RECENT CASES

Constitutional Law—Constitutionality of an Ordinance Requiring People Disseminating and Selling Religious Pamphlets to Pay a License Fee—Defendants, engaged in selling religious literature were indicted for violation of an ordinance requiring transient agents, dealers, or distributors of books to pay a fee and obtain a license which was revokable at the discretion of the city commission.[1] Defendants, members of a religious sect known as Jehovah's Witnesses, claim that the ordinance was an unconstitutional restriction of freedom of religion and of the press.[2] *Held* (four justices dissenting),[3] ordinance valid as these sales partake more of commercial than religious or educational transactions and as such may be subjected to a reasonable fee for the privilege of canvassing.[4] *Jones v. Opelika*, 10 U. S. L. WEEK 4462 (1942).[5]

Freedom of religion and freedom of press are not absolute as can be seen in the prohibition of the practice of polygamy[6] and restrictions on the publishing of lewd literature,[7] which are held to be subversive of good order. In every case where a statute has regulated the power to distribute religious literature by requiring permission from a particular individual, the Supreme Court has declared the statute invalid,[8] even if the declared aim of the ordinance was for the welfare of the community. On the other hand, it has permitted regulation of religious parades[9] and required children to pledge allegiance to the flag.[10] The issue just passed upon appears to be a new one, i. e. license fee, which in similar cases before other courts has been held not applicable to Jehovah's Witnesses.[11] The majority

1. Ordinance required a license fee of five dollars per annum. Under § 1 of the ordinance all licenses were subject to revocation in the discretion of the city commission with or without notice.

2. U. S. CONST. AMEND. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." This is applied to the states through the Fourteenth Amendment.

3. The Chief Justice, with Justices Douglas, Black, and Murphy dissented.

4. The Chief Justice wrote a dissenting opinion, stating that the ordinance was invalid because the requirement of payment of a flat tax and the power to revoke the license at any time results in the suppression of the distribution of literature. Justice Murphy, in another dissenting opinion, held the ordinance invalid claiming that the revenue tax should not be levied on people disseminating ideas without commercial motive to others, and that such a tax burdens their right to worship the Deity in their own fashion, in violation of the Fourteenth Amendment.

5. The instant case was united with two other cases involving similar questions, Jobin v. Arizona and Bowden v. City of Fort Smith.

6. Reynolds v. United States, 98 U. S. 145 (1878).

7. Knowles v. United States, 170 Fed. 409 (C. C. A. 8th, 1909).

8. Cantwell *et al.* v. Connecticut, 310 U. S. 296 (1940), (1941) 89 U. of PA. L. REV. 515 (approval of the Secretary of the Public Welfare Council); Schneider v. State, 308 U. S. 147 (1939) (approval of the Chief of Police); Lovell v. City of Griffin, 303 U. S. 444 (1939) (permission of the City Manager required).

9. Cox *et al.* v. New Hampshire, 312 U. S. 569 (1941).

10. Minersville v. Gobitis *et al.*, 310 U. S. 586 (1940). Justices Black, Douglas and Murphy recognized the instant decision as a logical extension of the principles on which the *Minersville* decision rested and stated that they now believe that case was wrongly decided. Instant case at 4468.

11. City of Blue Island v. Kozul, 379 Ill. 511, 41 N. E. (2d) 515 (1942) (license not applicable to Jehovah's Witnesses who sold without financial gain); *cf.* Hannan *et al.* v. City of Haverhill, 120 F. (2d) 87 (C. C. A. 1st, 1941); Borchert v. City of Ranger, 42 F. Supp. 577 (N. D. Tex. 1941); Leiby v. City of Manchester, 33 F. Supp. 842 (N. H. 1940); McConkey *et al.* v. City of Fredericksburg, 19 S. E. (2d) 682 (Va. 1942).

opinion holds that when a religious group enters the field of commercial activity it can be subjected to a license fee for the privilege. This proposition seems valid,[12] but it should be applied with extreme care. And the conclusion of the majority in the instant case that the activities of Jehovah's Witnesses are commercial seems questionable.[13] The Chief Justice's view was that the ordinance was an unconstitutional restriction; first, because the power to revoke was at the discretion of the authorities, and, second, the amount of the fee was burdensome.[14] The majority refused to face the issue of the revocation clause on the ground it was too contingent.[15] Such an unlimited power of revocation would seem to make the ordinance clearly unconstitutional on the basis of past decisions of the court.[16] A fee of twenty-five dollars a quarter, payable in advance,[17] is certainly not reasonable.[18] The majority would not consider this question because it was not argued by counsel.[19] The criterion of what constitutes a reasonable fee on a religious group entering the commercial field must be left for future decision.

Constitutional Law—Defendant in Felony Case Cannot Waive Right to Trial by Jury Without Advice of Counsel—The relator was indicted for using the mails to defraud. Informed by the judge of his constitutional rights of trial by jury and assistance of counsel,[1] he chose to represent himself, having had legal training and having previously done so in a civil suit involving similar transactions. The court granted his motion to waive a jury, acquiesced in by government counsel. After conviction a writ of habeas corpus was brought. *Held* (one judge dissenting), relator discharged. On trial for felony defendant, not himself a lawyer, cannot waive trial by jury without the advice of counsel. *United States* ex rel. *McCann v. Adams*, 126 F. (2d) 774 (C. C. A. 2d, 1942).[2]

Until the case of *Patton v. United States*[3] it was settled in subordinate federal courts that one accused of felony was powerless to waive jury trial.[4] In that case the Supreme Court laid down the broad rule that the power of waiver extended to felony cases;[5] earlier it had been permitted

12. If, for example, a church group decided to hold a benefit sale, it could scarcely be doubted that they could be subject to regulation.

13. The aim of this sect is to teach the tenets of their religion, the sale of pamphlets being but incidental to this. Thomas v. City of Atlanta, 59 Ga. App. 520, 1 S. E. (2d) 598 (1939); State v. Meredith, 197 S. C. 351, 15 S. E. (2d) 678 (1941); *accord*, State *ex rel.* Hough v. Woodruff, 147 Fla. 299, 2 So. 577 (1941); State *ex rel.* Semansky v. Stark, 196 La. 307, 199 So. 129 (1940). *Contra:* Commonwealth v. Anderson, 272 Mass. 100, 172 N. E. 114 (1930); City of Pittsburgh v. Ruffner, 134 Pa. Super. 192, 4 A. (2d) 224 (1939).

14. Instant case at 4465.

15. *Ibid.*

16. See cases cited at note 8 *supra*, in which an unlimited power to grant or refuse a license was held invalid.

17. The fee required in *Jobin v. Arizona*. Instant case at 4463.

18. *Id.* at 4466. The Chief Justice called it burdensome. Such a fee would probably cause the group's activities to cease.

19. *Id.* at 4463.

1. U. S. CONST. ART. III, § 2; *id.* at AMEND. VI.

2. Majority opinion by Judge Learned Hand; dissenting opinion by Judge Chase.

3. 281 U. S. 276, 70 A. L. R. 263, 279 (1929).

4. Coates v. United States, 290 Fed. 134 (C. C. A. 4th, 1923); Low v. United States, 169 Fed. 86 (C. C. A. 6th, 1909); Dickinson v. United States, 159 Fed. 801 (C. C. A. 1st, 1908). *But see* United States v. Shaw, 59 Fed. 110, 113 (1893).

5. Factually, the case involved defendant's waiver of the presence of one incapacitated juror, but the Court drew no distinction between partial and total waiver of the jury. (Holmes, Brandeis, Stone, JJ., concurred in the result; Hughes, C. J., took no

in trials for misdemeanors.[6] The instant decision is unique in that it limits the power of jury waiver in felony trials by requiring defendant to have counsel's advice.[7] Heretofore, the only restrictions imposed were that it be express and intelligent, with the court's sanction, concurred in by government counsel.[8] But in its treatment of right to trial by jury and right to assistance of counsel,[9] the Supreme Court has maintained an extreme caution;[10] this attitude influenced the instant decision.[11] Since the constitutional provision for jury trial in criminal cases is intended as a protection to the accused,[12] the majority here is properly concerned with its preservation.[13] It is believed that the requirement of counsel's advice effectually protects the defendant against his own judgment, however confidently exercised,[14] and furnishes a positive criterion to be employed in determining the competency of defendant's waiver.[15] There is a clear tendency toward encouraging jury waiver in criminal cases.[16] In practice,

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part in the decision.) Brown v. Zerbst, 99 F. (2d) 745 (C. C. A. 5th, 1938), *cert. denied*, 305 U. S. 661 (1939); *see* United States v. Strewl, 99 F. (2d) 474, 478 (C. C. A. 2d, 1938). (In these cases defendant had counsel.)

6. Shick v. United States, 195 U. S. 65 (1904); United States v. Praeger, 149 Fed. 474 (W. D. Texas 1907); *see* Low v. United States, 169 Fed. 86, 89 (C. C. A. 6th, 1909).

7. On substantially similar facts it has been intimated that waiver of jury may be made without the advice of counsel. *See* Dillingham v. United States, 76 F. (2d) 36, 39 (C. C. A. 5th, 1935).

8. Rees v. United States, 95 F. (2d) 784 (C. C. A. 4th, 1938); United States v. Dubrin, 93 F. (2d) 499 (C. C. A. 2d, 1937), *cert. denied*, 303 U. S. 646 (1939); *see* Patton v. United States, 281 U. S. 276, 312 (1929). (In these cases defendant had counsel.) *But see* A. L. I. Code of Criminal Procedure (1930) § 266.

9. Waiver of counsel's assistance in conducting a trial has been recognized, Johnson v. Zerbst, 304 U. S. 458 (1937); Kelly v. Aderhold, 112 F. (2d) 118 (C. C. A. 10th, 1940), provided it is intelligent and competent, which depends upon the peculiar circumstances of each case. *See* Johnson v. Zerbst, *supra* at 464. It is allowed on a guilty plea; Harpin v. Johnston, 109 F. (2d) 434 (C. C. A. 9th, 1940); Buckner v. Hudspeth, 105 F. (2d) 396 (C. C. A. 10th, 1939), *cert. denied*, 308 U. S. 553 (1939), and it may even be implied when accused appears without counsel and fails to request that counsel be assigned to him. Buckner v. Hudspeth, *supra; see* Kelly v. Aderhold, *supra*, at 119.

10. "The duty of the trial court in that regard [determining competency of waiver] is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial [jury] . . . and with a caution increasing in degree as the offenses dealt with increase in gravity." Patton v. United States, 281 U. S. 276, 312 (1929); Glasser v. United States, 315 U. S. 60, 71 (1942). *But cf.* Betts v. Brady, 86 L. ed. 1116 (U. S. 1942).

11. Judge Hand intimates that the decision might have been otherwise had this attitude of the Supreme Court's not been clearly demonstrated. Instant case at 776.

12. *See* Patton v. United States, 281 U. S. 276, 312 (1929).

13. But the opinion has been advanced that the sanctity of jury trial has become part of our "judicial fundamentalism", largely by reason of its long existence as a legal institution. *See* Oppenheim, *Waiver of Trial by Jury in Criminal Cases* (1927) 25 Mich. L. Rev. 695, 711.

14. ". . . there can be no doubt that the ordinary layman does not have the necessary experience" (to appraise his chances between judge and jury). Instant case at 776 (majority opinion). Judge Hand's long courtroom experience must be given due weight in evaluating this statement.

15. The rule can be easily administered: under ordinary circumstances when defendant has had advice of counsel in waiving jury trial his waiver can be adjudged competent without going beyond the face of it. Judge Chase contends that the waiver's competency is to be determined by the trial judge, but offers no criterion for its determination. *See* instant case at 776.

16. For collections of constitutional provisions and statutes, see A. L. I. Code of Criminal Procedure (1930) Commentary, § 266; Index Digest of State Constitutions for New York State Constitutional Convention Commission (1915), p. 803. For general discussion see Perkins, *Proposed Jury Changes in Criminal Cases* (1931) 16 Iowa L. Rev. 20, 223; Oppenheim, *Waiver of Trial by Jury in Criminal Cases* (1927) 25 Mich. L. Rev. 695.

waiver of jury trial has resulted in: greater dispatch in criminal trials; more direct and concise evidence;[17] and greater protection for the accused under certain circumstances.[18] The limitation imposed by the instant case does not represent a reaction against this tendency. It will not inhibit defendant's power of jury waiver, but rather implement it by making expert advice by counsel mandatory,[19] though such advice is confined solely to the question of waiver.[20]

Constitutional Law—Refusal of State Court to Appoint Counsel for Indigent Defendant Indicted for Non-capital Offense Not a Violation of Fourteenth Amendment—Petitioner, an indigent farm hand of little education, was indicted on a charge of robbery in a state court. Unable to pay for a lawyer's services, he requested that counsel be appointed for him. Upon the denial of his request, petitioner conducted his own defense, was found guilty, and imprisoned. On petition for writ of habeas corpus, *Held* (three justices dissenting),[1] refusal to appoint counsel was not a deprivation of liberty in violation of the Fourteenth Amendment. *Betts v. Brady*, 10 U. S. L. WEEK 4435 (1942).

The Sixth Amendment[2] guarantees the right to benefit of counsel in all federal cases.[3] This guarantee has been interpreted to mean that the court must voluntarily appoint counsel[4] for indigent defendants unless that right has been intelligently waived.[5] The view that the Fourteenth Amendment[6] made the Sixth applicable to the states has never been

17. *See* Maltbie, *Criminal Trials Without a Jury in Connecticut* (1926) 17 J. CRIM. L. & CRIM. 335; Bond, *The Maryland Practice of Allowing Defendants in Criminal Cases to Choose a Trial Before a Judge or a Jury Trial* (1920) 6 MASS. L. Q. 89.

18. Where the crime has aroused public indignation, where race prejudice may be involved, where the defendant's past record is of a sort to prejudice a jury. *See* Maltbie, *Criminal Trials Without a Jury in Connecticut* (1926) 17 J. CRIM. L. & CRIM. 335, 338; Bond, *The Maryland Practice of Allowing Defendants in Criminal Cases to Choose a Trial Before a Judge or a Jury Trial* (1920) 6 MASS. L. Q. 89, 93.

19. However, there is no indication that defendant's choice must be governed by counsel's advice; the requirement is met if such advice is given to him.

20. Instant case at 776. For a different analysis of the instant case, see (1942) 55 HARV. L. REV. 1209.

1. Mr. Justice Roberts wrote the majority opinion, Mr. Justice Black wrote the dissent, in which Justices Murphy and Douglas concurred.

2. U. S. CONST. AMEND. VI: "In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defence."

3. Johnson v. Zerbst, 304 U. S. 458 (1938), held that this guarantee extended to those federal cases involving non-capital offenses.

4. The right to assistance of counsel means the right to effective assistance. Achtien v. Dowd, 117 F. (2d) 989, 992 (C. C. A. 7th, 1941); Thomas v. District of Columbia, 90 F. (2d) 424, 428 (App. D. C. 1937). This includes an opportunity for appointed counsel adequately to prepare the defense. Avery v. Alabama, 308 U. S. 444 (1940). The case of Glasser v. United States, 62 Sup. Ct. 457, 464 (1942), held the requirement of effective counsel was not met where the attorney appointed for one co-defendant also represented another one and defendants had conflicting interests.

5. Johnson v. Zerbst, 304 U. S. 458 (1938), cited note 3 *supra;* Powell v. Alabama, 287 U. S. 45 (1932). Ignorance of the defendant becomes important in determining whether there has been an effective waiver of right to the assistance of counsel; Note, *The Right to Benefit of Counsel Under the Federal Constitution* (1942) 42 COL. L. REV. 271, 278.

6. U. S. CONST. AMEND. XIV: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

accepted.[7] However, it has been held that the failure to appoint counsel for ignorant persons indicted for capital offenses in state courts is a denial of due process.[8] The instant case denies that the guarantee of due process necessitates extending the right, as above defined, to cases involving non-capital offenses in state courts. In support of their position the majority point out that historically, at common law and in early state constitutions,[9] the right to assistance of counsel was not considered fundamental. They further conclude that practically it would be a bad policy to impose on states, particularly in small crimes before justices of the peace. However the decision appears questionable when it is considered that the reasons which make the failure to appoint counsel for indigent defendants in a capital case a deprivation of due process apply to an equal degree in a non-capital case. The Fourteenth Amendment is a guarantee against deprivation of liberty as well as life. Of course, as the majority points out, the protection against *minute* deprivations of liberty should not be permitted to outweigh considerations of time and expense.[10] On the other hand, whenever a substantial deprivation of liberty [11] is involved and the benefit of counsel is necessary for a layman intelligently to cope with the complexities of legal procedure, he should have that right. Admittedly it is a problem of where to draw the line, but it seems impossible to justify the proposition of the instant decision that in this regard a valid distinction can be made between a trial involving the death penalty and one involving imprisonment, for example, of ten or twenty years.

Criminal Law—Exception to Rule Requiring Two Witnesses or One Witness Plus Corroboration to Sustain Perjury Conviction— Defendant was indicted under the perjury statute [1] for swearing falsely under oath before a grand jury that he did not know what he was signing when he signed a communist party petition, which clearly indicated on its face what it was. He testified at a subsequent trial [2] that he did know what he was signing. Upon conviction, defendant appeals. *Held,* affirmed; two conflicting statements under oath being prima facie perjury, the question of which statement was the false one was properly inferable by the jury from the evidence. *Commonwealth v. Sumrak,* 25 A. (2d). 605 (Pa. Super., 1942).

The general rule is that two witnesses or one witness and corroboration to the falsity of the matter are necessary to support a conviction for

7. This view has never been adopted by the Supreme Court. Instant case at 4439. In fact, Maxwell v. Dow, 176 U. S. 581 (1900), has further declared that neither the Fourth, Fifth, nor Sixth Amendments granted rights which were privileges of citizens of the United States. For further analysis of decisions on this point, see Warren, *The New "Liberty" under the Fourteenth Amendment,* in 2 SELECTED ESSAYS ON CONSTITUTIONAL LAW (1938) 237.

8. Powell v. Alabama, 287 U. S. 45 (1932), cited note 5 *supra,* limited its decision to its facts, that the trial judge is bound to appoint counsel for ignorant persons charged with a capital crime.

9. Instant case at 4437.

10. Instant case at 4438.

11. Certainly the sentence of eight years imprisonment in the instant case was a substantial deprivation of liberty.

1. PA. STAT. ANN (Purdon, Supp. 1941) tit. 18, § 4322: "Whoever wilfully and corruptly makes false oral or written statements or testimony upon oath or affirmation, legally administered either . . . in any of the courts . . . or in relation to any statement or duty enjoined by law . . . is guilty of perjury." The language of the statute is clearly quite broad and covers the facts of the instant case.

2. Commonwealth v. Antico, 146 Pa. Super. 293, 22 A. (2d) 204 (1942).

perjury.[3] "The purpose of the rule is to protect the accused from the false testimony of a single witness swearing against him."[4] The weight of authority also holds that two conflicting statements under oath are not sufficient to convict.[5] However, when two conflicting statements are so made, one of them is *a fortiori* false, and the danger intended to be eliminated by the quantitative evidence rule is not present.[6] The question still remains, however, of proving the statement false for which the defendant was indicted, as he cannot be indicted in the alternative.[7] The instant case rejects the old rule of evidence as to perjury and adopts a new standard. Seemingly contra to the weight of authority, the instant case is distinguishable on its facts, since here we have *something more* than two conflicting statements, the fact that the petition was clearly labeled a communist party petition, from which a reasonable inference may well be made that the defendant knew that, and thus the question of which occasion the perjury was committed may be resolved.[8] Since the rule itself, when considered in connection with our entire system, is open to serious question,[9] and since in the instant factual situation it will not accomplish its purpose of protecting an innocent man, the exception laid down in the instant case seems well taken. This may well presage a gradual renunciation of the old rule in all jurisdictions.

Evidence—Evidence Necessary to Establish Prima Facie Case Against Bottler of Unwholesome Beverage—Plaintiff became ill as a result of drinking a bottle of Coca Cola containing fine pieces of glass. Plaintiff proved the presence of glass in Coca Cola manufactured by the

3. Commonwealth v. Bradley, 109 Pa. Super. 294, 296, 167 Atl. 471 (1933): "The general rule is that the testimony of a single witness to the falsity of the matter on which the perjury is assigned is insufficient to convict on a charge of perjury. Two witnesses, however, are not essential. One witness and corroboration is sufficient." Phair v. United States, 60 F. (2d) 953 (C. C. A. 3d, 1932); Cohen v. United States, 27 F. (2d) 713 (C. C. A. 2d, 1928); Williams v. Commonwealth, 287 Ky. 570, 154 S. W. (2d) 563 (1941); People v. McClintic, 193 Mich. 589, 160 N. W. 461 (1916); Commonwealth v. Haines, 130 Pa. Super. 196, 196 Atl. 621 (1938); and cases cited Note L. R. A. 1917C 58. *But cf.* Behrle v. United States, 100 F. (2d) 714 (App. D. C. 1938); People v. Doody, 172 N. Y. 165, 64 N. E. 807 (1902); State v. Wooley, 109 Vt. 53, 192 Atl. 1 (1937).

4. 7 WIGMORE, EVIDENCE (3d ed. 1940) § 2043.

5. United States v. Golan, 24 F. Supp. 523 (E. D. Pa. 1938): "Turning to a consideration of the common law of Pennsylvania I find it to be settled that two or more contradictory statements of a defendant standing alone will not sustain a charge of perjury." Commonwealth v. Haines, 130 Pa. Super. 196, 196 Atl. 921 (1938); Commonwealth v. Bradley, 109 Pa. Super. 294, 167 Atl. 471 (1933); 3 BISHOP, NEW CRIMINAL PROCEDURE (2d ed. 1913) § 931.

6. 7 WIGMORE, EVIDENCE (3d ed. 1940) § 2041: "The rule in its nature now is incongruous in our system. The quantitative theory of testimony, if consistently applied, should enforce a similar rule for every criminal charge, now that the accused is competent to testify."

7. State v. Bostic, 285 S. W. 432 (Mo. 1926); 1 BISHOP, *op. cit. supra* note 5, §§ 325, 401 (5).

8. Rumely v. United States, 292 Fed. 532 (C. C. A. 2d, 1923), *cert. denied*, 263 U. S. 713 (1923); People v. Dunbar Contracting Co., 215 N. Y. 416, 109 N. E. 554 (1915); Bettman v. United States, 224 Fed. 819 (C. C. A. 6th, 1915), *cert. denied*, 239 U. S. 642 (1915); 7 WIGMORE, EVIDENCE (3d ed. 1940) § 2043.

9. See note 6 *supra*. State v. Wooley, 109 Vt. 53, 60, 192 Atl. 1, 4 (1937): "We find ourselves unable to approve the doctrine that perjury is a more heinous crime than murder or that one charged with perjury should have greater immunity than one charged with murder. The lightness with which, we are pained to say, the oath of a witness is too often treated, does not warrant us in making conviction of the crime of perjury most difficult of all crimes of which state courts have jurisdiction. We hold that perjury may be proved by circumstantial evidence if proof is made beyond reasonable doubt, as in the case of other crimes." State v. Storey, 148 Minn. 398, 182 N. W. 613 (1921).

defendant, and his injury therefrom. The jury found for the plaintiff, but the trial judge thereafter sustained defendant's motion for a directed verdict. *Held,* affirmed, since plaintiff failed to establish by a clear preponderance of the evidence that there had been no reasonable opportunity for the bottle or its contents to be tampered with by maliciously minded persons. *Coca-Cola Bottling Works v. Sullivan,* 158 S. W. (2d) 721 (Tenn. 1942).

Two theories have been recognized under which liability may be imposed for injury resulting from eating food containing harmful foreign substances. The majority view [1] holds that the proper basis for recovery is negligence, while a minority of jurisdictions imposes liability under a theory of implied warranty.[2] Courts recognizing negligence as the basis of liability differ with regard to what constitutes sufficient evidence for the plaintiff to maintain his action.[3] Some jurisdictions hold that the presence of a foreign substance in a bottled beverage plus proof of injury is a *res ipsa loquitur* situation;[4] others, that the mere presence of impurities is no evidence of negligence;[5] and others that it gives rise to an inference of negligence.[6] Tennessee now proposes a further refinement, distinguishing sealed containers from those which may be opened and reclosed without noticeable damage.[7] In the case of a sealed container, using a rule analogous to the *res ipsa loquitur* doctrine, the Tennessee courts hold that a *prima facie* case is established against the defendant by proof of the presence of the injurious substance and defendant's connection with it.[8] But in the latter situation, under the rule of the instant case, the plaintiff must prove by a clear preponderance of the evidence that there was no reasonable opportunity for the contents of the bottle to have been tampered with after it left the control of the defendant, and only after that proof can the inference of negligence rule be applied.[9] The court literally leans over backward in formulating a rule to allow "the innocent to escape liability." [10] A connection between defendant and the presence of the harmful substance is essential, but the court here makes proof of the connection almost impossible. The decision is based on the theory that the court cannot permit the jury to base its verdict on the conjecture that the defendant is responsible for the presence of the substance.[11] Perhaps it is a more fanciful

1. See cases cited in (1936) 21 ST. LOUIS L. REV. 345, 346, n. 9; (1934) 13 TENN. L. REV. 57, 58, n. 5. See also Perkins, *Unwholesome Food as a Source of Liability* (1919) 5 IOWA L. BULL. 6, 86 *et seq.* Cases are collected in Notes (1919) 4 A. L. R. 1559; (1922) 17 A. L. R. 672, 696; (1925) 39 A. L. R. 992, 997; (1927) 47 A. L. R. 148, 153; (1936) 105 A. L. R. 1038, 1043.

2. See cases cited in (1936) 21 ST. LOUIS L. REV. 345, 346, n. 10; (1934) 13 TENN. L. REV. 57, n. 2.

3. (1934) 20 VA. L. REV. 921.

4. (1927) 5 N. C. L. REV. 174; (1934) 20 VA. L. REV. 921. See cases cited in (1936) 21 ST. LOUIS L. REV. 345, 348, n. 21.

5. Swenson v. Purity Baking Co., 183 Minn. 289, 236 N. W. 310 (1929); (1934) 20 VA. L. REV. 921.

6. See cases cited (1936) 21 ST. LOUIS L. REV. 345, 347, n. 20. See also cases in A. L. R. Notes, cited note 1 *supra.*

7. Instant case at 725.

8. See cases cited (1934) 13 TENN. L. REV. 57, n. 4, and also Hoback v. Coca Cola Bottling Works, 20 Tenn. App. 280, 98 S. W. (2d) 113 (1936).

9. Instant case at 725; *cf.* Hoback v. Coca Cola Bottling Works, 20 Tenn. App. 280, 287, 98 S. W. (2d) 113 (1936). Previous to the instant case, a line of Tennessee Appeals decisions left the exact status of this evidence rule unsettled. See cases cited note 8 *supra.*

10. Instant case at 723. *See* Crigger v. Coca-Cola Bottling Co., 132 Tenn. 545, 552, 179 S. W. 155, 157 (1915); Hoback v. Coca Cola Bottling Works, 20 Tenn. App. 280, 290, 98 S. W. (2d) 113, 118 (1936).

11. Instant case at 727; *see* Coca Cola Bottling Works v. Selvidge, 4 Tenn. App. 558, 562 (1927). (". . . the act of the jury is thus based upon a conjecture.") *But*

conjecture to say that the presence of glass in a bottle of Coca Cola should be attributed to some other agency than the defendant.[12]

Evidence—Use of Detectaphone to Obtain Evidence Not Prohibited by Fourth Amendment—Defendants were indicted for conspiracy [1] to violate the Bankruptcy Act.[2] Evidence was obtained by federal agents listening through the defendants' office wall by means of a detectaphone [3] permitting them to overhear conversations and one end of all telephone calls made within the office. *Held* [4] (three justices dissenting) that the methods employed did not violate the Fourth Amendment,[5] and the evidence was admissible. *Goldman v. United States,* 86 L. ed. 873 (1942).

Contrary to the rule generally applicable in the states,[6] the federal rule prohibits the admission of evidence obtained in violation of the Fourth Amendment.[7] The problem confronting the Court in the instant case was whether the activities involved constituted a violation of the Amendment. From the earliest application of the rule in *Boyd v. United States,*[8] the cases were almost uniformly those of invasions of the house or personality of the defendant without warrant.[9] A trespass was therefore the *sine qua non* of an unreasonable search and seizure, and the controversies settled around the validity of the exclusion rule. It is significant, however, that Mr. Justice Bradley in the *Boyd* case expressed a view pointing to an extension of the concept of a search and seizure far beyond that of the trespassory rifling of the defendant's possessions.[10] In *Olmstead v. United*

cf. Roddy Mfg. Co. v. Cox, 7 Tenn. App. 147, 151 (1927). Seemingly contra on the same facts is Coca Cola Bottling Works v. Kennedy, 13 Tenn. App. 199, at 202 (1931). ("We do not think that it was a matter of conjecture that there was enough evidence to go to the jury.")

12. Rost v. K. & C. Dairy Co., 216 Ill. App. 497 (1920).

1. 35 STAT. 1096 (1909), 18 U. S. C. A. § 88 (1926).

2. 52 STAT. 855 (1938), 11 U. S. C. A. § 52 (b) (Supp. 1941).

3. A detectaphone is a device similar to physician's stethoscope, amplifying sounds which are picked up by placing it against the wall of the room.

4. Affirming 118 F. (2d) 310 (C. C. A. 2d, 1941). Chief Justice Stone and Justice Frankfurter expressed a desire to overrule Olmstead v. United States, 277 U. S. 438 (1928), while Justice Murphy wrote a separate dissent. Justice Jackson took no part.

5. U. S. CONST. AMEND. IV (prohibiting unreasonable search and seizure). Defendants also contended unsuccessfully that the Fifth Amendment (prohibiting requiring the defendant in a criminal case to testify against himself), and as to the telephone messages, the Federal Communications Act, 48 STAT. 1103 (1934), 47 U. S. C. A. § 605 (Supp. 1941) were violated. With regard to the latter point, the Court held that the activities of the federal agents in the instant case did not constitute an interception within the meaning of Nardone v. United States, 302 U. S. 379 (1937), second appeal, 308 U. S. 509 (1940) Concerning the Nardone decision, see Note (1941) 25 MINN. L. REV. 382.

6. For an exhaustive list of the state decisions permitting the admission of illegally obtained evidence, see 8 WIGMORE, EVIDENCE (3d ed. 1940) § 2183.

7. The federal rule was first advanced in Boyd v. United States, 116 U. S. 616 (1886), and later was modified somewhat in Weeks v. United States, 232 U. S. 383 (1914), the additional requirement being that the illegality of the method of procuring the evidence be raised and established by motion before trial if at all.

The rule has been the subject of considerable criticism. For an interesting history of its development and an attack upon its validity, see 8 WIGMORE, EVIDENCE (3d ed. 1940) § 2184.

8. 116 U. S. 616 (1886).

9. See note 7 *supra.*

10. The spirit of the holding is expressed at 116 U. S. 616, 630: "It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . ."

States[11] was presented the question whether wiretapping fell within the inhibition of the Fourth Amendment, and the Court held that it did not. The majority limited the application of the principle to the older concept of a trespass upon the person or possessions of the defendant,[12] while the dissent of Justice Brandeis maintained that wiretapping was an unlawful invasion of the privacy of the individual.[13] The instant case represents another attempt to extend the protection of the Amendment to a new factual situation, scientific eavesdropping not involving a physical trespass. Assuming the rule of exclusion to be desirable, it seems inevitable, if the Amendment is to grow with conditions, that its application be extended to situations such as that presented in the instant case. However, the Court was unwilling to confront the new advancements in crime detection with a prohibitive decision at their outset. The hampering effect upon the detection and prosecution of criminals, should the scope of the Amendment be enlarged to include the activity in question, is all too obvious.[14] But perhaps a better solution would be to attack the rule of exclusion itself, rather than to restrict the scope of the Amendment.[15]

Labor Law—Capacity of Union to Sue for Wages on Behalf of Members—Plaintiff union brought suit to recover for the benefit of 3,500 members money due each member as wages under the terms of an arbitration agreement. *Held*, motion to dismiss complaint granted; the union does not have sufficient interest in the contract to entitle it to maintain the action. *Milk Wagon Drivers Union of Chicago, Local 753 v. Associated Milk Dealers, Inc.*, 42 F. Supp. 584 (N. D. Ill. 1941).

The increasing centralization of control over productive forces and the corresponding agglomeration of individual workers into labor unions during the past century have resulted in a new type of human relationship, vaguely designated as the collective labor agreement, which was unknown to early common law,[1] and to which the courts have as yet failed to attach precise and unvarying legal consequences. Judicial endeavours explaining the legal status of the employer-union-employee relationship are quite numerous,[2] although not always satisfying. One theory holds that the col-

11. 277 U. S. 438 (1928). *Cf.* Goldstein v. United States, 86 L. ed. 873 (U. S. 1941), decided same date as instant case.

12. 277 U. S. 438, 465.

13. *Id.* at 478.

14. For a thoughtful analysis of the general problem see Note (1940) 1 BILL OF RIGHTS REVIEW 48. Also, Note (1940) 53 HARV. L. REV. 863.

15. For a general discussion of the decisions involving the Bill of Rights by the Supreme Court in the last term, see Fraenkel, *Civil Liberties Decisions of the Supreme Court, 1941 Term, supra* this issue, at p. 1.

1. Anderson, *Collective Bargaining Agreements* (1936) 15 ORE. L. REV. 229, 250: "The common law was never designed to govern multiple-party relationships, nor did it contemplate a juristic personality with a shifting membership other than by incorporation."

2. The periodical literature on the legal status of the collective agreement is quite extensive, although the precise point raised by the instant case is rarely discussed. Anderson, *Collective Bargaining Agreements* (1936) 15 ORE. L. REV. 229; Christenson, *Legally Enforceable Interests in American Labor Union Working Agreements* (1933) 9 IND. L. J. 69; Fuchs, *Collective Labor Agreements in American Law* (1925) 10 ST. LOUIS L. REV. 1; Fuchs, *Collective Labor Agreements Under Administrative Regulation of Employment* (1935) 35 COL. L. REV. 493; Hamilton, *Individual Rights Arising From Collective Labor Contracts* (1938) 3 MO. L. REV. 252; Lenhoff, *The Present Status of Collective Contracts in the American Legal System* (1941) 39 MICH. L. REV. 1109; Mason, *Organized Labor as Party Plaintiff in Injunction Cases* (1930) 30 COL. L. REV. 466; Pipin, *Enforcement of Rights Under Collective Bargaining Agreements* (1939) 6 U. OF CHI. L. REV. 651; Rice, *Collective Labor Agreements in Ameri-*

lective labor agreement is completely extra-legal;[3] another that it is a mere statement of labor policy which must be adopted by the individual employee before any benefits under it accrue to him;[4] another that it is an open and continuing offer[5] of the employer which the employee accepts by entering employment. Analogies to agency law[6] and the third party beneficiary situation[7] are frequent, but the most novel interpretation considers the collective labor agreement as a new type of juridical act,[8] the legal effects of which are still to be determined by legislation and judicial opinion.[9] In the instant case, the court expressly rejects the third party beneficiary theory[10] and determines the union's ability to maintain the action by the directness of its interest in the controversy. Behind this mere form of words, however, the court relies on either the custom or open-offer theory,[11] and actually makes no new advance in the progress of the law. The directness of the union's interest is at best an amorphous concept, for as the court concedes,[12] a union may maintain an action to prevent the breach of a closed-shop agreement,[13] to restrain a lock-out of

can Law (1931) 44 HARV. L. REV. 572; Ward, *The Mechanics of Collective Bargaining* (1940) 53 HARV. L. REV. 754; Witmer, *Collective Labor Agreements in the Courts* (1938) 48 YALE L. J. 195; Wolf, *The Enforcement of Collective Labor Agreements: A Proposal* (1938) 5 LAW & CONTEMP. PROB. 273; and Notes (1931) 31 COL. L. REV. 1156, (1924) 24 COL. L. REV. 409, (1930) 16 CORN. L. Q. 96, (1938) 51 HARV. L. REV. 520, (1934) 18 MARQ. L. REV. 251, (1940) 38 MICH. L. REV. 516, (1941) 50 YALE L. J. 695, (1932) 41 YALE L. J. 1221.

3. St. L. I. M. & S. Ry. v. Matthews, 64 Ark. 398, 42 S. W. 902 (1897); Hudson v. Cincinnati, N. O. & T. P. Ry., 152 Ky. 711, 154 S. W. 47 (1913); *cf.* Holland v. London Society of Compositors, 40 T. L. R. 440 (K. B. 1924).

4. This is usually called the "custom" or "usage" theory. Yazoo & M. V. R. R. v. Webb, 64 F. (2d) 902, 903 (C. C. A. 5th, 1933); Kessel v. Great Northern Ry., 51 F. (2d) 304 (W. D. Wash. 1931); Hudson v. Cincinnati, etc. Ry., 152 Ky. 711, 716, 154 S. W. 47, 49 (1913); Burnetta v. Marceline Coal Co., 180 Mo. 241, 79 S. W. 136 (1904). *But cf.* Mastell v. Salo, 140 Ark. 408, 215 S. W. 583 (1919). Consult Christenson, note 2 *supra*, at 73-86, for an analysis of the cases.

5. Rentschler v. Missouri Pac. R. R., 126 Neb. 493, 253 N. W. 694 (1934).

6. Barnes & Co. v. Berry, 169 Fed. 225 (C. C. A. 6th, 1909); Boucher v. Godfrey, 119 Conn. 622, 178 Atl. 655 (1935); Gary v. Central of Georgia Ry., 44 Ga. App. 120, 160 S. E. 716 (1931); Piercy v. Louisville & N. Ry., 198 Ky. 477, 248 S. W. 1042 (1923); W. A. Snow Iron Works v. Chadwick, 227 Mass. 382, 116 N. E. 801 (1917); Schwartz v. Cigar Makers International Union, 219 Mich. 589, 189 N. W. 55 (1922); Hall v. St. Louis-San Francisco Ry., 224 Mo. App. 431, 28 S. W. (2d) 687 (1930); Meltzer v. Kaminer, 227 N. Y. Supp. 459 (1927).

7. Donovan v. Travers, 285 Mass. 167, 188 N. E. 705 (1934); Yazoo & M. V. Ry. Co. v. Sideboard, 161 Miss. 4, 133 So. 669 (1931), and (1931) 16 MINN. L. REV. 100; Gulla v. Barton, 164 App. Div. 293, 149 N. Y. Supp. 952 (3d Dep't 1914); H. Blum & Co. v. Landau, 23 Ohio App. 426, 155 N. E. 154 (1926).

8. Duguit, *Collective Acts as Distinguished From Contracts* (1918) 27 YALE L. J. 753.

9. Compare the foreign law of collective agreements: Rice, *loc. cit. supra* note 2, at 575-581; Fuchs, *The French Law of Collective Labor Agreements* (1932) 41 YALE L. J. 1005, and *Collective Labor Agreements in German Law* (1929) 15 ST. LOUIS L. REV. 1.

10. If the court had accepted the third party beneficiary theory, it would seem that the union, as promisee, could maintain the action for the benefit of its members. FED. RULES CIV. PROC., Rule 17 (a), 28 U. S. C. A. foll. § 723c (Supp. 1941).

11. "The union did not enter into an agreement to furnish employees who would accept the award and work for the wages set by the arbitrators. The most that was accomplished was that the union induced the employer to agree that he would pay the stipulated wages to such members of the union as cared to accept employment on those terms. There was no contract with an employee until he accepted the terms offered by the employer by entering into employment." Instant case at 585.

12. Instant case at 585.

13. Ribner v. Racso Butter & Egg Co., 135 Misc. 616, 238 N. Y. Supp. 132 (Sup. Ct. 1929); Harper v. Local Union No. 520, I. B. E. W., 48 S. W. (2d) 1033 (Tex. Civ. App. 1932); Dubinsky v. Blue Dale Dress Co., 162 Misc. 177, 292 N. Y. Supp. 898 (Sup. Ct. 1936).

union members,[14] or to enjoin the discharge of members in violation of an agreement.[15] No doubt the court would permit a few employees to join as plaintiffs and bring a class action,[16] or allow one employee to bring an action, the controversy becoming *res adjudicata* as to the others. But since the prestige and the social utility of a labor union depends chiefly on its ability to further the interests of the class it represents, it would appear that the best solution is to consider the collective agreement in its true light, as a new set of legal relationships,[17] and to encourage unions to bring this type of suit on behalf of its members, regardless of their consent.[18]

Mortgages—Remedy on Mortgage as Affected by Statute of Limitations on the Debt—Administrator of mortgagee brings action in ejectment on two mortgages where the twenty-one year statute of limitations has not run. Mortgagor claimed that prior unsuccessful action[1] by the administrator of the mortgagee to foreclose the mortgages securing the notes which were barred by the fifteen-year statute of limitations precluded an ejectment action on the mortgage. *Held*, the bar to recovery upon the note by the fifteen-year statute of limitations does not bar action in ejectment for the property. *Taylor v. Quinn*, 68 Ohio App. 164, 39 N. E. (2d) 627 (1941).

The courts are divided as to the effect of the statute of limitations upon a mortgage securing a debt barred by the statute. In the "title" jurisdictions[2] it is generally held that the barring of the right to collect the debt does not bar the right to enforce the mortgage.[3] However, in the "lien" jurisdictions[4] there is a conflict of authority. The majority holds that the barring of the debt does not bar relief upon the security of the debt.[5] The minority, on the other hand, holds that the mortgage is a mere incident of the debt and cannot be sued upon when the debt has been barred by the statute of limitations.[6] These jurisdictions have, however, refused to remove the cloud cast on the property by the recorded mortgage until

14. Goldman v. Cohen, 222 App. Div. 631, 227 N. Y. Supp. 311 (1st Dep't 1928).

15. President Self Service v. Affiliated Restauranteurs, 280 N. Y. 354, 21 N. E. (2d) 188 (1939); Simon v. Stag Laundry, 259 App. Div. 106, 18 N. Y. Supp. (2d) 197 (1st Dep't 1940).

16. FED. RULES CIV. PROC., Rule 23 (a), 28 U. S. C. A. foll. § 723c (Supp. 1941).

17. See note 8 *supra*, and Anderson, *loc. cit. supra* note 2, at 252; Rice, *loc. cit. supra* note 2, at 606; Witmer, *loc. cit. supra* note 2, at 195-199; and Wolf, *loc. cit. supra* note 2, suggesting legislative enactments for the enforcement of the collective labor agreement. However, see Lenhoff, *loc. cit. supra* note 2, at 1134, for the opposing view: "The right of the union to compel the employer to abide by a certain wage schedule does not coincide with the right of an individual employee to enforce payment of his wages for a certain period of time in pursuance of that schedule. There is not only diversity of parties in the proceedings; there is also a difference in the cause of action and in the relief sought by them. . . ."

18. If it is feared that the union is not competent to act as trustee of the funds recovered, the court could appoint a trustee of its own choice to administer the funds for the benefit of the union members.

1. Taylor, Admr. v. McCullough, Ohio Ct. of Appeals Opinions, Sixth District, vol. 47, p. 413 (unreported).

2. 1 JONES, MORTGAGES (8th ed. 1928) § 16.

3. Markham v. Smith, 119 Conn. 355, 176 Atl. 880 (1935); Pearson v. Mulloney, 289 Mass. 508 (1935); Palmer v. White, 65 N. J. L. 69, 46 Atl. 706 (Sup. Ct. 1900).

4. 1 JONES, MORTGAGES (8th ed. 1928) § 16.

5. Harper v. Rasin Fertilizer Co., 158 Ala. 329, 48 So. 589 (1909); Belknap v. Gleason, 11 Conn. 160 (1836); Hulbert v. Clark, 128 N. Y. 295, 28 N. E. 638 (1891).

6. Depree v. Mansur, 214 U. S. 161 (1909) (stating the law of Texas); Zimmer v. Charbonnet, 185 La. 148, 168 So. 757 (1936); Pratt v. Pratt, 121 Wash. 298, 209 Pac. 535 (1922), 71 U. OF PA. L. REV. 284.

the mortgagor pays the debt,[7] indicating that the mortgagee has *something* left even after relief upon the security has been barred by the statute of limitations. If a court bases its decision upon the theory that the statute of limitations bars the remedy but does not extinguish the right,[8] it would seem *a fortiori* that if the remedy on the principal obligation is barred by the statute of limitations it should not automatically follow that the remedy on the security is also barred.[9] A factor which gives support to the majority is the fact that the mortgage and the evidence of the debt are usually separate instruments.[10] The instant case illustrates the somewhat anomalous situation in which the instant "title" jurisdiction has placed itself. Whereas the action of foreclosure is held barred by the statute on the note,[11] yet the action of ejectment is permitted. Relief is granted or not depending upon the form of action pursued.

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7. Provident Mutual Building Loan Ass'n v. Schwertnerm, 15 Ariz. 517, 140 Pac. 495 (1914); Raggio v. Palmtag, 155 Cal. 797, 103 Pac. 312 (1909); Berkley v. Idol, 91 Kan. 16, 136 Pac. 923 (1913).

8. Campbell v. Haverill, 155 U. S. 610 (1894); Mulvey v. Boston, 197 Mass. 178, 83 N. E. 402 (1908); Lightfoot v. Davis, 198 N. Y. 261, 91 N. E. 582 (1910).

9. Colonial & U. S. Mort. Co. v. Northwest Thresher Co., 14 N. D. 147, 103 N. W. 915 (1905); Colton v. Depew, 60 N. J. Eq. 454, 46 Atl. 728 (1900).

10. 3 JONES, MORTGAGES (8th ed. 1928) § 1565.

11. See note 1 *supra; see* Bradfield v. Hale, 67 Ohio St. 316, 322, 65 N. E. 1008, 1010 (1903).