RECENT CASES

Administrative Law—

ADMINISTRATIVE HEARING BASED UPON CRIMINAL CHARGES AND HELD BEFORE TRIAL VIOLATES DUE PROCESS

A licensed taxicab driver in the District of Columbia was arrested and charged with two acts of rape. At the time of his arrest a search of his automobile and home uncovered a revolver, some ammunition and a bayonet. After he had been acquitted on one charge, and while the second was still pending, the responsible administrative agency notified him to appear at a hearing to determine if his character was such as to justify revocation of his license.[1] The agency reviewed all the evidence concerning the second alleged rape and the discovered weapons and, without specifying the particular grounds, revoked his license. The cab driver then successfully sought restoration of his license in the district court, meanwhile gaining an acquittal on the second rape charge. On appeal the circuit court, with one judge dissenting, affirmed, holding that an administrative revocation of a license on the ground of a serious offense, upon which criminal charges were pending, was a denial of due process because disclosure of evidence at the hearing may prejudice a licensee's defense at the subsequent trial. *Silver v. McCamey,* 221 F.2d 873 (D.C. Cir. 1955).

The right of a defendant charged with a crime to conceal the elements of his defense until a strategic moment in the trial developed as one of the procedural safeguards to counteract the inquisitorial system.[2] This right has been protected in several ways. Although the defendant is entitled to know the specific charges for which he is indicted, he nevertheless may plead generally.[3] Furthermore, discovery techniques designed to eliminate surprise in civil proceedings have not been widely accepted in criminal practice.[4] The right not to reveal defense strategy has been criticized on

1. D.C. CODE ANN. § 47-2345 (1951), provides that: "The commissioners are further authorized and empowered . . . to revoke any license issued hereunder when, in their judgment, such is deemed desirable in the interest of public decency or the protection of lives, limbs, health, comfort, and quiet of the citizens of the District of Columbia, or for any other reason they may deem sufficient."

2. See Dean, *Advance Specifications of Defense in Criminal Cases,* 20 A.B.A.J. 435 (1934). A modern rationale of the defendant's right to conceal the theory of his defense is that he needs surprise to offset the prosecutor's superior investigative ability. Comment, 60 YALE L.J. 626, 635-37 (1951).

3. Dean, *supra* note 2, at 436.

4. The federal criminal procedure rules provide only for limited discovery by the defendant. FED. R. CRIM. P. 16, 17c; see also Combs, *The Scope of Discovery Against the Prosecution in Criminal Cases—How Far Should It Be Widened?,* 42 J. CRIM. L., C. & P.S., 774 (1952); Note, 67 HARV. L. REV. 492 (1954). English rules permit a greater amount of discovery on behalf of the defendant. See Indictable Offenses Act, 1848, 11 & 12 VICT., c. 42, §§ 17, 27; ARCHBOLD, PLEADING, EVIDENCE & PRACTICE IN CRIMINAL CASES 412-25 (31st ed. 1943).

the ground that it permits the guilty to escape conviction,[5] and, consequently, has been somewhat restricted by laws requiring notice of the affirmative defenses of insanity [6] and alibi.[7] It has also been subordinated to the interests of a plaintiff who brings a civil suit against the defendant on the basis of the same wrongful acts for which the defendant stands indicted. Although in those cases the defendant complained that to defend adequately in the civil suit he must reveal his defense to the pending criminal charge, a determination to proceed with the civil action was left to the sound discretion of the trial court.[8] In *State ex rel. Hurwitz v. North*,[9] an administrative agency's refusal to delay a hearing on revocation of a physician's license pending criminal prosecution of the licensee for abortion was upheld, the court dismissing the constitutional problem in a single sentence.[10] The instant case is the first considered opinion on whether a criminal defense is constitutionally protected from disclosure in a prior administrative proceeding.

The circuit court's conclusion that the revocation hearing in the instant case violated due process is open to serious question. Since in all the decisions on affirmative defenses and requests for continuances in civil cases the courts have failed to discuss the right of secrecy, although opportunities were presented by the constitutional issues raised, it may be inferred that the right is not protected when there is an overriding interest. Such an interest is found, in decisions refusing to stay a civil proceeding pending completion of the related criminal trial, in the need of the civil plaintiff to secure prompt adjudication of his claim. A quite analogous situation is presented by administrative hearings like the *Hurwitz* and the instant cases where the public interest in prompt adjudication is great. If the physician is unsuited to continue practice, or if a cab driver is a menace to the public, then immediate action on the issue is essential. Thus an interest is present of sufficient importance to subordinate the licensee's right to keep his criminal defense to himself.

Nevertheless, it is almost beyond question that the instant court was correct in concluding that suspension was the preferable remedy in this

5. See Perkins, *Absurdities in Criminal Procedure*, 11 IOWA L. REV. 297, 333 (1926); Comment, 60 YALE L.J. 626, 638-39 (1951).

6. CAL. PEN. CODE § 1016 (1949), People v. Troche, 206 Cal. 35, 273 Pac. 767 (1928); ORE. REV. STAT. § 135.870 (1953), State v. Wallace, 170 Ore. 60, 100, 131 P.2d 222, 237 (1942).

7. OHIO GEN. CODE ANN. § 13444-20 (1938), State v. Thayer, 124 Ohio St. 1, 176 N.E. 656 (1931); WIS. STAT. § 355.07 (1953), State v. Kopacka, 261 Wis. 70, 51 N.W.2d 495 (1952).

8. State v. Schauenberg, 197 Iowa 445, 197 N.W. 295 (1924) (injunction of illegal sale of liquor on facts constituting a criminal nuisance); Lowe v. Lowe, 293 S.W. 915 (Tex. Civ. App. 1927) (wife suing for divorce prior to husband's trial for murdering her lover). *Contra*, Anthony v. Clarke, 1 R.I. 284 (1850) (replevin-theft situation); see also Illingworth v. Coyle, 48 B.C. 81 (1933).

9. 304 Mo. 607, 264 S.W. 678 (1924), *aff'd on other grounds*, 271 U.S. 40 (1925).

10. "As to the oral application for continuance, it should be added that there is no substantial reason for postponing a proceeding like this until after the criminal prosecution is concluded." *Id.* at 624, 264 S.W. at 682.

type of case.[11] Therefore, it is possible that the court found that the revocation proceeding violated due process, not because the right of secrecy is a basic and fundamental right guaranteed by constitutional safeguards, but because suspension was an available alternative remedy. Thus interpreted, the decision fits more readily into the administrative law problem of what scope of review a court should exercise over an administrative agency's choice of remedies. Under administrative law doctrine, the major consideration is whether the fashioning of a remedy is an issue which brings into play the agency's expertise or one which the reviewing court is more qualified to decide.[12] Therefore, if the instant court decided that the choice of remedy was an issue peculiarly for the courts, it could have reversed with directions to suspend the license until the criminal charge is tried,[13] after which the full revocation hearing could be held.[14] On the other hand, if it were determined that the selection of the proper remedy fell within the scope of agency expertise, the court could have remanded to the agency for a reconsideration either because the agency abused its discretion[15] or because it failed properly to use its expertise.[16] Either of these procedures would have obviated the necessity of formulating a new concept of due process of doubtful validity, even if the instant court was satisfied that the procedure had violated our traditional concepts of substantial justice and fair play.

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11. Summary suspension would be admirably suited to solve the problem presented by the instant case. The defendant would not be placed in the dilemma of choosing either to contest the revocation hearing or to keep his defense secret until trial, while the public would be safeguarded by preventing the defendant from operating his taxi until the board could proceed with the revocation hearing after the criminal trial.

While there is no express authority permitting suspension of taxicab drivers in the District of Columbia, see note 1 *supra*, the court did not feel that such authority was vital. Instant case at 875. Suspension might be permitted under the provision of the District of Columbia code which authorizes the commissioners to make ". . . regulations that may be necessary in furtherance of the purpose of this chapter . . . ." D.C. CODE ANN. § 47-2345 (1951); *cf.* LaBonte v. Berlin, 85 N.H. 89, 154 Atl. 89 (1931).

12. See DAVIS, ADMINISTRATIVE LAW 893-97 (1951); LANDIS, THE ADMINISTRATIVE PROCESS 143-44 (1938).

13. People v. Noggle, 7 Cal. App. 2d 14, 45 P.2d 430 (1935); State *ex rel.* Williams v. Whitman, 116 Fla. 196, 156 So. 705 (1934).

14. In the instant case, the criminal charges had been tried at the time the court was reviewing the administrative proceeding. Although the defendant had been acquitted of the crimes, administrative revocation is not necessarily precluded. Misconduct need not amount to rape in order to show that a man is unfit to operate a taxicab. Furthermore, the quantum of evidence needed to convict of a crime is far greater than the "substantial evidence" standard of administrative action. Therefore, the instant court could have reversed the prior order and remanded the case to the agency for immediate hearing.

15. Jacobsen v. NLRB, 120 F.2d 96 (3d Cir. 1941) (alternative holding); *cf.* FTC v. Cement Institute, 333 U.S. 683 (1948); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

16. Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946).

Criminal Law—

CONFESSION ELICITED ONE HOUR AFTER LAWFUL BUT VIOLENT ARREST HELD INVOLUNTARY IN FEDERAL COURT

Police apprehended defendant and two accomplices in a car loaded with stolen goods. According to the prosecution, defendant resisted both the original arrest and later confinement at the police station and both times was forcibly subdued. About an hour after initial confinement, he was questioned, no force or threat of force being applied, whereupon he signed a confession detailing his part in the theft. According to the defendant, the arrest had been peaceful, and the beatings had occurred during the interrogation. Faced with this conflict of evidence, the trial court submitted the issue of voluntariness to the jury who found the defendant guilty on three counts.[1] Defendant appealed on the alleged error that the trial court had submitted the issue of the voluntariness of his confession to the jury in an improper manner.[2] The appellate court, accepting the prosecution's statement of the case, held that a confession elicited under the facts as presented by the prosecution, was involuntary and, therefore, should not have been admitted in a federal criminal trial.[3] *Payton v. United States,* 222 F.2d 794 (D.C. Cir. 1955).

The problem of excluding an involuntary confession has two aspects: what is "involuntary" and who shall make that determination? On the latter point, where the evidence before the court is in conflict, the federal courts are divided as to whether the judge or the jury should determine the voluntariness of the offered confession.[4] It seems, however, that in the absence of any conflict in the evidence the judge alone decides the issue as a matter of law.[5] Although the record in the instant case indicates there

1. These were housebreaking, grand larceny and carrying a dangerous weapon. The latter conviction was obtained upon evidence independent of the confession and was not contested on appeal.

2. The defendant alleged that the trial court, faced with this conflict in the evidence, erred in not hearing testimony outside the jury's presence, in "prejudically" referring to the confession as "signed" by him and in not explicitly instructing the jury to disregard the confession if they found it involuntary. Brief for Appellant, pp. 12-29.

3. In the alternative, the court held that it was prejudicial to accept a guilty plea from a co-defendant in the presence of the jury and to refer to that plea during the course of the trial. Instant case at 796.

4. The Supreme Court has enunciated a discretionary rule in this regard. Wilson v. United States, 162 U.S. 613, 624 (1896). At least one circuit has held that the judge alone decides. Shaffer v. United States, 221 F.2d 17 (5th Cir. 1955). The District of Columbia rule requires that, where there is a conflict in evidence, the issue of voluntariness must be submitted to the jury under instruction to disregard it if it is found involuntary. McAffee v. United States, 105 F.2d 21 (D.C. Cir. 1939). There is a similar division among the states. Annot., 85 A.L.R. 870 (1933). The more subtle variations of this division are considered by Meltzer, *Involuntary Confessions: The Allocation of Responsiblity Between Judge and Jury,* 21 U. CHI. L. REV. 317 (1954).

5. See Wilson v. United States, 162 U.S. 613, 624 (1896); Meltzer, *supra* note 4, at 318, 321-24.

was a real question of what had actually happened, the appellate court avoided the necessity of resolving any conflict by accepting arguendo the facts presented by the prosecution. Since even on these facts the court found error, the manner of submitting the issue to the jury became immaterial, and the only problem remaining is the instant court's definition of what is "involuntary" as a matter of law.

The criterion for the admission of confessions in federal cases is that they must have been given "freely, voluntarily and without compulsion or inducement of any sort." [6] A similarly abstract standard would seem to prevail in the state courts.[7] Several rationales have been articulated for excluding confessions not meeting this requirement: traditionally "involuntary" confessions have been considered testimonially untrustworthy; [8] but, recently, exclusion has been strongly supported as a means of controlling particularly repugnant police activities.[9] Confessions have been held inadmissible, on one theory or the other, where they were extracted by corporal violence,[10] or threats of violence,[11] or various psychological pressures.[12] Where the confessor has attempted to invalidate a confession on the ground that he was induced by fear generated by lawful acts of force by the police, state courts have rejected the contention and held that this is solely a question of weight.[13] The instant case appears to be the first

6. Wilson v. United States, 162 U.S. 613, 623 (1896); *cf.* United States v. Carignan, 342 U.S. 36, 38 (1951); Denny v. United States, 151 F.2d 828, 833 (4th Cir. 1945).

7. See, *e.g.*, People v. Schwartz, 3 Ill. 2d 520, 121 N.E.2d 758 (1954); State v. Walker, 15 N.J. 485, 105 A.2d 531 (1954); State v. Hamer, 240 N.C. 85, 81 S.E.2d 193 (1954); 3 WIGMORE, EVIDENCE § 826 & n.2 (3d ed. 1940).

8. See, *e.g.*, Lisenba v. California, 314 U.S. 219 (1941); Wood v. United States, 128 F.2d 265 (D.C. Cir. 1942); Patton v. State, 207 Miss. 134, 41 So. 2d 55 (1949). Wigmore makes this the sole test. 3 WIGMORE, *op. cit. supra* note 7, § 822.

9. See, *e.g.*, State v. Graffam, 202 La. 869, 889, 13 So. 2d 249, 255 (1943). McCormick accepts this motive as predominant and considers the "trustworthy" doctrine as only "ancillary" in shaping the rule. MCCORMICK, EVIDENCE § 109 (1954). The interplay of these motives in the Supreme Court, with each at times appearing decisive, is discussed in Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411 (1954). *Compare* Brown v. Allen, 344 U.S. 443 (1953), *with* Stein v. New York, 346 U.S. 156 (1953).

10. Brown v. Mississippi, 297 U.S. 278 (1936).

11. Edmonson v. State, 72 Ark. 585, 82 S.W. 203 (1904).

12. Chambers v. Florida, 309 U.S. 227 (1940); Ziang Sung Wan v. United States, 266 U.S. 1 (1924); Perrygo v. United States, 2 F.2d 181 (D.C. Cir. 1924). In many of the cases there may be a combination of threats, force or other pressures. See Kokenes v. State, 213 Ind. 476, 13 N.E.2d 524 (1938); 3 WIGMORE, *op. cit. supra* note 7, § 833.

13. State v. Wise, 115 A.2d 62 (N.J. 1955) (Defendant, shot during an attempted escape, confessed a considerable time later, after he had received medical treatment but before removal of the bullet.); People v. Burwell, 279 P.2d 744 (Cal. 1955) (Defendant was struck and his arm twisted to speed him past fellow prisoners to avoid a possible riot; he confessed shortly thereafter.); Roman v. State, 23 Ariz. 67, 201 Pac. 551 (1921) (Defendant, attempting to shoot captors, was shot by them instead and confessed immediately.); Territory v. Emilo, 14 N.M. 147, 89 Pac. 239 (1907) (Defendant, arrested at gun point following an exchange of shots, confessed upon arrest.); Connors v. State, 95 Wis. 77, 69 N.W. 981 (1897) (Defendant, engaged in cell fight, was clubbed in order to break it up; one-half hour later he confessed.).

to hold that even lawful violence, administered without design to secure a confession, will render it inadmissible if it is obtained soon after the violence occurred.

The instant court found that, from the facts as presented by the prosecution, a compelling inference must be drawn that the confession was not the "free act" of the prisoner.[14] Whether by "free act," the court meant to imply that the confession was not free from the influences which would render it untrustworthy, or only that it was not free from an aura of repugnant police conduct, is not clear. On whichever theory of exclusion the court rested, the result is open to question. To justify exclusion on the ground that the confession was untrustworthy, the circumstances surrounding its extraction would have to be such as would generally lead the accused to sacrifice truth for present bodily safety and peace of mind.[15] In the instant case, exclusion on this theory could only be supported by the argument that the force used caused the prisoner to fear an additional beating if he were not to confess. Absent empirical evidence that such would indeed be the case, a rule of law assuming that it is seems unwarranted. Concededly, in the individual case a suspect might be so influenced, but this would seem properly a question of credibility, to be decided by the jury on the particular facts. Likewise, exclusion in the instant case would be questionable as a condemnation of undesirable police activity. Since neither the fact of lawful forceful arrest nor the fact of questioning a suspect would be considered repugnant, it is difficult to conclude that a combination of the two would be the more so. In the absence of a showing of a design on the part of the police to utilize lawful force as a means of unbalancing the prisoner in an effort to make him susceptible to later confessing, there is little to condemn in this conduct. No such design appears in the instant case;[16] therefore, the court, assuming that it desired to discourage any such inclination, might well have postponed consideration of the problem pending a case actually presenting the situation.

Internal Revenue—

TAXPAYER'S WAR LOSS DEDUCTIBLE IN YEAR SUBSEQUENT TO ENEMY SEIZURE

Taxpayer constructed a house in Vienna in 1937 which she used as a residence and as medical offices for her husband. When she left Austria in 1938 to come to the United States, she appointed a manager of the property with authority to rent it; however, no rental payments were

14. Instant case at 797.

15. See 3 WIGMORE, *op. cit. supra* note 7, § 822.

16. By accepting the prosecution's statement of the case, there is no question but that the force actually used was reasonable and necessary to effect the arrest. Instant case at 797.

ever received. Subsequently, the Nazi Government seized the property on the authority of the Act of November 25, 1941, which provided for confiscation of the property of all Jews who had left Germany or countries controlled by that nation. In 1944 the property was damaged substantially by a bomb. The taxpayer, claiming a deduction in 1944 as a result of the bombing, brought an action in a United States district court to recover taxes paid for the years 1943 to 1946.[1] The district court, apparently accepting taxpayer's view that the seizure of her property was void ab initio,[1a] held that she was still the owner thereof in 1944 when the damage actually occurred and, therefore, permitted her to take a net operating loss for the years in question. The government appealed, claiming that the loss was deductible only in 1941, the year of the seizure, either as an ordinary loss under section 23(e) [2] or as a war loss under section 127(a)(2).[3] The circuit court held that the taxpayer did not come under the war loss provision and that she could claim an ordinary loss for the year in which her property was bombed.[4] *Reiner v. United States,* 222 F.2d 770 (7th Cir. 1955), *cert. not auth.,* 5 CCH 1955 STAND. FED. TAX REP. ¶ 51150.

In general, in order for a loss to be deductible the taxpayer must show a completed transaction evidenced by an identifiable event, such as the sale or other disposition of the property,[5] in the year in which the

1. Int. Rev. Code of 1939, § 122, as amended, 56 STAT. 847-48 (1943), permits a taxpayer to spread a loss attributable to a trade or business regularly carried on over a period of years when the loss was greater than the taxable income in the year in which sustained. INT. REV. CODE OF 1954, § 172 continues the general rule but has made some significant changes. See note 4 *infra.*

1a. This argument was predicated upon an act issued by the Austrian Government on May 15, 1946, which declared the Nazi seizures null and void. Instant case at 771-72.

2. Int. Rev. Code of 1939, § 23(e), 53 STAT. 13 (now INT. REV. CODE OF 1954, § 165(c)).

3. Int. Rev. Code of 1939, § 127(a)(2), added by 56 STAT. 852 (1943). There is no corresponding section in the 1954 Code. Losses due to wartime conditions existing after the termination of World War II are deductible under § 23(e). I.T. 4086, 1952-1 CUM. BULL. 29.

4. The second problem the instant court faced was whether the destruction of taxpayer's property was a loss attributable to the operation of a trade or business regularly carried on within the meaning of § 122 of the 1939 Code. See note 1 *supra.* The court held that the rental of the property constituted a business on the authority of Anders I. LaGreide, 23 T.C. 508 (1954), and cases cited therein. Therefore, a casualty loss to such property was a loss attributable to the business. Chicago Title & Trust Co. v. United States, 209 F.2d 773 (7th Cir. 1954), which held that a taxpayer who sold property from which rents were received was not entitled to a net operating loss deduction, was distinguished on the basis of how the loss arose. The instant court properly decided that, while a voluntary sale of a business asset was not a loss attributable to a business, an involuntary casualty loss was. See Note, *When Is Real Estate Held for the Production of Income Used in the Trade or Business of the Taxpayer?,* 59 HARV. L. REV. 119 (1945). Non-business casualty losses were made fully deductible under the Int. Rev. Code of 1939, § 122(d)(5), as amended, 65 STAT. 517 (1951) (now INT. REV. CODE OF 1954, § 172(d)(4)(c)). The sale of business property is now considered a business loss. INT. REV. CODE OF 1954, § 172(d)(4)(A). See S. REP. No. 1622, 83d Cong., 2d Sess. 213 (1954).

5. Johnson Drake & Piper, Inc. v. Helvering, 69 F.2d 151 (8th Cir.), *cert. denied,* 292 U.S. 650 (1934).

deduction is claimed.[6] Seizure of property by an enemy sovereign consistently has been held an identifiable event which justifies a loss deduction in the year of seizure[7] even though there is some possibility of the property's recoupment.[8] Section 127 was added to the Internal Revenue Code of 1939 to obviate the difficulty of ascertaining the actual date of enemy seizure during World War II and gives the taxpayer the benefit of a conclusive presumption that his property was lost for tax purposes on the date of the United States' declaration of war.[9] If section 127 is applicable the taxpayer is bound by its provisions whether or not he elects to take the loss,[10] and no deduction will be permitted under section 23(e).[11] In order to come within section 127, the taxpayer must prove his ownership on the day of the United States' entry into the war.[12] However, if his property was seized prior thereto, the taxpayer still can claim an ordinary loss deduction under section 23(e) in the year of seizure.[13] Until the instant decision, no court has allowed the taxpayer a deduction in a year other than the year of seizure, if section 23(e) was applicable,[14] or later than the declaration of war, if section 127 governed.[15] In *Waclaw Szukiewicz*[16] the Tax Court, in a memorandum opinion, held

6. 5 MERTENS, FEDERAL INCOME TAXATION § 28.15 (1952).

7. Such seizure divests the owner of all right, title, and interest in the property. See Littlejohn & Co. v. United States, 270 U.S. 215 (1926); White v. Mechanics Securities Corp., 269 U.S. 283 (1925); Miller v. United States, 78 U.S. (11 Wall.) 268 (1870); Brown v. United States, 12 U.S. (8 Cranch) 110 (1814).

8. United States v. S.S. White Dental Mfg. Co., 274 U.S. 398 (1927); *accord,* Eugene Houdry, 7 T.C. 666 (1946); Jacob F. Brown, 18 B.T.A. 859 (1930), *aff'd,* 54 F.2d 573 (9th Cir. 1931), *cert. denied,* 286 U.S. 556 (1932); Hector Fezandie, 12 B.T.A. 1325 (1928); Emil Stern, 5 B.T.A. 89 (1926). Loss of a United States' citizens' property through seizure by the Alien Property Custodian was held deductible in year of seizure. Albert F. Gallum, 10 B.T.A. 747 (1928); Richard B. Wagner, 9 B.T.A. 925 (1927).

9. Ezra Shahmoon, 13 T.C. 705 (1949); Abraham A. Andriesse, 12 T.C. 907 (1949). For a complete analysis of § 127, see Note, 20 N.Y.U.L.Q. REV. 112 (1944). See also Simon, *Presumptions of Section 127,* 27 TAXES 791 (1949).

10. Ezra Shahmoon, 13 T.C. 705 (1949); Franklin S. Garner, P-H 1951 T.C. Mem. Dec. ¶ 51374.

11. Albert A. Andriesse, 12 T.C. 907 (1949). See also cases cited in note 10 *supra.*

12. Rozenfeld v. Commissioner, 181 F.2d 388 (2d Cir. 1950); David Schnur, 10 T.C. 208 (1948); Benjamin Abraham, 9 T.C. 222 (1947); Eric H. Heckett, 8 T.C. 841 (1947); Ernest Adler 8 T.C. 726 (1947). See also U.S. Treas. Reg. 111, § 29.127(a)-1 (1943).

13. Eugene Houdry, 7 T.C. 666 (1946).

14. In the following cases the taxpayer was denied a deduction in a year subsequent to seizure: Hector Fezandie, 12 B.T.A. 1325 (1928); Albert F. Gallum, 10 B.T.A. 747 (1928); Emil Stern, 5 B.T.A. 89 (1926); Eric E. Franke, P-H 1953 T.C. Mem. Dec. ¶ 53116; Waclaw Szukiewicz, P-H 1951 T.C. Mem. Dec. ¶ 51102.

In several cases the government contested the deduction in the year of seizure, but the deduction was allowed: United States v. S.S. White Dental Mfg. Co., 274 U.S. 398 (1927); Eugene Houdry, 7 T.C. 666 (1946); Jacob F. Brown, 18 B.T.A. 859 (1930), *aff'd,* 54 F.2d 573 (9th Cir. 1931), *cert. denied,* 286 U.S. 556 (1932); Richard B. Wagner, 9 B.T.A. 925 (1927).

15. See notes 10 and 11 *supra.*

16. P-H 1951 T.C. Mem. Dec. ¶ 51102.

that a taxpayer whose property was seized by the Nazis in 1939 and later ceded to Russia under the Yalta Agreement in 1945 could not deduct the loss in 1945, reasoning that the taxpayer had not retained any semblance of control in the interim between the German confiscation and the cession to Russia which would enable him to show a loss suffered in 1945. In *Eric E. Franke,*[17] a later memorandum decision, the Tax Court held that where the taxpayer's farm was confiscated by the Czech Government in 1945, unsuccessful legal action to reacquire the property terminating in 1950 did "not justify the postponement of a loss deduction." Neither the *Franke* nor *Szukiewicz* case was mentioned by the instant court in reaching its decision. Although a memorandum decision is not binding precedent on a circuit court, these cases appear contrary to the instant case and should have been distinguished,[18] if possible, or overruled.

The instant case presents the analytic problem of the desirability of giving a taxpayer the option of claiming a loss on either of two dates: the year of seizure or the subsequent year in which the property was physically damaged. The court's decision rests not on the fact that the taxpayer's loss was not complete in 1941, nor that there was no identifiable event in that year, but on the subjective feeling of the taxpayer that the property was not in fact lost. However, in a similar situation dealing with worthless securities,[19] the Supreme Court, in interpreting section 23(e),[20] said that the plain language of the statute and the regulations ". . . repels the use of such a subjective factor [*i.e.,* the taxpayer's honest and reasonable belief as to worthlessness] as the controlling or sole criterion"[21] and imposed an objective standard of when in fact the loss occurred, as evidenced by identifiable events. This same rule was applied to bad debts in *Redman v. Commissioner,*[22] where the court pointed out that the specific policy of the act was to substitute an objective standard for a subjective test in determining the year in which the bad debt loss was deductible.[23] Because the code requires the taxpayer to account for net income on an annual basis,[24] the courts insist

17. P-H 1953 T.C. Mem. Dec. ¶ 53116.

18. *Szukiewicz* may be distinguishable on the basis that the signing of the Yalta Agreement did not "convert" the taxpayer's property within the meaning of a casualty, or involuntary conversion, whereas damage by a bomb is undoubtedly a casualty. Similarly, in *Franke,* there was no specific identifiable event in 1950 that compares with a bombing.

19. Boehm v. Commissioner, 326 U.S. 287 (1945). For other cases dealing with worthless securities, see Helvering v. Smith, 132 F.2d 965 (4th Cir. 1942); Mahler v. Commissioner, 119 F.2d 869 (2d Cir. 1941); Keeny v. Commissioner, 116 F.2d 401 (2d Cir. 1940); A.R. Jones Oil & Operating Co. v. Commissioner, 114 F.2d 642 (10th Cir. 1940).

20. Revenue Act of 1936, § 23(e), 49 STAT. 1659. The wording is similar to § 23(e) of the 1939 Code.

21. Boehm v. Commissioner, 326 U.S. 287, 292 (1945).

22. 155 F.2d 319 (1st Cir. 1946).

23. 155 F.2d at 320. See Int. Rev. Code of 1939, § 23(k), as amended, 56 STAT. 820 (1942) (now INT. REV. CODE OF 1954, § 166).

24. Int. Rev. Code of 1939, § 43, as amended, 56 STAT. 830 (1942) (now INT. REV. CODE OF 1954, § 461(a)). See Boehm v. Commissioner, 326 U.S. 287 (1945); *cf.* Burnett v. Sanford & Brooks Co., 282 U.S. 359 (1931).

upon the taxpayer's reporting a loss in the year of occurrence in order to prevent tax manipulation,[25] even though there may be some difficulty in ascertaining the date of the loss. The facts of the instant case present a strong case for compelling the taxpayer to claim the loss in the year of seizure, for the taxpayer knew or should have known that her loss was deductible in that year.

Also implicit in the court's holding is a distinction between the degree of ownership necessary to claim a war loss under section 127 and an ordinary loss under section 23. If the taxpayer was correct in claiming that the confiscation was void ab initio, then she had title and ownership on the date that the United States entered the war and consequently would be subject to the conclusive presumption of section 127.[26] If no credence is given to the "void ab initio" theory,[27] then it would appear that the court must reason that the taxpayer did not "continue to have an interest in the property whose seizure or destruction could be considered a loss" [28] for purposes of section 127, and yet retained sufficient ownership to entitle her to a deduction under section 23(e) in 1944. However, such a dichotomy is not apparent from either the language or the history of the two sections.[29]

Restitution—

CITY AUTHORIZED TO RECOVER FUNDS PAID BY CITY EMPLOYEES TO MAYOR

Frank Hague, while mayor of Jersey City, allegedly extorted fifteen million dollars from city employees by demanding and receiving every year three per cent of the annual salary of each municipal employee as a condition of employment. Jersey City, suing Hague to recover this money, alleged that the defendant and others, in their capacities as officials of the City, appropriated the money to themselves in such a manner as to constitute thefts and extortions from the city payroll funds. The City asked

25. De Loss v. Commissioner, 28 F.2d 803 (2d Cir. 1928), *cert. denied*, 279 U.S. 840 (1929). See also Mahler v. Commissioner, 119 F.2d 869 (2d Cir. 1941).

26. See notes 9, 10 and 11 *supra*.

27. It is believed that this is the better view since at the time of the event the taxpayer must determine whether he has sustained a loss or not; he cannot rely on the seizures being held void five years later. Allowing subsequent events to control the outcome in such a situation would lead to a postponement of the deduction in the hope of more favorable tax circumstances.

28. See Rozenfeld v. Commissioner, 181 F.2d 388 (2d Cir. 1950).

29. The court in Rozenfeld v. Comissioner, *supra* note 28, made no distinction between a §23(e) loss and a §127(a)(2) loss, and decided that no loss could be claimed subsequent to seizure. Since the taxpayer was only claiming a war loss under §127(a)(2), this case would not be authority for the proposition that no loss could be claimed subsequent to the seizure under §23(e)(3), although the wording points strongly in that direction.

that this money be forfeited to it for its own use or as trustee for the use of the employees. Because of the unsatisfactory form of the complaint, the trial court sustained defendant's motion to dismiss for failure to state a claim upon which relief could be granted.[1] While the case was pending before the Appellate Division, the New Jersey Supreme Court, on its own motion, agreed to hear it.[2] In reversing and remanding, the court approved at least two theories of recovery: first, the City could recover on the theory of restitution for its own funds, wrongfully taken by the defendant; or, second, even though the money in question belonged to the employees, it was forfeit to the City as beneficiary of a constructive trust.[3] *Jersey City v. Hague,* 115 A.2d 8 (N.J. 1955) (4-3).

That the money taken by Hague should be recovered is obvious. If the facts alleged in the complaint are true, there has been corruption in a position of public trust. Some remedy is called for. In the absence of an alert electorate the usual remedies of exposure, dismissal and criminal prosecutions are largely ineffectual.[4] First, unlike the civil remedy of constructive trust,[5] they are not designed to make the dishonest official disgorge ill-gotten profits.[6] Second, the effectiveness of exposure and dismissal is further limited by the community's tendency to forgive and to forget.[7] Third, procedural safeguards limit the effectiveness of the criminal sanction. For example, in criminal cases the defendant's guilt must

1. In granting a motion to dismiss, the trial court characterized the complaint as ". . . contradictory, ambiguous and confusing . . . [and] completely stultified by its incongruities." Instant case at 17-18.

2. N.J. SUP. CT. REV. R. 1:10-1 allows for hearing of a cause by the supreme court on its own motion.

3. The court may have held also that the money was forfeit to the City as trustee for the employees. Instant case at 16-17; *id.* at 22 (dissenting opinion). But this theory seems inexplicable. By claiming to recover as trustee the City has in effect alleged that the employees are the beneficial owners of the money. The employees, therefore, are the proper party plaintiffs in a suit to recover it. See, *e.g.,* Board of Supervisors of Lunenburg County v. Prince Edward-Lunenburg County Bank, 138 Va. 333, 121 S.E. 903 (1924). There are no allegations in the complaint that the employees have declared a trust in their cause of action with the City as trustee to enable the City to sue on their behalf.

4. Lenhoff, *The Constructive Trust as a Remedy for Corruption in Public Office,* 54 COLUM. L. REV. 214 (1954).

5. The beneficiary of a constructive trust can follow the wrongfully appropriated property into its product in the hands of the "trustee." 3 SCOTT, TRUSTS § 508 (1939); RESTATEMENT, RESTITUTION § 202 (1937). If the property cannot be traced into any product, the beneficiary has only a personal claim against the "trustee." SCOTT, *op. cit. supra,* § 521.3; RESTATEMENT, RESTITUTION § 215 (1937).

6. While the police may lawfully seize the fruits of a crime in the possession of a defendant either incident to a lawful arrest, see, *e.g.,* Cline v. United States, 9 F.2d 621 (9th Cir. 1925); 18 CALIF. L. REV. 673 (1930), or by use of a search warrant, see, *e.g.,* Gouled v. United States, 255 U.S. 298, 309 (1921), neither device is useful in the instant situation. Due to the type of crime it seems extremely unlikely that the money extorted will be susceptible to seizure as most probably it will have been invested and mingled with the defendant's other property.

7. See note 4 *supra.* In 1945 James Curley, who had been forced to pay back money taken as graft while previously mayor of Boston, and who had been jailed for violation of the Civil Service Act, and who was then under indictment for mail fraud, was elected mayor of Boston by a large majority. He was subsequently convicted of the latter offense. Time, Jan. 28, 1946, p. 23; N.Y. Times, Nov. 7, 1945, p. 6, col. 4; *id.* Nov. 8, 1945, p. 12, col. 5.

be established beyond a reasonable doubt, while in civil cases a preponderance of the evidence is usually sufficient for a judgment. In the instant case, while the defendant's acts seemingly fit within the proscribed definitions,[8] the criminal sanction is not available due to the applicable statute of limitations.[9] Even if available, the maximum penalty authorized would be only one year in jail and/or a fine of $1,000,[10] although the possibility would exist of consecutive sentences for each act of extortion.[11] Even assuming the availability of a criminal sanction, use of a civil remedy is warranted as an additional deterrent to fraud by municipal officials.

The real problem posed by the instant case is on what legal theory recovery can be accomplished. Solution of this problem is complicated by the confusion created by the conflicting allegations in the City's complaint as to whose money was taken.[12] If it were the City's money which was wrongfully taken, recovery is proper on the theory of restitution,[13] the court's first holding. However, it seems more probable that it was the employees' money which was taken.[14] The court's second theory of recovery is predicated on this assumption.

The court's second holding employs the remedy of a constructive trust. A constructive trust is a restitutionary device whereby a person who would be unjustly enriched if he were permitted to retain property is converted by equity into a "trustee" for the benefit of the rightful owner of the property.[15] Rarely has this remedy been used in cases involving public officials,[16] and then only when the profit realized by the official was

8. See N.J. STAT. ANN. § 2A:170-90 (1953). Defendant may also have violated N.J. STAT. ANN. § 2A:105-1 (1953) which prohibits a public officer from taking a fee or reward, not authorized by law, for the performance of his duties.

9. N.J. STAT. ANN. § 2A:159-2 (Supp. 1954) provides a five year statute of limitations for non-capital crimes. In general an equity action, such as the instant case, is barred only by laches, which is an omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party. 2 POMEROY, EQUITY JURISPRUDENCE §§ 418-19 (5th ed. 1941). This issue was not raised in the instant case.

10. N.J. STAT. ANN. § 2A:169-4 (1953). If the defendant is convicted under N.J. STAT. ANN. § 2A:105-1 (1953) (See note 8 *supra*), a maximum sentence of three years and/or a fine of $1000 is prescribed. N.J. STAT. ANN. § 2A:85-7 (1953).

11. State v. Roleson, 14 N.J. 403, 409-10, 102 A.2d 606, 608-9 (1953), *cert. denied*, 347 U.S. 947 (1954); *Ex parte* Benton, 10 N.J. Super. 595, 599, 77 A.2d 517, 518 (L. 1950).

12. Instant case at 17-19.

13. RESTATEMENT, RESTITUTION §§ 1, 130, 138 (1937); see also United States v. Carter, 217 U.S. 286 (1910); Minneapolis v. Canterbury, 122 Minn. 301, 142 N.W. 812 (1913).

14. Instant case at 22 (dissenting opinion); Brief for Defendant, pp. 14-15; Defendant's Petition for Rehearing, pp. 3-5.

15. 4 POMEROY, *op. cit. supra* note 9, § 1047; SCOTT, *op. cit. supra* note 5, § 462, at 2315.

16. See United States v. Carter, 217 U.S. 286 (1910); Boston v. Dolan, 298 Mass. 346, 10 N.E.2d 275 (1937); Boston v. Santosuosso, 298 Mass. 175, 10 N.E.2d 271 (1937); Minneapolis v. Canterbury, 122 Minn. 301, 142 N.W. 812 (1913).

made at the expense of the governmental unit involved.[17] In cases in which a municipality has suffered no loss, courts have refused recovery on the ground that a better right of recovery has vested in some other party. For example, in *Boston v. Dolan* [18] the court held that the city could not recover from the city treasurer profits made by him from the misuse of trust funds belonging to the library corporation. A Kentucky court denied recovery to a city for fees unlawfully collected by the city treasurer on the ground that they would be due the parties from whom they were unlawfully exacted.[19] But in the instant case it is unlikely that the employees will sue on their own behalf. This hypothesis seems plausible because there has been at least a seven year time lapse [20] without action and, perhaps, because in the absence of an organization of municipal employees, there is not sufficient money at stake to make an action by any one individual economically feasible.[21] Furthermore, the employees may be precluded from bringing suit either because of their participation in the crime [22] or because of their fear of reprisal by the defendant. Hence, in the instant situation, the only practicable plaintiff is the City.

Allowing the City to recover, while not consistent with established precedent on misconduct of municipal officials, is not without reputable legal support. The *Restatement of Restitution* declares that a constructive trust will be imposed on a fiduciary who receives a profit in violation of his duty to the beneficiary although the profit was not made at the expense of the beneficiary.[23] This view was followed in *Fleishhacker v. Blum*,[24]

17. *E.g.*, Minneapolis v. Canterbury, 122 Minn. 301, 142 N.W. 812 (1913) (City officer purchased property and sold it to the city through a third party for an increased price.) *But see* United States v. Carter, 217 U.S. 286, 306 (1910), where the Court states that a public official who takes any gratuity in violation of his duty must account to his principal for all he received.

18. 298 Mass. 346, 10 N.E.2d 275 (1937).

19. City of Princeton v. Baker, 237 Ky. 325, 35 S.W.2d 524 (1931); see also Commonwealth v. Griffy, 208 Ky. 469, 271 S.W. 560 (1925), and cases cited therein.

20. The complaint alleges that Hague was mayor of Jersey City from 1917 to 1947 and that the extortion occurred throughout this period. Instant case at 9-10. Thus, the minimum period of inaction is seven years.

21. A class action is probably permissible in this situation. See N.J. SUPER. L. & S. REV. R. 4:36-1; Weeks v. Bareco Oil Co., 125 F.2d 84 (7th Cir. 1941) (interpreting FED. R. CIV. P. 23(a) which is identical with the New Jersey rule).

22. It is not clear from the allegations of the complaint whether the employees would be barred from recovering in their own right. The only pertinent allegation states that "under the laws of New Jersey and the ordinances and resolutions of the City of Jersey City . . . it was unlawful for any paid employee of the City of Jersey City to give or pay to any person any money . . . as a condition of obtaining or holding such City employment or of obtaining City funds as salary therefor." Instant case at 10. But no such statute has been found. Brief for Defendant, pp. 30-31; Defendant's Petition for Rehearing, pp. 7-12. The possibility remains of showing either that the money was paid by the employees as a bribe, which would preclude any recovery by them, Clark v. United States, 102 U.S. 322 (1880), or that the money was extorted by duress because of the unequal bargaining power between the mayor and the employees, in which case recovery would be allowed. Clonavor Realty Co. v. Unscheid, 129 N.J.L. 247, 29 A.2d 179 (Sup. Ct. 1942).

23. RESTATEMENT, RESTITUTION § 197, comment *c* (1937).

24. 109 F.2d 543 (9th Cir. 1940).

where it was held that a bonus paid to a bank officer for procuring loans belongs to the bank, even though it had suffered no loss. Similarly, an English court has allowed the Crown to recover illegal profits even though it had suffered no loss.[25] The instant court, in ignoring the possibility of a better right to recovery vested in the employees, has reached an appropriate result.[26] Although the municipality can show no compensable loss, it would appear to have the right to recover on the rationale that there has been a breach of duty owed to the electorate by the mayor as an elected official. The exact nature of this duty is unclear. It is described as an obligation to serve the public with the highest fidelity.[27] Since the instant case was decided on demurrer, it can be assumed, as alleged in the complaint, that the defendant extorted in his capacity as mayor and thereby breached this duty by abusing his position.[28] The City, if it recovers, is vindicating the public interest which it represents.

Workmen's Compensation—

WORKING MEMBER OF LIMITED PARTNERSHIP ASSOCIATION HELD "EMPLOYEE" WITHIN MEANING OF WORKMEN'S COMPENSATION LAW.

Petitioner was a member and officer of a limited partnership association,[1] and devoted a small portion of his working time to executive duties.[2] He was also employed as a lathe operator by the association at a regular

25. Reading v. Attorney General, [1951] A.C. 507, 65 HARV. L. REV. 502 (1952). An army sergeant rode on lorries containing contraband in order to enable them to pass Egyptian police. For so doing he received £20,000, which the Crown confiscated. On a petition of right to recover the money, it was held that the Crown was entitled to it.

26. *Cf.* Securities Exchange Act of 1934, §16(b), 48 STAT. 896 (1934), 15 U.S.C. §78p(b) (1952), which provides that any profit made by "insider trading" may be recovered by the corporation whose stock was being traded. This act is contrary to the common law which, when it permitted recovery, made the stockholder the proper party plaintiff. Yourd, *Trading in Securities by Directors, Officers and Stockholders: Section 16 of the Securities Exchange Act,* 38 MICH. L. REV. 133, 148-49 (1939).

27. See Driscoll v. Burlington-Bridge Co., 8 N.J. 433, 474-77, 86 A.2d 201, 221-23 (1952), and cases cited therein.

28. If, as is alternatively alleged in the complaint, the defendant extorted in his capacity as an individual, the theory of abuse of position does not apply. There must be a connection between the agent's duties and the transaction in which he sought to profit in order for the remedy of construtive trust to be appropriate. Goldberg's Corp. v. Goldberg Realty & Investment Co., 134 N.J. Eq. 415, 425, 36 A.2d 122, 128 (Ch. 1944).

1. N.J. REV. STAT. §§42:3-1 to 13 (1937) govern the formation of a limited partnership association, of which the distinguishing features are: management by elected officers, not by the partners as such; ability to own real estate, execute bonds, and to sue and be sued in the association name; and the limitation of the liability of all its members to the unpaid portion of their subscription to capital.

2. The record indicates only the stipulation that petitioner was a "workman." Information as to petitioner's actual duties and activities was obtained from counsel. Letter from Martin Simon, counsel for petitioner, to the *University of Pennsylvania Law Review,* Sept. 21, 1955, on file in Biddle Law Library, University of Pennsylvania Law School.

hourly wage. He sustained an injury in lifting a piece of steel while working at his lathe and sought compensation under the Workmen's Compensation Act.[3] The lower court held that he was not an employee within the meaning of the act.[4] On appeal, the court reversed, holding that petitioner was such an employee and, therefore, compensation should have been granted. *Carle v. Carle Tool & Engineering Co.*, 114 A.2d 738 (N.J. Super. Ct. 1955).

Generally, individuals who carry out the managerial powers of a corporation are identified as employers while exercising those powers and, therefore, not covered by the workmen's compensation laws.[5] But since a corporation is a legal entity which in itself can be regarded as an employer, its officers or stockholders, who perform duties of a non-executive nature for the corporation, qualify as employees under compensation law.[6] Thus, a corporation officer has been granted compensation as an employee when injured while doing mining labor,[7] working as a shop foreman,[8] acting as a salesman,[9] running a can-capping machine,[10] or milking cows.[11] But, when injured while doing work in his executive capacity compensation has been refused.[12] On the other hand, almost every state[13] which has dealt judicially[14] with the status of working partners of a general partnership

3. N.J. REV. STAT. § 34:15-36 (1937).

4. Carle v. Carle Tool & Engineering Co., 33 N.J. Super. 469, 110 A.2d 568 (County Ct. 1954).

5. See LARSON, WORKMEN'S COMPENSATION § 54.21 (1952).

6. Annot., 81 A.L.R. 644 (1932); see SCHNEIDER, WORKMEN'S COMPENSATION § 798 (1943); LARSON, *op. cit. supra* note 5, §§ 54.21, 54.22.

7. Mount Pleasant Mining Corp. v. Vermeulen, 117 Ind. App. 33, 65 N.E.2d 642 (1946).

8. Adam Black & Sons, Inc. v. Court of Common Pleas, 8 N.J. Misc. 442, 150 Atl. 672 (Sup. Ct. 1930).

9. Eagleson v. Harry G. Preston Co., 265 Pa. 397, 109 Atl. 154 (1919).

10. Columbia Cas. Co. v. Industrial Comm'n, 200 Wis. 8, 227 N.W. 292 (1929).

11. Staples v. Henderson Jersey Farms, Inc., 181 So. 48 (La. Ct. App. 1938).

12. *E.g.*, Kutil v. Floyd Valley Mfg. Co., 205 Iowa 967, 218 N.W. 613 (1928); Higgins v. Bates Street Shirt Co., 129 Me. 6, 149 Atl. 147 (1930); Donaldson v. William H. B. Donaldson Co., 176 Minn. 422, 223 N.W. 772 (1929); Gassoway v. Gassoway & Owen, 220 N.C. 694, 18 S.E.2d 120 (1942); Carville v. A. F. Bornot & Co., 288 Pa. 104, 135 Atl. 652 (1927).

13. The dissenting states are Oklahoma, which has long held that an individual can be both a member of a partnership and an employee of that partnership, Ohio Drilling Co. v. State Industrial Comm'n, 86 Okla. 139, 207 Pac. 314 (1922), and Louisiana, which recently overruled its previous decisions and held that under civil-law concepts, a partnership can be considered as a separate entity for the purposes of the compensation act, Trappey v. Lumbermens Mut. Cas. Co., 77 So. 2d 183 (La. Ct. App. 1954), *cert. granted*, La. Sup. Ct., Feb. 14, 1955. The *Trappey* case overruled Dezendorf v. National Cas. Co., 171 So. 160 (La. Ct. App. 1936) and Harper v. Ragus, 62 So. 2d 167 (La. Ct. App. 1952).

14. Various types of statutes enabling working partners to be eligible for workmen's compensation have been enacted as follows: CAL. LABOR CODE § 3359 (1947); MICH. COMP. LAWS § 411.7 (Supp. 1952); NEV. COMP. LAWS § 2680.10(d) (Supp. 1949); ORE. REV. STAT. § 656.128 (1953); UTAH CODE ANN. § 35-1-43(4) (1953); WASH. REV. CODE § 51.32.030 (1951).

has held that they cannot be considered as employees.[15] This difference in treatment is presumably due to two factors.[16] First, a general partnership, except for a few specific purposes, is not an entity separate from its members, so that a partner-employee would also be an employer, a dual status not within the contemplation of the compensation act. Stronger than this conceptual difficulty is the fact that by law each member has an equal share in the management, and therefore has actual possession of the powers of the employer, unless contracted away. In contrast to both a corporation and a partnership stands a limited partnership association, which contains certain features of each. The instant court decided that for the purpose of workmen's compensation a limited partnership can be treated like a corporation, thereby enabling the working limited partner to be given employee status. Though the case at hand is one of first impression, it reaches a result similar to that of an Idaho mining partnership case, in which the mining partner's lack of right to participation in management was an important factor in enabling him to collect compensation.[17]

It is generally agreed that the purpose of the compensation act is to require industry to carry a fair share of the burden of personal injury suffered by employees, arising out of and in the course of their employment.[18] It seems that in dealing with the "employee" status of a part-owner or officer of a business organization, the courts have generally become enmeshed in technical concepts not at all in line with the usual liberal construction of the compensation act. The instant court sought at great length to classify, for the purpose of workmen's compensation, a limited partnership association as a corporation instead of as a partnership, though it is admittedly neither. It would seem that whether or not the petitioner is entitled to compensation should be determined by a more rational test than the classification of the business organization with which he is associated. The following factors should merit consideration: type of services performed, control to which the individual is subject in his activities, the share in the daily management of the enterprise exercised by the individual, and whether his compensation is primarily dependent upon a share of the

15. *E.g.*, Brinkley Heavy Hauling Co. v. Youngman, 264 S.W.2d 409 (Ark. 1954); United States Fidelity & Guaranty Co. v. Neal, 188 Ga. 105, 3 S.E.2d 80 (1939); Pederson v. Pederson, 229 Minn. 460, 39 N.W.2d 893 (1949); Rasmussen v. Trico Feed Mills, 148 Neb. 855, 29 N.W.2d 641 (1947); Lyle v. H. R. Lyle Cider & Vinegar Co., 243 N.Y. 257, 153 N.E. 67 (1926). The leading English decision is Ellis v. Joseph Ellis & Co., [1905] 1 K.B. 324.

16. LARSON, *op. cit. supra* note 5, §§ 54.31, 54.32.

17. Albertini v. Hull Lease, 54 Idaho 30, 28 P.2d 205 (1933). In a mining partnership, which exists not because of agreement but because of joint ownership and the working of a mine, the individual as such has no share in the management, which is controlled by the majority in interest. *But see* Cooper v. Industrial Accident Comm'n, 177 Cal. 685, 171 Pac. 684 (1918).

18. See Bowser v. State Industrial Accident Comm'n, 182 Ore. 42, 185 P.2d 891 (1947), citing the preamble to Oregon's Workmen's Compensation Law, ORE. REV. STAT. § 656.004 (1953); Carpenter v. Globe Indemnity Co., 65 R.I. 194, 14 A.2d 235 (1940); King v. Western Electric Co., 122 N.J.L. 442, 5 A.2d 490 (Sup. Ct. 1939); cases cited in SCHNEIDER, *op. cit. supra* note 6, § 3 n.9. See also SOMERS, WORKMEN'S COMPENSATION 281-84 (1954).

profits or upon a fixed wage. Use of these criteria would enable the courts to ascertain the individuals whose protection would seem to be within the contemplation of the act. As in the past, compensation could be refused to the entrepreneur, who retains a large share of the control of the enterprise, performs work mainly of an executive nature, and derives the main source of his income from the profits of the business rather than from earned wages. These criteria applied to the facts of the instant case present an individual worthy of compensation: although he has a share in the ownership of the enterprise and some executive duties, he has little control over the business, receives a regular wage regardless of profit, primarily performs work of a non-executive nature, and thus is subject to the same risks and has the same need for protection as any other individual covered by the act. Although most cases would not fall exactly into either classification, it would seem advisable for courts to orient their thinking along the suggested lines. In cases dealing with working partners, the courts have overlooked the above factors and concentrated on the lack of a separate entity to serve as employer. Though this latter point might have been important when the common law required an act or omission on the part of the employer as a condition for his liability,[19] modern compensation law is not based on common-law liability,[20] but rather on public policy and humanitarian purposes. The employer's liability exists merely because an individual has been injured in the course of his employment.[21] The instant court reached an appropriate result, but neglected an opportunity to establish standards for the determination of the existence of the employment relationship, which, when utilized, would better effectuate the purpose of the compensation act.

19. See SOMERS, *op. cit. supra* note 18, at 17-21.

20. See SCHNEIDER, *op. cit. supra* note 6, § 4.

21. Cudahy Packing Co. v. Parramore, 263 U.S. 418 (1923); McGregor & Pickett v. Arrington, 175 S.W.2d 210 (Ark. 1943); Brinkley Heavy Hauling Co. v. Youngman, 264 S.W.2d 409, 412 (Ark. 1954) (dissenting opinion); see LARSON, *op. cit. supra* note 5, §§ 2.10, 2.20; SOMERS, *op. cit. supra* note 18, at 28-29.