RECENT CASES

Conspiracy—Withdrawal of Plea of Guilty after Nolle Prosequi Entered as to Co-defendants—Defendant was one of three indicted for conspiracy. He pleaded guilty and was a witness for the government at two successive trials of the co-defendants. After each trial the jury was unable to agree, and a *nolle prosequi* was subsequently entered as to the co-defendants. On defendant's motion to withdraw his plea of guilty, *held,* motion refused.[1] *United States v. Fox,* 130 F. (2d) 56 (C. C. A. 3d, 1942).

It is a well-recognized rule of law that in a prosecution for conspiracy, if all are acquitted except one, that one must also be acquitted.[2] However, a single conspirator may be convicted under circumstances in which the guilt of the alleged co-conspirators is as yet undetermined: one or more may have died;[3] may not have been tried[4] or apprehended;[5] or the defendant may have been indicted "with divers other persons whose names are to the Grand Jury unknown."[6] There is little precedent on whether a *nolle prosequi* has the effect of an acquittal, or is analogous to the above situations in which the conviction of the defendant alone is held to stand. A Federal District Court[7] has held that a motion of *nolle prosequi* to the indictment of two defendants does not entitle a third defendant to withdraw his plea of guilty, sustaining the court in the instant case.[8] On the other hand, *State*

1. It was further held that the trial court judge was within the exercise of his discretion in refusing defendant permission to withdraw his plea of guilty. The prosecution had agreed not to oppose defendant's request to withdraw his plea of guilty in the event of the acquittal of one of the conspirators, and indicated a desire that the motion in question be granted. It was held that in spite of this recommendation it was within the judge's discretion to refuse the motion.

2. Worthington v. United States, 64 F. (2d) 936 (C. C. A. 7th, 1933); Feder v. United States, 257 Fed. 694 (C. C. A. 2d, 1917); State v. Tom, 2 Dev. 569 (N. C. 1830); Rex v. Plummer (1902) 2 K. B. 339; Regina v. Manning, 12 Q. B. D. 241 (1883).

"A conspiracy consists . . . in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means." Willes, J., in Mulcahy v. Regina, L. R. 3 H. L. 306 (1868). Combination is an essential of the crime, and two or more must therefore participate to create the crime. If all are acquitted but one, he must also be acquitted as he alone is not capable of committing the crime.

3. People v. Nall, 242 Ill. 284, 89 N. E. 1012 (1909) (indictment stated one conspirator was "now deceased"); People v. Olcott, 2 Johns. 301 (N. Y. 1801) (where one of three defendants died, and another was acquitted, the third was convicted); Regina v. Kendrick, 5 Q. B. 49 (1843) (the other defendant died).

4. De Camp v. United States, 56 App. D. C. 119, 10 F. (2d) 984 (1926); United States v. Miller, 26 Fed. Cas. No. 15,774 (C. C. E. D. Va. 1878); People v. Mather, 4 Wend. 229 (N. Y. 1830).

5. Rosenthal v. United States, 45 F. (2d) 1000 (C. C. A. 8th, 1930); United States v. Cerecedo, 6 Porto Rico Fed. Rep. 626 (D. C. P. R. 1914); Commonwealth v. MacKenzie, 211 Mass. 578, 98 N. E. 598 (1912); *accord,* Farnsworth v. Zerbst, 98 F. (2d) 541 (C. C. A. 5th, 1938) (co-conspirator not subject to prosecution because of immunity attaching to representatives of foreign governments).

6. Worthington v. United States, 64 F. (2d) 936 (C. C. A. 7th, 1933); Jones v. United States, 179 Fed. 584 (C. C. A. 9th, 1910); United States v. Hamilton, 26 Fed. Cas. No. 15,288 (C. C. S. D. O. 1876); Commonwealth v. Edwards, 135 Pa. 474, 19 Atl. 1064 (1890).

In the instant case, the indictment contained the residuary clause, charging conspiracy of the named conspirators "with divers other persons whose names are to the Grand Jury unknown". Instant case at 57. This was not a factor in the court's consideration of the case, however, as the attorney for the government admitted that there was no evidence of other conspirators than those named in the indictment.

7. United States v. Lieberman, 8 F. (2d) 318 (D. C. N. Y. 1925); *see* Rutland v. Commonwealth, 160 Ky. 77, 82, 169 S. W. 584, 587 (1914).

8. The court in the instant case did not cite *United States v. Lieberman,* although it is the only Federal decision sustaining the court's position.

v. Jackson,[9] supported by dicta in the Second [10] and Fourth [11] Circuits, held that a conviction under these circumstances cannot be sustained.[12] The soundness [13] and general acceptance [14] of the decision in the *Jackson* case may be questioned. The court in the instant case rejects the doctrine of *State v. Jackson,* recognizing the inherent difference in effect between a *nolle prosequi* and an acquittal. A *nolle prosequi* is "a declaration of prosecuting officer that he will not prosecute suit further at this time," [15] makes no determination of the merits, and does not bar a second prosecution for the same offense; [16] an acquittal determines the case finally in favor of the defendant, and he cannot be prosecuted thereafter.[17] On advice of counsel the defendant in the instant case admitted his guilt,[18] and neither the guilt nor the innocence of his co-conspirators had been determined; in this situation defendant's motion to withdraw his plea of guilty was properly denied.

Criminal Law—Admissibility of Evidence Illegally Obtained by State Officials in Federal Prosecution—Defendant was indicted for a violation of the Internal Revenue Code. The evidence was entirely obtained by state officers under an invalid search warrant. Although there was no agreement among state and federal officials, it was the general practice that in cases of sufficient importance prosecution would be tendered to federal

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9. 7 S. C. 283 (1876).

10. Feder v. United States, 257 Fed. 694 (C. C. A. 2d, 1917).

11. Miller v. United States, 277 Fed. 721 (C. C. A. 4th, 1921).

12. In *State v. Jackson,* defendant was convicted by the verdict of a jury; in the instant case, defendant pleaded guilty. This distinction is immaterial to the question at hand. "A plea of guilty . . . is itself a conviction. Like a verdict of a jury it is conclusive. . . . The court has nothing to do but give judgment and sentence." Kercheval v. United States, 274 U. S. 220, 223. Instant case at 58.

13. The theory of the decision in *State v. Jackson* is that there must be two persons indicted for conspiracy to uphold the conviction of one. "Where two are charged, . . . a *nol. pros.* as to one before verdict rendered leaves the count in the indictment inoperative and without effect as to the other, because in that event no conspiracy is alleged against either. . . . If the effect of the *nol. pros.* is to discontinue the charges as to Fields, there can be none against Jackson, for the essential ingredient is the combination." *State v. Jackson,* at 288. It cannot be denied that the combination in crime is essential if the crime of conspiracy is to be proved; but it does not necessarily follow that both must be indicted, which is the position taken by the South Carolina court. In United States v. Miller, 26 Fed. Cas. No. 15,774 (C. C. E. D. Va. 1878), a single conspirator was indicted under a charge that two or more conspired. On demurrer it was held that a single conspirator could be indicted separately, on such a charge. See 1 BISHOP, NEW CRIMINAL PROCEDURE (4th ed. 1896) 464. In People v. Mather, 4 Wend. 229 (N. Y. 1830), it was held that an indictment against a single conspirator would lie when the names of the other conspirators were well-known. People v. Richards, 67 Cal. 412, 7 Pac. 828 (1885).

14. "It is not probable that this doctrine will be generally accepted in the States." 2 BISHOP, NEW CRIMINAL PROCEDURE (4th ed. 1896) 225.

15. State v. Kopelow, 126 Me. 384, 386, 138 Atl. 625, 626 (1927).

16. United States v. Perez, 9 Wheat. 579 (U. S. 1824); United States v. Shoemaker, Fed. Cas. No. 16,279 (C. C. D. Ill. 1840). *Contra:* Morgan County Com'rs v. Johnson, 31 Ind. 463, 466 (1869).

17. State v. Champeau, 52 Vt. 313 (1879).

18. Instant case at 59. It is pointed out that defendant's plea of guilty was a well-considered choice, on the advice of competent counsel, and that he gave evidence in support thereof at two trials. Such a plea of guilty should not be considered lightly, as might a plea of guilty entered by a defendant without due consideration of its consequences. Similar sentiments were expressed by Garvin, J., in United States v. Lieberman, 8 F. (2d) 318, 319 (D. C. N. Y. 1925): "(Defendant) duly pleaded guilty, and only now is for the first time registering a complaint. I cannot believe that he is not guilty; at most, he can be seeking to change his plea in order to escape the consequences of his guilt, not because of his innocence, but because conditions have altered since his plea was entered."

officers. *Held* (one judge dissenting),[1] in view of this general practice, the evidence is inadmissible because it was obtained by an illegal search and seizure in violation of the Fourth Amendment.[2] *Lowrey v. United States,* 128 F. (2d) 477 (C. C. A. 8th, 1942).

The familiar doctrine of the federal courts which excludes the use of evidence obtained by an unreasonable search, is contrary to the rule[3] followed in England, Canada, and a diminishing majority[4] of states. Due to the extreme difficulty encountered by the government in enforcing its liquor laws, the federal courts have found it necessary to give increasing scope to certain recognized exceptions to the rule.[5] One of the most important of these exceptions is the admissibility of evidence obtained by state officials regardless of means employed.[6] This exception is based on the theory that the first ten amendments apply only to activities of the national government.[7] It is subject, however, to the limitation that where the federal government participates, either by requesting active state participation[8] or by joining through its officers in the search,[9] the evidence is inadmissible if illegally obtained. It has also been held to be sufficient participation, even though no federal officers were present, where they had previously arranged with state or local officials to have the particular search made,[10] or where the search was made according to a pre-arranged general plan of cooperation between state and federal officers.[11] Despite these holdings there is extreme difficulty, as the dissent points out, in ascertaining just when cooperation does exist. The better long-run policy would seem to be to abandon the exclusion rule itself[12] and correspondingly to strengthen by statute the older remedies against police officials in order to give the innocent effective redress for the violation of their constitutional rights.[13] Lower federal

1. Majority opinion by Judge Reddick; dissenting opinion by Judge Thomas, who states that since a law of the state made the acts with which the defendant was charged criminal, the evidence should be admissible for the search and seizure were made by state officers whose duty it was to enforce state law.

2. U. S. CONST. AMEND. IV (prohibiting unreasonable search and seizure). The opinion did not express any view on whether the Fifth Amendment (prohibiting a defendant in a criminal case to testify against himself) was violated, as the defendant claimed, by the admission of evidence so obtained.

3. For the reasons behind the rule favoring admission, severe criticism of the federal rule and its development, state and federal decisions, and a list of articles discussing various aspects of this subject, see 8 WIGMORE, EVIDENCE (3d ed. 1940) §§ 2183, 2184, 2184a; but see *contra* 5 JONES, EVIDENCE (2d ed. 1926) § 2075 *et seq.*

4. Fraenkel, *Recent Developments in the Law of Search and Seizure* (1928) 13 MINN. L. REV. 1.

5. Note (1927) 36 YALE L. J. 536.

6. Weeks v. United States, 232 U. S. 383 (1914).

7. Barron v. Baltimore, 7 Pet. 242 (U. S. 1833); Twining v. New Jersey, 211 U. S. 78 (1908).

8. Gambino v. United States, 275 U. S. 310 (1927).

9. Byars v. United States, 273 U. S. 28 (1927). For an excellent analysis of this case, see Ely, *Federal Constitutional Limitations on Searches by State Authority* (1927) 12 ST. LOUIS L. REV. 159.

10. Flagg v. United States, 233 Fed. 481 (C. C. A. 2d, 1916); United States v. Bush, 269 Fed. 455 (D. C. N. Y. 1920).

11. Ward v. United States, 96 F. (2d) 189 (C. C. A. 5th, 1938); Sutherland v. United States, 92 F. (2d) 305 (C. C. A. 4th, 1937); Fowler v. United States, 62 F. (2d) 656 (C. C. A. 7th, 1932). *Contra:* Timonew v. United States, 286 Fed. 935 (C. C. A. 6th, 1923).

12. See note 5 *supra.* For a discussion and analysis of the policies behind the federal rule and the rule favoring admission, and a protest against the method used by the courts to arrive at a solution on this subject, see Waite, *Reasonable Search and Research* (1938) 86 U. OF PA. L. REV. 623.

13. See Broadhurst, *Use of Evidence Obtained by Illegal Search and Seizure* (1938) 24 KY. L. J. 191, 200, where it is said: "With such legislation in force, it is believed that competency and pertinency may well become the controlling considera-

courts, however, are of course bound to follow the exclusion rule. But, in view of the fact that the rule has been progressively weakened by technicalities [14] and that the Supreme Court has shown reluctance to apply it to new factual situations,[15] the instant court would have been justified in holding that where, as here, the facts are on the borderline, the exclusion rule does not apply.

Evidence—Possession of Firearm by Criminal as "Presumptive Evidence" of Violation of Federal Firearms Act—Defendant was prosecuted under a statute providing that it is unlawful for any person who has been convicted of a crime of violence to receive a firearm which has been shipped in interstate commerce and creating a presumption of guilt from possession of a firearm by such person.[1] The government proved defendant's prior conviction and possession of the weapon. Defendant and two others testified that defendant acquired the gun before the statute was enacted. In rebuttal the government proved an interstate shipment of the gun in 1919. Defendant's motion for a directed verdict was denied. *Held,*[2] affirmed, the statute is constitutional; the case was properly submitted to the jury.[3] *United States v. Tot,* U. S. C. C. A. 3d, Oct. 28, 1942.

The rule is well settled that a legislature has the authority to provide by statute that certain facts shall be presumptive evidence of other facts, and it is not a denial of due process if there is some rational connection between the fact proved and the ultimate fact presumed, the inference being reasonable—not an arbitrary mandate.[4] However, there is conflict among the courts concerning the weight to be given the presumptions and the time when they are dispelled.[5] The court in the instant case proceeded on the

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tion for the admissibility of all evidence however procured. The innocent will have redress for the violation of their rights and convictions will surely overtake the guilty." Grant, *Circumventing the Fourth Amendment* (1941) 14 So. CALIF. L. REV. 359, at 372, goes a step further: "The victim of an illegal search should have a right to sue, not only the trespassing officer, but the government, which should be required to underwrite his acts. . . . Only through financial liability, it seems, can the government be brought to a realization of the necessity of maintaining personnel adequately schooled in the rights of persons accused of crime. Only through the maintenance of such a personnel can the rights of the individual be adequately protected."

14. 8 WIGMORE, *op. cit. supra* note 5, § 21842; Grant, *loc. cit. supra* note 15; Note (1927) 36 YALE L. J. 536, 542, cited *supra* note 7.

15. Goldstein v. United States, 316 U. S. 114 (1942); Goldman v. United States, 316 U. S. 129 (1942); Olmstead v. United States, 277 U. S. 438 (1928).

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1. FEDERAL FIREARMS ACT, 52 STAT. 1250 (1938), 15 U. S. C. A. §§ 901, 902 (f) (1939).

2. This is the first decision by an appellate court as to the validity of this statute.

3. *Accord,* Del Vecchio v. Bowers, 296 U. S. 280 (1935). *But see:* Note (1939) 13 ST. JOHN'S L. REV. 437, 446 (author submits that the presumption in the FEDERAL FIREARMS ACT cannot be held constitutional; it is unreasonable).

4. Mobile, J. & K. C. R. R. v. Turnipseed, 219 U. S. 35 (1910) (*held,* legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact in issue is but to enact a rule of evidence and within the general power of government. First announced the test of "rational connection"); Morrison v. California, 291 U. S. 82 (1934) (states test "that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression", at 89). *Contra:* People v. Lyon, 27 Hun 180 (N. Y. 1882); Hammond v. State, 78 Ohio St. 15, 84 N. E. 416 (1908); State v. Beswick, 13 R. I. 211, 43 AM. REP. 26 (1881).

5. This conflict arises on interpretation of the legislative intent. Keeton, *Statutory Presumptions—Their Constitutionality and Legal Effect* (1931) 10 TEX. L. REV. 34.

theory [6] that the presumption did not relieve the government of its burden to convince the jury beyond a reasonable doubt of defendant's guilt; that the presumption did not disappear merely from the introduction of oral testimony tending to rebut it. The jury must determine the credibility of the testimony [7] and if it disbelieves the witnesses may infer the fact which the statute established as a presumption.[8] Under the principle that he who has exclusive means of proving the falsity of the presumed fact, if it is false, should do so,[9] and with the authority of *White v. United States*,[10] the court construed the effect of this statutory presumption in accordance with the most acceptable view. However, the instant decision leaves unanswered an important question under this act: whether the presumption is conclusive so that the jury must infer the fact presumed should it disbelieve the defendant's witnesses and the government offers no proof showing the existence of that fact. The answer must be based on an interpretation of the statute and desirable public policy.[11] And it would seem that public policy is satisfied by the extent of this decision, that the jury may infer the fact presumed.[12]

Insurance—Interpretation of "Accidental Means" Clause in Insurance Policies—Plaintiff, a dentist, had to have his hand amputated because of burns received from holding X-ray films in the mouths of patients over a period of twenty years. He now seeks to recover under a

6. For a discussion of other theories which have been advanced see Morgan, *Some Observations Concerning Presumptions* (1931) 44 HARV. L. REV. 906; Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof* (1933) 47 HARV. L. REV. 59; Morgan, *Presumptions* (1937) 12 WASH. L. REV. 255.

7. It is normally the province of the jury to determine the credibility of witnesses and the weight to be given the testimony. Firotto v. United States, 124 F. (2d) 532 (C. C. A. 8th, 1942); United States v. Tot, 42 Fed. Supp. 252 (D. N. J. 1941).

8. Easterling Lumber Co. v. Pierce, 235 U. S. 380 (1914); O'Dea v. Amodeo, 118 Conn. 58, 170 Atl. 486 (1934); Gillett v. Michigan United Traction Co., 205 Mich. 410, 171 N. W. 536 (1919). Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof* (1920) 68 U. OF PA. L. REV. 307, 315, n. 13: "If a policy is strong enough to call a presumption into existence, it is hard to imagine it so weak as to be satisfied by a bare recital of words on the witness stand or the reception in evidence of a writing." Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof* (1933) 47 HARV. L. REV. 59, 82.

9. "Opportunities for knowledge" included in the Morrison test: Morrison v. California, 291 U. S. 82 (1934), cited *supra* note 4; Rossi v. United States, 289 U. S. 89 (1933). In United States v. Platt, 31 Fed. Supp. 788 (S. D. Tex. 1940), the court said Congress may have presumed it would be difficult for a criminal to get a gun locally. Such criminal is in a peculiar position to know from what source he received the gun. It is no undue burden or unreasonable inconvenience on defendant to make him explain; *cf.* People v. Cannon, 139 N. Y. 32, 34 N. E. 759 (1893).

10. 16 F. (2d) 870 (C. C. A. 9th, 1926), *cert. denied*, 274 U. S. 745 (1927) ("The prima facie presumption of unlawful possession created by the statute undoubtedly attaches to the act of possession, and imposes upon the accused the burden of showing lawful possession whether by reason of the fact that the drug was imported prior to the time when the act went into effect or for any other reason." *Id.* at 872.

11. The federal courts have consistently sustained, under the commerce clause of the Constitution, legislation directed at certain classes of persons whose activities are dangerous or detrimental to public welfare. Whitfield v. Ohio, 297 U. S. 431 (1936) (prison-made goods); Brooks v. United States, 267 U. S. 432 (1924) (stolen cars); Weeks v. United States, 245 U. S. 618 (1917) (impure and improperly labeled food); Hoke v. United States, 227 U. S. 308 (1913) (white slaves). It will not be denied that armed criminals come well within the classification as being potentially dangerous to the public.

12. Construing the presumption as not conclusive would disenable the jury to infer the fact presumed where justice demands. It would allow adjustment of each individual case on its merits.

policy insuring against injury through *accidental means*.[1] *Held* (one judge dissenting), for the plaintiff—when an unusual, unexpected and unforeseen injury results from an intentional act of insured, the ensuing injury is caused by "accidental means", even though no mischance, slip or mishap occurred in doing the act. *Murphy v. Travelers Ins. Co.*, 2 N. W. (2d) 576 (Neb. 1942).

This case represents the minority view's interpretation of the "accidental means" clause [2] in insurance contracts. The majority rule is that where the means which caused the injury are exactly as the insured intends, they are not accidental and the insurer is not liable even though the result was unexpected and accidental.[3] The majority view clearly distinguishes between accidental result and the result of an accidental cause.[4] In requiring only an accidental result the instant case follows what is probably the modern trend.[5] It frankly recognizes the distinction between accidental cause and result, but repudiates it as having no effect in determining the insurer's liability.[6] Other minority cases do not even recognize this distinction.[7] Instead, they construe the policies liberally and interpret the means in the light of their results.[8] Those advocating strict construction rely principally on the ground that the language of insurance policies, like other contracts, should be interpreted literally.[9] Although the majority rule is easy to state, it is difficult to apply with any manner of consistency.[10] The

1. The policy insured ". . . against loss . . . resulting directly, independently and exclusively of any and all other causes from bodily injury solely through accidental means . . ."

2. Early insurance policies were in comparatively simple terms, merely insuring against injury by accident. The court's construction of these terms to include almost every injury or death led the insurance companies to attempt to limit and define their risks more precisely. As a result, the modern accident policies insure against death or injury "caused by external, violent and accidental means". VANCE, INSURANCE (2d ed. 1930) 867, 868, n. 1. See also COOLEY, BRIEFS ON THE LAW OF INSURANCE (2d ed. 1928) § 5233.

3. Travelers' Ins. Co. v. Selden, 78 Fed. 285 (C. C. A. 4th, 1897) (injury from running over rough ground—did not stumble or fall); Lehman v. Great Western Acc. Ass'n, 155 Iowa 737, 133 N. W. 752 (1911) (appendicitis from strain while bowling—no slip or fall); Lawrence v. Mass. Bonding and Ins. Co., 113 N. J. L. 265, 174 Atl. 226 (1934) (injury to back while pitching quoits—no deviation from intended manner). See also cases collected in Note (1940) 13 ROCKY MT. L. REV. 145, n. 5.

4. Landress v. Phoenix Ins. Co., 291 U. S. 491, 90 A. L. R. 1382, 1387 (1934); U. S. Mutual Ass. Ass'n v. Barry, 131 U. S. 100 (1889); United Commercial Travelers v. Shane, 64 F. (2d) 55 (C. C. A. 8th, 1933); Pope v. Prudential Ins. Co. of America, 29 F. (2d) 185, 187 (C. C. A. 6th, 1928).

5. Dickerson v. Hartford Acc. and Indemnity Co., 56 Ariz. 70, 105 P. (2d) 517 (1940). Also see Note (1940) 13 ROCKY MT. L. REV. 145, 150.

6. Instant case at 578; *accord*, Mangol v. Metropolitan Life Ins. Co., 103 F. (2d) 14 (C. C. A. 7th, 1939); American Nat. Ins. Co. of Galveston, Texas v. Belch, 100 F. (2d) 48 (C. C. A. 4th, 1938); Commercial Travelers' Ass'n v. Smith, 85 Fed. 401 (C. C. A. 8th, 1898); Lewis v. Ocean Acc. & Guaranty Co., 224 N. Y. 18, 120 N. E. 56 (1918); Prov. Life and Acc. Ins. Co. v. Green, 172 Okla. 591, 46 P. (2d) 372 (1935).

7. Paoli v. Loyal Protective Ins. Co., 289 Ill. App. 87, 6 N. E. (2d) 909 (1937); Brunson v. Mutual Life Ins. Co., 189 La. 743, 180 So. 506 (1938); Konschak v. Equitable Life Ass. Soc., 186 Minn. 423, 243 N. W. 691 (1932); Jacobson v. Mutual Benefit Health & Acc. Ass'n, 69 N. D. 632, 289 N. W. 591 (1940).

8. Commercial Travelers' Ass'n v. Smith, 85 Fed. 401 (C. C. A. 8th, 1898); Denton v. Travelers' Ins. Co., 25 F. Supp. 556 (D. Md. 1938). See also Notes (1938) 24 CORN. L. Q. 129, 130, (1939) 25 VA. L. REV. 710, 711.

9. *See* Landress v. Phoenix Mutual Life Ins. Co., 291 U. S. 491, 496 (1934), (1935 33 MICH. L. REV. 449. *But see* Farmer v. Railway Mail Ass'n, 227 Mo. App. 1082, 1089, 57 S. W. (2d) 744, 747 (1933).

10. The late Justice Cardozo, dissenting in Landress v. Phoenix Mutual Life Ins. Co., suggested: "The attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian Bog." 291 U. S. 491, 499 (1934).

variety of opinions indicate that the most serious defect of the rule is its lack of certainty.[11] In an attempt to preserve the distinction between the means and the results and also afford a basis for greater consistency, it is suggested that if there is a mishap in the act causing the injury, or the ignorance of a material fact, then the injury is caused by accidental means.[12] This would bring about the same result that is reached in applying the foreseeability test [13] of the liberal courts. However, the rule abolishing the distinction between means and results seems to be the simplest approach,[14] and also gives to the insurance policy the construction which the average man attaches to it.[15] The argument against this is that the insurance company is forced to pay for a risk not covered by the policy.[16] But since the insurer frames the policy, he can cure this defect by changing the words.[17]

Landlord and Tenant—Landlord's Tort Liability for Failure to Perform Agreement to Repair—Tenant threatened to move if the ceiling was not repaired, and landlord's agent said: "Don't move, I am going to fix it." Two months thereafter, the repairs not having been made, the ceiling fell on tenant and injured her. Suit is brought in tort, based on negligence of defendant landlord in failing to repair. *Held,* breach of promise to repair subjects the landlord to liability for personal injuries to the tenant. *Maday v. New Jersey Title Guarantee and Trust Co.,* 23 A. (2d) 178 (N. J. Sup. Ct. 1941).

The present case presents a problem upon which authorities differ.[1] While the weight of authority recognizes only contractual liability for breach of a contract to repair,[2] a number of jurisdictions hold a lessor

11. Some courts have denied recovery where death resulted from sunstroke [Harloe v. Calif. State Life Ins. Co., 206 Cal. 141, 273 Pac. 560 (1928)]; heart rupture [Shanberg v. Fidelity Casualty Co. of N. Y., 158 Fed. 1 (C. C. A. 8th, 1907)]; and infection following a tooth extraction [Ramsey v. Fidelity & Casualty Co., 143 Tenn. 42, 223 S. W. 841 (1920)]. Other courts following the same doctrine allowed recovery in cases of death from sunstroke [Lower v. Metropolitan Life Ins. Co., 111 N. J. L. 426, 168 Atl. 592 (1933)]; poisoned food [Hahn v. Home Life Ins. Co. of N. Y., 169 Tenn. 232, 84 S. W. (2d) 361 (1935)]; and an infection following a tooth extraction [Int'l Travelers' Ass'n v. Francis, 119 Tex. 1, 23 S. W. (2d) 282 (1930)].

12. BULLITT, ACCIDENTAL MEANS 23 (Address before the Association of Life Insurance Counsel, December 27, 1927). If the means used are applied exactly as planned and foreseen by insured, they may be regarded as accidental if there is present another unusual element, ignorance of some material fact in the situation, which could not reasonably have been foreseen and which had the insured known of its presence, would have induced him to perform the act in a manner different from that employed, or not at all. *But cf.* Note (1930) 78 U. OF PA. L. REV. 762, 766.

13. If the resulting injury or death are of a nature as not to be foreseen by the reasonable man, then the liberal courts say that they were the result of accidental means.

14. Notes (1938) TEMPLE L. Q. 125, 130, (1939) 25 VA. L. REV. 710, 714.

15. Aetna Life Ins. Co. v. Portland Gas & Coke Co., 229 Fed. 552 (C. C. A. 9th, 1916); Mannsbacker v. Prudential Ins. Co. of America, 273 N. Y. 140, 144, 7 N. E. (2d) 18, 20 (1937); Lewis v. Ocean Accident & Guarantee Corp., 224 N. Y. 18, 21, 120 N. E. 56, 57 (1918). *But see* Pope v. Prudential Ins. Co. of America, 29 F. (2d) 185, 187 (C. C. A. 6th, 1928); Note (1934) 1 U. OF CHI. L. REV. 812, 813.

16. Dissent in the instant case at 583.

17. Farmers v. Railway Mail Ass'n, 227 Mo. App. 1082, 1089, 57 S. W. (2d) 744, 747 (1933); Travelers' Protective Ass'n v. Stephens, 185 Ark. 660, 666, 49 S. W. (2d) 364, 366 (1932). See also Note (1938) TEMPLE L. Q. 125, 131.

1. PROSSER, TORTS (1941) 658; Bohlen, *Landlord and Tenant* (1922) 35 HARV. L. REV. 633; Eldredge, *Landlord's Tort Liability for Disrepair* (1936) 84 U. OF PA. L. REV. 467; Harkrider, *Tort Liability of a Landlord* (1928) 26 MICH. L. REV. 200, 383, 392-400; Note (1917) 1 MINN. L. REV. 339.

2. See cases cited in Notes (1930) 68 A. L. R. 1194, supplementing (1920) 8 A. L. R. 765; PROSSER, TORTS (1941) 659, n. 91. A small minority extends contract damages

liable in tort to the tenant for injuries resulting from a failure to perform a contract[8] to repair. This minority view has been adopted by the Restatement of Torts.[4] New Jersey has consistently held that a valid contract to repair creates a duty to repair, for breach of which a tort action will lie.[5] This right of action is strictly limited to parties to the contract, and is not extended to members of the tenant's family.[6] On the other hand, the duty has been extended so that the landlord must make a reasonable inspection at the proper times in order to discover defective conditions in need of repair.[7] It is clear that New Jersey allows recovery only in tort actions, for it has been expressly decided that personal injuries sustained by the tenant cannot be recovered in a contract action; they do not naturally follow from a breach of the contract, and are not those in contemplation when the contract is made.[8] It is submitted that, on sound principles of tort and contract law, there should be no recovery in this situation. It is a basic principle that when the sole relation between two parties is contractual in its nature, a breach of the contract does not create a liability for negligence, unless the breach is also a violation of a common law duty.[9] Since the ordinary relationship of landlord and tenant imposes no duty on the landlord to repair,[10] it seems impossible to find any sound basis for imposing a tort liability on the landlord for the mere failure to perform a contract duty.[11] The instant case, on its facts, may perhaps be regarded as an extension of the minority rule. The existence of a valid contract to repair may be questioned on the consideration point.[12] A tendency to find a contract where the landlord assures the tenant that he will repair is not, however, inconsistent with the philosophy underlying the minority rule—the feeling that responsibility retained voluntarily by the landlord should remove the risk of harm from the tenant and place the burden on the landlord.[13]

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to include personal injuries: Hart v. Coleman, 201 Ala. 345, 78 So. 201 (1917); Mason v. Howes, 122 Mich. 329, 81 N. W. 111 (1899).

3. The consideration which the court found in the instant case was the tenant's agreement not to vacate if the landlord promised to repair.

4. 2 RESTATEMENT, TORTS (1934) § 357.

5. Ionin v. E. D. & M. Corp., 107 N. J. L. 145, 151 Atl. 640 (1930); Dulberger v. Radli, 105 N. J. L. 126, 143 Atl. 323 (1928); Rosenberg v. Krinick, 116 N. J. L. 597, 186 Atl. 446 (Sup. Ct. 1936); Sidway v. Greater Atl. Finance & Mortgage Co., 12 N. J. Misc. 83, 164 Atl. 531 (Sup. Ct. 1933); Bland v. Gross, 10 N. J. Misc. 446, 159 Atl. 392 (Sup. Ct. 1932); Schau v. Lynn, 1 N. J. Misc. 326 (Sup. Ct. 1923). Cases decided under the New Jersey Tenement Housing Act, 55 N. J. STAT. ANN. (1940) § 7-1, must be distinguished from the cases cited in this note.

6. Clyne v. Helmes, 61 N. J. L. 358, 39 Atl. 767 (Sup. Ct. 1898).

7. Dulberger v. Radli, 105 N. J. L. 126, 143 Atl. 323 (1928).

8. Williams v. Fenster, 103 N. J. L. 566, 137 Atl. 406 (Sup. Ct. 1926).

9. See Note (1917) 1 MINN. L. REV. 339, 342.

10. See note 1 *supra*.

11. The New Jersey decisions are largely based on dicta in previous early cases. *See* Mullen v. Rainear, 45 N. J. L. 520, 523 (1883); Clyne v. Helmes, 61 N. J. L. 358, 363, 39 Atl. 767, 769 (Sup. Ct. 1898).

12. Whether the tenant's forbearance from moving was a forbearance from doing what she had a legal right to do, either by virtue of the termination of the then existing lease or by virtue of the state of disrepair, did not appear greatly to concern the court. The court said at 178: "The precise character of the contract [of letting] does not seem to be important." It might also be questioned whether the landlord's agent expressed an intent to be contractually bound to make the repairs. In reply to the tenant's threat to move if the repairs were not made, the agent said: "Don't move, I am going to fix it." Instant case at 179.

13. PROSSER, TORTS (1941) 661.

War—Process of Induction Under Selective Service Act Necessary to Military Jurisdiction—A draftee under Selective Training Act presented himself at army reception center pursuant to draft board order, was given a physical examination and, on being notified of his acceptance for service, refused to take the oath of induction, claiming that he was a conscientious objector.[1] When he was subsequently held by the army, he petitioned for a writ of *habeas corpus. Held,* denied. Registrant had been "inducted" into the army so that jurisdiction of military authorities attached, notwithstanding his refusal to take the oath. *Ex parte Billings,* 46 F. Supp. 663 (D. Kan. 1942).

The Selective Training Act provides that the rights of parties subject to the draft are determined by the civil law until the parties are actually inducted into the army.[2] Moreover, the Second Article of War [3] (stating that those persons are subject to military law who are "lawfully called . . . into service, from the dates they are required by the terms of the call to obey the same") is interpreted by decisions [4] as an affirmation of the principle that military jurisdiction does not attach until actual induction. The leading case of World War I,[5] the facts of which are the same as those of the instant case, held that a draftee is subject to military laws and regulations, if not from the date he is drafted, then certainly after he is accepted by the army following a favorable physical examination; and the subsequent taking of the oath is not the determinant factor in establishing military jurisdiction. Indeed, it has even been asserted that mere notification to report for service, and failure to do so, subjects a party to military discipline on charges of desertion in spite of the fact that no oath or physical examination has been administered.[6] The mailing of this notification is considered sufficient in some cases to initiate military jurisdiction, irrespective of whether the notice is received by the draft registrant.[7] This would seem to be an undesirable extension of the power of courts-martial,[8] and the more expedient rule makes the determination of physical qualifications for service and the notice of such determination indispensable prerequisite steps to induction.[9] After these steps, the oath constitutes a mere desirable formality. Immediate attachment of military jurisdiction following notice that the draftee has satisfied mental and physical requirements for army service is consistent with the policy behind the draft that such service is based, not on the registrant's acceptance of the army, but the army's acceptance of the registrant.[10] Military jurisdiction should arise by operation of law following such acceptance in spite of the mental attitude manifested by draftees who refuse to take the oath.

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1. Petitioner urged the claim of conscientious objection before his local draft board; on being overruled, he appealed to the state board. When the state board denied his petition, he presented himself at the reception center.

2. Selective Training and Service Act of 1940, 54 STAT. 894, 50 U. S. C. A. § 311 (Supp. 1941).

3. 41 STAT. 787 (1920), 10 U. S. C. A. § 1473 (1934).

4. United States *ex rel.* Feld v. Bullard, 290 Fed. 704 (C. C. A. 2d, 1923); *Ex parte* Thieret, 268 Fed. 472, 478 (C. C. A. 6th, 1920); Franke v. Murray, 248 Fed. 865 (C. C. A. 8th, 1918).

5. Franke v. Murray, 248 Fed. 865 (C. C. A. 8th, 1918).

6. *Ex parte* Thieret, 268 Fed. 472 (C. C. A. 6th, 1920); *Ex parte* Dunn, 250 Fed. 871 (D. Mass. 1918).

7. United States v. McIntyre, 4 F. (2d) 823 (C. C. A. 9th, 1925); United States *ex rel.* Feld v. Bullard, 290 Fed. 704 (C. C. A. 2d, 1923).

8. *Ex parte* Goldstein, 268 Fed. 431 (D. Mass. 1920).

9. Ver Mehren v. Sirmyer, 36 F. (2d) 876 (C. C. A. 8th, 1929); Franke v. Murray, 248 Fed. 865 (C. C. A. 8th, 1918).

10. Instant case at 667, 668.