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Comments On Recent Cases

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Criminal Procedure—Pre-trial Discovery—Applicability of Iowa Rules of Civil Procedure.—Defendant in a pending criminal action brought application to respondent court to compel the state's witnesses to answer oral interrogatories propounded under the Iowa Rules of Civil Procedure. On the advice of the county attorney the witnesses refused to answer. Thereafter, they were ordered to answer by the respondent presiding judge. Upon certiorari to the Supreme Court of Iowa, *held*, the order was in excess of the district court's jurisdiction. Notwithstanding an Iowa statute[1] providing that a defendant in a criminal case may examine witnesses "in the same manner and with like effect as in civil actions," the Iowa Legislature did not intend to make discovery-deposition procedure applicable to criminal cases. *State v. District Court*, 114 N.W.2d 317 (Iowa 1962).

The objective of pre-trial discovery in criminal cases should be "to promote the fullest possible presentation of the facts, minimize opportunities for falsification of evidence, and eliminate the vestiges of trial by combat."[2] Although there has been some judicial feeling that extensive use of discovery procedures would lead to perjured testimony, the suppression of evidence,[3] and "fishing expeditions" through the state's evidence,[4] it cannot be overemphasized that the

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[1] IOWA CODE § 781.10 (1962).

[2] Comment, *Pre-trial Disclosure in Criminal Cases*, 60 YALE L.J. 626 (1951), quoted with approval in State v. Tune, 13 N.J. 203, 210, 98 A.2d 881, 884 (1953).

[3] See State v. Tune, *supra* note 2, at 884, where the court in denying the defendant the right to inspect his own confession stated:

> In criminal proceedings long experience has taught the courts that often discovery will lead not to honest fact-finding, but on the contrary to perjury and the suppression of evidence. Thus the criminal who is aware of the whole case against him will often procure perjured testimony in order to set up a false defense .... Another result of full discovery would be that the criminal defendant who is informed of the names of all of the State's witnesses may take steps to bribe or frighten them into giving perjured testimony or into absenting themselves so that they are unavailable to testify. Moreover, many witnesses, if they know that the defendant will have knowledge of their names prior to trial, will be reluctant to come forward with information during the investigation of the crime ....

Contra, Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293 (1960), discussing the *Tune* and *Johnson* cases at 298-99; 4 MOORE, FEDERAL PRACTICE ¶ 26.02, at 1014 (2d ed. 1961): "[Discovery procedures are] of great assistance in ascertaining the truth and in checking and preventing perjury."; *cf.* State v. Johnson, 28 N.J. 133, 145 A.2d 313 (1958).

[4] See Rosier v. People, 126 Colo. 82, 247 P.2d 448 (1952) (denied pre-trial discovery of confession and "all the files and records" of police). In Jencks v. United States, 353 U.S. 657 (1957), which reversed a criminal conviction because the Government refused to comply with an order to produce reports in its possession, Mr. Justice Clark, dissenting from the Court's opinion, stated:

> Unless the Congress changes the rule announced by the Court today, those intelligence agencies of our Government engaged in law enforcement may as well close up shop, for the Court has opened their files to the

defendant in a criminal case is presumed innocent until proved guilty beyond a reasonable doubt. Public protection of the innocent would, therefore, seem to require that the defendant be granted liberal rights of discovery, the exercise of which would be controlled by the courts.[5]

A better appreciation of the need for greater discovery by a criminal defendant in Iowa might be gained by focusing upon the present discovery techniques that are available to the state in a criminal case. Under Section 777.18 of the Iowa Code the defendant who pleads not guilty to a criminal charge must file a written notice if he intends to show insanity as a defense or that he relies on an alibi, setting forth the names of witnesses and a statement of their expected testimony. In addition, Section 771.7 gives the county attorney authority to compel the issuance of subpoenas for witnesses to appear before the grand jury. Significantly, there is no requirement that these witnesses must potentially testify for the state.[6] In comparison to the scope of its own

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> criminal and thus afforded him a Roman holiday for rummaging through confidential information as well as vital national secrets. *Id.* at 681-82 (dissenting opinion).

For an enjoyable discussion of the *Jencks* case and the Congressional reaction prompted by Mr. Justice Clark's exaggerated opinion, see Keeffe, *Jinks and Jencks*, 7 CATHOLIC U.L. REV. 91 (1958). In a recent Nebraska case, *Jencks* was unsuccessfully relied upon to sustain a due process objection to the denial of a motion for inspection of statements given to the police. Erving v. State, 116 N.W.2d 7 (Neb. 1962). The Supreme Court of Iowa has held that it is not bound to follow *Jencks* and that it will not grant discovery of writings not proved to be in existence. State v. Kelly, 249 Iowa 1219, 91 N.W.2d 562 (1958).

According to one authority, extensive fishing expeditions of witnesses are customary in Iowa civil litigation. See 2 MESSER & VOLZ, IOWA PRACTICE § 1779, at 100 (1957).

[5] For example, FED. R. CRIM. P. 16 provides the courts with discretionary power

> to order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects . . . upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order . . . may prescribe such terms and conditions as are just.

It has been stated that under Rule 16, "the boundaries of disclosure before trial and the remedies for failure to produce should be left to the absolute discretion of the trial judge." United States v. Heath, 260 F.2d 623, 626 (9th Cir. 1958) (held no appeal from dismissal for failure to produce records). Compare United States v. Malizia, 154 F. Supp. 511 (S.D.N.Y. 1957), which held that voluntary statements of the defendants given to government agents were not "tangible objects" within purview of Rule 16.

On the other hand, in United States v. Wortman, 26 F.R.D. 183, 207 (E.D. Ill. 1960), the court denied a subpoena under FED. R. CRIM. P. 17(c) to produce "documents, books, papers and objects," stating: "Rule 17(c) is not a pre-trial discovery vehicle but is designed as an aid in obtaining evidence which defendants can use at trial. Only where it appears that the defendant may use his statements for evidentiary purposes, may its production be compelled pursuant to Rule 17(c)." See generally Freed, *The Rules of Criminal Procedure: An Appraisal Based on a Year's Experience*, 33 A.B.A.J. 1010 (1947).

[6] The statute merely provides that subpoenas may be issued "for witnesses." IOWA CODE § 771.7 (1962). Section 771.15 of the Iowa Code provides: "The grand

pre-trial discovery devices,[7] the state presently is required to furnish the defendant with a list of witnesses examined before the grand jury and the minutes of their testimony.[8]

Generally, the defendant in a criminal case may interview a witness before the trial if the witness voluntarily agrees to the interview.[9] In contrast to the state's pre-trial methods of discovery, however, there presently is no means in Iowa outside of the discovery-deposition procedures by which the defendant may compel pre-trial examination for discovery.[10] Although there has been some suggestion that the denial of limited discovery and inspection to the defendant may be unconstitutional,[11] the United States Supreme Court has found no due process violation where the defendant was denied the right to inspect his written confession before pleading to the indictment.[12] Thus the rights to discovery in a criminal case would appear to be largely statutory. Courts have, however, occasionally acknowledged the ex-

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jury is not bound to hear evidence for the defendant, but *may* do so . . . ." (Emphasis added.)

[7] The state's pre-trial discovery is strengthened by the tremendous influence which the county attorney exerts upon the grand jury investigation. In fact one commentator has suggested that this influence may jeopardize the grand jury's position as an independent investigatory body. See Note, *The Grand Jury—Its Investigatory Powers and Limitations*, 37 MINN. L. REV. 586, 600 (1953).

[8] IOWA CODE § 772.3 (1962). Additionally, Section 780.10 of the Iowa Code provides that the "county attorney . . . shall not be permitted to introduce any witness who was not examined before a committing magistrate or the grand jury . . . unless he shall have given to the defendant . . . notice . . . at least four days before the commencement of such trial."

Where a county attorney's information rather than a grand jury indictment is returned, "the names of the witnesses whose evidence . . . [the county attorney] expects to introduce and use on the trial" together with the minutes of their expected testimony must be furnished to the defendant. IOWA CODE § 769.4 (1962).

[9] In Bobo v. Commonwealth, 187 Va. 774, 48 S.E.2d 213 (1948), the court held on state constitutional grounds that it was reversible error to deny the accused's attorney the right to interview witnesses privately. *But see* Atkins v. State, 115 Ohio St. 542, 155 N.E. 189 (1927).

[10] A motion was made by counsel for defendant for an order requiring . . . [two sons of defendant] to submit to a private interview with defendant's counsel, and the refusal to sustain such motion is alleged as error. . . . It was beyond the power of the court to require such witnesses to submit to any examination except in open court . . . . State v. Wallack, 193 Iowa 941, 944, 188 N.W. 131, 133 (1922).

In Dicks v. United States, 253 F.2d 713 (5th Cir. 1958), the court found no error with the district court's refusal to compel named witnesses to talk with defendant's counsel before he put them on the stand. See generally Hagan, *Interviewing Witnesses in Criminal Cases*, 18 BROOKLYN L. REV. 207 (1962).

[11] See State v. Dorsey, 207 La. 928, 22 So. 2d 273 (1945), where a conviction of murder was reversed and remanded because the defendant was denied pre-trial inspection of his confession.

[12] Cicenia v. Lagay, 357 U.S. 504 (1958); *accord*, Leland v. Oregon, 343 U.S. 790 (1952) (conceding, however, that it may be "better practice" to permit inspection).

istence of an inherent power to compel pre-trial inspection and discovery in criminal cases.[13]

Prior to the instant case, defendants in Iowa criminal proceedings have attempted to invoke the Iowa Rules of Civil Procedure. A defendant has been able to seek a continuance of an action under Rule 183,[14] which is made applicable to criminal cases by Section 780.2 of the Iowa Code. On the other hand, defendants have been unsuccessful in attempting to invoke rules that were not made applicable in criminal cases by specific adopting statutes and which, if followed, would have transgressed upon existing statutes.[15]

In *State v. Addison*[16] the Iowa Supreme Court declared that the Iowa Rules of Civil Procedure do not apply in criminal cases "unless a statute makes them applicable."[17] In order to satisfy this requirement with respect to the Iowa rules for taking depositions the defendant in the instant case relied upon Section 781.10 of the Iowa Code: "A defendant in a criminal case, either after preliminary information, indictment, or information, may examine witnesses conditionally or on notice or commission, *in the same manner and with like effect as in civil actions.*"[18] Taken literally, the statute provides that a defendant in a criminal case may take depositions in accordance with the applicable rules of procedure in civil cases.[19] Iowa Rule of Civil Procedure 140 provides that a party may take the deposition of any person upon oral examination for the purpose of discovery. Had the court in the instant case determined that this rule was applicable to criminal proceedings, presumably it would have upheld the trial court's order compelling the state's witnesses to answer oral depositions propounded by the defendant.

Section 781.10 of the Iowa Code was enacted into the Revision of

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[13] See, *e.g.*, State v. Superior Court, 78 Ariz. 74, 275 P.2d 887 (1954); Powell v. Superior Court, 48 Cal. 2d 704, 312 P.2d 698 (1957); State v. Circuit Court, 60 S.D. 115, 244 N.W. 100 (1932) (alternative holding). In People v. Supreme Court, 245 N.Y. 24, 32, 156 N.E. 84, 86 (1927), Judge Cardozo stated:

> Whether apart from statute and beyond it there is a supervisory jurisdiction, as yet unplumbed and unexhausted, in respect of criminal prosecutions, is something that can best be determined at the call of particular exigencies in the setting of the concrete instance. The courts are properly reluctant to abjure the power in advance, or to confine in predetermined formulas the occasions of its existence.

[14] See State v. Sieren, 111 N.W.2d 249 (Iowa 1961); State v. Mauch, 236 Iowa 217, 17 N.W.2d 536 (1945). *But see* State v. Gaffney, 237 Iowa 1399, 25 N.W.2d 352 (1946).

[15] See, *e.g.*, State v. Addison, 250 Iowa 712, 95 N.W.2d 744 (1959) (IOWA R. CIV. P. 252-53 governing motion for new trial); State v. Fees, 250 Iowa 163, 93 N.W.2d 103 (1958) (IOWA R. CIV. P. 336 governing procedure for appeal); State v. Thomas, 238 Iowa 998, 29 N.W.2d 198 (1947) (same); State v. Bales, 246 Iowa 446, 452, 68 N.W.2d 95, 98 (1955) (*semble*) (IOWA R. CIV. P. 252 governing motion for new trial).

[16] 250 Iowa 712, 95 N.W.2d 744 (1959).

[17] *Id.* at 712, 95 N.W.2d at 747.

[18] Emphasis added.

[19] See 1 MESSER & VOLZ, IOWA PRACTICE § 1543 (1954); Vestal, *A Decade of Practice Under the Iowa Rules of Civil Procedure*, 38 IOWA L. REV. 439, 442 (1953).

1860.[20] In contrast, Rule 140, providing that depositions may be taken for the purpose of discovery as well as for use as evidence, was not adopted until 1957.[21] At the outset, it should be noted, however, that this discrepancy was of little import to the result of the instant case. In the words of the court: "[I]t must be conceded that when a statute adopts the general law on a particular subject . . . it adopts not only the existing law but later legislation on the subject."[22] Nevertheless, the court refused to interpret Section 781.10 literally so that it would incorporate the present rules for taking depositions in civil cases; instead, the court found a legislative intent that these rules were not applicable in criminal cases.

While discovery by deposition has been held inapplicable to criminal proceedings in other states,[23] the results of these decisions do not appear to have compelled the result reached in the instant case.[24] One of the explanations offered by the court for its conclusion that the discovery-deposition rules are inapplicable to criminal cases is the apparent conflict that exists between Iowa Rule of Civil Procedure 143 and various statutes governing criminal procedure. Rule 143 provides that "a party shall not be required to list the witnesses he expects to call at the trial." However, under Section 772.3 of the Iowa Code the state in a criminal case is required to indorse upon the indictment "the names of all witnesses on whose evidence it is found."[25] Upon the state's failure to indorse the names of all the grand jury witnesses upon the indictment, Section 776.1(2) provides that a motion to set aside the indictment must be sustained. The court found these provisions governing criminal procedure "impossible to reconcile"[26] with Rule

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[20] REVISION of 1860 § 4960.

[21] See Vestal, *New Iowa Discovery Rules*, 43 IOWA L. REV. 8, 31-35 (1957).

[22] 114 N.W.2d at 319.

[23] *Ex parte* Denton, 266 Ala. 279, 96 So. 2d 296 (1957); Bailey v. State, 227 Ark. 889, 302 S.W.2d 796 (1957); State v. Axilrod, 248 Minn. 204, 79 N.W.2d 677 (1956), *cert. denied* 353 U.S. 938 (1957); Hackel v. Williams, 167 A.2d 364 (Vt. 1961); State v. Christensen, 40 Wash. 2d 329, 242 P.2d 755 (1952) (per curiam).

[24] In State v. Axilrod, *supra* note 23, the court relied upon MINN. R. CIV. P. 1, which provides: "These rules govern the procedure in the district courts of the State of Minnesota in all suits of a *civil* nature . . . ." (Emphasis added.) Iowa has no comparable provision. However, in 114 N.W.2d at 322, the court in the instant case discounted this distinction: "[T]he enabling act in Iowa gives the supreme court authority only to enact rules governing civil proceedings, and it must be presumed this court did not go beyond the power granted to it." See text accompanying note 36 *infra*.

Unlike the instant case, Bailey v. State, Hackel v. Williams and State v. Christensen, *supra* note 23, do not appear to have involved any statute purportedly making discovery-deposition rules applicable to criminal proceedings.

In *Ex parte* Denton, *supra* note 23, the court based its decision upon reasoning that the federal discovery-deposition rules were intended only for civil cases.

[25] See note 8 *supra*.

[26] 114 N.W.2d at 321. The court continued:

> On the one hand, the criminal law makes it mandatory that the names of witnesses by whom the state must prove its case be given to the defendant; on the other, the rules provide that "a party shall not be required to list the witnesses he expects to call at the trial."

143 and "a clear indication"[27] that the Iowa rules for taking depositions were intended to be applicable in civil cases only.

The court found additional support for this conclusion in Iowa Rule of Civil Procedure 141(c) which provides in part: "Except where the action involves an interest in real estate, depositions for discovery may not be taken where the amount in controversy . . . is less than one thousand dollars . . . ." Unless an applicable fine can be considered "in controversy" pending a determination of the defendant's guilt or innocence, criminal cases do not involve any "amount." Consequently, the court reasoned: "This again makes clear the legislative intent that the amendments permitting discovery do not apply except in civil matters."[28] However, Rule 141(c) additionally provides that upon leave of court, notice, and a showing of just cause, depositions for discovery may be taken "upon such terms as justice may require" notwithstanding the absence of $1,000 in controversy.

Even more significant than the above exception to Rule 141 (c) is the judicial control of taking depositions provided by Rule 141(d): "[T]he court in which the action is pending may make an order that the deposition shall not be taken . . . or that the scope of the examination shall be limited to certain matters . . . or the court may make any other order which justice requires . . . ." In light of this limitation, withdrawal of the right to take depositions for discovery in civil cases involving less than $1,000 in controversy seems perfectly consistent with the applicability generally of the discovery-deposition rules to criminal cases. Similarly, the conflict between the specific civil and criminal provisions with respect to the disclosure of witnesses[29] becomes reconcilable. Additionally, from the standpoint of criminal justice, judicial control of discovery by depositions in criminal cases obviates the policy objections that might be advanced were the defendant given an uncontrolled right to take depositions.

Perhaps the strongest reason for the court's conclusion in the instant case[30] that depositions for discovery may not be taken in criminal proceedings is the proviso in Iowa Rule of Civil Procedure 140 that "a party may take the testimony of any person, including a *party*, by deposition . . . ."[31] Notwithstanding the fact that Rule 143 limits the scope of the examination to "any matter, *not privileged*,"[32] the court seemed to feel that if Rule 140 were enforced against a defendant in a criminal case it would conflict with the privilege against self-incrimination provided by Section 781.12 of the Iowa Code.[33] However, there is no possibility that Rule 140 could be enforced to effect this result since Section 781.10 is restricted to the rights of *defendants*.[34] More-

[27] *Id.* at 320.

[28] *Ibid.*

[29] See notes 25-27 *supra* and accompanying text.

[30] 114 N.W.2d at 320.

[31] Emphasis added.

[32] Emphasis added.

[33] "Defendants in all criminal proceedings shall be competent witnesses in their own behalf, but cannot be called as witnesses by the state." IOWA CODE § 781.12 (1962).

[34] Similarly, Rule 140 could not conflict with the defendant's right of confrontation.

over, where depositions of the state's witnesses are sought, as in the present case, obviously there is no conflict. Perhaps in answer to this argument the court stated: "It will not answer to say that this provision of Rule 140 could be ignored; we are here searching for the legislative intent."[35] Unfortunately, the court's search for "legislative intent" fails to consider that the same body of rules to which the court repeatedly refers for examples of specific provisions that are inapplicable to criminal cases subjects all such provisions to the control of the courts.[36] Further, in the last paragraph of the instant opinion, it is difficult to discern exactly with whose intention the court is concerned. The court declares: "[T]he enabling act in Iowa gives the Supreme Court authority only to enact rules governing civil proceedings, and it must be presumed *this court did not go beyond the power granted it.*"[37] If the court is truly concerned with the *legislative* intent behind the Iowa discovery-deposition rules, its own intent at the time these rules were adopted seems totally irrelevant.

There is another apparent conflict between an Iowa rule of civil procedure and a specific criminal statute to which the court does not refer in the instant case. Section 780.35 of the Iowa Code provides: "The rules relating to the instruction of juries in civil cases shall be applicable to the trial of criminal prosecutions." Iowa Rule of Civil Procedure 196 provides that "such instructions shall be in writing . . . provided, however, that in actions triable to a jury where the amount in controversy . . . is three hundred dollars or less, and in any action where the parties so agree, the instructions may be oral." On the other hand, Section 780.9 of the Iowa Code requires without exception that instructions to the jury in criminal cases be made in writing.[38] If the court's reasoning in the instant case was adopted to resolve the apparent conflict engendered by Section 780.9, Rule 196 would not be applicable to criminal cases despite the presence of Section 780.35. While there has been no express determination of this question by the Iowa court since the 1961 amendment to Rule 196 providing for oral instructions,[39] it seems unlikely that Rule 196 will be construed

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[35] 114 N.W.2d at 320.

[36] IOWA R. CIV. P. 141(d).

[37] 114 N.W.2d at 322 (Emphasis added.) The enabling act to which the court refers provides: "The supreme court shall have the power to prescribe all rules of pleading, practice and procedure . . . for all proceedings of a civil nature." IOWA CODE § 684.18 (1962).

[38] "Upon the conclusion of the arguments, the court shall charge the jury in writing, without oral explanation or qualification, stating the law of the case." IOWA CODE § 780.9 (1962).

[39] Prior to the 1961 amendment of IOWA R. CIV. P. 196 providing for limited availability of oral instructions, the Iowa court declared: "[S]tatutes . . . make it the duty of the trial court to submit the instructions . . . in a criminal case in accordance with Rule 196." State v. Holder, 237 Iowa 72, 83, 20 N.W.2d 909, 915 (1945) (dictum); see Vestal, *supra* note 19, at 442. Although the Iowa court has not ruled on the applicability of Rule 196 to criminal cases since the 1961 amendment including the exception for oral instructions, in State v. Brightman, 252 Iowa 1278, 1285, 110 N.W.2d 315, 319 (1961), a criminal case of larceny, the trial court's instruction to the jury was upheld without any rejection of Rule 196.

as totally inapplicable to criminal cases. This conclusion is drawn because of the detailed procedures set forth in Rule 196 and the consequent void that would exist in criminal proceedings were it held inapplicable.

Generally, pre-trial discovery and inspection in criminal cases is discretionary with the trial court[40] and the appellate court will reverse only where there has been a manifest abuse of discretion.[41] However, Section 781.10 of the Iowa Code provides that a defendant in a criminal case "may examine witnesses . . . *with like effect as in civil actions.*"[42] The emphasized words would seem to indicate that a defendant in a criminal action has the right to take depositions for discovery, since he has this right in civil actions except where the amount in controversy is less than $1,000 and the cause of action does not involve an interest in realty, in which event leave of court is required.[43]

It is regrettable in the instant case that the Iowa Supreme Court quashed the trial court's order for discovery by construing the Iowa rules for taking depositions as inapplicable to criminal cases.[44] As a policy matter such a construction seems to reflect the view that discovery by deposition is less important for the defendant in a criminal case than for the defendant in civil litigation. To whatever extent this view may be held, the result seems difficult to justify and of doubtful legislative intent. Finally, it defies the plainest meaning of Section 781.10. Iowa Rule of Civil Procedure 344(f) (13) provides: "In construing statutes the courts search for legislative intent as shown by what the legislature said, rather than what it should or might have said."

Eminent Domain—Licensed Use of Public Street—Right of Action for Taking.—Pursuant to a town ordinance[1] enacted under a permis-

[40] See, *e.g.*, Cramer v. State, 145 Neb. 88, 15 N.W.2d 323 (1944); State v. Cicenia, 6 N.J. 296, 78 A.2d 568 (1951); State v. Thompson, 59 Wash. 2d 100, 338 P.2d 319 (1959). However, one authority has concluded that "on the rare occasions when the trial court [has] exercised its discretion to order rather than deny discovery, the appellate court has usually revoked the invitation." Fletcher, *supra* note 3, at 298.

[41] State v. Clark, 21 Wash. 2d 774, 778, 153 P.2d 297, 299 (1944).

[42] Emphasis added.

[43] IOWA R. CIV. P. 141(c).

[44] Discussing the comparative roles of the trial and appellate courts, one authority has concluded:

> The appellate court is usually in a difficult position affirmatively to order discovery. . . .
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> [T]he trial judge is more likely to appreciate the policy factors behind granting or denying discovery. He sees cases at the formative state where the advantages of discovery techniques in civil cases are most striking, he sees the burdens on defense counsel in criminal cases prior to trial, and he sees the ignorance of defendants entering a guilty plea. He is also better able to measure the extent of the threats to the effective administration of criminal law which discovery prior to trial might present in the particular case . . . . He is able realistically to determine the relative advantages each side will have with or without discovery. Fletcher, *supra* note 3, at 297-98.

[1] Manning, Iowa, Ordinance 115, July 11, 1933.

sive state statute,[2] plaintiff had obtained a revocable license authorizing placement, control, and possession of gasoline pumps and concrete ramps and approaches in the town-owned street. Defendant instituted condemnation proceedings against a portion of plaintiff's property adjoining the street for highway improvement purposes. Plaintiff rejected the sheriff's jury award and appealed to the district court where defendant's motion to strike, *inter alia*, those parts of plaintiff's petition which alleged that valuable property rights in the licensed and permitted use of the street had been destroyed was sustained. On interlocutory appeal to the Iowa Supreme Court, *held*, reversed. Even though a license or right to use land is revocable, it can not be said as a matter of law that the interest is too speculative or insignificant to be compensated if destroyed by condemnation. *Kuker v. Iowa State Highway Comm'n*, 114 N.W.2d 290 (Iowa 1962).

While the constitutional principles of fair compensation for property taken for public use are easily stated,[3] various interests related to land have met with varying treatment in eminent domain proceedings. State granted franchises for various enterprises have been protected by some courts on the theory that they were as much a vested right of property as the ownership of tangible property.[4] Other courts have refused compensation for a loss in value of nonexclusive franchises because no physical injury to or actual taking of property was involved,[5] or the franchise was no longer a profitable one[6] or the condemnor was the grantor of the franchise and had reserved the right to

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[2] IOWA CODE § 368.8 (1962) provides in part: "They [cities and towns] shall have power to limit the number of, regulate, license, or prohibit . . . . 6. *Gasoline curb pumps.* Gasoline curb pumps in streets, highways, avenues, alleys, and public places." In Lamoni v. Smith, 217 Iowa 264, 251 N.W. 706 (1933), the court held that these powers granted by the statute could only be exercised under a validly enacted town ordinance.

[3] In the early case of Henry v. Dubuque & Pac. R.R., 2 Iowa 288 (1855), the court stated: "[T]he person whose property is taken for public use, shall have a *fair equivalent in money*, for the injury done him by such taking; in other words, that he shall be made whole, so far as money is a measure of compensation . . . ." *Id.* at 300. (Emphasis by court.)

[4] See, *e.g.*, Grand River Dam Authority v. United States, 175 F. Supp. 153 (Ct. Cl. 1959) (nonnavigable water rights granted by state and taken by United States); Bloxton v. State Highway Comm'n, 225 Ky. 324, 8 S.W.2d 392 (1928) (toll bridge franchises); Boston Elevated Ry. v. Commonwealth, 310 Mass. 528, 39 N.E.2d 87 (1942) (statute irrevocably granting license to construct elevated railway constituted contract); *In re* Gillen Place, 304 N.Y. 215, 106 N.E.2d 897 (1952) (alternative holding) (subsurface mains and conduits in city street which was closed and appropriated to proprietary city function); Montgomery County v. Schuylkill Bridge Co., 110 Pa. 54, 20 Atl. 407 (1885); Town of East Hartford v. Hartford Bridge Co., 51 U.S. (10 How.) 511, 539 (1850) (dictum) (exclusive franchise on river crossing to toll bridge). See generally 2 NICHOLS, EMINENT DOMAIN § 5.75 (3d ed. 1950).

[5] Alabama Power Co. v. City of Guntersville, 235 Ala. 136, 177 So. 332 (1937) (nonexclusive franchise to operate a light and power company).

[6] Roberts v. New York City, 295 U.S. 264 (1935) (franchise and easements of unprofitable elevated railroad).

modify or repeal it.[7] Easements, however, are generally compensated since the tenement with the permanent easement appurtenant is normally more valuable than without it.[8] In this area it is the increased value of property due to the right of enjoyment of such easements as flowage rights,[9] access,[10] and light and air[11] that is determinative. But courts have generally held licenses not compensable for the reason that they are not an interest in land,[12] relying on the frequently cited definition that a license is a privilege to do one or more acts on land *without possessing any interest therein.*[13] Mere licenses are, however, protected to the extent that the holder may have a right of action for damages and injunctive relief against strangers[14] who interfere with the licensed activities. Thus, compensation in condemnation proceedings has tended to depend on whether or not a given interest is labeled as a property right.[15] Such reliance on labels has been criticized as an

[7] United States v. 85237 Acres of Land, 157 F. Supp. 150 (S.D. Tex. 1957), *aff'd sub nom.* Guerrero-Zapata Bridge Co. v. United States, 252 F.2d 116 (5th Cir. 1958) (revocable franchise to operate toll bridge).

[8] See United States v. Welch, 217 U.S. 333 (1910); 2 LEWIS, EMINENT DOMAIN § 721, at 1263 (3d ed. 1909); 4 NICHOLS, EMINENT DOMAIN § 12.41[1] (4th ed. 1962).

[9] See United States v. Virginia Elec. & Power Co., 365 U.S. 624 (1961).

[10] See Liddick v. City of Council Bluffs, 232 Iowa 197, 5 N.W.2d 361 (1942); Jafco Realty Corp. v. State, 32 Misc. 2d 329, 224 N.Y.S.2d 191 (Ct. Cl. 1962) (acquisition of right to end access at any time in future).

[11] See Roberts v. City of New York, 295 U.S. 264 (1935).

[12] See Millhouse v. Drainage Dist. No. 48, 304 S.W.2d 54 (Mo. Ct. App. 1957); Ohio Valley Advertising Corp. v. Linzell, 107 Ohio App. 351, 152 N.E.2d 380 (1957) (license to erect billboards on condemned land not compensable). *Contra,* Whitmier & Ferris Co. v. State, 12 App. Div. 2d 165, 209 N.Y.S.2d 247 (1961) (statute required compensation for licenses).

[13] See, *e.g.,* Radke v. Union Pac. R.R., 138 Colo. 189, 207, 334 P.2d 1077, 1086 (1959); Sisters of Mercy v. Lightner, 223 Iowa 1049, 1063, 274 N.W. 86, 94 (1937); Cook v. Chicago, B. & Q.R.R., 40 Iowa 451, 456 (1875); Smallwood v. Diz, 245 S.W.2d 439, 440 (Ky. 1952); Blue River Sawmills, Ltd. v. Gates, 225 Ore. 439, 474, 358 P.2d 239, 255 (1960). In Wood v. Gregory, 155 S.W.2d 168, 171 (Mo. 1941), the court added, "Indeed, the distinguishing characteristics of a license are that it *gives no interest in land . . . .*" (Emphasis added.) In RESTATEMENT, PROPERTY § 512 (1944) it is said, "The term 'license' as used in this Chapter [Licenses] denotes an interest in land . . . ." However, this definition is later limited by the language: "A consequence of its [a license's] terminability is that it is not recognized in law as a property interest . . . even though it is by definition an interest in land . . . . It is regarded in law as a mere privilege of use rather than a property interest." *Id.* § 520, comment *a.*

[14] Miller v. Inhabitants of Township of Greenwich, 62 N.J.L. 771, 42 Atl. 735 (Ct. Err. & App. 1899); Moundsville Water Co. v. Moundsville Sand Co., 124 W. Va. 118, 19 S.E.2d 217 (1942); RESTATEMENT, PROPERTY § 521, comment *b* (1944).

[15] See note 13 *supra.* RESTATEMENT, PROPERTY § 512 (1944) states, "The term license . . . denotes an interest in land in the possession of another which . . . (d) is not an easement." In comparing a license to an easement the *Restatement* says that some licenses could be easements if they had been created by proper formalities. *Id.* § 514. See generally 1 NICHOLS, EMINENT DOMAIN §§ 118, 120 (2d ed. 1917). For a critical analysis of the *Restatement's* definition see CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH RUN WITH THE LAND 20-24 (2d ed. 1947).

example of circular reasoning on the basis that deciding ". . . whether it is a property right is really the question to be answered."[16] Often it has been required that there be a physical disturbance of the property claimed to have been taken.[17] Some courts, however, have seen ". . . no reason to grope about in the mysterious world of 'estates' and 'interests not estates' "[18] and hold that property consists of the rights and powers over and interests in an object or thing which are sanctioned by law.[19] Under this view the theory of property adopted is not as important as whether an owner has been deprived of an immediate valuable right relating to an object.[20] If the condemnor destroys such value, the owner thereof should usually be compensated[21] unless the damage is held to be merely incidental or consequential. Such a "taking" may consist of interfering with rights of ownership, use, enjoyment or any other incidence of property.[22] The criterion becomes actual market value of the interest to the owner, whatever its form.[23]

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[16] United States v. Willow River Power Co., 324 U.S. 499, 503 (1945) (dictum).

[17] *E.g.*, Adaman Mut. Water Co. v. United States, 278 F.2d 842 (9th Cir. 1960); Alabama Power Co. v. City of Guntersville, 235 Ala. 136, 177 So. 332 (1937). In the landmark case of Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1872), a physical invasion of the land was required but the range of compensable interests was expanded by defining taking as including destruction of usefulness.

[18] United States v. 53¼ Acres of Land, 139 F.2d 244, 247 (2d Cir. 1943) (dictum).

[19] Anderlik v. Iowa State Highway Comm'n, 240 Iowa 919, 38 N.W.2d 605 (1949); Liddick v. City of Council Bluffs, 232 Iowa 197, 5 N.W.2d 361 (1942). For a discussion of the difference between property as meaning physical objects to which various legal rights relate and property as meaning the aggregate of legal relations in regard to physical objects, see Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L.J. 221 (1931); Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596 (1954).

[20] United States v. Smoot Sand & Gravel Corp., 248 F.2d 822 (4th Cir. 1957). The court said it was immaterial whether the interest was called a "revocable though unrevoked" license or a "profit a prende." "The substance cannot be taken away . . . even for a public use without the owner being made whole." *Id.* at 828. *Cf.* Brooklyn E. Dist. Terminal v. City of New York, 139 F.2d 1007 (2d Cir. 1944). See also Woodside v. City of Atlanta, 214 Ga. 75, 103 S.E.2d 108 (1958).

[21] United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950); United States v. General Motors Corp., 323 U.S. 373 (1945).

[22] *E.g.*, *In re* Forsstrom, 44 Ariz. 472, 38 P.2d 878 (1934); Liddick v. City of Council Bluffs, 232 Iowa 197, 5 N.W.2d 361 (1942); Smith v. Erie R.R., 134 Ohio St. 135, 16 N.E.2d 310 (1938); Gasque v. Town of Conway, 194 S.C. 15, 8 S.E.2d 871 (1940). *Cf.* Woodside v. City of Atlanta, 214 Ga. 75, 103 S.E.2d 108 (1958).

[23] *E.g.*, United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950) (destruction of agricultural value of land); United States v. Petty Motor Co., 327 U.S. 372 (1946) (immaterial whether actual leasehold taken or simply destruction of right of occupancy); Phillips v. United States, 243 F.2d 1 (9th Cir. 1957) (mineral rights in addition to value as ranch); Burger v. City of St. Paul, 241 Minn. 285, 64 N.W.2d 73 (1954) (restrictive residence zone granted by city); Matter of City of New York, 117 App. Div. 553, 102 N.Y. Supp. 667 (1907) (irrevocable right to erect a shed). In the last case cited the *possibility* of obtaining a revocable permit to erect a shed was held not to be a proper element of value.

Agreeing with this concept by implication the defendant in the instant case argued that the rights of plaintiff were valueless because of their revocability and that even if they had value, the license was rescinded by the town when it permitted defendant to improve the street.[24] The court rejected these points as matters to be raised by answer[25] and recognized that until revocation or lack of value was established plaintiff had a property interest, the value of which could be considered.[26] An argument similar to that of defendant in the instant case was made by the United States in *Monongahela Nav. Co. v. United States*.[27] The Government maintained that the lock company's franchise was conditioned upon its assent, although granted by the state, and was destroyed when the United States condemned the physical property. This contention was rejected by the Court in its holding that the franchise was a vested right of property which could be taken only upon full payment or through compliance with expressly reserved methods set forth in the grant. However, the federal government can terminate those rights which are subservient to its navigation easement without compensation,[28] but any value not so covered which is taken must be paid for.[29] Thus, where rights are not enforceable against the grantor, as where they are revocable at will or issued by a governmental authority, they cannot be taken, either by another public authority or a third party, without indemnification.[30] This includes such tangential interests as a right of redeeming or possibility of renewing a lease[31] and the possession of an unrevoked license.[32] Where, however, the interest is repealed by a government

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[24] Brief for Appellee, p. 16.

[25] 114 N.W.2d at 297.

[26] *Id.* at 295.

[27] 148 U.S. 312 (1893).

[28] United States v. Twin City Power Co., 350 U.S. 222 (1956) (value in flow of stream); United States v. Commodore Park, Inc., 324 U.S. 386 (1945) (deprived of right to enjoy navigable waters); United States v. Chicago, M., St. P. & Pac. R.R., 312 U.S. 592 (1941) (injury to structures between high and low water marks).

[29] United States v. Virginia Elec. & Power Co., 365 U.S. 624 (1961) (depreciative impact of flowage easement on nonriparian uses of property); United States v. Smoot Sand & Gravel Corp., 248 F.2d 822 (4th Cir. 1957) (rights to sand and gravel under adjacent tidal waters).

[30] United States v. Smoot Sand & Gravel Corp., *supra* note 29; Renwick, Shaw & Crossett v. Davenport & N.W.R.R., 49 Iowa 664 (1878), *aff'd sub nom.* Railway Co. v. Renwick, 102 U.S. 180 (1880); New York, N.H. & H.R.R. v. Blacker, 178 Mass. 386, 59 N.E. 1020 (1901).

[31] United States v. 53¼ Acres of Land, 139 F.2d 244 (2d Cir. 1943) (right of redemption of leasehold by mortgagee); Matter of City of New York, 118 App. Div. 865, 103 N.Y. Supp. 908 (1907) (possibility of lease renewal).

[32] Miller v. Inhabitants of Township of Greenwich, 62 N.J.L. 771, 42 Atl. 735 (Ct. Err. & App. 1899) (third person damaging sewer authorized by parol license liable in tort); Moundsville Water Co. v. Moundsville Sand Co., 124 W. Va. 118, 19 S.E.2d 217 (1942) (third person damaging water line existing under presumed license may be enjoined and assessed damages).

grantor[33] or was the subject of a contract specifically reserving the right of termination,[34] no payment need be made. A further limit is that there need be no compensation for interests so consequential or remote as to be incapable of valuation.[35] The denial of compensation as a result of this consequential loss doctrine may be avoided, however, if a direct connection between the interest and the land is established.[36] Justification for damages may also be found, as suggested in the instant case, in the theory that if the licensee has made a substantial investment in the property in reliance upon the privileges granted, he is entitled to compensation.[37]

Once the interest has been deemed compensable, the possibility of revocation or change in legal rights should be considered as an element of fair market value before taking.[38] This is true even though the owner has no legal right to have the privilege continue.[39] The inquiry should be in regard to the effect the revocable or legally compellable privilege has on the market price of the property.[40] An award is not prevented by the possibility of the exercise of the power of revocation.[41] Such a possibility merely affects the value of the subservient interest,[42] so that this value may fluctuate from time to time depending on the probability or improbability of actual exercise of

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[33] Keyser v. City of Boise, 30 Idaho 440, 165 Pac. 1121 (1917) (holder of permit to make installation in public street acquires no property right); City of Fort Worth v. Southwest Magazine, 358 S.W.2d 139 (Tex. Civ. App. 1962).

[34] *E.g.*, Sinclair Pipe Line Co. v. United States, 287 F.2d 175 (Ct. Cl. 1961) (revocable license for pipeline not compensable when property condemned); Richfield Oil Corp v. United States, 178 F. Supp. 799 (Ct. Cl. 1959) (terminated lease not compensable).

[35] First Reformed Dutch Church v. Croswell, 210 App. Div. 294, 206 N.Y. Supp. 132 (1924), *appeal dismissed*, 239 N.Y. 625, 147 N.E. 222 (1925) (possibility of reverter); United States v. 53¼ Acres of Land, 139 F.2d 244, 247 (2d Cir. 1943) (dictum).

[36] Adaman Mut. Water Co. v. United States, 278 F.2d 842 (9th Cir. 1960) (dictum) (diminution of water company's assessment base was taking of compensable interest).

[37] See Stoner McCray Sys. v. City of Des Moines, 247 Iowa 1313, 78 N.W.2d 843 (1956); Town of Spencer v. Andrew & McQueen, 82 Iowa 14, 47 N.W. 1007 (1891); Cook v. Chicago, B. & Q.R.R., 40 Iowa 451 (1875); CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH RUN WITH THE LAND 31, 59-64 (2d ed. 1947); Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596, 643 (1954).

[38] Kennebec Water Dist. v. City of Waterville, 97 Me. 185, 54 Atl. 6 (1902); State Rds. Comm'n v. Warriner, 211 Md. 480, 128 A.2d 248 (1957).

[39] New York, N.H. & H.R.R. v. Blacker, 178 Mass. 386, 59 N.E. 1020 (1901) (easy access to rail service proper element of value). The court points out that the owner of land in the business center of a city has no legal right to have the business of the city continue there, but such a location affects market value of land.

[40] *E.g.*, United States v. Wheeler Township, 66 F.2d 977 (8th Cir. 1933); State *ex rel.* McKelvey v. Styner, 58 Idaho 233, 72 P.2d 699 (1937).

[41] Brooklyn E. Dist. Terminal v. City of New York, 139 F.2d 1007 (2d Cir. 1944).

[42] United States v.. Virginia Elec. & Power Co., 365 U.S. 624 (1961); Brooklyn E. Dist. Terminal v. City of New York, *supra* note 41.

the termination power.[43] Like all fact questions, it is for the jury to decide the likelihood of this possibility.[44]

That the plaintiff in the instant case has pleaded enough to be entitled to a trial on the merits is all that is strictly held. However, the court's opinion suggests a possibility that the defendant might escape liability by showing that since the use granted plaintiff in the public street was for private profit and not for the public convenience, the grant may be invalid.[45] This reasoning would seem to be supported by *Bennett v. Town of Mt. Vernon*,[46] where the Iowa court held that a town could not allow the streets to be used for private drainage ditches, and *Lacy v. City of Oskaloosa*[47] in which the court said a city could not authorize perversion of its streets to private uses. These cases, however, are distinguishable because in them the *grantor* rather than a third party without privity to the grant was the one to revoke. Also it is noteworthy that in none of these cases had the town issued any kind of license to the plaintiff. Furthermore, both cases imply that such grants might be made if authorized by statute,[48] which was alleged by the plaintiff to be the situation in the instant case.[49] Since

[43] Augusta Power Co. v. United States, 278 F.2d 1 (5th Cir. 1960) (by implication). See also Olson v. United States, 292 U.S. 246 (1934).

[44] See United States v. Smoot Sand & Gravel Corp., 248 F.2d 822 (4th Cir. 1957); Mayor of Baltimore v. Rice, 73 Md. 307, 21 Atl. 181 (1891). *Contra*, Emery v. Boston Terminal Co., 178 Mass. 172, 59 N.E. 763 (1901).

[45] "In Town of Lamoni v. Smith, supra, we held a city may lawfully authorize and permit its streets for purposes other than travel, when such use is conducive to the public convenience." 114 N.W.2d at 297. In Town of Lamoni v. Smith, 217 Iowa 264, 251 N.W. 706 (1933), the defendants surreptitiously constructed gasoline pumps in the town-owned street after being denied permission to do so by the town council. The court, relying on a statutory provision which made an incumberance or obstruction of public roads a nuisance, held that the town was entitled to injunctive relief as an aid to removal of the pumps.

[46] 124 Iowa 537, 100 N.W. 349 (1904).

[47] 143 Iowa 704, 121 N.W. 542 (1909). And see Emerson v. Babcock, 66 Iowa 257, 23 N.W. 656 (1885).

[48] The predecessor of the current statute was held valid, insofar as it delegated to a city or town the power to regulate the exhibition of motion pictures on Sunday under a validly enacted city ordinance, in City of Ames v. Gerbracht, 194 Iowa 267, 189 N.W. 729 (1922). For an example of a license held authorized by statute, see Town of Spencer v. Andrew & McQueen, 82 Iowa 14, 47 N.W. 1007 (1891), where the town council granted a private business the right to install a scale in the city street. After the licensee had acted in reliance on the license, the council was "estopped from revoking it until the interests of the public shall require that it be revoked." *Id.* at 18. Private uses in public property have been held valid in other jurisdictions. See Newport Manor, Inc. v. Carmen Land Co., 82 So. 2d 127 (Fla. 1955) (private sewers beneath city streets); Kirzenbaum v. Paulus, 51 N.J. Super. 186, 144 A.2d 25 (Super. Ct. L. 1958) (sidewalk bank depository). In Gates v. City of Bloomfield, 243 Iowa 1, 50 N.W.2d 578 (1951), the court held that absent a permissive statute a city could not limit parking in city street to interurban busses as a benefit to bus station owner over objection of abutting land owner.

[49] 114 N.W.2d at 294. The Iowa court held in Town of Lamoni v. Smith, 217 Iowa 264, 251 N.W. 706 (1933), that in order to grant the licenses authorized in

the fee title to public streets in Iowa is vested in an incorporated town[50] with statutory authority to grant licenses covering their use for certain specific purposes, the state would seem to be in no position to complain when the authority has been duly exercised.[51]

If the facts are proven substantially as alleged the Iowa court indicates a willingness to approve jury consideration of the value of the revocable interest, whether denominated a license or not, in determining total market value at time of taking. The plaintiff need not show a property interest historically recognized as an estate in land, but only that the rights he enjoyed under a duly authorized license had value to the extent that they would be considered by a buyer willing to purchase if the plaintiff were willing to sell. Thus, the possibility of license revocation by the granting town is not a bar to compensation for the interest, but only an element to be considered in determining the market value of property taken by a state agency.

Evidence—Unreasonable Search and Seizure—Exclusion of Illegally Obtained Evidence Extended to Civil Action.—Special Agents of the Internal Revenue Service armed with a search warrant forced entry into a building owned by plaintiffs and conducted a raid during which certain papers that evidenced the operation of a business of accepting wagers were seized. Plaintiffs were subsequently indicted by a grand jury on a charge of willfully conspiring to attempt to evade a federal tax, but the criminal charges were dismissed following a determination that the warrant for search of the premises was invalid and the search unlawful requiring suppression of the evidence thus obtained.[1] Thereafter, a jeopardy assessment of excise wagering taxes was made against plaintiffs. The Internal Revenue Service admitted that the amount of taxes allegedly due was calculated from records seized in the unlawful raid and that without these records the tax liability could not have been determined. A notice and demand for payment was issued and

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IOWA CODE § 368.8(6) (1962) the town must duly enact an ordinance covering such licenses for use of the public streets. The Manning ordinance authorizes use of the public streets for driveways only, and specifically forbids the location of pumps so that any vehicle having its tank filled therefrom will stand upon or across any part of the street or public way. Manning, Iowa, Ordinance 115, §§ 5, 11, July 11, 1933. If the location of the plaintiff's pumps violates this provision, their presence in the public street would seem to be totally unauthorized and illegal.

[50] Town of Lamoni v. Smith, *supra* note 49; Lacy v. City of Oskaloosa, 143 Iowa 704, 121 N.W. 542 (1909).

[51] See United States v. Smoot Sand & Gravel Corp., 248 F.2d 822, 828 (4th Cir. 1957), where the court stated:

> The legal power to confer such benefit upon the abutting land owner rests with the State of Virginia. Questions as to the wisdom and social utility of the action of its lawmakers are not for us; our sole function is fairly to ascertain and give effect to their action. If, as the Government asserts, the State has needlessly enriched riparian owners at its own expense, we cannot on this account disregard Virginia's statute or ignore Federal constitutional guarantees.

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[1] United States v. Lassoff, 147 F. Supp. 944 (E.D. Ky. 1957).

notices of federal tax liens were recorded. Plaintiffs' action in equity to enjoin the collection of the tax was dismissed,[2] but on appeal the dismissal was reversed.[3] On remand to the district court, *held*, complaint dismissed. Although evidence obtained in an unreasonable search and seizure in violation of the fourth amendment to the United States Constitution is not admissible in a civil action, the burden is on the taxpayer to prove the invalidity of the assessment, and in addition he is not entitled to an injunction when there exists an adequate remedy at law.[4] *Lassoff v. Gray*, 207 F. Supp. 843 (W.D. Ky. 1962).

Evidence obtained as the result of an unreasonable search and seizure has long been held inadmissible in a federal criminal action,[5] although at common law such evidence was admissible even though illegally obtained.[6] The exclusionary rule originated and flourished in the federal courts, but the state courts were generally reluctant to follow.[7] However, the recent ruling by the Supreme Court in *Mapp v. Ohio*[8] has imposed exclusion on the state courts as well, thus extending the exclusionary rule to its logical conclusion.[9]

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[2] Lassoff v. Gray, 168 F. Supp. 363 (W.D. Ky. 1958).

[3] Lassoff v. Gray, 266 F.2d 745 (6th Cir. 1959).

[4] In order to come within the equity jurisdiction of the court, the taxpayer must show both that the tax sought to be enjoined was illegally levied and the existence of special and extraordinary circumstances which would require equity to intervene. Here, although there was no admissible evidence to prove that the taxpayers were engaged in the business of accepting wagers, the plaintiffs had not offered any credible evidence to disprove the assessment, and thus had failed to carry the burden of proof. Furthermore, a proper determination of plaintiffs' tax liability could have been had by the payment of the excise tax on one alleged wager by each plaintiff and the filing of a timely claim for refund. In the event the claim for refund was denied, plaintiffs could have filed suit for refund in a court of law, and thus there were no grounds which required equity to intervene.

[5] *E.g.*, Mapp v. Ohio, 367 U.S. 643 (1961); Elkins v. United States, 364 U.S. 206 (1960); Weeks v. United States, 232 U.S. 383 (1914). However, it was not until Mapp v. Ohio, *supra*, that the Court clearly held exclusion of illegally obtained evidence was inherent in the constitutional guarantee that: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV. For an extensive citation of commentary on the development of the exclusionary rule, see LADD, CASES ON EVIDENCE 300-01 (2d ed. 1955).

[6] See Adams v. New York, 192 U.S. 585 (1904); 8 WIGMORE, EVIDENCE § 2183 (McNaughton rev. 1961). The rationale for the common-law rule was that any evidence which would enable the court to determine the truth ought to be admissible, and therefore the courts would not look behind the evidence to see how it was obtained.

[7] See Mapp v. Ohio, 367 U.S. 643, 651 (1961); Elkins v. United States, 364 U.S. 206, 224-32 (1960) (Appendix); Wolf v. Colorado, 338 U.S. 25, 33-39 (1949) (Appendix).

[8] 367 U.S. 643 (1961).

[9] See in chronological order Weeks v. United States, 232 U.S. 383 (1914) (evidence illegally obtained by federal officers inadmissible in federal court); Wolf v. Colorado, 338 U.S. 25 (1949) (security against arbitrary intrusion by police enforceable through due process clause); Elkins v. United States, 364

One facet of the exclusion problem which remains in doubt, however, is the applicability of the rule to civil actions. As the prohibition of the unreasonable search and seizure clause is a guarantee against arbitrary intrusion by the government only, the issue of the exclusion of evidence arises primarily where the government is a party to the action,[10] as in the instant case.

In *Boyd v. United States*,[11] the genesis of the exclusionary doctrine in the United States, the Court held a provision of the customs revenue act unconstitutional because it compelled the production of evidence for use in a libel proceeding, the Court equating such compulsion with an unreasonable search and seizure as well as forced self incrimination. Although the proceeding was for the forfeiture of property for violation of the customs laws, the Court went to great length to indicate the "quasi-criminal nature" of the proceeding.[12] Implicit in the opinion was the necessity for this emphasis on the criminal aspect since the court based its holding on the "intimate relation" between the personal privileges granted by the unreasonable search and seizure clause of the fourth amendment and the self-incrimination clause of the fifth amendment.[13] Thus, it seemed at the outset that the rule based on both amendments was restricted by the language of the Court to the exclusion of evidence to be used to convict a man of a crime or to forfeit his goods.

The court in the instant case, however, relied on dicta from later decisions based solely on fourth amendment grounds in upholding the taxpayer's contention that illegally obtained evidence should also be excluded in a civil case, although admitting that the Supreme Court had never specifically so held.[14]

In *Weeks v. United States*,[15] in holding for the first time that evidence *seized* illegally was not admissible in a criminal action, the

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U.S. 206 (1960) (evidence illegally obtained by state officers inadmissible in federal court); Mapp v. Ohio, *supra* note 8 (evidence illegally obtained by state or federal officers inadmissible in state court).

[10] Indeed, the rationale breaks down if the government is not a party to the action as the purpose of the exclusionary rule is to deter violations of the Constitution by removing the incentive to disregard it. Elkins v. United States, *supra* note 9; Mapp v. Ohio, 367 U.S. 643, 656 (1961) (dictum). However, for examples of cases in which the rule was considered when the government was not a party to the action, see Ravellette v. Smith, 300 F.2d 854 (7th Cir. 1962) (wrongful death action); Bolt v. Morgenstein, 81 A.2d 656 (D.C. Munic. Ct. App. 1951) (debt on check); Contestible v. Brookshire, 355 S.W.2d 36 (Mo. 1962) (wrongful death action); Chambers v. Rosetti, 226 N.Y.S.2d 27 (New York City Ct. 1962) (replevin); Martell v. Klingman, 11 Wis. 2d 296, 105 N.W.2d 446 (1960) (tort).

[11] 116 U.S. 616 (1886).

[12] *Id.* at 634.

[13] *Id.* at 633. This "intimate relation" has been reaffirmed, though modified, so that the two concepts are now complementary to, rather than dependent upon, the other in its sphere of influence. See Mapp v. Ohio, 367 U.S. 643, 657 (1961) (dictum). This theory of interrelationship has been criticized. See 8 WIGMORE, EVIDENCE § 2264 n.4 (McNaughton rev. 1961).

[14] 207 F. Supp. at 846.

[15] 232 U.S. 383 (1914).

Court also stated: "This protection reaches all alike, *whether accused of crime or not,* and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws."[16]

Again, in *Silverthorne Lumber Co. v. United States,*[17] although holding that the government could not base a proper indictment upon knowledge gained from a prior illegal search and seizure, the Court went on to say: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that *it shall not be used at all.*"[18]

However, the general rule as repeated by the courts is that the right to have evidence suppressed on the grounds of unreasonable search and seizure does not apply to civil cases[19] although the courts have not adhered strictly to such a rule. By the weight of authority, the "quasi-criminal" area of libel proceedings is within the purview of the exclusionary doctrine,[20] but in spite of the fact that *Boyd* itself was a libel proceeding a survey of the decisions shows that the area of forfeiture has still caused some courts concern in regard to the applicability of the exclusionary rule. Two recent decisions from federal district courts point up the problem clearly, one court excluding the evidence[21] and the other admitting it,[22] yet both falling victim to the same fallacious argument. The confusion resulted from a failure in the review of forfeiture decisions to distinguish between the inadmissibility of illegally seized evidence for the purpose of proving unlawful use of the res, and the authority of the Government to take advantage of or to adopt an illegal seizure and possession of an unlawfully used res for purposes of maintaining a forfeiture action against it. The rule seems well settled in all of the circuits that unconstitution-

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[16] *Id.* at 392. (Emphasis added.)

[17] 251 U.S. 385 (1920). This case is the source of what has been popularly referred to as the "fruit of the poisonous tree"doctrine. 8 WIGMORE, EVIDENCE § 2184a, at 40 (McNaughton rev. 1961). The persuasiveness of both *Weeks* and *Silverthorne* is diminished, however, by the fact that they are criminal cases.

[18] 251 U.S. 385, at 392. (Emphasis added.)

[19] See, *e.g.,* Camden County Beverage Co. v. Blair, 46 F.2d 648, 650 (D.N.J. 1930), *appeal dismissed as moot,* 46 F.2d 655 (3d Cir. 1931); Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, Inc., 32 F.2d 195, 202 (2d Cir. 1929) (dictum); United States v. Four Thousand One Hundred & Seventy One Dollars, 200 F. Supp. 28, 30 (N.D. Ill. 1961) (dictum); United States v. One 1953 Oldsmobile Sedan, 132 F. Supp. 14, 18 (W.D. Ark. 1955) (dictum); United States v. 62 Packages, More or Less, of Marmola Prescription Tablets, 48 F. Supp. 878, 884 (W.D. Wis. 1943) (dictum); Sackler v. Sackler, 16 App. Div. 2d 423, 425, 229 N.Y.S.2d 61, 63 (1962) (alternative holding).

[20] See, *e.g.,* United States v. Physic, 175 F.2d 338 (2d Cir. 1949); United States v. Butler, 156 F.2d 897 (10th Cir. 1946); Walker v. United States, 125 F.2d 395 (5th Cir. 1942); United States v. One 1946 Plymouth Sedan Automobile, 167 F.2d 3, 5 (7th Cir. 1948) (dictum); United States v. One 1953 Oldsmobile Sedan, *supra* note 19, at 18 (dictum).

[21] United States v. Four Thousand One Hundred & Seventy One Dollars, 200 F. Supp. 28 (N.D. Ill. 1961).

[22] United States v. One 1956 Ford 2-Door Sedan, 185 F. Supp. 76 (E.D. Ky. 1960).

ally obtained evidence is inadmissable to prove the violation causing the forfeiture,[23] but the Third Circuit also holds that the Government cannot maintain forfeiture proceedings against a res used in the commission of a crime which was illegally seized by federal officers.[24] In both district court cases, the court confused these issues by failing to interpret the language of previous decisions in its factual setting. One court[25] referred to Justice Holmes' words in *Dodge v. United States*[26] as supporting the position that exclusion of illegally obtained evidence is not required in forfeiture proceedings. However, the *Dodge* case held that the Government could maintain forfeiture proceedings against a res despite its illegal seizure by local police, and Justice Holmes was merely distinguishing this issue from that of the exclusion of illegally obtained evidence to prove unlawful use of the res.

The other district court[27] first noted that the area seemed in a state of confusion, and then proceeded to misconstrue decisions of the Fourth and Fifth Circuits. In *United States v. One 1956 Ford Tudor Sedan*[28] the Fourth Circuit had said: "Considerations which, in criminal cases, require the suppression of evidence obtained in an unlawful search and seizure have no application in a forfeiture action." However, the Fourth Circuit was actually referring to the same distinction noted in *Dodge,* and, indeed, cited Justice Holmes as authority! The district court then quoted a similar statement by the Fifth Circuit in *Martin v. United States,*[29] although from the fact issue before that court and a review of the cases cited,[30] it cannot be doubted that that court was also referring to the same distinction. However, the district court then rejected its own interpretation of the language of the Fourth and Fifth Circuits and correctly held the evidence to be inadmissible.[31]

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[23] See cases cited note 20 *supra.*

[24] United States v. Plymouth Coupe 182 F.2d 180 (3d Cir. 1950). *Contra,* Martin v. United States, 277 F.2d 785 (5th Cir. 1960); United States v. Carey, 272 F.2d 492 (5th Cir. 1959) (noting Third Circuit holding); United States v. One 1956 Ford Tudor Sedan, 252 F.2d 725 (4th Cir. 1958); United States v. One 1960 Lincoln Two-Door Hard-Top, 195 F. Supp. 205 (D. Mass. 1961) (noting Third Circuit holding); *cf.* Dodge v. United States, 272 U.S. 530 (1926); United States v. One Ford Coupe Automobile, 272 U.S. 321 (1926).

[25] United States v. One 1956 Ford 2-Door Sedan, 185 F. Supp. 76 (E.D. Ky. 1960).

[26] 272 U.S. 530 (1926).

[27] United States v. Four Thousand One Hundred & Seventy One Dollars, 200 F. Supp. 28 (N.D. Ill. 1961).

[28] 253 F.2d 725, 727 (4th Cir. 1958).

[29] 277 F.2d 785 (5th Cir. 1960).

[30] United States v. Carey, 272 F.2d 492 (5th Cir. 1959) (noting distinction); Grogan v. United States, 261 F.2d 86 (5th Cir. 1958), *cert. denied,* 359 U.S. 944 (1959).

> The seizure of property, the title to which has been forfeited to the United States, is to be distinguished from the exclusion of evidence secured through an unlawful search and seizure. In the one case the Government is entitled to the possession of the property, in the other it is not. *Id.* at 87 (dictum).

[31] 200 F. Supp. at 31. For a well-reasoned district court opinion holding illegally

Authority for an extension of the exclusionary rule into civil litigation other than the transitional "quasi-criminal" forfeiture proceedings is not as clear. In an exhaustive and persuasive opinion, a federal district court held in *Camden County Beverage Co. v. Blair*[32] that evidence obtained by an unconstitutional search and seizure was nevertheless admissible in a civil action to revoke a liquor permit. The court concluded after an extensive review of the authorities that the historical thrust of the fourth amendment was to prevent a search by authority of law of one's premises or person with a view to the discovery of *"some evidence of guilt to be used in the prosecution of a criminal action for some crime or offense with which he is charged."*[33] The court also noted the dictum in *Weeks*, quoted by the instant court, to the effect that the protection reached all alike, "whether accused of crime or not," but construed it to mean that although illegal seizure of evidence violates the Constitution exclusion is required only when it is to be used in a criminal, penal, or forfeiture case,[34] as such was the clear intention of *Boyd*.[35]

However, the court in the instant case was not without precedent for its extension of the exclusionary rule.[36] In *Rogers v. United States*,[37] the First Circuit directly faced the issue of the exclusionary rule in an action in assumpsit by the Government to recover customs duties. The court there relied on the same language quoted by the instant court from *Silverthorne* that evidence seized illegally "shall not be used at all," and held that the evidence was inadmissible.[38]

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obtained evidence inadmissible, see United States v. One 1960 Lincoln Two-Door Hard-Top, 195 F. Supp. 205 (D. Mass. 1961). For a state court opinion reaching the same result in a forfeiture proceeding, though based on a statute excluding evidence in a *criminal* case if seized in violation of the federal or state constitution, see, Mosse v. State, 332 S.W.2d 383 (Tex. Civ. App. 1960). *But cf.* McColl v. Hardin *ex. rel.* State, 70 S.W.2d 327 (Tex. Civ. App. 1934) (abatement of public nuisance).

[32] 46 F.2d 648 (D.N.J. 1930), *appeal dismissed as moot*, 46 F.2d 655 (3d Cir. 1931).

[33] *Id.* at 650. (Emphasis by court.)

[34] *Id.* at 654.

[35] For the necessity of such an implication in *Boyd*, see note 12 *supra* and accompanying text.

[36] See Rogers v. United States, 97 F.2d 691 (1st Cir. 1938) (action to recover customs duties); Tovar v. Jarecki, 83 F. Supp. 47, 48 (N.D. Ill. 1948) (dictum), *rev'd on other grounds*, 173 F.2d 449 (7th Cir. 1949) (suit to enjoin special marijuana tax); Schenck *ex rel.* Chow Fook Hong v. Ward, 24 F. Supp. 776, 778 (D. Mass. 1938) (dictum) (habeas corpus from deportation proceeding); *Ex parte* Jackson, 263 Fed. 110, 112-13 (D. Mont. 1920) (alternative holding) (habeas corpus from deportation proceeding).

[37] 97 F.2d 691 (1st Cir. 1938).

[38] If a writ of subpoena is rendered invalid because of the use in framing it of evidence obtained by the government in violation of the Fourth Amendment, we think that a judgment in a civil cause, in the procurement of which evidence thus illegally obtained is used, is likewise rendered invalid. *Id.* at 692.

The case was criticized in 6 U. CHI. L. REV. 113 (1938).

A Supreme Court decision not cited in the instant case, *United States v. Wallace & Tiernan Co.*,[39] posed the question of whether the use of evidence obtained in violation of the fourth amendment was barred in a civil anti-trust proceeding. The court ultimately held that there was no unreasonable search or seizure but first implied that if the seizure had been illegal the Government would have "forfeited *all opportunity* to make use of [the] evidence"[40] under the *Silverthorne* doctrine.

Since exclusion has only recently been required of the states,[41] the issue of its extension to civil actions has to date been confined primarily to the federal courts. State courts which have ruled directly on the issue have been inclined to follow the general rule limiting the doctrine to criminal prosecutions[42] although one court adopted the quasi-criminal position in excluding illegally seized evidence from an action by officials to recover a penalty for violation of a city ordinance.[43] However, several state courts, although holding that there had been no illegal search and seizure, have implied by going to the merits of the contention, that the evidence might have been excluded had a constitutional violation been found.[44]

With the changes wrought by the *Mapp* decision, state courts will undoubtedly be forced to face again the issue of admissibility of illegally seized evidence in civil cases.[45] Furthermore, as *Mapp* held

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[39] 336 U.S. 793 (1949).

[40] *Id.* at 799-800. (Emphasis added.)

[41] *Supra* note 8 and accompanying text.

[42] See Streipe v. Hubbuch Bros. & Wellendorf, 233 Ky. 194, 197, 25 S.W.2d 358, 359 (1930) (alternative holding); Sackler v. Sackler, 16 App. Div. 2d 423, 425, 229 N.Y.S.2d 61, 63 (1962) (alternative holding); Walker v. Penner, 190 Ore. 452, 227 P.2d 316 (1951) (dictum). *Contra,* Lebel v. Swincicki, 354 Mich. 427, 93 N.W.2d 281 (1958); Chambers v. Rosetti, 226 N.Y.S.2d 27 (New York City Ct. 1962). The *Lebel* case, *supra,* is unique in that the illegal seizure was committed by a private person rather than an agent or officer of the government, and the court held the evidence inadmissible, although affirming the decision on the grounds that there was sufficient independent evidence to sustain the verdict. The extension of the doctrine to include seizures by private persons seems clearly erroneous, as the Constitution is a limit on the actions of government officials only, which has been well settled since Burdeau v. McDowell, 256 U.S. 465 (1921). The *Sackler* case, *supra,* reversed a decision by the lower court which had followed *Lebel,* Sackler v. Sackler, 224 N.Y.S.2d 790 (Sup. Ct. 1962), although two justices dissented vigorously. For further discussion of the *Sackler* case, see 46 MINN. L. REV. 1119 (1962); 110 U. PA. L. REV. 1043 (1962); 8 UTAH L. REV. 84 (1962).

[43] City of Chicago v. Lord, 3 Ill. App. 2d 410, 122 N.E.2d 439 (1954), *aff'd,* 7 Ill. 2d 379, 130 N.E.2d 504 (1955) (showing of obscene films). *But cf.* McColl v. Hardin *ex rel.* State, 70 S.W.2d 327 (Tex. Civ. App. 1934) (dance hall as nuisance).

[44] See People v. Frangadakis, 184 Cal. App. 2d 540, 7 Cal. Rptr. 776 (1st Dist. 1960) (public nuisance); State Conservation Dep't v. Brown, 335 Mich. 343, 55 N.W.2d 859 (1952) (condemnation and confiscation); Contestible v. Brookshire, 355 S.W.2d 36 (Mo. 1962) (wrongful death action); *cf.* Martell v. Klingman, 11 Wis. 2d 296, 105 N.W.2d 446 (1960) (question expressly left open in tort action).

[45] "[I]t now seems that we may expect a marked increase in cases wherein the resolution of this issue will be all decisive." United States v. Four Thousand One Hundred & Seventy One Dollars, 200 F. Supp. 28, 30 (N.D. Ill. 1961).

that illegally seized evidence is no longer excluded by operation of a Court rule of evidence, but by the force of the Constitution itself, it would appear that former policy considerations[46] regarding the propriety of the exclusionary rule are now of little moment. With the undercutting of these classical arguments against exclusion, the real issue becomes simply whether government officials have in fact committed an unreasonable search and seizure. With the promotion of the exclusionary rule to the status of a constitutional requirement of both the fourth and fourteenth amendments there would seem to be no grounds for limiting its effectiveness to a lesser area than that in which the related personal privilege against self incrimination embodied in the fifth amendment is held to operate. If the government has seized evidence in violation of the Constitution, the exclusion of the fruits of the seizure is now required by constitutional command and this requirement would seem to demand compliance without regard to the type of action in which the evidence is offered.

Federal Jurisdiction—Venue—Transfer of Action by Federal District Court in Absence of Personal Jurisdiction.—Plaintiff, a resident of Pennsylvania, brought a private antitrust action against corporate defendants.[1] The federal District Court for the Eastern District of Pennsylvania held venue improper with respect to two corporate defendants[2] and transferred the action to the Southern District of New York, pursuant to Section 1406(a)[3] of the Judicial Code, to "cure" the defect in venue. The New York court granted defendants' motion to dismiss for lack of personal jurisdiction, holding that since the Pennsylvania court lacked both venue and personal jurisdiction, extraterritorial service was not perfected on them and that transfer was im-

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[46] See, *e.g.*, People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955) (Traynor, J.); Wolf v. Colorado, 338 U.S. 25, 41 (1949) (Murphy, J., dissenting); Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting); Olmstead v. United States, 277 U.S. 438, 469, 471 (1928) (Holmes and Brandeis, JJ., dissenting). *Contra*, Eleuteri v. Richman, 26 N.J. 506, 141 A.2d 46 (1958) (Weintraub, C.J.); People v. Defore, 242 N.Y. 13, 150 N.E. 585, *cert. denied*, 270 U.S. 657 (1926) (New York opinion by Cardozo, J.).

[1] The action was brought under Clayton Act § 4, 38 Stat. 731, (1914), 15 U.S.C. § 15 (1958), and Sherman Act §§ 1, 2, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1958). Venue provisions under the Clayton Act and other antitrust legislation are treated at length in Note, *Venue in Private Antitrust Suits*, 37 N.Y.U.L. REV. 268 (1962).

[2] Venue was held improper with regard to the corporate defendants because of the doctrine of corporate separateness. See Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925) (presence of subsidiary in state insufficient to confer jurisdiction over out-of-state parent corporation); Harris v. Deere & Co., 223 F.2d 161 (4th Cir. 1955) (same). The court refused to treat two subsidiaries as agents of the parent corporation for venue purposes under Section 12 of the Clayton Act, which requires that a corporation be an inhabitant of, be found, or transact business in the district in which suit was brought. Clayton Act § 12, 38 Stat. 736 (1914), 15 U.S.C. § 22 (1958) (quoted note 11 *infra*).

[3] 28 U.S.C. § 1406(a) (1958) (quoted note 15 *infra*).

proper in the absence of personal jurisdiction.[4] The Court of Appeals for the Second Circuit affirmed[5] holding that transfer under Section 1406(a) was unauthorized where the transferring court lacked personal jurisdiction over the defendants. On certiorari to the United States Supreme Court, *held*, reversed, one dissenting opinion. Section 1406(a) authorizes the transfer of actions "in the interest of justice" from a district in which venue is improper to one "in which it could have been brought" to cure defective venue regardless of whether the district court in which the action was filed had personal jurisdiction over the defendant. *Goldlawr, Inc. v. Heiman*, 82 Sup. Ct. 913 (1962).

Venue provisions delimit the proper places where actions may be instituted and proceed to final judgment,[6] as distinguished from personal jurisdiction requirements which relate to the power or control of a court necessary to render an in personam judgment.[7] Personal jurisdiction acquired by valid service of process or voluntary appearance is essential before a court can enter a valid judgment against a defendant.[8] Like venue, personal jurisdiction may be waived by the defendant.[9] Absent waiver, however, either improper venue or a lack of personal jurisdiction may result in the dismissal of an action.

Special venue statutes such as Section 12 of the Clayton Act, which was involved in the instant case, have been enacted by Congress to permit certain federal actions to be brought in districts other than those provided under the general venue provisions of Section 1391(c)

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[4] Goldlawr, Inc. v. Shubert, 175 F. Supp. 793 (S.D.N.Y. 1959). Under Section 12 of the Clayton Act, once venue has been properly laid, service may be perfected outside the district in which suit was brought in either the district in which the corporation is an inhabitant or may be found. The court construed this provision for extraterritorial service to be only applicable to actions brought in a district in which the corporation is an inhabitant, is found, or transacts business—that is, the applicable venue provisions authorized under Section 12. Since the action was not brought in such a district, extraterritorial service did not perfect jurisdiction. *Accord*, Dazian's, Inc. v. Switzer Bros., 111 F. Supp. 648 (N.D. Ohio 1951); Reid v. University of Minnesota, 107 F. Supp. 439 (N.D. Ohio 1952) (alternative holding). Jurisdiction continues after transfer if service was properly made by the transferring court. But effective service is necessary to confer jurisdiction, and the transferee court cannot exercise jurisdiction solely on the basis of the transfer. See note 24 *infra*.

[5] Goldlawr, Inc. v. Heiman, 288 F.2d 579 (2d Cir. 1961), 75 HARV. L. REV. 421.

[6] See Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 167-68 (1939); Riley v. Union Pac. R.R., 177 F.2d 673, 675 (7th Cir. 1949); Herrington v. Thompson, 61 F. Supp. 903, 904 (W.D. Mo. 1945); 1 MOORE, FEDERAL PRACTICE ¶ 0.140 [1.—1], at 1317 (2d ed. 1961).

[7] *Ibid.*; MOORE & VESTAL, MOORE'S MANUAL § 7.01, at 382 (1962).

[8] See International Shoe Co. v. Washington, 326 U.S. 310 (1945); Robertson v. Railroad Labor Bd., 268 U.S. 619, 622 (1925).

[9] See, *e.g.*, Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 168 (1939); (venue may be waived by defendant); Western Loan & Sav. Co. v. Butte & Boston Consol. Mining Co., 210 U.S. 368 (1908) (defense on the merits waives personal jurisdiction); Matter of Moore, 209 U.S. 490 (1908) (plaintiff waived jurisdiction after removal by filing amended petition and entering stipulations). Waiver of venue is codified in 28 U.S.C. § 1406(b) (1958).

of the Judicial Code.[10] Section 1391(c) provides that a corporation may be sued in any district in which it is incorporated, licensed to do business, or doing business. Under Section 12 of the Clayton Act such actions may be brought where the corporation is found or transacts business, and process may be served where the corporation is an inhabitant or is found.[11] Under both sections, tests for determining proper venue closely parallel those factors necessary to perfect service in obtaining personal jurisdiction.[12] Consequently, a lack of personal jurisdiction often accompanies defective venue. This is particularly likely to occur in the case of a suit brought against a corporate defendant where it is "doing business" because of the varying content given to the phrase "doing business" and the failure of some courts to distinguish between jurisdiction over the corporation and venue.[13] The result of this indefiniteness in the federal law is that good faith mistakes in selecting the proper forum in which to bring an action frequently lead to dismissal. Provisions for the transfer of actions in which venue is either inconvenient or improper have been enacted to avoid the harshness of dismissal in such cases.[14]

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[10] 28 U.S.C. § 1391(c) (1958) provides: "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

[11] Clayton Act § 12, 38 Stat. 736 (1914), 15 U.S.C. § 22 (1958) provides:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

Other special venue statutes are listed and discussed in FINS, FEDERAL JURISDICTION AND PROCEDURE 83-95 (1960). Where applicable, special venue provisions take precedence over the general venue provisions of Section 1391(c). See Sonken-Galamba Corp. v. Atchison, T. & S.F. Ry., 27 F. Supp. 902 (W.D. Mo. 1939).

[12] See MOORE & VESTAL, *op. cit. supra* note 7, § 7.06, at 396-98, where it is noted that the "doing business" standard to determine proper venue under § 1391(c) cannot easily be distinguished from due process requirements in determining corporate amenability to service of process. The authors conclude that a corporation should be held to be "doing business" for venue purposes if it is amenable to service of process. They suggest that in close cases courts should look to the particular facts involved and examine the corporation's contacts with the state in relation to the controversy being litigated. See Note, *Jurisdiction of Federal District Courts Over Foreign Corporations*, 69 HARV. L. REV. 508, 518 (1956).

[13] See, *e.g.*, Cooke v. Kilgore Mfg. Co., 105 F. Supp. 733 (N.D. Ohio 1952); Goldstein v. Chicago, R.I. & P.R.R., 93 F. Supp. 671 (W.D.N.Y. 1950). See generally Barrett, *Venue and Service of Process in the Federal Courts—Suggestion for Reform*, 7 VAND. L. REV. 608 (1954).

[14] 28 U.S.C. § 1404(a) (1958) (transfer for the convenience of parties and witnesses), 28 U.S.C. § 1406(a) (1958) (quoted note 15 *infra*). Both sections were enacted in 1948 to permit transfer under circumstances previously requiring dismissal. 62 Stat. 937 (1948). Neither provision states whether personal jurisdiction is required in the transferring court before a transfer can be made. Of course, transfer by a court which lacks subject-matter jurisdiction is clearly unauthorized, since a court in that instance has no power to deal with the proceedings in any

Under Section 1406(a), an action filed in a district of improper venue may be dismissed or tranferred to a proper forum at the discretion of the district judge.[15] In the usual case, a motion to transfer is made by the plaintiff following a timely objection to improper venue by the defendant. Similarly, when personal jurisdiction is lacking the defendant will normally move to dismiss rather than transfer, whether or not venue is proper, and the plaintiff will move to transfer, raising the question of transfer in the absence of personal jurisdiction. One of the primary considerations in resolving this jurisdiction question thus should be the effects on defendant's rights caused by any advantage accruing to the plaintiff through transfer without jurisdiction.

Section 1406(a) is commonly applied to actions in which a plaintiff in good faith erroneously believed that a corporate defendant which was amenable to service of process in the state was also present for venue purposes in the particular district in which the action was brought.[16] In many cases such a mistake might not be considered sufficient to warrant dismissal, and transfer to secure an adjudication on the merits would thus be "in the interest of justice."[17] Similarly, injustice of the kind involved in cases in which a statute of limitations has run on a cause of action has frequently been held to merit transfer since dismissal would either terminate the cause of action or unduly prolong the proceedings.[18] The choice between dismissal and transfer in these situations has usually been based upon the vague and flexible command that transfer be "in the interest of justice."

The decision in the instant case resolves a conflict among the lower federal courts whether a transferring court must have personal jurisdiction over the defendant in order to transfer under Section 1406(a).[19]

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manner. *E.g.*, First Nat'l Bank v. United Air Lines, 190 F.2d 493 (7th Cir. 1951), *rev'd on other grounds*, 342 U.S. 396 (1952); Scarmardo v. Mooring, 89 F. Supp. 936 (S.D. Tex. 1950).

[15] 28 U.S.C. § 1406(a) (1958) provides:

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

[16] See, *e.g.*, Westerman v. Grow, 198 F. Supp. 307 (S.D.N.Y. 1961); Jones v. Radio Corp. of America, 129 F. Supp. 440 (S.D.N.Y. 1955).

[17] See, *e.g.*, Torres v. Continental Bus Sys., Inc., 204 F. Supp. 347 (S.D. Tex. 1962); Johnson v. Coon Constr. Co., 195 F. Supp. 197 (E.D. Pa. 1960); Jacobson v. Indianapolis Power & Light Co., 163 F. Supp. 218 (N.D. Ind. 1958); Petroleum Financial Corp. v. Stone, 116 F. Supp. 426 (S.D.N.Y. 1953), 38 MINN. L. REV. 874 (1954).

[18] See, *e.g.*, Gold v. Griffith, 190 F. Supp. 482 (N.D. Ind. 1960); Wilt v. Smack, 147 F. Supp. 700 (E.D. Pa. 1957).

[19] The lower federal courts were nearly evenly divided between those courts which permitted transfer without personal jurisdiction, *e.g.*, Hayes v. Livermont, 279 F.2d 818 (D.C. Cir. 1960); Internatio-Rotterdam, Inc. v. Thomsen, 218 F.2d 514 (1955) (admiralty libel); Schiller v. Mit-Clip Co., 180 F.2d 654 (2d Cir. 1950), and those which held that personal jurisdiction was a necessary prerequisite to transfer, *e.g.*, Hohensee v. News Syndicate, Inc., 286 F.2d 527 (3d Cir. 1961); Hargrove v. Louisville & N. R.R., 153 F. Supp. 681 (W.D. Ky. 1957); McDaniel v. Drotman, 103 F. Supp. 643 (W.D. Ky. 1952).

The majority's reasoning in dispensing with the personal jurisdiction requirement prior to transfer for improper venue turned largely on its interpretation that the words and legislative history of Section 1406(a) do not expressly preclude its application to cases in which personal jurisdiction is absent.[20] The Court reasoned that the problem sought to be remedied by the enactment of the section was that of avoiding the injustice which often accompanies dismissal of actions instituted on the basis of some mistake or erroneous guess. Thus, emphasis was placed on the great likelihood that plaintiffs will frequently make mistakes in ascertaining the proper districts for venue purposes.

Although the effect of Section 1406(a) is to remedy defects resulting from laying venue on the basis of elusive facts and indefinite standards such as "doing business" and corporate "presence," the legislative history of Section 1406(a) indicates that Congress intended improper venue be cured by transfer to a proper forum *only* when "in the interest of justice." Prior to the enactment of Section 1406(a) in 1948 defective venue made mandatory the dismissal of an action, and the statute as originally enacted seemed to require transfer of an action laid in the wrong venue.[21] However, the section was amended in 1949 to make it clear that an action is to be dismissed if laid in the wrong venue unless there is an affirmative showing that injustice would result from dismissal.[22] The court of appeals, interpreting the legislative history as indicating a congressional intent that personal jurisdiction over the parties be a prerequisite to the operation of the statute, relied on language in the Senate Report of the 1949 amendment which seems to presume that service has been perfected in the transferring court before any determination of transfer is considered.[23]

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[20] 82 Sup. Ct. at 915.

[21] H.R. REP. No. 352, 81st Cong., 1st Sess. 14 (1949); S. REP. No. 303, 81st Cong., 1st Sess. 4 (1949). See Stamatiou v. Miller, 88 F. Supp. 556 (E.D. Pa. 1949). Following the 1949 amendment to § 1406(a), the same district abandoned the decision in *Stamatiou* and dismissed rather than transferred an action in which both venue and personal jurisdiction were lacking. Pinesich v. Miller, 89 F. Supp. 539 (E.D. Pa. 1950).

[22] 63 Stat. 101 (1949). See Skilling v. Funk Aircraft Co., 173 F. Supp. 939 (W.D. Mo. 1959); Jones v. Radio Corp. of America, 129 F. Supp. 440 (S.D.N.Y. 1955).

The 1948 version was vulnerable to possible abuse since a plaintiff conceivably could deliberately bring suit where he could serve the defendant and then compel transfer to a district where venue was proper but where the defendant could not have originally been served. Allowing transfer in the absence of personal jurisdiction not only presents the danger of the same abuse but the additional possibility that a plaintiff whose cause has been barred by the statute of limitations may be able to bring his action in any forum in which the applicable statute of limitations has not expired, thereby tolling the statute, and then obtain transfer to the proper forum in which service could be perfected, but where the statute had previously expired. See generally 75 HARV. L. REV. 421 (1961).

[23] 288 F.2d at 583. That Congress presumed defendants would have been properly served in the transferring district before transfer under § 1406(a) was sought is apparent from the Senate Report explaining the 1949 amendment to the section:

> It is thought that this provision may be subject to abuse in that a plain-

The holding in the instant case would seem, in effect, to provide a short-cut method for obtaining personal jurisdiction where a plaintiff brings his action in a district where venue is improper and jurisdiction over the parties doubtful. A plaintiff could file his action and, if the defendant objects, seek to have it transferred to the proper forum where the defendant would be amenable to service of process. Nothing in the legislative history of Section 1406(a) indicates that it was intended to correct a defect in or remedy a failure to perfect service of process in obtaining personal jurisdiction.[24] The court of appeals distinguished and rejected authorities supporting transfer in the absence of personal jurisdiction[25] and concluded that a more liberal transfer statute might be desirable, but that until one is enacted plaintiffs must meet personal jurisdiction requirements before attempting transfer. The dissent in the instant case supported this view. Mr. Justice Harlan noted the apparent inconsistency in saying that Congress intended transfer to be proper where both venue and jurisdiction are lacking but did not specifically provide for transfer where venue is proper but personal jurisdiction cannot be obtained.[26]

In contrast to the Court's liberal interpretation of jurisdictional requirements in Section 1406(a) is its recent decision in *Hoffman v.*

> tiff might deliberately bring a suit in the wrong division or district *where he could get service on the defendant,* and when the question of venue is raised the court is required to transfer the case to the court where it "could have been brought." However, in the meantime, *service has been perfected on a defendant in the wrong venue,* and it will carry over into the new (and proper) venue. . . . S. REP. No. 303, 81st Cong., 1st Sess. 4 (1949) (Emphasis added.)

[24] See, *e.g.,* Hohensee v. News Syndicate, Inc., 286 F.2d 527 (2d Cir. 1961); McDaniel v. Drotman, 103 F. Supp. 643 (W.D. Ky. 1952). The sole purpose of § 1406(a) is to provide a means for curing venue improperly laid. The order of transfer could hardly be said to serve as a substitute for process in the transferee court. The service of summons is the procedure by which a court having venue and subject-matter jurisdiction obtains personal jurisdiction of the party served. In the federal courts service of process is governed by FED. R. CIV. P. 4(f), and is intended to implement the subject-matter jurisdiction of the courts by providing a procedure by which defendants can be brought before the proper court as provided by statute. See Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 444 (1946). This would seem to support the conclusion that Congress intended valid service of process as the exclusive procedure by which a defendant could be brought before the proper court.

[25] 288 F.2d at 534. According to the court, transfer without personal jurisdiction developed from a case in which the defendant argued in favor of transfer, thereby waiving the right to object to the jurisdictional defect in the transferring court. Schiller v. Mit-Clip Co., 180 F.2d 654 (2d Cir. 1950). Several cases were distinguished on the basis of their unquestioning adherence to the *Schiller* case. United States v. Welch, 151 F. Supp. 899 (S.D.N.Y. 1957); Petroleum Financial Corp. v. Stone, 116 F. Supp. 426 (S.D.N.Y. 1953). The remaining persuasive cases supporting transfer without personal jurisdiction were distinguished as resting on principles of admiralty jurisdiction. Internatio-Rotterdam, Inc. v. Thomsen, 218 F.2d 514 (4th Cir. 1955); Orzulak v. Federal Commerce & Nav. Co., 168 F. Supp. 15 (E.D. Pa. 1958).

[26] 82 Sup. Ct. at 916-17.

Blaski,[27] where the Court held that the power of a district court to transfer an action under Section 1404(a) "for the convenience of parties and witnesses, in the interest of justice,"[28] is entirely dependent upon whether the transferee district is one in which the plaintiff had a right to bring the action. In this case the defendants requested transfer of the action and waived their right to object to improper venue and lack of personal jurisdiction. Despite defendants' waiver of defenses, the phrase "where it might have been brought" was strictly construed to mean a district where there was venue and the defendant was amenable to service of process. The effect of the *Hoffman* case is to limit the importance of the phrase "in the interest of justice" and to support the application of strict interpretations of statutory venue and service of process.

Although the principal case undoubtedly marks an innovation in federal procedure, it is not entirely unprecedented. In a few other limited instances courts have dispensed with requirements of personal jurisdiction—notably, in cases involving *ex parte* requests for temporary restraining orders and in actions to enjoin execution of judgment previously entered by the same court.[29] Other federal courts have urged that all courts have a "jurisdiction over the proceedings" and can issue orders necessary to maintain the litigation itself before personal jurisdiction is acquired.[30] Although the opinion in the instant case did not articulate this theory, the concept is implicit in the determination that personal jurisdiction is not necessary for exercise of the statutory transfer power.[31] When jurisdiction is based on a federal question, as in the instant case, Rule 3 of the Federal Rules of Civil Procedure provides that the filing of a complaint commences the action,[32] thereby tolling the statute of limitations. If service is subsequently made within a reasonable time, the action may proceed even though the statute of limitations has expired in the interim.[33] Thus,

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[27] 363 U.S. 335 (1960).

[28] 28 U.S.C. § 1404(a) (1958).

[29] *E.g.*, Minnesota Co. v. St. Paul Co., 69 U.S. (2 Wall.) 609, 633 (1864) (attack on prior judgment considered as ancillary action); Irwin v. Dixion, 50 U.S. (9 How.) 10, 28-29 (1850) (temporary restraining order issued pending determination of jurisdiction); see Comment, 61 COLUM. L. REV. 902, 913 (1961). Although the power to enter temporary restraining orders before jurisdiction is determined in order to avoid irreparable injury is of judicial origin, such a procedure is now specifically provided for by FED. R. CIV. P. 65(b).

[30] See Internatio-Rotterdam, Inc. v. Thomsen, 218 F.2d 514, 516 (4th Cir. 1955); Rinaldi v. The Elisabeth Bakke, 107 F. Supp. 975 (N.D. Cal. 1952); Comment, 61 COLUM. L. REV. 902, 913 (1961).

[31] Prior to this case the lower federal courts reasoned that until personal jurisdiction has been obtained by perfected service no action is brought, and a court is powerless to issue orders affecting the rights of adverse parties. See, *e.g.*, General Elec. Co. v. Central Transit Warehouse Co., 127 F. Supp. 817, 824 (W.D. Mo. 1955); McDaniel v. Drotman, 103 F. Supp. 643, 644-45 (W.D. Ky. 1952); Wilson v. Kansas City So. Ry., 101 F. Supp. 56, 60 (W.D. Mo. 1951).

[32] FED. R. CIV. P. 3.

[33] See Blume & George, *Limitations and the Federal Courts*, 49 MICH. L. REV. 937, 955-57 (1951); Comment, 61 COLUM. L. REV. 902, 916 (1961). Where jurisdic-

it seems the Court could have justified transfer without personal jurisdiction in the instant case as an exercise of jurisdiction over the proceedings, since process may usually be served in a transferee forum as quickly as it might have been where the action was originally brought.

This justification does not completely explain away the traditional notion that a court can take no affirmative action in a case without having jurisdiction over the defendant. The Court's holding that a jurisdictional mistake is immaterial and may be transferred along with defective venue under Section 1406(a) would seem to conflict with the "interest of justice" standard for transfer. For a transfer to be in the "interest of justice" would seem to require as a basic premise that a court establish some jurisdictional hold on a defendant before affecting his rights by transfer.[34] A determination under this standard may depend largely on facts presented by the parties, and personal jurisdiction would seem to be a prerequisite to the making of such a determination.[35] Allowing transfer in the absence of personal jurisdiction may result in a unilateral presentation of the "interest of justice" when a defendant relies on the lack of personal jurisdiction and fails to appear.[36]

The most pervasive reason for the Court's decision appears to be its feeling that dismissal and a subsequent bar under the statute of limitations should not result merely because plaintiff made a mistake in laying his action, since the act of filing itself shows the proper diligence which statutes of limitations are intended to insure. Such reasoning has the effect of imposing on the court the burden of discerning the "good faith" of plaintiffs in filing their actions, since deliberate misfiling would be clear grounds for dismissal.[37] Proponents of the Court's interpretation argue that the use of a "good faith" standard will not unduly burden defendants, however, since a transferee forum must obtain personal jurisdiction by a new service or voluntary appearance before a final judgment can be entered against a defendant.[38] Although

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tion is based on diversity of citizenship, the applicable state law determines when the action is commenced and the statute of limitations tolled under the rule of Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[34] See cases cited note 31 *supra*.

[35] See Hohensee v. News Syndicate, Inc., 286 F.2d 527, 530 (3d Cir. 1961); McDaniel v. Drotman, 103 F. Supp. 643, 645 (W.D. Ky. 1952).

[36] In some situations a defendant might fail to appear if he felt confident that the court lacked jurisdiction over his person. Although these instances are becoming increasingly rare because single act statutes and other legislation applicable to nonresidents prevent defendants from being certain that a specific court does not have jurisdiction over them, the danger of a determination with only the plaintiff's interests presented does still exist. See generally Note, *Single Act Statutes and Jurisdiction Over Foreign Corporations*, 43 VA. L. REV. 1105 (1957). However, the instant case should serve as an effective warning to defendants to appear to support their interests even when personal jurisdiction is clearly lacking since it is now clear that the federal courts can and will transfer actions in the absence of personal jurisdiction.

[37] See Skilling v. Funk Aircraft Co., 173 F. Supp. 939, 942 (W.D. Mo. 1959) (dictum).

[38] See note 31 *supra*.

this argument is valid, the objection to transfer without personal jurisdiction is the unauthorized exercise of control over a defendant and not the ultimate rendition of a final judgment by a proper court.

Although personal jurisdiction is no longer a prerequisite to transfer under Section 1406(a), there remain several safeguards for defendants' rights. Existing rules governing statutes of limitations insure that the limitations statute of that forum in which personal jurisdiction can be obtained and in which the action may proceed will be applied.[39] It also is frequently argued that the "interest of justice" standard itself can be used to prevent abuses resulting from transfer in the absence of personal jurisdiction.[40] However, the Supreme Court's opinion provides no substantial test by which determinations "in the interest of justice" can be made. Congress provided for transfer "in the interest of justice" considering the effect of transfer on both the plaintiff and defendant. Although dismissal for lack of personal jurisdiction presents the danger of barring a cause of action on a purely procedural basis, a plaintiff will not be unduly burdened by dismissal in most situations if his action is timely brought.

It would seem then that something stronger than a good faith mistake in laying venue must be shown to justify transfer in the absence of personal jurisdiction. The plaintiff should be required to demonstrate a "reasonable cause" for having chosen the forum as a basis for laying his action and obtaining personal jurisdiction.[41] If this standard were employed, the burden would be properly placed on the plaintiff to show his reasons for commencing an action in a particular forum and to demonstrate that he had a reasonable basis for believing the defendant would be amenable to process in that district. Transfer would seem not to be "in the interest of justice" on the bare assumption, in good faith, that service could be obtained. Thus, in actions against corporate defendants where proper venue may be difficult to ascertain, plaintiffs would be encouraged to use available procedures to conserve time or insure having the action laid in a proper venue. The danger of the holding in the instant case, when transfer under Section 1406(a) is the desired remedy, is that it will facilitate hasty and ill-prepared filing of actions and create uncertainty in discerning the "good faith" of plaintiffs.

Grand Jury—Reports—Power of Court to Cite for Contempt.—The grand jury recommended in an interim report that attorneys or firms closely associated by blood or marriage to any member of the judiciary refrain from practicing before their kin as an aid to sustaining an unshaken public confidence in the courts. The judge of the county circuit court, nephew to a member of a law firm in that county, purged this statement from the report and cited the entire grand jury for contempt of court. On appeal by individual members of the grand jury

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[39] See Comment, 61 COLUM. L. REV. 902, 914 (1961).

[40] See Internatio-Rotterdam, Inc. v. Thomsen, 218 F.2d 514, 516 (4th Cir. 1955); Comment, 61 COLUM. L. REV. 902, 920 (1961).

[41] See Skilling v. Funk Aircraft Co., 173 F. Supp. 939, 942 (W.D. Mo. 1959). See also Jones v. Radio Corp. of America, 129 F. Supp. 440, 441-42 (S.D.N.Y. 1955) (case to be dismissed unless plaintiff demonstrates injustice by dismissal).

to the District Court of Appeal of Florida, *held,* reversed. When properly charged, a grand jury may not be cited for contempt of court for a report of its findings as to the general conditions prevailing in the county with regard to law enforcement and orderly administration of the county government, nor may this report be purged from the records. *Clemmons v. State,* 141 So. 2d 749 (Fla. 1962).

Originally the grand jury was used to implement the power of the king and was not concerned with safeguarding individual rights.[1] A change in this function came in 1681, however, when two grand juries refused to return indictments for treason despite extreme pressure from the crown.[2] From this period emerged the modern notion that the grand jury is to serve as a buffer between the individual and the power of the state, thereby protecting the citizenry from tyrannous prosecution.[3] During these same years in which the grand jury was developing as an instrument against despotism, grand jury reports were used to present to the court matters concerning the business of the country.[4]

The practice of issuing reports on matters of public concern was followed in the American colonies[5] and is still utilized today. The

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[1] See 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW 313, 321 (7th ed. 1956); 1 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 136-53 (2d ed. 1923).

[2] Proceedings at the Old-Bailey upon a Bill of Indictment for High Treason Against Anthony Earl of Shaftesbury, 8 How. St. Tr. 759 (1681); The Trial of Stephen Colledge at Oxford for High Treason, 8 How. St. Tr. 550 (1681) (North, L.C.J.) Although Shaftesbury was freed, the unfortunate Mr. Colledge received rather short shrift. After his grand jury returned an *ignoramus* ("not a true bill") the foreman of the grand jury was taken into custody, examined, imprisoned, and ultimately forced to flee the country. A second, "more pliable," grand jury was convened which returned an indictment. Colledge was then tried, hanged, and quartered. See 3 KENNETT, A COMPLETE HISTORY OF ENGLAND 499 (1706), quoted in 8 How. St. Tr. 550 n. (1810). *But see* NORTH, EXAMEN: OR AN INQUIRY INTO THE CREDIT AND VERACITY OF A PRETENDED COMPLETE HISTORY, SHEWING THE PERVERSE AND WICKED DESIGN OF IT, AND THE MANY FALSITIES AND ABUSES OF TRUTH CONTAINED IN IT 591 (1740) (calling Kennett, *supra,* a liar).

One commentator described the new-found independence of the grand jury as follows:

> But as the knights of Malta could make knights of their order for eight pence a piece, yet could not make a soldier or seaman: So these kings though they could make what judges they pleased, to do their business, yet could not make a grand jury, from whom the judges in all criminal cases between the king and subject must take their measures . . . . 2 COKE, DETECTION 308, quoted in 8 How. St. Tr. 759 n., at 763 (1810).

[3] See Hale v. Henkle, 201 U.S. 43, 59 (1906); Proceedings at the Old-Bailey upon a Bill of Indictment Against Anthony Earl of Shaftesbury, *supra* note 2, at 853 (Remarks by Sir John Hawles, Solicitor General in the Reign of William III); 4 BLACKSTONE, COMMENTARIES *349-50.

[4] Earl of Macclesfield v. Starkey, 10 How. St. Tr. 1330 (1684) (action against grand juror for libelous report); 10 HOLDSWORTH, A HISTORY OF ENGLISH LAW 146-51 (1938).

[5] See GOEBEL & NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 362 & n.144 (1944); SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 7-71 (1930).

power of the grand jury to make reports and the acceptability of the contents of these reports depend on the law of the forum where the grand jury is convened. Because these laws may either be defined by statute[6] or derived from common law,[7] there is a variance from state to state. Some states by judicial decision allow a grand jury to report on neglect of duty by public employees;[8] in other states the grand jury is required by statute to report on misconduct or incompetence in government.[9] However, other jurisdictions by statute completely prohibit reports by a grand jury.[10]

The reporting function of the grand jury has not been entirely accepted. Some of the objections to these reports may be that they either violate the secrecy of the grand jury oath,[11] expose the grand jury to libel,[12] or charge wrong-doing while effectively denying the use of a judicial forum in which to reply.[13] Nevertheless, the reporting function is established in most jurisdictions in the United States today.

Even though the grand jury is supreme in the ultimate performance of its duties, it is subject to the control of the court in many ways. The grand jury is an arm of the court and is therefore limited to the jurisdiction of the court of which it is an appendage.[14] At any time,

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[6] See, *e.g.*, Coons v. State, 191 Ind. 580, 134 N.E. 194 (1922); Rector v. Smith, 11 Iowa 302 (1860).

[7] See, *e.g.*, Cotton v. State, 85 Fla. 197, 95 So. 668 (1923); O'Regan v. Schermerhorn, 25 N.J. Misc. 1, 28, 50 A.2d 10, 25 (Sup. Ct. 1946).

[8] Irwin v. Murphy, 129 Cal. App. 713, 19 P.2d 292 (1st Dist. 1933); Owens v. State, 59 So. 2d 254 (Fla. 1952); O'Regan v. Schermerhorn, 25 N.J. Misc. 1, 50 A.2d 10 (Sup. Ct. 1946).

[9] ALA. CODE tit. 41, § 200 (1958); GA. CODE ANN. § 59-309, -317 (1935); MISS. CODE ANN. § 1788 (1942).

[10] LA. REV. STAT. § 15:210 (1950).

[11] But it is generally acknowledged that the rule of secrecy was designed for the protection of the witnesses who appear and not to protect the accused. See United States v. Central Supply Ass'n, 34 F. Supp. 241 (N.D. Ohio 1940); State v. Rothrock, 45 Nev. 214, 200 Pac. 525 (1921); Commonwealth v. Kirk, 340 Pa. 346, 17 A.2d 195 (1941) (affirming on opinion of lower court).

[12] However, a grand jury report not amounting to an indictment but made within the lawful duties of the grand jury has been held at least qualifiedly privileged and many times absolutely privileged on the theory that grand jury proceedings are judicial proceedings subject to privilege. See Irwin v. Murphy, 129 Cal. App. 713, 19 P.2d 292 (1st Dist. 1933); Ryon v. Shaw, 6 Fla. Supp. 83, 77 So. 2d 455 (Sup. Ct. 1955); O'Regan v. Schermerhorn, 25 N.J. Misc. 1, 50 A.2d 10 (Sup. Ct. 1946); *cf. Ex parte* Burns, 261 Ala. 217, 73 So. 2d 912 (1954) (no civil liability). *Contra*, Coons v. State, 191 Ind. 580, 591, 134 N.E. 194, 197 (1922) (dictum) (by implication); *see* Rector v. Smith, 11 Iowa 302 (1860) (not privileged but no recovery without malice); *cf.* Rich v. Eason, 180 S.W. 303 (Tex. Civ. App. 1915) (adopts *Rector, supra*, but allows suit). See also ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 161 (1947) (no action lies for findings, even when predicated on malice).

[13] This objection appears to have some merit. See *Ex parte* Burns, 261 Ala. 217, 221, 73 So. 2d 912, 915 (1954) ("not in accord with American sense of fair play"); *cf.* Rector v. Smith, 11 Iowa 308 (1860) (statute contemplated indictment).

[14] See United States v. Smyth, 104 F. Supp. 283, 291-93 (N.D. Cal. 1952); *cf.*

with or without cause, the court may discharge the grand jury.[15] The court may refuse to authorize aid to the grand jury for investigations[16] or may refuse process to them.[17] It would seem that these restrictions are not subject to negation by higher courts or outside agencies. No cases have been found where instructions and rules furnished by the controlling court were ever subjected to review by an appellate court.[18] When the grand jury has exceeded its authority in a report, the court may refuse to accept the report[19] or purge from it any improper material.[20] Through refusal and expurgation of these reports, the court may protect its own dignity as well as protect the unwary juror from libel suits. Once the reports are filed with the court, their contents cease to be secret and are open to attack by those injured.[21]

The court may also cite an individual grand juror for contempt of court for gross misconduct in direct violation of the oath which the court is required by law to administer to him.[22] It is undisputed that

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Skipper v. Schumacher, 124 Fla. 384, 397-98, 169 So. 58, 63-64 (1936) (agency of state).

[15] See *In re* National Window Glass Workers, 287 Fed. 219 (N.D. Ohio 1922) (under statute); Baker v. State, 183 Ind. 1, 108 N.E. 7 (1915); FED. R. CRIM. P. 6(g). See generally United States v. Smyth, *supra* note 14 (discussing history and function of grand jury).

[16] The federal grand jury relies on the United States attorneys' office for aid for investigations and the grand jury may not seek assistance on its own. United States v. Philadelphia & R. Ry., 221 Fed. 683 (E.D. Pa. 1915). In Proceedings at the Old-Bailey upon a Bill of Indictment for High Treason Against Anthony Earl of Shaftesbury, 8 How. St. Tr. 759, 771-79 (1661), the court denied, in succession, the grand jury's requests for a private hearing, a record of the proceedings, a list of the witnesses, and a copy of the warrant under which Shaftesbury was arrested.

[17] The court may prevent an abuse of its processes. McKinney v. United States, 199 Fed. 25, 27 (8th Cir. 1912) (dictum); *In re* National Window Glass Workers, 287 Fed. 219 (N.D. Ohio 1922).

[18] See United States v. Smyth, 104 F. Supp. 283, 292 & n.36 (N.D. Cal. 1952).

[19] See Bennett v. Kalamazoo Circuit Judge, 183 Mich. 200, 150 N.W. 141 (1914); State v. Bramlett, 166 S.C. 323, 332, 164 S.E. 873, 877 (1932) (dictum); Report of Grand Jury, 204 Wis. 409, 235 N.W. 789 (1931).

[20] See, *e.g.*, *Ex parte* Robinson, 231 Ala. 503, 165 So. 582 (1936); *In re* Report of Grand Jury, 152 Fla. 154, 11 So. 2d 316 (1943) (motion to expunge overruled); *In re* Report of Grand Jury, 152 Md. 616, 137 Atl. 370 (1927); Bennett v. Kalamazoo Circuit Judge, *supra* note 19; In the Matter of Crosby, 126 Misc. 250, 213 N.Y. Supp. 86 (Sup. Ct. 1925).

[21] In order for an attack to be successful, it would appear it should be made promptly to repair the injured reputation. However, this was held not to be a requirement in Report of Grand Jury, 204 Wis. 409, 235 N.W. 789 (1931), where the report was purged of the offensive matter eight months after it was filed.

[22] See Joslyn v. People, 67 Colo. 297, 184 Pac. 375 (1919); *cf.* State v. Estill, 50 Wash. 2d 331, 311 P.2d 667, 669 (1957) (dictum) (referring to petit jurors). In Skipper v. Schumacher, 124 Fla. 384, 169 So. 58 (1936), it was alleged that three grand jurors threatened a witness with indictment and prosecution unless he testified before the grand jury in order to secure an indictment against a banker. The court stated that had this action been brought to the attention of the trial court they would have been held in contempt.

a judge has the power to uphold the dignity of the court by citation for contempt. Contempt is a device that is necessary to the courts for self-protection and for the execution of judicial functions.[23] A 1922 Indiana case, *Coons v. State*,[24] appears to be the only previous decision involving the liability of an entire grand jury for contempt of court. In this case the final report of the grand jury was delivered in open court and the following day the judge found it to contain scandalous and contemptuous language charging him with conspiracy to thwart the ends of justice. In holding the grand jury in contempt the Indiana Supreme Court stated:

> The duties of the grand jury in this state are governed by statute, and it has no rights or privileges based upon the common law. The statutes do not provide that the grand jury make reports to the court of crimes and misdemeanors of public officials, or of other citizens. . . . If the grand jury . . . conclude from the evidence taken that a presentment in the form of an indictment should not be made against the person or persons . . . it is not their duty or privilege, to make accusations in the form of a report, based on such evidence. There is no privilege, absolute or qualified, to commit contempt of court.[25]

It was urged in the instant case that the doctrine in the *Coons* case is the law in Florida.[26] However, Indiana, unlike Florida, grants the grand jury its powers by statute alone.[27] Florida grand juries are of common-law derivation[28] and the statutes merely extend these common-law powers. The duties regarding indictment for criminal offenses are provided in the statutes.[29] Also by statute, the Florida courts are required to administer an oath to the grand jurors[30] and charge them of their duties.[31] By judicial practice the charge to the grand jury extends the reporting powers and duties. Florida trial courts have charged the grand jury to investigate every offense that affected the morals, health, sanitation, and general welfare of the com-

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[23] See *In re* Terry, 128 U.S. 289, 303-04 (1888); Bloomberg v. Roach, 43 Ohio App. 178, 182 N.E. 891, 893 (1930).

[24] 191 Ind. 580, 134 N.E. 194 (1922).

[25] *Id.* at 589, 134 N.E. at 197. The court added that the existence of a contempt depended upon the act and not upon the intention with which it was done. *Id.* at 591, 134 N.E. at 197; *accord,* State v. Howell, 80 Conn. 668, 69 Atl. 1057 (1908); Kneisel v. Ursus Motor Co., 316 Ill. 336, 147 N.E. 243 (1925).

[26] The *Coons* case was cited in State *ex rel.* Brautigam v. Interim Report of Grand Jury, 93 So. 2d 99 (Fla. 1957), in which contempt of court of a grand juror was not in issue. From this citation it has been urged that the Florida Supreme Court has adopted the entire holding of the *Coons* case. However, the court in *Brautigam* specifically stated, "We have concluded that such a report goes far beyond any authority which, by judicial decision, has been conferred upon the grand juries in this state." *Id.* at 101. Therefore, it would appear that *Brautigam's* reliance on the *Coons* case was to establish that the act of the grand jury was outside their duties and not to establish contempt as a device for controlling the entire grand jury.

[27] Coons v. State, 191 Ind. 580, 588-89, 134 N.E. 194, 196-97 (1922).

[28] Cotton v. State, 85 Fla. 197, 95 So. 668 (1923).

[29] FLA. STAT. § 905.16 (1959).

[30] FLA. STAT. § 905.10 (1959).

[31] FLA. STAT. § 905.11 (1959).

munity, including those involving its officers and institutions.[32] Accordingly, Florida is one of few states which has allowed reports critical of public employees to the effect that they were incompetent[33] or not qualified for their positions.[34] However, another Florida decision held that a grand jury may not make accusations of misconduct against a public officer without indicting him for a crime.[35] Nevertheless, the Florida grand jury, by virtue of the charge given them by the court, has a much broader power to report on conditions in the community than do grand juries in many other states.[36]

The line of demarcation between a legitimate report and one that merely castigates a public official without filing an indictment is a difficult one to draw in any jurisdiction. This is emphasized by the fact that the instant case is the first in Florida and only the second in the nation where an entire grand jury was cited for contempt for misuse of the reporting function. The Florida court's view of the power to cite for contempt can be explained, in part, by its position on the status of the grand jury. The majority stated: "This institution bears a place within our governmental structure and our system of justice *on an equal footing with the courts.* It has been . . . referred to as a coordinate branch of the judiciary . . . ."[37] This seems a perversion of the generally accepted notion that the grand jury is not an "independent planet" in the judicial system[38]—the position taken in the dissent.[39]

It is clear that the court must have some means of control over the grand jury, and both the majority and minority opinions in the principal case accept this. They differ, however, as to what those controls are. The majority indicated that citation for contempt was not proper and that the appropriate remedy was to expunge the objectionable matter from the record.[40] But, since the court further held that the

[32] See *In re* Report of Grand Jury, 152 Fla. 154, 158, 11 So. 2d 316, 318 (1943) (dictum).

[33] Owens v. State, 59 So. 2d 254 (Fla. 1952).

[34] Ryon v. Shaw, 6 Fla. Supp. 83, 77 So. 2d 455 (Sup. Ct. 1955) (libel action).

[35] See note 10 *supra.* In addition to those states prohibiting reports, many decisions have followed the dissent in Jones v. People, 101 App. Div. 55, 92 N.Y. Supp. 275, *appeal dismissed,* 181 N.Y. 389, 74 N.E. 226 (1905), where it was argued that the grand jury reports might charge wrongdoing in a manner that deprived offenders of a chance to defend themselves in a judicial forum. See In the Matter of Wilcox, 153 Misc. 761, 276 N.Y. Supp. 117 (Sup. Ct. 1934), for a review of the New York authorities relying on the *Jones* dissent. Courts in other jurisidctions have also followed the *Jones* dissent to quash reports. See Application of United Elec. Workers, 111 F. Supp. 858, 867 (S.D.N.Y. 1953); *Ex parte* Robinson, 231 Ala. 503, 505, 165 So. 582, 583 (1936); *In re* Report of Grand Jury, 260 P.2d 521, 523-24 (Utah 1953).

[36] State *ex rel.* Brautigam v. Interim Report of Grand Jury, 93 So. 2d 99 (Fla. 1957). This seems to be the view taken in most jurisdictions in the United States. See, *e.g.,* Coons v. State, 191 Ind. 580, 134 N.E. 194 (1922); Rector v. Smith, 11 Iowa 302 (1860).

[37] 141 So. 2d at 753. (Emphasis added.)

[38] *In re* National Window Glass Workers, 287 Fed. 219, 225 (N.D. Ohio 1922).

[39] 141 So. 2d at 757.

[40] *Id.* at 754-55.

report was not so improper as to require expunging it, it would seem that the issue of the power to cite for contempt need not have been met. Although the Florida court's position on the power to cite a grand jury for contempt is clear for the present, the extreme holding in the instant case might have been better left to some future case in which it would be necessary.

Insurance—Statutory Penalties for Insurer's Refusal of Payment.—Plaintiff brought an action against his insurance company to recover the benefits alleged to be due under two health and accident policies and the statutory penalties[1] which Louisiana provided for arbitrary refusal of payment. Defendant-insurer contended that plaintiff's illness originated after cancellation of the policies. Determining this issue adversely to the defendant, the trial court awarded plaintiff's successors in interest the benefits requested, but denied the claim for statutory penalties. On appeal from both parties to the Louisiana Court of Appeal, *held,* affirmed.[2] The insurer's refusal to pay was predicated on just and reasonable grounds within the meaning of the Louisiana penalty statutes; therefore, the plaintiff's recovery was properly re-

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[1] Although the court's opinion in the instant case is not wholly clear with respect to which of the Louisiana statutes was applicable, reference to the Brief for Plaintiff, on file with the *Iowa Law Review,* shows that the litigation was instigated under LA. REV. STAT. § 22.657 (1950) which provides:

> All claims arising under the terms of health and accident contracts issued in this state shall be paid not more than *thirty days* from the date upon which written notice and proof of claim, in the form required by the terms of the policy, are furnished to the insurer unless *just and reasonable grounds,* such as would put a reasonable and prudent business man on his guard, exist. . . . Failure to comply with the provisions of this Section shall subject the insurer to a *penalty* payable to the insured of *double the amount of the health and accident benefits due* under the terms of the policy or contract during the period of delay, together with attorney's fees to be determined by the court. . . . (Emphasis added.)

The court also referred to LA. REV. STAT. § 22.656 (1950), which is limited to life insurance policies, and to LA. REV. STAT. § 22.658 (1950), which is applicable to all policies other than life, health and accident policies. The former imposes a 6% per annum interest penalty on insurers that refuse to make payment without "just cause." The latter imposes a penalty of 12% of the loss plus attorney's fees on the insurance company whose failure to pay is "arbitrary, capricious, or without probable cause . . . . Provided, that all losses on policies covering automobiles, trucks, motor propelled vehicles and other property against fire and theft, the amount of the penalty . . . shall be twenty-five percent and all reasonable attorney's fees."

It is immaterial whether these statutory impositions on an insurer are labeled "damages" or "penalties." "The measure, not the name, controls." Life & Cas. Ins. Co. v. McCray, 291 U.S. 566, 573 (1934). However, the imposition of $7,500 in attorney's fees under the authority of a Kansas statute was held to be compensatory rather than penal in Wolf v. Mutual Benefit Health & Acc. Ass'n, 188 Kan. 694, 366 P.2d 219 (1961). See also Legislation, 48 HARV. L. REV. 319, 326 (1934).

[2] The three-judge court handed down three opinions, one dissenting.

stricted to the benefits arising under his policies. *Militello v. Bankers Life & Cas. Co.*, 114 So. 2d 454 (La. Ct. App. 1962).[3]

The insurance business has long been recognized as one which is affected with the public interest and, as such, requires governmental regulation.[4] In order to discourage insurance companies from attempting to force favorable settlements through unnecessary delay and litigation, a significant number of states have enacted statutes which encourage prompt settlement by the insurer.[5] Seemingly, such statutes must balance what are frequently conflicting interests of the parties. On the one hand, the insured desires immediate payment of his claim; on the other hand, the insurance company obviously wishes to avoid payment of groundless claims.[6]

Owing to their remedial nature, penalty statutes affecting insurance recoveries are limited in scope and one-sided in operation.[7] They do

[3] Writs were refused by the Supreme Court of Louisiana. Letter From Plaintiff's Attorney, October 26, 1962, on file with the *Iowa Law Review*. Thus, the decision of the court in the instant case is final.

[4] Early Supreme Court decisions established the rule that a business by its nature and the surrounding circumstances may "rise" from private to public concern, thereby subjecting itself to governmental regulation. See Brass v. Stoeser, 153 U.S. 391 (1894); Budd v. New York, 143 U.S. 517 (1892); Munn v. Illinois, 94 U.S. 113 (1876). This doctrine was later extended to insurance companies in German Alliance Ins. Co. v. Kansas, 233 U.S. 389 (1914).

[5] ARK. STAT. ANN. § 66-3238 (Supp. 1961); FLA. STAT. § 625.08 (1959); GA. CODE ANN. § 56-1206 (1960); IDAHO CODE ANN. § 41-1839 (1961); ILL. REV. STAT. ch. 73, § 767 (1961); KAN. GEN. STAT. § 40-256 (Supp. 1959); LA. REV. STAT. §§ 22.656-.658 (1950); MICH. STAT. ANN. § 24.11830 (1957); MO. REV. STAT. § 375.420 (1959); NEB. REV. STAT. § 44-381 (1960); OKLA. STAT. § 36.1107 (1961); ORE. REV. STAT. § 736.325 (1961); TENN. CODE ANN. § 56-1105 (1955); TEX. INS. CODE art. 3.62 (1952).

Many jurisdictions impose statutory penalties on insurance companies for issuance of policies after revocation of the company's license or denial of permission to do business. See, *e.g.*, IOWA CODE § 511.17 (1962) (amount equal to all payments, plus attorney's fee); MICH. STAT. ANN. § 24.11805 (1957) ($200 to $1,000 for each contract); ORE. REV. STAT. §§ 736.610, .990(6) (1961) (not more than $100).

[6] A coextensive problem arises where the insurer on a liability policy refuses to settle within the policy limits and a subsequent judgment is rendered against the insured for an amount in excess of these limits. The typical liability insurance policy includes a provision giving the insurer an exclusive right to decide whether a covered claim should be settled or litigated. Nevertheless, courts have held that, if the insurer fraudulently or in bad faith refuses to settle, the insured can recover the amount of the judgment which exceeds the policy's coverage. Indeed, there is a decided trend in favor of a similar recovery for negligent failure to settle. For a detailed discussion, see Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136 (1954).

[7] However, the Supreme Court of Arkansas apparently makes no restriction with respect to persons entitled to recover statutory penalties. See New York Life Ins. Co. v. Thweatt, 221 Ark. 478, 254 S.W.2d 68 (1953) (beneficiary); General Am. Life Ins. Co. v. Frauenthal & Schwarz Inc., 193 Ark. 663, 101 S.W.2d 953 (1937) (assignee); Federal Life Ins. Co. v. Pearrow, 191 Ark. 597, 86 S.W.2d 1106 (1935) (administrator). In Corder v. Morgan Roofing Co., 355 Mo. 127, 195 S.W.2d 441 (1946) the Supreme Court of Missouri held that only the insured

not apply to the nonpayment of debts generally but only to the nonpayment of claims arising from an insurance contract; equally significant, they do not usually provide an insurer with any affirmative relief from false and fraudulent claims by the insured. As a result of this discrimination, either extrinsically among debtors[8] or intrinsically between the parties to the insurance contract,[9] early cases held statutes similar to the one in the instant case unconstitutional as a denial of equal protection.

In the 1934 decision of *Life & Cas. Ins. Co. v. McCray*,[10] the United States Supreme Court upheld an Arkansas statute imposing attorney's fees and twelve per cent of the loss under a life insurance policy as a penalty for the insurer's failure to pay within the time specified by the policy. The Court, specifically referring to the need for immediate payment of benefits under fire, life, health, and accident policies covered by the Arkansas statute, stated: "Classification prompted by *these* needs is not tyrannical or arbitrary."[11] Additionally, the Court's approval of statutory penalties was expressly limited to reasonable penalties acting as "a stimulus to settlement without vexatious delay" as opposed to penalty statutes which might be "an unfair barrier against the endeavor of an honest litigant to obtain the judgment of a court."[12]

Statutes presently in force extend the imposition of penalties to many other kinds of insurance than those which were referred to in the *McCray* case.[13] Indeed, in *Schecter v. Camden Fire Ins. Ass'n*,[14] the same court that decided the instant case awarded statutory penalties for the failure to pay promptly the full amount due under a policy insuring the claimant's lost wedding ring. However, the *Schecter* and *McCray* cases are distinguishable with respect to the type of penalty

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could suffer a loss under the policy; consequently, his judgment creditors could not recover statutory penalties.

Similarily, there is no limitation on the kind of claim that may be brought to establish the liability for statutory penalties. See Bankers' Reserve Life Co. v. Crowley, 171 Ark. 135, 284 S.W. 4 (1926) (equity); Allen v. Tallon, 120 Neb. 611, 234 N.W. 411 (1931) (counterclaim).

[8] Fidelity Phenix Fire Ins. Co. v. Purlee, 192 Ind. 106, 135 N.E. 385 (1922); *cf.* Gulf, C. & S.F. Ry. v. Ellis, 165 U.S. 150 (1897) (statutory penalty upon railroads failing to pay certain debts).

[9] Williamson v. Liverpool, L. & G. Ins. Co., 105 Fed. 31 (1900); Pacific Mut. Life Ins. Co. v. Van Fleet, 47 Colo. 401, 107 Pac. 1087 (1910).

[10] 291 U.S. 566 (1934) (life insurance); *accord*, Life & Cas. Ins. Co. v. Barefield, 291 U.S. 575 (1934) (accident insurance). The *McCray* case is discussed in Legislation, *Preventing Litigous Delay in Payment of Insurance Claims*, 48 HARV. L. REV. 319, 320 (1934); 19 MINN. L. REV. 119 (1934); 82 U. PA. L. REV. 761 (1934).

[11] 291 U.S. at 570. (Emphasis added.)

[12] *Id.* at 574.

[13] The Arkansas statute itself has now been broadened to include "cargo, fire, marine, casualty, fidelity, surety, cyclone, tornado, life, health, accident, medical, hospital, or surgical" insurance policies. ARK. STAT. ANN. § 66-3238 (Supp. 1961). Other statutes include all types of insurance policies. *E.g.*, LA. REV. STAT. §§ 22.656 to .658 (1950); ORE. REV. STAT. § 736.325 (1961).

[14] 141 So. 2d 451 (La. Ct. App. 1962).

statute that was applicable in each as well as the kind of insurance covered.

A majority of penalty statutes, including the Louisiana statutes applied in *Schecter* and the instant case, require that the insurer's bad faith or vexatious delay be shown as a condition precedent to imposition of the penalty.[15] Since the presence or absence of these factors is a factual question, the issue has been relegated to the jury.[16] The apparent rationale behind the majority approach is that the insurer should not be penalized for litigating those claims where liability is doubtful.

Disregarding the grounds for litigation entirely, a minority of penalty statutes, including the Arkansas statute which confronted the Court in *McCray*, impose penalties whenever there is a judgment against the insurance company.[17] From the insured's point of view, this approach is highly desirable, since it obviates the necessity of showing bad faith or vexatious delay by the insurer in accordance with varying and frequently nebulous judicial standards. Justification for the minority rule seems strongest where there is an immediate need for payment of disability and hospitalization benefits. However, the minority approach creates an extremely harsh dilemma for the insurance company confronted with a claim of doubtful validity: If immediate payment is withheld and the claim is later adjudged to be valid, imposition of penalties is automatic.

Excepting the situation where the need for immediate payment of benefits outweighs all other considerations, the minority rule does not seem consonant with the public interest. Unless the insurance companies are permitted to contest the validity of doubtful claims free from the threat of statutory penalties, higher premiums will undoubtedly result from increased costs.[18] Unfortunately, in those states

[15] GA. CODE ANN. § 56-1206 (1960) (25% plus attorney's fees where bad faith exists); ILL. REV. STAT. ch. 73, § 767 (1961) (attorney's fees where refusal is vexatious and without reasonable cause); KAN. GEN. STAT. ANN. § 40-256 (Supp. 1959) (attorney's fees where refusal is without just cause); LA. REV. STAT. §§ 22.656 to .658 (1950) (discussed note 1 *supra*); MICH. STAT. ANN. § 24.11830 (1957) (attorney's fees not to exceed 12½% where refusal vexatious and without reasonable cause); MO. REV. STAT. § 375.420 (1959) (damages not to exceed 10% plus attorney's fees for vexatious refusal); OKLA. STAT. § 36.1105 (1961) (attorney's fees where vexatious refusal, limited to unauthorized insurer); TENN. CODE ANN. § 56-1105 (1955) (sum not exceeding 25% where bad faith exists).

[16] *E.g.*, Dixon v. Business Men's Assur. Co., 365 Mo. 580, 285 S.W.2d 619 (1955); Palatine Ins. Co. v. E. K. Hardison Seed Co., 42 Tenn. App. 388, 303 S.W.2d 742 (1957).

[17] ARK. STAT. ANN. § 66-3238 (Supp. 1961) (12% plus attorney's fee); FLA. STAT. § 627.0127 (1959) (attorney's fees); IDAHO CODE ANN. § 41-1839 (1961) (same); NEB. REV. STAT. § 44-381 (1960) (same); ORE. REV. STAT. § 736.325 (1961) (same); TEX. INS. CODE ANN. art. 3.62 (1952) (12% and attorney's fees).

[18] See 82 U. PA. L. REV. 761, 762 (1934), which suggests that the insurance company will either increase premiums or "provide in their policies that benefits shall not be payable until the insurer has had the opportunity of litigating the right of the claimant to recover." However, it seems doubtful that a court would uphold the latter alternative which so clearly contravenes the states' public policy as manifested by a statutory penalty.

willing to face the problem, a singular approach has been adopted for every kind of insurance recovery. On this basis, the majority rule seems eminently preferable.

A prerequisite to recovery under some penalty statutes is the demand for payment[19] which must be pleaded and proved.[20] However, this requirement has been waived where the insurer denied its liability on the insurance policy.[21] While no particular form of demand is required, the insured must show that he is asserting a right under the insurance contract.[22] Merely commencing the action against the insurer is usually not sufficient.[23] Consequently, either the absence or insufficiency of demand may constitute a defense to an insurer faced with the prospect of paying a statutory penalty. Additionally, the insurer may avoid statutory penalties by establishing liability for less than the original claim[24] or proving that the insurance contract was entered into before the applicable statutory penalty provisions were enacted.[25]

New York Life Ins. Co. v. Thweatt,[26] a 1953 decision, indicates that where an insurance policy provides for more than one kind of benefit, the insurer can hold possible statutory penalties to a minimum by liti-

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[19] See, *e.g.*, Mutual Reserve Fund Life Ins. Ass'n v. Tuchfeld, 159 Fed. 833 (6th Cir. 1908) (interpreting Tennessee statute); Massachusetts Mut. Life Ins. Co. v. Montague, 63 Ga. App. 137, 10 S.E.2d 279 (1940); Steadman v. Pearl Assur. Co., 127 So. 2d 366 (La. Ct. App. 1961).

[20] See Massachusetts Mut. Life Ins. Co. v. Montague, *supra* note 19; Life & Cas. Ins. Co. v. Smith, 53 Ga. App. 838, 187 S.E. 288 (1936).

[21] Franklin Life Ins. Co. v. Staats, 94 F.2d 481 (5th Cir. 1938) (applying Texas law); Sbisa v. American Equitable Assur. Co., 202 La. 196, 11 So. 2d 527 (1942); Reed v. Prudential Ins. Co., 229 Mo. App. 90, 73 S.W.2d 1027 (1934).

[22] See Coscarella v. Metropolitan Life Ins. Co., 175 Mo. App. 130, 157 S.W. 873 (1913); National Mut. Benefit Ass'n v. Aaron, 45 S.W.2d 371 (Tex. Civ. App. 1931).

[23] Pan-American Life Ins. Co. v. Terrell, 29 F.2d 460 (5th Cir. 1929) (interpreting Texas statute); Mutual Reserve Fund Life Ass'n v. Tuchfield, 159 Fed. 833 (6th Cir. 1908) (interpreting Tennessee statute); Steadman v. Pearl Assur. Co., 127 So. 2d 336 (La. Ct. App. 1961); American Nat'l Ins. Co. v. Park, 55 S.W.2d 1088 (Tex. Civ. App. 1933). *But cf.* State v. Claypool, 145 Ore. 615, 28 P.2d 882 (1934). In Trinity Universal Ins. Co. v. Smithwick, 222 F.2d 16 (8th Cir. 1955), the federal court appears to have confused the requirement of demand with the Arkansas Supreme Court's holding in Broadway v. Home Ins. Co., 203 Ark. 126, 155 S.W.2d 889, 891 (1941), that where the insured files suit for less than the amount of his demand the insurer cannot be held for penalties if he tenders payment "in apt time."

[24] See Good Canning Co. v. London Guar. & Acc. Co., 128 F. Supp. 778 (W.D. Ark. 1955) (interpreting Arkansas statute); Broadway v. Home Ins. Co., *supra* note 23; Cross v. Peerless Ins. Co., 351 S.W.2d 826 (Mo. Ct. App. 1961). *But cf.* Franklin Life Ins. Co. v. Durham, 351 S.W.2d 104 (Tex. Civ. App. 1961).

[25] Good Canning Co. v. London Guar. & Acc. Co., *supra* note 24 (refusing retroactive effect to amendment of Arkansas penalty statute). However, a penalty statute will not be struck down on constitutional grounds at least where bad faith on the part of the insurer is made a prerequisite to recovery. Fraternal Mystic Circle v. Snyder, 227 U.S. 497 (1913).

[26] 221 Ark. 478, 254 S.W.2d 68 (1953).

gating only those benefits whose payment is questioned. In this case the insured's beneficiary successfully recovered double indemnity benefits on two life insurance policies. Having promptly paid the life benefits on these policies prior to suit, however, the insured was held liable for statutory penalties only on the amount of the additional benefits.

The facts of the instant case present an appealing picture for imposition of statutory penalties. On three separate occasions plaintiff was hospitalized for a heart condition. Undisputed medical testimony established that the basic underlying cause in each instance was hardening of the arteries.[27] Both policies held by the insured covered any "sickness, illness, or disease"[28] contracted while the policies were in force. During the second hospitalization period defendant-insurer cancelled these policies, advising the plaintiff, however, that its action was "without prejudice to any loss beginning prior to the expiration of the time for which premiums had been accepted."[29] Nevertheless, defendant refused to pay benefits for the third period of hospitalization, stating in a letter to the plaintiff that it was liable only for losses incurred prior to cancellation of the policies.[30] Despite the apparent lack of any evidence that would support "just and reasonable grounds" for withholding payment of benefits, the court refused to impose statutory penalties, lest the insurer be denied its "day in court."[31] Vigorously dissenting from the majority's opinion, Judge Regan described the instant case as "a classic example wherein statutory penalties and attorney's fees should be imposed without equivocation upon the defendant insurer."[32]

An interesting case to compare with the instant decision is the aforementioned *Schecter*[33] case which the Louisiana Court of Appeal decided on the same day. In *Schecter* the amount tendered for payment of a lost wedding ring differed from the insured's undisputed testimony concerning its appraised value. Although conceding that this testimony bordered "closely on hearsay,"[34] the court awarded statutory penalties

[27] 114 So. 2d at 457.

[28] The hospital idemnity policy held by the insured defined sickness as any "sickness, illness or disease . . . which is contracted and begins while this policy is in force." Sickness was defined in the preferred family hospital-surgical policy as any "sickness, illness, or disease, which is contracted and begins and causes loss beginning while this policy is in force." Both policies provided that, "any one sickness shall be construed to include sickness from the same cause at various times or sickness from various causes at the same time." *Id.* at 455.

[29] *Id.* at 456.

[30] *Ibid.* Defendant alternatively contended that the insured's third period of hospitalization resulted from a posterior myocardial infarct, whereas prior illness stemmed from an anterior myocardial infarct. Brief for Defendant, p. 13, on file with the *Iowa Law Review*. Whatever scientific validity this contention may have, the court disregarded it as "a distinction without a difference, developed by Defendant without any supporting medical testimony." 144 So. 2d at 457.

[31] *Id.* at 458.

[32] *Id.* at 460.

[33] Schecter v. Camden Fire Ins. Ass'n, 141 So. 2d 451 (La. Ct. App. 1962). See note 14 *supra* and accompanying text.

[34] *Id.* at 453.

in addition to the balance of plaintiff's claim. It seems difficult to reconcile this result with that reached in the instant case, notwithstanding the court's caveat that "each case must depend upon its own facts and circumstances."[35] The expert medical tesimony in the instant case to the effect that the insured's last period of hospitalization resulted from an earlier sickness covered by his policies was as much "undisputed" as the plaintiff's testimony in *Schecter* over the value of her ring. Certainly, it was more reliable. Moreover, public policy would seem to favor the immediate payment of hospitalization and disability benefits over the immediate payment of benefits for a lost wedding ring.

Perhaps the court's reluctance to impose statutory penalties in the instant case is partially explained by the fact that such a recovery would have given the plaintiff judgment for double the amount of the benefits claimed under his policies.[36] Assuming the absence of this much additional injury resulting from the insurer's refusal of payment, it may be seriously questioned whether such a recovery would have been "reasonable" within the constitutional validity test of *McCray*.[37] Only Tennessee appears to have satisfactorily faced this problem where statutory penalties other than attorney's fees[38] have been authorized for an insurer's refusal of payment. The Tennessee statute provides for a penalty sum *not exceeding* twenty-five per cent of the liability for loss "if it appears to the court or jury trying the case that the refusal to pay said loss was not in good faith."[39] However, any additional liability imposed must be "*measured* by the additional expense, loss, and injury"[40] which the insurer's refusal to pay has inflicted. Tennessee has thus made certain that failure to pay within the prescribed statutory period will not of itself result in the imposition of penalties *even where such refusal is made in bad faith*.[41] Instead, statutory penalties are recoverable only if and to the extent that the refusal to pay promptly inflicts an additional injury upon the insured. Unfortunately, most penalty statutes, including the one which was ap-

[35] 141 So. 2d at 458, citing Thibodeaux v. Pacific Mut. Life Ins. Co., 237 La. 722, 112 So. 2d 423 (1959) (penalties denied); Finley v. Hardware Mut. Ins. Co., 237 La. 214, 110 So. 2d 583 (1959) (same); Jones v. Standard Life & Acc. Ins. Co., 129 So. 2d 84 (La. Ct. App. 1961) (same).

[36] See note 1 *supra*.

[37] Life & Cas. Ins. Co. v. McCray, 291 U.S. 566 (1934). See note 10 *supra* and accompanying text.

It should be noted that the Arkansas statute itself did not relate the penalty imposed to the additional injury caused by the delay in payment. Arguably, therefore, the case disposes of this issue by implication. However, the statute in *McCray* provided for a penalty of 12% of the loss whereas the applicable statute in the instant case provided for a penalty of 100%, thus making the lack of any correlation between injury and penalty much more serious.

[38] See MICH. STAT. ANN. § 24.11830 (1957) (attorney's fees *not to exceed* 12½% where refusal vexatious and without reasonable cause).

[39] TENN. CODE ANN. § 56-1105 (1955). An identical penalty is prescribed for policyholders whose suit for recovery is not brought in good faith. TENN. CODE ANN. § 56-1106 (1955).

[40] TENN. CODE ANN. § 56-1105 (1955). (Emphasis added.)

[41] *Ibid.*

plied in the instant case, do not correlate the amount of the penalty with the insured's additional injury resulting from the refusal of payment.[42]

The Tennessee approach not only seems fair from the standpoint of the adequacy of damages but, additionally, should facilitate more frequent recovery of statutory penalties because of the added flexibility in determining the amount of damages. If it were universally adopted by the states, ultimately the public should benefit from a speedier disposition of insurance claims.

Licenses—Contracts—Enforceability When in Violation of State Licensing Statutes.—Plaintiffs, members of a New York architectural firm, executed a contract in Iowa wherein they agreed to furnish architectural services for defendant, although at that time they did not have certificates of registration as architects as required by Iowa law.[1] Plaintiffs performed the services agreed upon and brought action on the contract to recover the fees due. Defendant pleaded that the plaintiff's lack of certification as required by statute rendered the contract unenforceable, which was sustained by the trial court in a ruling in favor of defendant on law points under Rule 105 of the Iowa Rules of Civil Procedure. On appeal to the Iowa Supreme Court, *held,* reversed and remanded. Conceding the applicable licensing statute to be an exercise of the police power of the state, there was no indication that the legislature intended to render contracts unenforceable when executed without compliance with the statute. *Davis, Brody, Wisniewski v. Barrett,* 115 N.W.2d 839 (Iowa 1962).

When a licensing statute imposes a penalty for its violation but there is no express prohibition against the conduct of the business or no language declaring contracts void when made without complying with the statute, courts have first determined whether the imposition of the licensing requirement and fee is in the exercise of the police power or merely a revenue measure.[2] The basis for this determination is said to be the intention of the legislature in enacting the statute.[3] Since the police power of a state extends only to protection of the lives, health, comfort, or welfare of the public, a licensing statute can-

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[42] See notes 15 & 17 *supra.* The Missouri statute provides for a penalty *not to exceed* 10%, but, unlike the Tennessee statute, does not correlate it with the extent of additional injury caused by the refusal of payment. MO. REV. STAT. § 375.420 (1959).

[1] IOWA CODE § 118.6 (1962).

[2] *E.g.,* Wood v. Krepps, 168 Cal. 382, 143 Pac. 691 (1914) (license on business of loaning money on personal property held a revenue measure); Bernstein v. Peters, 68 Ga. App. 218, 22 S.E.2d 614 (1942) (license to control sale of liquor was exercise of police power); Howard v. Lebby, 197 Ky. 324, 246 S.W. 828 (1923) (occupation tax on house painting not an exercise of police power). *Cf.* Colbert v. Ashland Constr. Co., 176 Va.500, 11 S.E.2d 612 (1940) (failure to register assumed business name rendered contract unenforceable). See 6A CORBIN, CONTRACTS § 1512 (1962); GRISMORE, PRINCIPLES OF THE LAW OF CONTRACTS § 289 (1947); Note, 43 VA. L. REV. 411-12 (1957); 23 SO. CAL. L. REV. 98 (1949).

[3] See cases cited note 2 *supra.*

not be justified as a proper exercise of that power unless it appears that the requirement of the license tends to promote the public health, morals, safety, or welfare.[4] If the purpose of the statute in requiring a license for the privilege of carrying on a certain business is held to be the prevention of fraud or of activity by improperly qualified persons in a particular business in order to protect the public, the statute will usually be construed as impliedly forbidding the conduct of the business without a license. A contract made by an unlicensed person in violation of such a statute has ordinarily been declared void and unenforceable.[5] If the relevant factors, including the sum charged for the license, disposition of license fees, lack of regulatory provisions, and absence of standards governing the granting of licenses, indicate that the object of the statute is not for the purpose of regulation and protection but designed solely to yield revenue, the penalty imposed is viewed as applicable only to the person and not the business, and contracts made in the course of the business are regarded as valid and enforceable.[6] In other words, if the license is authorized under the police power and may be granted or withheld in the interest of the public then a contract made by one who has not procured a license is void because his practice of the occupation is illegal. But if the tax is imposed as a revenue measure only, without intent to protect the public health, morals, or welfare, the violation of the statute consists not of pursuing the occupation but of failing to pay the license fee before pursuing it.

A few courts have been willing to find exceptions to this general rule that all contracts made in violation of a regulatory licensing statute are void.[7] Arguments relying on these exceptions may provide the best grounds for obtaining satisfaction of such claims since in many jurisdictions contravention of a statutory prohibition also precludes an action for quantum meruit,[8] although non-compliance with mere

[4] See Howard v. Lebby, 197 Ky. 324, 246 S.W. 828 (1923).

[5] See Munsell v. Temple, 8 Ill. (3 Gilman) 93 (1845); Board of Educ. v. Elliott, 276 Ky. 790, 125 S.W.2d 733 (1939); American Store Equip. & Constr. Corp. v. Jack Dempsey's Punch Bowl, Inc., 174 Misc. 436, 21 N.Y.S.2d 117 (Sup. Ct. 1939), *aff'd per curiam*, 283 N.Y. 601, 28 N.E.2d 23 (1940); Sherwood v. Wise, 132 Wash. 295, 232 Pac. 309 (1925).

[6] See Wood v. Krepps, 168 Cal. 382, 143 Pac. 691 (1914); Howard v. Lebby, 197 Ky. 324, 246, S.W. 828 (1923); Banks v. McCosker, 82 Md. 518, 34 Atl. 539 (1896); Welles v. Revercomb, 189 Va. 777, 54 S.E.2d 878 (1949).

[7] See John E. Rosasco Creameries, Inc. v. Cohen, 276 N.Y. 274, 11 N.E.2d 908 (1937) (denial of relief to unlicensed seller out of proportion to requirements of public policy); McCallum v. McIsaac, 159 Tenn. 655, 21 S.W.2d 392 (1929) (failure of agent to obtain license did not defeat right of principal). In addition see RESTATEMENT, CONTRACTS § 600 (1951). The *Restatement* takes the position that if a contract does not involve ". . . serious moral turpitude, and the bargain is not prohibited by statute . . . recovery may be allowed of anything that has been transferred under the bargain, or its fair value, if necessary to prevent a harsh forfeiture." *Ibid.* For examples of the application of this rule, see John E. Rosasco Creameries, Inc. v. Cohen, *supra*; Ryan v. K. V. L., Inc., 198 Wash. 459, 88 P.2d 836 (1939).

[8] See United States Rubber Co. v. City of Tulsa, 103 Okla. 163, 229 Pac. 771 (1924); Journal Printing Co. v. City of Racine, 210 Wis. 222, 245 N.W. 425 (1933).

statutory formalities may not prevent a recovery on that basis.[9]

Factors weighed by the courts in considering whether exceptions to the general rule of nonenforceability may be allowed are the danger of injury to the public which may result from non-compliance with the regulatory provisions as opposed to the possibility that by voiding the bargain a disproportionately heavy forfeiture may be imposed upon one whose offense is not really serious. While the statute itself may assess only a small penalty for violations, the additional permission granted a defendant to keep all that he has received from a violator without payment may operate as an extremely severe sanction.[10] On the other hand, it has been argued that the small penalties imposed for violation of statutes regulating businesses or professions are not intended to be the sole punishment since they are not sufficiently stringent by themselves to discourage violations.[11] Thus, courts must balance the policy which opposes providing relief to one who is a party to an illegal transaction against the injustice of permitting one person to be enriched at the expense of another.

The decisions construing statutes requiring the licensing or certification of architects are virtually unanimous in holding these statutes to have been enacted for the protection of the public from fraud and incompetence and, therefore, to be within the exercise of the police power of the state.[12] While the statutes vary a great deal, almost all states have prescribed penalties in the form of fines or imprisonment.[13] But most of the statutes do not expressly state that contracts entered into by an unlicensed architect are to be rendered unenforceable.[14]

The architect certification statutes may also be divided into two additional categories: those which expressly prohibit the non-complying individual from *performing the functions* included in the profession of architecture,[15] and those which provide only that the individual is prohibited from *representing himself* as an architect without complying

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[9] See United States v. R. P. Andrews & Co., 207 U.S. 229 (1907); Clark v. United States, 95 U.S. 539 (1877); L. Shepp Co. v. United States, 61 Ct. Cl. 219 (1925).

[10] See, *e.g.*, John E. Rosasco Creameries, Inc. v. Cohen, 276 N.Y. 274, 11 N.E.2d 908 (1937); American Store Equip. & Constr. Corp. v. Jack Dempsey's Punch Bowl, Inc., 174 Misc. 436, 21 N.Y.S.2d 117 (Sup. Ct. 1939), *aff'd per curiam*, 283 N.Y. 601, 28 N.E.2d 23 (1940).

[11] See F. F. Bollinger Co. v. Widmann Brewing Corp., 339 Pa. 289, 14 A.2d 81 (1940).

[12] See, *e.g.*, Palmer v. Brown, 127 Cal. App. 2d 44, 273 P.2d 306 (2d Dist. 1954); Johnson v. Delane, 77 Idaho 172, 290 P.2d 213 (1955); Board of Educ. v. Elliott, 276 Ky. 790, 125 S.W.2d 733 (1939); Wedgewood v. Jorgens, 190 Mich. 620, 157 N.W. 360 (1916); Hickey v. Sutton, 191 Wis. 313, 210 N.W. 704 (1926).

[13] See, *e.g.*, CONN. GEN. STAT. REV. § 20-297 (1958) (fine of not more than $500.00 or imprisonment for not more than one year or both); ILL. REV. STAT. ch. 10½, § 16 (1961) (fine of not less than $200 nor more than $500 or imprisonment not more than six months or both); WIS. STAT. § 101.31(14) (1959) (fine of not less than $100, nor more than $500 or imprisonment not more than 3 months or both).

[14] See. *e.g.*, CONN. GEN. STAT. REV. § 20-297 (1958); ILL. REV. STAT. ch. 10½, § 16 (1961); PA. STAT. ANN. tit. 63, § 29 (1959). See generally GRISMORE, *op. cit. supra* note 2, § 289.

[15] See, *e.g.*, ILL. REV. STAT. ch. 10½, §§ 1, 4 (1959); MICH. STAT. ANN. § 18.84(1)

with certification requirements.[16] The latter category allows the performance of architectural functions without a license as long as the person does not assume the *title* of "architect."

The applicable chapter of the Iowa Code is entitled "Registered Architects"[17] and is included under Title V of the Code, which deals with the police powers of the state. The statute requires that any person who desires to practice architecture in the state and use the title "architect" must first apply for and receive certification from a board of architectural examiners.[18] This requirement, however, does not prevent an individual without certification from providing exactly the same services as those which a registered architect may perform, provided he makes no attempt to represent himself as an architect.[19] The statute nowhere specifically provides that a contract entered into by a person not complying with the provisions of the chapter is void or unenforceable. However, it does state that a violation shall be deemed a misdemeanor punishable by a fine of up to 200 dollars or imprisonment of not more than one year or both.[20]

In *Pangborn v. Westlake*[21] the Iowa court at an early date acknowledged the general rule that when a statute prohibits or attaches a penalty to the doing of an act, a contract involving the performance of such an act is void and will not be enforced.[22] But the court also stated that certainly not every statute annexing a penalty for violation implies unenforceability, and it concluded that the language, subject matter, and intent of the statute must be the basis for the judgment.[23] Thus, while acknowledging the general rule, the court was careful to indicate that decisions should not be arbitrarily controlled by the determination that the statute under consideration is a regulatory measure and hence a contract in violation of it automatically unenforceable.

The court in the instant case recognized the general rule and also that the statute in question was an exercise or attempted exercise of the police power,[24] but it held that there was no clear indication that

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(1957); MO. REV. STAT. § 327.020 (1959); UTAH CODE ANN. § 58-3-6 (1953); VA. CODE ANN. § 54-27 (1958); WIS. STAT. § 101.31 (1959).

[16] See, *e.g.*, MASS. GEN. LAWS ANN. ch. 112, §§ 60K, 60L (1957); W. VA. CODE § 2957 (1961).

[17] IOWA CODE §§ 118.1-.14 (1962).

[18] IOWA CODE § 118.6 (1962).

[19] IOWA CODE § 118.7 (1962).

[20] IOWA CODE § 118.14 (1962).

[21] 36 Iowa 546 (1873).

[22] *Id.* at 548.

[23] The court in *Pangborn* stated:

> We are, therefore, brought to the true test, which is, that while, as a general rule, a penalty implies a prohibition, yet the courts will always look to the language of the statute, the subject-matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment; and if, from all these, it is manifest that it was not intended to imply a prohibition or to render the prohibited act void, the courts will so hold, and construe the statute accordingly. *Id.* at 549.

[24] 115 N.W.2d at 841.

the legislature actually intended that a violation of the statute should result in forfeiture of the right to have contracts enforced.[25] This determination was based on the fact that nowhere in the chapter did the legislature indicate that performing architectural services without a license was inimical to the public welfare. The only expressed prohibition was against the uncertified use of the title. The majority opinion cites *Dunn v. Finlayson*[26] as representing the reasoning and result it deems correct. The facts of *Dunn* were very similar to those in the instant case. The plaintiff, although not licensed, performed services under the title of "architect." The statute merely prohibited the use of the title by one not licensed, and the court held that since the statute in no way prohibited the actual practice of architecture it did not deprive the plaintiff of his right to recover for services rendered. The court pointed out that the only illegality connected with the contract was the use of the title "architect," and therefore the services in the performance of the contract were not illegal.[27] *Dunn v. Finlayson* appears to be the only case from among the various jurisdictions to entertain this reasoning.[28]

The dissent in the instant case takes the position that it was the intention of the legislature to render contracts to perform services in violation of the statute void and unenforceable.[29] An examination of cases from other jurisdictions dealing with similar statutes indicates that the interpretation of the dissent is in accord with the weight of authority.[30] In *Sherwood v. Wise*[31] the fact situation and the statute applicable to architects were somewhat similar to those of the instant case, and the court held that it was illegal to assume the professional title of architect and enter into a contract without holding a license.[32] The court did draw a distinction between prohibiting the use of the title of architect and prohibiting the performance of architectural services, but held the contract was illegal and unenforceable in either case. However, in *Sherwood v. Wise* the planning and resulting construction were alleged to be of poor quality,[33] while in the instant case there

[25] *Id.* at 842.

[26] 104 A.2d 830 (D.C. Munic. Ct. App. 1954).

[27] *Id.* at 831-32.

[28] The case is no longer a valid precedent in the District of Columbia because the statute was amended in 1950. Among the changes were a statement in the title that its purpose was to safeguard life, health, and property, and to promote the public welfare, *id.* at 832, a definition of the practice of architecture, and a prohibition not only of the use of the title of architect but of the practice of architecture by one not qualified as required by the statute. D.C. CODE ANN. § 2-1014 (1961). The court in *Dunn* indicated that a contract in violation of these provisions would be unenforceable. 104 A.2d at 832.

[29] 115 N.W.2d at 843-44.

[30] See, *e.g.*, Keenan v. Tuma, 240 Ill. App. 448 (1926); Board of Educ. v. Elliott, 276 Ky. 790, 125 S.W2d 733 (1939); Wedgewood v. Jorgens, 190 Mich. 620, 157 N.W. 360 (1916); F. F. Bollinger Co. v. Widmann Brewing Corp., 339 Pa. 289, 14 A.2d 81 (1940); Sherwood v. Wise, 132 Wash. 295, 232 Pac. 309 (1925); Hickey v. Sutton, 191 Wis. 313, 210 N.W. 704 (1926).

[31] 132 Wash. 295, 232 Pac. 309 (1925).

[32] *Id.* at 301, 232 Pac. at 311.

[33] *Id.* at 298, 232 Pac. at 310.

was no indication that the services performed were unsatisfactory or that the plaintiffs were incompetent, since they were subsequently issued certificates in 1959.[34] Thus, the Iowa statute's apparent purpose of protecting the public from fraud was actually not involved. Another similar case, *Hickey v. Sutton*,[35] also held that the plaintiff's representation of himself as an architect in violation of the statute prevented recovery under a contract. In its holding the court stated that there was no conflict in the authorities with reference to the rule that failure to procure a license bars recovery where the license is exacted as a police measure for protection of the public.[36] In none of the authorities, with the exception of *Dunn v. Finlayson*, is the distinction between a statute prohibiting the use of the title of architect and one completely prohibiting the performance of architectural services without a license considered significant in its effect upon the validity of contracts.

Hence, the Iowa court has refused to follow the generally established rule regarding architect licensing statutes. The prevailing rule clearly is mechanical, leaving no room for consideration of the quality of the services rendered, the qualifications of the architect, or the circumstances of the violation. It is far more rigid in application than the criminal sanctions expressly provided in the statute.[37] It appears that in weighing the competing policy considerations priority was given to the policy against unjust enrichment as opposed to the policy against granting relief to a party to an illegal transaction. To have allowed the defendant in the instant case to retain the value of satisfactory services without payment would be to permit him to reap a substantial windfall by virtue of a technical statutory violation and to assign a disproportionately heavy penalty to the violator, when no purpose of the statute or interest of the public would be advanced by so doing.

Torts—Negligence—Last Clear Chance.—Plaintiff was injured when his truck collided with defendant's train at a rural grade crossing. At the trial evidence was introduced that the trainmen had observed the truck continuously from the time it was a quarter of a mile from the crossing. Both train and truck continued to approach the crossing with no reduction in speed. As the truck neared the crossing the train crew began blowing the distress signal. However, plaintiff, who remembered nothing of the accident, apparently remained oblivious of the approaching peril until the moment of impact. The jury returned a verdict for plaintiff. On appeal to the Supreme Court of Iowa, *held*, affirmed. Viewing the facts most favorably for plaintiff, there was sufficient evidence to sustain a jury finding that the collision would have been avoided if the speed of the train had been reduced; defendant

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[34] 115 N.W.2d at 840.

[35] 191 Wis. 313, 210 N.W. 704 (1926).

[36] *Id.* at 315, 210 N.W. at 704.

[37] IOWA CODE § 118.14 (1962) sets no minimum amount on the fine which may be imposed, and if a nominal fine is assessed no imprisonment is required. The maximum sentence allowed is a $200 fine and imprisonment for a year.

thus had the last clear chance to avoid the accident. *Tilghman v. Chicago & N.W. Ry.*, 115 N.W.2d 165 (Iowa 1962).

The doctrine of last clear chance is applicable when a plaintiff by his own negligent conduct places himself in peril from defendant's action; upon apprehending plaintiff's predicament the defendant must avoid injuring him if he is capable of doing so. If injury does occur, defendant is said to have had the "last clear chance" to avoid it, and he is accordingly held responsible.[1] The doctrine has been applied in nearly all jurisdictions as an exception to, or a modification of, the strict rule of contributory negligence, or it has been based upon the alternative theory that defendant's action was the proximate cause of the injury.[2] The theory of proximate cause finds its basis in the premise that defendant's negligent acts occurred later than those of plaintiff.[3] In situations where plaintiff's negligence continues until the time of the accident and where, therefore, defendant's negligence would be no later than plaintiff's, courts have applied last clear chance as an exception to contributory negligence.[4] The alternative theories have not been discussed in recent Iowa cases,[5] and it is reasonable to assume that recovery will be allowed if the other requirements for the operation of the doctrine, now to be considered, are met.

To be successful in a last clear chance action in Iowa, the plaintiff must establish four elements. Although the majority in the instant case acknowledged the necessity of proving these four elements,[6] its conclusion that the plaintiff's evidence was sufficient to reach the jury must be regarded as a departure from previous interpretations of the Iowa court. According to the established Iowa rule, the plaintiff's contributory negligence is presupposed, and he is required to present proof that defendant (1) had actual knowledge of plaintiff's presence; (2) that he realized or should have realized in the exercise of reasonable care that plaintiff was in peril; (3) that he had the ability to avoid injury to plaintiff thereafter; and (4) that he failed to do so.[7]

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[1] See generally PROSSER, TORTS § 52 (2d ed. 1955); RESTATEMENT, TORTS §§ 479-80 (1934); 1 SHEARMAN & REDFIELD, NEGLIGENCE § 118 (rev. ed. 1941).

[2] See PROSSER, *op. cit. supra* note 1, § 52, 291-92; James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704, 707-08 (1938); Slife, *The Iowa Doctrine of Last Clear Chance*, 34 IOWA L. REV. 480, 481-85 (1949); *cf.* HARPER, TORTS § 138, at 304-05 (1933) (drawing analogy to liability for reckless or wanton conduct).

[3] The proximate cause theory has been employed in the majority of Iowa cases. See, *e.g.*, Winegardner v. Manny, 237 Iowa 412-13, 21 N.W.2d 209 (1946); Groves v. City of Webster City, 222 Iowa 849, 854, 270 N.W. 329, 332 (1936); Wilson v. Illinois Cent. R.R., 150 Iowa 33, 41, 129 N.W. 340, 344 (1911).

[4] See, *e.g.*, Arp v. Illinois Cent. R.R., 230 Iowa 869, 870, 299 N.W. 413, 414 (1941) (last clear chance applied despite concession of continuing negligence by plaintiff); Lynch v. Des Moines Ry., 215 Iowa 1119, 1126, 245 N.W. 219, 222 (1932) (doctrine presupposes plaintiff's negligence); Bruggeman v. Illinois Cent. R.R., 147 Iowa 187, 205, 123 N.W. 1007, 1014 (1910) (last clear chance applicable regardless of contributory negligence).

[5] See, *e.g.*, Tilgham v. Chicago & N.W. Ry., 115 N.W.2d 165 (Iowa 1962); Olson v. Truax, 250 Iowa 1040, 97 N.W.2d 900 (1959); Strom v. Des Moines & Cent. Iowa Ry., 248 Iowa 1052, 82 N.W.2d 781 (1957).

[6] 115 N.W.2d at 168.

[7] Olson v. Truax, 250 Iowa 1040, 1049. 97 N.W.2d 900, 905 (1959); Strom v. Des

To meet the first requirement, Iowa law requires that defendant actually be aware of plaintiff's presence.[8] Of course, this knowledge may be inferred from circumstantial evidence, notwithstanding denial by the defendant.[9] There is no controversy concerning the meeting of this requirement in the principal case, since defendant's crew members testified they saw plaintiff approaching from a quarter of a mile distant.[10]

There was considerable controversy concerning the meeting of the second requirement—that is, whether the train crew in the exercise of reasonable care should have realized in time to avoid the accident that plaintiff had reached a position of peril.[11] The majority took judicial notice of the fact that it is the custom of motorists to drive toward an oncoming train at a constant rate of speed and to stop abruptly before reaching the track.[12] Acceptance of this fact would logically seem to lead to the conclusion that the trainmen could not have realized the plaintiff was endangered until the truck had actually failed to stop, begun to cross the tracks, and collision had become inevitable. Nevertheless, the majority concluded that the defendant was not justified in assuming plaintiff would stop at the crossing; rather, defendant had an affirmative duty to exercise due care for the safety of the plaintiff by reducing the speed of the train even though there was still sufficient time for the plaintiff to stop had he become aware of the dangerous situation.[13] The majority's conclusion is contrary to previous Iowa cases which held that a plaintiff is not in peril, and a defendant is thus under no obligation to exercise care for his safety, until he reaches a point after which he can no longer stop.[14]

Moines & Cent. Iowa Ry., 248 Iowa 1052, 1070, 82 N.W.2d 781, 791 (1957); Menke v. Peterschmidt, 246 Iowa 722, 725-26, 69 N.W.2d 65, 68 (1955). See RESTATEMENT, TORTS § 479 (1934).

[8] "It is an essential element of the rule that the defendant must have actually seen and had actual knowledge of the position of the person injured." Mast v. Illinois Cent. R.R., 79 F. Supp. 149, 160 (N.D. Iowa 1948) (dictum). See Slife, *supra* note 2, at 486 n.35 (cases collected).

[9] See, *e.g.*, Menke v. Peterschmidt, 246 Iowa 722, 730, 69 N.W.2d 65, 68-69 (1955); Gregory v. Wabash R.R., 126 Iowa 230, 235, 101 N.W. 761, 763 (1904).

[10] 115 N.W.2d at 169.

[11] In the early Iowa cases there was some confusion whether the second element required actual realization of plaintiff's peril, or only that as a reasonably prudent man the defendant should have realized it. *Compare* Jarvis v. Stone, 216 Iowa 27, 34, 247 N.W. 393, 396 (1933) (actual discovery necessary), *with* Roennau v. Whitson, 188 Iowa 138, 154, 175 N.W. 849, 855 (1920) (sufficient if man of ordinary prudence would have realized plaintiff's peril). This issue was clarified in Menke v. Peterschmidt, 246 Iowa 722, 726, 69 N.W.2d 65, 69 (1955), which held that it was not necessary to show actual knowledge of the danger but only that the perilous situation should have been realized by the defendant in the exercise of reasonable care.

[12] 115 N.W.2d at 173.

[13] *Id.* at 170.

[14] See, *e.g.*, Levendosky v. Chicago, M., St. P. & Pac. Ry., 223 F.2d 395, 398 (8th Cir. 1955) (Iowa law imposes no duty to stop until plaintiff enters danger zone); Mast v. Illinois Cent. R.R., 79 F. Supp. 149, 163 (N.D. Iowa 1948) (trainmen may assume motorists will stop in time); Arp v. Illinois Cent. R.R., 230 Iowa 869, 871,

It is even more questionable whether there was sufficient evidence to prove the third requirement that the defendant had the ability to avoid injury to the plaintiff. The majority did not contend that the train could have been stopped in time to avoid the accident. Defendant's negligence was predicated on evidence that plaintiff's truck could have cleared the track if the speed of the train had been slightly reduced sooner than it was. According to the majority, a jury could reasonably find that "if the train had reached the crossing just one second later than it did this collision would have been avoided."[15] The dissenting opinion utilized evidence introduced by plaintiff to demonstrate that if the defendant could have prevented the accident at all, the collision would have been avoided by the merest fraction of a second.[16] The dissenters pointed to previous Iowa decisions holding that errors in judgment do not constitute negligence in an emergency situation in which a party has only seconds in which to act.[17]

The recent Iowa decision of *Strom v. Des Moines & Cent. Ry.*,[18] would seem to have been controlling precedent for this case. On facts nearly identical to those of the principal case the court in *Strom* held that there was insufficient evidence to submit the last clear chance question to the jury. In that case defendant's crew members testified that they had observed plaintiff's automobile approach the crossing and that nothing indicated plaintiff intended to stop. The brakes of the train were not applied until after plaintiff had nearly reached the crossing. The engineer testified that before the automobile reached this position of peril he "just hoped plaintiff would stop in time."[19] As in the instant case, the plaintiff in *Strom* did not contend that the train could have been stopped before her vehicle reached the crossing; instead she argued that the speed of the train might have been reduced sufficiently to allow her to cross the tracks safely. The court found the doctrine of last clear chance inapplicable primarily because there was insufficient time for defendant to avoid the accident after plaintiff's predicament became apparent. Plaintiff's argument that defendant could have prevented the collision was dismissed as conjectural. The majority in the instant case avoided an explicit overruling of the *Strom* case by attempting to find it factually distinguishable.[20]

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299 N.W. 413, 414 (1941) (no action required until plaintiff reaches a position of peril); Menke v. Peterschmidt, 246 Iowa 722, 731, 69 N.W.2d 65, 71 (1955) (dictum) (rule also applicable to automobile accident cases).

[15] 115 N.W.2d at 169-70.

[16] *Id.* at 177 (dissenting opinion).

[17] *E.g.*, Olson v. Truax, 250 Iowa 1040, 1049, 97 N.W.2d 900, 906 (1959) (brief period in an emergency not sufficient); Menke v. Peterschmidt, 246 Iowa 722, 733, 69 N.W.2d 65, 73 (1955) (no "clear chance" where no "real time" to avoid accident); Koob v. Schmolt, 241 Iowa 1294, 1299, 45 N.W.2d 216, 218 (1950) (mistakes in a sudden emergency situation not negligence); Slife, *supra* note 2, at 490 n.56 (cases collected). *But see* Arp v. Illinois Cent. R.R., 230 Iowa 869, 872, 299 N.W. 413, 414-15 (1941) (dictum), where the court indicated that even if the train could not be stopped, recovery might have been allowed if the engineer acting as a reasonably prudent person had time to slow down to avoid the collision.

[18] 248 Iowa 1052, 82 N.W.2d 781 (1957).

[19] *Id.* at 1070, 82 N.W.2d at 791-92.

[20] 115 N.W.2d at 168-69. The majority attempted to distinguish the *Strom* case on

The principal case thus must be categorized as a departure from earlier Iowa decisions. Certainly, evidence that defendant was at "fault" was at best equivocal in view of previous standards of negligence under the last clear chance doctrine. On the other hand, the decision seems to be in accord with what is thought to be a general trend towards expanding liability.[21] Many commentators profess to see in this trend a growing societal desire to compensate injured persons regardless of the fault or negligence of the party being sued,[22] particularly if the plaintiff was injured through the operation of a potentially dangerous enterprise such as a railroad.[23] According to these authorities, the courts, although not articulating underlying policies, have furthered this trend without departing from established

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several grounds. The first distinction made was that the accident occurred at night. The significance of this factor is diminished by the fact that the trainmen testified they had observed plaintiff's lights for some distance prior to the time she reached the tracks. A second difference urged was that there was no evidence in the *Strom* case to indicate that the plaintiff was oblivious to the approach of the train until the collision occurred. However, there were no skid marks to indicate that plaintiff attempted to stop before reaching the crossing, and she testified that she had not seen the train. Moreover, there was a complete lack of evidence on this point in the instant case since the plaintiff testified he suffered from temporary amnesia and could remember nothing of the accident. Finally, the majority argued that the train crew in *Strom* could not have been aware of plaintiff's perilous situation until she failed to turn at an intersection 60 feet from the track. But the court in *Strom* posited that "a vehicle approaching a railroad does not usually reach a position of danger until it can no longer be stopped or turned aside . . . ." 248 Iowa at 1071, 82 N.W.2d at 792. It is interesting to note that the opinions in both cases were written by Chief Justice Garfield.

[21] See generally EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951); Green, *Tort Law Public in Disguise*, 38 TEXAS L. REV. 1 (1959); Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 219 (1953); James, *Tort Law in Midstream: Its Challenge to the Judicial Process*, 8 BUFFALO L. REV. 315 (1959); Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463 (1962).

[22] See, *e.g.*, Feezer, *A Circle Tour Through Negligence*, 27 N.Y.U.L. REV. 647, 652-53 (1952) (trend already well established); Keeton, *supra* note 21, at 466 (expanding liability due to changing economic and social attitudes); *cf.* Karlin, *For Whom Does the Bell Toll—The Public? The Insurer? The Lawyer?*, A.B.A. SECT. INS. N. & C.L. 37, 39 (trend not caused by social demands but instigated by insurance industry). In James, *Accident Liability Reconsidered*, 57 YALE L.J. 549 (1948), the author recognizes a need for extended liability as a result of mechanization and suggests a plan of social insurance to satisfy the need.

[23] See EHRENZWEIG, *op. cit. supra* note 21, § 16, at 56:

> Frequently railroads and automobile operators are, under the negligence rule, "really" not held for a particular "fault" occurring in their operations, but, as under rules of strict liability, for the inevitable consequences of their dangerous activities which, but for their being tolerated because of a superior interest, would be "negligent" because of being foreseeably harmful. In this sense this enterprise liability for "negligence" is "strict" in that it is imposed on lawful rather than on reprehensible conduct; and the purportedly required "negligence" in the railroad engineer's or automobile driver's incorrect reaction is reduced to a mere vehicle of a "quasi-strict" liability for dangerous enterprise.

rules of negligence by relaxing the plaintiff's burden of proof and by giving more discretion to the jury, thereby introducing an element of popular prejudice in favor of claimants.[24]

By holding plaintiff's evidence sufficient to present a jury question under the last clear chance doctrine, the court in the instant case greatly relaxed plaintiff's burden of proof.[25] Previous Iowa cases which seemingly precluded recovery were not overruled but distinguished on their facts. By refusing to overrule contrary authority and by giving wide discretion to the jury, the scope of recovery under last clear chance was substantially increased but only at the cost of diminishing the predictability of future cases under that doctrine.

Wrongful Death—Intra-Family Tort Actions—Child Liable for Death of Parent.—Plaintiff's decedent was killed while riding as a guest in a car driven by her minor daughter. Subsequent to the child's complete emancipation through marriage and court decree, plaintiff brought an action for wrongful death[1] against the child and the owner of the car. The trial court sustained the defendants' demurrer. On appeal to the Supreme Court of Tennessee, *held,* reversed and remanded. Either the emancipation of a minor child or the death of his parent destroys the child's immunity from suit for a tort committed during his minority. *Logan v. Reaves,* 354 S.W.2d 789 (Tenn. 1962).

Until recently the courts have been unfavorably disposed towards actions in tort between parent and child. In the 1891 landmark decision of *Hewellette v. George,*[2] a minor daughter, married but separated from her husband, brought an action for false imprisonment against her mother. The Supreme Court of Mississippi held: "[S]o long as the parent is under obligation to care for, guide, and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this can be maintained."[3] According to recent

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[24] "Any rule of substantive law or procedure which enlarges the jury's theoretical sphere tends to extend liability, and conversely any rule which restricts the jury's sphere, tends to restrict liability." James, *Function of Judge and Jury in Negligence Cases,* 58 YALE L.J. 667, 689 (1949); see 1 HOLDSWORTH, HISTORY OF THE ENGLISH LAW 349 (4th ed. 1927); Green, *supra* note 21, at 3; Keeton, *supra* note 21, at 503.

[25] It is well settled that the plaintiff has the ultimate burden of proving defendant in fact had the last clear chance to avoid the injury. See, *e.g.,* Floersch v. Merchants Motor Freight, Inc., 248 F.2d 704, 708 (8th Cir. 1957); Menke v. Peterschmidt, 246 Iowa 722, 725, 69 N.W.2d 65, 68 (1955); Nagel v. Bretthaurer, 230 Iowa 707, 712, 298 N.W. 852, 854 (1941).

[1] TENN. CODE ANN. § 20-607 (Supp. 1962) provides:

> The right of action which a person, who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrongdoer, in case death had not ensued, shall not abate or be extinguished by his death, but shall pass . . . to his personal representative . . . . In the case of the death of a married woman, such right of action shall pass to the surviving husband.

[2] 68 Miss. 703, 9 So. 885 (1891).

[3] *Id.* at 711, 9 So. at 887.

comment,[4] this decision marks the beginning of the American parent-child tort immunity rule. Forty years later, in *Schneider v. Schneider*,[5] a minor defendant was held immune from suit by his mother for injuries sustained in an automobile collision. Thus, a rule of immunity was fully established which today excludes negligence actions between parent and child.[6] In contrast to the various instances of immunity that have been recognized in actions between husband and wife,[7] the rule is thought to be primarily American in origin, having little if any foundation in the English common law.[8]

Courts have explained the parent-child tort immunity doctrine as necessary for the preservation of harmony within the family unit.[9] However, the doctrine is not applicable to property actions,[10] nor does

[4] Cooperrider, *Child v. Parent in Tort: A Case for the Jury?*, 43 MINN. L. REV. 73 (1958); 34 CHI.-KENT L. REV. 333, 334-35 (1956).

[5] 160 Md. 18, 152 Atl. 498 (1930).

[6] For cases where the unemancipated child has been the plaintiff see, *e.g.*, Perkins v. Robertson, 140 Cal. App. 2d 536, 295 P.2d 972 (1956); Baker v. Baker, 364 Mo. 453, 263 S.W.2d 29 (1953); Hastings v. Hastings, 33 N.J. 247, 163 A.2d 147 (1960); Badigian v. Badigian, 9 N.Y.2d 472, 174 N.E.2d 718 (1961); *cf.* London Guar. & Acc. Co. v. Smith, 242 Minn. 211, 64 N.W.2d 781 (1954).

For decisions where the parent has been plaintiff see *e.g.*, Oliveria v. Oliveria, 305 Mass. 297, 25 N.E.2d 766 (1940); Chosney v. Konkus, 64 N.J. 328, 165 A.2d 870 (1960); Silverstein v. Kastner, 342 Pa. 217, 20 A.2d 205 (1941). *But see* Wells v. Wells, 48 S.W.2d 109 (Mo. Ct. App. 1932); Becker v. Rieck, 19 Misc. 2d 104, 188 N.Y.S.2d 724 (Sup. Ct. 1959) *aff'd. mem.*, 214 N.Y.S.2d 632 (1961).

[7] At common law the bar against interspousal suits of any kind partially rested upon the fiction that husband and wife were a single legal entity. Where, however, the procedural disability of suing oneself was removed by a subsequent divorce of the parties, the English case of Phillips v. Barnette, [1876] 1 Q.B. 436, nevertheless held defendant immune from suit by his wife for a tort committed during their marriage. *Accord*, Abbott v. Abbott, 67 Md. 304 (1877) (first American case). See generally Akers & Drummond, *Tort Actions Between Members of the Family—Husband & Wife—Parent & Child*, 26 Mo. L. REV. 152 (1961), where the authors conclude that presently "a large majority of American courts, following Thompson v. Thompson, [218 U.S. 611 (1910)], have construed their Married Women's Acts as not furnishing the means whereby one spouse may sue the other for a personal tort committed during coverture." *Id.* at 156-57. *Accord*, *In re* Dolmage's Estate, 203 Iowa 231, 212 N.W. 553 (1927).

[8] See generally McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1059-63 (1930); Comment, 26 Mo. L. REV. 152, 180 (1961).

[9] See Rambo v. Rambo, 195 Ark. 832, 114 S.W.2d 468 (1938); Meehan v. Meehan, 133 So. 2d 776 (Fla. App. 1961); Schneider v. Schneider, 160 Md. 18, 152 Atl. 498 (1930); Parks v. Parks, 390 Pa. 254, 135 A.2d 65 (1957). For criticism of this rationale, see McCurdy, *supra* note 7, at 1074.

[10] "Indeed, the books are filled with cases in which children have litigated with their parents over contracts, wills, inheritances and settlements. If a child may sue its father because of a broken contract, why . . . may he not sue him because of a broken leg?" Badigian v. Badigian, 9 N.Y.2d 472, 476 174 N.E.2d 718, 721 (1961) (dissenting opinion). See McKern v. Beck, 73 Ind. App. 92, 126 N.E. 641 (1920); Becker v. Rieck, 19 Misc. 2d 104, 188 N.Y.S.2d 724 (Sup. Ct. 1959), *aff'd. mem.*, 214 N.Y.S.2d 632 (1961); McLain v. McLain, 80 Okla. 113, 194 Pac. 894 (1921). In *Becker* a father recovered from his unemancipated son for loss of services and

it extend to actions in tort between parties having a different family relationship. Thus, recovery has been allowed in actions between a woman and her son-in-law,[11] a three-year-old and his grandmother,[12] and in actions between minor brothers and sisters.[13] Conversely, the rule has been applied to prevent an unemancipated minor from suing a stepparent standing in *loco parentis*.[14]

If the preservation of family harmony constitutes the justification for the parent-child tort immunity rule, its scope would seemingly embrace additional family relationships and additional suits. The fact that such a development has not occurred supports the view taken in *Dunlap v. Dunlap*[15] that where the child is plaintiff the rule principally rests upon the importance of maintaining parental discipline.[16] Under this view "such immunity as the parent may have from suit by the minor child for personal tort arises from a *disability to sue*, and not from lack of violated duty."[17] One result of this position might be that it would permit numerous automobile negligence suits between parent and child which are presently disallowed. On the other hand, where the parent is plaintiff one court has stated that suit against the child is disallowed because "a person cannot at the same time occupy the position of parent and natural guardian, fulfilling the functions devolved upon that position, and the position of plaintiff demanding damages from the child at law."[18]

Courts have refused to recognize the immunity rule where the tortious injury was wantonly or wilfully inflicted.[19] Undoubtedly there

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medical expenses incurred due to the negligent injury of another minor son. The court stated: "Plaintiff's loss, although predicated on negligence, is in the nature of an infringement on a property right, as to which there has never been any question that a parent may maintain an action against an unemancipated child." *Id.* at 106, 188 N.Y.S.2d at 727.

[11] Russell v. Cox, 65 Idaho 534, 148 P.2d 221 (1944); *cf.* Hamburger v. Katy, 10 La. App. 215, 120 So. 391 (1928) (father against son-in-law).

[12] Spaulding v. Mineah, 239 App. Div. 460, 268 N.Y. Supp. 772 (1933), *aff'd. per curiam*, 264 N.Y. 589, 191 N.E. 578 (1934).

[13] See, *e.g.*, Overlock v. Ruedemann, 147 Conn. 649, 165 A.2d 335 (1960); Rozell v. Rozell, 281 N.Y. 106, 22 N.E.2d 254 (1939); Midkiff v. Midkiff, 201 Va. 829, 113 S.E.2d 875 (1960).

[14] "We therefore hold that the rule which bars an unemancipated minor from maintaining an ordinary negligence action against his parent for damages for personal injuries applies to a stepparent who stands *in loco parentis* to a minor child." London Guar. & Acc. Co. v. Smith, 242 Minn. 211, 217, 64 N.W.2d 781, 785 (1954). *Accord*, Trudell v. Leatherby, 212 Cal. 678, 300 Pac. 7 (1931); Bricault v. Deveau, 21 Conn. 486, 157 A.2d 604 (1960).

[15] 84 N.H. 352, 150 Atl. 905 (1930).

[16] "[T]here emerges one substantial and reasonable ground for denying a recovery, and one only. The parental authority should be so far supreme that whatever would unduly impair it should be foregone by the child for his ultimate good." *Id.* at 354, 150 Atl. at 906; see generally Akers & Drummond, *supra* note 7, at 188-89.

[17] 84 N.H. at 372, 150 Atl. at 915. (Emphasis added.)

[18] Schneider v. Schneider, 160 Md. 18, 23, 152 Atl. 498, 500 (1930).

[19] This exception to the rule appears to have been demanded by the court's reasoning in Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905), where a minor

is some realization that in this situation the action brought is the result and not the cause of family discord. Exceptions to the immunity rule have been recognized in cases where the parent and child were respectively master and servant,[20] or the owner of a common carrier and its passenger[21] and on which the defendant parent carried liability insurance. A minor has also been able to recover for injuries inflicted by a parent in the course of the parent's employment.[22] In a recent Iowa case, *Cody v. J.A. Dodds & Sons*,[23] a minor recovered from his father's partnership for injuries caused by the negligence of his father. Without deciding whether the immunity rule is recognized in Iowa, the court held that since a partnership is recognized as a legal entity in Iowa it is not entitled to whatever protection may be accorded the father.

In addition to the foregoing exceptions, the parent-child tort immunity rule may be affected by one or more of three other factors: (1) the tortfeasor's ownership of liability insurance; (2) emancipation of the minor child subsequent to the tort's occurrence; and (3) death of the injured party.

Although preferring to rest the child's inability to sue his parent upon the preservation of parental control, Judge Peaslee in *Dunlap v. Dunlap*,[24] recognized that American courts had given great weight to the protection of family harmony. He then found his own justification for the rule inapplicable because the negligent father had by employing his plaintiff son assumed a master's responsibility, thereby releasing

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plaintiff, raped by her father, was disallowed recovery. Although conceding that the desire to preserve family harmony was an inapplicable justification for upholding the immunity rule, the court declared that if it were "once established that a child has a right to sue a parent for a tort, there is no practical line of demarkation which can be drawn." *Id.* at 244, 79 Pac. at 789. Four years prior to the *Roller* decision, however, recovery was allowed against a stepmother who had inflicted injuries on the child *malanimo*. Treschman v. Treschman, 28 Ind. App. 206, 61 N.E. 961 (1901). Today, parental immunity from suit is disallowed where injuries are wantonly or wilfully inflicted. See, *e.g.*, Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Nudd v. Matsoukas, 7 Ill. 2d 608, 131 N.E.2d 525 (1956); Cowgill v. Boock, 189 Ore. 282, 218 P.2d 445 (1950); Brown v. Selby, 332 S.W.2d 166 (Tenn. 1960).

[20] Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930).

[21] In Worrell v. Worrell, 174 Va. 11, 26-27, 4 S.E.2d 343, 349 (1939), the court stated: "[T]he action was brought against the father, in his vocational capacity, as a common carrier, not against the father for the violation of a moral or parental obligation in the exercise of his parental authority." *Cf.*, Lusk v. Lusk, 113 W.Va. 17, 166 S.E. 538 (1932), holding that a pupil could sue her father, the operator of a school bus, where father was protected by indemnity insurance.

[22] In Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952), a five-year old child recovered from his father who backed an employer's truck over him.

[23] 252 Iowa 1394, 110 N.W.2d 255, 47 IOWA L. REV. 1159 (1961). *Accord*, Signs v. Signs, 156 Ohio St. 592, 103 N.E.2d 743 (1952) (unemancipated child recovered from father for burns resulting from defective gasoline pump). *Contra*, Aboussie v. Aboussie, 270 S.W.2d 636 (Tex. Civ. App. 1954); *cf.* Belleson v. Skilbeck, 185 Minn. 537, 242 N.W. 1 (1932).

[24] 84 N.H. 352, 150 Atl. 905 (1930).

"his parental control so far as necessary to attain that end."[25] Additionally, the judge declared that since the father was insured against personal liability, "it must be found that this suit has no tendency to disturb the family relations."[26] Unfortunately, many courts hold that liability insurance does not alter the parent-child tort immunity doctrine, but only recompenses liability where it otherwise exists.[27] Assuming that the possibility of fraud and collusion in a tort suit is enhanced where the parties are members of the same family unit, such a danger seemingly could be controlled by the insurance companies themselves[28] and therefore should not alone be sufficient to bar recovery. Moreover, a complete interdicting of suit does not seem as rationally expressive of a policy against collusion as might rules concerning presumptions, burden of proof, and quantum of evidence required.[29]

A minor child emancipated at the time of injury has repeatedly been allowed to bring a negligence action against his parent.[30] On the other hand, he has not been permitted to sue the parent for torts committed prior to his emancipation.[31] Where the positions of the parties are reversed, the instant case proceeds one step further by permitting the parent's administrator to bring an action against a minor child who was emancipated at the time of suit but unemancipated at the time of injury. Emancipation may arise either by relinquishment of parental control[32] or by operation of law,[33] such as marriage in the present case. Whether emancipation has occurred in a particular instance

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[25] *Id.* at 373, 150 Atl. at 915.

[26] *Ibid.*

[27] See, *e.g.*, London Guar. & Acc. Co. v. Smith, 242 Minn. 211, 64 N.W.2d 781 (1954); Baker v. Baker, 364 Mo. 453, 263 S.W.2d 29 (1953); Hastings v. Hastings, 33 N.J. 247, 163 A.2d 147 (1960); Badigian v. Badigian, 9 N.Y.2d 472, 174 N.E.2d 718 (1961).

[28] See State Farm Mut. Auto. Ins. Co. v. Ward, 340 S.W.2d 635 (Mo. 1960), in which the court upheld a clause which excluded liability for injury to the insured or any member of his family residing in the same household. In Rambo v. Rambo, 195 Ark. 832, 838, 114 S.W.2d 468, 470 (1938), the parent-child tort immunity doctrine was held to bar a minor plaintiff from recovering against his father whose insurance was limited to "the loss from the liability imposed by law."

[29] See Ford, *Interspousal Liability for Automobile Accidents in the Conflict of Laws: Law and Reason Versus the Restatement*, 15 U. PITT. L. REV. 397, 400 (1954).

[30] See, *e.g.*, Martinez v. Southern Pac. Co., 45 Cal. 2d 244, 288 P.2d 868 (1955); Wurth v. Wurth, 322 S.W.2d 745 (Mo. 1959); Glover v. Glover, 319 S.W.2d 238 (Tenn. 1958).

[31] See, *e.g.*, Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924); London Guar. & Acc. Co. v. Smith, 242 Minn. 211, 64 N.W.2d 781 (1954); Reingold v. Reingold, 115 N.J.L. 532, 181 Atl. 153 (1935); Shea v. Pettee, 110 A.2d 492 (Conn. Sup. Ct. 1954) (by implication).

[32] See, *e.g.*, Perkins v. Robertson, 295 P.2d 972 (Cal. App. 1962); Pennsylvania R.R. v Patesel, 118 Ind. App. 233, 76 N.E.2d 595 (1948); Swenson v. Swenson, 241 Mo. App. 21, 227 S.W.2d 103 (1950).

[33] See, *e.g.*, Lancaster v. Lancaster, 213 Miss. 536, 57 So. 2d 302 (1952); *Ex parte* Olcott, 141 N.J.Eq. 8, 55 A.2d 820 (1947).

is a question of fact for the jury,[34] unless the emancipation has occurred by operation of law.

Death of the injured party considerably alters the complexion of the parent-child tort immunity rule. Not only has the family relationship between the parent and child been severed, but any subsequent action for wrongful death will be controlled by statute.[35] A majority of states have wrongful death statutes[36] patterned after the original Lord Campbell's Act.[37] These acts create a new cause of action for the enumerated beneficiaries if the fatal act or neglect would have entitled the injured party to maintain an action had death not ensued.

Legislative silence upon the effect such statutes have in a parent-child tort proceeding has produced opposite results in two jurisdictions.[38] However, some Lord Campbell jurisdictions where the immunity rule is existent do not confine it to negligence actions but apply it to bar wrongful death actions between parent and child or their administrators.[39] Inasmuch as Lord Campbell statutes attempt to create a *new* cause of action, the results of these decisions seem difficult to justify.

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[34] See, *e.g.*, St. Croix v. St. Croix, 17 App. Div. 2d 692, 229 N.Y.S.2d 969 (1962); Murphy v. Murphy, 206 Misc. 228, 133 N.Y.S.2d 796 (Sup. Ct. 1954); Parker v. Parker, 230 S.C. 28, 94 S.E.2d 12 (1956); Wadoz v. United Nat'l. Indem. Co., 274 Wis. 383, 80 N.W.2d 262 (1957).

[35] See generally Oppenheim, *The Survival of Tort Actions and the Action for Wrongful Death—A Survey and a Proposal*, 16 TUL. L. REV. 386 (1942); Note, *Wrongful Death Damages in Iowa*, 48 IOWA L. REV. 666 (1962) (this issue).

[36] PA. STAT. ANN. tit. 12, § 1601, provides:

> Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives may maintain an action for and recover damages for the death thus occasioned.

See also ILL. ANN. STAT. ch. 70, § 1; MICH. STAT. ANN. § 27.711 (Smith-Hurd 1959); N.Y. DECED. EST. LAW § 130; OHIO REV. CODE ANN. § 2125.01 (Page 1953); WIS. STAT. ANN. § 331.03 (1958).

[37] An Act for Compensating the Families of Persons Killed by Accident, 1846, 9 & 10 Vict. c. 93.

[38] In Durham v. Durham, 227 Miss. 76, 85 So. 2d 807 (1956), the court found nothing in MISS. CODE ANN. § 1453 (1942) expressing a legislative intent to abrogate the parent-child tort immunity doctrine. Therefore it held the doctrine applicable to deny a minor recovery from her father for the wrongful death of her mother. However, in Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. 1960), a father recovered from his wife's estate for negligent injuries caused their daughter. Since the Missouri statute, MO. ANN. STAT. § 537.030 (1953), expressly excluded certain types of actions from surviving, the court stated: "The fact that the act does not mention parent and child . . . is of significance." *Id.* at 72.

[39] See, *e.g.*, Perkins v. Robertson, 295 P.2d 972 (Cal. App. 1956) (minor against step-father for death of mother); Durham v. Durham, 227 Miss. 76, 85 So.2d 807 (1956) (minor against father for death of mother); Strong v. Strong, 70 Nev. 290, 267 P.2d 240 (1954) (minor against mother for death of father); Terwilliger v. Terwilliger, 106 N.Y.S.2d 481 (Sup. Ct. 1951) (deceased parent's administrator against minor).

In *Minkin v. Minkin*,[40] a 1939 decision, an eight-year-old boy recovered from his negligent mother for the wrongful death of his father and one year later, in *Oliveria v. Oliveria*,[41] a mother recovered for the death of her husband negligently caused by their nineteen-year-old son. Other Lord Campbell jurisdictions[42] have followed the results of these cases for two principal reasons. First, immunity under the doctrine is held to be personal to the parent or child and thus destroyed by the death of either.[43] Secondly, the statutory phrase which limits suits to those the deceased could have maintained is held to have reference to the cause of action and not the person by whom it could have been brought.[44] Purely as a matter of statutory construction this interpretation is sound. More importantly, it seems preferable from the standpoint of public policy.

Connecticut, Iowa, New Hampshire, and Tennessee, where the instant case was decided, comprise a small minority of jurisdictions which have pure survival statutes.[45] In contrast to Lord Campbell acts, these statutes, with some exceptions, generally do not purport to create a new cause of action for wrongful death, but rather attempt to preserve for the decedent's beneficiaries the exact cause of action the decedent had at the moment of his death. With the exception of Iowa, which has not decided the issue,[46] each of the above states recognizes the parent-child tort immunity doctrine in negligence actions.[47] Connecticut and New Hampshire additionally apply the doctrine to a wrongful death action between the parent or child and

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[40] 336 Pa. 49, 7 A.2d 461 (1939).

[41] 305 Mass. 297, 25 N.E.2d 766 (1940).

[42] See, *e.g.*, Harlan Nat'l Bank v. Gross, 346 S.W.2d 482 (Ky. 1961) (administrator of deceased child against parent); Palsey v. Tepper, 71 N.J. Super 294, 176 A.2d 818 (1962) (child against estate of deceased parent); Kaczorowski v. Kalkosinski, 321 Pa. 438, 184 Atl. 663 (1936); Lasecki v. Kabara, 235 Wis. 645, 294 N.W. 33 (1940) (child against deceased father's estate for wrongful death of mother). See Munsert v. Farmers Mut. Auto Ins. Co., 229 Wis. 581, N.W. 671 (1938) (mother against son for wrongful death of another son).

[43] The doctrine of intra-family immunity from such suits expires upon the death of the person protected and does not extend to the decedent's estate for the reason that death terminates the family relationship and there is no longer in existence a relationship within the reasonable contemplation of the doctrine. Although there may be immunity from suit between parent and child during life, the immunity does not extend to the personal representative of the deceased parent. The rationale of the rule of parental immunity has been extinguished by the death of the parent and neither logic nor justice persuades that it remain. Brennecke v. Kilpatrick, 336 S.W.2d 68, 73 (Mo. 1960) (child against estate of deceased parent).

[44] See, *e.g.*, Breed v. Atlanta B. & C. Ry., 241 Ala. 640, 4 So. 2d 315 (1941); Kaczorowski v. Kalkosinski, 321 Pa. 438, 184 Atl. 663 (1936).

[45] "All causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same." IOWA CODE § 611.20 (1962). See CONN. GEN. STAT. REV. § 52-553 (1958); N.H. REV. STAT. ANN. § 556:12 (1955); TENN. CODE ANN. § 20-607 (Supp. 1962).

[46] See 47 IOWA L. REV. 1159 (1962).

[47] See, *e.g.*, Shea v. Pettee, 19 Conn. Sup. 125, 110 A.2d 492 (1954); Levesque v. Levesque, 99 N.H. 147, 106 A.2d 563 (1954); Ownby v. Kleyhammer, 194 Tenn. 109, 250 S.W.2d 37 (1952).

the other's administrator.[48] Whether the Iowa court would recognize the parent-child immunity doctrine in this situation is unclear, but in view of the *Cody*[49] case, such a recognition appears to be doubtful.

In the instant case the family relationship between the parties was severed both by the emancipation of the minor defendant through her marriage and by the death of plaintiff's decedent. The court found either event sufficient to circumvent operation of the parent-child tort immunity rule, although defendant's marriage occurred subsequent to the time of injury. In each alternative the court's holding is a worthy inroad upon an antiquated doctrine.

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[48] Shaker v. Shaker, 129 Conn. 518, 29 A.2d 765 (1942) (parent's administratrix against child); Worrall v. Moran, 101 N.H. 26, 131 A.2d 438 (1957) (child against parent's administrator).

[49] See note 23 *supra* and accompanying text.