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Recent Case Comments

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RECENT CASE COMMENTS

AGENCY—"FAMILY PURPOSE DOCTRINE"—A comparatively recent and very popular means of transportation, the automobile, has given rise to the doctrine, involving the laws of agency, known as the "family purpose doctrine." The courts are at variance as to whether this is a new application of old principles, or a change in the interpretation of what constitutes a "father's business". In a recent case, *Ritter v. Hicks*,[1] there was an action by the plaintiff, administratrix of the deceased, against H. W. Hicks and his son I. R. for damages for the death of her husband. I. R. was driving, at the time of the accident, a car purchased for demonstration purposes in his fathers business. In the lower court damages were awarded against both defendants. On appeal the judgment was reversed and dismissed as to the father, and affirmed as to the son. The court held: the owner of an automobile purchased for demonstration and sale and not for family use is not responsible under the "family purpose doctrine" for a tort committed by his son while driving the automobile. Neither is he liable under the doctrine of *respondeat superior*, although the son was his agent in selling cars, when as in the instant case the car was used after business hours and for the son's pleasure.

Some courts hold the father is liable in such a case on the theory of *respondeat superior*,[2] there being a tendency to treat the children as servants, or as agents,[3] in carrying out the father's business. They hold that a parent makes it his affair by maintaining a family automobile for the use of the family. He owns the machine and has a right to say where, how, and by whom it might be used, and impliedly, if not expressly, authorizes its use (in the absence of an express prohibition) at the time when accidents occur.[4] "The

[1] (1926) W. Va. 135 S. E. 601.

[2] *Jones v. Cook* (1922) 90 W. Va. 710, 111 S. E. 828. Stepdaughter driving father's car. Owner held liable for injury caused to the plaintiff. The stepdaughter while so driving was acting in the furtherance of the owner's purpose, i.e. maintaining the car for the pleasure and comfort of his family. Decision not based on family or agency relationship.

[3] *Davis v. Littlefield* (1914) 97 S. C. 171, 81 S. E. 487. Plaintiff was injured by the negligent driving of the defendant's car by the defendant's son. The son habitually drove the car with his father's consent, and at the time of the accident was using it entirely for his own pleasure. Held that the defendant is liable on the principles of agency. The 'family purpose doctrine" obtains in Kentucky; see leading case of *Stowe v. Morris* (1912) 147 Ky. 386, 144 S. W. 52.

[4] *Robertson v. Aldridge* (1923) 185 N. C. 292, 116 S. E. 742.

doctrine of agency is not confined to merely commercial business transactions, but extends to cases where the father maintains an automobile for family use, with general authority, express or implied, that it may be used for the comfort, convenience, pleasure, and entertainment or outdoor recreation of members of the owner's family.[5]

In the case of *Thixton v. Palmer*[6] the plaintiff was struck by an automobile owned by the defendant for her use and that of her son. The son had taken the car, with the defendants permission, to go to the theatre. When the accident happened a friend of the son, who was neither related to the defendant nor had her permission to drive, was driving negligently. Held: defendant liable. The Kentucky court goes to the limit of this doctrine in the above case. The reason for such decision was that the defendant would be liable for the son's negligence and the son, being in control of the car, was negligent in allowing his friend to drive negligently.[7]

When the occupants of the car are members of the owners family it is competent for the jury to infer that there was at least an implied authority for such use.[8] Some courts hold that if only one occupant of the car is a member of the owners family the doctrine does not apply,[9] whereas it will apply if more than one are in the car. This argument seems fallacious as it is as much within the "general purpose of ownership that any member of the family should use it, and the agency is present in the use of it by one, as well as by all."[10]

The North Carolina Court has not accepted the "family purpose" doctrine, but rather bases its decisions strictly on the principles of agency, holding the parent liable for injuries caused by the negligent driving of his children only when it appears that the driver was acting within the authority, express or implied, of the owner.[11] And refusing to hold the parent liable where it appears that there was

[5] Keedy's *Cases on Agency,* p. 187; *Kayser v. Van Nest* (1914) 125 Minn. 277, 146 N. W. 1091, 51 L. R. A. (N. S.) 970; *Tyree v. Tudor* (1922) 183 N. C. 340, 111 S. E. 714; *Davis v. Littlefield, supra,* n. 3.

[6] *Thixton v. Palmer* (1925) 210 Ky. 838, 276 S. W. 971.

[7] *Moyle v. A. W. Scott Co.* (1919) 144 Minn. 173, 174 N. W. 832. The Minnesota court accepts the "family purpose" doctrine but will not extend the owner's liability so as to include a "favorite employee."

[8] *Denison v. McNorton* (1916) 228 Fed. 401.

[9] *Doran v. Thomsen* (1921) 300 Ill. 40, 132 N. E. 817.

[10] 1 Indiana Law Jour. 90.

[11] *Tyree v. Tudor, supra,* n. 5.

no authority or an express prohibition.[12] Any law changing such liability should come from legislative action and not by drastic decisions of the courts.

J. WIIG.

CONSTITUTIONAL LAW—FOREIGN COMMERCE—STATE LAW LICENSING SALE OF STEAMSHIP TICKETS—A Pennsylvania law required that no person, other than a railway or steamship company, should engage in the sale of steamship tickets or orders for transportation without first obtaining a license, the fee being $50 yearly, and filing a bond; the license to be revoked for fraud or misrepresentation; every application for license to be published, and applicant to give evidence of moral character and ability suitable for the business, and a list of at least three steamship companies for which he is acting.

Defendant was representing four steamship companies operating transatlantic steamers, and he was given certificates by them which he was required by law to keep posted. He received material—account books and ticket books, etc.—and his commission was 25% of the proceeds of sales.

Held, Justices Holmes, Brandeis and Stone dissenting, that this statute is a direct interference with foreign commerce and is unconstitutional.[1]

As the question whether a state regulation is an unlawful burden upon interstate or foreign commerce is the most difficult problem that arises under the commerce clause,[2] and the cases being too numerous to be summarized here, we will examine only the cases which the Court cites as being authority for the present holding.

Davis v. Farmers' Co-operative Co.[3] held that solicitation of traffic by railroads is a recognized part of interstate commerce. The

[12] *Linville v. Nissen* (1913) 162 N. C. 96, 77 N. E. 1096; 2 N. C. Law Rev. 178.

[1] *Di Santo v. Pennsylvania* (1927) 47 Sup. Ct. 267.

[2] Black's *Constitutional Law* (3rd ed.) p. 219; *Shafer v. Farmer's Grain Co.* (1925) 268 U. S. 189, 199, 45 Sup. Ct. 481, 69 L. Ed. 909.

[3] *Davis v. Farmers' Coöperative Co.* (1923) 262 U. S. 312, 315, 43 Sup. Ct. 556, 67 L. Ed. 996. A Minnesota statute provided that any foreign corporation having an agent in the state for purpose of soliciting traffic over its lines outside the state could be served with summons by leaving a copy thereof with the agent. This statute was construed by the state court as applying to cases where plaintiff is not and never has been a citizen of Minnesota. This was held unconstitutional as being a serious and unreasonable burden upon interstate commerce.

statute in the instant case, however, applied to persons "other than a railroad or steamship company."

Shafer v. Farmers' Grain Co.[4] held that state regulation of the buying of wheat for shipment outside the state was a direct interference with interstate commerce. But it might be noticed here that Congress had passed a law on the subject,[5] and the court found that the state law went further than the national law on the subject.[6] Hence the case is justified on the basis that the regulation was invalid because Congress had acted.

The court states that the present case is controlled by *Texas Transport Co. v. New Orleans*[7] and *McCall v. California.*[8] The former involved a revenue measure,[9] while the present case concerns a license fee, all of which was employed in regulating the business; in the case of *McCall v. California,* a license tax of $25 per quarter was imposed on railroad agents in California who solicited traffic over interstate railroads. But in the *McCall* case defendant was agent of a railroad, while the instant statute does not apply to railroad or steamship companies.

In *Real Silk Mills v. Portland*[10] a statute imposed a license tax of $12.50 quarterly upon agents on foot and $25 on agents with vehicles who went from place to place taking orders for future delivery, where a deposit or payment was required in advance. The dissenting opinion in the present case distinguishes it from the *Portland* case on the ground that in the latter the statute discriminated against interstate and foreign commerce. This point is difficult to

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[4] *Shafer v. Farmers' Grain Co., note* 2, above. Here a North Dakota statute, stating its purpose to be the prevention of frauds, prohibited buying of wheat by grade unless the buyer produced a state grading license, and, among other things, gave bond securing payment for all wheat so purchased and for complying with all state regulations. The state each year sent outside 125,000,000 bushels of wheat, or 90% of the total output. Held to be a direct interference with interstate commerce.

[5] U. S. Grain Standards Act (Comp. St. sec. 8747½—8747½k).

[6] *Shafer v. Farmers' Grain Co.* (1925) 268 U. S. 189, 202, 45 Sup. Ct. 481, 69 L. Ed. 909.

[7] *Texas Transport Co. v. New Orleans* (1924) 264 U. S. 150, 44 Sup. Ct. 242, 68 L. Ed. 611, 34 A. L. R. 907.

[8] *McCall v. California* (1890) 136 U. S. 104, 10 Sup. Ct. 881, 34 L. Ed. 391.

[9] The statute in *Texas Transport Co. v. New Orleans* imposed a license tax, graduated according to the amount of business done, on companies acting as agents for certain steamship companies exclusively engaged in interstate commerce.

[10] *Real Silk Mills v. Portland* (1925) 268 U. S. 325, 336, 45 Sup. Ct. 525, 69 L. Ed. 982.

see, as the statute in the *Portland* case evidently applied as well to intrastate as to interstate and foreign sellers of goods.

Mr. Justice Brandeis in his dissenting opinion in the *Di Santo* case, with which Mr. Justice Holmes concurs, says that the *McCall* case, *supra,* is distinguishable on its facts, and that if it is not so distinguishable it may be disregarded without encroaching upon the doctrine of *stare decisis,* that doctrine not requiring that the court make the same mistake twice when different statutes are being construed, and he urges the disregard of the *McCall* case.

It appears that all the cases which the court cites as sustaining its holding can be distinguished on their facts, although in some instances the line of demarcation is narrow. The multiplicity of cases on this subject have necessarily somewhat confused the application of the rules determining when a state law is an unlawful burden on interstate or foreign commerce.[11] For this reason each case must depend on its own facts in determining to which class it belongs.

Here the regulation was aimed at preventing fraud by those who sell tickets,[12] and did not apply to railroad and steamship lines. Since Congress has not acted on that particular subject, it seems that the court could have held the regulation valid without reversing any of its former decisions on the subject. Such regulations have been held valid by many of the state courts.[13]

S. E. VEST.

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[11] "The decisions of this court respecting the validity of state laws challenged under the commerce clause have established many rules covering various situations. Two of these rules are specially invoked here—one that a state statute enacted for admissible state purposes and which affects interstate commerce only incidentally and remotely is not a prohibited state regulation in the sense of that clause; and the other that a state statute which by its necessary operation directly interferes with or burdens such commerce is a prohibited regulation and invalid, regardless of the purpose with which it was enacted. These rules, although readily understood and entirely consistent, are occasionally difficult of application, as where a state statute closely approaches the line which separates one rule from the other. As might be expected, the decisions dealing with such exceptional situations have not been in full accord. Otherwise the course of adjudications has been consistent and uniform." *Shafer v. Farmers' Grain Co.* (1925) 268 U. S. 189, 199, 45 Sup. Ct. 481, 69 L. Ed. 909.

[12] See *Commonwealth v. Keary* (1901) 198 Pa. 500, 48 Atl. 472, for discussion of the evils perpetrated by ticket brokers and scalpers in Pennsylvania.

[13] *Commonwealth v. Keary* (1901) 198 Pa. 500, 48 Atl. 472; *Burdick v. People* (1894) 149 Ill. 600, 36 N. E. 948, 41 Am. St. Rep. 329, 24 L. R. A. 152; s. c. 149 Ill. 611, 36 N. E. 952; *Fry v. State* (1878) 63 Ind. 552, 30 Am. Rep. 238; *State v. Corbett* (1894) 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498.

CONSTITUTIONAL LAW—FOURTEENTH ADMENDMENT—LICENSE TO PRACTICE DENTISTRY—In a recent Minnesota case[1] the plaintiff was refused license to practice dentistry in that state because he was unable to produce a diploma from some dental college of good standing when he applied for license as required by statute.[2] He was convicted of practicing dentistry without license. The single question presented on appeal was whether the statute requiring an applicant to produce a diploma is constitutional. *Held,* that the statute was not unreasonable, arbitrary, discriminatory, nor violative of the due process clause or other provisions of the Fourteenth Amendment to the federal Constitution. The state, through the legislature, is primarily the judge of regulations required in the interest of safety and public welfare, and the validity of a police statute will be upheld so long as it is not unreasonable or arbitrary. Obviously the fact that an applicant has a diploma has a direct and substantial relation to his qualification to practice dentistry. The decision is in harmony with the holdings in other state courts involving the validity of statutes regulating the qualifications to practice professions which require a high degree of scientific learning.[3]

C. W. HALL.

CONSTITUTIONAL LAW—TAXATION—DISCRIMINATION AGAINST CITIZENS OF STATE—In the recent case of *Florida v. Mellon et al.* (1927) 47 S. Ct. 265, the state of Florida sought leave to file a bill of complaint against the defendants to enjoin the collection in Florida of inheritance taxes under the federal Revenue Act. The complaint alleged that under the Constitution of Florida no inheritance tax could be levied by the state; that according to this act of Congress[1] the estates of decedents which had been taxed by the states were given a graduated per centum credit up to 80%; that this was discrimination against Florida's citizens and detrimental to the state as tending to take money therefrom.

Held: that Florida could not maintain the action on the ground of injury to its citizens as *parens patriae,* for the citizens of Florida are

[1] *Graves v. State of Minnesota* (1926) 47 Sup. Ct. Rep. 122.

[2] Gen. Laws, 1889, c. 19, and amendments embodied in Gen. Stats. 1923, sects. 5757-5763.

[3] *In re Thompson* (1904) 36 Wash. 377, 78 Pac. 899; *State v. Green* (1887) 112 Ind. 462, 14 N. E. 352; *State v. Creditor* (1890) 44 Kan. 563, 24 Pac. 346; *People v. Phippin* (1888) 70 Mich. 6, 37 N. W. 888.

[1] Revenue Act of 1926, c. 27, 44 Stat. 9, 69, 70.

also citizens of the United States, and the laws of the United States made in pursuance of the Constitution are the supreme law of the land, the law of Florida to the contrary nothwithstanding;[2] nor could the state maintain the suit on the ground of discrimination against her, for the law is uniform in the sense that by its provisions the rule of liability shall be alike in all parts of the United States.[3]

GEO. ROUNTREE, JR.

CONTRACTS—LIABILITY OF INFANT FOR INDUCING CONTRACT BY MISREPRESENTING AGE—In *Meyers v. Hurley Motor Co.* (1926) 47 Sup. Ct. 277, the plaintiff, an infant, representing himself to be 24 years of age, purchased an automobile from defendant under a conditional sales contract. The plaintiff made payments amounting to $400, and then being in default, the defendant repossessed the car. The plaintiff now disaffirms the contract and sues to recover the $400 paid to defendant, who, in turn, sets up a counterclaim for $500, the amount necessary to repair the car and put it in the condition it was at the time of sale to the plaintiff. Hard and abusive usuage of the car by the plaintiff was alleged.

The case was certified to the Supreme Court upon the following questions: (1) Is the plaintiff, because of his misrepresentation, estopped from maintaining this action? (2) If not, may defendant set off the amount paid for repair of car, as an affirmative defense, or only so much as will equal plaintiff's claim.

The court answered the first question in the negative, holding that the doctrine of estoppel in pais does not apply to an infant. As to the second question, it was held that the defendant was entitled to its affirmative defense, it being, in effect, tortious conduct. But the defendant was not entitled to the excess of its claim over that of plaintiff, since relief was by way of recoupment, that is, "defendant's damage can be allowed only in abatement or diminution of plaintiff's claim, and that defendant cannot, *at least in that action,* recover any excess." The result is equitable. The infant is allowed the right to disaffirm his contracts, and, if he has not tortiously damaged the property, to receive back what he has paid. But the other party is protected to the extent of the damage done to the property by the

[2] *Ex parte Virginia,* 100 U. S. 339, 346; *Brown v. Walker,* 161 U. S. 591, 606; *Mass. v. Mellon,* 262 U. S. 447.

[3] Consti. Art. 1, s. 8, cl. 1.

tortious conduct of the infant. The North Carolina decisions on this subject have been discussed in 3 N. C. L. Rev. 110-127.

W. H. ABERNATHY.

CRIMINAL LAW—FRAUDULENT USE OF MAILS—The case of *Fasulo v. United States* (1926) 47 S. Ct. Rep. 200, decides that the use of the mails for the purpose of obtaining money by means of threats of murder and bodily harm is not an offense embraced by section 215 of the Criminal Code [35 Stat. 1088, 1130 (Comp. St. sec. 10385)] making it criminal to use the mails for transmitting any "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises." The court disagreed with the government's contention that the statute embraces the using of the mails to obtain money by any dishonest means: "Broad as are the words 'to defraud', they do not include threat and coercion through fear or force."

The holding is based on the strict construction of penal statutes, and the common usage and ordinary meaning of language.

S. E. VEST.

CRIMINAL LAW—INSANITY—PRIOR INSANITY AS A DEFENSE—In the recent case of *State v. Jones*,[1] the defendant was found guilty of murder in the firse degree and appealed, alleging as error the refusal of the court to instruct the jury that as the defendant was declared insane by the state prison physician of Connecticut three or four years previously, such insanity was presumed to continue, and the burden was on the state to prove the defendant's sanity at the time of the homicide by the preponderance of the evidence. The conviction was sustained there being no error.

Insanity, when pleaded as a defense in a criminal action, is an affirmative plea and must be proved by the defendant to the satisfaction of the jury.[2] The declaration of the state prison physician is not sufficient to raise a presumption that the defendant was insane, and rid him of the burden of its proof.

In view of the prevalent practice of those who are being tried for violations of the criminal law to claim insanity in an effort to

[1] *State v. Jones* (1926) 191 N. C. 753, 133 S. E. 81.

[2] *State v. Terry* (1917) 173 N. C. 761, 92 S. E. 154; *State v. Spivey* (1903) 132 N. C. 898, 43 S. E. 475; *State v. Payne* (1882) 86 N. C. 609.

escape the consequence of their acts, the Supreme Court seems to have acted wisely in refusing to accept a rule making it easier for the defendant to set up insanity as a defense. The purpose of the trial, when insanity is raised, is to determine the defendant's mental condition at the time of the commission of the crime. Consequently his previous condition should be permitted only as evidence.[3]

The case of *State v. Vann*[4] laid down the rule that though the prosecution conceded the insanity of the defendant a short time prior to the homicide, they contended that the defendant was sane at the time of the homicide, and that if the defendant was to avail himself of insanity the burden was on him to prove it to the satisfaction of the jury. This case is approved and followed by subsequent North Carolina cases.[5] The rule is followed in other jurisdictions also.[6] There are some jurisdictions which hold that if any reasonable doubt is raised as to the defendant's sanity he should not be convicted.[7] This rule does not seem to be desirable and is not followed in North Carolina, for in the case of *State v. Hancock*,[8] the defendant was found guilty of murder, but the jury said there was some doubt as to his sanity and asked for mercy; yet, the conviction was sustained.

In the principal case the defendant's insanity was described as "dementia praecox of the paranoid type" by Dr. Anderson, of the state prison at Raleigh. But, as Judge Connor said in the opinion, "The physician looks after the individual's interest, and his duty is to protect the individual and others by his isolation and confinement only; the courts, however, are required to act upon the philosophy underlying the right and duty of the state to punish offenders against the laws, and thus not only undertake the reformation of the offender but also to endeavor to deter others from the commission of crime by fear of like punishment." The defendant's sanity was

[3] *State v. Cooper* (1915) 170 N. C. 719, 87 S. E. 50; *Pflueger v. State* (1895) 64 N. W. 1094, 46 Neb. 493; *Cochran v. State* (1913) 61 So. 187, 65 Fla. 91.

[4] *State v. Vann* (1880) 82 N. C. 631.

[5] *State v. Terry* and *State v. Spivey*, see n. 2 *supra; State v. Cooper* n. 3 *supra.*

[6] *Wheeler v. State* (1878) 34 Ohio St. 394, 32 Am. St. Rep. 372; *People v. Schmitt* (1895) 106 Cal. 48, 39 Pac. 204; *State v. Quigley* (1904) 26 R. I. 263, 58 Atl. 905, 3 Ann. Cas. 920.

[7] *Matheson v. U. S.* (1913) 227 U. S. 540; *Davis v. U. S.* (1895) 160 U. S 469; *Adair v. State* (1911) 6 Okla. Crim. Rep. 284, 118 Pac. 416, 44 L. R. A (N. S.) 119.

[8] *State v. Hancock* (1908) 151 N. C. 699, 66 S. E. 137.

sufficient to obtain his release from the Insane Asylum of Connecticut, and at most his confinement to the asylum could be considered by the jury only along with other evidence of insanity.[9]

M. P. MYERS.

CRIMINAL PROCEDURE—TRIAL—WAIVER OF RIGHT TO BE PRESENT—It seems there is no uniform rule which governs the various jurisdictions in determining when a person accused of crime may waive the right to be present throughout the trial. In the recent Georgia case of *Swain v. State*,[1] the defendant was on trial for murder, and after all the evidence had been taken, the prosecuting attorney made a request joined in by the defendant's counsel that the jury be taken to the scene of the murder to see the circumstances under which it was committed. The defendant was present and raised no objection. Two officers were appointed by the court to escort the jury, and they viewed the scene unaccompanied by the defendant, his counsel, or the judge. After a verdict of first degree murder the defendant appealed on the ground that his constitutional rights had been violated. *Held,* that the defendant waived his right to be with the jury at the scene of the crime.

In a recent North Carolina case[2] on the same subject the defendant was on trial for first degree murder and after all the evidence had been taken and the jury had retired for deliberation the judge's attention was called to an error in the charge; he thereupon asked the defendant and his counsel to accompany him to the jury room to give the correct charge. They assured him that it was all right for him to go alone. He stepped to the door of the jury room and gave the correct charge. A verdict of second degree murder was rendered and the defendant appealed on the ground that he was entitled to a new trial because he could not waive his right to be present throughout the trial of a capital case. The court said that if there was any error committed it was cured by the verdict of second degree murder (not capital).

The Georgia case is in line with previous decisions of that jurisdiction, which hold that the right to be present during the trial is for the defendant's benefit, and he can waive this right even in capital

[9] Wigmore's Evid., section 233.

[1] *Swain v. State* (1926) Ga., 135 S. E. 187.

[2] *State v. Hardee* (1926), 192 N. C. 533, 135 S. E. 345.

cases.[3] The waiver may be made expressly by defendant, or by his counsel in his presence, the defendant raising no objections, or where he voluntarily absents himself during the trial. This right cannot be waived by counsel alone. And the court is very careful to see that the defendant's right to be present is not violated by proceeding in his absence without his consent.[4]

There is some authority to the effect that the inspection by the jury of the scene of the crime is not within itself a part of the trial when there are no witnesses, parties to the suit, or judge with them.[5] This seems to be very logical and desirable, for the evidence is brought out at the trial, and the purpose of the inspection is not to get more evidence but merely to enable the jury to understand the evidence they have. But in the case of *Chance v. State*,[6] the court reversed a verdict of guilty of a capital felony on the ground that the defendant's right to be present was violated when the jury was taken to the scene of the crime for inspection without the defendant's consent.

If the principal Georgia case had been decided in North Carolina a new trial would have been given, for in North Carolina the rule is that in trial for a capital felony a defendant cannot waive his right to be present at every stage of the trail.[7] But as to felonies less than capital the North Carolina rule is the same as the Georgia rule, and in view of this fact the decision of the principal North Carolina case is correct.[8] The defendant would have been entitled to a new trial had he been found guilty of first degree murder, but there was no violation of his rights when the verdict was for second degree murder (not a capital case), and he had waived his right to be present.

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[3] *Cawthon v. State* (1904) 119 Ga. 395, 46 S. E. 897; *Baldwin v. State* (1912) 138 Ga. 349, 75 S. E. 324; *Frank v. State* (1914) 142 Ga. 741, 645.

[4] *Lyons v. State* (1909) 7 Ga. App. 50, 66 S. E., 149; *Vanderford v. State* (1906) 126 Ga. 753, 55 S. E. 1025; *Denson v. State* (1923) 150 Ga. 618, 104 S. E. 780; *Mills v. State* (1918) 23 Ga. App. 14, 97 S. E. 408.

[5] *People v. Thorn* (1898) 156 N. Y. 285, 50 N. E. 947, 42 L. R. A. 368; *State v. Sing* (1924) 114 Ore. 267, 229 Pac.. 921.

[6] *Chance v. State* (1923) 156 Ga. 428, 119 E. E. 303.

[7] *State v. Blackwelder* (1866) 61 N. C. 39; *State v. Jenkins* (1881) 84 N. C. 814; *State v. Dry* (1910) 152 N. C. 813, 67 S. E. 1000.

[8] *State v. Bray* (1872) 67 N. C. 283; *State v. Kelly* (1887) 97 N. C. 404, 2 S. E. 185; *State v. Austin* (1891) 108 N. C. 786, 13 S. E. 219; *State v. Mitchell* (1896) 119 N. C. 784, 25 S. E. 783; *State v. Harstfield* (1924) 188 N. C. 357, 124 S. E. 629.

The prevailing rule is that a defendant has the right to be present at the trial of any felony,[9] but the authorities are not uniform as to the power of the defendant to waive this right. Some jurisdictions hold that a defendant must be present at every stage of a capital felony,[10] and he cannot waive his presence; others hold that the same rule applies to all felonies;[11] while the majority hold that in trials of felonies less than capital the defendant may waive any right he has to be present.[12]

There seems to be little reason why a defendant should not be able to waive his right to be present during the trial of a capital felony. Perhaps the rule is based on custom and policy at a time when a person accused of crime stood in need of every protection. Today, when defendants are surrounded by so many safeguards, it seems reasonable to allow a defendant to waive his presence at a trial under proper supervision of the court.

M. P. MYERS.

DAMAGES—ACTION FOR WRONGFUL DEATH—EXCESSIVE VERDICT—Action was brought by the wife of deceased under section 8069, Barnes' Federal Code, 35 Stat. 65 (U. S. Comp. Stat. 8657), for the benefit of herself and their two children, aged five and two respectively, for the wrongful death and the pain and suffering of her husband. The deceased was an engineer on defendant's train, aged 42, in good health, and, within three year period prior to his death, had earned $450 per month, two-thirds of which he had devoted to maintenance of his wife and children. Deceased suffered intense pain for fifteen days and was conscious to the very end. The jury awarded a verdict and judgment was entered for the plaintiff for $53,750. *Held,* not excessive. *Looney v. Norfolk & Western Ry. Co.,* 135 S. E. 262 (W. Va.-1926).

According to the Carlisle Mortality Tables, Looney's life expectancy was 26 years. The average earnings of the deceased during the last three years were $4500, two-thirds of which would be $3,000,

[9] 8 R. C. L., p. 94, par. 53.

[10] *Sherrod v. State* (1908) 93 Miss. 774, 47 So. 554; *Holton v. State* (1849) 2 Fla. 500; *Scott v. State* (1925) 113 Neb. 657, 204 N. W. 381; *State v. Reed* (1922) 65 Mont. 51, 210 Pac. 756.

[11] *Summeralls v. State* (1896) 37 Fla. 162, 20 So. 242, 53 A. S. R. 247; *State v. McCausland* (1918) 82 W. Va. 525, 96 S. E. 934; *Noell v. Commonwealth* (1923) 135 Va. 600, 115 S. E. 679.

[12] 16 C. J. 817.

which was devoted to the support of his wife and children. The investment required to provide an annuity of $3,000 at 4% for 26 years would be $47,948.40. The award of the jury for pain and suffering therefore was only $5,801.60. It was on this basis that the jury fixed the damages. The court says that in absence of any record that the verdict was affected by bias, prejudice, partiality on the part of the jury, or was based on some wrong theory or in violation of some rule of law, it is the duty of the appellate court not to invade the province of the jury in their right to fix the amount of damages.

C. R. JONAS.

EVIDENCE—CONSTITUTIONAL LAW—TRESPASS AB INITIO WHERE LIQUOR WRONGFULLY DESTROYED—ADMISSIBILITY OF PART OF LIQUOR IN EVIDENCE—Federal officers under a search warrant entered the premises of the appellant, seized a quantity of liquor and, without a court order, destroyed all except one quart which was saved for evidence. The whiskey was admitted in evidence over the objection of the appellant that, by reason of the unwarranted destruction, the officers were trespassers *ab initio,* and that, therefore, the seizure was unlawful under the fourth amendment to the United States Constitution and its admission in evidence prohibited by the fifth. *Held,* the whiskey was properly admitted in evidence. *McGuire v. United States* (1927) 47 S. Ct. 259.

In 1885 the United States Supreme Court swerved from the established precedents of a century, to the effect that evidence otherwise admissible is not rendered inadmissible because it was unlawfully obtained,[1] and declared in the *Boyd* case[2] that as a consequence of the fourth amendment, evidence obtained by an unwarranted search was inadmissible at the trial.[3] The same court in the *Adams* case,[4] decided in 1904, changed its opinion and admitted in evidence documents seized by officers nothwithstanding the rights of the prop-

[1] *Bishop Atterbury's Trial* (1723) 16 How. St. Tr. 495; *Legatt v. Tollervey* (1811) 14 East 302; *Chastening v. State* (1887) 83 Ala. 29, 3 So. 304; *Commonwealth v. Dana* (Mass.) 2 Metc. 329; *Scott v. State* (1897) 113 Ala. 64, 21 So. 425; *Williams v. State* (1897) 11 Ga. 511, 28 S. E. 624; *Gindrat v. The People* (1891) 138 Ill. 103, 27 N. E. 1085; *State v. Atkinson* (1893) 40 S. C. 363, 18 S. E. 1021.

[2] *Boyd v. United States* (1885) 116 U. S. 616.

[3] *Supra,* n. 2.

[4] *Adams v. New York* (1904) 192 U. S. 585.

erty holder had been invaded and the search conducted without a warrant.[5] Ten years later in the *Weeks* case[6] the court squarely repudiated that position, harking back to the *Boyd* case,[7] and held that such evidence will be excluded; with the qualification, however, that the defendant must move the court to exclude the same and return to him before the trial or at the first opportunity after the movant gets notice of the illegal seizure.[8] But the provision of the fourth amendment against unreasonable searches and seizures refers only to governmental action, and evidence, though illegally secured by private individuals, or even by state officers,[9] and turned over to the government prosecutor, in the absence of collusion between them, will be admitted.[10] Does the decision of the instant case indicate that the Federal Supreme Court is inclining again to the position it assumed prior to the *Boyd* case[11] and preparing to "switch back" to the *Adams*[12] position? The actual decision clearly does not go that far,[13] but the dictum of Mr. Justice Stone, who wrote the opinion in the case, would lead one to suppose so. He said: "A criminal prosecution is more than a game in which the government may be checkmated and the game lost merely because its officers have not played according to the rules."

The weight of state authority is to the effect that property obtained by an unwarranted seizure is nevertheless admissible.[14] This view was espoused by Greenleaf[15] and has been warmly defended by Wigmore, who maintains very forcibly that admissibility of evidence should be determined by its inherent probative value, and without

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[5] *Supra*, n. 4.

[6] *Weeks v. United States* (1914) 232 U. S. 383.

[7] *Supra*, n. 2.

[8] *Silverthorne Lumber Co. v. United States* (1920) 251 U. S. 385; *Gouled v. United States* (1921) 255 U. S. 298.

[9] *Crawford v. United States* (1925) 5 Fed. (2nd) 672; *Klein v. United States* (1926) 14 Fed. (2nd) 35.

[10] *Burdeau v. McDowell* (1921) 256 U. S. 465.

[11] *Supra*, n. 2.

[12] *Supra*, n. 4.

[13] Since the entry and the seizure of the liquor produced did not violate the constitutional provisions, but the only unlawful act was the extraneous act of destruction.

[14] *Hall v. Commonwealth* (Va.-1924) 121 S. E. 154; *Commonwealth v. Wilkins* (Mass.-1923) 138 N. E. 13; *People v. Mayen* (Cal.-1922) 205 Pac. 437; *Shields v. State* (Ala.-1894) 16 So. 85; *Williams v. State* (Ga.-1897) 28 S. E. 627; *State v. Prescott* (S. C.-1923) 117 S. E. 637.

[15] 1 Greenleaf, *Evidence*, sec. 254 A.

regard to the collateral issue, how obtained.[16] The favored reasoning of the state courts which adhere to this view is that as the unreasonable search and seizure, which is forbidden by the constitution, is already consummated before the evidence is offered at the trial, the two actions are separate and distinct. The constitutional guarantee of a man to be secure in his person and home is already invaded before the evidence is offered, and there must be a remedy for that invasion whether the invader returns the property, destroys it, sells it, or uses it in evidence in the trial of an action against the invadee. To exclude the evidence is no remedy for the act complained of. The logical and proper remedy would seem to be an action against the invading officer. In that view of the situation, the person whose home has been broken into and whose property has been summarily seized, is left to his civil remedy against the officer. This is obviously an inadequate remedy which virtually renders the constitutional guarantee nugatory, say the courts which exclude the evidence.[17]

North Carolina is universally cited as following the majority view, and that is the apparent line of decision in the decided cases.[18] Our cases, however, place great reliance upon the Adams case,[19] notwithstanding the doctrine in that case has been virtually repudiated.[20] Probably it is safe to say, from the paucity of decisions and this dependance upon the Adams case, that the future course of the North Carolina decisions on this point is not determined.

C. R. JONAS.

FEDERAL COURTS — JURISDICTION — REINCORPORATION IN ANOTHER STATE TO OBTAIN DIVERSITY OF CITIZENSHIP—In a recent case, the plaintiff was a Tennessee corporation authorized to carry on a general transfer business, not only in Tennessee, but in other states. The plaintiff had previously been a Kentucky corporation, and, while carrying on its general transfer business there, contracted with the

[16] 4 Wigmore, *Evidence*, sec. 2183-84.

[17] 25 Col. Law Review 11; *Young v. Commonwealth* (Ky.-1920) 224 S. W. 860; *Tucker v. State* (Miss.-1922) 90 So. 845; *State v. Willis* (W. Va.-1922) 114 S. E. 261; *Hughes v. State* (Tenn.-1922) 238 S. W. 588.

[18] *State v. Wallace* (1913) 162 N. C. 622, 78 S. E. 1; *State v. Fowler* (1916) 172 N. C. 905, 90 S. E. 408; *State v. Simmons* (1922) 183 N. C. 684, 110 S. E. 591.

[19] *Supra*, n. 4.

[20] *Weeks v. United States* (1914) 232 U. S. 383.

L. & N. Railroad Company for the exclusive privilege, "in so far as the railroad company can legally grant it", of soliciting the hauling of baggage and passengers in and around the railway terminal, with the further privilege of having an agent in the waiting room and a designated parking space. The defendant carried on a general transfer business in competition with plaintiff, refused to recognize the plaintiff's exclusive contract and violated the same. The railroad company did nothing to prevent such violation.

The defendant was justified in its conduct under the law of Kentucky, as set out in the decision of the state courts, that a common carrier cannot grant to any one person the exclusive privilege of hauling passengers and baggage from its stations.[1] On the other hand, the federal courts follow a different rule, that, when the contract is not unnecessary, unreasonable or arbitrary, a railroad may grant such exclusive privileges, in the absence of valid state legislation prohibiting the same. In the federal court view, such an exclusive arrangement is not a monopoly nor an improper use by the railroad company of its property.[2]

Upon the violation of its exclusive contract by the defendant, the Kentucky corporation was dissolved according to law and reincorporated in Tennessee with the same name, incorporators and stockholders. The property of the Kentucky corporation was turned over to the Tennessee corporation, which, however, had no property in Tennesee and did no business there.

Having perfected its incorporation in Tennessee, the plaintiff filed its bill in this case, alleging a diversity of citizenship and conceding that its acts of dissolving and reincorporating in another state were "for protection in this or any controversy that might arise out of this contract or any other." Defendant's motion to dismiss, for the reason that the contract was void under Kentucky law and that the plaintiff's conduct (dissolving in Kentucky and reincorporating in Tennessee) for the purpose of bringing suit in the federal courts was fraudulent, was overruled, and the plaintiff was successful in both the district court and the Circuit Court of Appeals. *Black and White Taxi Co. v. Brown and Yellow Taxi Co.* (1926) 15 Fed. (2d.) 509.

[1] *McConnell v. Pedigo* (1892) 92 Ky. 465, 18 S. W. 15; *Palmer Transfer Co. v. Anderson* (1909) 131 Ky. 217, 115 S. W. 182; *Commonwealth v. Louisville Transfer Co.* (1918) 181 Ky. 305, 204 S. W. 92.

[2] *Donovan v. Pennsylvania Co.* (1905) 199 U. S. 279, 295 *et seq.*, 26 S. Ct. 91, 50 L. Ed. 192.

The fact that the state court follows one rule on a point of general or commercial law does not prevent a federal court from adhering to another. Both state and federal courts sitting in Kentucky are courts of that jurisdiction and administer Kentucky law. It happens that they have different appellate tribunals. So each court is entitled to say what the law of its jurisdiction (Kentucky) is.[3] The federal courts consider principles of the common law and find that such a contract as that involved in this case is perfectly valid. The state courts reach the opposite conclusion. Aside from the argument of convenience, such a result seems to be satisfactory. And, where in addition, the point has been previously ruled upon by one of the national courts, as in this case, the federal courts will follow that ruling.[4] Therefore, though the contract would have been held void by the state courts in Kentucky, when the federal court gained jurisdiction, it recognized the rights of the plaintiff under the contract and gave relief accordingly.

Clearly, the suit involves a substantial controversy. The fact that the plaintiff preferred to bring his litigation in the federal courts instead of in the state courts is not wrongful so long as no improper act was done by which the jurisdiction of the federal court was obtained.[5] The motive does not affect the right to sue if there is a diversity of citizenship and if the conveyance to the corporation is a real transaction as distinguished from a fictitious one.[6] The decisive question, according to the court, is whether the Tennessee corporation is real or fictitious, so that it may or may not be dealt with as a citizen of Tennessee. The reality of the corporation does not not depend on the motive which occasioned it.[7] In this case, the conduct of the plaintiff's business was to be continued as a Tennessee corporation, according to the stated intention of one of the incorporators. In the absence of such a statement, dissolution of a corporation being equivalent to death of a natural person,[8] the dissolu-

[3] *Swift v. Tyson* (1842) 16 Pet. 1, 10 L. Ed. 65; *Community Building Co. v. Maryland Casualty Co.* (1925) 8 Fed. (2d) 678.

[4] *In re Jarmulouskey* (1918) 249 Fed. 319, 161 C. C. A. 327; *Railroad Co. v. National Bank* (1880) 102 U. S. 14, 26 L. Ed. 61 reaffirming *Swift v. Tyson*, note 3 *supra*.

[5] *In re Metropolitan Ry. Receivership* (1908) 208 U. S. 90, 111, 28 S. Ct. 219, 225, 52 L. Ed. 403.

[6] *Lehigh Mining etc. Co. v. Kelly* (1895) 160 U. S. 327, 332, 333, 16 S. Ct. 307, 40 L. Ed. 444.

[7] *Barney v. Baltimore* (1867) 6 Wall. 280, 18 L. Ed. 225; *Lehigh Mining etc. Co. v. Kelly*, note 6 *supra*.

[8] *Imperial Film Exch. v. General Film Co.* (1915) 244 Fed. 985.

tion in Kentucky is prima facie evidence of the intention to continue to conduct the business as a Tennessee corporation. After dissolution, the corporation is not capable of being sued or of suing in the corporate name.[9] Neither is there any corporation left in Kentucky to which to compel a reconveyance of the corporate property after the suit has been successfully prosecuted by the Tennessee corporation, as in *Lehigh Mining Co. v. Kelly*.[10] In that case, the stockholders of a Virginia corporation caused the incorporation of another corporation in Pennsylvania and conveyed land to it for purpose of having litigation concerning the land brought in the federal courts. The suit was not allowed, as the Virginia corporation had not been dissolved. The property of the corporation, including rights on contracts and choses in action, upon dissolution became vested in the stockholders, subject to the rights of creditors of the corporation.[11] When these assets were sold to the Tennessee corporation, the latter became owner of the right of action on the contract in controversy and could alone bring suit thereon.[12] The recognition of the Tennessee corporation as an entity does not allow the perpetration of fraud or the accomplishment of an unlawful act, and therefore, the case seems correctly decided.

W. H. ABERNATHY.

JUDGMENTS—SETTING JUDGMENT ASIDE FOR EXCUSABLE NEGLECT—In the recent North Carolina case of *Helderman v. Mills Co.*[1] the cause of action originally arose out of an alleged breach of contract. Summons was duly served on the defendant, and a complaint filed against him. Neither demurrer nor answer was filed within the time allowed by statute[2] and defendant made no request for an extension of time within which to file an answer. On October 26, 1925, upon motion by plaintiffs, judgment was rendered against the defendant by default. On December 14, 1925, defendant appeared for the first time and moved that the judgment be set

[9] *Sharp v. Eagle Lake Lumber Co. et al.* (1923) 60 Cal. App. 386, 212 Pac. 933; *Platz v. International Smelting Co.* (1923) 61 Utah 342, 213 Pac. 187.

[10] Note 6 *supra.*

[11] *Smyth v. Kenwood Land Co.* (1920) 97 Ore. 19, 190 Pac. 962; 3 Cook, *Corporations,* par. 641.

[12] *Baker-Matthews Mfg. Co. v. Grayling Lumber Co.* (1918) 134 Ark. 351, 203 S. W. 1021.

[1] *Helderman v. Mills Co.* (1926) 192 N. C. 626, 135 S. E. 627.

[2] C. S. 476.

aside, and that he be given time within which to file an answer, assigning as grounds for the motion, *inter alia,* that defendant's failure to answer within the time prescribed by law was due to its excusable neglect, and that defendant has a meritorious defense both in law and in fact. The clerk's order allowing the motion was affirmed by the Superior Court judge, and upon appeal to the Supreme Court the judgment was affirmed. It was found as a fact that by the terms of the contract, plaintiffs were not to ship certain articles which defendant had bought until defendant requested it; that plaintiffs shipped the articles without any request from defenant and defendant declined to accept them; further that, upon service of summons, defendant immediately retained an attorney well known for his high character and professional standing to defend the action, and authorized him to employ a local lawyer to assist in the defense; that the attorney not being well himself and being greatly distressed by the continued illness of his only son failed to employ a local attorney or to take any steps toward defending the action. The court held that defendant had a right to assume that the attorney would advise it when and what action was required for making its defense and hence its neglect was excusable.

By statute a judge shall "upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict, or other proceeding taken against him through his mistake, inadvertance, surprise, or excusable neglect. . . .[3] It was under this statute that the defendant in the instant case was given relief. This statute is highly remedial and is in harmony with the policy of the code states in looking at the substance and merits of the case rather than allowing a miscarriage of justice because of a mere lack of form or other technicality. Many other states have similar statutes.[4]

Did this statute excuse the defendant for its delay in the principal case? It must not only appear that defendant's neglect was excusable but also that it had a meritorious defense,[5] and the burden of showing these is on the applicant for relief.[6] The facts

[3] C. S. 600.

[4] Cal. Code Civ. Pro., sec. 473; Col. Rev. Code, sec. 81; S. C. Code Civ. Pro. 1912. sec. 225.

[5] *Land Co. v. Wooten* (1919) 177 N. C. 248, 98 S. E. 706; *White v. White* (1920) 179 N. C. 592, 103 S. E. 216; *Lumber Co. v. Cottingham* (1917) 173 N. C. 323, 92 S. E. 9.

[6] *Garner v. Quakenbush* (1924) 188 N. C. 180, 124 S. E. 154.

as found by the Superior Court judge are conclusive and are not reviewable,[7] but whether the facts found make a case of excusable neglect is a question of law and is reviewable.[8] It seems clear that the defendant in the instant case has prima facie a meritorious defense. If defendant was bound to make a request for shipment of the articles bought of plaintiffs within a reasonable time, and plaintiffs shipped without request before a reasonable time had elapsed then plaintiffs could not recover. Only a *prima facie* meritorious defense is required to be shown.[9] As to whether defendant's neglect is excusable the test is whether he acted as a man of ordinary prudence,[10] i.e., would a man of ordinary prudence assume that his attorney, who is known for his high character and professional standing, would advise him when and what action was required of him for making his defense?

Obviously the relationship of attorney and client is more than a mere principal and agent relationship. It is a relation of specific trust and confidence, and it is the duty of the attorney to be faithful to the interests of his client.[11] Usually the client knows little or nothing about procedure. The attorney does not act under the direction of his client, but having been given authority he acts according to his own knowledge and judgment as an officer of the court. Hence it seems to be well settled that the negligence of an attorney is not imputable to the client where the attorney is acting within his professional capacity and where the client himself has exercised ordinary care.[12] However, the mere employment of an attorney does not excuse a party from giving the suit his personal attention.[13]

It has been held that the neglect was not excusable where the defendants changed their address and did not receive the answer which their counsel sent them until eleven months after it was mailed,[14] where defendants were old and feeble and forgot about

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[7] *Lumber Co. v. Blue* (1915) 170 N. C. 1, 86 S. E. 724.
[8] *Bank v. Brock* (1917) 174 N. C. 547, 94 S. E. 301.
[9] *Gallins v. Ins. Co.* (1917) 174 N. C. 553, 94 S. E. 300; *Duffer v. Brunson* (1924) 188 N. C. 789, 125 S. E. 619.
[10] *Lumber Co. v. Lumber Co.* (1916) 172 N. C. 320, 92 S. E. 41.
[11] *Arrington v. Arrington* (1895) 116 N. C. 170, 21 S. E. 181.
[12] *Gaylord v. Berry* (1915) 169 N. C. 733, 86 S. E. 623; *Lumber Co. v. Parsons* (1916) 172 N. C. 320, 90 S. E. 241; *Holland v. Benevolent Asso.* (1918) 176 N. C. 86, 97 S. E. 150; *Stallings v. Spruill* (1918) 176 N. C. 120, 96 S. E. 890.
[13] *Pepper v. Clegg* (1903) 132 N. C. 312, 43 S. E. 906; also note 10 *supra*.
[14] *Vick v. Baker* (1898) 122 N. C. 98, 29 S. E. 64.

the service of summons,[15] where there was mere forgetfulness due to one giving his attention to more important matters,[16] where the client (a physician) knew that his attorney was ill and under his care when court convened,[17] and where the mistake was one of law rather than of fact.[18] But in the instant case where the defendant knew nothing about its attorney's handicaps and knew that the attorney was a man of high character and well known for his professional integrity, it cannot be said that it did not act as a reasonably prudent person in assuming that the attorney would advise it when and what steps to take in making its defense.

It was not necessary to decide in the instant case whether the attorney's neglect was excusable or whether he breached a duty which he owed to the client. To say that the attorney did not, under the circumstances, act as a reasonably prudent man would be a very doubtful assertion.

C. W. HALL.

TAXATION—FILING FALSE INCOME TAX RETURN—PROFITS FROM BOOTLEGGING AS INCOME—In *Steinberg v. U. S.* (1926) 14 Fed. (2d) 564, the defendant was indicted, tried and convicted on two counts charging that he filed a false and fraudulent income tax return[1] for the calendar year 1921, and that he committed perjury in swearing to the same return.[2] The evidence showed that his wrongdoing consisted in having obtained profits from the sale of liquor in violation of the National Prohibition Act, and then returning as his sole income his salary of $10,000 as an officer of a corpora-

[15] *Pierce v. Eller* (1914) 167 N. C. 672, 83 S. E. 758.

[16] Note 7, *supra.*

[17] *Holland v. Benevolent Asso.* (1918) 176 N. C. 86, 97 S. E. 150.

[18] *Lerch v. McKinne* (1924) 187 N. C. 419, 122 S. E. 9.

[1] Comp. St. Ann. Supp. 1923, s. 6336 1/8 v.: Any individual . . . who wilfully refuses . . . to make such return . . . or who wilfully attempts in any manner to defeat or evade the tax imposed . . . shall be guilty of a misdemeanor and shall be fined not more than $10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution.

[2] Comp. St. Ann. Supp. 1923, s. 6336 1/8 kk: Individuals "shall each make under oath a return stating specifically the items of his gross income and the deductions and credits allowed."

Crim. Cod, s. 125: Whoever, having taken an oath . . . in any case in which a law of the United States authorizes an oath to be administered, . . . that any . . . declaration, deposition, or certificate by him subscribed is true, shall wilfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury.

Sec. 335, Comp. St. s. 10509: This offense is a felony.

tion. In fact, his net income was $760,635.43. However, the judgment was reversed because certain evidence was erroneously admitted.

But as to the first count, the court, speaking through Hough, Circuit Judge, said:

"That the winnings of a professional gambler, the loot of a burglar, the bribes of a dishonest official, the wages of a prostitute, or the profits of any criminal commerce should not be regarded as income, but should for reasons of public policy be regarded as beneath the contempt of the law, is a proposition not without attraction.

"It is true that a distinction may be drawn between the profits of an embezzlement, a robbery, and a burglary, and those of sales of liquor, or plumes of birds of paradise, both of which are at present under rather similar bans; but there remains a long list of unlawful and profitable occupations in which the proprietor has that legal title to his illegal profits which the thief has not. . . ."

The judge then says that if Congress can extend the phrase "intoxicating liquors" so as to cover beverages confessedly not intoxicating, "it can assuredly extend the meaning of the word 'income' to cover items beyond the definition of any dictionary. . . . This has been done.[3] . . . We have no doubt that Congress meant to levy a contribution upon every species of gain, no matter how immoral or vicious the method of acquiring the same might be."

The court proceeds: "The whole matter is covered by one remark of Holmes, J., in *U. S. v. Stafoff*, 260 U. S. 477: *'Of course* Congress may tax what it also forbids.' . . . And equally it is of course, that, if the Legislature can tax the liquor which it forbids, it may also tax the gains made by dealing in that which is forbidden."

Steinberg was indicted in order to be punished severely for dealing *largely* in liquor, and, the court continued, "the question is not whether this is wise or politic, fair or in good taste, but whether it can legally be done. We think it can under the language of the

[3] Comp. St. Ann. Supp. 1923, s. 6338 1/8 ff, declares that "gross income" shall include "gains, profits and income derived from . . . professions, vocations, trades, businesses, commerce or sales . . . or the transaction of any business carried on for gain or profit, or gains or profits derived from any source whatever."

statutes, and know that similar things have been done for generations." [Citing instances and authorities].

Circuit Judge Manton, concurring in the result, thinks that the judgment should be reversed, and also the indictment dismissed. because no breach of the perjury statute is established. He says:

"In the case of criminal gains, a taxpayer may refuse to incriminate himself, and the government is powerless in securing the detailed information of his return.[4] If the recipient of this kind of income is obliged to make known its amount and the source, when it is received in sufficient sums to be beyond the exempt minimum, he is compelled to state under oath information that he is not obliged to give, if he chooses to exercise his right of protection. . . .

"It is hard to conceive of Congress ever having had in mind that the government be paid a part of the income, gains, or profits derived from successfully carrying on this crime, or entering into a combination with the person engaged in this unlawful business to ascertain how and to what extent he shall be taxed. . . .

"The courts of Canada . . . have held that its Parliament never intended to levy income tax on the proceeds of crime or gain derived from the business which cannot be carried on without violating its criminal law."

HILL YARBOROUGH.

TORTS—NEGLIGENCE—STANDARD OF CARE OWED BY PULLMAN COMPANY—In *Forbes v. Pullman Co., et al* (1926, S. C.) 135 S. E. 563 the plaintiff, an aged lady passenger entered a dimly lighted pullman coach—customary for that hour of the day—about 6:00 A.M., and while walking down the aisle stumbled over a suitcase and fell, receiving serious injuries. She brought an action for damages due

[4] Citing U. S. Const., Amend. V, "No. person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

Meaning, said Judge Manton, "that a person shall not be compelled, when acting as a witness in any investigation, to give testimony that might tend to show that he had committed a crime."

This view has been followed in *Sullivan v. U. S.* (1926) 15 F. (2d) 809, where it was held that, while Congress had power and, by the Revenue Act, manifested an intention to tax income derived from criminal transactions, as unlawful sales of liquor, the privilege against self-incrimination (5th. Amend.) furnished a complete defense to an indictment charging failure to file an income tax return when the return, if filed, would disclose that income was earned in criminal transactions.

See discussion of the *Steinberg* and *Sullivan* cases in 5 Texas L. Rev. 207; see also 11 Minn. L. Rev. 385 and 25 Mich. L. Rev. 470.