their names and addresses on the label. Before this subsection took effect in 1938, some manufacturers labeled their inferior food products with fictitious names and addresses.⁴⁰

Part (2) of this subsection restates one of the time-proven provisions of the 1906 Act, which required a statement of the quantity of the contents in terms of weight or measure to be "... plainly and correctly marked on the outside of the package. . . ." ⁴¹ As in the 1906 Act, reasonable variations, tolerances and exemptions were to be established. In the oft-cited case, *United States v. Shreveport Grain & Elevator Co.*,⁴² it was held that the 1906 statute was not open to the constitutional objection of uncertainty in defining the offense, because of the variations and exemptions allowable. The Court also ruled that the Act did not authorize an unconstitutional delegation of legislative power.

The regulations which have been promulgated by the Administrator are detailed and voluminous. Some of the more important regulations provide, *inter alia*, that the statement of contents must be in form and wording familiar to consumers;⁴³ common fractions are to be reduced to lowest terms;⁴⁴ and the largest possible units of measure should be used—for example, 1 quart, not 2 pints.⁴⁵ However, figures may be reduced where there are large fractions, *e.g.*, 1¾ quarts could be reduced to 1 quart, 1½ pints.⁴⁶ Minimum or average quantity is to be stated on the package and no variation below the minimum is permissible except as to food which normally decreases in weight or volume in transit.⁴⁷ If the distributor of the product, whose name appears on the label, is not also the manufacturer, the label must state, "Manufactured for and packed by . . .," or "Distributed by . . ." ⁴⁸

Under the provision of the 1906 Act, which corresponds to section 403(e) of the present statute, many precedents were established which are still applicable because of the similarity between the two laws. In *United States v. Rigney & Co.*,⁴⁹ the use of "commercial" or approximate measures was held to constitute misbranding. The fact that in the trade, quantities were customarily stated in liquid or solid measurements which closely approximated but did not actually describe the quantity, the products being labeled as containing a commercial quart, etc., did not prevent the label from being "misleading" under the old

⁴⁰ TOULMIN, *THE LAW OF FOOD, DRUGS AND COSMETICS* § 146 (1st Ed. 1942).

⁴¹ 34 STAT. 771 (1906).

⁴² 287 U. S. 77, 53 S. Ct. 42, 77 L. Ed. 175 (1932).

⁴³ 21 CODE FED. REGS. § 1.8(e)(2) (1949).

⁴⁴ 21 CODE FED. REGS. § 1.8(g) (1949).

⁴⁵ 21 CODE FED. REGS. § 1.8(h)(1) (1949).

⁴⁶ *Ibid.*

⁴⁷ 21 CODE FED. REGS. § 1.8(j) (1949).

⁴⁸ 21 CODE FED. REGS. § 1.8(a) (1949).

⁴⁹ 220 Fed. 734 (E. D. N. Y. 1915).

Act. In *United States v. Feeders' Supply & Mfg. Co.*,⁵⁰ animal feed, branded ". . . guaranteed analysis—protein not less than 43%," actually had a maximum protein content of 38.56%. Referring to the reasonable variations permitted, the court said that the statute prohibiting misbranding would not allow any variation, however slight, from the truth in labels which must list the ingredients or percentages of them contained in food.

On the other hand, in *United States v. Kraft Phenix Cheese Corp.*,⁵¹ cheese was sold in packages marked "½ lb. net weight." Although 59 out of 60 packages were found to be approximately ¼ ounce underweight, while only one was slightly overweight, the court held that this slight deficiency was not a misbranding since there was no evidence that it was not a reasonable variance.

The regulations under the 1938 Act eliminated several of the inconsistencies in the old Act by expressly providing that the only variations in contents permissible are those resulting from exposure to conditions after entering interstate commerce, or those normally resulting even under good packing practice.⁵² These variations are not permissible to the extent that the average quantity in the shipment falls below the stated quantity, ". . . and no unreasonable shortage in any package shall be permitted, even though overages in other packages in the same shipment or delivery compensate for such shortage."⁵³

Judging from the complex requirements of the regulations under section 403(e), compliance is obviously difficult. The manufacturer, packer or distributor of food should study this section thoroughly and plan his marketing and labeling practices accordingly, lest he run afoul of the statute or regulations through a technical, albeit innocent, violation.⁵⁴

Prominence of Display of Information on Label

The requirements of section 403(f) will render a food misbranded:⁵⁵

If any word, statement, or other information required by or under authority of this Act to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

⁵⁰ 15 F. Supp. 385 (W. D. Mo. 1936).

⁵¹ 18 F. Supp. 60 (S. D. N. Y. 1936).

⁵² 21 CODE FED. REGS. §§ 1.8(j), (k) (1949).

⁵³ 21 CODE FED. REGS. § 1.8(k)(2) (1949).

⁵⁴ For illustrations of the application of section 403(e) and supplementary regulations, see Food, Drug, and Cosmetic Act Notices of Judgment Nos. 15282, 15232, 15222, 15221, May 1950; Nos. 14938, 14934, 14915 and 14913, March 1950.

⁵⁵ 52 STAT. 1047 (1938), 21 U. S. C. § 343(f) (1946).

The net effect of section 403(f) is a requirement of notoriety.⁵⁶ Words cannot be hidden from the public by placing them on the bottom of the container, or on one side only, if two sides are likely to be presented to the public.⁵⁷ Insufficient label space⁵⁸ and small inconspicuous type or inadequate background contrast⁵⁹ must be avoided. An additional problem arises where the product is manufactured or packaged for foreign distribution. All words, statements, and other information required under the Act must be in English;⁶⁰ and if the label contains any representation in a foreign language, then all the information required by the Act also must be included on the label in the foreign language.⁶¹ The use of two panels, one bearing the required information in English and the other in the foreign language, seems to be the best solution.

Representations as to Definition and Standard of Identity of Food

Section 403(g)⁶² provides that a food is misbranded if it is represented to be a food for which a definition and standard of identity has been established,⁶³ unless it conforms to the definition and standard. The label must bear the name of the food specified in the definition as well as the common names of any optional ingredients (excluding spices, flavoring, and coloring).⁶⁴

Cases arising under this subsection have been of two types: those where an *imitation food*, represented to be an imitation of a food for which a standard of identity has been established, fails to conform to the standard; and those where a *food*, represented to be one for which a standard of identity has been established, fails to conform.

The recent *Jam* case,⁶⁵ previously discussed, illustrates the first situation. There, the product was plainly labeled an imitation but the Government contended that it was represented to be a food for which a standard and definition was specified. By holding that the imitation

⁵⁶ United States v. 246 Cases . . . , Food, Drug and Cosmetic Act Notice of Judgment No. 15645, May, 1950. Peanut oil contained artificial color and the declaration of its presence was not prominently placed so as to make it likely to be read and understood by the ordinary individual under customary conditions of purchase and use, since the individual cans did not bear labels listing the artificial color.

⁵⁷ 21 CODE FED. REGS. § 1.9(a)(2) (1949).

⁵⁸ 21 CODE FED. REGS. § 1.9(a)(4) (1949).

⁵⁹ 21 CODE FED. REGS. § 1.9(a)(6) (1949).

⁶⁰ 21 CODE FED. REGS. § 1.9(c)(1) (1949).

⁶¹ 21 CODE FED. REGS. §§ 1.9(c)(2), (3) (1949).

⁶² 52 STAT. 1047 (1938), 21 U. S. C. § 343(g) (1946).

⁶³ 52 STAT. 1046 (1938), 21 U. S. C. § 341 (1946). See note 22 *supra*.

⁶⁴ Section 403(k) exempts butter, cheese, and ice cream from the provisions of Section 403(g).

⁶⁵ 62 Cases, More or Less, Each Containing Six Jars of Jam, et al. v. United States, 340 U. S. . . . , 71 S. Ct. 515, 95 L. Ed. . . . (1951).

was not represented to be the standardized food, the Court clarified the difference between regulation of imitations under section 403(c), and regulations of foods for which a definition and standard had been announced under section 403(g).

In the second situation an apparent hardship exists. A food product designated "Fruit Spread" was found to be misbranded because it failed to meet the standard set for the food it was represented to be,⁶⁶ *i.e.*, preserves.⁶⁷ Since the Act makes no provision for the marketing of products which fail to conform to the applicable standard of identity, the product must meet the standard; it cannot merely be labeled "sub-standard" and marketed as such.⁶⁸ The rationale of this rule is that by limiting the types of food, confusion of the public is avoided.

The addition of an ingredient which has no effect on the taste or appearance of a product in a standardized category will not take the product out of the class.⁶⁹ A close question of this nature was decided in *Federal Security Administrator v. Quaker Oats Co.*,⁷⁰ in which the manufacturer had for ten years added vitamin D to the farina which it marketed as a cereal. When the regulations of the Administrator were promulgated, it was found that the product could not be sold as farina any longer because the vitamin D which it contained rendered it slightly different from the standardized farina. And it could not be marketed as enriched farina because it did not contain the additional vitamins required in that category. Nevertheless the Court held that the definitions and standards formulated by the Administrator were reasonable and that the Quaker Oats Co. must either remove the vitamin D to produce farina or add the additional minerals and vitamins to produce enriched farina. The Court undoubtedly was convinced

⁶⁶ *United States v. 30 Cases, More or Less, Leader Brand Strawberry Fruit Spread, etc.*, 93 F. Supp. 764 (S. D. Iowa 1950).

⁶⁷ For a similar case concerning preserves see *United States v. Ninety-Nine Cases, etc., Southland Fountain Fruit et al.*, 89 F. Supp. 992 (E. D. Tenn. 1949). Jars containing peach and pineapple product were labeled with the name of the fruit in large letters and the words "Fountain Fruit" in small letters. These words represented the product as a spread. It was held to be misbranded since it "purported" to contain "preserves."

⁶⁸ *United States v. 30 Cases, More or Less, Leader Brand Strawberry Fruit Spread, etc.*, 93 F. Supp. 764, 770 (S. D. Iowa 1950): "The use of a statement on the label that an article of food falls below the standard of *quality*, or below the standard of *fill of the container* is permitted . . . but no such permission is granted . . . where the article of food fails to conform to the applicable standard of *identity*. [Emphasis supplied.]

⁶⁹ Tomato catsup met the standard of identity even though sodium benzoate had been added as a preservative. The food was labeled, "Tomato Catsup with Preservative." *United States v. 306 Cases Containing Sandford Tomato Catsup with Preservative*, 55 F. Supp. 725 (E. D. N. Y. 1944), *aff'd sub nom.*, *Libby, McNeill and Libby v. United States*, 148 F. (2d) 71 (2d Cir. 1945).

⁷⁰ 318 U. S. 218, 63 S. Ct. 589, 87 L. Ed. 724 (1943).

that the added vitamin changed the product even though the taste and appearance might have remained unaffected.

Representations as to Quality and Quantity

While the marketing of products failing to comply with the definition and standard of *identity* is forbidden under section 403(g), discussed above, section 403(h)⁷¹ expressly allows the marketing of food which fails to meet the standard of *quality* or the standard of *fill of container* outlined by the Administrator. Of course, this inferior quality or slack-filled food must be adequately labeled as such. This difference in the phraseology of subsections (g) and (h) was recognized and given effect until the Supreme Court decided the *Jam* case,⁷² where an imitation of a food which had a standard of *identity* was allowed to be marketed. While this case did not authorize the marketing of food which fails to conform to the standard of identity of the product which it is represented to be, it did disturb the orthodox view. It remains for a court in the future to decide that farina, for example, represented and sold as such but in fact slightly different, may be marketed if labeled "substandard." However that may be, it is clear that subsection (h) allows a departure from standards of quality and fill provided the label clearly reveals it.

The standards of quality and fill prescribed by the Administrator may be challenged as unreasonable.⁷³ Of course, a court in reviewing the regulation or standard will not substitute its judgment for that of the Administrator,⁷⁴ and ". . . his findings are to be accepted as conclusive if supported by substantial evidence, *provided always, however, they are within statutory and constitutional limitations.*"⁷⁵

Obviously, the most frequent violations of this subsection arise from the bold failure to disclose the inferior quality⁷⁶ or short measure⁷⁷ on the label, since there is no problem of strict compliance to nebulous identity as demanded by subsection (g).

⁷¹ 52 STAT. 1047 (1938), 21 U. S. C. § 343 (1946).

⁷² 62 Cases, More or Less, Each Containing Six Jars of Jam, et al. v. United States, 340 U. S. . . ., 71 S. Ct. 515, 95 L. Ed. . . . (1951).

⁷³ A. E. Staley Mfg. Co. v. Secretary of Agriculture et al., 120 F. (2d) 258 (7th Cir. 1941).

⁷⁴ Columbia Cheese Co. et al. v. McNutt, 137 F. (2d) 576 (2d Cir. 1943).

⁷⁵ United States v. Lord-Mott Co., 57 F. Supp. 128, 133 (D. Md. 1944).

⁷⁶ Typical of decisions rendered under section 403(h) is United States v. 35 Cases . . . , Food, Drug, and Cosmetic Act Notice of Judgment No. 14841, February, 1950, where a quantity of canned pears failed to comply with subsection (h)(1) because the weight of the largest unit in the container was more than twice the weight of the smallest unit, many units were untrimmed and broken, and primarily because the label failed to state that the contents fell below standard.

⁷⁷ See e.g., United States v. 94 Cases . . . , Food, Drug and Cosmetic Act Notice of Judgment No. 14840, February, 1950, where a quantity of canned apricots was condemned because the containers were not filled to the level required by the standard of fill and the labels failed to reveal this discrepancy.

*Label Requirements Where There Is No Representation as to
Definition and Standard of Identity*

According to section 403(i),⁷⁸ nonstandardized foods are to be labeled with their common names.⁷⁹ All of the major ingredients must be listed by name,⁸⁰ while spices, flavoring and coloring are designated merely as "spice," etc., and not by specific name. When compliance is impracticable, or results in deception or unfair competition, the Administrator may authorize exemptions.

The Code of Federal Regulations exemplifies the requirements of this subsection with great detail. The name of the food must be specific and not collective.⁸¹ No ingredient may be designated as a spice, coloring or flavoring unless it is commonly known as one, and a bleaching substance is not to be termed a coloring.⁸² Under the regulations, a label may be misleading because of the order in which the ingredients are listed,⁸³ the relative prominence assigned an ingredient,⁸⁴ or because of a failure to reveal the true proportion of the ingredients.⁸⁵

An excellent statement of the legislative policy motivating the enactment of not only subsection (i) but of all the labeling provisions, is found in the Senate Committee Reports submitted while the 1938 Act was being drafted:⁸⁶

This requirement [labeling] is necessary to discourage the practice of coining a fanciful, high-sounding name for a product composed largely of cheap ingredients, which could not be extensively marketed at the exorbitant prices charged except by cloaking its identity under such a name. . . . On the other hand, proprietary food composed of valuable ingredients will gain public confidence and goodwill from this disclosure. It should be noted that this provision does not compel the disclosure of the formulas of such food since no information as to proportions is required and flavors, spices, and colors need not be specifically named.

⁷⁸ 52 STAT. 1048 (1938), 21 U. S. C. § 343(i) (1946).

⁷⁹ An interesting case decided under this requirement of subsection (i) is *United States v. Lakeside Fish and Oyster Co.*, Food, Drug and Cosmetic Act Notice of Judgment No. 16263, November, 1950. There frozen pollock fillets were offered for sale under the name frozen haddock fillets. They were deemed misbranded under sections 403(b) and 403(i)(1) because the label did not bear the common or usual name.

⁸⁰ Coming under this requirement of section 403(i) is *United States v. 100 Drums . . .*, Food, Drug and Cosmetic Act Notice of Judgment No. 16477, December, 1950, where the labeling on animal feed failed to comply because a clay-like material added to give the product a better appearance was not mentioned on the label.

⁸¹ 21 CODE FED. REGS. § 1.10(a) (1949).

⁸² 21 CODE FED. REGS. § 1.10(b) (1949).

⁸³ 21 CODE FED. REGS. § 1.10(d)(1) (1949).

⁸⁴ *Ibid.*

⁸⁵ 21 CODE FED. REGS. § 1.10(d)(2) (1949).

⁸⁶ SEN. REP. NO. 361, 74th Cong., 1st Sess. 12 (1935).

Labeling of Special Dietary Foods

Section 403(j)⁸⁷ requires foods which are represented to be for dietary purposes to bear labels listing the vitamin and mineral content and similar properties. The regulations issued by the Administrator reveal the general aims and purposes of this subsection. One regulation points out that the "special dietary uses" referred to in the subsection include, "Uses for supplying particular dietary needs which exist by reason of a physical, physiological, pathological or other condition."⁸⁸ Included among these conditions are those of disease, convalescence, pregnancy, lactation, allergic hypersensitivity to food, underweight and overweight.⁸⁹ Other special dietary uses are those which supply dietary needs arising because of age⁹⁰ and for fortifying the normal diet.⁹¹

In a proceeding before the Administrator,⁹² a mineral-vitamin preparation was found to be misbranded under subsection (j) because its label failed to bear the required statement of minimum daily requirements supplied by the product, but substituted instead a statement that the daily requirements for several of the vitamins and minerals had not been established.

This subsection potentially is one of the most important provisions of the Act because of the enormous increase in demand for vitamin and mineral-enriched foods. Considering the possibilities of fraud upon a public so eager to obtain more enriched and beneficial foods, it is patent that a checkrein upon the producers of these commodities is vitally important.

Artificial Flavoring, Coloring and Chemical Preservatives

Section 403(k)⁹³ is designed to regulate the incidentals in food preparations, flavorings, colorings and preservatives. While these could be regulated under the general provisions of the Act, the wide use of chemical preservatives and artificial coloring justifies a separate subsection. Generally, all artificial flavorings and colorings as well as chemical preservatives added to the product must be declared on the label whether the commodity is in package form or not.⁹⁴ They need not be specifically identified, however.

⁸⁷ 52 STAT. 1048 (1938), 21 U. S. C. § 343(j) (1946).

⁸⁸ 21 CODE FED. REGS. § 1.11(a)(1) (1949).

⁸⁹ *Ibid.*

⁹⁰ 21 CODE FED. REGS. § 1.11(a)(2) (1949).

⁹¹ 21 CODE FED. REGS. § 1.11(a)(3) (1949).

⁹² *United States v. Helios Foods, Inc., and Harry H. Grahn (Min-E-Vita Products Co.)*, Food, Drug and Cosmetic Act Notice of Judgment No. 16194, September, 1950. See also *United States v. 18 Bottles . . .*, Food, Drug and Cosmetic Act Notice of Judgment No. 15398, May, 1950.

⁹³ 52 STAT. 1048 (1938), 21 U. S. C. § 343(k) (1946).

⁹⁴ 21 CODE FED. REGS. § 1.12(c) (1949), states: "A statement of artificial flavoring, artificial coloring, or chemical preservative shall be placed on the food,