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Recent Decisions

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Attorneys — Censure — Private Misconduct as Ground for Disciplinary Action. — In re Serritella, 5 Ill.2d 392, 125 N.E.2d 531 (1955). Following a hearing, a recommendation of censure against the defendant attorney was filed with the Illinois Supreme Court by the committee on grievances of the Chicago Bar Association, as provided for by Supreme Court Rule 59, Ill. Ann. Stat. c.110, § 259.59 (Smith-Hurd Supp. 1954). The committee found that the defendant had cashed payroll checks issued to a non-existent person by the Cook County treasurer. In order to cash the checks, the defendant endorsed them with his name and also with the name of the non-existent person. The defendant was given the checks by his mother-in-law. She had received them from her brother, the defendant’s uncle, who used the name of the fictitious person as an alias to defraud the Cook County treasury of payroll funds for which no work was done. The defendant had actual authority from his mother-in-law to sign and cash the checks, and he turned over to her the money derived therefrom, receiving no benefit himself from the transaction. There was no evidence to show that the defendant had any knowledge of how the checks were originally obtained, nor that he had any intention of participating in a fraudulent scheme.

The question presented to the court by the recommendation was whether an attorney’s nonprofessional conduct in cashing checks that were fraudulently procured by another party would furnish grounds for disciplinary action if the attorney had acted in good faith. The Supreme Court of Illinois ordered the censure rule discharged, refusing to discipline the defendant in the absence of proof that his actions had been prompted by any improper or illegal motives.

At common law, it was an established rule that a lawyer could be disciplined for misconduct not committed in his professional capacity as an attorney. 5 Am. Jur., Attorneys at law § 276 (1936). In order to avoid policing the entire lives of its officers, however, the courts in later years have moved with caution in matters of private misconduct by an attorney. This attitude was revealed in Bartos v. District Court, 19 F.2d 722 (8th Cir. 1927), where the court said, 19 F.2d at 724:

We take it to be a sound principle that the court has no regulatory power over the private life of members of the Bar, and that it cannot exclude them from practice for acts in that capacity unless they be such as to clearly demonstrate their unfitness to longer enjoy the privileges of the profession.
This statement represents the majority view. A few states hold to the contrary of this principle, allowing no disciplinary action for acts committed by the attorney in his capacity as a private person. In re Burch, 73 Ohio App. 97, 54 N.E.2d 803 (1943). In 1873, this latter view was also recognized as the law in Illinois, People ex rel. Noyes v. Allison, 68 Ill. 151 (1873), but it has since been reversed, People ex rel. Chicago Bar Ass'n v. Meyerovitz, 278 Ill. 356, 116 N.E. 189 (1917).

Frequently the private misconduct is such that it results in conviction of a common law or statutory crime. 7 C.J.S., Attorney and Client § 21 (1937). In such a case, the test as to whether disciplinary action should be taken by a grievance committee is whether or not the attorney has been convicted of a felony or of a misdemeanor involving moral turpitude. Ex parte Wall, 107 U.S. 265, 273 (1882).

It is not necessary that the misconduct in a private capacity be such as constitutes a crime before disbarment, suspension, or censure will be warranted. In People ex rel. Healy v. Macauley, 230 Ill. 208, 82 N.E. 612 (1907), the court stated, 82 N.E. at 614:

The standard of personal and professional integrity which should be applied to persons admitted to practice law in the courts is not satisfied by such conduct as merely enables them to escape the penalties of the criminal law.

The test used most often at common law in cases of private misconduct, there being no criminal conviction, was that used in Baker v. Commonwealth, 73 Ky. (10 Bush) 592 (1874), when the court stated, 73 Ky. at 597:

... and when an attorney commits an act ... showing such a want of personal or professional honesty as renders him unworthy of public confidence, it is not only the province but the duty of the court ... to strike his name from the roll of attorneys.

In that case, the attorney was disbarred for altering a letter, exchanged between two judges, so as to fraudulently obtain the release on bail of the attorney's nephew from jail. See also, Delano's Case, 58 N.H. 5 (1876), where an attorney was disbarred for misappropriating money received as a town's tax collector.

Two other tests are also applied to these cases of private misconduct with no criminal conviction. The first is the moral turpitude standard, under which an attorney will be disciplined for any misconduct revealing moral turpitude, that is, anything knowingly done contrary to justice, honesty, or good morals. In re Cruickshank, 47 Cal. App. 496, 190 Pac. 1038 (1920), where an attorney was disbarred for misusing money loaned to
him for a specific purpose. The second test is the common honesty
and decency test, under which the license of an attorney will
be revoked when his habits reveal that he is unworthy of public
trust or when they become such as to bring scandal upon the
courts and the legal profession. In re Wells, 293 Ky. 201, 168
S.W.2d 730 (1943), where, among other things, an attorney was
publicly intoxicated and passed bad checks. See also, In re
Wilson, 79 Kan. 450, 100 Pac. 75 (1909), where one count of the
charges which resulted in the attorney's disbarment was for
personal immorality and vice; People ex rel. Healy v. Macauley,
supra, in which an attorney was disbarred for initiating a con-
spiracy to harass and extort money from a business corporation
by forming other corporations with the same or similar names.
Supplementing these general standards is a rule in some
jurisdictions that an attorney who engages in private business
transactions will be required to maintain a stricter degree of
honesty than would the ordinary business man. In re Genser,
15 N.J. 600, 105 A.2d 829 (1954). Other jurisdictions, however,
hold that only a "business man" standard will be required. In re
Renehan, 19 N.M. 640, 145 Pac. 111 (1914).
A common law defense to charges of private misconduct, not
involving a criminal conviction, is illustrated in In re Jones, 68
Utah 213, 249 Pac. 803 (1926), where the court held that an
attorney would not be disciplined for private misconduct unless
it was gross and infamous. Accord, People ex rel. Chicago Bar
Ass'n v. Hoering, 317 Ill. 390, 148 N.E. 299 (1925), where it is
stated "... this court has held that there may be misconduct of
an attorney in his private capacity so gross as to require his
disbarment." 148 N.E. at 301.
Good faith on the part of the attorney is also a common law
defense in disciplinary proceedings for misconduct in a private
capacity. In People ex rel. Chicago Bar Ass'n v. Hansen, 316 Ill.
502, 147 N.E. 431 (1925), the defendant attorney was exonerated
as there was no clear and satisfactory proof of fraudulent and
dishonest motives behind his conduct, though he paid for a
judgment with a worthless check, misrepresented certain facts
about a business venture, and misused funds given to him for
a specific purpose.
The good faith defense was disallowed in In re Ellis, 371 Ill.
113, 20 N.E.2d 96 (1939), and in In re Bookman, 196 App. Div.
765, 188 N.Y. Supp. 271 (1st Dep't 1921), but the two cases are
distinguishable from the instant case in that they both involved
professional rather than private misconduct. In In re Ellis, supra,
the attorney had deliberately put himself in a situation such as
gives the appearance of bad faith, causing the court to state
that an attorney is bound to “shun even the appearance of any fraudulent design or purpose.” 20 N.E.2d at 98. And according to the court in In re Bookman, supra, an attorney is able to act in good faith only because of his ignorance of the ethical standards required by his profession.

The subject of professional discipline is covered by statutes to a great extent today, as in IND. ANN. STAT. § 4-3614 (Burns 1946), and MASS. ANN. LAWS c.221, § 40 (1955). Neither these statutes nor the Canons of Professional Ethics are of much assistance, however, in seeking to apply general standards to specific cases. The Indiana and Massachusetts statutes, like many others, merely reiterate the very general standards of the common law. Even when the statutes attempt to be specific, the generality is not overcome, since it is held that statutes do not curtail the court's inherent common law power to discipline an attorney for any behavior deserving of discipline. Delano's Case, 58 N.H. 5 (1876). The Canons of Professional Ethics are concerned with misconduct in a professional capacity.

Two cases in which the private misconduct of the attorney warranted discipline present fact situations similar to the main case. The attorney in In re Brown, 389 Ill. 516, 59 N.E.2d 855 (1945), was suspended for signing over checks to his partner that facilitated the defrauding of a corporate treasury; and in In re Osmond, 174 Okla. 561, 54 P.2d 319 (1935), the attorney was disbarred for cashing travellers checks that were stolen in a robbery. However in both cases the court found clear evidence that the attorneys were knowingly participating in a fraudulent scheme.

In the principal case, the court repeatedly emphasized that there was no proof that the defendant knew of the circumstances surrounding the obtaining of the checks which he cashed, and hence there was no proof of improper or illegal motive. It is submitted that the case was correctly decided in view of the three standards commonly employed to test an attorney's private misconduct, discussed above, and taking into consideration the precedent of Illinois law in regard to the requirement of grossness, and particularly in regard to the defense of good faith. It seems neither necessary nor just that an attorney be condemned for private acts which he performs in good faith, and which prove to be wrongful only because of circumstances of which he has no knowledge. This is the line which the principal case has drawn. If justice has been denied in this case, it was due to the failure of the grievance committee to uncover the true facts of the situation involved, and not to any failure
of the court to reach a correct judicial decision based upon the facts that were revealed.

Robert P. Gorman

CONSTITUTIONAL LAW — COURTS — IMMUNITY OF FOREIGN SOVEREIGN FROM SET-OFF AND COUNTERCLAIM. — National City Bank v. Republic of China, 348 U.S. 356 (1955). In 1948 an agency of the Republic of China deposited $200,000 with petitioner National City Bank of New York. When respondent Republic of China subsequently attempted to withdraw its funds, the bank resisted payment and interposed two counterclaims seeking an affirmative judgment of $1,634,432 on defaulted treasury notes of respondent owned by petitioner. The district court dismissed the counterclaims on a plea of sovereign immunity. The Court of Appeals for the Second Circuit also dismissed, on the ground that the counterclaims could not be maintained because they were not based on the same subject matter as the original action, and hence to allow them to be enforced would be an invasion of respondent's sovereign immunity. The ruling of the district court refusing leave to amend the counterclaims, by denominating them set-offs, was also affirmed.

On certiorari the Supreme Court was called upon to resolve the question whether a foreign sovereign, by bringing suit in the courts of the United States, thereby subjects itself to a counterclaim based on a subject matter different from that of the main action. The Supreme Court reversed the ruling of the lower courts and held that by bringing suit in the courts of the United States the Republic of China thereby waived its immunity and left itself open to counterclaims regardless of whether or not they arose out of the same subject matter as the main action.

By destroying the long standing barrier of sovereign immunity to the invocation of defensive counterclaims which do not arise out of the subject matter of the principal action, the decision in this case marks the furthest advance made by the Supreme Court in its siege against the privilege of immunity afforded a foreign sovereign. The basic theory supporting this immunity was first expounded in The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812), where it was held that an American citizen could not assert title to an armed national vessel of a foreign power, the vessel being found within the waters of the United States. The basis for the decision was an implied consent of nations to respect the sovereignty of other powers
and to grant them immunity from suit for the mutual benefit of the nations involved.

The doctrine is expounded in The Schooner Exchange case, supra, had been modified before the decision in French Republic v. Inland Nav. Co., 263 Fed. 410 (E.D. Mo. 1920). There petitioner, Republic of France, had paid $330,000 on a contract under which the defendant, Inland Navigation Company, was to repair and complete certain barges. The petitioner sought to recover its deposit but the defendant alleged damages of $600,000 as the result of a breach of the contract by petitioner, and this amount was sought by defendant in the form of a counterclaim. The court held that by bringing suit in the courts of the United States a foreign sovereign does not thereby waive its immunity and subject itself to a counterclaim upon which an affirmative judgment is asked, even though it would be permissible as against a private suitor. However, the court asserted that a counterclaim may be had up to the amount pleaded by the sovereign, and that "the law is unquestionably in consonance with this concession...." 263 Fed. at 411. Evidently, the theory of The Schooner Exchange does not extend to mere set-offs.

The application of this theory was limited even more by Guaranty Trust Co. v. United States, 304 U.S. 126 (1938), wherein the Supreme Court held that the New York State statute of limitations runs against a foreign sovereign just as against private litigants. In this case the United States sued on a certain claim as the assignee of the Soviet Government. The claim was for deposits which had been repudiated by the bank as against the Soviet Government a number of years earlier, thus starting the running of the statutory period. The Court expressly recognized two important facts: upon the principle of comity, the public property of foreign sovereigns is not amenable to suits in our courts without the consent of such sovereigns, 304 U.S. at 134; and that the United States Government is exempt from the operation of statutes of limitations, 304 U.S. at 132. But the Court was convinced that a different rule should apply here because "by voluntarily appearing in the role of suitor it [the foreign sovereign] abandons its immunity from suit and subjects itself to the procedure and rules of decision governing the forum which it has sought." 304 U.S. at 134.

The Inland Nav. Co. and Guaranty Trust Co. cases, supra, are only two in a series of modern cases which mark the trend of the decisions in the field of sovereign immunity. The relaxing of the barrier to claims against the sovereign first became apparent in cases involving our own government. In United States v. The Thekla, 266 U.S. 328 (1924), damages were held award-
able against the United States as the result of a collision between a vessel chartered by the United States Fleet Corporation and the Norwegian ship "Thekla." There was no statutory authority for the award; the Court was of the opinion that the United States, by coming into court to assert a claim, took the position of a private party and the court could then do complete justice between the litigants. In a later case, while not granting an affirmative judgment, the Supreme Court allowed a cross-claim to completely offset a claim of the government. *United States v. Shaw*, 309 U.S. 495 (1940).

In actions concerning foreign sovereigns, the immunity doctrine has been relaxed by the courts so as to allow a defendant to interplead an adverse claimant where a foreign power seeks to enforce a claim. *Republic of China v. American Express Co.*, 195 F.2d 230 (2d Cir. 1952).

In considering whether immunity is to be granted to a foreign sovereign, the courts look to the State Department for guidance, and once the Department has spoken, the courts generally consider it their duty to follow the policy suggested. *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945); *Isbrandtsen Co. v. Netherlands East Indies Government*, 75 F. Supp. 48 (S.D.N.Y. 1947). Cf. *Fields v. Predionica I Tkanica A.D.*, 263 App. Div. 115, 31 N.Y.S.2d 739 (1st Dep't 1941). As pointed out by the Court in the principal case, the State Department has recently noted the desirability of relaxing the strict rule of foreign sovereign immunity. 26 DEP'T STATE BULL. 984 (1952). The Department noted that a restrictive policy has replaced the conventional doctrine of complete immunity in nations all over the world. It was further argued that a grant of immunity to foreign sovereigns in many cases would not be in consonance with the policy of our own government in subjecting itself to suit. This was undoubtedly a basic consideration in the Court's decision in the instant case.

The fact situation in *United States v. National City Bank*, 83 F.2d 236 (2d Cir. 1936), cert. denied, 299 U.S. 563 (1936), was similar to that of the principal case. There the Russian Government sued for funds deposited to its credit in the defendant bank; the bank attempted to offset this claim against certain promissory notes issued by the Russian Government and held by the bank. The court allowed the set-off to the extent of the Russian claim.

In the more recent case of *United States v. New York Trust Co.*, 75 F. Supp. 583 (S.D.N.Y. 1946), the United States had received title to funds deposited in the defendant bank by the Russian Government by virtue of the Litvinov assignment. In a
suit by the United States to collect these deposits, the bank
interposed a set-off based on notes of the Russian Government
owned by the bank. Here the court refused to allow the set-off
on the ground that it was not based on the same subject matter
as the original action. United States v. National City Bank,
supra, was distinguished because in that case the claim of the
bank on the notes was payable out of the deposits held by it,
and the set-off against the sovereign thus, in effect, arose out
of the same transaction on which the sovereign's claim was based.

The instant case extends the rule of National City Bank and
eradicates the rule of the New York Trust case, supra, the Court
stating that "... the ultimate thrust of the consideration of
fair dealing which allows a set-off or counterclaim based on the
same subject matter reaches the present situation." 348 U.S.
at 365.

In determining the reason for the repudiation of the long
standing doctrine adhered to in the New York Trust case, the
decision in the principal case is best viewed in the light of con-
siderations enunciated in The Schooner Exchange and Inland
Nav. Co. cases. Chief Justice Marshall's primary reason for
granting immunity to foreign sovereigns in The Schooner Ex-
change was the mutual benefit of the nations involved. In the
Inland Nav. Co. case the court refused to grant complete im-
munity to a foreign sovereign in a situation where it would
have been applied to the United States Government because
there was no persuasive demand of public policy generated by
the nature of the suitor. In other words, no benefit would accrue
to the United States or its citizens by granting immunity in the
case. Thus, in both these cases the primary consideration was
the ultimate benefit which would accrue to the United States
by offering immunity to the foreign sovereign.

While the Court in the instant case nowhere discusses the
benefit theory, the reasoning of the earlier cases suggests that
the Court may have been influenced here by more than mere
"considerations of fair dealing." By taking note of the fact that
the principle of sovereign immunity is coming into public dis-
favor, the Court could also mean that this country would prefer
to suffer the loss of mutual benefit between nations rather than
place the burden of immunity upon the shoulders of individual
defendants interposing counterclaims.

The question as to the true reason for the relaxing of the
immunity barrier in the principal case undoubtedly will cause
speculation as to just how far the Court will go in the future,
especially in the realm of affirmative counterclaims. But the
mere problem of enforcing a judgment against a foreign sover-
eign should preclude the allowance of any affirmative awards. In addition, it is unlikely that the State Department will allow any future cases on this point to come before the Court without making some sort of recommendation, all of which will bear heavily on future decisions. Perhaps the basic reasons for this latest inroad upon the privilege of foreign sovereign immunity will be given a better explanation in later decisions of the Court. Meanwhile, the decision in the instant case is basically sound. It promotes the interests of natural justice by placing a foreign sovereign on a level with a private litigant, at least as concerns a set-off, including those arising out of separate transactions, whenever that sovereign attempts to enforce a claim in the courts of the United States.

Edward J. Griffin

Constitutional Law — Equal Protection — Separate Accommodations on Public Carriers. — Flemming v. South Carolina Elec. and Gas Co., 224 F.2d 752 (4th Cir. 1955). The plaintiff, a negro woman, was a passenger on one of defendant's busses. The driver of the bus required her to change her seat in accordance with the segregation law of South Carolina regarding motor vehicle carriers. S.C. Code § 58-1491 (1952). Plaintiff brought this action for damages by virtue of the Civil Rights legislation. 17 Stat. 13 (1871), 42 U.S.C. § 1983 (1952), claiming defendant had violated her constitutional rights under color of state law. The district court dismissed the case on the ground that the state segregation statute was valid under the decision of Plessy v. Ferguson, 163 U.S. 537 (1896).

On appeal to this court, the question presented was whether a state may lawfully segregate races on public carriers in view of the recent Supreme Court decisions in the field of public education holding "equal but separate" facilities violative of the Fourteenth Amendment's equal protection of the law where states are concerned, Brown v. Board of Education, 347 U.S. 483 (1954), and the Fifth Amendment's due process clause where the federal government is concerned, Bolling v. Sharpe, 347 U.S. 497 (1954). The court of appeals held that, in view of these and other decisions, the "separate but equal" doctrine of Plessy v. Ferguson, supra, could no longer be regarded as the correct statement of the law and remanded the case to the lower court.

What is probably the earliest decision to specifically deal with segregation on common carriers is unimportant from a constitutional standpoint. The case dealt with a Congressional license
permitting a Virginia railway company to extend its line through the District of Columbia. In granting the license, Congress imposed a condition that no person could be excluded from the cars because of color. The practice of the railroad was to use separate cars for the negro and white races. In ruling that the condition was violated by this practice, the Supreme Court held that Congress had required that the races be placed on an equality. Railroad Company v. Brown, 84 U.S. (17 Wall.) 445 (1873). Separation was held to violate the legislative requirement of equal treatment.

During the reconstruction of the South after the Civil War the legislature of Louisiana passed a statute forbidding any discrimination by public carriers. A negro was discriminated against on a steam boat operating on the Mississippi and brought a civil action against the owner. On appeal to the United States Supreme Court it was held that this statute was invalid as an undue burden upon interstate commerce. The ruling of the court was based upon the fact that neighboring states required segregation, and if river commerce was subject to a non-segregation law in Louisiana, the varying treatment would hamper interstate commerce which was within the power of Congress to control. Hall v. DeCuir, 95 U.S. 485 (1877).

The Civil Rights Cases, 109 U.S. 3 (1883), inter alia, dealt with segregation in common carriers. An act of Congress which declared illegal any discrimination in inns, public carriers, and places of amusement anywhere in the United States was struck down on the theory that the Fourteenth Amendment guaranteed civil rights against state action only, and does not authorize Congressional legislation over private conduct in respect to the guaranties of the Fourteenth Amendment. This decision greatly hampered the advancement toward racial integration on the level of federal action.

Another obstacle to rise up in the law preventing earlier racial integration in the United States was the “equal but separate” doctrine—the cornerstone of legal racial segregation. In 1890, the General Assembly of Louisiana, then independent of Northern control, passed the following law: “[A]ll railway companies carrying passengers . . . shall provide equal, but separate accommodations for the white and colored races . . .” (emphasis added). A man, one-eighth negro, was ordered by a conductor to sit in a coach set aside for negroes; he refused and was promptly jailed. Upon review, the Supreme Court of the United States upheld the statute as a proper exercise of the police power of the state. Plessy v. Ferguson, supra. Reasoning that many situations involved legal segregation, the Court found that where the habits
and customs of the people traditionally treated the white race and
the colored race as separate, a state was not acting unreasonably
in making a distinction. In support of its decision, the Court re-
ferred to the then uncontested segregation in the public schools
of the District of Columbia, and the "equal but separate" doc-
trine became the Law of the Land. However, a warning note was
sounded in the dissent by Justice Harlan, 163 U.S. 537 at 559:

In my opinion, the judgment this day rendered will, in time, prove
to be quite as pernicious as the decision made by this tribunal in the
Dred Scott case.

He continued, 163 U.S. at 562:

The thin disguise of "equal" accommodations for passengers in
railroad coaches will not mislead any one, nor atone for the wrong
this day done.

As the Fourteenth Amendment argument against segregation
was for the moment drastically limited, a reversion to the inter-
state commerce argument was now made. The segregation statute
of Mississippi, substantially identical to the statute in the Plessy
case, had been upheld in Louisville, New Orleans and Texas Ry.
v. Mississippi, 133 U.S. 587 (1890) (decided six years prior to the
Plessy case) because of an earlier decision of the Mississippi Su-
preme Court that the statute had no extraterritorial application.
The Court held that because the statute did not apply to persons
travelling in interstate commerce, the commerce clause of the
Federal Constitution was not violated. No question of civil rights
was raised before the Court. Later the United States Supreme
Court placed a similar construction on the Kentucky "equal but
separate" carrier facility law, upholding it against the conten-
tion that it violated the commerce clause. Cincinnatian & Ohio
Ry. v. Kentucky, 179 U.S. 388 (1900).

Any effectiveness of the commerce clause in preventing segre-
gation in transportation was dissipated when the Supreme Court
held that a company-imposed segregation rule was not violative
of the commerce clause, even though the railway was an inter-
state company. Chiles v. Cheaspeake & Ohio Ry., 218 U.S. 71
(1910). Reasoning that Congress by inaction intended to leave
interstate carriers unfettered so long as their regulations were
reasonable, the Court held that segregation was not in violation
of the commerce clause. The commerce clause argument against
segregation in transportation was met squarely with the Tenth
Amendment in South Covington & Cincinnati Street Ry. v. Ken-
tucky, 252 U.S. 399 (1920).

While the arguments against segregation were, after the pro-
nouncement of the "equal but separate" doctrine, based in the
main on the exclusive power of Congress to regulate interstate commerce, there was still an insistence that the accommodations provided be actually physically equal. A case important for its discussion of this requisite was *McCabe v. Atchison, Topeka, and Santa Fe Ry.*, 235 U.S. 151, 161 (1914), although the case is not controlling because dismissed for lack of standing. Equality of accommodations was also insisted upon when a negro member of the House of Representatives was required to travel by coach although pullman cars were available to white passengers. However, the legal basis of the decision was the Interstate Commerce Act, 24 STAT. 380 (1887), 49 U.S.C. § 3 (1952). *Mitchell v. United States*, 313 U.S. 80 (1941); *Henderson v. United States*, 339 U.S. 816 (1950).

The argument that statutes requiring segregation place an undue burden upon interstate commerce was at last successful in *Morgan v. Virginia*, 328 U.S. 373 (1946), when *Hall v. DeCuir*, *supra*, was finally used as authority in declaring invalid the Virginia statute requiring segregation in public carriers.

Now, by the instant case, and others which will doubtless follow, *Plessy v. Ferguson* and the “separate but equal” doctrine is directly under attack—the civil rights argument is again in vogue. The onus is now upon the Supreme Court to clearly state the scope of its opinion in *Brown v. Board of Education*, *supra*. In establishing the “separate but equal” doctrine, the Court in 1896 relied upon the school segregation in the District of Columbia. It is submitted that the present Court will find this reliance fatal to the entire doctrine of “equal but separate” accommodations in transportation because of the ruling in *Boiling v. Sharpe*, *supra*, which struck at the doctrine’s very foundation.

*John E. Roberts.*

**CONSTITUTIONAL LAW—EQUAL PROTECTION—STATUTE VESTING DISCRETIONARY AUTHORITY IN GRAND JURY OR MAGISTRATE TO CHARGE ACCUSED WITH FELONY OR MISDEMEANOR HELD UNCONSTITUTIONAL.—State v. Pirkey, . . . Ore. . . .*, 281 P.2d 698 (1955). The defendant was indicted and charged by a grand jury with committing a felony for drawing a bank check against insufficient funds. The indictment was returned pursuant to Oregon Laws 1949, Chapter 129, Section 1, which was subsequently carried over as Ore. Rev. Stat. § 165.225 (1953), with some substantial changes. The court was concerned only with the original form of the statute which read, in part, as follows:
Any person who . . . shall willfully, with intent to defraud, make or draw, or utter or deliver any check . . . for the payment of money, knowing at the time of such making . . . that the maker . . . has not sufficient funds in, or credit with said bank . . . for the payment of such check . . . shall be guilty of a crime and may be proceeded against either as for a misdemeanor or as for a felony, in the discretion of the grand jury or the magistrate to whom complaint is made. . . .

Defendant filed a demurrer to the indictment upon the ground that the above statute was contrary to the Constitution of the State of Oregon; he also contended the statute violated the Fourteenth Amendment to the United States Constitution with regard to "due process" and "equal protection of the laws." The defendant further claimed the statute was void for indefiniteness and uncertainty. The trial court sustained the demurrer and dismissed the indictment. The state appealed to the Supreme Court of Oregon.

The question presented to the supreme court was whether this statute was constitutional in view of the above mentioned provisions of the state and federal constitutions, where the magistrate or grand jury has discretion to charge the defendant with either a misdemeanor or a felony.

The supreme court affirmed the trial court and held that part of the statute unconstitutional which gave to the grand jury or magistrate, "the unguided and untrammeled discretion to determine whether a defendant shall be charged with a felony or a misdemeanor." The court held that the statute denied the defendant the "equal protection of the laws" guaranteed by the Fourteenth Amendment to the Federal Constitution. U.S. Const. amend. XIV, § 1. The court also stressed the fact that the statute was an invalid encroachment upon the prerogative and duty of the courts to determine and fix punishment, and further that the statute provided no standards to guide the grand jury or the magistrate in the exercise of their discretion.

The guarantee of "equal protection" in the Constitution was an attempt to limit undue favor and special privileges afforded certain individuals and classes, which, if not guarded would lead to hostile discrimination and inequality. Truax v. Corrigan, 257 U.S. 312, 332 (1921). Discrimination cannot be regarded as reasonable if it offends the ". . . plain standards of common sense." Hartford Steam Boiler Inspection & Ins. Co. v. Harrison, 301 U.S. 459, 462 (1937). Here the Supreme Court held that a statute which discriminated between mutual and stock insurance companies as to whose employees could sell insurance was unreasonable and void. In the landmark case of Yick Wo v. Hopkins, 118 U.S. 356 (1886), the Supreme Court held a San Francisco ordinance void
which gave arbitrary power to a board of supervisors to withhold their consent as to the opening of laundries. It was determined that the main purpose of the ordinance was to prevent people of Chinese descent from operating this type of business. The Court also found that those of the Caucasian race in the identical situation as the Chinese were permitted to operate laundries. The Court was of the opinion that this was class legislation, at least in its operative effects.

In holding a statute valid which provided for the sterilization of mental defectives in state hospitals, the Supreme Court, in *Buck v. Bell*, 274 U.S. 200 (1927), stated, 274 U.S. at 208:

> ... the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow.

A test of what is required to satisfy "equal protection" was given by the Idaho Supreme Court in *J. C. Penny Co. v. Diefendorf*, 54 Idaho 374, 32 P.2d 784 (1934), when the court stated that "The Fourteenth Amendment ... only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon people in similar circumstances." 32 P.2d at 797.

If inequality results from a statutory classification, it does not necessarily follow that the statute must be invalidated. To be invalid the statute must be "actually and palpably unreasonable and arbitrary." *Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422, 429 (1936) (dictum). The Supreme Court has upheld a statute which provided that every person serving a life term in a state prison, who commits assault with intent to kill, is punishable with death. The Court held that differentiating between convicts serving life sentences and convicts serving lesser terms was a proper basis for classification. *Finley v. California*, 222 U.S. 28 (1911). In the case of *Davis v. Florida Power Co.*, 64 Fla. 246, 60 So. 759 (1913), the Florida Supreme Court upheld a statute which discriminated between individuals and corporations as to liability for wrongful death. The court stated that where there were reasonable and practical grounds for classification the statute should be sustained, even though some other classification would appear to be more in accord with the general welfare.

In considering the application of the requirement of "equal protection" to criminal law, the Supreme Court in *Barbier v. Connolly*, 113 U.S. 27 (1885), stated at page 31: "... in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences." (Dictum). The problem of punishment and "equal
 protección” was again considered by the Supreme Court in *Skinner v. Oklahoma*, 316 U.S. 535 (1942). In this case the Court held unconstitutional a statute which provided for sterilization of criminals who had been convicted two or more times for crimes amounting to felonies involving moral turpitude. The statute excluded offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses, and for this reason it was held contrary to the “equal protection” clause of the Fourteenth Amendment. The Court stated, 316 U.S. at 541:

> When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.

The court in *Ex parte Mallon*, 16 Idaho 737, 102 Pac. 374 (1909), held that a repeat of the prisoner’s original sentence as punishment for trying to escape from prison was arbitrary, unreasonable, and in no way based upon the nature, character, or gravity of the offense. Yet the same court in reviewing a more recent “escape” statute held that the provisions prescribing felony punishment for a felon who escaped, and a misdemeanor penalty for a misdemeanant who escaped, were not arbitrary or unreasonable. *Ex parte Knapp*, 73 Idaho 505, 254 P.2d 411 (1953). In the case of *People v. Queen*, 326 M. 492, 158 N.E. 148 (1927), the courts had the power to sentence a person convicted of a crime to the penitentiary or to the reformatory, and this judicial discretion was held constitutional. In a similar case, *Ex parte Rosencrantz*, 211 Cal. 752, 297 Pac. 15 (1931), the statute gave the courts the power to confine in the state prison or in the county jail one who had fraudulently issued a check. As to the constitutionality of this statute, the court said, 297 Pac. at 16:

> Since every person charged with the offense has the same chance for leniency as well as the same possibility of receiving the maximum sentence, there is nothing discriminatory in the statute.

A California statute which gave the state board of prison directors the authority to determine the length of prison terms was held to be constitutional, *per curiam*, in *Ex parte Gough*, 112 Cal. App. 218, 296 Pac. 658 (1931), on the ground that the basis for determining the sentence was the character of the prisoner.

The court in *Skinner v. Prather*, 136 Kan. 879, 18 P.2d 154 (1933), reviewed the application of its state habitual criminal act and held that a defendant sentenced under the act would not be deprived of “equal protection” simply because trial judges had not applied the act to others in like circumstances. Only in a case where the defendant could prove that the trial judge had acted in bad faith by willfully and deliberately discriminating against
him could the defendant successfully claim that he had been deprived of "equal protection." In *State v. Thomas*, 224 La. 431, 69 So.2d 738 (1954), a statute prohibiting parole of narcotic violators was held not to be a violation of "equal protection of the laws" on the basis that all members of the same class were treated alike. The Supreme Court, in two early decisions, *Collins v. Johnston*, 237 U.S. 502 (1915), and *Mackay Tel. & Cable Co. v. Little Rock*, 250 U.S. 94 (1919), attempted to clarify the concept of "equal protection" and its application to punishment. In the former case the defendant alleged that he had been deprived of "equal protection of the laws" because he had been sentenced to fourteen years imprisonment for perjury, while the average penalty for crimes of greater gravity was five years. The Supreme Court disposed of this contention by stating that the extent of punishment for a particular crime was to be determined by the legislatures of the several states. In the latter case it was not enough to show that a law had not been enforced against other persons although it was enforced against the person claiming discrimination.

The state legislatures have the sole and comprehensive power of providing punishment for offenses committed against the state. This power is unlimited except for the constitutional prohibitions against excessive fines and cruel and inhuman punishment. *State v. Mulcare*, 189 Wash. 625, 66 P.2d 360, 362 (1937) (dictum). In further support of this legislative power is the case of *Siiipola v. Ness*, 90 F. Supp. 18 (W.D. Wash. 1950), where the prison board gave the defendant a greater term than recommended by the sentencing judge or prosecuting attorney. In this case the sentence of the board was held valid.

The court in the instant case laid great stress on the fact that the magistrate or grand jury is given the power arbitrarily to determine whether to charge a defendant with a felony or a misdemeanor. The court pointed out that there was no criteria or standard in the statute which would serve to guide and limit the magistrate or grand jury in its decisions. This arbitrary power within the hands of the grand jury or magistrate might well lead to unconscionable results. *Yick Wo v. Hopkins*, supra.

The traditional function of the grand jury has been to determine whether or not the state's evidence warrants bringing an action against an accused and charging him with a specific crime or crimes. *United States v. Atlantic Comm'n Co.*, 45 F. Supp. 187, 192 (E.D.N.C. 1942).

The statute in the instant case authorized the committing magistrate, or the grand jury, to charge a defendant with either a felony or a misdemeanor. There was no standard set up by which
the magistrate or grand jury could guide themselves in reaching their determination. This grant of unlimited and unrestricted power proved fatal to the validity of the statute.

Ralph R. Blume

EVIDENCE—CONSTITUTIONAL LAW—ADMISSIBILITY OF EVIDENCE OBTAINED BY UNLAWFUL SEARCH AND SEIZURE.—People v. Cahan, ... Cal. ..., 282 P.2d 905 (1955). Defendant was charged with conspiring to engage in horserace bookmaking and related offenses in violation of California bookmaking laws. On trial, most of the incriminating evidence introduced against the defendant had been secured by Los Angeles police officers by breaking into the defendant's establishment and secreting hidden microphones whereby the police officers gathered incriminating statements. In addition there was a considerable amount of evidence obtained from the premises occupied by the defendant as a result of numerous forcible entries and seizures without search warrants. The trial court admitted this evidence over objection and defendant was convicted. He appealed to the Supreme Court of California from the order placing him on probation and also from the order denying him a new trial.

The court was thus presented with the question whether evidence obtained in violation of federal and state constitutional provisions prohibiting unlawful searches and seizures should have been admitted in the trial of the defendant. The Supreme Court of California reversed the lower court and held the evidence to be inadmissible. In reversing the trial court, the Supreme Court also reversed its previous policy as to the admissibility of illegally obtained evidence. In People v. Mayen, 188 Cal. 237, 205 Pac. 435 (1922), it was held that evidence was admissible in a criminal action no matter how it was obtained. This case had been religiously followed by the California courts until the present time. In overruling the Mayen case, supra, the Supreme Court of California came to the conclusion that it was now necessary to abolish the previous rule because it had failed to effectively protect the constitutional right of freedom from unreasonable searches and seizures. The court said that civil suits and criminal prosecutions against the offending officers were not sufficient deterrents against the violation of the constitutional privilege, and, further, for the courts to enforce the old rule was to condone this lawlessness.

There has been a considerable amount of conflict among the courts on this proposition ever since the Supreme Court of the United States decided that it would be proper to exclude such
evidence. *Weeks v. United States*, 232 U.S. 383 (1914). In this case the defendant had been charged with a federal crime in a federal court. Various letters of the accused had been seized by a United States marshal without a search warrant and had been used as evidence against him. The Supreme Court held that it was error to admit such evidence. This initiated the so-called "exclusionary rule." But this rule was to be applied only in federal courts, and in *Wolf v. Colorado*, 338 U.S. 25 (1949), it was held that the Fourteenth Amendment to the United States Constitution did not forbid the state courts from admitting such evidence in a criminal prosecution before a state court. This position was reaffirmed in *Irvine v. California*, 347 U.S. 128 (1954). See 29 *Notre Dame Law*, 660 (1954). However, if there is violence or brutality involved the Supreme Court may find an infringement of the due process clause of the Fourteenth Amendment. *Rochin v. California*, 342 U.S. 165 (1952). See 27 *Notre Dame Law*. 453 (1952). Thus, unless the procedure employed by the state law enforcement officers "shocks the conscience," the state courts have been left free to admit or exclude unlawfully obtained evidence as they see fit. Of course, it is conceded that affirmative sanction by the states of unlawful police invasion of an individual's privacy would be contrary to the dictates of the Fourteenth Amendment. *Wolf v. Colorado*, 338 U.S. 25, 28 (1949) (dictum).

The majority of the states today adhere to the so-called "orthodox rule"; in other words, they admit such evidence. Probably the best known case supporting the "orthodox rule" is *People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926), cert. denied, 270 U.S. 657 (1926). In that case a state officer obtained a blackjack from the premises of the defendant by means of a trespass. The court held that the evidence could be used against the accused even though it had been illegally obtained. The reasoning underlying the decision was that there was no distinction between a trespass by an official person and a private one, and since the evidence would be admitted if gathered by a private person, so should it be admitted if gathered by an official of the state. The opinion went on to relate that if the "exclusionary rule" need be adopted because of public policy, it was a task for the legislature, not the courts. This reasoning was followed by the Supreme Court of Pennsylvania when it approved the "orthodox rule," in *Commonwealth v. Agoston*, 364 Pa. 464, 72 A.2d 575 (1950), cert. denied, 340 U.S. 844 (1950).

Several other reasons have been set forth by the courts to justify the "orthodox rule." One of these is that a court will not pause to look into the legality or illegality of the method by which the evidence was obtained, because it is an issue collateral to the
The only question that will be determined is whether or not the evidence is relevant to the issue at trial. Commonwealth v. Wilkins, 243 Mass. 356, 138 N.E. 11, 13 (1923); State v. Lindway, 131 Ohio St. 166, 2 N.E.2d 490, 497 (1936), appeal dismissed and cert. denied, 299 U.S. 506 (1936). Other authorities say that it is not good law to exclude the evidence and thereby effect a release of a guilty criminal merely because the arresting officer blundered. State v. Black, 5 N.J. Misc. 48, 135 Atl. 685 (1926). In this case, it was said by the court, 135 Atl. at page 686:

It will be observed that the result of such practice is not to punish the individual who has violated the constitutional provision by making an unreasonable search and seizure, but to shield the criminal and penalize the people of the state by suppressing evidence tending to prove an offense “against its peace and dignity.”

In State v. Pluth, 157 Minn. 145, 195 N.W. 789 (1923), the court stated that the reason for admitting contraband goods, seized illegally by state officers, into evidence was that the defendant had no property right in such goods because they were contraband. Therefore, the defendant was not entitled to have the goods returned or suppressed from evidence. This reasoning has been adopted by few states. Today it seems that the states are divided into two categories only, either for or against the admissibility of illegally obtained evidence, and do not make a special distinction for contraband goods.

On the other side of the controversy, the reasons seem equally as compelling for the exclusion of such evidence. Freedom from unreasonable searches and seizures is, of course, one of the most basic rights of our democratic society; and it is claimed that in order to protect this constitutional right it is necessary to exclude such evidence. People v. Castree, 311 Ill. 392, 143 N.E. 112 (1924). Furthermore, it is asserted that not to exclude such evidence would encourage unreasonable searches and seizures and bring about an opinion in the people that the courts are encouraging these violations of constitutional rights. Youman v. Commonwealth, 189 Ky. 152, 224 S.W. 860, 866 (1920) (dictum).

Freedom from unreasonable searches and seizures and the privilege against self-incrimination have always been construed hand in hand, and many of the states who follow the “exclusionary rule” base their decisions jointly upon both. Gore v. State, 24 Okla. Crim. 394, 218 Pac. 545 (1923); Hoyer v. State, 180 Wis. 407, 193 N.W. 89 (1923).

In People v. Marxhausen, 204 Mich. 559, 171 N.W. 557 (1919), the court, after adopting the “exclusionary rule,” proceeded to try and reconcile the many conflicting cases on the ground that most of the states exclude the evidence if a motion is made to
suppress before the trial, and refuse to exclude it if the issue is brought up only by objection during the trial. In later cases, however, some states have excluded the evidence although no motion was made before the trial. Youman v. Commonwealth, supra; Rickards v. State, 6 Terry 573, 77 A.2d 199 (Del. 1950).

Three states have seen fit to enact legislation on this point, and two of them have adopted the "exclusionary rule" without qualification. N.C. Gen. Stat. § 15-27 (1953); Tex. Code Crim. Proc. Ann. art. 727a (Supp. 1954). The other state, Maryland, has taken a middle-ground. Md. Ann. Code Gen. Laws art. 35, § 5 (Supp. 1955), provides that in the case of a misdemeanor illegally obtained evidence is inadmissible. This seems to indicate that such evidence would be admitted in a felony prosecution.

As the alignment stands today, 27 states still adhere to the "orthodox rule" and 20 have adopted the "exclusionary rule." See 338 U.S. at page 29. The pendulum has slowly been swinging toward the "exclusionary rule," for two other states other than California have recently changed their policy. In Rickards v. State, supra, the Supreme Court of Delaware expressly overruled its previous decisions, which had followed the "orthodox rule," by reasoning that to exclude illegally obtained evidence was the most effective way to protect the public against unreasonable searches and seizures. North Carolina enacted a statute in 1951 that was in direct conflict to its previous decisions admitting such evidence. N.C. Gen. Stat. § 15-27 (1953).

These are the two conflicting views of a very controversial problem now present in American jurisprudence. Which of the two will emerge as the ultimate victor? Does either offer a satisfactory solution, or should new theories be inserted into the controversy? Perhaps a more severe punishment of the offending officer is the answer. The solution of the conflict is in the hands of the courts and legislatures and only a thorough understanding of the principles involved will aid in providing the correct solution to the problem.

Raymond P. Knoll

Evidence — Witnesses — Admissibility of Testimony that Defendant Is Insured. — Clayton v. St. Louis Pub. Serv. Co., 276 S.W.2d 621 (Mo. App. 1955). This is an appeal arising out of an action for personal injuries incurred by the plaintiff while a passenger in a streetcar operated by the defendant Public Service Company. An employee of Transit Casualty Company, defendant's insurance carrier, visited the plaintiff on several occasions
subsequent to the accident and on his first visit took a signed statement from her. At the trial, upon direct examination of the employee and upon cross-examination of the plaintiff and her witnesses, counsel for the defendant introduced and represented the witness to the jury as a claim agent of the Public Service Company. Over the objection of defendant's counsel, the plaintiff's lawyer was allowed to ask the employee by whom he was employed, and the following ensued:

Q. Well, who were you employed by the time this happened?  
A. Transit Casualty Company.  
Q. And who were you representing when you went out to see this lady? A. Public Service Company.  
Q. Were you ever in their employ? A. No.  
Q. But you were representing them when you went out to see her, is that correct? A. I was.  
Q. Would it be possible that you were representing Transit Casualty Company when you went out to see them?

Thereupon counsel for the defendant objected but his objection was overruled by the court. The question was re-phrased and the witness answered in the affirmative. In the course of his closing argument, plaintiff's attorney recalled to the jury that the witness was an employee of Transit Casualty Company and emphasized the fact that, although employed by the insurance company, he had testified that he represented the Public Service Company when he went to see the plaintiff. Defendant's counsel then made a motion for a mistrial on the grounds that the repeated reference to Transit Casualty Company was an attempt on the part of plaintiff's attorney to inject insurance into the case and thus prejudice the jury. This appeal assigned as error the overruling of this motion. The issue presented to the court, inter alia, was whether or not it was error in a personal injury suit to permit questions establishing the defendant's witness as an employee of an insurance company.

Sustaining the ruling of the court below, the court held that although the questions put to, and the answers made by, the witness brought out the fact that the defendant was insured, the testimony was admissible in order to establish the credibility of the witness; was relevant to show the interest of the witness; and was admissible to bring out who his employer was in order to show the connection between the witness and a party to the cause.

It is the general rule that in a personal injury action evidence that the defendant carries liability insurance is inadmissible. Ward v. Haralson, 196 Ark. 785, 120 S.W.2d 322 (1938) (dictum); Crawford v. Alioto, 105 Cal. App. 2d 45, 233 P.2d 148 (1951) (al-
ternative holding); M. & A. Motor Freight Lines v. Villere, 190 Miss. 848, 1 So.2d 788 (1941). One basis for excluding this type of evidence is irrelevancy. Jeddeloh v. Hockenhull, 219 Minn. 541, 18 N.W.2d 582 (1945); Lytton v. Marion Mfg. Co., 157 N.C. 381, 72 S.E. 1055 (1911). However the more compelling reason for the exclusion of this type of evidence is stated in Sutton v. Bell, 79 N.J.L. 507, 77 Atl. 42 (1910), at page 43:

... [N]ot that such evidential matter is lacking in relevancy or devoid of probative force logically considered, but... that the introduction of such facts and inquiries tends in actual operation to produce a confusion of issues in the mind of the jury and an unfair prejudice against one of the parties, in excess of, and, indeed, in the place of, the legitimate probative effect of such evidence. ...

Courts have held that the wilful introduction of insurance in order to influence the jury is so prejudicial as to constitute grounds for a new trial even though the trial court had admonished the jury to disregard such testimony. Watson v. Adams, 187 Ala. 490, 65 So. 528 (1914); Boyne v. Schulte, 222 S.W.2d 503 (Mo. App. 1949).

This strict prohibition against all references to insurance, however, is qualified by certain exceptions. It is never error to allow questions concerning insurance where that fact has a direct bearing upon the issue in controversy. For example, where the ownership of an automobile is in issue, the plaintiff may show the fact that defendant carried insurance on the auto as tending to prove ownership. Bash v. Hade, 62 N.W.2d 180 (Iowa 1954) (dictum); Layton v. Cregan & Mallory Co., 263 Mich. 30, 248 N.W. 539 (1933), reversed on other grounds on rehearing, 252 N.W. 337 (1933). In Olson v. Sharpe, 36 Tenn. App. 557, 259 S.W.2d 867 (1953), the court held that to introduce evidence of insurance in order to establish an agency relationship was not error.

A further exception to the general rule exists where an admission of a party concerning liability includes a reference to insurance. Jackson v. Ellis, 213 Ark. 826, 212 S.W.2d 715 (1948). In Garee v. McDonell, 116 F.2d 78 (7th Cir. 1940), cert. denied, 313 U.S. 561 (1941), the defendant sent a telegram to his insurance carrier admitting his liability for an automobile accident. The court held that, in order to show this admission, evidence concerning the telegram was properly allowed even though the jury would be informed of the fact that the defendant carried insurance. In Herschensohn v. Weisman, 80 N.H. 557, 119 Atl. 705 (1923), where a defendant said “Don’t worry, I carry insurance for that,” in answer to the plaintiff’s admonition to drive carefully, evidence of the conversation was admitted as tending to prove the defendant’s negligence even though the jury would be
apprised of the fact that the defendant was covered by liability insurance. The court said, 119 Atl. at page 705:

When the plaintiff remonstrated with him and admonished him to be more careful, his reply indicated that he was not concerned about his recklessness because he was protected by liability insurance. His attitude as disclosed by his words imply that he would be likely to exercise a less degree of care in operating his automobile for the reason that an insurance company would be called upon to pay for any damages occasioned to others by his reckless and negligent conduct. Consequently the fact that the defendant carried liability insurance was competent and important evidence bearing directly upon his negligence.

But where it is not necessary to refer to insurance in order to show an admission, and the matter of insurance is severable from the rest of the statement, it would be error to allow that part of the admission dealing with insurance to be presented. Anderson v. Mothershead, 19 Cal. App. 2d 97, 64 P.2d 995, 998 (1937) (dictum).

Another exception to the general rule of inadmissibility of the act of insurance is found in situations where an unexpected or unresponsive reference to insurance is made by a witness to an otherwise entirely proper question. Gleaton v. Green, 156 F.2d 459 (4th Cir. 1946). In these instances of volunteered remarks about insurance, courts have refused to grant mistrials if the trial judge immediately instructed the jury that the question of insurance was not to enter into their deliberations. Hazeltine v. Johnson, 92 F.2d 866 (9th Cir. 1937).

Testimony exposing the fact of insurance is admissible where it is sought merely to test the credibility of the witness. Dempsey v. Goldstein Bros. Amusement Co., 231 Mass. 461, 121 N.E. 429 (1919). In Butcher v. Stull, 82 S.E.2d 278 (W. Va. 1954), the court allowed cross-examination of an insurance adjuster to show that he was employed by the defendant's insurance carrier. The principal case falls within this exception to the general rule of inadmissibility. Although in the instant case the questions asked of and the answers made by the witness brought out the fact that the defendant was insured, the court held, that in order to establish the credibility of the witness his interest could be shown; notwithstanding the fact that the insurance would be incidently revealed to the jury.

In view of the various ways in which the existence of insurance may be elicited from a witness by bringing his testimony under one of the exceptions to the general rule excluding such evidence, the strict rule of inadmissibility appears to have become the exception instead of the rule. Moreover, if one takes a realistic view, it is hard to deny that almost every juror is conversant with
the fact that liability insurance is widespread and in the case of automobile owners almost universally procured. Courts, however, have consistently adhered to the general rule of inadmissibility, qualified by the exceptions discussed above. This adherence is sound, for to entirely disregard the doctrine of inadmissibility might tend to incline juries toward awarding excessive verdicts based upon the presence of the defendant's insurance in the case rather than the issue of the defendant's negligence.

Manuel A. Sequeira, Jr.

INSURANCE—AUTOMOBILE LIABILITY INSURANCE—"HOT ROD" BEING TOWED CONSIDERED TRAILER WITHIN MEANING OF EXCLUSIONARY CLAUSE.—Blue Ridge Ins. Co. v. Haun, ... Tenn. ... 276 S.W.2d 711 (1954), petition for rehearing denied (1955). The original bill was filed by the plaintiff insurance company seeking a declaratory judgment on the question whether a towed automobile was a "trailer" within the meaning of a clause in a policy excluding indemnity while the insured automobile "is used for the towing of any trailer owned or leased by the insured and not covered by like insurance in the company." Defendants to the suit were the insured and others having a claim against the insured by reason of an accident which occurred while the insured vehicle was towing a "hot rod" racing automobile not independently covered by insurance. The "hot rod" became disengaged from the towing automobile, veered to the left and collided head-on with an approaching car. No part of the insured automobile struck the other car or was involved in the collision.

The chancellor held that the car being towed was not a trailer within the terms of the policy. Under the exclusions provisions of the policy the insurance company was not liable: "(c) ... while the automobile is used for the towing of any trailer owned or leased by the insured and not covered by like insurance in the company." The court of appeals affirmed the chancellor's decision, reasoning that since there is an ambiguity in the use of the word trailer, which was of the insurer's own making, two well-known rules of construction relating to insurance policies were to be applied: (1) that all ambiguities will be resolved in favor of the insured, and (2) that all limitations of liability are to be construed strongly against the insurer. The Supreme Court of Tennessee reversed the decision of the court of appeals, finding for the insurance company. The court ruled that there could be no ambiguity in the use of the word trailer since it had been clearly defined in Waddey v. Maryland Cas. Co., 171 Tenn. 112, 100 S.W.2d 984 (1937), which definition still controlled, there
being no subsequent judicial or legislative attempts to define the term.

In the Waddey case, supra, the insurance policy excluded indemnity while the insured car was used for towing or propelling any trailer or any vehicle used as a trailer, but permitted "incidental assistance to a stranded automobile." The driver of the insured car permitted two young boys, who were stranded along the road, to attach their child-made wagon to his car. An accident occurred when the car started downhill and the boy steering the wagon lost control, crashed into a telephone pole and was injured. The court held that since the vehicle being towed was not an automobile, it obviously did not fall within the exception provided for in the policy. The court decided, however, that this wagon, made from the frame of a small buggy and mounted on four T-model Ford wheels with no tires and no bed or seat, except a plank extending from front to back axles, was a "trailer" as defined by Webster's International Dictionary: "A vehicle or one in a succession of vehicles hauled, usually, by some other vehicle." 100 S.W.2d at page 986.

It appears to be well settled that the insurer under a trailer exclusionary clause in an automobile insurance policy is exempt from liability regardless of whether or not the attached trailer caused or contributed to the accident. State Farm Mut. Automobile Ins. Co. v. Bass, 192 Tenn. 588, 241 S.W.2d 568 (1951). Thus, in Maryland Cas. Co. v. Cross, 112 F.2d 58 (5th Cir. 1940), cert. denied, 311 U.S. 701 (1940), the court held that an automobile liability policy, containing a provision suspending the insurance coverage so long as the automobile was using a trailer, did not cover injuries to the leg of the occupant of a truck which passed the insured vehicle while it was parked with a trailer attached, notwithstanding the fact that the occupant struck his leg against the fender of the insured automobile and not against the trailer. The decision was based on the ground that the insurance was wholly suspended while the automobile was used for towing the trailer. In Adams v. Maryland Cas. Co., 162 Miss. 237, 139 So. 453 (1932), the court ruled that even though there was no causal connection between the attachment of the trailer to the truck and the injury to the plaintiff, this would not be sufficient to make the insurance company liable. Substantially the same decision was rendered in Coolidge v. Standard Acc. Ins. Co., 114 Cal. App. 716, 300 Pac. 885 (1931), where the court stated that the attached trailer increased the peril of operating the automobile along the highway, and the insurer's exemption from liability did not depend upon the attached trailer becoming the cause of the accident or even contributing to the casualty. The reasoning under-
lying these decisions is set out at some length in Conner v. Union Automobile Ins. Co., 122 Cal. App. 105, 9 P.2d 863 (1932), at page 866:

The attachment of a trailer to the automobile while it was being operated is clearly an added hazard. There appears to be good reason why an insurance company may lawfully limit its liability to the operation of the insured machine free from the use of an attached trailer which increases the hazard.

The duration of the suspension of liability under these provisions includes casual stops enroute. United States Fidelity and Guaranty Co. v. Bachmann, 256 App. Div. 1042, 10 N.Y.S.2d 704 (4th Dep't 1939). The exclusionary clause did not apply in Maryland Cas. Co. v. Aguayo, 29 F. Supp. 561 (S.D. Cal. 1939) (alternative holding), where the truck and trailer had arrived at their destination so that the trailer was no longer actually being towed, the court stating that the word "towing" signified movement.

In a Pennsylvania case, the insured claimed the exclusionary provision should not apply because the trailer in question and another loaded on the bed of his truck were being hauled as freight in the normal course of business. The court, however, relieved the insurance company from liability, holding that the exclusionary provision still applied. Speca v. Bucci Constr. Co., 139 Pa. Super. 76, 11 A.2d 560 (1940). A further extension of this rule of non-liability was reached in Pennsylvania Indemnity Corp. v. Kurtz, 167 Md. 38, 172 Atl. 607 (1934), where there was testimony by plaintiff's witness to the effect that nothing was attached to the insured vehicle at the time of the accident. This same witness, however, testified that before the accident he saw the truck backed up against the curb, and immediately after the accident he saw a circus wagon attached to the truck about to be moved out. This was considered sufficient under the circumstances disclosed by the record, to show, as a matter of law, that the truck was being operated or manipulated to tow a wagon within the exclusionary provision of the liability policy. The decision would seem to indicate that the mere intention to attach a trailer brings the insured automobile within the exclusionary provision of the policy.

The question whether an attached vehicle is in fact a trailer or is being used as a trailer has arisen many times. In Moffitt v. State Automobile Ins. Ass'n, 140 Neb. 578, 300 N.W. 837 (1941), it was held that a hay grinder mounted upon four wheels and which was being drawn by a truck upon a public highway, was a trailer or vehicle within the common and ordinary meaning of these words.

In some states a trailer is defined by statute. A Florida statute
provides that a trailer shall include all four-wheeled vehicles, and a semi-trailer all two-wheeled vehicles, coupled to or drawn by a motor vehicle. FLA. STAT. ANN. § 320.01 (1943). In Poole v. Travelers Ins. Co., 130 Fla. 806, 179 So. 138 (1937), the policy provided that the truck in question shall be insured for the towing of any trailer only when such use is definitely declared and rated. The exception made no reference to semi-trailers. In holding the insurance company liable the court ruled that, construing the terms of the policy most strongly against the company, the failure to mention the semi-trailer in that part of the policy made it permissible for a truck insured under the policy to tow a semi-trailer and be insured though the semi-trailer was not definitely declared and rated.

In Maryland Cas. Co. v. Cross, supra, a Texas statute providing for the registration of motor vehicles, expressly distinguished a trailer from a semi-trailer. The court pointed out, however, that the classification for the purpose of registration fees did not throw much light on the meaning of the term as used in an insurance policy. In Maryland Cas. Co. v. Aguayo, supra, it was held that a concrete mixer which was attached to a truck at the time of the injury to a third party was not a trailer under the applicable California law. The court stated that, in writing the insurance policy, the insurer was careful to exclude from coverage trailers and semi-trailers which were defined in the California Vehicle Code, but it did not exclude special mobile equipment, also defined in the Vehicle Code. Under this view it could be assumed, therefore, that the insurer was willing to assume the added risk.

In many of the cases discussed above as well as the instant case, the policy further provides for a suspension of the trailer exclusionary provision if the vehicle towed is a utility trailer and not a home, office, store, display or passenger trailer. This added provision seems to further complicate the reduction of these exclusionary provisions to clear and certain application. Such a provision is discussed in Maryland Cas. Co. v. Hoffman, 75 Ariz. 103, 252 P.2d 82, 84 (1952) (dictum). The policy involved in that case defined utility trailer as "... a trailer not so described, if designated for use with a private passenger automobile, if not being used with another type automobile, and if not a home, office, store, display or passenger trailer." 252 P.2d at page 84. The court held such a policy to embrace all trailers of every description except those which are classified as home, office, store, display or passenger trailers.

The general proposition that where the terms of an insurance policy will bear two interpretations, that one will be adopted which sustains the claim for indemnity, is not contradicted in
any of the cases which have been discussed. In keeping with this rule the courts have regarded the term "trailer" as being susceptible of only one meaning. They then have proceeded to determine whether that meaning embraces the particular vehicle involved in the case. This was the procedure followed by the court in the instant case, and it is submitted that the decision that the "hot rod" was a trailer was reasonable in view of the controlling definition which had been previously adopted by the court.

James E. Sullivan

PROCEDURE—JURISDICTION OVER FOREIGN CORPORATIONS—"DOING BUSINESS" AND DUE PROCESS.—Jenkins v. Dell Publishing Co., 130 F. Supp. 104 (W.D. Pa. 1955). In an action for invasion of privacy the defendant publisher moved to dismiss for lack of jurisdiction on the ground that it was not doing business in Pennsylvania. Its magazines were distributed in Pennsylvania by an independent contractor who bought them from the defendant for resale. However, the defendant regularly employed traveling representatives to serve as liaison men between the corporation and its local distributors, to promote its sales, and to create good will in the state. These men did not sell magazines themselves; nor did they maintain office space or telephone service in Pennsylvania. PA. STAT. ANN. tit. 15, § 2852-1011 (B) (C) (Supp. 1954) provides that when an unregistered foreign corporation enters the state to perform "... a series of similar acts for the purpose of thereby realizing pecuniary benefit ...", that corporation may be sued in Pennsylvania on causes of action arising out of its activities in the state.

The question presented by this motion was whether defendant's contacts with the state were such as to make it reasonable for the court to assume jurisdiction over the defendant without offending the Fourteenth Amendment's due process of law. U.S. Const. amend. XIV § 1.

The court denied the motion to dismiss on the ground that the systematic and continuous activities of the defendant's representatives made it reasonable to require the corporation to defend this suit. It emphasized the statement of the Supreme Court in International Shoe Co. v. Washington, 326 U.S. 310 (1945), that presence in the state has never been doubted where "... the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on..." 326 U.S. at page 317.

Historically, a corporation was believed to have no existence
outside the state of its incorporation, *Bank v. Earle*, 38 U.S. (13 Pet.) 517, 587 (1839) (dictum), and could not be sued for a personal judgment outside that state since jurisdiction depended upon the presence of the defendant before the court. Accordingly, various theories were devised to acquire jurisdiction over foreign corporations. Since a state could prevent these corporations from doing local, or intrastate business without previously consenting to accept service of process, they either consented or were held to have implied their consent by conducting business within the state. This fiction of implied consent failed when the defendant was engaged solely in interstate commerce, which the state could not prevent. See Field and Kaplan, *Materials for a Basic Course in Civil Procedure*, 796-798 (1953). To satisfy the apparent need for the defendant's presence, the Court in *Philadelphia & Reading Ry. v. McKibbin*, 243 U.S. 264 (1917), enunciated the “presence theory,” under which a foreign corporation was regarded as being amenable to suit if its business was done in a manner and to an extent which would warrant the inference that it was present in the state.

Pointing out that a corporation has no existence except through the activities of its representatives, the Court in *International Shoe Co. v. Washington*, supra, rejected the “presence theory” to deal with the real problem: whether those activities in a state make it reasonable to hold the foreign corporation amenable to suit there. In that case the corporation’s business in the State of Washington was confined to sales in interstate commerce. However, it employed salesmen to solicit orders and display its shoes in sample rooms. The Court held that these systematic and continuous activities of the corporation’s salesmen provided the necessary contacts with the state so that the maintenance of the suit would not offend “traditional notions of fair play and substantial justice.” 326 U.S. at page 316. The Court pointed out that the privilege of carrying on activities in a state may give rise to obligations, and “... so far as those obligations arise out of... the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.” 326 U.S. at page 319.

As the concurring opinion in the *International Shoe* case anticipated, conflicting results have been reached by the courts in applying the general standard of reasonableness. It must be noted, however, that many decisions cannot follow the test completely, either because the state service statute is not broad enough, *Chapman v. Telex, Inc.*, 129 F. Supp. 567 (N.D. Ga. 1954), or because the statute has been narrowly construed by the state courts, *Pulson v. American Rolling Mill Co.*, 170 F.2d 193 (1st Cir. 1948). A state
is not obliged to expand its jurisdiction, *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 440 (1952) (dictum), *rehearing denied*, 343 U.S. 917 (1952), and the construction given to the service statutes by the state courts is controlling on the federal courts. *Pulson v. American Rolling Mill Co.*, *supra*.

While the words of the Court in the *International Shoe* case indicate that it would uphold jurisdiction where the defendant's activities are systematic and continuous and give rise to the liability sued on, some courts have continued to apply a technical and unrealistic test of what constitutes "doing business." On the authority of *Green v. Chicago Burlington and Quincy Ry.*, 205 U.S. 530 (1907)—which was called "extreme" although the Court declined to overrule it in *International Harvester Co. v. Kentucky*, 234 U.S. 579, 586 (1914) (dictum)—some courts have indicated that the mere solicitation of orders to be accepted outside the state does not constitute "doing business" for jurisdictional purposes. See *Schmidt v. Esquire, Inc.*, 210 F.2d 908, 915 (7th Cir. 1954) (dictum), *cert. denied*, 348 U.S. 819 (1954); *Landell v. Northern Pac. Ry.*, 98 F. Supp. 479, 482 (D. D.C. 1951) (dictum). Where this is actually held, the facts usually show that the injury did not result from the corporation's solicitation activities within the state, *Fiorella v. Baltimore & O. R.R.*, 89 F. Supp. 850 (E.D. Pa. 1950); or the injury occurred outside the state, *Zuber v. Pennsylvania R.R.*, 82 F. Supp. 670, 678 (N.D. Ga. 1949) (dictum); or the solicitation activities are carried on by independent contractors and not by agents or employees of the defendant, *Schmidt v. Esquire, Inc.*, *supra*. Solicitation alone has been held sufficient where the injury results from the solicitation activities of defendant's employees. *Zuber v. Pennsylvania R.R.*, *supra*.

It is well established that solicitation plus some additional activities subjects a foreign corporation to state jurisdiction, whether the facts are tested to see if the defendant is "doing business," *International Harvester Co. v. Kentucky*, *supra*, or by the "reasonableness" norm of the *International Shoe* case. Some additional activities on the part of a corporation's representatives which the courts have considered important in sustaining jurisdiction are: maintaining a local office where employees occasionally sell tickets themselves, *Landell v. Northern Pac. Ry.*, *supra*; office space, telephone service, bank account, and complaint adjustment by local employees, *Kendrick v. Seaboard Air Line R.R.*, 98 F. Supp. 372 (E.D. Pa. 1949); service representative repairs and demonstrates products, and services delinquent accounts, *Jensen v. Van Norman Co.*, 105 F. Supp. 778 (D. Minn. 1952); inspecting stock and displays, demonstrating products, investigating complaints, conducting sales meetings, driving defendant's automobile, *Radford*

In the above cases the activities were carried on by agents or representatives in the defendant's employ. An employment relationship is not always necessary under the "solicitation plus" rule of the above cases. Thus, jurisdiction may be sustained even though the defendant sells its products to an independent contractor for distribution, if the defendant exercises a substantial amount of control over the distributor's activities. Kahn v. Maico Co., 216 F.2d 233 (4th Cir. 1954); Thomas v. Hudson Sales Corp., 204 Md. 450, 105 A.2d 225 (1954). However, it has been held that a foreign corporation which clearly controls its subsidiary in a state is not suable in that state unless an agency relationship between parent and subsidiary is established, as the subsidiary is a distinct corporate entity. Harris v. Deere & Co., 128 F. Supp. 799 (E.D.N.C. 1955), aff'd per curiam, 223 F.2d 161 (1955); Favell-Utley Realty Co. v. Harbor Plywood Corp., 94 F. Supp. 96 (N.D. Cal. 1950).

Finally, the defendant corporation may be suable if the activities of its agents in a state are systematic and continuous and give rise to the liability sued on, even though there is no solicitation. The principal case sustained jurisdiction on sales promotion work alone. The regular, continuous and systematic purchase of large quantities of coal by defendant's agents was held sufficient to make the company amenable to service of process in Star Elkhorn Coal Co. v. Red Ash Pocahontas Coal Co., 102 F. Supp. 258 (E.D. Ky. 1951). In Green v. Equitable Powder Mfg. Co., 99 F. Supp. 237 (W.D. Ark. 1951), defendant, a foreign corporation, owned and operated a large game preserve in Arkansas for the entertainment of its guests and demonstration of its rifles, which were also displayed in state competition by expert marksmen in its employ. These sales promotion activities, being both systematic and continuous, were held to make it reasonable to require defense of an action brought against the defendant in Arkansas. In Murphy v. Arrow S. S. Co., 124 F. Supp. 199 (E.D. Pa. 1954), the defendant was held amenable to service although the activities of its agents were confined to docking at Philadelphia seven times in four years. Jurisdiction was upheld in Orange-Crush Grapico Bottling Co. v. Seven-Up Co., 128 F. Supp. 174 (N.D. Ala. 1955),
where the defendant's agents made "regular, systematic and frequent" trips to Alabama to promote sales through such activities as sales meetings, schools, demonstrations, advertisements, product analysis, plant and machinery inspection, negotiating and making agreements for new franchises. Opposed to this trend is *Cogburn v. MacFadden Publications, Inc.*, 129 F. Supp. 535 (E.D. S.C. 1955), substantially the same as the principal case on its facts in that sales promotion work was done by defendant's representatives, while sales were made to independent distributors.

In *Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663 (1953), the defendant's magazines were distributed through independent contractors, but two circulation road men were employed by defendant to check retail outlets in Florida. The Court returned the case to the district court to determine the jurisdictional issue. Justice Black, dissenting in part, chose to decide that question at once, and expressed the opinion that the activities of the circulation men show that the defendant was "doing business" in the state under the "basic fairness" test of the *International Shoe* case. He suggested that if the defendant will suffer in defending an action in a foreign jurisdiction, the way is clear for the court to grant a change of venue "in the interest of justice" under 28 U.S.C. § 1404(a) (1952). 345 U.S. at page 671.

In *Tiner v. Insulrock Corp.*, 120 F. Supp. 11, 14 (E.D. Ark. 1954) (dictum), the court suggested: "Perhaps the best method of determining whether or not a corporation . . . is doing business in the state is to look to the results."

The principal case, in sustaining jurisdiction although the defendant's activities were confined to mere sales promotion, seems to be in line with the modern trend of authority. The recent decisions indicate that the courts are gradually disregarding technical distinctions to consider the question of jurisdiction in terms of reasonableness and due process, thus following the lead of the Supreme Court. It is submitted that for a company maintaining contacts in many states the defense of an action in the most remote corner of America is no more inconvenient than the trip to the county courthouse may have been a hundred years ago. To a practical businessman, a corporation whose product is sold in a state is doing business there. Such a pragmatic, common sense test has great merit. When a corporation profits from its activities in a state it should not be heard to argue the injustice of its being called upon to assume corresponding obligations in that state.

*Edward S. Mraz*
SALES — EXPRESS WARRANTY — LIABILITY OF PROCESSOR OF FOOD TO ULTIMATE CONSUMER FOR REPRESENTATIONS ON LABEL OF CANNED FOOD.—Lane v. C. A. Swanson & Sons, 130 Cal. App. 2d 272, 278 P.2d 723 (1955). The defendant processed a can of ready-to-eat chicken and labeled it "boned chicken." The can was sold to a retailer who sold it to the plaintiff. When purchasing, the plaintiff relied on the label on the can and also on an advertisement of the defendant in a local newspaper. The advertisement stated that cans of chicken of this type contained no bones. The can purchased in fact contained a hidden chicken bone which became lodged in the plaintiff's throat, causing severe personal injuries. The plaintiff brought suit for damages for breach of an express warranty directly against the processor, C. A. Swanson & Sons. While admitting the existence of a warranty of fitness for human consumption, the defendant contended that the label merely described the manner of preparation and packing, and that it did not constitute an express warranty that the can was free from bones. The defendant did not raise the issue of privity. The trial court held that there was no express warranty.

On appeal, the question for the decision of the court was whether or not the label on the can constituted an express warranty. The appellate court reversed and held primarily that the label on the can supported by the newspaper advertisement constituted an express warranty which had been breached by the defendant.

In the early common law, a warranty was based on an action on the case for deceit, a tort claim, and it provided part of the background for the development of the action of special assumpsit. Ames, The History of Assumpsit, 2 Harv. L. Rev. 1, 8 (1888). In Stuart v. Wilkins, 1 Doug. 18, 99 Eng. Rep. 15 (1778), where the defendant represented as sound a horse which he sold to the plaintiff, and where in fact the horse was diseased, the action of assumpsit was first applied. Thus, basing the modern liability of a seller on contract as well as on tort can easily be explained.

When the seller expressly promised that some quality in a good was present, and when he received a sufficient consideration for it, he entered into a contract. As there was an action in contract for breach of contract, along with it came the requirement of privity. 30 Notre Dame Law. 173 (1954).

Privity and its effect on the parties to a contract have been important considerations for many years. The basic, underlying principle governing the liability of a manufacturer to an ultimate consumer was set out in a landmark case, Winterbottom v.
Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (1842), where the plaintiff contracted with a third party to drive the latter's coach. The defendant contracted with the same third party to keep the coach in good repair. The coach collapsed and the plaintiff was injured. The court held that lack of privity between the plaintiff and the defendant prevented a recovery. Two New York cases, MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), and Thomas v. Winchester, 6 N.Y. 397, 57 Am. Dec. 455 (1852), developed a new theory regarding a manufacturer's liability to a consumer. The New York courts allowed recoveries in both of these cases on the basis of negligence in the preparation of an "inherently dangerous article." The issue of privity was thus circumvented. The court in the instant case ignored the question of privity between the plaintiff and the defendant, demonstrating the modern tendency. Far-reaching changes in business methods and markets have brought about this variation. See generally, Prosser, Torts § 83 (1941).

Since the manufacturer and the consumer do not actually contract, some modern courts still hold to the privity requirement and refuse to extend the warranty to the consumer. J. I. Case Threshing Mach. Co. v. Dulworth, 216 Ky. 637, 287 S.W. 994 (1925). In Chanin v. Chevrolet Motor Co., 89 F.2d 889 (7th Cir. 1937), the plaintiff was injured by the shattering of a glass windshield. The defendant prepared circulars which it distributed to its dealers and which assured the shatterproof quality of the windshield. The defendant relied on the representations, the court denied recovery because the lack of privity negated the existence of a warranty. Contra, Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932). However, the court in Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N.W. 309 (1939), held the manufacturer liable for the breach of an express warranty. The warranty that the car's roof was seamless was set out in an advertisement. The difference between this case and the Chanin case, supra, seems to be that in the former, the warranty was made to the dealer, where in the latter, the court felt that the advertisement was made to the plaintiff himself.

Cases dealing mainly with food have led to a strong minority position, indicating a more recent trend. They have endorsed the rule that the processor is liable even without privity on the warranty theory. Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N.W. 382 (1920); Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942). Cf Southwest Ice & Dairy Products Co. v. Faullkenberry, 203 Okla. 279, 220 P.2d 257 (1950). This view, which gives the consumer a right of action
against the original wrongdoer also will give him a more valuable judgment since small corner-grocerymen might not be able to pay any damages that may be awarded. Comment, 23 CALIF. L. REV. 621, 625 (1935).

Considering this allowance of recovery despite the lack of privity, if the manufacturer made an express warranty an even stronger case could be made out against him. In earlier cases, the seller must have intended to make a warranty, express or implied. The court in Barnett v. Stanton, 2 Ala. 181, 184 (1841), stated that no matter how positive the representation of the seller was, it would only be an expression of belief or an opinion unless it was intended as a stipulation that the property was of the quality represented. Today, however, the intent of the seller is immaterial. Chamberlain Co. v. Allis-Chalmers Mfg. Co., 51 Cal. App. 2d 520, 125 P.2d 113 (1942) (dictum) (decided under the UNIFORM SALES ACT). See 1 WILLISTON, SALES §§ 197-201 (rev. ed. 1948).

In a gradual process of increased readiness to find warranties existing, it has been held that an express warranty need not contain the word “warranty,” nor is any technical set of terminology required. Belt Seed Co. v. Mitchelhill Seed Co., 236 Mo. App. 142, 153 S.W.2d 106, 109 (1941). In comparison with the requirements demanded in the Barnett case, supra, the definition of an express warranty in the UNIFORM SALES ACT has made the finding of a warranty an easier task and probably has given the courts a more uniform guide. In Section 12 of the Act it is stated:

Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.

The use of large-scale national and local advertising by the manufacturer has given rise to express warranties. An advertisement in a local newspaper that certain seed corn was 95 per cent germinative by test was held to be an express warranty in Baumgartner v. Glesener, 171 Minn. 289, 214 N.W. 27 (1927). The plaintiff in Turner v. Central Hardware Co., 353 Mo. 1182, 186 S.W.2d 603 (1945), demonstrated such strong reliance on a newspaper advertisement that he took the paper to the defendant's store when he purchased a stepladder. A recovery was allowed for the breach of an express warranty made in the advertisement when the ladder later proved to be defective.

In a similar case, Silverstein v. R. H. Macy & Co., 266 App.
Div. 5, 40 N.Y.S.2d 916 (1st Dep’t 1943), the plaintiff, after discussing the apparatus with the defendant’s salesman, purchased a chinning bar. Directions in the advertising matter advised that the bar would safely sustain 250 lbs. Injury resulted to the plaintiff who weighed 170 lbs. when the bar fell after only five months use. In allowing recovery, the court held that the defendant adopted as a warranty the representations of the manufacturer made in the circular.

Analogous to newspaper advertisements and printed circulars as express warranties are labels on cans and containers. Although recovery was denied because of the lack of privity in Jordan v. Brouwer, 86 Ohio App. 505, 93 N.E.2d 49 (1949), the label on a can of antifreeze was held by the court to be an express warranty. After citing Baumgartner v. Glesener, supra, to strengthen the decision, a tag attached to a package of seed stating that the seed was 98 per cent pure was held to be an express warranty in Mallery v. Northfield Seed Co., 196 Minn. 129, 264 N.W. 573, 574 (1936). Careful note must be taken of the words and phrases used on each particular label, and the application of Section 12 of the Uniform Sales Act is also important.

Though a similar case holding a label on a can of food to be an express warranty could not be found, the instant case seems to be indicative of the modern trend. A purchaser should be allowed to rely strictly on such descriptive names as “boned chicken.” By permitting a consumer to recover and making the manufacturer liable as an insurer, regardless of privity, courts will place the responsibility for injury with the only party to the transaction capable of controlling the situation. Advocating strict legal sanctions will promote higher ethics in advertising and discourage careless manufacture. Food processors especially will tend to keep their advertising truthful and take particular notice of their packing methods. While individual jurisdictions will continue to follow their respective theories, the grip of public policy and the demands of social justice will probably move an increasing number of courts toward strict liability for the manufacturer.

Paul M. Kraus

Taxation—Federal Income Tax—Punitive Damages Includible in Gross Income.—Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955). This is a consolidation of two cases, the other defendant being the William Goldman Theatres, Inc. Both cases have distinct factual situations, yet the issue involved is the same.
In the principal case a suit was brought by Glenshaw Glass Co. against another company and demand was made for exemplary damages for fraud, and treble damages for injury to its business by reason of a violation of the federal antitrust laws. A settlement was reached and Glenshaw Glass received a sum which represented payment of punitive damages. This amount was not reported as income for the tax year involved. In the William Goldman Theatres case, the theatre corporation sued another corporation under the federal antitrust laws and recovered treble damages, a third of which constituted lost profits. It reported as income the amount equal to its lost profits, but not the sum representing punitive damages. In both instances the Commissioner asserted a deficiency claiming as taxable the total sum recovered less any deductible legal fees. The Tax Court in both cases held for the taxpayer disallowing as income the treble or punitive damages. The Court of Appeals, after consolidating the two cases, affirmed the Tax Court. The Supreme Court granted certiorari.

The issue presented to the Court by both cases was whether money received as exemplary damages for fraud, or as the punitive two-thirds portion of a treble damage antitrust recovery, must be reported as gross income under Int. Rev. Code of 1939, §22(a), 53 Stat. 9 (now Int. Rev. Code of 1954, §61(a)). The Supreme Court, reversing the lower court, held that the sums received as punitive damages were gross income within the meaning of the code.

It is conceded by the taxpayer in the principal case that the problem is not of a constitutional nature, but one of determining from the revenue code the meaning of gross income. The Supreme Court, in the early case of Eisner v. Macomber, 252 U.S. 189 (1920), attempted to define the concept of income by stating at page 207:

"Income may be defined as the gain derived from capital, from labor, or from both combined," provided it be understood to include profit gained through a sale or conversion of capital assets. . . .

In Bowers v. Taft, 20 F.2d 561 (2d Cir. 1927), aff'd, 278 U.S. 470 (1929), an attempt was made by Judge Learned Hand in a concurring opinion, to define income when he stated, 20 F.2d at page 564:

No increase in value not realized in cash can be taxed as income under the Sixteenth Amendment; that was very deliberately decided in Eisner v. Macomber. . . . If it is important, I suggest that the language of the Amendment itself gives Congress power to lay "taxes on incomes," not on persons.

Justice Holmes in Towne v. Eisner, 245 U.S. 418 (1918), in dis-
cussing the term income stated, 245 U.S. at page 425:

But it is not necessarily true that income means the same thing in the Constitution and the act. A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.

In United States v. Kirby Lumber Co., 284 U.S. 1 (1931), the Court rejected judicial definitions as to the meaning of income and stressed a "plain popular meaning" rule. This case is commented on in an article by Surrey and Warren, The Income Tax Project of the American Law Institute, 66 Harv. L. Rev. 761, 771 (1953), where income is described in this manner:

The Supreme Court has recognized the futility of attempting to capture the concept of income and confine it within a phrase. In United States v. Kirby Lumber Co. the Court explicitly abandoned the search for a definition, and succeeding cases have not revived the search. The courts have given a wide scope to the income tax, but have recognized that the borderline content of "income" must be determined case by case. Essentially the concept of income is a flexible one, with the result in a particular case being determined by the interplay of common usage, accounting concepts, administrative goals, and finally judicial reaction to these forces. Each force and judicial reaction in turn reflects an underlying judgment as to what types of receipts should be subject to a tax imposed on "income."

Despite this rejection of a judicial definition as to the meaning of income, exceptions, not found in the code, continued to be imposed by the courts. In Central R. Co. v. Commissioner, 79 F.2d 697 (3d Cir. 1935), a penalty was declared not to be income. This proposition was followed in Highland Farms Corp. v. Commissioner, 42 B.T.A. 1314 (1940), when the Board of Tax Appeals stated, at page 1322:

A penalty imposed by law does not meet the test of taxable income set forth in Eisner v. Macomber, 252 U.S. 189, as "the gain derived from capital, from labor, or from both combined. . . ."

Yet in Park & Tilford Distillers Corp. v. United States, 123 Ct. Cl. 509, 107 F. Supp. 941 (1952), cert. denied, 345 U.S. 917 (1953), there is dictum to the effect that punitive damages are taxable. The court stated, at 107 F. Supp. 944:

The treatment, for income tax purposes, of a penalty, so far as the receiver of the penalty is concerned, is analogous to the treatment of damages received by him for some violation of his rights. When damages are recovered in lieu of profits or income to which the taxpayer would have been entitled, but for the violation of his rights, they are taxable to him as income.

In Commissioner v. Obear-Nester Glass Co., 217 F.2d 56 (7th Cir.
RECENT DECISIONS

1954), cert. denied, 348 U.S. 982 (1955), the dictum of the Park & Tilford case, supra, was followed, and punitive damages were held to be includible in gross income. The court reasoned that the respondent had realized an economic gain and Congress had failed to provide a specific exclusion for these damages.

The decision in the principal case strengthens the "plain popular meaning" rule expounded in the Kirby Lumber Co. case as opposed to the limited definition given income in Eisner v. Macomber. Hence the decision in the instant case is in full accord with more recent Supreme Court decisions wherein the Court has not been able to find any statutory authority for the inclusion or exclusion of a particular item in gross income. Thus, money obtained by extortion was held to be includible, in Rutkin v. United States, 343 U.S. 130 (1952); and, in General American Investors Co. v. Commissioner, 348 U.S. 434 (1955), "insider profits" received by a corporation pursuant to the Securities Exchange Act of 1934 were held includible.

The term "gross income" as defined in the revenue code is too inclusive to permit the courts to exclude punitive damages without any sanction by Congress. In reference to gross income as defined in Int. Rev. Code of 1939, § 22 (a), 53 Stat. 9 (now Int. Rev. Code of 1954, § 61 (a)), the Supreme Court in Helvering v. Clifford, 309 U.S. 331 (1940), stated at page 334:

The broad sweep of this language indicates the purpose of Congress to use the full measure of its taxing power within those definable categories.

This interpretation of gross income, found also in the principal case and the General American Investors case, appears to construe the statutory phrase as broadly as the wording found in the Sixteenth Amendment. Hence, if the statutory meaning is as wide in scope as there is constitutional power, the courts have to apply a test broad in meaning as to what is income, for the Court in the Clifford case, supra, clearly states that the courts must effectuate the full measure of the taxing power. It only follows that if the courts impose limitations on the term "gross income" the wishes of the legislature are not being followed.

The arguments propounded in favor of excluding punitive damages from gross income are based on the following theories: 1) punitive damages are not income, but penalties; 2) an admission that most large sums recovered as punitive damages result from a treble damage recovery under the antitrust law, and that this feature of the legislation is designed to reward those who bring suit under this law. Therefore if this recovery is taxed the incentive to file suit is lessened.
The second argument admits that the purpose behind the antitrust legislation should modify the otherwise sweeping language of the statutory definition of "gross income." Int. Rev. Code of 1954, § 61 (a). If this is allowed, however, the taxing power of Congress would be curtailed by statutes clearly not intended to be in pari materia with the revenue code. It follows therefore that antitrust legislation should not be construed with taxing statutes in order to create an artificial exclusion for punitive damages. See Commissioner v. Obear-Nester Glass Co., 217 F2d 56, 61-62 (7th Cir. 1954).

As to the first argument, the question of whether or not the term income, for tax purposes, should include a penalty must be answered. The new code defines gross income as "... all income from whatever source derived ...," yet this section makes no mention of a penalty. Int. Rev. Code of 1954, § 61 (a). A penalty, therefore, is a judicial exclusion written into the code by the courts. This is error in view of the broad, all inclusive language of § 61 (a); hence the term gross income should include penalties. See 217 F.2d 56, 59.

After rejecting the rule of Eisner v. Macomber and accepting the standard employed by the Supreme Court in the Kirby Lumber Co. case, could the Court reasonably hold that punitive damages are not income within the meaning of the revenue code? Upon receipt of the punitive damages, there is an increase in the net worth of the corporation without any deductions or exclusions, and hence a negative answer should be given to this question. These monies, therefore, should be included within the gross income of the corporation upon the filing of its tax return, unless they are expressly excluded by Congress. To date Congress has not sanctioned the exclusion of punitive damages. See however, Surrey and Warren, Federal Income Taxation 156 (1955 ed.) where the following is stated:

The House Ways and Means Committee in its consideration of the 1954 Code had specifically decided not to exempt punitive damages, Supplemental Memorandum of Gov't, p. 8, in Glenshaw Glass case.

In conclusion, if punitive damages are to be excluded from gross income the decision should be made by Congress as a matter of policy.

J. Robert Geiman

UNEMPLOYMENT INSURANCE—PUBLIC WELFARE—RIGHT OF WORKERS TEMPORARILY UNEMPLOYED AS A RESULT OF A STRIKE TO RE-
RECENT DECISIONS

CEIVE UNEMPLOYMENT COMPENSATION. — *Snook v. Int'l Harvester Co.*, . . . *Ky.* . . ., 276 S.W.2d 658 (1955). The plaintiffs were employed in the foundry of the International Harvester Company plant in Louisville, Kentucky, which also employed machinists. The foundry workers and the machinists were each represented by different labor unions, operated under different labor contracts, and maintained separate seniority and vacation lists and personnel records. The foundry and machine shop were housed in separate buildings located on the same premises, but from a production standpoint, they were closely integrated. A strike by the machine shop employees caused the temporary unemployment of the foundry workers although they were not directly involved in the strike. Upon application for unemployment benefits, the Unemployment Insurance Commission decided that the foundry workers were not entitled to compensation. The decision of the Commission was affirmed by the circuit court. On appeal to the Kentucky Supreme Court, the question presented was whether the foundry employees of the International Harvester Company, who were laid off because of a strike by the machine shop employees at the Louisville plant, were entitled to unemployment compensation under the Kentucky Unemployment Compensation Act. *Ky. Rev. Stat. Ann.* § 341.005 (Baldwin 1943). Section 341.360 of the Act provides that no worker shall be paid unemployment benefits if:

(1) A strike or other bona fide labor dispute which caused him to leave or lose his employment is in active progress in the establishment in which he is or was employed . . .

The court of appeals held that the machine shop and foundry were so integrated and operated in such close proximity that they in effect constituted a single establishment within the meaning of the Unemployment Compensation Act, thereby excluding the foundry workers from unemployment benefits since a labor dispute was in existence "in the establishment" where they were employed.

The purpose of unemployment insurance is to allow compensation for a limited period of time to those capable of working and available for work who are involuntarily unemployed through no fault of their own. A problem arises, however, when the courts try to distinguish between voluntary and involuntary unemployment. A failure of grocery department employees to cross a picket line maintained by striking members of a meat cutters union was held to be a voluntary leaving of work resulting in disqualification from unemployment insurance benefits. *Beaman v. Safeway Stores Inc.*, 78 Ariz. 195, 277 P.2d 1010
(1954). In W. R. Grace & Co. v. California Employment Comm'n, 24 Cal.2d 720, 151 P.2d 215 (1944), it was held, *inter alia*, that longshoremen who stopped work at a point where striking employees of a clerks' union were employed, were voluntarily unemployed and therefore not entitled to compensation. A refusal of members of the C.I.O. to cross picket lines of striking members of the A.F. of L. was held to be a voluntary act of leaving work and refusal of unemployment benefits was ruled proper in Brown v. Maryland Unemployment Compensation Bd., 189 Md. 233, 55 A.2d 696 (1947). Again, in General Motors Corp. v. Appeal Bd., 321 Mich. 724, 34 N.W.2d 497 (1948), *reversing on rehearing*, 321 Mich. 604, 33 N.W.2d 90 (1948), it was decided that an employee who was a die maker, working in a separate and distinct unit, and who was laid off because of a strike called by another union in the plant, was voluntarily unemployed and hence was rightfully denied compensation.

The courts are in agreement that those workers who are actively participating in a labor dispute and consequently laid off should be denied unemployment benefits. However, there is disagreement among the courts in cases where there are two plants under one management in close proximity to each other and a labor dispute at one plant causes unemployment at the other. In the instant case, where the foundry workers were employed in a building separated from the striking machinists, though close by, the court denied unemployment benefits because the foundry workers were employed in the same establishment as the strikers. As to what constitutes an "establishment" or "factory," there is a tendency to limit the meaning of these terms to a particular factory or establishment. However, the meaning of the terms has been extended to cover several plants if they are within reasonably close proximity and are functionally integrated. In Chrysler Corp. v. Smith, 297 Mich. 438, 298 N.W. 87 (1941), a labor dispute in the Dodge main plant in the Detroit area halted work in other Dodge plants located within 11 miles of the main plant. All employees, those who assumed an active interest in the dispute and those who did not participate in any manner, were denied unemployment benefits. The Supreme Court of Michigan applied the "functional integrality" test and held that all the Dodge plants were so synchronized as to constitute one establishment within the provisions of the Michigan Unemployment Compensation Act. All employees were therefore directly interested in the labor dispute because it would affect their wages, hours of employment, and conditions of work. The Wisconsin court applied this test in Spielmann v. Industrial Comm'n, 236 Wis. 240, 295 N.W. 1 (1940), and de-
RECENT DECISIONS

...decided that a strike at the Kenosha plant, which stopped work at the Milwaukee plant, was a strike involving a single establishment because of the physical proximity, functional integrality, and general unity of the two plants; on this basis unemployment benefits were denied. Each plant however was 40 miles distant; each had its own wage and labor contract; they had separate seniority and service records; and each was represented by its own union. Also, the contract negotiations of one plant were done independently from the other; the employees in one plant had no standing in the other plant; each plant had its own hiring and firing department; and the employer-employee relationship of each plant was distinct. The Wisconsin court therefore attacked the problem by considering whether the units were a single enterprise from the viewpoint of management. In Mountain States Tel. & Tel. Co. v. Sakrison, 71 Ariz. 219, 225 P.2d 707 (1950), the court held the company’s state-wide system of three plants constituted a single establishment and refused compensation to workers laid off in one plant because of a strike in one of the other plants.

The “functional integrality” test could possibly be extended to embrace an entire industry as distinct from a single employer, for it is realistic that many enterprises, whether independently owned or not, are so integrated that a labor dispute at one plant will affect another. The court, when confronted with the problem as a result of the strike called at the Ford plant at Dearborn, Michigan, rejected this test and adopted the “geographical” test to permit a recovery of benefits. Nordling v. Ford Motor Co., 231 Minn. 68, 42 N.W.2d 576 (1950). The strike at the Ford plant in Dearborn, Michigan caused the unemployment of Ford employees at St. Paul, Minnesota. The Supreme Court of Minnesota rejected the “functional integrality” theory as an absolute test and stated that the following consideration should be of prime importance: whether the unit is a separate establishment from the standpoint of employment and not from the standpoint of management. In determining this inquiry, the court listed a number of items to be taken into consideration: hiring and discharging of employees; relationship between local unions; extent of seniority rights; “bumping” rights; payment to unemployment compensation fund; and who called the strike. However, the Supreme Court of Georgia in Ford Motor Co. v. Abercrombie, 207 Ga. 464, 62 S.E.2d 209 (1950), extended the application of the “functional integrality” test to deny unemployment benefits to Ford workers laid off at Hopeville, Georgia, because of the same strike that was involved in the Nordling case, supra. The court said, 62 S.E.2d at page 214:
It cannot be held on any basis of reason and logic that the mere separate locations, regardless of the distance, of these indispensable functions do and could change them into two separate factories, establishments, or other premises.

The court also reasoned that the calling of the strike by the International Union, which had authority to do so by a contract between the Ford Company and the union, was an act by an agent selected by all the Ford employees and that the latter, as principals, were liable for such agent’s acts.

The result of 

Nordling v. Ford Motor Co., supra,

was followed in 

Ford Motor Co. v. Kentucky Unemployment Compensation Comm’n, 243 S.W.2d 657 (Ky. 1951); Ford Motor Co. v. New Jersey Dep’t of Labor, 5 N.J. 494, 76 A.2d 256 (1950); and in 

Ford Motor Co. v. Unemployment Compensation Comm’n, 191 Va. 812, 63 S.E.2d 28 (1951). In the latter case, the court said,

63 S.E.2d at page 34:

The dependence of one or more plants in this great industry upon the home office and principal manufacturing establishment does not, however, necessarily make of the entire industry one plant or one establishment.

In 

Tennessee Coal, Iron & R. Co. v. Martin, 251 Ala. 153, 36 So.2d 547 (1948),

the “geographical” test was also adopted. The Tennessee Coal, Iron & R. Co. transported its own ore, coal, and limestone from various places. The coal miners were idled by a strike of the steel workers and ore miners. A recovery of benefits was allowed the coal miners, the court holding the coal mine to be a separate establishment. In 


an employer who smelted and refined copper also owned a smelter in Utah and a refinery in Baltimore. A strike in Utah idled workers in Baltimore and the court held the workers in Baltimore to be employed in a separate establishment.

In the instant case, the foundry employees were denied compensation benefits because they were unemployed by reason of a strike involving other workers at the establishment in which they were employed. Yet it appears that to fulfill the purpose of unemployment insurance, which is to compensate those involuntarily unemployed, an employee who is not participating in a labor dispute, nor aiding it financially, should not be subject to disqualification from benefits merely because he is then employed at the establishment where the labor dispute exists. Nevertheless, the Kentucky court followed the general trend of other courts in arriving at its decision herein, justifying its holding by the sweeping disqualification provision in the Kentucky Unemployment Insurance Act.

John F. Chmiel
ZONING—CONSTITUTIONAL LAW—DISCRIMINATION BETWEEN PUBLIC AND PRIVATE SCHOOLS.—Roman Catholic Welfare Corp. v. Piedmont, . . . Cal. App. 2d . . ., 278 P.2d 943 (1955). Petitioner owned a tract of land in the city of Piedmont, California, upon which it wished to construct a school. A building permit was denied petitioner on the sole ground that the city zoning ordinance prohibited the construction of any school in zone A, where petitioner's parcel was located, except public schools under the jurisdiction of the Board of Education of Piedmont. Petitioner brought mandamus proceedings to compel respondent city to issue the building permit. The court was thus presented with the question of whether a municipality in the exercise of its police power may exclude a private school from a zone in which public schools are permitted.

A peremptory writ of mandate was issued as prayed, the court following the decisions of other jurisdictions to the effect that no reasonable basis of classification or distinction exists, in these cases, between or among schools furnishing the same type of education to a similar group of students. The court chose not to consider the collateral issues of whether a municipality may exclude all schools from a certain area; whether it could constitutionally prohibit private schools not engaged in the same type of teaching, e.g., dancing schools, barber colleges, etc.; whether it could prohibit schools engaged in giving instruction to a dissimilar age group, e.g., colleges and universities in areas where public elementary and secondary schools are permitted to exist; or whether an issue of religious discrimination was involved.

Zoning ordinances find their justification in the police power of the state. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Under this power cities, villages and other municipalities may constitutionally impose reasonable restraints upon the use of private property. This power to interfere with the general rights of the landowner by restricting the character of his use is not unlimited however, and it can only be imposed where the restraints bear a substantial relation to the protection of public health, safety, welfare, or morals. Village of Euclid v. Ambler Realty Co., supra. An ordinance which in its application restricts the use of private property with no substantial relation to the public health, safety, welfare, or morals, does so in contravention of the Fourteenth Amendment. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

The Fourteenth Amendment guarantees due process and equal protection of the laws as separate rights. U.S. Const. amend. XIV, § 1. The guarantee of equal protection requires equality of application of the laws—that all persons similarly situated shall
be treated alike. *State v. Northwestern Preparatory School Inc.*, 228 Minn. 363, 37 N.W.2d 370 (1949). Thus, a zoning ordinance must:

... provide those in similar circumstances, among whom no reasonable basis for distinction exists, with equal protection of the law, as is constitutionally required of all ordinances as well as statutes.


The vital question in relation to schools under zoning laws, therefore, is whether there is a dissimilarity between public and private schools so that a distinction may be drawn between them regarding their admittance to a particular zoning area without violating the constitutional guarantee of "equal protection of the laws."

The Supreme Court of Illinois has held that no dissimilarity exists between private and public schools, and that an ordinance barring private schools from areas where public schools were permitted "... bears no substantial relationship to the promotion of public health, safety, morals, or welfare." *Catholic Bishop v. Kingery*, 371 Ill. 257, 20 N.E.2d 583, 585 (1939). Although no efforts were made to point out what differences, if any, do exist between a public and private school, the court in that case indicated that none actually did exist. The Supreme Court of Florida, in looking to the objectionable characteristics of private schools to the comfort or general welfare of the surrounding community, concluded that the same objectionable characteristics would probably obtain to the same degree in a public school. *Miami Beach v. State ex rel. Lear*, 128 Fla. 750, 175 So. 537 (1937). These two cases dealt specifically with private schools offering the same instruction to a similar group of students as did the public schools.

A military school offering courses to prepare young men for admission to Annapolis and West Point was involved in *State v. Northwestern Preparatory School Inc.*, supra. The court was confronted with the argument that if the school were permitted to exist in a residential district where only public schools and "churches and schools accessory thereto" were provided for by the zoning ordinance, other private schools with dissimilar curricula, such as barber colleges, dancing academies and riding schools, would also have to be admitted to this area. And, if this last category of schools was to be admitted, a further dissimilarity —the age of students in attendance—would result. This argument was rejected on the grounds that barber colleges, etc., do not constitute institutions of learning. The court also held that a private school has no different effect upon a residential district than does a public or parochial school, and that an ordinance which discriminates between schools on the basis of ownership is arbi-
trary and unlawful.

In *Roman Catholic Archbishop v. Baker*, 140 Ore. 600, 15 P.2d 391 (1932), the validity of an ordinance providing for an inspection of the premises upon which a proposed school was to be built was in dispute. If the inspection revealed that a school building would not be detrimental to public health, welfare, safety, or morals, the common council could, within its discretion, approve or disapprove the proposed location. Although affirming the principle that such statutes are constitutionally permissible, the court held that the unrestricted discretionary power of the common council to decide whether to grant or deny the building permit constituted a "... naked and arbitrary power to give or withhold consent, not only as to places, but as to persons." 15 P.2d at 394. The court cited at length the leading case of *Village of Euclid v. Ambler Realty Co.*, supra, as its authority for upholding the legality of this type of ordinance generally and yet to pronounce it arbitrary and therefore untenable in this particular instance.

The dominant note in the cases discussed above has been an insistence by the courts that no ordinance which seeks to arbitrarily restrict the use of private property shall be sanctioned. In particular cases courts have upheld ordinances which permit the exclusion of all churches from a restricted area, *Church of Latter-Day Saints v. City of Porterville*, 90 Cal. App. 2d 656, 203 P.2d 823 (1949), appeal dismissed, 338 U.S. 805 (1949), or which permit the exclusion of none, *State ex rel. United Lutheran Church v. Joseph*, 139 Ohio St. 229, 39 N.E.2d 515 (1942). The primary concern of the courts in the school, church, and philanthropic building cases has been, therefore, not whether zoning ordinances may exclude them from restricted areas as a group, but whether one such building can be excluded where others are not. Until the decision in *State ex rel. Wisconsin Lutheran High School Conference v. Sinar*, 287 Wis. 91, 65 N.W.2d 43 (1954), appeal dismissed, 349 U.S. 913 (1955), the states had been unanimous in holding that it cannot. This case arose on a mandamus proceeding to compel the issuance of a building permit for the construction of a private high school within a restricted zone. Public high schools were permitted within that zone. Although stating that the *Kingery and Lear* cases, supra, were identical with the present situation, the court ordered the writ quashed and the permit withheld. The basis for the court's decision was that a substantial difference did exist between the two types of schools, in that one was private whereas the other was public. The court stated, 65 N.W.2d at 47:

To begin with, the term "public" is the antithesis of "private." The
public school is not a private one. They serve different interests and are designed to do so. The private school is founded and maintained because it is different. . . . The public school has the same features objectionable to the surrounding area as a private one, but it has, also, a virtue which the other lacks, namely, that it is located to serve and does serve the area without discrimination. . . . The private school imposes on the community all the disadvantages of the public school but does not compensate the community in the same manner or to the same extent.

The refusal of the Supreme Court of the United States to hear the appeal in the Sinar case for lack of a substantial federal question seems to indicate that the exclusion of the private school from an area where public schools were allowed was not arbitrary or otherwise violative of federal constitutional provisions.

The majority of the states, however, in considering the effect of exclusionary zoning provisions upon individual property and constitutional rights, regard these provisions as bearing directly upon state guarantees of “due process” and “equal protection.” The court in the instant case chose to strike down the zoning ordinance on the ground that it denied petitioner equal protection of the laws, in that there existed no reasonable distinction as regards the application of a zoning ordinance between public and private schools which would warrant different treatment of one from the other.

It is submitted that the position of the court in the instant case is the sounder of the two prevailing theories. Conceding that a per se difference does exist between public schools and private schools, the writer nevertheless fails to detect in this distinction a reasonable relation to the object sought by zoning ordinances. The effect of discriminating between two groups which are different merely in themselves, but who are similar in their status to given legislation, is to deny them the equal protection of the laws. The better constitutional reasoning clearly indicates that this type of zoning ordinance is properly declared invalid.

Jack Economou