NOTES

An Insurance Policy Providing for Replacement of Fire Damaged Structures With New Materials

In a broad sense, all insurance on property is "replacement" insurance, since it aids the insured in rebuilding or replacing his property. With an exception,[1] the fire insurance contract has been in theory one of pure "indemnity." [2] Therefore, in the ordinary case if the insured's fifty year old house is destroyed by fire he is entitled to money sufficient to rebuild his property with fifty year old materials. The figure is arrived at by taking the cost of reproduction with new materials of like kind and quality, and subtracting from it an amount representing depreciation [3] caused by wear and tear to the property before the fire, and occasionally an amount representing "obsolescence." [4] In any event, the figure arrived at may not exceed the insurance on the property. Replacement insurance would seem to discard the theory of indemnity. Under this coverage, the insured receives the amount of money necessary to rebuild his property with *new* materials of like kind and quality, *without* deduction for depreciation,[5] if he has sufficient insurance. Logically, this might be accomplished by a change in the provisions of the policy itself, or by a contract supplemental to the policy whereby the insurer agrees to in-

1. Valued policy laws which provide for "face value" recovery in case of total loss have been passed in 23 states, mostly agricultural. See note 5 *infra.*

2. *See* Castellain v. Preston, 11 Q. B. D. 380, 386 (1883): "The very foundation . . . of every rule which has been applied to insurance law is . . . that the contract of insurance . . . is a contract of . . . indemnity only, and that this contract means that the assured, . . . shall be fully indemnified, but never shall be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it . . . that proposition must certainly be wrong."

3. The 1918 version of the New York Standard Fire Policy began as follows: ". . . does insure . . . to the extent of the actual cash value (ascertained with proper deductions for depreciation) . . ." In the 1943 version, it reads, ". . . to the extent of the actual cash value at the time of the loss . . ." The words in parenthesis were deleted in the interest of simplicity, since courts had already used depreciation as a factor in determining "actual cash value." HEDGES, PRACTICAL FIRE AND CASUALTY INSURANCE 43 (1946); Note, 39 ILL. L. REV. 66, 70 (1944).

4. *E. g.*, McAnarney v. Newark Fire Insurance Co., 247 N. Y. 176, 159 N. E. 902 (1928).

5. Distinguish the following: (1) The replacement policy is not the same as a "valued" policy. The "valued" policy conclusively fixes the amount which the insured will recover in case of total loss at the "face" of the policy. See, *e. g.*, Alexander, *The Wisconsin "Valued" Policy Law,* 10 WIS. L. REV. 248 (1935). This follows from legislation which was passed in many of our agricultural states, to discourage the insurer from putting too much insurance on a property. The "valued" provisions concerning partial loss are not uniform. See 13 VA. L. REV. 239 (1927). Replacement insurance is distinguishable in that whether the loss is total or partial, the insurer's liability is governed by the cost of rebuilding with new materials, rather than conclusively fixed. (2) Replacement insurance differs from "property-life" insurance. "Property-life" insurance, a recent development in this country, is essentially a savings system through which the insured, by paying premiums, builds up a fund which is used to repair his building as it suffers from ordinary wear and tear. See, *e. g.*, N. Y. INS. LAW §§ 400-408 (1940); HEYMANN, PROPERTY-LIFE INSURANCE (1939). With replacement insurance the insured's recovery for wear and tear is contingent upon his suffering a fire loss. (3) Finally, the provision in the ordinary "indemnity" policy which states, ". . . but not exceeding the amount it would cost to repair or replace the property with material of like kind and quality . . ." merely states a top limit of recovery and is not to be confused with the coverage under discussion.

clude in the loss payments an allowance for depreciation. Since 1946, several state legislatures have authorized replacement insurance.[6] In at least one state, and without legislative enactment, it has been approved by the state insurance department.[7] The purposes of this Note are to examine some of the legal problems which are created by replacement insurance, and to determine the motivation and necessity for this coverage.

Provisions and Problems of Interpretation

A comparison of authorized replacement insurance provisions throws some light on the philosophy behind this type of coverage. Since there might be some incentive to arson in a "new for old" provision, more cautious jurisdictions have limited the cover to factories, government buildings, public and private institutions,[8] and buildings used for mercantile purposes if a sprinkler system is maintained.[9] Only Massachusetts extends the coverage to personalty, but limits this to tools used in connection with the business. Others cover any real property.[10] Flexibility in underwriting would seem preferable; indeed, more moral hazard seems involved in the case of some commercial properties than in that of homes. Rebuilding is uniformly a condition precedent to payment for replacement cost. No hardship should result, since the insured should be able to obtain credit on the strength of having a policy. Rebuilding, likewise, seems essential to measure the recovery. If the insured does not rebuild, he recovers as under the ordinary "indemnity" policy.[11] It is generally required that the property be rebuilt on the same premises,[12] although Massachusetts has a peculiar compromise provision allowing insured and insurer to agree upon any location within the Commonwealth.[13] Some statutes are silent as to the limitation on time for rebuilding; others, fix a period of one[14] or two years.[15] This will be clarified by the provisions of the endorsements themselves. A time limitation seems essential because of changing price levels, for the insured recovers on the basis of

6. Mass. Laws Ann. c. 175 § 47 (Supp. 1946); N. J. Laws 1947, c. 203; S. C. Stat. 1947, No. 232, Art. 1, § 56; Wash. Laws 1947, c. 79, § .27.02; Wis. Laws 1947, c. 189, § 203.06(d). In Michigan, S. 258 was presented to the 1947 legislature. Weekly Underwriter, April 19, 1947, p. 1069.

7. The New York Fire Insurance Rating Organization, under its Rule 16 A (Supp. 52, May 12, 1943) filed form No. 625 which the Insurance Department of New York approved.

8. Mass. Laws Ann. c. 175, § 47 (Supp. 1946); Wis. Laws 1947, c. 189, § 203.06(d); Mich. S. 258 (1947).

9. Wis. Laws 1947, c. 189, § 203.06(d).

10. N. J. Laws 1947, c. 203 (". . . property described in such policy . . ."); N. Y. Fire Ins. Rating Org., Rule 16A (". . . building and building service equipment . . ."); S. C. Stat. 1947, No. 232, Art. 1, § 56 (". . . such insured property . . ."); Wis. Laws 1947, c. 189, § 203.06(d) (". . . such property . . .").

11. For example New York form No. 625 reads: "This company shall not be liable for . . . any loss beyond the actual cash value . . . unless the property is actually . . . rebuilt . . .".

12. Fire, Casualty and Surety Bulletins, Misc. Fire Acd—1 to 3: "With many types of buildings, residences, stores, hotels, theatres, etc., *location* has such an important bearing on value that there could be a strong temptation to the insured if he could get an insurance company to pay for rebuilding at a more desirable location."

13. The original draft read, ". . . or some other location mutually agreed upon between the insurer and the insured." This was changed as the committee was bothered by the possibility that Massachusetts' industries might use the proceeds to rebuild in the South. Weekly Underwriter, March 9, 1946, p. 612.

14. Fire, Casualty and Surety Bulletins, Misc. Fire Acd—1, 2 states this to be the practice on the Pacific coast.

15. N. J. Laws 1947, c. 203.

the amount he actually spends. South Carolina has produced a strange blend by following through with its "valued" policy concept; in that state the insured will recover on his depreciation insurance policy ". . . the difference between the actual value *stated* in the policy and the amount actually expended . . ." Most jurisdictions require an 80% or 100% co-insurance clause, a device to impose part of the risk on the insured in case of partial loss.[16] With replacement insurance, the co-insurance clause applies to the full replacement cost of the building,[17] and, for example, in the case of the 80% clause, replacement insurance will have to be carried up to 80% of the replacement cost of the building to provide for adequate partial loss coverage.

Limited Interests: While most of the replacement provisions are silent as to how extensive an interest the insured must have to avail himself of replacement insurance, a few indicate that the insured need not be the owner in fee.[18] The insured with the "limited interest" [19] presents the immediate problem of whether he will be entitled, if he insures the fee, to full replacement, or replacement *pro tanto*. Under the indemnity principle, courts have attempted to ascertain the exact monetary value of the insured's interest, and pay him no more. Thus, where a lessee insures fixtures he has attached to the freehold, and title passes to the lessor at the expiration of the lease, the lessee has recovered that proportion of the "actual value" of the fixtures as the balance of the term bears to the entire term.[20] Where a husband with a curtesy initiate interest insured the fee, he recovered only the value of his inchoate right.[21] There has been a tendency in cases where the extent of the insured's interest was difficult of ascertainment, as in the life tenant cases,[22] or where the legal

---

16. The formula for the insured's recovery is: $\frac{\text{Insurance} \times \text{Loss}}{\text{Percentage of Value}}$ equals Recovery. See, GOLDIN, PRINCIPLES OF THE NEW YORK STANDARD FIRE INSURANCE POLICY, 243-246 (1938). For example, with an 80% clause, if the insurance were $8000, the loss $5000, and the "actual value" of the property $20,000, the insured's recovery would be $\frac{\$8000 \times \$5000}{80\% \text{ of } \$20{,}000}$ or $2500. In effect, the insurer and insured share the loss.

17. The formula in note 16 *supra* is rewritten: $\frac{\text{Insurance} \times \text{Repair Cost}}{\text{Percentage of Full Replacement Cost}}$ equals Recovery.

18. Wash. Laws 1947, c. 79, § .27.02: ". . . or of any insurable interest therein . . ." N. Y. Fire Ins. Rat. Org., Rule 16A (Supp. 52, May 11, 1943): ". . . interest of either owner or lessee . . ."

19. A complete list of "insurable interests" in property is recited by Wolfe, *Insurable Interest in Fire Insurance,* Am. J. Ins., June 1928, p. 5. For analyses of the "limited interest" cases, see Note, 32 MICH. L. REV. 529 (1934); McClain, *Insurance of Limited Interest Against Fire,* 11 HARV. L. REV. 512 (1898).

20. Harrington v. Agricultural Ins. Co., 179 Minn. 510, 229 N. W. 792 (1930); Lighting Fixture Supply Co. v. Pacific Fire Ins. Co., 176 La. 499, 146 So. 35 (1933) (same result with "valued" policy); REED, ADJUSTMENT OF FIRE LOSSES 164, 194 (1929). However, in Commercial Union Assur. Co. v. Jass, 36 F. 2d 9 (C. C. A. 5th 1929), the court seemed to take the possibility of renewal into account, for the jury was asked to consider that the relations between insured and lessor were cordial, that the insured had rebuilt at his own expense, and that the lease had already run for three years after the fire.

21. Doyle v. American Fire Ins. Co., 181 Mass. 139, 63 N. E. 394 (1902).

22. Convis v. Citizens Mutual Fire Ins. Co., 127 Mich. 616, 86 N. W. 994 (1901); Note, 32 MICH. L. REV. 529, 536 (1934).

problem was knotty,[23] to allow full recovery. Abhorrence of "wagering" agreements, fear of moral hazard, and considerations of "unjust enrichment" have dictated the ordinary result. If there were only considerations of social policy involved, there would seem to be little argument against allowing full replacement to the "limited interest" insured, for his recovery would be limited to the amount he was out of pocket for the rebuilding.[24] Indeed such an interpretation would be the first substantial protection that has been afforded lessees.[25] Of course, if the holder of the limited interest would then have a right to recover from the owner of the fee for value added to the property by the new materials, a "wagering" element would be present.[26] However strong the social argument *for* full recovery under replacement insurance to holders of limited interests, a provision inserted for the first time in the 1943 New York Standard Fire Policy[27] should not be ignored. On the first page of this form is the phrase, ". . . nor in any event for more than the interest of the insured . . ."[28] This language would seem to prevent more than a *pro tanto* replacement. The weight that courts will give to this clause is a matter for conjecture.[29]

Depreciation: The essence of replacement insurance is that no deduction is made for "depreciation." But the word "depreciation" itself presents a further problem. As will be later demonstrated, the content of the word is uncertain; but it has generally been interpreted to mean *physical* depreciation.[30] It was not until 1928 that a court clearly enunciated the proposition that an insured's recovery should be reduced if the property is no longer as useful as it was meant to be. This new factor is tagged "obsolescence." In the case of *McAnarney v. Newark Fire Insurance Company*,[31] a distiller's recovery for loss of buildings by fire was vastly reduced, as the Prohibition Act was taken into consideration. It is conceded that a deduction for "obsolescence" leads to a just

23. *E. g.*, Savarese v. Ohio Farmers' Ins. Co., 260 N. Y. 45, 182 N. E. 665 (1932) (amount of damage to mortgaged property as arbitrary measure of damage to security interest of mortgagee; recovery of mortgagee not defeated though premises rebuilt by mortgagor).

24. If there were moral hazard in this situation, it would only be because a moral hazard of the same proportion is present where the insured is the owner of the fee, and will get "new for old." But a strange problem would be raised in Massachusetts, if several limited interest persons insured the same fee with different insurers, and each desired to rebuild in a different place.

25. A lessee who receives the value of the balance of his term may not have enough money to lease another building.

26. TIFFANY, REAL PROPERTY, § 462 (3d ed. 1939) states the rule to be that where a person makes improvements without the consent of his cotenants, there is no right of contribution from the cotenants. In the absence of stipulation, a tenant may not impose an obligation on the landlord to reimburse the tenant for improvements made on the land. 2 TIFFANY, LANDLORD AND TENANT 1692 (1910).

27. This form has been accepted as standard in 42 states.

28. The California Standard Fire Policy has a similar provision: ". . . actual cash value of the interest of the insured . . ."; as does the Texas Standard Policy: ". . . nor shall it exceed the interest of the insured . . ." The Massachusetts Standard Fire Policy is alone in having no such provision. The Massachusetts form is used also in Minnesota and New Hampshire.

29. Professor Patterson suggests that this insertion might lead courts in the future to limit a life tenant's recovery to the value of the life estate. Patterson, *Insurance Law During the War Years*, 46 COL. L. REV. 345, 354 (1946). However, it might have been inserted merely as a statement of the common law.

30. *E. g.*, Lee v. Providence Washington Ins. Co., 82 Mont. 264, 266 Pac. 640 (1928); Bonbright and Katz, *Valuation of Property to Measure Fire Insurance Losses*, 29 COL. L. REV. 857, 863 (1929).

31. 247 N. Y. 176, 159 N. E. 902 (1928).

compensation where the ordinary indemnity policy is involved.[32] At first glance, it would appear that courts should not, when such a case arises, deduct for "obsolescence" when measuring the insured's recovery under replacement insurance. For if the insured desires to rebuild, the fact that the plant is out of date should be of little concern to the insurer. But what of the case where the insured wants to rebuild along more modern lines, but with materials that are not more expensive?

Amount Actually and Necessarily Expended: A source of future litigation would seem to be the indefinite wording of the endorsement on the subject of how closely the insured must approximate the demolished structure when he rebuilds. For example, the New Jersey endorsement states that a top limit of recovery shall be the ". . . amount actually and necessarily expended in repairing . . . to a condition similar in character but not superior to or more extensive than its condition when new . . . intended for the same occupancy and use . . ."[33] If the insured builds a larger structure, would he recover what he would have expended on the smaller one? Or if a house were of Victorian vintage, is the insured safe in building a functional structure of the same size? Certainly, there seems to be some latitude in the New Jersey provision. The New York endorsement is more laconic,[34] and for this reason it is typical of most of the replacement endorsements. If aberration from the contours of the original structure is used as a defense by the insurer, the insurer might be sustained since the insured would recover for the "actual cash value" of the property in any event. On the other hand, it would seem an appealing argument that the insured with a chance to rebuild would not desire to incorporate features into his property which have proved useless in the past. Courts will probably develop some sort of "substantial reproduction" doctrine to provide for hard cases. It is even more obvious that litigation will arise from disagreement on what it should reasonably have cost to replace the property. The words "necessarily expended" seem wisely to have been inserted in the New Jersey form, since there is always danger that the contractor will load the costs. Before the insured begins rebuilding, a written agreement should be entered into between the insurer and insured covering the amount of money for which the insurer will be liable when the structure is replaced, and for desired changes from the pattern of the original structure.

Replacement Insurance as It Affects the Insured's Recovery

"Actual cash value"[35] is a rather meaningless concept, for it is used to describe the measure of recovery, for realty or personalty. With personalty, market value has been the starting point in the determination of loss,[36] whereas with realty, computations usually begin with replacement cost. Since in theory the measure of a real property loss has been replacement cost with deductions for physical depreciation,[37] and recently

32. Comment, 37 YALE L. J. 827 (1928).
33. 13 Spectator (Prop. ed.) Oct. 23, 1947, p. 9.
34. ". . . replacement cost with material of like kind and quality within a reasonable time after such loss . . ."
35. See note 3 *supra.*
36. See cases collected in 56 A. L. R. 1155 (1928).
37. *See, e. g.,* Aetna Ins. Co. v. Jonhson, 11 Bush 587 (Ky. 1874); Stenzel v. Pa. Fire Ins. Co., 110 La. 1019, 35 So. 271 (1903); Yost v. Anchor Fire Ins. Co., 38 Pa. Super 594 (1909); *cf.* Roquette v. Farmers Ins. Co., 49 N. D. 478, 191 N. W. 772 (1922) (barn could not be rebuilt, deducted depreciation from original cost rather than replacement cost).

for obsolescence,[38] it is clear that "actual cash value" as a concept will be abandoned in determining losses under replacement insurance. It is the purpose of this section to determine the extent to which insureds' *actual* recoveries [39] will differ under the new provision. There have been but few reported cases which deal with valuation,[40] as compared with a tremendous amount of insurance business.

Total Loss: Only minor differences of opinion exist in theory, where total loss is involved, and these mainly concern the weight to be given obsolescence.[41] Though the insurer would seem protected by the verbal formulation of the rule, there are pitfalls. In a recent Pennsylvania case,[42] the doctrine was announced that where the particular material of which the demolished structure was built is unavailable, replacement cost with substitute materials, though more expensive, is taken as the starting point, and it would appear that depreciation is subtracted from that figure. In a time of shortages, this rule of law might prove very costly to the insurer. Secondly, the rules of evidence have been used quite effectively against the insurer. In one case, evidence of the cost of replacement at the time of the *trial* was allowed to go to the jury.[43] This was not considered error, for it was felt that if there had been a change in the cost of materials between the dates of the fire and the trial, this could have been clarified on cross-examination. Of course, such methods are also available to the insurer.[44] Finally, juries tend to uphold the individual as against the large insurance enterprise. This fact is operative for two reasons. First, the science of measuring depreciation has never been satisfactorily developed. If experts cannot formulate the tests with certainty, the juries can not be expected to apply them.[45] Secondly,

38. McNarney v. Newark Fire Ins. Co., 247 N. Y. 176, 159 N. E. 902 (1928).

39. Conclusive material on unlitigated claims does not seem available. However, general statements are to be found insisting upon the eminent liberality of insurers. Moore, *Estimates on Building Values and Building Losses,* in THE FIRE INSURANCE CONTRACT, ITS HISTORY AND INTERPRETATION 373 (1922). It is to be noticed that insurers rarely exercise their option to rebuild. REED, ADJUSTMENT OF FIRE LOSSES 50 (1929). For unless the insured specifically agrees to contribute in an amount equal to depreciation, the company must give "new for old" and cannot claim an allowance of excessive value. See Freeman, *Adjustment of Building Losses,* in THE FIRE INSURANCE CONTRACT, ITS HISTORY AND INTERPRETATION 361 (1922).

40. Reasons given are at extreme poles. One explanation is that the insured is usually forced into a settlement. Jacobowitz, *The "Standard Fire Insurance Policy" of New Jersey,* 64 N. J. L. J. 517 (1941).

41. Lee v. Providence Washington Ins. Co., 82 Mont. 264, 266 Pac. 640 (1928) ("commercial depreciation" not a proper deduction in determining loss). Two cases, severely criticized, involved an insured who made a contract of sale of his land to the city of Boston. It was provided that if the buildings were not removed by a certain date, they would be forfeited to the city. The insured then renewed his policies, the insurers being ignorant of the situation. After a fire, the insured recovered on a basis of replacement cost minus depreciation, rather than on the basis of the value to the insured. Washington Mills Emery Mfg. Co. v. Comm. Fire Ins. Co., 13 Fed. 646 (C. C. D. Mass. 1882); Washington Mills Emery Mfg. Co. v. Weymouth and Braintree Ins. Co., 135 Mass. 503 (1883).

42. Metz v. Travelers Fire Ins. Co., 355 Pa. 342, 49 A. 2d 711 (1946). *But cf.* Great American Ins. Co. v. Crume, 266 Ky. 729, 99 S. W. 2d 742 (1936).

43. Cummins v. German American Ins. Co., 192 Pa. 359, 43 Atl. 1016 (1899).

44. Merchants Ins. Co. v. Frick, 5 Ohio Dec. Rep. 47 (1873). The court indicated that facts could be brought in on cross-examination for impeachment purposes, though such evidence would be inadmissible as substantive evidence.

45. Straight line depreciation tables can be used as nothing more than guides, for if a building is regularly painted, cleaned and occupied, depreciation is slow. See REED, ADJUSTMENT OF FIRE LOSSES 48, 58, 59 (1929).

judges in their charges present many factors for the jury to consider,[46] sometimes contradictory,[47] warning them that no one factor gives the entire answer. Since juries have not been held to rigid standards, they tend to minimize depreciation, using as the guide their own experience, rather than the testimony of experts. It would seem, therefore, that in cases of total loss, there are considerations which might more than compensate the insured for a theoretical depreciation deduction. But this is not to imply that recoveries on total loss will be reduced to certainty with replacement coverage. For as pointed out above, disputes should also arise as to the "amount necessarily expended."

Partial loss: In the case of partial loss also, the broad standard for recovery has been replacement cost minus depreciation.[48] Since most fire losses are partial, it might be well to examine the results in some partial loss cases. The co-insurance clause becomes highly important here. For the co-insurance clause is only operative where the requisite amount of insurance is not carried, *and* where there is partial loss.[49] In cases where no co-insurance clause is involved, it is to the insurer's advantage to value the property low. Where the co-insurance clause is present, it is to the insurer's advantage to value the property high and estimate the loss as low.[50] It can not be established conclusively that the court's sympathies for the insured will cause them to vary the standard test. In a few cases involving partial loss and co-insurance, the courts seemed to consider facts not ordinarily relevant, to uphold the insured in his contention for low valuation.[51] But in two similar cases, the insurer was upheld in its contention for high valuation.[52] At least it can be predicted that, since co-insurance clauses are required under replacement insurance, the insurer will attempt to prove that replacement of the entire building would have been very expensive, and that the necessary repair could have been accomplished at a very low figure.

The truly significant development in the partial loss cases has been the recent emergence of the doctrine that in case of partial loss, *no* deduc-

46. In State Ins. Co. v. Taylor, 14 Colo. 499, 24 Pac. 333 (1890), original cost, cost of construction with new materials at time of trial, the difference between the value of a new building and one deteriorated by reason of age and use were all considered relevant; Citizens Savings Bank and Trust Co. v. Fitchburg Mut. Fire Ins. Co., 86 Vt. 267, 84 Atl. 970 (1912) (appraisal of building by public listers properly considered; rents capitalized not the measure of "actual cash value" but admissible to determine such value).

47. *E. g.,* the case of Fedas v. Ins. Co. of State of Pa., 300 Pa. 555, 151 Atl. 285 (1930), is usually read to the jury in fire insurance litigation in Pennsylvania.

48. *Cf.* Bonbright and Katz, *Valuation of Property to Measure Fire Insurance Losses,* 29 COL. L. REV. 857, 858 n. 3 (1929). The measurements of recovery the authors present are (1) cost of restoring with materials of like kind and quality, (2) difference in value of building before and after the fire, (3) difference in value of the entire piece of real estate before and after the fire.

49. Both conditions must be present. See formula, note 16 *supra.*

50. This increases the denominator of the formula.

51. Lamp Market Co. v. Alliance Ins. Co., 22 N. W. 2d 427 (S. Dak. 1946) (weight given to insured's evidence of low market value); Citizens' Savings Bank and Trust Co. v. Fitchburg Mut. Fire Ins. Co., 86 Vt. 267, 84 Atl. 970 (1912) (weight given to insured's evidence of high upkeep and taxes and low rentals).

52. Britven v. Occidental Ins. Co., 234 Iowa 682, 13 N. W. 2d 791 (1944) (error to charge that actual cash value meant market value); Smith v. Allemannia Fire Ins. Co., 219 Ill. App. 506 (1920).

tion will be made for depreciation. This stems from a case which on its facts, and in result, is connected only philosophically with the proposition. In that case,[53] the insured recovered for the full value of a party wall destroyed by fire. Perhaps the significance of the case was in the fact that the insured recovered for more than his portion of the wall, or perhaps it was in the idea that a realistic approach ought to be taken in attempting to make the insured whole. Then, in 1930, the insurers were rather upset by the case of *Fedas v. Insurance Company of the State of Pennsylvania.*[54] Here the Pennsylvania court seemed to enunciate the principle that in partial loss cases, no deduction is to be made for depreciation. But because of lack of clarity in the opinion,[55] the case probably served as an incentive to settlements in Pennsylvania, for the question was not brought before the Pennsylvania court again.[56] There followed in 1938 the case of *McIntosh v. Hartford Fire Insurance Company*[57] in which the Montana court, relying heavily on portions of the *Fedas* opinion, refused to deduct for depreciation, and awarded to the insured the cost of repairing with new materials. Possibly, the persuasive effect of the Montana decision as authority in other states is weakened by the fact that the court relied on a local statute.[58] However the court might well have reached the same result without reference to a statute so broad and general in its terms as was the one referred to. The Tennessee court in 1943 cited both the *Fedas* and *McIntosh* cases, and without such a statute, refused to deduct for depreciation, and in an unqualified manner adopted the principle.[59] The rationale of these cases is that otherwise the sum would be insufficient to complete the repairs.[60] Furthermore it is arguable that if a roof is partially burned and the portion is replaced with new materials, the insured does not have a better roof than he had before the fire. What then, under *these* cases, is the advantage to the insured in having replacement insurance? Since there is a co-insurance requirement, he must carry more insurance. He must also pay an extra premium for replacement coverage. Perhaps there is an advantage in that he is reimbursed after the property is rebuilt rather than paid according to an estimate which might later prove insufficient.

53. Citizens' Fire Ins. Co. v. Lockridge and Ridgeway, 132 Ky. 1, 116 S. W. 303 (1909).

54. 300 Pa. 555, 151 Atl. 285 (1930). *Contra,* Springfield Fire and Marine Ins. Co. v. Ramey, 245 Ky. 367, 53 S. W. 2d 560 (1932).

55. 300 Pa. 555, 563, 151 Atl. 285, 288 (1930): ". . . it may be difficult to arrive at actual cash value, less depreciation if it is to be considered; but difficulties cannot prevent the right to compensation . . . If the new material is to be depreciated to reach the actual cash value contemplated by the policy, the timber or part destroyed must be considered in connection with the whole structure and valued accordingly, and should reflect the use in place . . ."

56. However, Bobereski v. Ins. Co., 105 Pa. Super. 585, 161 Atl. 412 (1932), discusses the problem, since the same parties, fire, and buildings were involved.

57. 106 Mont. 434, 78 P. 2d 82 (1938).

58. MONT. REV. CODE § 8157 (1935): "If there is no valuation in the policy, the measure of indemnity in an insurance against fire is the expense, at the time the loss is payable, of replacing the thing lost or injured, in the condition in which it was at the time of the injury . . ."

59. Third Nat. Bank v. American Equitable Ins. Co., 27 Tenn. App. 249, 178 S. W. 2d 915 (1943).

60. *Id.* at 272, 178 S. W. 2d at 935: ". . . depreciation may not be deducted from such cost because that would make the sum insufficient to complete the repairs and would leave the building unfinished; and this would fall short of the indemnity contracted for in the policy . . ."

Social Pressures for Replacement Coverage: Costs of repair and replacement have risen phenomenally;[61] and some dissatisfaction must arise when the insured is paid on the basis of the insurance he was carrying before the price rise. But this would not seem a complete explanation for the recent demand for the authorization of replacement insurance. For as the price scale goes up, so does the value of old materials increase. It is possible that the disparity between the values of new and old materials widens under these circumstances. However, unless a straight line depreciation system is coming into more common use,[62] high prices would not seem to create a special pressure for this coverage. The insured may provide for increased values by obtaining more "indemnity" insurance.[63] Perhaps there are reasons for insurers to desire the authorization of such insurance. Where there is litigation, deduction for depreciation is latent with "juridical risk." [64] Recent partial loss cases especially would seem a danger signal for the insurers.[65] It would appear that by writing such insurance, insurers will please the insured, especially one to whom location is important, by offering him something which purports to be very desirable, will obtain premiums for the depreciation risk, and will be able to meet "head on" the threat of the *Fedas* case.[66] And at least for the present, the moral risk involved would not seem so considerable,[67] for the insured will realize that in many instances the new materials with which his building will be repaired are inferior to the original materials It would seem, therefore, that replacement insurance is only partially the product of an inflationary period.

Replacement Insurance Without State's Approval

It is the purpose of this section to determine what would be the legal consequences of writing replacement insurance without special legislative authority.

---

61. *What Will it Cost to Rebuild?* 91 Rough Notes Apr. 1948, p. 36. The following indicate the percentage fire cover should be increased to provide for values in April, 1948. (Copyrighted by Rough Notes and reproduced with permission.)

	Policies Bought in: Mar. '43	Mar. '45	Mar. '47
Dwellings			
Frame	72.0%	48.1%	19.3%
Brick	69.3%	46.6%	17.7%
Apartments, Hotels, Office Buildings			
Brick-Wood	69.1%	46.3%	17.7%
Brick-Concrete	52.6%	38.6%	14.5%
Brick-Steel	56.1%	39.7%	15.3%
Factories and Commercial Buildings			
Frame	74.2%	49.1%	19.9%
Steel	46.5%	33.3%	13.9%
Brick-Wood	66.4%	45.2%	16.5%
Brick-Steel	52.1%	37.6%	14.2%
Brick-Concrete	52.6%	38.4%	14.7%

62. For an indication that this is not the case, see note 45 *supra.*

63. Insurance companies have been waging a recent advertising campaign to bring this about. See, *e. g.,* Boeckh, *What's Happening to Values?* 90 Rough Notes Nov. 1947, p. 17, 45 Eastern Underwriter, Nov. 24, 1944, p. 32.

64. See discussion at p. 846 *supra.*

65. See discussion at p. 848 *supra.*

66. See note 54 *supra.*

67. There has been a tendency to exaggerate the number of fraudulent burnings to collect indemnity insurance. See Patterson, *Transfer of Insured Property in German and in American Law,* 29 Col. L. Rev. 691, 703 (1929). However the factor of increased carelessness should also be considered as part of the "moral hazard."

Suits by the insured: If the insured sought to recover upon an unauthorized replacement policy, a serious problem would arise, especially where the wording of the basic policy is embodied in a statute.[68] The New York Standard Fire Insurance Policy of 1943, lines 42 to 48, reads as follows: "Added provisions. The extent of the application of insurance under this policy and of the contribution to be made by this Company in case of loss and any other provision or agreement *not inconsistent* with the provisions of this policy, may be provided for in writing added hereto, but no provision may be waived except such as by the terms of this policy is subject to change . . ." [69] A replacement endorsement would seem "inconsistent with" the phrase "actual cash value" which is found on the first page of the policy.

Case law indicates that where the insured sues to recover for loss, defenses by the insurer based upon added provisions fall into two basic classes. First, there are defenses based upon provisions less favorable to the insured than those found in the statutory form. As would be expected, courts usually reason that such provisions are "void," and in awarding recovery to the insured, ignore the restrictive provision; [70] and this might be so though the insurance department has given antecedent approval.[71] Replacement endorsements, of course, are more favorable to the insured than the provisions of the ordinary indemnity policy, although in jurisdictions requiring "valued" policies the replacement provision might be considered less favorable to the insured where the loss is total. In past cases, where the provisions have been more favorable to the insured than were those found in the statutory form, courts followed two approaches in awarding recovery to the insured on the basis of the more favorable provision. If the deviation were only slight, courts would say that the rider "modified" the policy,[72] and that the modification was contemplated by the statute. If the change were serious or forbidden, and despite the word "void" found in many statutes, courts would say that although the statute imposes a penalty on the insurer for writing such a provision, as between the insurer and the insured the "contract" is enforceable.[73] Only one case throws doubt on the prediction that an insured would be able to recover on the basis of an unauthorized replacement endorsement,

68. The policy is statutory in most jurisdictions. In a few states, the provisions of the policy are within the dominion of the insurance department. *See, e. g.,* COLO. STAT., c. 87, § 61 (1935). In those jurisdictions a similar problem would arise if such endorsements were written without the department's approval.

69. *See* N. Y. INS. LAW § 168 (Supp. 1947) (emphasis added).

70. See Commercial Union Assur. Co. v. Preston, 115 Tex. 351, 282 S. W. 563 (1926) (insured recovered despite a clause that the insurer was not to be liable for damage to motion picture projectors caused by fire originating within them, since the commissioner had never approved the clause. *But cf.,* O'Connor v. Allemannia Fire Ins. Co., 128 Pa. Super. 336, 194 Atl. 217 (1937). Usually the insured's request for a reformation will be denied where the reformed policy would be inconsistent with the standard form. *E. g.,* Ottens v. Atlas Assur. Co., 226 Wis. 596, 275 N. W. 900 (1938).

71. Scanlan v. Home Ins. Co., 79 S. W. 2d 186 (Tex. Civ. App. 1935); Barnett v. Merchants' L. Ins. Co., 87 Okla. 42, 208 Pac. 271 (1922). *But cf.* Ins. Co. of N. A. v. Renfro, 121 Okla. 124, 247 Pac. 990 (1926).

72. Tarleton v. De Veuve, 113 F. 2d 290 (C. C. A. 9th 1940); Springfield F. & M. Ins. Co. v. Dickey, 73 Okla. 57, 174 P. 2d 235 (1918).

73. Wojtzak v. Hartland Farmers' Mut. Fire Ins. Co., 200 Wis. 118, 227 N. W. 255 (1929); Armstrong v. Western Mfrs. Mut. Ins. Co., 95 Mich. 137, 139, 54 N. W. 637, 638 (1893); "The state imposes a penalty upon the insurance company for issuing such a policy, but imposes none upon the insured. In using the word 'void' the Legislature certainly did not contemplate that an insurance company might insert a clause not provided for in the standard policy, receive premiums year after year upon it, and, when loss occurs, say to the insured, 'Your policy is void because we inserted a clause in it contrary to the law of Michigan.'"

Palatine Insurance Co. v. Commerce Trust Company.[74] Here the court refused to give effect to a "valued" provision which fixed the worth of an automobile at $3000. The insured recovered the "actual cash value" of the automobile, a smaller sum. Perhaps the fact that the plaintiff was the assignee of the policy helped the court reach this result.

The State and the Insurer: While lines 42-48 of the Standard Policy purport to govern the relationship between insurer and the insured, other statutory provisions regulate the insurer in its relationship with the state. It has been usual to provide by statute that where a domestic insurer or its agent fails to comply with the standard policy laws, a fine will be imposed.[75] The typical sanction imposed against the foreign insurer is revocation of its license.[76] To avoid such penalties, insurers have brought before the courts in a number of ways [77] the question of the validity of a particular form they wished to use. But an insurer taking a common sense attitude today would not risk the impairing of its good standing with a state insurance department by so forcing the issue.[78] For the insurer who would risk loss of standing, it would seem necessary to examine the statutory laws of each jurisdiction, to determine whether legislation authorizing replacement insurance would be necessary before such insurance might be written without penalty. In some states, legislation would not seem to be required, since in a few jurisdictions the only requirement is that all provisions be reduced to writing;[79] and in others, the assumption by the insurer of greater liability in itself would seem to preclude the possibility of attack.[80] There are still other jurisdictions with no statutory provisions on this subject.[81] In a large number of jurisdictions, the outcome would be difficult to predict, either because the statutory language is not clear,[82] or because of the requirement of approval of any new endorsement by the state insurance department.[83] In many

74. 73 Okla. 236, 175 Pac. 930 (1918).

75. *See, e, g.,* PA. STAT. ANN. titl. 40 § 659 (Purdon Supp. 1946), which gives the Commissioner three courses of action.

76. *See, e. g.,* N. Y. INS. LAW, Art. 4 § 40 (6) (1940).

77. Declaratory judgment: General Ins. Co. of America v. Ham, 49 Wyo. 525, 57 P. 2d 671 (1936); petition to compel approval: Pacific Employers Ins. Co. v. Carpenter, 10 Cal. App. 2d 592, 52 P. 2d 992 (1935); petition to enjoin disapproval: Mutual Ben. L. Ins. Co. v. Welch, 71 Okla. 59, 175 Pac. 45 (1917); Mutual Ben. L. Ins. Co. v. Younger, 28 Ohio N. P. (New Series) 868 (1931); petition to enjoin refusal to renew license: State *ex rel.* Time Ins. Co. v. Smith, 184 Wis. 455, 200 N. W. 65 (1924); question raised by publication of by-laws to effect that policies could contain certain provisions: Commonwealth v. Susquehanna Mut. Fire Ins. Co., 14 C. C. R. 438 (Pa. 1894).

78. Unauthorized replacement insurance seems to have been written in Wisconsin before the statute was passed authorizing it. Commissioner Duel ordered all companies writing such insurance to cease such writings and cancel all policies. Weekly Underwriter, Jan. 18, 1947, p. 101. In Pennsylvania it appears that replacement insurance is being written, though the Department has never given its formal approval.

79. ALA. CODE, tit. 28, § 75 (1940); IDAHO CODE § 40-1401 (1932).

80. CAL. CODE § 2079 (1937); IOWA CODE § 9020 (1932); N. C. CODE § 58-177(c) (Supp. 1945).

81. Indiana and Maryland.

82. CONN. STAT. § 4159 (1930); Me. Laws 1947, c. 170 (V); ORE. CODE § 101-1801 c. (Supp. 1947).

83. ARIZ. CODE, Art. 11, § 61-501 (Supp. 1945); GA. CODE § 56-810 (1933); ILL. STAT. ANN., c. 73, § 1009 (Smith-Hurd Supp. 1947); MICH. STAT. ANN., tit. 24, § 24.423 (9) (1943); NEB. REV. STAT. § 44-380 (1943); N. M. STAT., c. 135, § 66 (1925); N. D. CODE § 26-0342 (1943); OKLA. STAT. ANN., tit. 36, § 244.1 (Supp. 1947); PA. STAT. ANN., tit. 40, § 657(b)(g) (Purdon Supp. 1946); R. I. Laws 1945, c. 1623, § 1-5; TEX. STAT. ANN., tit. 78, Art. 4889 (Vernon, 1925); UTAH CODE, tit. 43-3-29 (1942); VA. CODE, § 4305(c) (1942); WYO. STAT. ANN. § 52-406 (1945).

jurisdictions, legislation would seem clearly to be required. For in two of these states, the statute expressly limits the insured's recovery to the "actual cash value" of the property.[84] And in a great number of jurisdictions, the "valued" policy is mandatory.[85]

In summary, it would seem that in most jurisdictions the insured would recover in accordance with the "replacement" tenor of the policy, though such insurance were "unauthorized." But on the question of whether the insurer could write such insurance without risk of criminal sanction, or loss of its good standing with a state insurance department, answers are to be found only by examination of each state statute, and by careful determination of the attitude of each department involved.

SIGNIFICANCE

The very fact that replacement insurance has been accorded statutory recognition is a significant legal development. This would seem to be the second wave in the statutory assault upon the "indemnity" concept as applied to real property insurance. While the first attack, passage of "valued" policy laws,[86] would appear to have been the more radical departure, it must not be forgotten that these laws were passed mainly as a device to hold the insurer in check.[87] Replacement statutes illustrate the result of a pressure being exerted in part by the insurer to tear down the very concept which was erected for the insurer's protection and for the protection of society.

Is it that people are more "law abiding" than they have been? Do our arson statutes have more of a deterrent effect than they had previously? While the element of moral risk would seem insignificant in a period of shortages, more normal times may be envisioned when rules of human conduct might again become operative. True, most fire policies run for only a few years. However, it is predicted that when the shortage crisis ends, the desire of insurers to write such policies will continue. This prediction is based on the observation that the pressure for replacement insurance would seem to be, in part, an attempt by the insurer to put an end to some, but not all, of the ever present juridical risk in law suits involving the problem of valuation of property.[88] It would also seem to be an attempt to charge for the depreciation risk with which the trend of partial loss decisions makes the insurer chargeable.[89] This is accented by the fact that most fire losses are partial losses. With these factors is combined the obvious desire of insureds to recover more for fire losses. Those persons who need replacement insurance the most are those with old buildings in valuable locations. And the desire for this cover would seem to be the product of an inflationary period only to the extent that an insured becomes more conscious of the depreciation factor during a period of high replacement costs. The pressure would seem enough for the prediction that many more state legislatures will authorize replacement insurance within the next few years.

---

84. MONT. CODE § 8157 (1936); TENN. CODE § 6173 (1934).

85. DEL. CODE, c. 20, § 50 (1935); FLA. STAT. § 92.23 (1941); KAN. CODE § 40-905 (1935); KY. REV. STAT. § 298.120(1) (1946); LA. GEN. STAT. § 4183 (Dart, 1939); MISS. CODE § 5693 (1942); MO. REV. STAT., c. 37, § 5819 (1932); MINN. STAT. § 65.01 (1941); N. H. REV. STAT., c. 326-8 (1942); OHIO CODE § 9583 (1938); S. D. CODE, c. 31.22 (1939); W. VA. CODE § 3368 (1933).

86. See note 5 *supra.*

87. *Ibid.*

88. See discussion at p. 849 *supra.*

89. See discussion at p. 848 *supra.*

The social value of such coverage is difficult of measurement. Concededly, a "sinking-fund" system, either by "writing off" property, or by "property-life" insurance, is a desirable method of maintaining reserves for the preservation of the physical condition of properties. But replacement coverage, as distinguished from "property-life" insurance,[90] does not purport to serve as the "setting aside" of a fund to cover depreciation; with replacement insurance, the contingency of depreciation is only provided for upon the occurrence of another, more extraordinary, event. Against the benefit to be derived from such coverage is to be balanced any increase in the incentive to arson which replacement insurance might promote, and the questionable desirability of relieving the insurers of the "juridical risk" (at the expense of the insured) which our mores have imposed upon them. The entire situation should be reconsidered before such statutes are passed in other jurisdictions or before other state insurance departments tender their approval.

M. S. G.

Evidence of Defendant's Character in Pennsylvania Criminal Cases

"Inflexibly the law has set its face against the endeavor to fasten guilt . . . by proof of character predisposing to an act of crime." [1] Cardozo thus phrased the common-law rule which prohibits the introduction of evidence of previous crimes for the purpose of showing a disposition in the accused to commit crime.[2] The motivating policies are said to be to avoid confusion,[3] unfair surprise,[4] and prejudice.[5] It is thought that proof of a previous crime or act of misconduct will distract the jury, leading them to forego an indepedent analysis of the evidence and to rely merely on the tendency they possess in common with most people of saying "once a thief, always a thief." [6] The rule has been used effectively to upset many a long and costly trial. A good illustration is the New York case of *People v.*

90. See note 5 *supra*.

1. People v. Zackowitz, 254 N. Y. 192, 197, 172 N. E. 466, 468 (1930).

2. Commonwealth v. Saulsbury, 152 Pa. 554, 25 Atl. 610 (1893); Goersen v. Commonwealth, 99 Pa. 388 (1882); Shaffner v. Commonwealth, 72 Pa. 60 (1872); Hoffman v. Kemerer, 44 Pa. 452 (1863); Commonwealth v. Brown, 23 Pa. Super. 470 (1903); Commonwealth v. Gibbons and Rosenberry, 3 Pa. Super. 408 (1897) (error for State to ask its witness "Have you heard that Dr. Gibbons was guilty of abortion?"). *See* Commonwealth v. Chalfa, 313 Pa. 175, 177, 169 Atl. 564, 565 (1933); Commonwealth v. Williams, 307 Pa. 134, 148, 160 Atl. 602, 607 (1932): "Nor can evidence of such crime be received . . . to prove a normal disposition to commit the crime for which the accused is on trial." *But cf.* Commonwealth v. Melissari, 298 Pa. 63, 148 Atl. 45 (1929) (proper, in order to prove defendant's denied acquaintance with X, for prosecution witness to testify he saw defendant and X together in a police cell on a previous occasion).

3. Commonwealth v. Levinson, 34 Pa. Super 286, 290 (1907): "Evidence of collateral facts . . . diverts the attention of the jurors from the consideration of the real point in issue and has a tendency to mislead them. . . ."

4. 1 WIGMORE, EVIDENCE § 194 (3d ed. 1940).

5. 1 WIGMORE, EVIDENCE § 194 (3d ed. 1940).

6. Shaffner v. Commonwealth, 72 Pa. 60, 65 (1872): ". . . if one be shown to be guilty of another crime . . . it will prompt a more ready belief that he might have committed the one with which he is charged; it therefore predisposes the mind of the juror to believe the prisoner guilty." *Id.* at 65.

Hines.[7] There, in the course of an extended trial, the prosecutor asked a defense witness whether, in a former grand jury investigation, there had been any allusion to the defendant's having been involved in a "poultry racket." This interrogation was held to be prejudicial error and ground for a mistrial.

In 1911, the general assembly of Pennsylvania passed an act[8] which copied with some exceptions the English Criminal Evidence Act of 1898[9] and which led Dean Wigmore to say that Pennsylvania by its further narrowing the area of admissibility, ". . . has now permitted . . . vicious legislation to slip in and thus tenderly to make it easier for astute defenders to juggle their clients out of legal danger."[10] In 1947, the general assembly amended[11] the Act of 1911 with an act to which Wigmore's invective would be more appropriate. It is the purpose of this note to describe and evaluate the unique[12] Pennsylvania position created by this legislation.

7. People v. Hines, 6 N. Y. S. 2d 2 (1938), noted in 37 MICH. L. REV. 113 (1938), 24 CORN. L. Q. 122 (1938).

8. PA. STAT. ANN., tit. 19, § 711 (Purdon, 1930):

"Hereafter any person charged with any crime, and called as a witness in his own behalf, shall not be asked, and, if asked, shall not be required to answer, any question tending to show that he has committed, or been charged with, or been convicted of any offense other than the one wherewith he shall then be charged, or tending to show that he has been of bad character or reputation; unless—

"One. He shall have at such trial, personally or by his advocate, asked questions of the witness for the prosecution with a view to establish his own good reputation or character, or has given evidence tending to prove his own good character or reputation; or

"Two. He shall have testified at such trial against a codefendant, charged with the same offense."

9. 61-62 VICT. c. 36, § 1(f): "A person charged and called as a witness in pursuance of this Act shall not be asked and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offense other than that wherewith he is then charged, or is of bad character, unless—

"(i) the proof that he has committed or been convicted of such other offense is admissible evidence to show that he is guilty of the offense wherewith he is then charged; or

"(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defense is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

"(iii) he has given evidence against any other person charged with the same offense."

10. 8 WIGMORE, EVIDENCE § 2276 n. 3 (3d ed. 1940).

11. PA. STAT. ANN., tit. 19, § 711 (Purdon, 1948):

"Section 1. . . . in the trial of any person charged with crime, no evidence shall be admitted which tends to show that the defendant has committed, or has been charged with, or has been convicted of any offense, other than the one wherewith he shall then be charged, or that he has been of bad character or reputation unless,—

"One. He shall have at such trial, personally or by his advocate, asked questions of the witness for the prosecution with a view to establish his own good reputation or character, or has given evidence tending to prove his own good character or reputation; or,

"Two. He shall have testified at such trial against a co-defendant, charged with the same offense.

"Three. The proof that he has committed or has been convicted of such other offense is admissible evidence as to the guilt or the degree of the offense wherewith he is then charged."

12. Only two other states have similar statutes. See 1 WIGMORE, EVIDENCE § 1946 n. 1 (3d ed. 1940).

Preliminarily, it may be noted that Pennsylvania, of course, follows the universally accepted doctrine that the prosecution may not initially attack the character of the accused, *i. e.*, the prosecution must wait until the defendant has made an issue of his reputation for the trait involved.[13] Nor can the fact that the accused fails to take the stand in his own behalf be adversely commented upon by court or counsel during the trial.[14]

I. Impeachment of the Defendant-Witness by Use of Prior Crimes and Misconduct

At common law, if the accused elected to testify, he was treated like any other witness, and the prosecution could then offer proof of his bad reputation for veracity for the purpose of impeaching his credibility.[15] But it was error to introduce evidence of a bad reputation in general,[16] even though coupled with proof tending to show a lack of truthfulness.[17] Another avenue of attack upon credibility was by cross-examination as to previous acts of misconduct reflecting a bad character for veracity.[18] This was restricted, however, by a privilege in the accused to refrain from answering questions which would tend to "disgrace" him[19] and was further restricted by the requirement of a charge to the jury that the evidence was "impeaching," not "substantive" evidence. Manifestly, the jury could not make this subtle distinction and by this indirection the prosecution was permitted to infringe upon the rule against proof of specific acts to show a disposition to commit crime. This form of impeachment, however, was limited to cross-examination of the defendant; extrinsic evidence of the misconduct was forbidden.[20]

As respects impeachment by showing conviction for crime, the accused was also treated like the ordinary witness. Thus the Commonwealth could impeach him either by extracting the details of a previous crime from his own lips,[21] or by introducing the record of his conviction,[22] but in either

13. Pauli v. Commonwealth, 89 Pa. 432 (1879); Commonwealth v. Anthony, 91 Pa. Super. 518 (1927) (erroneously citing the Act of 1911 as authority). See also, Model Code of Evidence, Rule 311 (1942).

14. Pa. Stat. Ann., tit. 19, § 631 (Purdon, 1930) (privilege against self incrimination).

15. Commonwealth v. Duckworth, 2 C. C. R. 443 (Pa. 1886). *See* Commonwealth v. Barry, 8 C. C. R. 216, 218 (Pa. 1890): "The prisoner, by becoming a witness, placed himself in the same position as any other witness, and is subject to all the legal objections to his credibility that any other witness is subject to." If the defendant previously has been convicted of perjury, he is made totally incompetent. Pa. Stat. Ann., tit. 19, § 682 (Purdon, 1930).

16. Commonwealth v. Payne, 205 Pa. 101, 54 Atl. 489 (1903); M'Kee v. Gilchrist, 3 Watts 230 (Pa. 1834); Wike v. Lightner, 11 S. & R. 198 (Pa. 1824). See Cotterall, *Character Evidence in Virginia,* 15 Va. L. Rev. 34 (1928).

17. Commonwealth v. Payne, 205 Pa. 101, 54 Atl. 489 (1903).

18. Commonwealth v. Williams, 209 Pa. 529, 58 Atl. 922 (1904). In this case the court ignored Elliott v. Boyles, 31 Pa. 65 (1857), and held it error to cross-examine as to any previous acts of misconduct. However, it seems that the court confused impeachment by way of misconduct with the privilege given a witness to refrain from answering questions which tend to disgrace him.

19. Elliot v. Boyles, 31 Pa. 65 (1857); Galbreath v. Eichelberger, 3 Yeates 515 (Pa. 1803); Respublica v. Gibbs, 3 Yeates 429 (Pa. 1802); Commonwealth v. Doe, 18 Pa. Dist. 611 (1908); Yard's Case, 10 C. C. R. 41 (Pa. 1891).

20. Ramsey v. Johnson, 3 Pen. & W. 293 (Pa. 1831). *See* Elliott v. Boyles, 31 Pa. 65, 67 (1857) to the effect that the policy reasons prohibiting the use of extrinsic evidence of misconduct are: (1) confusion of new issues, and (2) unfair surprise.

21. Commonwealth v. Racco, 225 Pa. 113, 73 Atl. 1067 (1909).

22. Commonwealth v. Racco, 225 Pa. 113, 73 Atl. 1067 (1909), *overruling* Buck v. Commonwealth, 107 Pa. 486 (1884) (record of conviction only for impeachment purposes).

case he could not be impeached by charges of offenses of which he had not been convicted.[23] Again the jury must be charged that the evidence was not substantive and again this demanded of it the impossible.

As noted above,[24] if the prosecution chose to impeach the accused by proof of bad reputation or misconduct, the proof had to point not to bad character generally but specifically to a want of veracity in the accused. Logically, then, the crime offered to impeach him should likewise be confined to one tending to show a lack of veracity, not bad moral character in general.[25] However, in the celebrated *Racco* case[26] the Pennsylvania court held that it was within the trial judge's discretion as to what type of crime could be shown. Almost immediately, there followed the Act of 1911,[27] which provided that ". . . any person charged with any crime, and called as a witness in his own behalf, shall not be asked . . . any question tending to show that he has committed . . . any offense other than the one wherewith he shall then be charged, . . . unless . . . he shall have at such trial . . . asked questions of the witness for the prosecution with a view to establish his own good reputation . . ., or has given evidence tending to prove his own good . . . reputation; or . . . he shall have testified at such trial against a co-defendant, charged with the same offense."

However, the protection that the Act afforded the witness-defendant was only slightly effective. Although the courts felt bound by its terms to preclude impeachment by *cross-examination* as respects previous crimes unless the defendant had made an issue of his character or had testified against a co-defendant,[28] nevertheless they allowed such impeachment by *extrinsic* evidence (*e. g.*, a record of conviction) unconditionally, thus refusing to follow a contrary construction placed upon the English Criminal Evidence Act.[29] In reaching this conclusion, the court affirmed the rule of discretion of the *Racco* case.[30]

Whether the accused may, under the 1947 amendment, be impeached by proof of previous offenses or acts of misconduct depends, according to the terms of the amendment, upon whether ". . . he shall have at such trial, personally or by his advocate, asked questions of the witness for the prosecution with a view to establish his own good reputation or character, or has given evidence tending to prove his own good character or reputation; or . . . he shall have testified at such trial against a co-defendant, charged with the same offense. . . ." Thus if he has neither made an issue of his reputation for the specific trait nor testified against a co-defendant, not only cross-examination as to previous crimes to impeach but also extrinsic evidence of such crimes is prohibited.

Whether he may be cross-examined as to acts of misconduct other than crime is questionable (unless prior to taking the stand he has made

23. Stout v. Rassel, 2 Yeates 334 (Pa. 1798). *See* Evans v. Metropolitan Life Ins. Co., 294 Pa. 406, 412, 144 Atl. 294, 296 (1928).

24. See notes 15 and 18 *supra.*

25. 3 WIGMORE, EVIDENCE § 980 (3d ed. 1940).

26. Commonwealth v. Racco, 225 Pa. 113, 73 Atl. 1067 (1909).

27. *See* Commonwealth v. Williams, 307 Pa. 134, 149, 160 Atl. 602, 607 (1932): ". . . it (the Act of 1911) was passed to relieve a prisoner from the hardship and the breadth of the rule announced in the Racco case. . . ."

28. If the accused had put his character in issue for the trait involved prior to having taken the stand, he was treated like any other witness and could be impeached by either extrinsic or intrinsic evidence of the prior crime. Commonwealth v. Yeager, 329 Pa. 81, 196 Atl. 827 (1938); Commonwealth v. Lisowski, 274 Pa. 22, 117 Atl. 794 (1922); Commonwealth v. Dietrich, 65 Pa. Super. 599 (1917).

29. Commonwealth v. Dorst, 285 Pa. 232, 132 Atl. 168 (1926).

30. Commonwealth v. Quaranta, 295 Pa. 264, 145 Atl. 89 (1928).

an issue of his reputation or has testified against a co-defendant). Under the 1911 Act, the courts permitted cross-examination of the accused as to previous acts of misconduct if they were somehow relevant to the crime charged, even though this could have been held prohibited by the terms of the Act which stated that ". . . any person charged with any crime . . . shall not be asked . . . any question . . . tending to show that he has been of bad character . . . unless . . ." the defendant has made an issue of his reputation or testified against a co-defendant. Thus, in *Commonwealth v. Musto*,[31] where the defendant was charged with murder, the court held it was proper for the prosecution to ask defendant (who testified that he attempted to acquire custody of his children) whether his real motive was to escape the draft. Similarly, in *Commonwealth v. Martin*,[32] it was held not error for the prosecution, when trying to break down the accused's alibi, to question him as to the reason for his frequent visits to a lady's house.

II. Cross-Examination of Defendant's Character Witnesses

If the defendant has made an issue of his reputation by evidence that his reputation in the community is unimpeachable, the prosecution may not introduce proof of a previous offense committed by the accused to impeach the veracity of his witness, for that would be violative of the rule prohibiting the use of specific acts to show that the accused has a disposition to commit crime. Still in this situation the Commonwealth can subtly circumvent the rule and convey to the jury the idea that this defendant is a "bad actor." Ostensibly for the purpose of impeaching the accused's character witness, the prosecution may ask on cross-examination whether the witness has ever *heard* of any reports or rumors circulating in the community of any crimes or acts of misconduct on the part of the accused which are inconsistent with the good reputation asserted.[33] When phrased in the form of a leading question suggesting a specific misdeed, this procedure accomplishes a two-fold purpose: it serves not only to cancel out the witness's direct testimony but also puts before the jury evidence which it probably will use in a determination of defendant's guilt, and this despite a charge to the contrary. This holds true even though the witness denies having heard the rumor. The only limitation operating to restrict this subterfuge is that the witness must never be asked if he *knows* of the particular offense.[34] Inasmuch as the witness will probably base his answer on personal knowledge rather than upon rumors circulating in the community, it would seem that the rigid distinction preserved between rumor which is permissible and knowledge which is error is not founded upon a sound appreciation of the practicalities of witness psychology.

31. 348 Pa. 300, 35 A. 2d 307 (1944).

32. 302 Pa. 118, 153 Atl. 141 (1930).

33. Commonwealth v. Thomas, 282 Pa. 20, 127 Atl. 427 (1925); Commonwealth v. Colandro, 231 Pa. 343, 80 Atl. 571 (1911). See also, 22 Iowa L. Rev. 583 (1937); 15 Minn. L. Rev. 240 (1931); 24 Mich. L. Rev. 418 (1926).

34. Commonwealth v. Colandro, 231 Pa. 343, 80 Atl. 571 (1911) *semble;* Commonwealth v. Flynn, 137 Pa. Super. 458, 9 A. 2d 204 (1939). In Commonwealth v. Becker, 326 Pa. 105, 115, 191 Atl. 351, 356 (1937), the court said that "where the record discloses that the actual purpose of such cross-examination was to show that defendant has committed a specific crime of which he is not now accused, and not to test the credibility of the character witness, it will be held improper if it tends to prejudice the accused." Since it involves the motive of the prosecutor in conducting the cross-examination, it is believed that the detection of such practice will be extremely difficult.

III. Evidence of Defendant's Reputation for the Specific Trait Involved

The 1947 amendment[35] leaves unchanged the rule which existed at common law[36] and under the Act of 1911,[37] that the accused may always offer proof of his good character to be used by the jury as substantive evidence that he did not commit the crime with which he is charged. Character, when put in issue, has reference to reputation for the particular trait involved in the crime charged,[38] and this can only be proved by evidence of community opinion,[39] not by proof of conduct in similar circumstances on other occasions. The accused having elected to make an issue of his character, the prosecution may now proceed to attack it, subject to the restriction that evidence offered as to reputation must be confined to reputation for the specific trait involved.[40] Again, of course, the prosecution may not introduce proof of a previous offense for the purpose of showing the accused's bad trait, for this would violate the rule prohibiting the use of specific acts to show an inveterate disposition to commit crime.

Section 1 of the 1947 amendment states in part that ". . . no evidence shall be admitted which tends to show that the . . . defendant has been of bad character or reputation . . ." unless he has testified against a co-defendant or has made an issue of his character for the trait involved.[41] The phrase "bad character or reputation" could be construed two ways. First, it might mean that the prosecution is precluded only from attacking the character of the defendant for the specific trait involved (unless he has made an issue of it or has testified against a co-defendant), thus admitting evidence of a bad reputation for veracity (even though he has neither made an issue of his character for the trait involved nor has testified against a co-defendant). Or it might be construed as excluding evidence attempted to be introduced by the prosecution of the defendant's bad reputation for truthfulness and the trait involved (unless he has testified against a co-defendant or has put his character in issue for the trait involved). Since, however, the purpose of the amendment is further to restrict the Commonwealth in attacking the reputation of the accused, it is believed that the latter construction would more nearly coincide with the "legislative intent."

35. Section one. See note 8 *supra.*

36. Commonwealth v. Aston, 227 Pa. 106, 75 Atl. 1017 (1910); Commonwealth v. Cate, 220 Pa. 138, 69 Atl. 622 (1908); *See* Commonwealth v. Cleary, 135 Pa. 64, 84, 19 Atl. 1017, 1018 (1890): "Of what avail is a good character, which a man might have spent a lifetime in acquiring, if it is to benefit him nothing in his hour of peril?" Note that the court fails to distinguish between reputation and character. Reputation has reference to community opinion of a person, while character has reference to the actual traits of a person. For example, a man might enjoy an excellent reputation in the community for honesty, yet he might be guilty of a dozen acts of larceny.

37. Commonwealth v. White, 271 Pa. 584; 115 Atl. 870 (1922); Commonwealth v. Stefanowicz, 118 Pa. Super. 79, 179 Atl. 770 (1935).

38. Commonwealth v. Castellana, 277 Pa. 117, 212 Atl. 50 (1923); Cathcart v. Commonwealth, 37 Pa. 108 (1860) (murder; evidence that defendant was a "kind-hearted" man inadmissible); Commonwealth v. Stefanowicz, 118 Pa. Super. 79, 179 Atl. 770 (1935); Commonwealth v. Irwin, 2 Pa. L. J. 329 (1843) (libel; evidence that defendant was a "peaceable and orderly man" inadmissible); *see* Commonwealth v. Colandro, 231 Pa. 343, 355, 80 Atl. 571, 575 (1916).

39. Commonwealth v. Becker, 326 Pa. 105, 191 Atl. 351 (1937); Commonwealth v. Jones, 280 Pa. 368, 124 Atl. 486 (1924); Snyder v. Commonwealth, 85 Pa. 519 (1877); Shaffner v. Commonwealth, 72 Pa. 60 (1872); Hoffman v. Kemerer, 44 Pa. 452 (1863); Kimmel v. Kimmel, 3 S. & R. 336 (Pa. 1817).

40. Commonwealth v. Weber, 167 Pa. 153, 31 Atl. 481 (1895).

41. See note 6 *supra.*

Subsection two of the Act of 1911 remains unchanged by the 1947 amendment. This subsection states, when read in conjunction with section one, that the prosecution may not show that the defendant is of bad character or reputation unless the defendant ". . . shall have at such trial, personally or by his advocate, asked questions of the witness for the prosecution with a view to establish his own good reputation or character, or has given evidence tending to prove his own *good character or reputation.*" This subsection has reference to the defendant's making an issue of his reputation for the trait involved in the crime charged, and not to his reputation for truthfulness as a witness. It is a well-settled rule that the accused may not offer proof of his reputation for truthfulness as a witness until that reputation has been attacked by the prosecution.[42] Thus, inasmuch as the Commonwealth is precluded by the amendment from *initially* attacking the accused's reputation for the trait involved in the crime charged and from attacking his veracity as a witness, subsection two can only have reference to the accused's making an issue of his reputation for the trait involved in the crime charged and not to his making an issue of his reputation for veracity.

IV. Evidence of Crimes Admissible to Increase the Penalty

The prosecution may, under the 1947 amendment, introduce evidence of a previous offense for the purpose of increasing the penalty in those cases where the defendant is charged with murder in the first degree. The 1947 amendment states in part that no evidence shall be admitted which tends to prove that the defendant has committed any offense other than the one with which he is now charged, or that he has a bad character, unless the proof that he has committed such other offense is admissible evidence as to ". . . the *degree* of the offense wherewith he is then charged." [43] The quoted portion, part of subsection three, does not appear in the Act of 1911; perhaps its meaning can best be explained by giving its historical background. During the unamended existence of the Act of 1911, the Act of 1925 was passed for the purpose of permitting the jury, not the judge, to fix the penalty where the defendant is found guilty of murder in the first degree.[44] Although it will be noticed that the Act of 1925 is silent on the subject of proof of other crimes, the courts construed it in relation to the Act of 1911 and concluded that evidence of the prior crime should be admissible in those cases "where the crime on trial was committed for profit, such as highway robbery, burglary, murder for life insurance, bank holdups and the like, and/or the criminal is an habitual offender against society, or where death is the result of sordid passion, or is of an atrocious nature." [45] It is at once apparent that this rule excludes no evidence of the commission of a previous crime in any case where the defendant is charged with killing with malice aforethought. And, astonishingly, in view of the purpose behind the Act of 1911, this evidence was given to the jury *before* it retired to reach a verdict, with instructions, in effect, to keep

42. 4 Wigmore, Evidence § 1104 (3d ed. 1940).

43. See note 6 *supra.*

44. Pa. Stat. Ann., tit. 18, § 2222 (Purdon, 1930). This act was re-enacted in Pa. Stat. Ann., tit. 18, § 4701 (Purdon, 1945): ". . . whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case, which shall fix the penalty by its verdict. . . ."

45. Commonwealth v. Kurutz, 312 Pa. 343, 348, 168 Atl. 28, 30 (1933).

such evidence locked in a secret chamber of the mind and not to utilize it until after a verdict of murder in the first degree had been reached.[46] Therefore, against this background, it is clear the General Assembly has merely given its approval, demonstrated by the words "degree of the offense wherewith he is then charged," of the construction placed upon the Act of 1925 of permitting proof of previous crimes to enable the jury to set the penalty of life imprisonment or death, in first degree murder cases. And one may safely predict that this evidence will be given to the jury before it retires to reach a verdict.[47]

V. Evidence of Crimes, Independently Relevant as Proof of Defendant's Guilt

The meaning of the concept "independent relevancy" [48] simply stated is that when a crime other than the one charged tends to prove not only that defendant is of bad character but in addition points to guilt on some other theory, the evidence is admissible under a charge limiting its use to this latter theory. The label of "independent relevancy" has been used effectively by the Commonwealth in a variety of situations, at common law and under the Act of 1911, to justify the introduction of evidence of crimes other than the one presently investigated. Under the 1947 amendment, the situation remains unchanged.

To Neutralize a Defense of Accident or Mistake: The case of *Goersen v. Commonwealth* [49] illustrates how the prosecution may offer proof of other crimes to neutralize the defendant's defense of accident or mistake, in those cases where the prosecution must prove intent. There the defendant was charged with the murder of his wife by arsenic poisoning. He set up a defense that either his wife intentionally took the arsenic for the purpose of committing suicide, or that if he had administered the poison to her, it was by mistake. The Commonwealth then was permitted to prove that defendant, a homeopathic physician, had treated his mother-in-law with some powder, that she soon died, and that, after the finding of arsenic in the wife, the body of the mother-in-law was exhumed and strong traces of arsenic were found on post-mortem. Defendant objected to this evidence on the ground that it showed he had committed a separate and distinct crime for which he was not then charged. The appellate court held no error in receiving the evidence, saying that the purpose for which the evidence was introduced "clearly brought the offer within the rule permitting the evidence of the other offense to be given." [50]

To Establish Motive: The Pennsylvania courts go quite far in permitting the prosecution to introduce proof of other crimes to establish defendant's motive for committing the crime on trial. For example, in *Com-*

46. Commonwealth v. Petrillo, 341 Pa. 209, 19 A. 2d 288 (1941).

47. At the 1947 session, the Senate passed a bill which amends Pa. Stat. Ann., tit. 18, § 4701 ((Purdon, 1945) (see note 44 *supra*) to the extent that evidence of the previous crime will not be given to the jury until after it reaches a verdict of murder in the first degree. See p. 113, Senate Bill No. 306, 1947 session. It was laid on the table by the House. See History of Senate Bills, 1947 session, p. 61.

48. See McCormick, Cases on Evidence 356 (1940).

49. 99 Pa. 388 (1882).

50. *Id,* at 399. For cases enunciating the same rule, see, *e. g.* Commonwealth v. Fugmann, 330 Pa. 4, 198 Atl. 99 (1938); Commonwealth v. Strantz, 328 Pa. 33, 195 Atl. 75 (1932); Commonwealth v. Huster, 118 Pa. Super. 24, 178 Atl. 535 (1935).

monwealth v. Levinson [51] the Commonwealth was permitted to prove that the prisoner was intimate, in South Africa, with the wife of the prosecuting witness. Supposedly the evidence was submitted for the purpose of proving that defendant stole a coat from the wife in Allegheny County. Said the court: "It is manifest that this evidence was not introduced for the purpose of establishing an independent crime, but to account for the situation of the parties at the time the larceny was committed." [52] It is submitted that this evidence is relevant to prove nothing but a disposition in the defendant to commit crime, and furthermore violates not only the rule prohibiting the prosecution from initially attacking the defendant's character but also the rule prohibiting the use of specific acts to show that the accused has a disposition to commit crime.

To Prove Guilty Knowledge: [53] Suppose the defendant is charged with knowingly receiving stolen goods. His defense is that he did not know the goods were stolen. For the purpose of proving his guilty knowledge, the prosecution may now prove that on previous occasions the accused has been convicted of knowingly receiving stolen goods. However, it would seem that this evidence is relevant only as showing that the accused has a disposition to commit crime.

To Show Plan, System or Habit: The ease with which any aggressive prosecutor could introduce proof of a previous, unconnected crime, under the guise of showing "plan, system or habit," would seem obvious. A good illustration is *Kramer v. Commonwealth.*[54] There the defendant was charged with arson. The court permitted proof of previous attempts by the accused to burn the same building, on the ground that it showed that he was in the habit of burning buildings, and that it was all a part of his plan.

Finally, the Commonwealth may bring in evidence of other independently relevant crimes for the purpose of completing the story of the crime on trial by describing happenings closely connected in time or place, as where murder grows out of an attempted robbery of the victim,[55] or for

51. 34 Pa. Super. 286 (1907). Of similar import are Commonwealth v. Chalfa, 313 Pa. 175, 169 Atl. 564 (1933); Commonwealth v. Morrison, 266 Pa. 223, 109 Atl. 878 (1920) (proof of a previous robbery admissible to show motive for killing victim who blocked defendant's path of escape); Commonwealth v. Dumbar, 69 Pa. Super. 196 (1918) (previous acts of fraud motive for arson). In Commonwealth v. Huster, 118 Pa. Super. 24, 178 Atl. 535 (1935), the court went so far as to hold that evidence of crimes barred by the statute of limitations is admissible to show motive for embezzlement. See also, 14 WASH. L. REV. 147 (1939).

52. 34 Pa. Super. 286, 291.

53. Commonwealth v. Weinstein, 133 Pa. Super. 237, 2 A. 2d 555 (1938); Commonwealth v. Flick, 97 Pa. Super. 169 (1929); *See* Goersen v. Commonwealth, 99 Pa. 388, 398 (1882). For an excellent analysis of the problem, see McKusick, *Techniques in Proof of other Crimes to Show Guilty Knowledge,* 24 IOWA L. REV. 471 (1939).

54. 87 Pa. 299 (1878). See also, Commonwealth v. Bell, 166 Pa. 405, 31 Atl. 123 (1895); Commonwealth v. Jones, 123 Pa. Super. 56, 186 Atl. 765 (1936); Commonwealth v. Pugliese, 44 Pa. Super. 361 (1910).

55. Commonwealth v. Weiss, 284 Pa. 105, 130 Atl. 403 (1925), McConkey v. Commonwealth, 101 Pa. 416 (1882); Commonwealth v. Habecker, 113 Pa. Super. 335, 173 Atl. 831 (1934). *See* Goersen v. Commonwealth, 99 Pa. 388, 398 (1882): ". . . under certain circumstances, evidence of another offense by the defendant may be given . . . to connect the other offense with the one charged, as part of the same transaction."

the purpose of identifying the accused as the person who committed the crime presently investigated.[56]

Turning now to subsection three of the 1947 amendment, it will be noted that it states that the prosecutor may not introduce proof that the prisoner has committed another crime unless ". . . the proof that he has committed or has been convicted of such other offense is admissible evidence as to the *guilt* . . . of the offense wherewith he is then charged." [57] The words "as to the guilt" simply mean that the prosecution may still introduce proof of other crimes having an independent relevancy for the purpose of proving that the defendant is guilty of this crime with which he is now charged. Subsection three is a new addition to the Act of 1911; it is, in substance, an exact reproduction of § 1 f (i) of the English Criminal Evidence Act of 1898,[58] the omission of which section from the Act of 1911 caused Dean Wigmore to term it a "vicious piece of legislation," for he thought that by omitting § 1 f (i), the Pennsylvania General Assembly intended to keep out evidence of all of those crimes having an independent relevancy.

At common law and under the Act of 1911, the Commonwealth was permitted to introduce evidence of another crime tending to prove the guilt of the accused *whether or not he had previously made an issue of his character, or had testified in his own behalf.* Under the 1947 amendment, since it appears to be merely a codification of the common law and the law which grew out of the 1911 Act, the same will probably be true.

VI. Evaluation

It is believed that the 1947 amendment will add little but a period of confusion and uncertainty in the law regarding evidence of defendant's character in criminal cases.[59] Moreover, even if a favorable attitude were taken toward the purpose of the statute, it still falls short of producing the desired result. Suppose the accused makes an issue of his reputation for the trait involved, as, for example, the trait of peaceableness in a trial for the crime of murder. Then should he take the stand he may be impeached by evidence, for example, of having committed larceny. Thus, although the crime of larceny which involves the trait of honesty would not be admissible to attack the defendant's reputation for peaceableness (for that would violate the rule prohibiting the use of specific acts to show a disposition to commit crime) still it would, under the vague language found in the *Quaranta* case,[60] be admissible for the purpose of shaking the defendant's credibility as a witness, although unquestionably the jury will use it as substantive evidence of a disposition in him to commit crime. Now if one were really interested in keeping a "bad record" from the ears of the jury, the mere fact that the defendant has testified and has made an issue of his peaceableness should not be an operative fact in allowing proof of his dishonesty. Except for the purpose of proving a disposition to commit crime, there is little logical inter-relation of one to the other. Furthermore, in admitting evidence of previous convictions before the jury retires to reach a verdict in those cases where the defend-

56. Johnson v. Commonwealth, 115 Pa. 369, 9 Atl. 78 (1887). *See* Commonwealth v. Strantz, 328 Pa. 33, 44, 195 Atl. 75, 81 (1932); Commonwealth v. Williams, 307 Pa. 134, 148, 160 Atl. 602, 607 (1932). The problem is discussed in Note, 16 N. C. L. Rev. 24 (1938).

57. See note 11 *supra.*

58. See note 9 *supra.*

59. *See, e. g.,* 30 Erie County Legal Journal 4 (1947).

60. See note 30 *supra.*

ant is charged with murder in the first degree, it seems obvious that the jury will use such proof as evidence of the defendant's disposition to commit crime even though the judge charges to the contrary. Basically, however, the exceptions contained in the 1947 amendment which permit the introduction of such evidence, demonstrates the need for admitting proof of previous offenses without restriction. Instead of commencing with a general exclusionary rule and then piling exception after exception upon it, thus creating an elaborate and extremely technical basis for admissibility, it would be better to eliminate the present statute, the rule prohibiting the use of specific acts to show a disposition to commit crime, and the rule preventing the Commonwealth from initially attacking the character of the accused. Even under this new amendment each of these last two rules will be constantly hurdled, although only after much academic quibbling.

Clearly the fact that a man has once committed a crime is relevant as tending to prove that he committed the crime with which he is now charged[61] (though not, of course, sufficient of itself to sustain a conviction) for criminalogical studies have conclusively shown that most criminals are recidivists.[62] Furthermore, the resort to evidence of previous offenses is commonplace in European criminal procedure,[63] and has, apparently produced excellent results.

It has been said that the tendency of human nature is to punish, not because our victim is guilty this time, but because he is a "bad man" and may as well be condemned now that he is caught. But it should be borne in mind that proof of a previous crime will not alone make out a prima facie case. Moreover, even if the prior crime is lumped in with other proof and the case submitted to the jury, there is the safeguard of judicial review to determine whether the evidence is sufficient to support the verdict. Of course, there is a slight possibility that an innocent man might be trapped, and most people prefer to let a hundred thieves go free rather than catch an innocent man in the net; but if this argument be strong enough to prevent the use of evidence of other crimes, then *a fortiori* no man should be convicted by other types of circumstantial evidence where the danger may be even greater and the suggested inference less probable.[64]

These complex rules, with their super-added statutory technicalities, should be retained no longer. Sweeping away the debris will not sacrifice the innocent.

R. F. B.

Trends in the Non-Promissory Liability of the Chattel Vendor

It is generally accepted that a vendor of chattels manufactured by a third person may be held liable to persons injured as a result of defects in such chattels if the vendor knew of the existence of the defects and failed

61. 1 WIGMORE, EVIDENCE § 193 (3d ed. 1940).

62. HAYNES, CRIMINOLOGY 201 (1930). Thorsten Sellin, in his research for the American Law Institute found that 59.8% of the Pennsylvania prison population were "repeaters." It is conceded, however, that this is a most conservative figure because previous convictions had been inaccurately reported. See WAITE, THE PREVENTION OF REPEATED CRIME 23 (1943).

63. 1 WIGMORE, EVIDENCE § 193 (3d ed. 1940).

64. For some striking illustrations, see WIGMORE, EVIDENCE 42-51 (Student ed. 1935).

to warn the buyer thereof.[1] Much less clear is the state of the law where it appears that the vendor was himself unaware of the existence of the defects which caused the injury.[2] It will be the purpose of the following discussion to examine into the merits of this latter problem and to ascertain, if possible, the direction in which the law is moving today. The discussion will not, however, include cases where the vendor made an express representation that the chattel was free from defects, thereby rendering himself liable for a negligent representation or for a breach of an express warranty.

Liability Based on Fault

As might be expected in the cases where the vendor's liability is predicated on sub-standard conduct, the vendor has been categorized as "negligent." Generally speaking, for a cause of action to succeed on a theory of negligence there must have been a breach of some duty on the part of the defendant-vendor, which breach has been the legal cause of harm resulting to the plaintiff.[3] Furthermore the plaintiff must not have been guilty of contributory negligence nor have voluntarily assumed the risk. Consequently if plaintiff is to succeed on this ground he must first show that the defendant-vendor had a duty to check for a defect in the merchandise and to warn him thereof—*i. e.*, a duty of inspection. That the vendor does not have such a duty of inspection where the article was manufactured by a third person has been argued forcefully.[4] Since 1940 [5] few cases have decided this specific issue, and, of those which have, only those involving goods intended for human consumption,[6] flatly held in favor of a duty to inspect, although two non-food cases, seemed to be quite in accord with the contention that no such duty exists.

Non-food cases: In *Sears, Roebuck & Co. v. Marhenke* [7] a fourteen-day old plaintiff was scalded by water leaking from a hot water bag which had been purchased from the defendant retailer by the plaintiff's mother. The bag had a defective stopper, but there was no evidence that defendant *knew* of the defect. The Ninth Circuit denied liability, saying that a dealer who purchases and sells an article in common and general use in the usual course of trade without knowledge of its dangerous qualities is not under a duty to exercise ordinary care to discover whether it is dangerous or not.[8] In *Rankin v. Harlin Retreading Co.*[9] plaintiff had purchased from the de-

1. Restatement, Torts § 399 (1934).

2. In Eldredge, *Vendor's Tort Liability,* 89 U. of Pa. L. Rev. 306 (1941), the author maintained the thesis *inter alia* that a vendor of chattels manufactured by another "was not liable (in the absence of a warranty) for harm caused by a defect where he did not know it existed or was not possessed of information which should have made him suspicious." Shortly after the appearance of this article Professor Donald J. Farage crossed lances with Mr. Eldredge in *Must a Vendor Inspect Chattels Before Their Sale?—An Answer,* 45 Dick. L. Rev. 159 (1941), contending that on the basis of the authorities adduced by Mr. Eldredge no such general statement of the law could be sustained. For the controversy over the state of the law that developed between the two authors, see Eldredge, *Vendor's "Duty" to Inspect Chattels—A Reply,* 45 Dick. L. Rev. 269 (1941) and Farage, *Vendor's Duty to Inspect Chattels—A Rejoinder,* 45 Dick. L. Rev. 282 (1941).

3. Prosser, Torts 175 (1941).

4. See Mr. Eldredge's articles cited in note 2 *supra.*

5. Mr. Eldredge's research extended only through 1940. See note 2 *supra.*

6. Mr. Eldredge, in his articles cited in note 2 *supra,* did not consider the food cases, apparently because he considered food to be the subject of a special rule.

7. 121 F. 2d 598 (C. C. A. 9th 1941).

8. *Id.* at 600, citing Tourte v. Horton Mfg. Co., 108 Cal. App. 22, 290 Pac. 919 (1930).

9. 298 Ky. 461, 183 S. W. 2d 40 (1944).

fendant some cement material to be used for repairing motor vehicle tires, carrying it home in sealed, glass containers. Some days later, while using the cement, plaintiff placed one of the containers within a few feet of a hot stove, whereupon it exploded causing injuries. The court rationalized a judgment for the defendant in language very similar to that in the *Sears, Roebuck* case, just discussed.

In apparent opposition to these two holdings are dicta in a number of cases which indicate that there is some duty to inspect: In *Coralnick v. Abbotts Dairies, Inc.*,[10] plaintiff, a grocer dealing in milk produced by the defendant, cut his hand on a bottle while removing milk from the case in which it had been delivered to him. The court, in refusing to apply the doctrine of *res ipsa loquitur,* said, "No proof was attempted to show what caused the bottle to break. The defendant did not manufacture the bottle nor warrant that it was free from defects. *The limit of its duty was to provide against defects discernible upon reasonable inspection.* . . . There is not anything to show that it failed of its duty in these respects."[11] In *Shroder v. Barron-Dady Motor Co.*,[12] a dealer in automobiles was held not liable where grease leaked from a wheel, affected the brake bands, and thus caused an accident, since, as the court said, the defect was latent. In fact, the defendant had tested the brakes, and they were working properly when the car was delivered. The court, however, remarked further that, "It is true, of course, that defendant, receiving new cars from the manufacturer, had some duty of inspection, before selling them. . . . This duty would undoubtedly require them to observe the cars as they received and operated them to see if they did operate properly, . . . and also to investigate the condition of and check the operation of parts and appliances, which they might reasonably expect (as a result of their experience and knowledge of these cars) would need attention before being delivered to purchasers."[13] In *Heggblom et al. v. John Wanamaker New York*[14] the plaintiff was suing for injuries caused by the breaking of an exercising device. The court held that the defendant retailer was not liable since the defect was latent, further asserting by way of dictum[15] that the duty of a retailer requires him to discover defects which may be found by inspection alone as distinguished from dangers so concealed that mechanical tests are needed to disclose them.[16] Although admittedly these statements are dicta, nevertheless it would seem that their effect is to cast some doubt on the correctness of an

10. 337 Pa. 344, 11 A. 2d 143 (1940).

11. *Id.* at 345, 11 A. 2d at 144 (italics supplied).

12. 111 S. W. 2d 66 (Mo. App. 1937).

13. *Id.* at 71. In its opinion the court implied that this duty of inspection rested on the fact that the defendant operated an exclusive agency for the sale of the cars in question. Mr. Eldredge, in *Vendor's Tort Liability,* 89 U. OF PA. L. REV. 306 n. 72 (1941), says he considers the imposition of such a duty justifiable in this situation since the dealer regularly does considerable work on the car before delivery and knows that until this work is done the car is not ready for operation. However this may be, it would seem that the most justifiable reason for imposing the duty in this case is the relatively slight burden on the retailer of making an inspection sufficient to reveal the most likely defects as compared with the harm almost certain to result to the occupants of the car if there is a dangerous defect which causes an accident.

14. 178 Misc. 792, 36 N. Y. S. 2d 777 (Sup. Ct. 1942).

15. *Id.* at 796, 36 N. Y. S. 2d at 781.

16. *See* Bel. v. Adler, 63 Ga. App. 473, 476, 11 S. E. 2d 495, 497 (1940); McCabe v. Boston Consolidated Gas Co., 314 Mass. 493, 495, 50 N. E. 2d 640, 641 (1943); Dempsey v. Virginia Dare Stores, Inc., 186 S. W. 2d 217, 221 (Mo. App. 1945).

unqualified statement that the retail vendor has no duty to inspect, even in cases where goods intended for human consumption are not involved.[17]

Food cases: In *Safeway Stores, Inc. v. Ingram*[18] plaintiff was made ill through the consumption of an unwholesome piece of cheese loaf purchased from the defendant. The court sustained a jury charge which, in effect, imposed on the defendant a duty to exercise ordinary care in the sale of food for human consumption to see that the food sold was reasonably fit to eat, thereby rendering the defendant liable if defendant's employee knew or by the exercise of reasonable care could have known that the cheese loaf was unfit for human consumption.[19] In *Finck v. Albers Super Markets, Inc.*,[20] plaintiff drank part of a bottled soft drink which had been purchased by his wife from the defendant retailer, and was made ill by insects and filth contained therein. The court denied liability because the statute of limitations had run, saying, nevertheless,[21] that even under the common law "a vendor of provisions or drinks, selected, sold and delivered by the retailer in a visible condition to the purchaser for his immediate domestic use is bound to know at his peril that the same is sound and wholesome and fit for immediate use." [22]

Synthesis: From the foregoing discussion and case analysis it seems fairly clear that where sales of chattels intended for human consumption are involved the vendor has a duty to use reasonable care to see that they are fit for such a purpose—*i. e.*, to make reasonable inspection.[23] On the other hand, where the chattel involved is not one intended for human consumption the state of the law is much less certain. In a majority of the relatively few cases which have raised the question, no duty to inspect has been imposed.[24] The factual situations in most of those cases, however, have been such that, in spite of the unequivocal language of the courts to the effect that no duty of inspection exists,[25] it would be unsafe to assume that on *no* set of facts would such a duty be imposed. Often, for example, the defect was such that it would not have been disclosed by an ordinary

17. See note 6 *supra.*

18. 185 Ark. 1175, 51 S. W. 2d 985 (1932).

19. *Accord,* Crowley v. Lane Drug Stores, Inc., 54 Ga. App. 859, 189 S. E. 380 (1936) (retailer dispensing ice cream by removing it in small quantities from the container owes duty to customer to exercise ordinary care to see that it is free from foreign matter).

20. 136 F. 2d 191 (C. C. A. 6th 1943).

21. *Id.* at 192.

22. *See* Great Atl. & Pac. Tea Co. v. Gwilliams, 189 Ark. 1037, 1045, 76 S. W. 2d 65, 68 (1934); Madden v. Great Atl. & Pac. Tea Co., 106 Pa. Super. 474, 479, 162 Atl. 687, 689 (1932); *Cf.* Elmore v. Grenada Grocery Co., 189 Miss. 370, 197 So. 761 (1940), in which the court denied liability where defective pineapples were sold in sealed and (probably) opaque cans, and Kirkland v. Great Atl. & Pac. Tea Co., 233 Ala. 404, 171 So. 735 (1936) (liability denied where flour in a sack contained calcium arsenate).

23. See 22 Am. Jur., Food, § 97 for authorities in accord with the conclusion reached here.

24. Sears, Roebuck & Co. v. Marhenke, 121 F. 2d 598 (C. C. A. 9th 1941); Noble v. Sears, Roebuck & Co., 12 F. Supp. 181 (W. D. Wash. 1935); Tourte v. Horton Mfg. Co., 108 Cal. App. 22, 290 Pac. 919 (1930); Rankin v. Harlin Retreading Co., 298 Ky. 461, 183 S. W. 2d 40 (1944); Peaslee-Gaulbert Co. v. McMath's Adm'r., 148 Ky. 265, 146 S. W. 770 (1912); Belcher v. Goff Bros., 145 Va. 448, 134 S. E. 588 (1926).

25. *See, e. g.,* Sears, Roebuck & Co. v. Marhenke, 121 F. 2d 598, 600 (C. C. A. 9th 1941); Eldredge, *Vendor's "Duty" to Inspect Chattels—A Reply,* 45 DICK. L. REV. 269, 271 *et seq.* (1941).

inspection which might reasonably be required of a retailer, but would entail a thorough testing to reveal it.[26] Furthermore, as has been observed above,[27] dicta in a number of cases seem to indicate that even the verbal rule is not so consistently echoed as might at first be inferred from the language of the cases in which no duty was found.

In this state of the decisions two interpretations are open: One may regard the general rule as imposing no liability unless the vendor knows or has reason to know of the defect, with the food cases as an exception to this rule, and with the dicta in the non-food cases simply careless language to which the courts will not adhere when actually confronted with the problem.[28] As opposed to this interpretation, it is suggested that a more realistic view of the situation is to be obtained by viewing salable chattels as a class (including food) and that when this is done there is no categorical answer to the question of whether the vendor has a duty to inspect. It appears, rather, that what the courts are actually doing, consciously or unconsciously, is weighing the various interests of the consumer against those of the retailer, and that it is the result of this process and not the application of any dogmatic rule which in the long run determines whether in a given class of cases a duty to inspect will be imposed. In this connection it is thought that the following factors may be of importance in influencing a court's judgment: (1) the probability that a chattel of the class in question will contain a defect, (2) the magnitude and probable social extent of the harm if there is a defect, (3) the kind of interest threatened—*i. .e,* personal or property, (4) the ability of the consumer to protect himself,[29] (5) the necessity to the consumer of trading in the particular class of chattels, (6) the cost to the vendor of making an effective inspection, and (7) the customs of the business.[30] That factors such as these ought to be considered in arriving at the answer to the question of duty to inspect *vel non* seem unquestionable. The fundamental theory underlying all aspects of our law is the balancing of interests, and while it may be true that in the majority of cases not involving food or drugs the balance is in favor of the vendor, nevertheless as long as the actual holdings do not force such a step it seems undesirable to interpret the decisions as laying down an absolute rule which would deny liability unless the chattels involved are intended for human consumption. A class of cases might arise in which it would be socially beneficial to impose liability.

Liability Imposed Without Fault

Despite the observed hesitance of the courts to enunciate a "duty to inspect," liability has been boldly imposed in situations where the vendor has admittedly been without fault.

---

26. See Farage, *Vendor's Duty to Inspect Chattels—A Rejoinder,* 45 Dick. L. Rev. 282 (1941) where this matter is discussed at length.

27. See notes 11, 13, 15, and 16 *supra.*

28. This apparently is the view taken by Mr. Eldredge, since he omits consideration of the food cases. See note 6 *supra.*

29. In connection with this factor see Restatement, Torts § 402 (1934). As pointed out by Mr. Eldredge in *Vendor's Tort Liability,* 89 U. of Pa. L. Rev. 306, 326 (1941), the language of this section is extremely difficult to evaluate.

30. It is believed that considerations such as these form the basis of the so-called "original package" doctrine, which states that a vendor will not be held liable where he sells goods in the original package in which he received them from the manufacturer [West v. Emanuel, 198 Pa. 180, 47 Atl. 965 (1901)], and the doctrine of "inherent danger," which although now intellectually outmoded, still seems to find favor with a number of courts. See Prosser, Torts 678 (1941).

Negligence per se: In addition to the cases discussed which impose a common-law liability for negligence upon retailers of foodstuffs there is a class of cases in which violation of the local pure food statutes has been regarded by various jurisdictions as constituting "negligence per se." [31] This form of liability is supported by a rationale which imputes to the legislature in enacting a statute making certain acts crimes (as, for example, selling adulterated food) the establishment of a civil standard of care. It seems clear that the liability imposed in such cases does not accord with any of the generally accepted conceptions of negligence and is better characterized as a species of liability without fault. Defendant is held liable if he in fact violates the statute—*i. e.,* in the above example, sells adulterated food—regardless of the degree of diligence which he may have exercised to prevent such an occurrence.[32] These cases can hardly be said to impose a duty of inspection. Liability is imposed regardless of the care exercised. The vendor may successfully defend, however, by proving contributory negligence or voluntary assumption of the risk,[33] just as he may in the ordinary negligence case.

Implied Warranty: In many cases which for one reason or another cannot easily be fitted into the conceptual requirements of a negligence action or in which proof of negligence is difficult or impossible, liability is imposed by finding a breach of an implied warranty.[34] An implied warranty may be either a warranty of suitability for a particular purpose, where such purpose has been made known expressly or by implication to the seller,[35] or a warranty of merchantable quality.[36] To establish a cause of action based on the former it must appear that the buyer relied on the skill and judgment of the seller in selling him goods fit for the particular purpose. In the latter it is necessary only that the sale be "by description." Once these requirements are established it is immaterial according to the majority view, that there has been no breach of duty on the part of the seller such as would render him liable in a common law negligence action.

31. Donaldson v. Great Atl. & Pac. Tea Co., 186 Ga. 870, 199 S. E. 213 (1938); Kelley v. John R. Dailey Co., 56 Mont. 63, 181 Pac. 326 (1919); *accord,* Abounader v. Strohmeyer & Arpe Co., 243 N. Y. 458, 154 N. E. 309 (1926). The State of Ohio has been particularly stringent in imposing this kind of liability, having in recent years rendered judgments against many vendors in factual situations where there almost certainly would have been no remedy at common law. Troietto v. G. H. Hammond Co., 110 F. 2d 135 (C. C. A. 6th 1940); Leonardi v. A. Habermann Provision Co., 143 O. St. 623, 56 N. E. 2d 232 (1944); Rubbo v. Hughes Provision Co., 138 O. St. 178, 34 N. E. 2d 202 (1941). In Wolfe v. Great Atl. & Pac. Tea Co., 143 O. St. 643, 647, 56 N. E. 2d 230, 232 (1944), the court said, "Ignorance of the unwholesome condition of the food is no excuse for the seller. Neither is it any excuse that the seller chose to offer the food in a sealed container whereby he could not examine the contents. The seller's duty to warn the buyer cannot be avoided by the excuse that he did not know the provision was unwholesome and that it was impracticable to open the can to examine the provision."

32. See note 31 *supra.* For a short discussion of "negligence per se" liability see 95 U. OF PA. L. REV. 218 (1946).

33. Leonardi v. Habermann Provision Co., 143 O. St. 623, 56 N. E. 2d 232 (1944); PROSSER, TORTS 274 (1941).

34. The action for breach of implied warranty originally sounded in tort, and it was not until comparatively recently that it came to be regarded by the courts as a contract action. PROSSER, TORTS 669 (1941). However, the measure of damages is substantially the same as in a negligence action, and is not like the measure used where the liability is promissory.

35. UNIFORM SALES ACT § 15(1). Most of the food cases are put on this ground. Bonenberger v. Pittsburgh Mercantile Co., 345 Pa. 559, 28 A. 2d 913 (1942).

36. UNIFORM SALES ACT § 15(2). Ryan v. Progressive Grocery Stores, Inc., 255 N. Y. 388, 175 N. E. 105 (1931).

This is illustrated in cases where liability is imposed for breach of warranty where the goods sold were in their original packages and where, therefore, there was no reasonable opportunity for the vendor to inspect.[37] Although lack of care on the part of the plaintiff in using the chattel it not regarded, theoretically, as a defense to a case sounding in contract, the courts are prone to find missing some element necessary to constitute a cause of action for breach of warranty where the plaintiff is shown to have been at fault.[38]

In this connection it may be well to note that there appears to be a real distinction in some respects between those factual situations which will support recovery on a negligence theory and those which will support recovery on a theory of implied warranty. For example, it has been the negligence rule in Pennsylvania for many years that reasonable care does not require a retailer to inspect goods sold in their original packages.[39] In spite of this, in *Bonenberger v. Pittsburgh Mercantile Co.*[40] the court ignored the negligence rule and imposed liability by finding a breach of an implied warranty where a retailer had sold a can of oysters containing a sharp shell which stuck in plaintiff's throat, causing injuries. Said the court, "The seller's obligation in this suit is not based on negligence, but upon implied warranty. This action being on a warranty and not in trespass for negligence, the tort cases heretofore decided . . . are not controlling and are here of little if any aid. Plaintiff's right to recover is dependent upon the construction to be given to the Sales Act as applied to the facts developed on trial." [41] Of course, in jurisdictions where liberal pleading rules are in force recovery may be allowed if the facts show a cause of action under either theory, regardless of the one which plaintiff adopts. Even here, however, the total result may not be the same since in many jurisdictions the legal incidents which flow from the proof of a cause of action in negligence differ materially from those arising from the establishment of a cause of action in implied warranty. The best illustration of this is the rule in a number jurisdictions that breach of an implied warranty cannot, like negligence, be made the ground of an action for wrongful death.[42]

Evaluation: From the foregoing discussion it would seem that from a plaintiff's point of view the theory of implied warranty would be a great deal more useful as a tool in aid of recovery than would negligence, particularly since negligence, even when present, is often extremely difficult to

37. Martin v. Great Atl. & Pac. Tea Co., 301 Ky. 429, 192 S. W. 2d 201 (1946) (can of chili con carne); Botti v. Venice Grocery Co., 309 Mass. 450, 35 N. E. 2d 491 (1941); Bolitho v. Safeway Stores, Inc., 109 Mont. 213, 95 P. 2d 443 (1939); Ryan v. Progressive Grocery Stores, Inc., 255 N. Y. 388, 175 N. E. 105 (1931) (loaf of bread in wrapper); Rabb v. Covington, 215 N. C. 572, 2 S. E. 2d 705 (1939) (sausage in "skin"); Bonenberger v. Pittsburgh Mercantile Co., 345 Pa. 559, 28 A. 2d 913 (1942) (can of oysters); Griggs Canning Co. v. Josey, 139 Tex. 623, 164 S. W. 2d 835 (1942) (can of spinach).

38. See cases collected in note 50 *infra.*

39. Elizabeth Arden, Inc. v. Brown, 107 F. 2d 938 (C. C. A. 3d 1939); West v. Emanuel, 198 Pa. 180, 47 Atl. 965 (1901); *see* Ebbert v. Philadelphia Electric Co., 330 Pa. 257, 264, 198 Atl. 323, 327 (1938).

40. 345 Pa. 559, 28 A. 2d 913 (1942).

41. *Id.* at 561, 28 A. 2d at 914.

42. Burkhardt v. Armour & Co., 115 Conn. 249, 161 Atl. 385 (1932); Wadleigh v. Howson, 88 N. H. 365, 189 Atl. 865 (1937). *Contra:* Schuler v. Union News Co., 295 Mass. 350, 4 N. E. 2d 465 (1936).

In the case of Challis v. Hartloff, 136 Kan. 823, 18 P. 2d 199 (1933), it was held that where the action was brought on an implied warranty the contract and not the tort statute of limitations was applicable.

prove, with or without the doctrine of *res ipsa loquitur*.[43] Furthermore, this conclusion is borne out by the great preponderance of warranty cases in the courts. The implied warranty action does, however, have one very important limitation in that most courts today regard it as an action arising *ex contractu* and hence refuse to extend the benefits of the warranty to persons not parties to the contract of sale.[44] This means that if the person injured is not a party to that contract he is, in these jurisdictions, forced to fall back upon his remedy based on negligence for whatever it may be worth. A few courts, however, particularly in cases involving food have found ways to extend the warranty to the person injured, even though he may not have been a party to the contract of sale,[45] and in spite of the apparent reluctance of the majority to follow this lead, the indications are that the present trend of the law is in this direction.[46]

Summary and Conclusion

It would seem apparent that there is no simple answer to the question of the liability *vel non* of a vendor of chattels manufactured by a third person for damages caused by defects therein. It may depend upon (1) the type of chattel involved, and (2) the theory upon which plaintiff relies for his recovery.

Where plaintiff bases his action upon negligence he can recover only if he can show that the defendant had a duty to inspect the merchandise before sale and failed properly to do so. Where chattels not intended for human consumption are involved the courts have for the most part been reluctant to find such a duty. In spite of this, however, a conclusion that there never is imposed any such duty seems unwarranted without more evidence on the point than is at present available.[47] Where, on the other hand, the chattel involved is one intended for human consumption the courts generally have been willing to impose a duty to inspect, but even here the duty does not extend to foodstuffs sold in original packages of

43. Prosser, Torts 689 (1941) and cases cited note 45 *infra*.

44. Dumbrow v. Ettinger, 44 F. Supp. 763 (E. D. N. Y. 1942) (liver extract); Paull v. McBride, 273 Mich. 661, 263 N. W. 877 (1935) (kerosene); Hopkins v. Amtorg Trading Corp., 265 App. Div. 278, 38 N. Y. S. 2d 788 (1st Dep't 1943) (meat); Prosser, Torts 690 (1941).

45. Patargias v. Coca-Cola Bottling Co. of Chicago, 332 Ill. App. 117, 74 N. E. 2d 162 (1947); Lindroth v. Walgreen Co., 329 Ill. App. 105, 67 N. E. 2d 595 (1946) (vaporizer); Prosser, Torts 690-691 (1941).

46. Prosser, Torts 692 (1941). The Proposed Revision of the Uniform Sales Act indicates the trend in this regard:

§ 42—*Third Party Beneficiaries of Warranties:* "A warranty whether express or implied extends to any natural person who is in the family or household of the buyer or who is his guest or one whose relationship to him is such as to make it reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section."

§ 120—*Direct Action Against Prior Seller:* "Damages for breach of a warranty sustained by the buyer or any beneficiary to whom the warranty extends under § 42 may be recovered in a direct action against the seller or any person subject to impleader under § 119. An action against one warrantor does not itself bar action against another."

47. In view of the present trend of the law in favor of actions brought on implied warranty it is somewhat doubtful whether there will ever be enough cases decided on the negligence theory to settle finally the question whether there is or is not a duty of inspection.

such nature as to preclude inspection without opening.[48] The usual defenses to an action for negligence at common law—*viz.*, contributory negligence and voluntary assumption of the risk—are available to the defendant in this type of case as well as others.

Some states, while still adhering to the general language and pattern of an action based on negligence have imposed a kind of liability without fault in food cases, based on the violation of the local pure food statutes. The violation of the statute is denominated "negligence per se." In these jurisdictions the plaintiff may recover if the defendant has in fact violated the statute, even though it is quite clear that he has taken all precautions required by the common law for the protection of his customers. But since the action is nominally one for negligence, the common-law defenses to negligence are still available (except, of course, that defendant cannot show that he was "not negligent").

Where the action is for breach of warranty the situation is like that last mentioned in that the defendant cannot show absence of fault as a defense, but since here the theory of recovery is not negligence, neither contributory negligence nor voluntary assumption of the risk in the use of the goods is a defense per se,[49] if the other elements necessary to the cause of action are present. However, it would appear that the courts are more likely to find some element of the cause of action for breach of warranty missing if the plaintiff has himself been at fault.[50]

The greatest disadvantage of implied warranty as a theory on which a plaintiff can recover lies in the fact that as yet the majority of courts have refused to extend it to persons not parties to the contract of sale. But the present trend of the law seems to be away from this position, and it is probable that as the trend grows, "negligence" (even now a little used remedy) will be almost entirely superseded by "implied warranty" as a basis for recovery in actions of this type. There may still be some advantage to suing on the negligence theory, however, as long as there are jurisdictions which regard breach of warranty as an action *ex contractu* and hence refuse to allow it as a basis for an action for wrongful death.[51]

In any case it would seem that the present tendency toward strict liability is a socially desirable one. As between the retailer and the consumer, if both be innocent, it seems more equitable to place the loss on the retailer, for it is he who selects the manufacturer or processor in whose goods he deals; furthermore, he is usually able to purchase inexpensive insurance which will adequately cover him for the few misfortunes which are likely to occur to his customers as a result of defects in the goods he sells. The onus of insuring is not too great a burden for vendors to include in their cost of doing business.

W. S. P.

48. Kirkland v. Great Atl. & Pac. Tea Co., 233 Ala. 404, 171 So. 735 (1937) (flour in a sack contained calcium arsenate).

49. Contributory negligence or assumption of the risk in *purchasing* the goods is covered in some degree by § 15(3) of the Uniform Sales Act, which provides, "If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed." Challis v. Hartloff, 136 Kan. 823, 18 P. 2d 199 (1933); *cf.* Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N. W. 309 (1939), 25 CORN. L. Q. 625 (1940).

50. Cheli v. Cudahy Bros. Co., 267 Mich. 690, 255 N. W. 414 (1934); Epstein v. John Mullins & Sons, 266 App. Div. 665, 40 N. Y. S. 2d 212 (2d Dep't 1943), *aff'd*, 292 N. Y. 535, 54 N. E. 2d 381 (1944).

51. See note 42 *supra*.

The Legal Disposition of the Sexual Psychopath

Although the "sex crime" [1] is not one committed by an ordinary criminal with ordinary motives,[2] yet the sex offender has generally been treated as any other offender—by imposing a fine or imprisonment upon him after the offense has been committed.[3] Every state has a long list of sex offenses for which punishments of various degrees of severity have been provided, with varying results.[4]

There is a rapidly developing appreciation of the inadequacy of a legal system which operates largely by punishing for crimes after their commission. Modern preventative criminology stresses the recognition of criminal tendencies before a crime has been committed,[5] and emphasizes the need for legal isolation of those whose mental conditions make them potentially dangerous.[6] Psychiatrists believe, as do many judges, that stress should be placed, more than is the case at present, upon the general security of society and the adjustment and cure of the criminal.[7] It is obvious that a system which provides for frequent appearances in court of individuals who after completing one sentence are soon before the court again on another, usually similar, charge is doing but little toward protecting the community or "reforming" the offender.[8]

One of the chief criticisms offered by psychiatry is that the law is too lenient with some offenders and too severe with others, the main

---

1. The proposed New York statute relating to sexual psychopaths (which was vetoed for procedural defects 9 April 1947) defined "sex crimes" as "impairing the morals of a minor" (§ 483), "carnal abuse of a minor" (§ 483(a), (b)), "sodomy" (§ 690), "incest" (§ 1110), "indecent exposure" (§ 1140), and "disorderly conduct in soliciting men in a public place for the purpose of committing a crime against nature" (§ 722(8)). "Rape" (§ 2010) is generally regarded as one of the most serious sex offenses.

2. "Among the flotsam of modern society sex offenders require special consideration. To the average lawyer they represent a class of individuals little known and rarely encountered. For this reason, when legal precedent alone determines the outcome of litigation involving sexual offenders, it may be a case of the blind leading the blind." East, *Sexual Offenders—A British View,* 55 YALE L. J. 527 (1946). See Held, *Sex and Crime,* 44 MEDICO-LEGAL J. 39 (1927) for an excellent discussion of sex crimes as caused by sex stimulation on "pathologically stigmatized, neurotic, over-sensitive or unstable minds."

3. See *e. g.,* PA. STAT. ANN., tit. 18, § 4501-4530 (Purdon, 1945) relating to the so-called "offenses against public morals and decency" in Pennsylvania. See also PA. STAT. ANN., tit. 18, § 4721 (Purdon, 1945) for the punishment for rape. Comparable legislation can be found in the criminal statutes of all states.

4. To the effect that punishment or the fear of punishment has not reduced the incidence of sex crime, *see* Mullins, *How Should the Sexual Offender be Dealt With?* 2 MED.-LEG. AND CRIMINOLOGICAL REV. 236, 241, (1934); see Harris, *A New Report on Sex Crimes,* CORONET, Oct., 1947, p. 1 for statistics in the United States for the seven month period, Aug. 1946-Mar. 1947. *Cf.* Leppmann, *Essential Differences between Sex Offenders,* 32 J. CRIM. L. & CRIMINOLOGY 366 (1941). But see Strecker, *The Challenge of Sex Offenders,* 22 MENT. HYG. 1 (1938), in which he states his doubts as to any statistical increase in sex crimes having occurred, with which compare SCALLEN, *The Alarming Increase of Sex Crimes* (1937) (Report Compiled by Recorder's Court, Detroit).

5. Commonwealth v. McAnany, 31 D. & C. 426 (Pa., 1938), commented on in 12 TEMP. L. Q. 516 (1938).

6. See Wis. Laws 1947, c. 459, § 51.015(5), which provides for confinement, at the discretion of the court, of the alleged sexual psychopath until the statutory proceedings relating to the existence of sexual psychopathy can be had.

7. See Cohane, *Psychiatry and the Criminal Law,* 1 AM. J. MED. JUR. 152 (1938).

8. Dixon, *Psychiatric Angles of Criminal Behavior,* 14 ORE. L. REV. 352 (1935); *The Mental Condition of Offenders Against the Law,* 96 JUST. P. 555 (1932); Overholser, *What Immediate Practical Contribution Can Psychiatry Make to Criminal Law Administration?* 55 A. B. A. REP. 594 (1930).

difficulty being that the punishment imposed is likely to be based upon the name of the crime rather than upon the character of the man committing it.[9] A system of constraints, punishments and treatment founded on the offender's shortcomings as well as on the demands for society's protection would seem more useful than the usual method based alone on the seriousness of or damage resulting from the particular crime.[10] In an attempt to reach this rational result, the various statutes discussed in detail below have been enacted.

CHARACTERISTICS OF THE OFFENDER

While it is now recognized that there are numerous factors which may lead to the commission of sex offenses,[11] the discussion herein is limited to those offenders characterized by a mental aberration in regard to sexual matters medically classified as "psychopathic personalities." [12] This type of person does not learn by experience and will almost invariably

9. The Problem of Sex Offenses in New York City, Study by Staff of Citizen's Committee on the Control of Crime in New York, 1939, 5-6; Overholser, *supra* note 8, at 607; White, *The Need for Cooperation between the Legal Profession and the Psychiatrist in Dealing with the Crime Problem*, 52 A. B. A. REP. 497 (1927); Glueck, *Psychiatric Examination of Persons Accused of Crime*, 36 YALE L. J. 632 (1927).

10. Procedure could then in large measure be adjusted to the peculiar character of each offender, including the sexual psychopath. See GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 388 (1925); East, *Responsibility in Mental Disorders*, 84 J. MENT. SCI. 203, 210 (1938); Bromberg and Thompson, *The Relation of Psychosis, Mental Defect and Personality Types to Crime*, 28 J. CRIM. L. & CRIMINOLOGY 70, 75-78 (1938); Myerson, *The Legal Phases of Psychiatry*, 1 AM. J. MED. JUR. 73 (1938); Richmond, *Psychiatry and the Study of the Criminal*, 43 MED.-LEG. J. 39 (1926).

11. Those factors include (1) *ethnic and geographic* (sexual activities are related to national qualities and national habits, with the highest incidence of sex offenses reported in June and July); (2) *clinical and environmental* (sex criminality is committed largely by unmarried persons. Due to inadequate housing, bad examples and the low mentality of their parents, many persons grow up in an environment in which there is no sublimation of sex life); (3) *biological and anthropological* (behavior patterns similar to those of certain sex offenders are found among animals); (4) *physical* (the influence of the physical characteristics of the subject of a sex crime apparently depends on the type of crime. Personal attributes of the woman are but rarely considered in any detail by the attacker. Sex offenses are sometimes related to climacteric changes in man and woman. Although an enlarged prostate is alleged to be a common cause of sex crime in elderly men, this is probably exaggerated); (5) *psychological* (past traumatic experiences and learned responses account for much deviational conduct. A connection between sex offenses and normal tendencies is easily discoverable—*i. e.*, the "showing" of genitals is a common game between children prior to puberty; misuse of children may be attributable to the different conceptions of sexual maturity in different regions and epochs; the impulse to rape may reflect the force and cruelty long a part of the history of sexual relations); (6) *psychiatric* (sex offenses are frequently attributable to mental defectiveness, some forms of psychopathic personality, psychoneurosis and insanity). For a more detailed discussion of these factors, see East, *supra* note 2, at 530 and Leppmann, *supra* note 4.

12. NOYES, MODERN CLINICAL PSYCHIATRY 504 (1940), defines *psychopathic personality* as "a term applied to various inadequacies and deviations in the personality structure of individuals who are neither psychotic nor feeble-minded, the defect existing particularly in the conative, emotional and characterological aspects of the personality. These aspects are not so organized and adapted to each other as to operate as a harmonious unit or to permit coordination of the individual with his environment." See also HOAG, CRIME, ABNORMAL MINDS AND THE LAW 105 (1923) and WEISS AND ENGLISH, PSYCHOSOMATIC MEDICINE 549 (1943) for definitions similar in content, though phrased somewhat differently. An interesting summary of the behavior patterns of this group can be found in Hovey, *Behavior Characteristics of Antisocial Recidivists*, 32 J. CRIM. L. & CRIMINOLOGY 636 (1942).

repeat.[13] In the ordinary affairs of life, the behavior of the "normal" man may be influenced by the fact that penalties are liable to be inflicted if anti-social tendencies are indulged. In the majority of psychopathic personalities, the penalty may be clearly appraised, but outweighed or obscured by the urgency of the desire to commit the illegal act. Neither punishment nor reasoning apparently succeed in altering their attitudes or their lack of normal emotional drive, and any attempt at punishment, followed by parole, results usually in a repetition of criminal behavior.[14]

The frequency of relapse or repetition is dependent upon the type of offense.[15] For exhibitionists the rate of relapse is very high. Sex offenses against children are more frequently occasional slips than symptomatic of sexual perversion; yet figures, prove that a large percentage of such offenders have a tendency to commit the same crime again. The "habitual rapist," however, is not a familiar figure among the inmates of prisons. Where sadistic tendencies are so violent that they lead to a persistent habit of raping, they may lead to sexual murder. Several sexual crimes of different types are frequently found in the records of a single sex offender. The combinations of various offenses in the same person depend upon the personality of the individual.

It appears, then, that there is usually a certain degree of predictability as regards these people—those who have committed one sexual offense are very likely to commit another, usually of a similar type. For their own good, so that they may, if possible, be "cured" of their mental illness, and for the protection of society they should receive some specialized consideration in the medico-legal sphere.

Inadequacy of the Punitive Approach

Convicted sex offenders like ordinary criminals, are generally sentenced to prison for a term fixed by penal laws, which impose maximum upper limits beyond which confinement cannot be continued, but which rarely provide for treatment.[16] Since the sex offender has a definite tendency to recidivism, treatment for his mental aberration, if any, should, to be most profitable for the offender and society, be provided at the time of his original conviction. Effective treatment, however, cannot be provided properly in the absence of a provision for segregation for an indeterminate period—until cured.[17] Having completed his sentence, the former prisoner is, under traditional procedure, returned to society irrespective of his mental or physical condition, even though he may now be more of a menace than he was before incarceration.

Until recently the law recognized no mean between insanity (*i. e.*, inability to know the nature and quality of the act done or that the doing

13. Compare *Study Made by Moran,* a Member of the Board of Parole of New York State, in Correction, April 1941, p. 1.

14. Compare Dixon, *supra* note 8.

15. Cases and statistics may be found in Leppmann, *supra* note 4. See also Mullins, *supra* note 4.

16. See Long, *Punishment v. Treatment in the Cure of the Criminal,* 2 John Marshall L. Q. 560 (1937).

17. See Dession, *Psychiatry and the Conditioning of Criminal Justice,* 47 Yale L. J. 319, 335 (1938); Cohane, Harno and Hagan, *Report of the Committee on Psychiatric Jurisprudence to the Section on Criminal Law of the American Bar Association,* 1 Am. J. Med. Jur. 121 (1938).

of that act was wrong) and full criminal responsibility.[18] Even now that legal machinery has been provided in many states for dealing with forms of mental defect short of "legal insanity," the existence of one of these disorders is not a defense to a charge of crime, and the offender is held completely accountable.[19] Most of those convicted of sex crimes must be regarded not as "insane" in the legal sense, but rather as falling within the category of "psychopathic personalities," [20] though in such cases the only choice in the way of treatment lies between the insane asylum and the penitentiary, neither of which is a proper place for such persons.[21] In an insane asylum these persons give rise to incessant trouble, and detract greatly from the possibilities of care and treatment of the "insane" for whom these institutions are established. In a penal institution these individuals are not understood, and as they readily become insubordinate, disorder is inevitable and leads to the adoption of repressive measures which are liable to enhance rather than diminish the difficulty.[22] Some penal institutions, however, provide psychiatric treatment for their psychopathic inmates, and others segregate criminal psychopathic personalities. But such measures as psychiatric treatment and segregation in penal institutions are, of necessity, limited by the number of adequately trained psychiatrists available, the cost, administrative difficulties,[23] and, most important, the fact that a prisoner incarcerated for a definite term has scant incentive to submit to treatment, knowing that there is a time limit beyond which he cannot be detained.[24] Where adequate psychiatric facilities are available the power of the judge to sentence the offender for an indefinite period is of great value.[25] Since the indeterminate segregation of the insane is based on the fact that they are a serious menace to society when allowed to remain at large and should, therefore, be confined until it is reasonably certain that they are cured, it would seem that the procedure ought to

18. In general, the law today still provides no alternative between complete responsibility and complete irresponsibility. *See* Commonwealth v. Wireback, 190 Pa. 138, 146, 42 Atl. 542, 545 (1899). *Cf.* Commonwealth v. Szachewicz, 303 Pa. 410, 416, 154 Atl. 483, 484 (1931); *see* State v. Holloway, 156 Mo. 222, 231, 56 S. W. 734, 737 (1900); People v. Moran, 249 N. Y. 179, 163 N. E. 553 (1928); Commonwealth v. Hollinger, 190 Pa. 155, 160, 42 Atl. 548, 549 (1899). *Contra:* Anderson v. State, 43 Conn. 514 (1876); State v. Green, 78 Utah 580, 602, 6 P. 2d 177, 185 (1931); Hempton v. State, 111 Wis. 127, 86 N. W. 596 (1901).

19. See *Mental Condition of Offenders Against the Law,* 96 JUST. P. 555 (1932).

20. Bowman, *Psychiatric Aspects of the Problem,* 22 MENT. HYG. 10, 20 (1938). That the law has so far taken little heed of this intermediate group, see *Mentally Defective Criminals,* 78 SOL. J. 396 (1934).

21. See SINGER AND KROHN, INSANITY AND THE LAW 151 (1924). An interesting suggestion is made by GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 383 (1925) wherein he advocates rather than orthodox incarceration, limited freedom of social conduct, or colony life, under intelligent medico-penal supervision. See also notes 77-79 *infra* regarding treatment facilities where a person has been adjudged a sexual psychopath under an applicable statute.

22. See SINGER AND KROHN, *op. cit. supra* note 21 at 152.

23. MacCormick, *New York's Present Problem,* 22 MENT. HYG. 4, 8 (1938).

24. See Report of the Forensic Committee of the Group for the Advancement of Psychiatry, Nov. 9-11, 1947.

25. "An indeterminate sentence is a sentence to imprisonment either (1) for a wholly indefinite term or (2) for an indefinite term not less than the minimum period or more than the maximum period fixed by the judge pursuant to statutory authorization. . . . The indeterminate sentence of the first sort is not employed in any American jurisdiction for any crime, but that of the second sort is widely used." MICHAEL AND WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION 1275 n. 11 (1940). See Menninger, *Medicolegal Proposals of the American Psychiatric Association,* 52 A. B. A. REP. 486 (1927) for a discussion of the sociological utility of the indeterminate sentence.

be the same for the sex criminal's sentence to confinement in a mental institution, there to undergo discipline and treatment with his progress carefully observed, and release to be granted only if and when, with safety to society and to himself, it is feasible. Here, as in all cases dealing with ordinary criminals and mental defectives, the rights of the individual must be safeguarded against possible arbitrariness in contravention of the fourteenth amendment.[26]

Pioneer Legislation

One statutory approach to the problem of combatting the increase in sex crime has been sterilization [27] designed to reduce the number of mental defectives, including certain types of sex offenders, with whom society must otherwise contend in the future.[28] The constitutionality of such legislation has been upheld,[29] Justice Holmes saying: "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes." [30] In view of the sex deviate's great potential harm to society, it would seem that the application of the same principle sustaining segregation of the insane, compulsory vaccination and sterilization would suffice to sustain segregation and psychiatric treatment of the sexual psychopath.[31]

---

26. See Glueck, *Principles of a Rational Penal Code,* 41 Harv. L. Rev. 453, 475 (1928). Commitment until a cure has been effected may be so severe as to result in life imprisonment. A balance must be struck between the loss of liberty of the individual on the one hand and the improvement of society on the other. When the means employed to reach even a legitimate end are arbitrary or have only a remote relationship to that end, there is a resulting violation of the Fourteenth Amendment. This analysis is presented in greater detail in Legis., 39 Col. L. Rev. 534, 541 (1939).

27. Note, *Sterilization Laws—Their Constitutionality—Their Social and Scientific Basis,* 17 B. U. L. Rev. 246, 247-249 (1937), summarizes the coverage and applicability of the 28 states which in 1937 had valid sterilization laws: "A list of the classes of people to whom the statutes apply cover the range of 'abnormality' and 'subnormality.' Only one class, the feebleminded, has recevied the attention of the legislatures of all the twenty-eight states. 19 states have provided for epileptics, 17 for idiots and the insane, 15 for imbeciles, and 8 for hereditary insanity that is recurrent. The statutes of 7 states apply to each of the following—moral degenerates, habitual criminals, and *sexual perverts* showing hereditary degeneracy. Three times crime convicts with present moral depravity can be sterilized in 2 states, while one state or another is concerned with the following—*rapists,* confirmed criminals, two times *sex criminals* with present moral depravity, lifers with one previous crime and present moral depravity, hereditary mental defectives, syphilitics, incurable chronic manias, dementias, hereditary criminals, diseased and degenerate people, criminals, *sodomists,* those guilty of *crimes against nature,* mentally diseased, and *habitual sexual criminals.* No statutes apply to *persons guilty of carnal abuse of a female, prostitutes, sexual criminals,* drunkards, drug fiends, those twice convicted for felony, lunatics, morons, or any inmate of a penal or charitable institution." [Italics ours.]

28. It is pointed out, *id.* at 247, that in the 28 valid sterilization statutes in the United States, all had a eugenic motive, though three also involved a punitive motive, and in one there is also found the incentive of state economy. Ballard, Mental Hygiene Laws in Brief (1941) lists 29 states as having valid sterilization legislation, all of which have a eugenic motive.

29. Buck v. Bell, 274 U. S. 200 (1927) (upholding the constitutionality of the Virginia sterilization statute); Smith v. Wayne Probate Judge, 231 Mich. 409, 204 N. W. 140 (1925); Shartel, *Sterilization of Mental Defectives,* 24 Mich. L. Rev. 1 (1925). *Cf. in re* Brown, 39 Wash. 160, 81 Pac. 552 (1905) (upholding the power to commit to institutions insane persons who are dangerous to the peace and safety of the community).

30. Buck v. Bell, *supra* note 29.

31. A further discussion of this point may be found in Note, *Validity of Sex Offender Acts,* 37 Mich. L. Rev. 613, 616 (1939).

The *Briggs Act* in Massachusetts [32] was the initial American statute to recognize defective delinquents as a separate and distinct class. A commitment procedure was outlined and special departments were authorized for this newly-defined class of offenders. The law allows commitment to the Department of Defective Delinquents [33] for an indefinite term [34] under procedure carefully outlined by the statute and designed to protect individual liberty. New York [35] and many other states [36] have passed "defective delinquent" acts similar to the Massachusetts statutes.

Another statutory approach to this general problem of the "abnormal" criminal has been the enactment by California,[37] Minnesota [38] and Wisconsin [39] of the "Youth Correction Acts" establishing special procedures and treatment for the younger delinquent.[40]

That none of these enactments adequately solved the problem of the sex deviate who is not insane but who is characterized by a "psychopathic personality," is obvious. The crux of the situation was summarized by Governor Dewey, in his message [41] vetoing the proposed New York statute relating to "the definition, examination, sentencing and rehabilitation of sexual psychopaths," in which he said: "The problem to which this bill is directed is one of the most serious in the field of criminology. Nevertheless, despite our lack of a proper system for handling the problem, we are not justified in engaging upon any program which is not reasonably sound and properly considered, and most certainly in the process we should not demolish the important safeguards that surround personal liberty . . . I am most anxious that we continue our efforts to develop a good system for the handling of the sexual psychopath. I am confident that . . . [the committee] will continue their efforts . . . and will be able to work out satisfactory legislation to meet this important problem."

In 1937 Michigan passed the first "sex offender" act.[42] The act provided that in case any person who has been convicted of or who has pleaded guilty to any one of a number of sex crimes, although not insane, appears to be a sex degenerate or pervert, or appears to be suffering from a mental disorder with marked sex deviation and with tendencies dangerous to the public safety, the court may before pronouncing sentence, but after conviction, institute a thorough examination and investigation of such person, and shall call in two or more reputable physicians including one psychiatrist, and if it is proved to the satisfaction of the judge and jury that such person is a psychopathic personality, the court may then

32. Mass. Acts and Resolves 1911, c. 595. An excellent discussion of the *Briggs Act*, including much constructive criticism, can be found in Tulin, *The Problem of Mental Disorder in Crime: A Survey*, 32 COL. L. REV. 933, 958 (1932).

33. Mass. Gen. Laws 1932, c. 123, § 117 as amended.

34. *Id.* at § 117.

35. N. Y. CONSOL. LAWS §§ 121-134a (McKinney Supp., 1947).

36. BALLARD, MENTAL HYGIENE LAWS IN BRIEF (1941) contains a summary of existing "defective delinquent" legislation in states having such statutes.

37. CALIF. WELFARE AND INSTITUTIONS CODE §§ 1744-1783 (Deering, 1941 Supp.).

38. Minn. Laws 1947, c. 595.

39. Wis. Laws 1947, c. 546.

40. The Youth Correction Acts do not apply *specifically* to sex offenders. For a careful discussion of these acts see Note, *Legislation for Treatment of a New Category of Juvenile Offenders*, 96 U. OF PA. L. REV. 692 (1948).

41. Memorandum filed with Senate Bill, Introductory No. 1432, Printed No. 2790, 9 April 1947. This veto message indicates that Governor Dewey recognizes the need for such legislation. However, certain procedural aspects of the statute provided inadequate protection for the convicted sex offender.

42. Mich. Pub. Acts 1937, No. 196.

commit such person to a suitable state hospital for an indeterminate period. The act further safeguarded the person by entitling him to a jury trial unless waived.[43] In *People v. Frontczak*,[44] this Michigan statute was held invalid upon the premise that the act provided for a criminal proceeding and therefore violated the Michigan constitution in not observing certain rights guaranteed thereby to the accused in a criminal prosecution.[45] The court based its conclusion that the Michigan statute provided for a criminal proceeding on two main premises—that it was contained in the criminal procedure code and that the indefinite confinement was regarded as an added penalty for crime.[46] Such objections have been avoided in many of the presently existing "sex offender" acts by regarding the commitment as more analagous to an insanity inquest than to a criminal trial, by not making such legislation part of the penal code, and by providing for these proceedings prior to conviction of a crime.

Contemporary Legislation

The first valid legislation dealing with the criminal sexual psychopathic offender was enacted in Illinois in 1938.[47] Similar legislation is now also in effect in California,[48] Massachusetts,[49] Michigan,[50] Minnesota,[51] Ohio,[52] and Wisconsin.[53] To escape the rigidity of criminal proceedings, the statutes utilize the flexible procedure employed in determining the necessity for civil commitment.[54] The state legislatures have made every effort to induce the courts to regard the proceeding provided for as civil and not criminal. These statutes are not made a part of the criminal code. In the Minnesota statute the persons subjected to the hearings provided by the statute are denominated "patients."

Persons Within the Purview of the Statute: Since psychiatrists and neurologists are not agreed as to what constitutes a "sexual psychopathic personality," *any* definition is open to criticism. Those subject to the statutes have been designated as "criminal sexual psychopathic persons" in Illinois and Michigan; in Massachusetts and Minnesota as "psychopathic personalities"; in California and Wisconsin as "sexual psychopaths" and in Ohio as "psychopathic offenders," all vague terms, but necessarily so, since psychiatrists do not clearly understand or agree as

43. Note, *Validity of Sex Offender Acts*, 37 MICH. L. REV. 613, 620 (1939).

44. 286 Mich. 51, 281 N. W. 534 (1938).

45. MICH. CONST. Art. II, § 19.

46. Note, *Validity of Sex Offender Acts*, 37 MICH. L. REV. 613, 622 (1939). See also Legis., 39 COL. L. REV. 534 (1939) and Stewart, *Concerning Proposed Legislation for the Commitment of Sex Offenders*, 3 JOHN MARSHALL L. Q. 407, 420 (1938).

47. ILL. STAT. ANN., c. 38, § 820 (Smith-Hurd, 1938), as amended, ILL. STAT. ANN., c. 108, § 112 (Smith-Hurd, 1947 Supp.).

48. CALIF. WELFARE AND INSTITUTIONS CODE, c. 4, § 5500 (Deering, 1939 Supp.).

49. IV MASS. STAT. ANN., c. 123A (1947 Supp.).

50. 25 MICH. STAT. ANN. §§ 28.967-(1) (1947 Supp.).

51. Minn. Laws 1945, §§ 526.09-.11.

52. 10 OHIO GEN. CODE §§ 13451-19–13451-23 (Page, 1947 Supp.).

53. Wis. Laws 1942, c. 459.

54. This is probably necessary to allay any such attack on the constitutionality of this type of legislation as was relied on to invalidate the 1937 Michigan statute in the case of People v. Frontzak, 286 Mich. 51, 281 N. W. 534 (1938). *But see* Hughes, *The Minnesota "Sexual Irresponsibles" Law*, 25 MENT. HYG. 76, 83 (1941).

to the nature of the malady.[55] However, since psychiatric knowledge and terminology are still in a state of flux, it might be advisable to designate the condition in something other than technical psychiatric terms. Once having become a part of public law, such labels attain a fixity unresponsive to newer psychiatric knowledge and application. Perhaps "sex deviate" or "abnormal sex offender" would be a preferable label.

In order to reach *dangerous* individuals the Illinois and Michigan statutes attempt to define "sexual psychopathic personality" by establishing three criteria:

1. *Possession of mental disorder amounting neither to insanity nor to feeble-mindedness.* No exact definition of the particular mental disorder is included, but from certain characteristics, universally recognized as symptomatic, such as emotional instability, lack of response to social standards, and general lack of control, working definitions can be evolved.[56]

2. The requirement that *mental disorder must have existed for a period of one year* indicates a desire to be certain that the disorder is serious in nature.

3. Not all sex deviators are dangerous to society in the sense that they are prone to commit vicious and criminal offenses. The requirement that the offender exhibit *propensities for the commission of sex offenses* makes it possible to deal with each case on its own facts.[57]

Both Minnesota and Wisconsin provide that a person, to be subject to their acts must be "one who is suffering from such conditions of emotional instability or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his acts, or a combination of any such conditions, as to render him irresponsible for his conduct with respect to sexual matters and thereby dangerous to himself and to other persons." In *Minnesota* ex rel *Pearson v. Probate Court of Ramsey County,*[58] this language was interpreted as indicative of an intention to ". . . include those persons who, by a habitual course of misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury, loss or pain or other evil on the objects of their uncontrolled and uncontrollable desire." Succeeding statutes have based their terminology on the language of this decision, Massachusetts adopting it verbatim.

"Any person . . . charged with a criminal offense"[59] is made subject to the provision of the California, Illinois[60] and Michigan legislation.

55. Report of a Committee of Neurologists and Psychiatrists called by the Honorable Thomas J. Courtney, State's Attorney of Cook County, Illinois, on Recommendations for the Treatment of Sex Psychopaths 1, 12-16 (1938); EAST, FORENSIC PSYCHIATRY 4 (1927); Bromberg and Thompson, *supra* note 10, at 75; *The Mental Condition of Offenders Against the Law,* 96 JUST. P. 555 (1932).

56. See Report of the Forensic Committee of the Group for the Advancement of Psychiatry, 9-11 Nov. 1947.

57. If it is true that a propensity for the commission of sex offenses is *per se* a mental disorder, then the third requirement of the definition is merely descriptive of the kind of mental disorder within the scope of the statute. See Legis., 39 COL. L. REV. 534 (1939).

58. 309 U. S. 270, 273 (1940) *aff'g* State *ex rel.* Pearson v. Probate Court of Ramsey County, 205 Minn. 545, 287 N. W. 297 (1939).

59. Compare the BRIGGS LAW in Massachusetts, IV MASS. STAT. ANN., c. 123, § 100A (1942), which limits the class to be examined to persons indicted for a capital offense, or those indicted more than once or previously convicted of a felony.

60. In Illinois there is also a further basis of jurisdiction, detention in a state penitentiary.

This provision is an improvement over the Ohio statute, its applicability of which is limited to persons convicted of a "felony," a rather capricious method of selection.[61] "Felony" *per se* lacks relevance as the sole indicia of the existence of mental disorder in the offender, although frequently persons charged with housebreaking, robbery, manslaughter or assault have committed the offense in an attempt to carry out a sex offense.[62] By providing a wider net, there is greater certainty that the potential sex offender will be reached. But why should a charge of a criminal offense be necessary as a prerequisite to the invocation of the procedure for inquiry provided by these statutes?[63] If these statutes be regarded as in the nature of civil commitment legislation it is submitted that by analogy to the insanity commitment statutes, no criminal offense need be charged.[64]

Procedure: Initiation of proceedings should be discretionary with the court upon petition and affidavit of *any person* setting forth facts indicating the existence of good cause for judicial inquiry.[65] Where the district attorney or attorney general is expected to take the initial step in singling out from those charged with a criminal offense persons who "appear" to him to be psychopathic, his ability to do so will be dependent upon the availability of records and reports as to the offender's nature and previous offenses. Such statutes should, therefore, provide for compulsory coordination with probation officers, clinics, hospitals and other agencies which may have helpful data.[66]

Upon the filing of the above-mentioned affidavit and petition, the judge must appoint at least two physicians to conduct a personal examina-

61. Tulin, *The Problem of Mental Disorder in Crime: A Survey,* 32 COL. L. REV. 933, 961 (1932); Note, 16 B. U. L. REV. 204, 217 (1936).

62. KRAFFT-EBING, PSYCHOPATHIA SEXUALIS 587 (1901) (a fetichist may be apprehended as a robber or thief).

63. In People v. Chapman, 301 Mich. 584, 4 N. W. 2d 18 (1942), defendant contended that the statute denied equal protection of the laws (U. S. CONST. AMEND. XIV; MICH. CONST. Art. II, § 1) because it "limits the class of criminal sexual psychopathic persons who might be brought within its provisions only to those charged with a criminal offense" and that such classification makes the statute unconstitutional as class legislation. The court held that there was "a sound and logical basis" for the limitation. Though the legislature might constitutionally have extended the statute to cover a larger class, it can limit its scope to the eradication of evil where presumably the need is greatest.

64. Neither Massachusetts, Minnesota (for which see Minnesota *ex rel.* Pearson v. Probate Court of Ramsey County, 309 U. S. 270 (1940)) nor Wisconsin provide that a crime or charge thereof is necessary. One disadvantage of making a charge of a criminal offense unnecessary might be the number of people against whom the statute may be invoked, with the concommitant cost and administrative difficulties. Bingham, *Determinants of Sex Delinquency in Adolescent Girls Based on Intensive Studies of 500 Cases,* 13 J. CRIM. L. & CRIMINOLOGY 494, 575-577 (1923) points out that many suitable institutions have long waiting lists. See, in general, Davis, *Some Institutional Problems in Dealing with Psychopathic Delinquents,* 10 J. CRIM. L. & CRIMINOLOGY 385 (1919).

65. The California statute permits the petition and affidavit to be made by any person. In Massachusetts, Minnesota and Wisconsin, initiation of proceedings is discretionary with the district attorney; in Michigan it is discretionary with the county attorney or the attorney general; in Illinois it is discretionary with the attorney general or the state's attorney and is mandatory with the department of public safety. In Ohio, proceedings are initiated by the court after conviction and before sentence, being mandatory in some cases, discretionary in others.

66. Compare the amendment to the Briggs Act in Massachusetts to correct just such a weakness. IV MASS. LAWS ANN., c. 123, § 100A (1942); Werthen, *Psychiatry and the Prevention of Sex Crimes,* 28 J. CRIM. L. & CRIMINOLOGY 847, 852 (1938).

tion of the "patient." [67] Appointment of psychiatrists is no longer a novel procedure,[68] and so it is surprising that the Minnesota, Massachusetts and Wisconsin statutes do not require the medical examiner to be a psychiatrist.

Various qualifications have been suggested, including membership in the American Board of Neurology and Psychiatry.[69] The higher the caliber of the examining psychiatrists, the more weight will be given their findings by the judge and jury (in those jurisdictions where jury participation is required or has been requested, where discretionary), who make the final determination as to the existence of sexual psychopathy in the "patient."

All seven of the applicable statutes provide for hearing in a court of record to decide whether or not the "patient" is a sexual psychopath within the meaning of this legislation.[70]

Under the Illinois statute a jury of laymen [71] is mandatory; in California, Michigan and Wisconsin the alleged sexual psychopath can demand a jury; in Massachusetts the allowance of a jury is discretionary with the court, while Minnesota and Ohio make no provision for jury participation in the commitment proceeding. This latter situation appears to be preferable procedurally,[72] since a jury is incompetent to decide a medical question. There is always the possibility of nullification of the statute by the jury.[73] A jury may be reluctant to commit, for what may be an indefi-

67. In California, the judge appoints "not less than two nor more than three psychiatrists." Minnesota requires only that the examination be made by "two duly licensed doctors of medicine"; the Massachusetts requirement is but slightly more specific, "two duly licensed qualified physicians certified by the department of mental health"; Wisconsin requires that the "two duly licensed physicians" have "two years of general experience, or one year of experience as a physician in a hospital for the insane"; Michigan requires that the examiners be "two qualified psychiatrists" but does not elaborate upon what qualifications are necessary. Illinois establishes the most stringent requirements, the *exclusive* limitation of practice to mental and nervous disorders for five years, while Ohio and California require five years *experience* in mental diseases and a practice directed *"primarily* to the diagnosis and treatment of mental and nervous disorders for not less than five years, and at least one of whom shall be from the medical staff of a state hospital or county psychopathic hospital" respectively.

68. Dession, *supra* note 17, at 321 infers that this has been one of the marked advances toward a harmonious coordination of psychiatry and the criminal law.

69. Report of the Forensic Committee of the Group for the Advancement of Psychiatry, Nov. 9-11, 1947. Such a statutory definition of a qualified psychiatrist would prevent appointment of incompetents and eliminate the possibility that the judges might employ their appointive powers for patronage. It has also been suggested that the examining psychiatrists be officially attached to a court clinic or employed by a state hospital system. The resultant continuity in personnel would make it possible for a body of individuals to specialize in the study of sex offenders. However, it must be borne in mind that there is at present a shortage of adequately trained psychiatrists.

70. Wisconsin further provides that where the alleged sexual psychopath is under the age of 18, the juvenile court has jurisdiction to conduct the same proceeding.

71. A jury of *experts* is suggested by Tulin, *supra* note 61, at 958.

72. In State *ex rel.* Pearson v. Probate Court of Ramsey County, 205 Minn. 545, 287 N. W. 297 (1939), *aff'd* 309 U. S. 270 (1940) the court, in upholding the statute, said that while the due process clause requires notice and opportunity to be heard, the constitutional right to a jury trial does not apply to proceedings for the care and commitment of a sexually irresponsible person dangerous to others. See Comment, 32 J. CRIM. L. & CRIMINOLOGY 196 (1941).

73. See BRASOL, THE ELEMENTS OF CRIME 333 (1927); Dession, *supra* note 17, at 321; Nelson, *Need for Statutory Psychiatric Examination in Criminal Cases*, 11 ST. LOUIS L. REV. 284, 291 (1926); Overholser, *The Place of Psychiatry in the Criminal Law*, 16 B. U. L. REV. 322, 328, 341 (1936).

nite period, one who has been charged with a trivial offense; the alternative may be chosen of refusing to commit so that the individual can have a criminal trial upon the offense charged and serve his short term. On the other hand, the jury may be reluctant to commit one accused of a sordid sex offense to a state hospital and allow him to escape with what they believe to be a comparatively light punishment.[74]

As these statutes are generally considered civil rather than criminal in nature, there would probably be no constitutional objection to a discretionary private hearing, a provision for which is found in the Massachusetts, Minnesota and Wisconsin statutes. The stigma of "sexual psychopathy" which attaches to a person undergoing this procedure will be less where his hearing is not open to the curious and sensation seekers.

Ultimate "Criminal" Responsibility: The effect of commitment on criminal proceedings is one of the most controversial aspects of this type of legislation. In Illinois, commitment under the statute postpones the criminal proceedings until after the criminal sexual psychopathic person has been released, but this does not act as a defense to the crime charged. Therefore, having been adjudged cured, he is remanded for trial upon his criminal offense.[75]

It may be claimed that deterrence could be accomplished by the subsequent trial and imprisonment, but such an argument ignores the general agreement as to the non-deterrability of the criminal psychopathic person which, in part, underlies the "sexual psychopathic" statutes. Perhaps the legislature, while fearing that the statute might be constitutionally vulnerable if a court were to conclude it to be a criminal statute,[76] expected trial judges in exercising their discretion, to take into account the previous commitment and give suspended or minimum sentences where merited. The California act takes cognizance of this exercise of discretion by the judge and if, within 30 days of certification by the superintendent of the hospital that the defendant is no longer a menace to the health and safety of others, the committing court does not order him returned for the criminal proceedings which were suspended by the initiation of the "inquest," the superintendent of the hospital may parole him, as in the case of a formerly insane person, for not less than five years. Massachusetts provides that the existence of a condition of psychopathic personality shall not constitute a defense to a crime. In all cases, except murder conviction, execution of sentence is stayed only until release. Perhaps here, too, in practice, the courts will take into consideration the previous commitment and give suspended or minimum sentences where merited. In Minnesota, while the statute of limitations runs, the existence of psychopathic personality is not a defense to a charge of a crime. This does not imply that persons with psychopathic personalities are "legally sane." While public welfare re-

74. *See* Cohane, *supra* note 7, in which he discusses the importance of eliminating the vengeance motive, which appears to dominate the minds of juries, and substituting a recognition of the importance of providing adequate security for society as a whole.

75. No principle of treatment seems to favor this provision which was enacted despite the recommendations of the Committee of Neurologists and Psychiatrists that the cured offender be freed. Illinois Report, *supra* note 55, at 18. Wisconsin also provides that commitment as a sex psychopath does not constitute a defense.

76. *Compare* Robison v. Wayne Circuit Judges, 151 Mich. 315, 326, 115 N. W. 682, 686 (1908) where the court looked beyond the mere declaration of non-criminality to find that the effect was criminal, *with* People v. Chapman, 301 Mich. 584, 4 N. W. 2d 18 (1942), in which the constitutionality of the present Michigan statute making *commitment* as a "criminal sexual psychopathic person" a *defense* to the crime charged at the time of filing the petition, was upheld.

quires that they be treated before they have an opportunity to injure others, does it necessarily follow that their malady must excuse them from criminal conduct occurring in the past? Michigan answers this in the affirmative as regards the crime of which the "patient" was charged at the time this proceeding was initiated. To refuse to allow the existence of this mental disorder as a defense provides scant incentive for a sex offender to reform and seek treatment if upon recovery he is "rewarded" with punitive action against him. Retributive punishment should be unnecessary, and there is no reason to extend or impose an added or different sentence under the guise of hospitalization.

The Ohio statute has adopted a more realistic compromise of these two conflicting views. While commitment as a psychopathic offender is not a defense, upon release from the treatment facility the defendant is confined to a penal institution until the total period of confinement equals the applicable sentence. There is a slight tinge of vengeance in that the offender will be confined for no less than the term of his criminal incarceration, but yet he will not be released into society uncured.

Treatment: Should the committed sex offender be treated in a penal or non-penal institution? In most instances it has been necessary to utilize the institutions presently existing in a state in lieu of the abandonment of the legislation for the care and treatment of the criminal sexual psychopathic person.[77] Consistency demands that if a sex offender is diagnosed as mentally disordered, he should be treated as a mental case in a facility for that purpose, *i. e.*, a psychiatric hospital.[78] The sex offender in a psychiatric ward does not bear the same stigma as is attached to him in a penal institution. There additional publicity attaches to the prisoner which may interfere greatly with his cooperation. Commitment to a penal institution is feasible only if prisons are transformed into realistic treatment facilities. Even so, treatment is carried out under an unusual form of stress in isolation from normal contacts, from encouragement by friends, and from opportunities to test the progress made; and in conditions which are often otherwise disadvantageous. However, the desire for cure has an added urgency for some prisoners (although there may be but slight incentive for a man serving a term sentence to reach out for psychiatric help), and the environment has an abnormal freedom from extraneous distractions.[79]

The efficacy of a sentence of probation with voluntary out-patient psycho-therapy is questionable. If the sex offender receives a non-custodial award in the hope that he will submit himself to medical treatment, he may do so but refuse to cooperate with the psycho-therapist, with the result that he is free to resume his anti-social conduct. The main purpose of this type of statute will thus be thwarted.

A Proposal

While there has been some adverse criticism of this type of legislation,[80] there is at present considerable agitation for the passage of such statutes in states which now lack them. As a possible "model" statute, outlining a procedure that is practical based upon the experience gained under

77. *See* People v. Chapman, 301 Mich. 584, 4 N. W. 2d 18 (1942).

78. These, however, may be so overcrowded or inadequately staffed as not to effectuate their purpose. See, for a discussion of this problem, MacCormick, *New York's Present Problem*, 22 MENT. HYG. 4 (1938).

79. See East, *Sexual Offenders—A British View*, 55 YALE L. J. 527, 557 (1946).

80. Stewart, *Concerning Proposed Legislation for the Commitment of Sex Offenders*, 3 JOHN MARSHALL L. Q. 407 (1938) is quite vehement in his opposition to this type of legislation.

the seven presently existing statutes, the following proposed act is presented:

An Act Relating to the Care, Treatment and Rehabilitation of Sexual Psychopaths [81]

1. *Definitions*

(a) The term "sexual psychopath" as used in this act means any person suffering from such conditions of emotional instability or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his acts, or a combination of any such conditions, as to render such person irresponsible with respect to sexual matters and thereby dangerous to himself or to other persons.

(b) The term "majority of the board of psychiatrists" as used in this act means at least two members of the board of psychiatrists.

(c) The term "superintendent" as used in this act means the warden, director, superintendent or head of an institution under the jurisdiction of the department of correction or the department of mental health in which a sexual psychopath is confined.

2. *Inquiry*

(a) *Mandatory*

(1) Whenever a person is charged with one or more of the following sex offenses: rape, sodomy, incest, carnal abuse of a minor or indecent exposure, the district attorney *shall* prepare a petition requesting the county court of the county having jurisdiction over the offense charged, to conduct an inquiry into his mental condition. Where the offender is under 18 years of age, the petition shall be filed with the Juvenile Court (if any) of such county.[82]

(2) No person charged with one or more of the sex offenses mentioned in (1) above shall be tried therefor until the board of psychiatrists, as defined in § 3 below has filed a report of the result of its examination, and, in case a majority of the board, as defined in § 1 above, reports that the accused is a sexual psychopath, until a decision has been reached upon a hearing held pursuant to § 4.

(b) *Discretionary*

Whenever facts are presented to the district attorney which satisfy him that good cause exists for judicial inquiry as to whether a person is a sexual psychopath as defined in § 1(a) he *may* prepare a petition setting forth such facts and requesting a court to conduct an inquiry into the condition of such person. The petition shall be executed and verified by a person having knowledge of the facts on which it is based. The petition shall be filed with the county court of the county in which such alleged sexual psychopath has his legal settlement or in which such person is present, except that where such alleged sexual psychopath is under 18 years of age, the petition shall be filed with the juvenile court (if any) of such county.

81. See discussion in text under heading *"Persons Within the Purview of the Statute."*

82. If the age limit of jurisdiction of the Juvenile Court in the state or county is below 18, that age should be substituted for 18 wherever used.

3. *Examination*

(a) The court with which the petition described in § 2 was filed shall appoint a board of psychiatrists, composed of not less than two nor more than three psychiatrists, each of whom shall be a holder of a valid and unrevoked physician's and surgeon's licensure certificate, who has directed his professional practice primarily to the diagnosis and treatment of mental and nervous disorders for a period of not less than five years, and at least one of whom shall be attached to a court psychiatric clinic or to the medical staff of a state or county mental hospital, to examine the alleged sexual psychopath or the one accused of one or more of the sex offenses stated in § 2(a)(1) to ascertain whether the person is a sexual psychopath as defined in § 1(a).

(b) The psychiatrists so appointed shall file with that court a written report of the result of their examination, together with their opinions, conclusions and recommendations. A certified copy of this report shall be served upon such person within three days after the filing thereof with the court.

4. *Hearing*

(a) If the majority of the board of psychiatrists find that the person being proceeded against pursuant to § 2(a) or § 2(b) is a sexual psychopath within the meaning of this act, the court shall conduct a hearing thereon within thirty days after receipt of the report so stating, which report shall be admissible as evidence. The court may, at its discretion, exclude the general public from attendance at such hearing. There shall be no jury at this hearing. The person complained of or accused of a sex offense as provided in § 2(a)(1) shall be entitled to be present at the hearing and to be represented by counsel. If the court determines that he is financially unable to obtain counsel, the court shall appoint counsel to represent him. The person complained of or accused of one or more of the sex offenses stated in § 2(a)(1) shall be entitled to have subpoenas issued out of the court to compel the attendance of witnesses in his behalf.

(b) The psychiatrists who made the examination pursuant to § 3 may be present at the hearing and may be called on to testify as to the result of their examination and to any other pertinent facts within their knowledge. The district attorney shall appear for the board of psychiatrists and cause witnesses to be subpoenaed, if necessary, in support of the report.

(c) Upon such hearing, it shall be competent to introduce evidence of the commission by the person charged with a sex offense as stated in § 2(a)(1) of any number of sex crimes together with any action taken in the way of punishment or otherwise.

(d) The proceedings had shall be reduced to writing and shall be part of the records of the court.

(e) The court shall make an order determining whether or not the person proceeded against pursuant to § 2(a) or § 2(b) is a sexual psychopath as defined in § 1(a). From such order, the person determined to be a sexual psychopath has the right of appeal.

5. *Commitment*

(a) Any person determined by the court to be a sexual psychopath within the meaning of this act shall either be committed to the state department of mental health to be confined in an appropriate mental (psychiatric) hospital designated by the state department of mental health, which shall make adequate provisions at such hospital to house such persons and for their medical care and treatment while at such hospital or, at the discretion of the court, he shall be released on probation to such persons and under such conditions as the court, taking into consideration his condition, deems advisable.

(b) The state department of mental health shall make periodic examinations of any such person so committed or placed on probation with the view to determining the progress of cure, if any, and shall, in an annual report submitted to the attorney general, give a medical finding on each such person. These reports in each individual's case shall not be destroyed sooner than six years after a final determination by the court, pursuant to § 6, of the recovery of said person from the condition of sexual psychopathy.

6. *Discharge*

(a) If the person proceeded against pursuant to § 2(a) or § 2(b) has been committed to a mental or psychiatric hospital as a sexual psychopath, whenever thereafter the superintendent of the hospital wherein he is confined (or, if he has been placed on probation, these steps shall be taken by the person under whose supervision he was placed by the court) shall notify the department of mental health that the person has recovered, or that his mental condition has improved to such an extent that he will not be benefited by further treatment and that he is no longer a menace to the health and safety or others, the department shall recommend his release to the committing court and shall send to such court a record of the case containing the opinion of the superintendent of the hospital wherein he was confined or of the person under whose supervision he had been placed by the committing court.

(b) The court shall, after a hearing, order the discharge of such person unless it shall be found at the hearing, upon the testimony of psychiatrists subject to the same qualifications as in § 3(a) that said person has not recovered, or that his mental condition has not improved to such an extent that he will not be benefited by further treatment and that he remains a menace to the health and safety of others. The court shall order such person to be returned to custody to be held under the previous commitment of such person, making any modifications in such commitment as is discretionary with the court under § 5(a).

7. *Trial upon original charge prohibited*

No person described in § 2(a) who is found to be a sexual psychopath within the meaning of this act, such finding having become final, may thereafter be tried upon a charge or indictment arising out of the sex offense with which he was accused at the time of the filing of the petition pursuant to § 2(a).

8. *Detention pending inquiry*

On the receipt by a court of the petition to initiate proceedings pursuant to § 2(b), the judge thereof may, if in his opinion the public safety so requires, deliver to the sheriff a written order requiring him forthwith to take and confine the person alleged to be a sexual psychopath within the meaning of this act in some specified place until the proceedings provided for in §§ 2(b)-5 can be had or until further order.

9. *Person executing petition for inquiry exempt from damages*

The person who, acting in good faith, executes the petition for inquiry specified in § 2(b) of this act shall not be liable in damages to any person for such act.

10. *Payment for maintenance; reimbursement*

The county from which a person found to be a sexual psychopath is committed, if not the county wherein such person has his legal settlement, shall pay the cost of maintaining such person during his commitment, but shall be reimbursed out of such person's estate, or if he be indigent, by the county of his legal settlement.

11. *Procedure where person proceeded against is adjudged not a sexual psychopath*

(a) If, after receiving the report of the board of psychiatrists pursuant to § 3 and conducting a hearing pursuant to § 4, the court is of the opinion that the alleged sexual psychopath is not a sexual psychopath as defined in § 1(a), then, where proceedings under this act were brought pursuant to § 2(b), he shall be freed from custody and discharged.

(b) If after receiving the report of the board of psychiatrists pursuant to § 3 and conducting a hearing pursuant to § 4, the court is of the opinion that the person charged with one or more of the sex offenses stated in § 2(a) (1) is not a sexual psychopath as defined in § 1(a) then, where proceedings under this act were brought pursuant to § 2(a), the criminal proceedings which were, in accordance with § 2(a) (2) suspended by the proceedings under this act shall be resumed as if no such proceedings under this act has been ordered.

F. P. F.