University of Missouri Bulletin Law Series

Volume 43 *May 1931* Article 4

1931

Masthead

LAW SERIES

Published four times a year by the University of Missouri School of Law.

FEBRUARY, NINETEEN HUNDRED AND THIRTY ONE

"My keenest interest is excited, not by what are called great questions and great cases but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution, or a telephone company, yet which have in them the germ of some wider theory, and therefore some profound interstitial change in the very tissue of the law."—MR. JUSTICE HOLMES, Collected Legal Essays, p. 269.

NOTES ON RECENT CASES

ESTATES BY ENTIRETY—

SURVIVING TENANT'S RIGHT TO ESTATE WHERE HE CAUSES DEATH OF OTHER TENANT. *Barnett v. Couey.*[1]

One Cora Washington and her husband, James Washington held a certain bank account as tenants by entirety. While this account stood to the credit of the parties, James Washington wilfully murdered his wife, Cora, and immediately thereafter committed suicide. This action was brought in equity by plaintiff, as administrator of Cora, against defendant, as administrator of James, the purpose being to have defendant declared trustee of one-half of the bank account held by the parties as aforesaid. The petition set forth the tenancy by the entirety in the bank account and the fact that James had murdered Cora. Upon a demurrer, which admitted the wilful murder, the court granted the relief as prayed for.

In a tenancy by the entirety, both tenants are regarded as owners of the property in the entirety with "the consequence that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor."[2] Each party is regarded as having a vested interest in the whole from the inception of the estate,[3] but "they take but one estate as a corporation would take, being by the common law deemed but one person, and if one dies, the estate continues in the survivor, the same as if a corporator were to die."[4] The result of the death of either of the tenants apparently is that such deceased's interest disappears and the ownership of the entire estate continues in the survivor. The Missouri case

1. Mo. App., 27 S. W., (2nd) 757 (1930).
2. 2 Bl. Comm. 182.
3. Frost v. Frost, 200 Mo. 474, 98 S. W. 527 (1906).
4. Co. Lit. 187b.; 2 Kent. Com. 132.

hold that this common law estate exists with all of its incidents and limitations.[5]

The question would therefore, appear to be: Could the act of James Washington's murdering his wife operate to divest an apparently vested interest in him in favor of the personal representative of Cora Washington? In order to justify the result of this decision, it would seem that this question would have to be answered in the affirmative because it is not a question of James Washington's taking an estate from Cora upon her death—he had that from the beginning—and it is therefore necessary to find a condition operating to take an estate from him.

It is difficult to perceive how an owner of a vested interest in property may be divested of his ownership by any act—lawful or otherwise—which is not a condition to such divestment operative either pursuant to some provision of statutory law or pursuant to some provision contained in the instrument creating such ownership. The matter of devolution of property, its vesting and its divestiture, is controlled solely by the laws of conveyancing via transfer as the same may have been from time to time modified by the statutes in force in the jurisdiction concerned. For example: If an estate in Blackacre be given to A for life with a remainder to B and his heirs, B's interest is vested and according to the better authority, his remainder will not be divested even though B were to murder A, thereby accelerating his remainder in possession. By virtue of the law of estates, upon A's death B's remainder fell in and inasmuch as B's unlawful act is not a condition to divest his remainder, as a matter of law he will still be possessed thereof.[4a]

It would seem to follow, if the foregoing analysis is sound, that the wrongful act of James Washington could not serve to divest him of his title as surviving tenant. Such wrongful act was not a condition causing a divestiture either according to the common law or according to a statutory modification thereof. The murder could have no effect whatever upon his title as a surviving tenant by the entirety. No matter how desirable it might be from a social point of view to deprive James Washington of his right as a surviving tenant, nevertheless, so far as his legal estate was concerned, he had the same by virtue of his survivorship, there having occurred no condition, which according to law, would be operative to destroy his rights as a tenant and vest the same in the personal representative of Cora Washington. Accordingly if there be no other justification for taking James Washington's estate from him, it would seem that the decision in the principal case is wrong in its result; that because of the positive rules governing the vesting and divesting of property James Washington was entitled to the property and if a contrary result should be reached relief must be sought by statutory modification, and there is authority so holding.[6]

While courts for the most part have conceded that murder by a person situated as James Washington was in the principal case will not divest him of his legal interest as a surviving tenant by the entirety, occasionally it has been held that he may not profit by his own wrong and that he will hold the legal title as a trustee for the proper representatives of the murdered tenant, the same to pass to them upon the expiration of his life estate.[7] Under this line of reasoning, it would be said that James Washing-

4a. Ames, Lectures on Legal History, p. 310.

5. Wimbush v. Danford, 292 Mo. 607, 238 S. W. 460 (1921); Ashbaugh v. Ashbaugh, 273 Mo. 353, 201 S. W. 72 (1918); Otto F. Stifel's Union Brewery v. Saxy, 273 Mo. 159, 201 S. W. 67, L. R. A. 1918c 1009 (1918); Frost v. Frost, supra note 3; First National Bank v. Frye, 168 Mo. 492, 68 S. W. 348 (1902); Johnson v. Johnson, 173 Mo. 93, 73 S. W. 202 (1902); Gibson v. Zimmerman, 12 Mo. 385 (1849); Lomax v. Cramer, 202 Mo. App. 365, 216 S. W. 575 (1919); In re Greenwood's Estate, 201 Mo. App. 39, 208 S. W. 635 (1919); Rezabek v. Rezabek, 196 Mo. App. 673, 192 S. W. 107 (1917); Ryan v. Ford, 151 Mo. App. 689, 132 S. W. 610 (1910).

6. Beddingfield v. Estill, 118 Tenn. 39, 100 S. W 108, 9 L. R. A. (N. S.) 640 (1907).

7. Bryant v. Bryant, 193 N. C. 372, 137 S. E 188, 51 A. L. R. 1100 (1927); Van Alstyne v. Tuffy, 169 N. Y. S. 173, 103 Misc. R. 455 (1918); Ellerson v. Westcott, 148 N. Y. 149, 42 N. E. 540 (1896).

ton took away his wife's vested interest and "it being impossible to know which of the two would have outlived the other, equity would doubtless give" Cora Washington "the innocent victim the benefit of the doubt, as against the wrong-doer who had deprived" her of her chance of survivorship, and "accordingly give the entire equitable interest to" Cora Washington's successors upon James Washington's death.[8]

It is to be noted that under this suggested analysis of the case, James Washington would be entitled to hold the property in suit during his natural life. This would seem to be correct because as a tenant by the entirety, he had a life interest vested in him in every event and in spite of his wrongful act. The only effect of his murdering his wife was to deprive her of any possible ultimate interest in the property beyond his death by wrongfully cutting off her chance of surviving him. In such a situation, it seems altogether reasonable to deny to James Washington absolute beneficial ownership for all time, to indulge in the presumption that Cora Washington would have survived him had events taken their natural course and to place upon James Washington the duties of a constructive trustee according to such presumption. The Supreme Court of North Carolina has laid down this rule by way of *dictum*.[9] In that case, however, the Court merely decided that they would presume that the murdered tenant would have outlived the murderer, because she was in fact the younger of the two.

A possible objection to placing the burden of a constructive trustee upon James Washington and pursuant thereto requiring a diversion of the property in favor of plaintiff might be that it will work a forfeiture of the former's vested legal estate contrary to the provision of Sec. 13 of Article II of the Missouri Constitution. This section of the Constitution forbids a "conviction" working a "forfeiture of estate." Some courts have decided that this is the result of the imposition of such duties and the creation of such equitable rights in favor of the successors of Cora Washington. It is said that a legal beneficial interest is taken from the surviving tenant; that such taking amounts to further punishment for the murder and constitutes a forfeiture.[10] Accordingly, it has been held that the property cannot be taken from the surviving tenant and upon his death must descend as in ordinary cases.[11]

It will have to be conceded that the application of the equitable principles above stated in the case under review, will take a vested property right from James Washington. As already explained, James Washington had by operation of law a vested legal interest as a result of his surviving Cora Washington, in spite of the fact that the survivorship was due to murder. If a court of equity deprives James Washington and his successors of this interest, it will be taking away from him an ownership which was perfect and complete according to law.

In a certain sense, such divestiture may be characterized as a forfeiture. But is it a forfeiture within the meaning of the Missouri constitutional provision? No well-reasoned decisions have been found denying that such a divestiture is a forfeiture obnoxious to like constitutional provisions. Courts which have taken the property away from the surviving tenant on the ground that he was a constructive trustee have either entirely ignored constitutional requirements of this nature or have contented themselves with saying that the divestiture was not an unconstitutional forfeiture.[12]

As a matter of principle, it is wondered whether an equitable decree calling for the vesting of the legal title in the legal representatives of the murdered tenant must be characterized as a forfeiture within the meaning of the Missouri Constitu-

8. Ames, supra Note 4a, p. 321.
9. Bryant v. Bryant, supra Note 7.
10. Beddingfield v. Estill, supra Note 6.
11. Ibid.
12. Bryant v. Bryant, supra Note 7; Ellerson v. Westcott, supra Note 7.

tion? It is believed that all would agree that the surviving murderer should not be permitted to retain the legal beneficial title so as to have the same devolve as his property upon his death. It would accordingly be desirable, if possible, to hold that a decree bringing about this result is not obnoxious to the Constitution. The suggestion is ventured that such an interpretation of the Constitution is not imperative. The Constitution forbids a *"conviction"* working a forfeiture. Can it not be said that "conviction" does not mean a suit in equity in which, according to well-established equitable principles, a duty is established to vest a title in the hands of the successors of the murdered tenant? Can it not be said that conviction means a criminal proceeding? Obviously, if the latter construction be adopted, the way is clear to vest a title in the plaintiff pursuant to the equitable decree.

Moreover, there seems to be another substantial reason in addition to the foregoing for holding that depriving the administration of James Washington of the estate on the grounds that there is a constructive trust does not work an unconstitutional forfeiture. It will be found that the source of Sec. 13 of Article II of the Missouri constitution and all like constitutional provisions is Sec. 10 of Article I of the Federal constitution forbidding a state to "pass any bill of attainder". Apparently, the purpose of the Constitutional Convention in enacting the prohibition was to protect the heirs of a person convicted of treason by prohibiting a state legislature from enacting a statute forfeiting such convicted person's lands to the state.[13] Apparently, by reason of past practices, the Constitutional Convention feared that such unjust forfeitures might be continued. This provision found in the Federal constitution apparently has been carried over into the constitutions of the various states but the same has been amplified so that now we find in the Missouri constitution not only a requirement that no bill of attainder shall be passed (i. e. a statute) but also that no "conviction" working a forfeiture shall be permissible.

It seems that the Federal Constitutional Convention had only one purpose in mind in the adoption of the provision which is the source of Sec. 13, Art. II of the Missouri constitution. That Convention did not have in mind the repeal of any equitable principle found in the common law equity of England;[14] it did not have in mind preventing the divestiture of an interest of a person who was under the duty of a constructive trustee, but, as already stated, the purpose was to prevent the infliction of punishment upon innocent heirs of a person convicted of treason. It sought by the adoption of this section of the constitution to prevent a state's taking from a felon's heirs land which was charged with no equity whatever and which but for the felony, which felony in turn had no connection with the property forfeited, would have descended by operation of law to the heirs. For this additional reason, it is believed that the decree in the principal case did not go counter to Sec. 13 of Article II of the Missouri constitution.

While the decision of the learned Court in the principal case is not as clear as might be desired, the grounds therefor seem to be as follows: that (1) by the wrongful termination of the marriage, the unity of person of the spouses was destroyed and, as in cases of divorce, the estate was converted into a tenancy in common thereby entitling the representative of Cora Washington to a half interest therein; (2) "conceding but not deciding that full legal title passed to the husband by the fact of survivorship yet, because of the unconscionable mode of acquisition, a court of equity. . . . . will treat him [i. e. James Washington] as a constructive trustee."[15] Apparently also, the learned Court advanced as a reason for its decision that the

13. Wallach v. Van Riswick, 92 U. S. 202, 23 L. Ed. 473 (1875); Wellner v. Eckstein, 105 Minn. 444, 117 N. W. 830, dissent of Elliott, J.

14. See, Ross-Meehan Brake Shoe Foundry Co. v. Malleable Iron Co., 72 Fed. 960, (1896), where this general question is discussed in another connection.

15. Barnett v. Couey, supra Note 1, l. c. 760.

successors of James Washington could not inherit the property, because James Washington in the first instance could not have taken the property by his own wrongful act.

The analogy drawn between the case under review and the divorce cases seems specious rather than sound. The reason that a divorce converts a tenancy by the entirety into a tenancy in common is because the law of its own operation, as a result of the divorce, has destroyed the unity of person of tenants. Whenever there is a severance of the unity of person, through dissolution of the marriage, both tenants surviving such dissolution, the estate also must necessarily be divided. After such severance, two persons are found (who are no longer in contemplation of law regarded as one person), both interested in the property which was formerly held as one. With such separation of the owners, there must come also a division of the property. It is believed that this is the reason that tenancies by entirety are converted into tenancies in common upon the divorce of the tenants.[16]

However, in the case of the death of one tenant, the other surviving, there is no division of the unity of person in the sense that there is in the case of divorce, and there is, therefore, no need for a division of ownership with the consequent division of the property. Obviously, the death of one of the tenants terminates the marriage but this is the only status that is affected. It must be recalled that in a tenancy by the entirety, the theory of the estate is that the husband and wife each own in the entirety. The conception may be peculiar, but it is that ownership is vested in an entity and upon the death of either member of the entity, it continues, the survivor being the sole member thereof and by virtue of this fact, the owner of the entire estate. The dropping out of one member of the entity does not change the entity's nature. There is not—as in the divorce cases—a separation of the owners and a destruction of the entity, upon one tenant's death, the entity still continues to exist and to own the estate, but the surviving tenant is now the sole member of the entity.

The learned Court's second reason for the decision would seem to be sound and to follow the analysis of the facts that have been made in this note. The Court, however, was unwilling to say that upon the murder of Cora Washington by James title vested in the latter. The Court contents itself with saying that if this were the fact, then a constructive trust would exist. As already pointed out, it seems sound to say that title was in James Washington at the time of the murder and unless there is a constructive trust, plaintiff is entitled to no interest in the property. The question of whether or no the enforcement of the constructive trust would work an unconstitutional forfeiture was not considered in the opinion.

The last reason apparently assigned by the Court for its decision, namely, that James Washington could not take the property by virtue of his own wrong, is inconsistent with the Court's second reason and the assumption upon which it is based. The second reason assumes that James Washington had a title by virtue of his being the surviving tenant but which is taken from his successors because of his inequitable conduct. The last ground for the decision seems to suppose that James Washington had no vested interest at the time of the murder and could take none because of that act. Of course, no such rule as this can be applied in a case of a tenancy by the entirety. This is so because the surviving tenant has a *vested* interest. It is not a case of denying to a party *the right to succeed to an interest which is not vested* in him; but is a case of finding a legal device whereby, according to equitable principles a vested interest may be taken away from a party because of his unconscionable conduct.

16. State ex rel. v. Ellison, 290 Mo. 28, 233 S. W. 1065 (1921); Russell v. Russell, 122 Mo. 235, 265 S. W. 677 (1894); 25 Univ. of Mo. L. Series 50.

One wonders if plaintiff upon a proper analysis of the case and proper pleadings, would not have been entitled to the entire property rather than merely to one-half thereof as prayed for by the plaintiff in the petitions. The suggestion is ventured that such relief would have been entirely proper. As suggested by the late Dean Ames in discussing an analogous case, James Washington, by his wrongful act and crime, deprived Cora Washington of her "chance of survivorship". It is quite possible that she might have survived and taken the whole estate but for her premature death brought about by James' crime. It should not lie in the mouth of the successors of James Washington to say that the probabilities were that James would have survived Cora. The benefit of the doubt might well be given to Cora's successors and a court of equity might well assume that Cora would have survived and been entitled to the entire estate.

In any event, is there any justification for giving plaintiff merely one-half of the estate? If he is entitled to half, is he not entitled to all and if he is not entitled to all, is he entitled to any? This is not a case of tenancy in common. There is no divided interest. By operation of law, the survivor takes all. The tenant dying first takes nothing. The only justification for permitting plaintiff to take any is that a court of equity is willing to indulge in the presumption that Cora, but for her having been murdered, would have survived James and as result would have been the owner of the property in its entirety.

C. M. F.

INTOXICATING LIQUORS—FORFEITURE UNDER THE INTERNAL REVENUE AND NATIONAL PROHIBITION ACTS. *United States v. One Dodge Coupe.*[1]

Proceedings for forfeiture of an automobile were instituted under Section 3450 Revised Statutes. State officers noticed the car in question being operated in a suspicious manner, and, as they approached the car, the occupants abandoned it and were never apprehended. The car contained twenty gallons of liquor. The plaintiff was the owner of the automobile and had no knowledge, or reasonable grounds to believe, that it was being used illegally. The court held that those transporting the liquor knew that it had not been taxed, but that there was no evidence that their transportation of the liquor was undertaken with any intent of evading taxation; that an intent to violate the prohibition law is not the same thing as the special intent which Section 3450 Revised Statutes requires; that that statute relating to forfeiture is only applicable where an actual intent enters into the transportation; and that under the National Prohibition Act, the government has an adequate remedy for illegal transportation which safeguards the rights of innocent ownership of property unlawfully used.[2]

It is a matter of immense practical importance, in cases where an automobile is used in the unlawful transportation of liquor, whether government prosecutors are

1. 34 Fed. (2d) 942 (D. C. 1929).

2. On the question of the intent required for the application of Section 3450 Revised Statutes, courts have said that the fact that the tax has not been paid on liquor, and that the liquor was concealed and transported in a vehicle establishes the intent to defraud the United States of the tax. United States v. One Oldsmobile Coupe, 22 Fed. (2d) 441 (D. C. 1927); United States v. One Packard Automobile, Engine, 29 Fed. (2d) 424 (D. C. 1928); Commercial Credit Company v. United States, 18 Fed (2d) 927 (C. C. A. 1927). In the case last cited, the court said this was so despite the statements of persons in charge of the vehicle that they were ignorant of the law imposing such tax, and that the fact that their primary interest may have been to violate the prohibition law need not prevent the court from inferring an intent also to evade the tax law, as such evasion would necessarily result from their concealment and removal of the liquor. However, in United States v. One Dodge Sedan, 21 Fed. (2d) 971 (D. C. 1927) the court said where there was no direct intent to avoid the payment of the tax, except such as might possibly be inferred from the circumstances, any such implied intent

permitted to institute forfeiture proceedings under Section 3450 Revised Statutes, or whether they must institute such proceedings under the National Prohibition Act. Section 3450 Revised Statutes provides: "Whenever any goods in respect whereof any tax is or shall be imposed . . . are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax . . . every . . . conveyance whatsoever . . . used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited." Section 26 of the National Prohibition Act provides: "When the commissioner . . . or any officer of the law shall discover any person in the act of transporting in violation of law, intoxicating liquors in any . . . automobile. . . or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer, he shall take possession of the vehicle . . . and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction . . . The court upon conviction of the person so arrested . . . unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for seizure, and the cost of sale, shall pay all liens according to their priorities, which are established . . . as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used for illegal transportation of liquor."

A comparison of the two will indicate three objections from the standpoint of Federal prosecutors to the National Prohibition Act which are not present in Section 3450 Revised Statutes. First, under the National Prohibition Act, the interest of innocent parties in vehicles used in violation of the act are not subject to forfeiture, the purpose of the act being to subject the interest of the guilty party alone to forfeiture, and to protect the interest of those who had no knowledge or notice of the use to which the vehicle was being put.[3] An owner, by showing "good cause to the contrary", can prevent the sale of an automobile sought to be forfeited; while a lienor, who was without notice that the car was being used, or was to be used for such illegal transportation, can claim the proceeds after sale.[4] To avoid the possibility of fraud in interventions by owners and claims by lienors, government prosecutors have apparently turned to Section 3450 Revised Statutes for confiscatory authority, for that statute has been construed strictly, and all parties interested in the chattel sought to be forfeited have been deprived of their property, although the parties may be in-

would be negatived by the fact that there was no way in which a tax upon the liquor in question could be paid, and by the fact that the inference from the circumstances would seem to be that the driver's intent was to violate the prohibition law, and not to avoid the tax.

In United States v. C. I. T. Corporation, 31 Fed. (2d) 680 (C. C. A. 1929), the facts were somewhat similar to the facts in the principal case, but a contrary result was reached. Federal agents attempted to arrest the occupants of a vehicle, but they speeded up. When trapped by a "blind alley", they abandoned the car and made their escape. It was found that the car contained liquor on which the tax had not been paid Of course, no actual, subjective intent could be proved, but the court held the circumstances showed an intent to defraud the United States of the tax.

Where there is no evidence that the taxes on the liquor are unpaid, or that the containers do not have such revenue stamps upon them as are required by law, of course no forfeiture can be had under Section 3450 Revised Statutes, since illegal possession by itself is not sufficient upon which to found an inference of evasion of, or intent to evade, taxes United States v. One Six Ton Wichita Motor Truck and 126 cases of Intoxicating Liquor, 37 Fed. (2d) 617 (D. C. 1929). It is also clear that a bill for forfeiture under Section 3450 Revised Statutes which fails to state an intent to defraud the United States of taxes due on the liquor is insufficient. Hawley v. United States, 15 Fed. (2d) 621 (C. C. A. 1926); United States v. Two Mack Trucks, 20 Fed. (2d) 188 (D. C. 1927).

3. Jackson v. United States, 295 Fed. 620 (C. C. A. 1924); Oakland Motor Car Company v. United States, 295 Fed. 626 (C. C. A. 1924); United States v. Sylvester, 273 Fed. 253 (D. C. 1921); United States v. Burns, 270 Fed. 681 (D. C. 1921); The Saxons 269 Fed. 639 (D. C. 1921); United States v. Brockley 266 Fed. 1001 (D. C. 1920); United States v. Smith, 295 Fed. 624 (D. C. 1920).

4. United States v. Kidd, 19 Fed. (2d) 535 (D. C. 1927).

nocent and may not have participated in the illegal act.[5] Such forfeitures are based upon the idea that the "thing" is the offender, the guilt or innocence of its owner being accidental. It is a thing that has been used in the removal of goods and commodities and the law is explicit in the condemnation of such things. Secondly, the National Prohibition Act uses the word "transportation" which implies that the vehicle when seized must be moving. Consequently, when the vehicle is not being used in the actual transportation of liquor when seized, but is at a standstill, the provisions of the National Prohibition Act are of no effect.[6] Section 3450 Revised Statutes uses the words "removed", "deposited", or "concealed" so includes any case whether the vehicle is in locomotion or not. Thirdly, the language of Section 26 of the National Prohibition Act requires a conviction of the driver of the offending vehicle before there can be forfeiture proceedings under its provisions.[7] If an automobile is seized and the driver never apprehended, or, if apprehended, escapes, there can be no forfeiture unless resort is had to some other statute. But section 3450 Revised Statutes requires no conviction.

These three reasons have, in some cases perhaps, led government prosecutors to forfeit automobiles under the Internal Revenue Act if possible. The question presented, then, is: When may government prosecutors institute forfeiture proceedings under Section 3450 Revised Statutes, and when must they institute such proceedings under Section 26 of the National Prohibition Act? The principal case certainly does not decide the question. The language of the court merely indicates that there may be forfeiture proceedings under the Internal Revenue Act when there is an actual intent to defraud the government of the tax, but it is indefinite as to when a government prosecutor is permitted to proceed against a vehicle under Section 3450 Revised Statutes, and when, and under what circumstances, the provisions of Section 26 of the National Prohibition Act become mandatory on the government, and preclude forfeiture proceedings under the Internal Revenue Act.

Although there is some doubt as to the right in every case to proceed under Section 3450 Revised Statutes, it is settled that an actual prosecution and conviction of the driver of the offending vehicle for unlawful possession and transportation of liquor under Section 26 of the National Prohibition Act precludes a proceeding under the Internal Revenue Act.[8] The disposition of the automobile prescribed in Section 26 becomes mandatory after the driver's conviction. Also where a driver is convicted of the unlawful possession of liquor under Section 3 of the National Prohibition Act, and not of the unlawful transportation of liquor under Section 26, such conviction requires the government to forfeit the vehicle used under Section 26 of the National Prohibition Act if the possession for which the conviction was had were possession in transportation—possession incidental to transportation;[9] but if the possession were separate from and independent of transportation, forfeiture proceedings may be had under the Internal Revenue Act.[10]

5. Goldsmith Grant Co. v. United States, 254 U. S. 505 (1921).

6. The Jugo Slavia, 21 Fed. (2d) 99 (D. C. 1927); United States v. One Buick Automobile, 33 Fed. (2d) 353 (D. C. 1929); United States v. One Ford Automobile, 2 Fed. (2d) 882 (D. C. 1924); United States v. One Ford Coupe Automobile, 272 U. S. 321 (1926). In the last mentioned case, such point was not necessary to the decision. Forfeiture proceedings were instituted under Section 3450 Revised Statutes, and there was no allegation in the libel that the automobile was used in the transportation of liquor. The court had merely to decide whether forfeiture could be had under the revenue act, and not whether it must be so bad.

7. United States v. Two Mack Trucks, 20 Fed. (2d) 188 (D. C. 1927).

8. Shelliday v. United States, 25 Fed. (2d) 372 (C. C. A. 1928); Commercial Credit Co. v. United States, 17 Fed. (2d) 483 (C. C. A. 1927); United States v. Torres, 291 Fed. 138 (D. C. 1923); Port Gardner Investment Co. v. United States, 272 U. S. 564 (1926).

9. Commercial Credit Corporation v. United States, 276 U. S. 226 (1928); United States v. One Dodge Sedan, 21 Fed. (2d) 971 (D. C. 1927).

Where the driver of an automobile has been informed against for the unlawful possession and transportation of liquor in violation of the National Prohibition Act, it has been held that forfeiture proceedings against the vehicle could not then be had under Section 3450 Revised Statutes.[11] The theory of the courts holding that there can be no forfeiture of a vehicle under the Internal Revenue Acts pending the prosecution of the driver for a violation of the prohibition act is that, after conviction, such forfeiture is forbidden, and to say that it is permitted during the pendency of the prosecution, and up to the time of the conviction would not only be inequitable to innocent owners and lienors, but would also put a premium on dilatory prosecutions in order that forfeiture may be secured before conviction. All the cases do not reach the same result, however; one, at least has held that pendency of the prosecution of the driver for a violation of the National Prohibition Act does not bar forfeiture proceedings under Section 3450 Revised Statutes.[12] The better view would certainly seem to be that such prosecution is a bar to forfeiture under the revenue acts. The government should be held to have made its election; otherwise, there would be an incentive for delay in trials so that forfeiture might be had before the driver was convicted and thus deprive an innocent owner or lienor of his interest.

Where a seizure has been made under the Internal Revenue Act, forfeiture proceedings may be had under the National Prohibition Act.[13] And where a person has been apprehended in the act of unlawfully transporting liquor in a vehicle, it has been held that forfeiture proceedings must be had under the National Prohibition Act, even though a warrant was sworn out for the driver under Section 3450 Revised Statutes.[14] In such a case, the provision of Section 26 are mandatory and there is no authority of law for proceeding under Section 3450 Revised Statutes, either to prosecute the driver or to forfeit the vehicle.

At least two cases have held that whenever a vehicle is used in the transportation of liquor and is seized, whether the drivers of the vehicles are ever apprehended or not, the provisions of Section 26 of the National Prohibition Act are mandatory, and forfeiture of the vehicle can not be had under Section 3450 Revised Statutes.[15] These cases do not mean that forfeiture can be had under the National Prohibition Act even though the driver is not convicted of a violation of the National Prohibition Act. They stand for the proposition that, if a forfeiture is to be had at all, under such circumstances, it must be had under the National Prohibition Act. The practical result would be that if the drivers were never apprehended, or, if apprehended, escaped, then it would be impossible to have any forfeiture at all.

Until a recent United States Supreme Court decision, there was doubt as to whether a mere arrest under the National Prohibition Act would bar forfeiture proceedings under the Internal Revenue Act. Some cases have said that it is a conviction, and not a prosecution, which is a bar to a proceeding under Section 3450 Revised Statutes, and consequently forfeiture under the Internal Revenue Act is not precluded because the driver of the vehicle has been arrested and bound over on a charge of violating the National Prohibition Act.[16] However, a contrary result was reached in a case decided two years later, the court holding that where an arrest has been made under the National Prohibition Act it becomes the duty of the govern-

10. United States v. One Oldsmobile Coupe, 22 Fed. (2d) 441 D. C. 1927).

11. Commercial Credit Corporation v. United States, 18 Fed. (2d) 927 (C. C. A. 1927); United States v. Graham Paige Sedan, 38 Fed. (2d) 848 (D. C. 1930).

12. United States v. One Chevrolet Truck, 4 Fed. (2d) 612 (D. C. 1925).

13. General Motors Acceptance Corp. v. United States, 23 Fed. (2d) 799 (C. C. A. 1928).

14. United States v. General Motors Acceptance Corp. 25 Fed. (2d) 238 (C. C. A. 1928).

15. Marmon Atlanta Co. v. United States, 8 Fed. (2d) 267 (C. C. A. 1925); United States v. Milstone, 6 Fed. (2d) 481 (D. ofC.1925).

16. United States v. Commercial Credit Co., 20 Fed. (2d) 519 (C. C. A. 1927).

ment to prosecute under that law, and, as an incident to the proceeding thereunder, it becomes necessary to forfeit the vehicle under Section 26 of the National Prohibition Act.[17] The question has probably been put at rest by a decision of the United States Supreme Court in *Richbourg Motor Company v. United States*.[18] There, a car was seized and its occupants arrested and bound over on a charge of violating the National Prohibition Act. They were not proceeded against, however, under that act, but under the revenue statute. Then forfeiture proceedings were instituted against the car under Section 3450 Revised Statutes. The court held that forfeiture proceedings could not be had under the latter, but only under the National Prohibition Act; that the language of the National Prohibition Act is in form mandatory throughout; and that under that act, it is the duty of the prohibition officers to arrest any person discovered in the act of transportation and to seize the transporting vehicle, and such arrest and seizure require the government to proceed for forfeiture of the vehicle under the National Prohibition Act. This case has probably definitely settled the question once and for all that a seizure and arrest under the National Prohibition Act make it incumbent upon the government prosecutors to proceed against the vehicle under that act, and that forfeiture under Section 3450 Revised Statutes in such a case is precluded. However, the Supreme Court of the United States has not yet taken the final step and decided that whenever a car is seized in the unlawful transportation of liquor, and no arrest has been made, forfeiture proceedings may not be instituted under the Internal Revenue Act.

It seems that the tendency of the courts is to hold whenever possible that forfeiture proceedings must be instituted under Section 26 of the National Prohibition Act and not under Section 3450 Revised Statutes. Probably such a result is desirable. It would seem that whenever an automobile is used in the unlawful transportation of liquor in violation of the National Prohibition Act, forfeiture should be under that act. It is difficult to conceive how a vehicle in itself can be an offender, and that is the basis of the absolute construction placed on the Internal Revenue Act. In enacting the National Prohibition Act, Congress probably intended to cover the whole field of liquor law violation, and to punish only the party or parties who committed the wrongful act, and to protect the innocent owner or lineor. Then too, it is somewhat absurd to penalize a man for not paying a tax when the payment of that tax in itself would subject him to a charge of violation of the National Prohibition Act. "It is not easy to see how a duty to pay a tax can arise, if there is no way in which it can be paid and no officer authorized to receive it; nor how, lacking any law which makes it a duty to pay, there can be an intent to defraud the law by not paying or by acts which would be in aid of an intent to not pay. . . . Without doubt, the power to tax illicit liquor, in spite of the absolute prohibition against manufacture, continues unimpaired; but the actual existence of any such tax until it is specifically assessed may well be thought to be inconsistent with the abolition of all existing methods of payment and the substitution of no other method."[19]

There seems to be little reason why the rights of an innocent owner or linenor should not be protected. He has done nothing for which he should be penalized by the loss of his interest in the vehicle sought to be forfeited, nor is his conduct sought to be stigmatized as unlawful. Neither does it appear that the confiscation of the automobile, the owner or lienor being entirely innocent, will contribute perceptibly to a more effective enforcement of the law.

J. W. P.

17. United States v. Chevrolet Truck, 30 Fed. (2d) 830 (D. C. 1929).

18. 50 Sup. Ct. 385 (1930).

19. Lewis v. United States, 280 Fed 5 (C. C. A. 1922). J. W. P.

CONSTITUTIONAL LAW—POLICE POWER—AESTHETICS AS A BASIS FOR THE REGULATION OF BILLBOARDS BY A MUNICIPAL CORPORATION—*General Outdoor Advertising Co. v. City of Indianapolis.*[1]

This is a suit to enjoin the board of park commissioners of the city of Indianapolis from interfering, by authority of an ordinance passed under express statutory provision, with the construction and maintenance of advertising signs or billboards within 500 feet of certain parks and boulevards.[2] As to the provision for abating existing billboards, the ordinance is declared invalid because it does not provide compensation as called for by the statute, the billboards not being nuisances so as to be subject to abatement without compensation. The prohibition of further erection of billboards is sustained, however, on the ground that it bears a reasonable relation to the public safety, health, morals, or general welfare, but the court holds that aesthetic considerations may be given considerable weight and the ordinance sustained, partially at least, on that basis.

There seems to be little doubt but that a city does have the right under its police power to regulate the construction and maintenance of billboards. The courts have very generally held that the city has such power, either under an express statute as here, or by implication from the provisions of its charter.[3] Even those courts holding an ordinance invalid have recognized the general power to regulate billboards.[4] Such a right was clearly recognized in Missouri in the case of *St. Louis Gunning Advertising Co. v. City of St. Louis*[5] and has since been affirmed.[6]

The two questions which apparently have caused the most difficulty in the cases

1. 172 N. E. 309. (Indiana, 1930).

2. The ordinance prohibited the placing and operation of advertising signs or billboards within 500 feet of any park or boulevard and provided for the abatement of existing billboards, but did not provide compensation therefor, as provided in the statute authorizing the ordinance.

3. St. Louis Gunning Advertising Co. v. City of St. Louis, 235 Mo. 99, 137 S. W. 929 (1911); Kansas City Gunning Advertising Co. v. Kansas City, 240 Mo. 659, 144 S. W. 1099 (1912); Id. 240 Mo. 629, 144 S. W. 1104 (1912); Thomas Cusack Co. v. City of Chicago, 242 U. S. 526, 37 S. Ct. 190, 61 L. Ed. 472 (1917), L. R. A. 1918A, 136, Ann. Cas. 1917 C, 594; Haskell v. Howard, 269 Ill. 550, 109 N. E. 992 (1915), L. R. A. 1916B, 893; State v. Staples, 157 N. C. 637, 73 S. E. 112 (1911), 37 L. R. A. (N. S.) 696 (1912); City of Rochester v. West, 164 N. Y. 510, 58 N. E. 673 (1900), 53 L. R. A. 548 (1902), 79 Am. St. Rep. 659 (1901); Oppenheim Apparel Corporation v. Cruise. 194 N. Y. S. 183, 118 Misc. Rep. 368 (1922); People v, Wolf, 220 N. Y. S. 656 (1927), reversing 216 N. Y. S. 741, 127 Misc. Rep. 382 (1926); State ex rel. Morton v. Hauser, 17 Ohio App. 4 (1922); Appeal of Liggett et al, 291 Pa. 109, 139 Atl. 619 (1927); Horton v. Old Colony Bill Posting Company, 36 R. I. 507, 90 Atl. 822 (1914), Ann. Cas. 1916A, 911; Ex parte Savage, 63 Tex. Cr. R. 285, 141 S. W. 244 (1911), Ann. Cas. 1913 D, 951; Cream City Bill Posting Co. v. Milwaukee, 158 Wis. 86, 147 N. W. 25 (1914); see Varney & Green v. Williams, 155 Calif. 318, 321, 100 Pac. 867, 868, 21 L. R. A. (N. S.) 741, 743 (1909), 132 Am. St. Rep. 88, 91 (1910); Curran Bill Posting and Distributing Co. v. City of Denver, 47 Colo. 221, 224, 107 Pac. 261, 263, 27 L. R. A. (N. S.) 544, 545 (1910); Anderson v. Shackelford, 74 Fla, 36, 43, 76 So. 343, 345 (1919), L. R. A. 1918A, 139, 142; City of Chicago v. Gunning System, 214 Ill. 628, 639, 73 N. E. 1035, 1040 (1905) 70 L. R. A. 230, 237 (1906); Crawford v. City of Topeka, 51 Kan. 756, 61, 33 Pac. 476, 477, 20 L. R. A. 692, 694 (1893), 37 Am. St.Rep. 323, 324 (1894); Commonwealth v. Boston Advertising Company, 188 Mass. 348, 353, 74 N. E. 601, 603, 69 L. R. A. 817, 820 (1905), 108 Am. St. Rep. 494, 498 (1906); Bill Posting Sign Co. v. Atlantic City, 71 N. J. Law 72, 74, 58 Atl. 342 (1904); Bryan v. City of Chester, 212 Pa. 259, 261, 61 Atl. 894, 895 (1905), 108 Am. St. Rep. 870 (1906).

4. Varney & Green v. Williams; Curran Bill Posting and Distributing Co. v. City of Denver; City of Chicago, v. Gunning System; Bryan v. Chester, all *supra* note 2.

5. 235 Mo. 99, 200, 137 S. W. 929, 961, (1911). "While the authorities are conflicting upon some of the questions presented and discussed, yet it may be fairly said that all of them agree upon the following legal propositions: First, that municipal corporations even under their general police powers, may, by ordinance, exercise reasonable care over the construction and maintenance of billboards, house signs, and sky signs..."

6. Kansas City Gunning Advertising Co. vr Kansas City, 240 Mo. 659, 144 S. W. 1099 (1912); Id. 240 Mo. 679, 144 S. W. 1104 (1912); St. Louis Poste. Advertising Co. v. City of St. Louis, 249 U. S, 269, 39 S. Ct. 274, 63 L. Ed. 599 (1919), affirming 195 S. W. 717 (1917).

on this question are (1) the reasonableness of the regulation, and (2) the proper basis for such regulation. The court in the case under consideration does not discuss the reasonableness of the ordinance but simply seems to assume or admit that the regulation is reasonable. However, a number of courts have held less stringent requirements to be unreasonable and on that basis have declared an ordinance void.[7] Other courts, including those of Missouri,[8] have upheld similar ordinances as reasonable.[9] The real basis of distinction in these cases, however, although discussed as to the reasonableness of the requirement, seems to be the question of what the court adopts as the basis for this type of regulation. All courts, in the final analysis, have considered this question and based their decision on their conclusions as to the basis for this exercise of the police power.

The view first expressed by the courts was that the regulation of billboards, just as the exercise of the police power in general, could be justified only in so far as it was based upon a protection of the public health, safety, morals, or general welfare. A strict relation to one of these interests was required, and any aesthetic consideration as a basis for the regulation rendered it invalid.[10] Missouri adopted this view when the Supreme Court held "... that said power to regulate said matters begins where the public safety, health, morals, and good government demand such regulation, and ends where those public interests are not beneficially served thereby."[11]

The increase in the billboard advertising business has, naturally enough, led to

7. Curran Bill Posting & Distributing Co. v City of Denver, *supra* note 2 (ordinance restricting the size of billboards and forbidding them within 10 feet of street, alley, or building held invalid as being too general and unnecessary); Crawford v. City of Topeka, *supra* note 2 (requirement that distance of the billboard from the sidewalk exceed by five feet, the height of the billboard held unreasonable); (City of Chicago v. Gunning System, *supra* note 2 (ordinance held invalid on the ground that an ordinance of wide application, with no exceptions for safe structure or varying types of districts, was unreasonable); Bill Posting Sign Co. v. Atlantic City, *supra* note 2 (ordinance prohibiting the erection of billboards irrespective of safety, held invalid); City of Passaic v. Paterson Bill Posting Co., 72 N. J. Law 75, 58 Atl. 343 (1904) (ordinance requiring that the distance between the billboard and the sidewalk be not less than ten feet held invalid as unreasonable and not necessary to safety); People ex rel. Wineburgh Advertising Co. v. Murphy, 195 N. Y. 126, 88 N. E. 17, 21 L. R. A. (N. S.) 735 (1909); State v. Whitlock, 149 N. C. 542, 63 S. E. 123 (1908), 128 Am. St. Rep. 670 (1909), 16 Ann. Cas. 675 (1910); Bryan v. Chester, *supra* note 2.

8. St. Louis Gunning Advertising Co. v. City of St. Louis, *supra* note 4; Kansas City Gunning Advertising Co. v. Kansas City; St. Louis Poster Advertising Co. v. City of St. Louis, both *supra* note 5.

9. In re Wilshire, 103 Fed. 620 (C. C. S. D. Cal. 1900) (ordinance restricting height of billboards to 6 feet held reasonable); Whitmier & Filbrick Co. v. City of Buffalo, 118 Fed. 773 (C. C. W. D. N. Y. 1902) (ordinance prohibiting tce erection of billboards more than 7 feet high without permission of the council held to be reasonable); City of Rochester v. West, *supra* note 2 (ordinance prohibiting the erection of billboards more than 6 feet in height, without permission of the council, held valid); Gunning System v. City of Buffalo, 77 N. Y. S. 987, 75 App. Div. 31 (1902) (ordinance prohibiting billboards of more than 7 feet in height held to be reasonable); State v. Staples, *supra* note 2 (ordinance requiring a clearance of 24 inches above the ground in the construction of billboards held to be reasonable); State ex rel. Morton v. Hauser, *supra* note 2 (ordinance prohibiting erection of billboards except with consent of a majority of the property owners in the block, and requiring that billboards of more than 2 feet in height be constructed entirely of metal, held to be reasonable); Appeal of Liggett et al, *supra* note 2. (ordinance prohibiting billboards in residence section is reasonable zoning provision); Horton v. Old Colony Bill Posting Co., 36 R. I. 507, 90 Atl. 822 (1914), Ann. Cas. 1916A, 911 (ordinance restricting the height, size, distance from sidewalk, and material of construction of billboards held to be reasonable); Cream City Bill Posting Co. v. Milwaukee, *supra* note 2 (ordinance requiring that billboards be of noncombustible material and requiring at least 3 feet clearance from the ground found to be reasonable).

10. City of Passaic v. Paterson Bill Posting Co.; People ex rel. Wineburgh Advertising Co. v. Murphy; both *supra* note 6; Bryan v. Chester, *supra* note 2, Goodrich, *Billboard Regulation and the Aesthetic Viewpoint with Reference to California Highways* (1929) 17 CALIF. L. REV. 120, 131. "Not so long ago the charge that a law was in any degree motivated by 'aesthetic' considerations was enough to damn it utterly."

11. St. Louis Gunning Advertising Co. v. City of St. Louis, *supra* note 4, 235 Mo. at 200, 137 S. W. at 961.

increased regulation. The basis or reason in the minds of the city councils for that regulation frequently has been almost purely an aesthetic one and has been so recognized by the public. The courts have to some extent recognized that fact and frequently have refused to sustain the ordinance for that reason.[12] These courts have pointed out that the basis of such legislation must be the protection of the public health, safety, morals, or general welfare. A federal court in California was the first to recognize that aesthetic considerations might well be accepted as a minor contributing factor.[13] Since that decision there has been a tendency among other courts to accept the view expressed in that case.[14] On this question the United States Supreme Court,[15] in affirming a Missouri case, was one of the first to adopt the view and state expressly that the presence of incidental aesthetic considerations should not invalidate the ordinance so long as the primary basis continued to be the protection of the public health, safety, morals, or general welfare. A similar view seems to have been rather generally adopted by the courts in the allied fields of zoning regulations.[16]

The decision of the Indiana court in this case again raises the question as to how far the courts should go in the recognition of the aesthetic in sustaining billboard regulation. It is true that the court expressly states that ". . . citizens must not be compelled under the police power to give up rights in property solely for the attainment of aesthetic objects. . . and (that) under the law as it exists today aesthetic or artistic considerations alone are not considered sufficient to warrant the exercise of the police power to prohibit advertising billboards generally throughout a city. . ."[17] However, the court recognizes that aesthetic considerations may enter to a considerable extent ". . . where the regulation has a real or reasonable relation to the safety, health, morals, or general welfare."[18] The court then reasons that the park system, of which the boulevards are construed to be a part, is maintained by cities for the purpose of increasing the health, pleasure, and entertainment of its citizens and that the prohibition of billboards in close proximity thereto might have a relation to the public health and welfare which it would not have when applied to the city in general."[19] It does not seem clear in just what manner this might be true. As a matter of fact it seems to be more an aesthetic consideration than a regulation to protect public health and welfare, and it seems that the court rather arbitrarily concludes that there is a relationship in order to sustain the ordinance and reach a desired end. The court expressly approves such a result in recognizing and stating with approval the recent tendency toward the recognition of the aesthetic.[20]

12. Varney & Green v. Williams; Anderson v. Shackelford, both *supra* note 2; Haller Sign Works v. Physical Culture Training School, 249 Ill. 436, 94 N. E. 920, 34 L. R. A. (N. S.) 998 (1911); Crawford v. City of Topeka, *supra* note 2; City of Passaic v. Paterson Bill Posting Company, *supra* note 6; McBAIN, AMERICAN CITY PROGRESS AND THE LAW (1918) 77.

13. In re Wilshire, *supra* note 8.

14. Welch v. Swasey, 214 U. S. 91, 29 Sup. Ct. 567, 53 L. Ed. 523 (1909), affirming 193 Mass. 364, 79 N. E. 745; In re Opinion of the Justices, 234 Mass. 597, 127 N. E. 525 (1920); Ayer v. Commissioner on Height of Buildings in Boston, 242 Mass. 30, 136 N. E. 338 (1922); See Varney & Green v. Williams *supra* note 2; Wulfsohn v. Burden, 241 N. Y. 288, 300, 150 N. E. 120, 123. See also Goodrich, *Billboard Regulation and the Aesthetic Viewpoint with Reference to California Highways* (1929) 17 CALIF L. REV. 120, 133; Light, *Aesthetics In Zoning* (1930) 14 MINN. L. REV. 109, 121; McQUILLIN, MUNICIPAL CORPORATIONS (2nd ed. 1928) Sec. 943.

15. St. Louis Poster Advertising Co. v. City of St. Louis, *supra* note 5, 249 U. S. at 274, "Possibly one or two details, especially the requirement of conformity to the building line, have aesthetic considerations in view more obviously than anything else. But as the main burdens imposed stand on other ground, we should not be prepared to deny the validity of relatively trifling requirements that did not look solely to the satisfaction of rudimentary wants that alone we generally recognize as necessary."

16. Light, *Aesthetics In Zoning* (1930) 14 MINN. L. REV. 109, 113, 123.

17. 172 N. E. 309, 312.

18. *Ibid.*

19. *Contra:* Commonwealth v. Boston Advertising Co., *supra* note 2.

20. 172 N. E. 309, 312. "Under a liberalized construction of the general welfare purposes of state

It is very probable that the courts have realized for some time that the ordinances regulating billboards are passed very largely from aesthetic considerations. However, they have been unwilling to sustain them on that basis. Instead a number of cases have sustained the regulations by finding real beneficial effects on the public health, safety, morals, or general welfare.[21] Undoubtedly this has been to a large extent only a means to a desirable end, but nevertheless a real relation to some such recognized basis for the exercise of the police power has been shown to exist. A few cases have gone further and have asserted, usually in dictum, that greater weight should be given aesthetic considerations, but even these courts have usually made an effort to base their decisions on some of the more widely recognized bases mentioned above.[22] The Indiana court has apparently attempted the same thing.

The desirable result would seem to demand that the courts frankly recognize the importance and desirability of aesthetic considerations and sustain ordinances solely on that ground rather than declare them unreasonable or search for some relation to health or general welfare on which to sustain them. A Philippine court, after a discussion of the decisions in this country on the question, reaches that result.[23] The Louisiana court[24] seems to adopt a very logical view when it asserts that

and Federal Constitutions there is a trend in the modern decisions (which we approve) to foster under the police power, an aesthetic and cultural side of municipal development to prevent a thing that offends the sense of sight in the same manner as a thing that offends the senses of hearing and smelling."

21. Thomas Cusack v. City of Chicago, *supra* note 2; St. Louis Poster Advertising Co. v. City of St. Louis; Kansas City Gunning Advertising Co v Kansas City, both *supra* note 5; People ex rel. Publicity Leasing Co. v. Ludwig, 218 N. Y. 540, 113 N. E. 532 (1916), affirming 172 App. Div. 71 (1916); State v. Staples; Horton v. Old Colony Bill Posting Co., both *supra* note 2; Gilmartin v. Standish-Barnes Co., 40 R. I. 219, 100 Atl. 394 (1917); Cream City Bill Posting Co. v. Milwaukee, *supra* note 2; note, 38 MISSOURI LAW SERIES 44; Proffitt, *Public Esthetics and the Billboard* (1931) 16 CORNELL L. QUAR. 151.

22. Ware v. Wichita, 113 Kan. 153, 214 Pac. 99 (1923); State ex rel. Civillo v. New Orleans, 154 La. 271, 97 So. 440, 33 A. L. R. 260 (1923); State ex rel. Carter v. Harper, 182 Wis. 148, 196 N. W. 451, 33 A. L. R. 269 (1923). In each of these cases the court indicates in rather strong language the growing importance of the aesthetic, and goes so far as to indicate a belief that regulation might well be sustained solely on that basis. In the Louisiana case the court expressly states, "In fact, we believe that the billboard case (s) . . . might have rested as logically upon the so-called aesthetic considerations as upon the supposed other considerations of general welfare." However, in each of these three cases, which seemingly take the most progressive view on the subject prior to the Indiana case, the statements are really only dicta of the court as the decisions are based on a relationship to the more accepted basis of protection of the public health and safety. The court in State ex rel. Carter v. Harper says that the results of zoning "are material rather than aesthetic in their nature." The court in State ex rel. Civello v. New Orleans says, "It is sufficient that the municipal council could reasonably have had such considerations (public health, safety, morals, or general welfare) in mind. If such considerations could have justified the ordinances, we must assume that they did justify them." The court then enumerates a number of such considerations showing a relationship thereto. The case of Ware v. Wichita has frequently been accepted as standing unequivocally for the proposition that aesthetic considerations are a sufficient basis for the exercise of the police power in regulating the use of property. The court says, "With the march of times, however, the scope of the legitimate exercise of the police power is not so narrowly restricted by judicial interpretation as it used to be. There is an aesthetic and cultural side of municipal development which may be fostered within reasonable limitations. . ." Later in the opinion, however, the court further states, "It cannot be denied, however, that there is a good ground for the view that a reasonable zoning ordinance has some pertinent relationship to the health, safety, morals, and general welfare of the community." The court also quotes with approval from *In re* Opinion of the Justices, *supra* note 2, in which it is stated that the primary basis should be protected of the public health and safety and cites numerous specific examples thereof.

23. Churchill v. Rafferty, 32 Philip. Rep. 580 (1915); Churchill v. Collector of Internal Revenue, 14 Official Gazette of the Philippines 383 (1916).

24. State ex rel. Civello v. New Orleans, *supra* note 20. "If by the term 'aesthetic considerations' is meant a regard merely for outward appearances, for good taste in the matter of the beauty of the neighborhood itself, we do not observe any substantial reason for saying that such a consideration is not a matter of general welfare . . . Why should not the police power avail, as well to suppress or prevent a nuisance committed by offending the sense of sight as to suppress or prevent a nuisance committed by offending the sense of hearing, or the olfactory nerves? An eyesore in a neighborhood of residences might be as much a public nuisance, and as ruinous

aesthetic considerations are part of the general welfare and that a thing offensive to the sense of sight might well be considered as much a public nuisance as something offensive to the sense of hearing or of smell, both of which are protected. A similar view is expressed by the Philippine court[25] and in the dicta by the court in a Wisconsin case.[26] The recognition of beauty is becoming greater and greater as our views change and we adopt systems of city planning and beautification. It seems that the courts should recognize this change and adopt it as a basis for sustaining regulation of the use of property rather than adhere to the earlier view as to the rights of property owners in a day in which such regulations were unheard of as well as unnecessary. The only other objection urged to this recognition of the aesthetic is that it is too indefinite and will leave too much to the discretion and individual viewpoint of the judge.[27] However, we do this now in the matter of what bears a reasonable relation to the public health and safety and even more as to morals, general welfare, and public convenience. These are bases on which the exercise of the police power is sustained and as to which there are no set standards and on which opinions might differ widely.[28] Yet there has been no objection that this latitude and room for variation results in an undesirable situation.

The court here seems to go further than any court heretofore in the recognition of aesthetic considerations as a primary factor in sustaining billboard regulation in that it finds no real relation to the public health, safety, morals, or general welfare.[29] Possibly the next step will be a frank recognition of such factors as sufficient to sustain regulations of this type. Such a holding would clearly be contra to the

to property values in a neighborhood generally, as a disagreeable noise, or odor, or a menace to safety or health."

25. Churchill v. Rafferty, *supra* note 21, 32 Philip. Rep. at 611. ". . . We are of the opinion . . . that unsightly advertisements or signs, signboards, or billboards which are offensive to the sight, are not disassociated from the general welfare of the public."

26. See State ex rel. Carter v. Harper, *supra* note 20, 182 Wis. at 277. "Nauseous smells have always come under the ban of the law, but ugly sights and discordant surroundings may be just as distressing to keener sensibilities. The rights of property should not be sacrificed to the pleasure of an ultra-aesthetic taste. But whether they should be permitted to plague the average or dominant human sensibilities well may be pondered." It is also stated in *Aesthetic*, 1 ENCYC. BRIT. (11th ed.) 280, that "authorities on aesthetics agree in granting a superiority to the senses of sight and hearing, because of their larger scope over those of smell and touch." But see MCBAIN, AMERICAN CITY PROGRESS AND THE LAW (1918) at 87.

27. See Youngstown v. Kahn Building Co., 112 Ohio St. 654, 661, 148 N. E. 842, 844 (1925).

28. It is true, however, as is pointed out in an article in the CORNELL LAW QUAR., supra note 21, that opinions will vary less on things offensive to smell and sound than those offensive to sight. Such a difference results from the nature of the senses.

29. As pointed out in note 20 *supra*, other courts, although recognizing the value in promoting the aesthetic, have found some real relation to the public health, safety, morals, or general welfare on which to sustain the regulation. In this case it is difficult to see how a requirement that billboards not be erected within 500 feet of parks and boulevards can be considered to have any real relation to the protection of the public health or welfare as commonly construed. The arguments as to the danger of fire, danger to passers-by during a strong wind, that such are hiding places for criminals, etc., advanced in the case of St. Louis Poster Advertising Co. v. City of St. Louis, *supra* note 5, and other cases would not demand such a requirement. It is hard to base the ordinance on anything other than aesthetic factors, despite the court's statement that such a requirement might have a real or reasonable relation to the public health or safety. Furthermore, the holding is exactly contra to Haller Sign Works v. Physical Culture Training School, *supra* note 11, in which the Illinois court held an identical ordinance to be invalid as having no relation to the public health, safety, morals, or general welfare, but on the contrary based solely on aesthetic considerations. Likewise in Kansas City Gunning Advertising Co. v. Kansas City, *supra* note 5, it was conceded by the city that a provision in its ordinance which prohibited billboards within 100 feet of boulevards was invalid as being based solely on aesthetic considerations, and that view was affirmed by the court. A similar view has been expressed in Commonwealth v. Boston Advertising Co., City of Chicago v. Gunning System, both *supra* note 2, and in State ex rel. v. Rapp, 16 Ohio N. P. (N. S.) 1 (1914). The principal case clearly abandons the view expressed in these cases and in effect, it seems, sustains the regulation solely on an aesthetic basis, though it purports to find a relation to public health. A recent article in the CORNELL LAW QUARTERLY, *supra* note 21, recognizes that this case may be significant in the development on this question.

present Missouri doctrine which recognizes aesthetic considerations only as an incidental factor. The question of billboard regulation has not been considered for thirteen years by the Missouri Court, however, and it is not clear whether the court would recognize in its entirety or in part this new development in the recognition of the aesthetic as a basis of the exercise of the police power to regulate billboards. Its decision in sustaining zoning in Missouri indicates an adherence to the doctrine previously followed which required that the primary basis of the regulation be a protection of the public health, safety, morals, or general welfare.[30]

J. A. F., JR.

CONSTITUTIONAL LAW—

WAIVER OF JURY TRIAL IN CRIMINAL CASES IN THE FEDERAL COURTS. *Patton v. United States.*[1]

Defendants were indicted and tried in the United States District Court for conspiracy to bribe a federal prohibition agent. During the trial, one of the twelve jurors was excused because of illness. By stipulation in open court it was agreed that the trial should proceed with the remaining eleven jurors, counsel for the government and counsel for defendants having consented, and defendants having given their personal consent. The court assented to this proceeding. A verdict of guilty was returned by the eleven jurors, and sentences were pronounced upon the defendants, who appealed, claiming that they had no power to waive their constitutional right to a jury of twelve men. The circuit court of appeals certified a question upon the point to the Supreme Court of the United States, which held that the effect of Article III, paragraph 2, clause 3 of the Constitution of the United States was not to establish trial by jury as part of the frame of the government, but only to guarantee the right to such trial; that Article III, as to trial by jury, is not jurisdictional, but confers a right on the accused which cannot be withheld from him, but which he may forego at his election; that waiver of jury trial must be expressly and intelligently made by the accused; and that such waiver may be exercised in both felonies and misdemeanors, with the consent of the court.

Two provisions of the Constitution of the United States are involved. Article III, paragraph 2, clause 3, provides that "The trial of all crimes, except in cases of impeachment, shall be by jury." The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *." Whatever may be the effect of these provisions, it is well established that they relate to procedure in the federal courts only, and do not limit or control the criminal proceedings of the states.[2]

The Constitution thus expressly preserves trial by jury as constituted at common law[3] as the means of determining criminal cases in the federal courts. A

30. State v. Christopher, 318 Mo. 225, 2 S. W. (2nd) 621.

1. 281 U. S. 276, 50 Sup. Ct. Rep. 253 (1930).

2. Maxwell v. Dow, 176 U. S. 581, 20 Sup. Ct. Rep. 494, 44 L. Ed. 597 (1899); Eilenbecker v. Plymouth County, 134 U. S. 31, 10 Sup. Ct. Rep. 424, 33 L. Ed. 801 (1889); HYATT, TRIALS (192) § 4 353; see Capital Traction Company v. Hof, 174 U. S. 1, 19 Sup. Ct. Rep. 580, 43 L. Ed. 873; 1898 Freeman v. United States, 227 Fed. 732 (1915).

3. Rassmussen v. United States, 197 U. S. 516, 25 Sup. Ct. Rep. 514, 49 L. Ed. 862 (1904); Thompson v. Utah, 170 U. S. 343, 18 Sup. Ct. Rep. 620, 42 L. Ed. 1061 (1898); Dickinson v. United States, 159 Fed. 801 (1908); State v. Sanders, 243 S. W. 771 (Mo. 1922); State v. Mansfield, 41 Mo. 470 (1867); Opinion of the Justices, 41 N. H. 550 (1860); Cancemi v. People, 18 N. Y. 128 (1858); COOLEY, CONST. LIMS. (8th ed., 1924) 668, 674; THOMPSON AND MERRIAM, JURIES (1888) 6.

common law jury was composed of twelve men[4], and no other number would suffice[5]. Neither trial by a lesser number nor trial by the court alone satisfies the requirement.[6] Trial by eleven, for example, by consent, is a waiver of the right to be tried by the common law jury of twelve, and consent to the substitution of another body, consisting of eleven men, as the fact-finding body. Hence, trial by only eleven jurors is, on principle, identical with trial by the court alone, without a jury, so far as the accused's common law rights, secured by the Constitution, are concerned; and, if the whole jury cannot be waived, it would seem that the presence of any member thereof is indispensable.[7] But the trial of certain "petty offenses" was not by jury at common law,[8] and this rule has been recognized as surviving to permit the waiver of trial by jury in cases of "petty offenses" in both federal courts[9] and some state courts.[10] The effect of the constitutional provisions quoted is limited, therefore, to the trial of felonies and the more serious misdemeanors, although it has been urged that the exception of such "petty offenses" is not justified.[11] The effect of the instant case is to class all offenses together, whether "petty" or serious, insofar as the accused's right to waive jury trial is concerned.

To sustain the result of the principal case it is necessary to establish the fundamental premise that trial by jury is a right of the accused in the nature of a privilege, which may be waived. This principle was the chief reason assigned for the result reached. Cases decided prior to *Patton v. United States*, however, expressed a contrary view. Three principal arguments have been relied upon in support of the proposition that an accused has no right to waive the mode of trial provided for by the Constitution: (a) that trial by jury is, by the Constitution, made part of the frame of the government;[12] (b) that it is essential to confer jurisdiction upon a court to hear and give judgment in a criminal case;[13] (c) That public interest and policy

4. Rassmussen v. United States; Thompson v. Utah; State v. Sanders; State v. Mansfield; Opinion of the Justices; Cancemi v. People, all *supra* note 3; COOLEY, *op. cit. supra* note 3, at 5; 2 STORY, CONST. § 1779.

5. *Supra* note 4, and cases cited. But see King v. Perkins, Holt's Rep. 403, Carthew 465, 90 Eng. Reprint 1122 (1698), where the withdrawal of a juror was permitted, by consent, in a criminal case less than capital.

6. Rassmussen v. United States, *supra* note 3 (trial by 6, under Alaska statute, held void, and statute unconstitutional); Thompson v. Utah, *supra* note 3 (trial by 8 held void); Low v. United States, 169 U. S. 86 (1909) (trial without jury held void); State v. Sanders; State v. Mansfield; Cancemi v. People, all *supra* note 3 (trial by 11 held void in each case); Commonwealth v. Hall, 91 Pa. Super. Ct. 485, 291 Pa. 341, 140 Atl. 626 (1928) (trial without jury held void).

7. *Supra* note 6, and cases cited holding trial by less than 12 a nullity. But *cf.* Commonwealth v. Egan, 281 Pa. 251, 257, 126 Atl. 488 (1924), where a distinction was drawn between trial by jury of less than 12, which was said to be a mere irregularity, and trial without a jury, which was said to go to the constitution of the tribunal, and its capacity or jurisdiction to try the case. It is submitted that this distinction is unsound, *infra*. The same distinction was suggested in Commonwealth v. Hall, *supra* note 6, and in Commonwealth v. Rowe, 257 Mass. 172, 153 N. E. 537 (1926), distinguishing Commonwealth v. Dailey, 12 Cush. 80 (Mass. 1853).

8. Frankfurter and Corcoran, *Petty Federal Offenses and Trial by Jury* (1926) 39 HARV. L. REV. 917; see Schick v. United States, 195 U. S. 65, 24 Sup. Ct. Rep. 826, 49 L. Ed. 99, 1 Ann. Cas. 585 (1903); Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. Rep. 1301, 32 L. Ed. 223 (1887).

9. Schick v. United States, *supra* note 8; Frank v. United States, 192 Fed. 864 (1911); Frankfurter and Corcoran, *op. cit. supra* note 8.

10. Murphy v. Commonwealth, 1 Metc. 365 (Ky. 1858); Miller v. State, 218 N. W. 743 (Neb. 1928); Frankfurter and Corcoran, *op. cit. supra*; COOLEY, *op. cit. supra* note 3, at 672. In Murphy v. Commonwealth, waiver was allowed where the penalty for the offense charged was no more than a fine, on the ground that such a case would involve no more than the mere civil rights of the accused, since only his rights of property would be affected. The right to waive jury trial in a civil suit is well established. See *post* note 30.

11. See the dissenting opinion of Harlan, J., in Schick v. United States, *supra* note 8; Commonwealth v. Beard, 48 Pa. Super. Ct. 319, 323 (1911); CLARK CR. PROCED. (2d. ed.) 509.

12. Coates v. United States, 290 Fed. 134 (1923); Freeman v. United States, *supra* note 2, at 744; United States v. Taylor, 11 Fed. 470 (1882).

13. "It was not in the power of one accused of felony, by consent expressly given or by his silence

demand the established form of trial as a public safeguard,[14] no authority being given to waive it on behalf of the state.[15]

(a) Is trial by jury, by the Constitution, made an essential part of the frame of the government? It seems to partake more of the nature of a right which is expressly secured to the accused. The common law, which was the source of the modern jury system,[16] regarded trial by jury as a privilege designed to protect the accused,[17] and it was incorporated into the constitutions of the States as a fundamental right.[18] Those states which allow waiver do so upon the basis that it is within the power of an accused to dispense with that which is merely a personal right.[19] Similarly, since the purpose of the federal Constitution was to preserve the common law mode of trial, its provisions manifestly merely reasserted and secured the right. This is emphasized by a consideration of the terms of the Sixth Amendment with the language of Article III. The Amendment sets forth several "rights" of the accused—confrontation, speedy trial, and the right to have counsel—enumerating trial by jury as one of them. Since these other "rights" have been regarded as privileges which may be waived,[20] it seems illogical to argue that trial by jury should be placed in a separate category, and be made obligatory and indispensable.[21] However, opponents of the doctrine of waiver point to the language of Article III as being inconsistent with this interpretation, because of its mandatory nature. If there is any conflict between Article III and the Sixth Amendment, which has been denied by the

to authorize a jury of only eight persons to pass upon the question of his guilt.***If one under trial for a felony could not legally consent that the trial proceed in his absence, still less could he assent to be deprived of his liberty by a tribunal not authorized by law to determine his guilt." Thompson v. Utah, *supra* note 3, at 353.

"The 'trial' of every such crime 'shall be by jury.' It goes to the constitution of the tribunal, and a 'trial' for a 'crime' which is not 'by jury' is not a trial by any tribunal known to the constitution.*** It is not competent for the accused and the district attorney to change, by consent, the constitution of the tribunal provided for the trial of crimes.***The accused may not waive that which concerns both himself and the public, nor any matter which involves fundamentally the jurisdiction of the court. The jurisdiction of the court to pronounce a judgment on conviction for crime, when there has been a plea of not guilty, rests upon the foundation of a verdict by a jury. Without that basis, the judgment is void." Low v. United States, 169 Fed. 86, 90, 92 (1909); Harris v. People, 128 Ill. 585, 21 N. E. 563, 15 Am. St. Rep. 153 (1889); Commonwealth v. Rowe, *supra* note 7; State v. Sanders, *supra* note 3; State v Mansfield, *supra* note 3. However, Illinois now permits waiver: People v. Fisher, 340 Ill. 250, 172 N. E. 722 (1930), citing with approval Patton v. United States, *supra* note 1.

14. Hopt v. Utah, 110 U. S. 574, 4 Sup. Ct. Rep 202, 28 L. Ed. 262 (1883); Low v. United States, *supra* note 13; Cancemi v. People, *supra* note 3; Commonwealth v. Egan; Commonwealth v. Hall, both *supra* note 7.

15. "The public officer prosecuting for the people has no authority to consent to such a change, nor has the defendant." Cancemi v. People, *supra* note 3, at 138.

16. *Supra* note 3.

17. HYATT, *op. cit. supra* note 2, § 350; BLACKSTONE, COMMENTARIES, Book III, 379; 2 STORY, *op. cit. supra* note 4, § 1779; Oppenheim, *Waiver of Trial by Jury in Criminal Cases*, 25 MICH. L. REV. 695.

18. "The right of trial by jury shall remain inviolate." Ala., I:12; Ark., II:7; Conn., I:2; Ind., I:20; Iowa, I:9; Miss., III:31; Minn., I:4; Neb., I:6; N. J., I:7; R. I., I:15; S. C., I:11; S. D., VI:6; Tenn., I:6; Texas, I:6; Wis., I:5. See HYATT, *op. cit. supra* note 2, § 353.

19. Cleghorn v. State, 116 So. 510 (Ala. 1928); *ex parte* Boyd, 291 Pac. 845 (Cal. 1930), approving Patton v. United States, *supra* note 1; People v. Howard, 289 Pac. 830 (Cal. 1930), approving Patton v. United States; State v. Worden, 46 Conn. 349, 33 Am. Rep. 27 (1878); People v. Fisher, 340 Ill. 250, 172 N. E. 722 (1930), approving Patton v. United States; Miller v. State, 218 N. W. 743 (Neb. 1928); State *ex rel* Warner v. Baer, 103 Ohio St. 585, 134 N. E. 786 (1921); *Ex parte* Hollingsworth, 287 Pac. 840 (Ok. 1930); Byers v. Commonwealth, 42 Pa. St. 89 (1862).

20. Queenan v. Oklahoma, 190 U. S. 548, 23 Sup. Ct. Rep. 762, 47 L. Ed. 1175 (1902) (right to a qualified jury); Diaz v. United States, 223 U. S. 442, 32 Sup. Ct. Rep. 250, 56 L. Ed. 500, Ann. Cas. 1913C, 1139 (1912) (right of confrontation); State v. Ellington, 204 N. W. 307 (Iowa 1925) (right to speedy trial); Keddington v. State, 19 Ariz. 457, 172 Pac. 273, L. R. A. 1918D, 1093 (1918) (right to public trial); Gatlin v. State, 87 S. E. 151 (Ga. 1915) (right to counsel). See also notes in 19 MICH. L. REV. 439; 11 IOWA L. BULL. 81; 5 MINN. L. REV. 554 64 U. OF PA. L. REV. 401; 22 MICH. L. REV. 609.;

21. Oppenheim, *op. cit. supra* note 17.

Supreme Court,[22] the language of the Amendment should control, "under the well-understood rule that the last expression of the will of the lawmakers prevails over an earlier one."[23] Under any analysis, therefore, trial by jury assumes the aspect of a right or privilege which is personal to the accused, and which can be waived. But a few cases have clung to the idea that the apparently mandatory language of Article III prohibits waiver,[24] and that the right to trial by jury is a right which the accused may not waive,[25] although little reason is assigned for the latter view. Generally, state courts have regarded it as a privilege.[26]

(b) Does a federal court have jurisdiction to give judgment in a criminal case except upon the verdict of a jury? Article III provides that "The trial of all crimes, except in cases of impeachment, *shall be by jury*." (Italics supplied.) Standing alone, this language seems to be mandatory, and to provide, for the trial of criminal cases, a tribunal of which a jury is an essential part, and it may be argued that a court without a jury would have neither authority nor capacity to try such criminal cases; at least, it would lend support to the idea expressed in some cases that a court without a jury would have no criminal jurisdiction.[27] Even if trial by jury is viewed in its proper light as a privilege, it is clear that no court has the right, under the Constitution, to try a *non-consenting* defendant without a jury, since the right to be so tried is expressly secured to him, and he cannot be deprived of it. But in the same manner that trial by jury was not made part of the frame of government, it was not made essential to the structure of tribunals having criminal jurisdiction. The District Courts of the United States are given, in a broad grant, jurisdiction of all crimes and offenses cognizable under the authority of the United States.[28] "Moreover, there is no act of Congress requiring that the trial of all offenses shall be by jury, and a court is fully organized and competent for the transaction of business without the presence of a jury."[29] This conclusion is reinforced by the analogy to the civil jurisdiction of the District Courts, which, with the consent of the parties involved, may dispense with trial by jury.[30] Having regard both to this general grant of jurisdiction and the true nature of trial by jury as a privilege, the court in the principal case concluded that it was equally reasonable to permit the trial of criminal cases without a jury, upon waiver by the accused.

But the strongest argument against the jurisdiction or capacity of federal courts to try a crime in the absence of a jury lies in the fact that only one exception is made in the general requirement of Article III that all crimes shall be tried by jury; the single exception is "cases of impeachment". By implication, it may be said that all other cases come within the operation of the provision, and extension of the exception to include other offenses is unjustified.[31] But this objection presupposes that Article III goes to the jurisdiction of the trial courts, whereas, as has been pointed

22. Callan v. Wilson, *supra* note 8; Patton v. United States, *supra* note 1 at 258.

23. Schick v. United States, *supra* note 8.

24. Coates v. United States; Freeman v. United States; United States v. Taylor, all *supra* note 12; Low v. United States, *supra* note 6; Dickinson v. United States, *supra* note 3.

25. Cleghorn v. State, *supra* note 19; Harris v. People, *supra* note 13; State v. Talken, 292 S. W. 32 (Mo. 1927); State v. Straughn, 197 N. C. 691, 150 S. E. 330 (1929); State v. Crawford, 197 S. C. 513, 149 S. E. 729 (1929); see Frier v. State, 108 Tex. Cr. Rep. 379, 380, 1 S. W. (2d) 306, 307 (1928).

26. *Supra* note 13, and cases cited.

27. *Supra* note 13, and cases cited.

28. § 24, Judicial Code.

29. Schick v. United States, *supra* note 8, at 70.

30. Kearney v. Case, 12 Wall. (U. S.) 275, 281, 20 L. Ed. 395 (1870), and note, establishing the right of parties to a civil action to waive trial by jury, notwithstanding the fact that the Judiciary Act of 1789 (§ 9, § 12, 1 Stat. 73) provided that issues of fact in all civil causes in the District Courts "shall be by jury," i. e., the same apparently mandatory language used in Article III of the Constitution.

31. See the dissenting opinion of Harlan, J., in Schick v. United States, *supra* note 8, opposing specifically the inclusion of the class of "petty offenses" within the exception. Of course, the same argument would apply to oppose a similar inclusion of all criminal offenses within the exception.

out, its true effect, particularly in the light of the Sixth Amendment, is to secure a *right* to the accused. The exception in cases of impeachment may be explained by the provision of another more formal mode of trial for such cases;[32] it is difficult to see how the exception, under this interpretation, can defeat the interpretation placed upon Article III by the court in the instant case:" * * * the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused. * * * The reasonable inference is that the concern of the framers of the Constitution was to make clear that the right of trial by jury should remain inviolable, to which end no language was deemed too imperative. That this was the purpose of the third article was rendered highly probable by a consideration of the form of expression used in the Sixth Amendment: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury* * *.'" And further: "* * * the latter provision may fairly be regarded as reflecting the meaning of the former. In other words, the two provisions mean substantially the same thing * * *. Upon this view, we conclude that article 3, § 2, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election. To deny his power to do so is to convert a privilege into an imperative requirement." It seems clear, therefore, that an accused is entitled to a jury trial as a matter of right in all cases except in cases of impeachment, for which another mode of trial was provided; but he may waive his right and consent to trial before the court alone, at his election.

(c) Does public policy forbid waiver on the ground that trial by jury was intended as a public safeguard? The older view was that the state had an interest in the life and liberty of a citizen which ought to be protected,[33] and cases proceeding upon this theory have consistently refused to permit waiver;[34] but the instant case and others which permit waiver distinctly mark the abandonment of the doctrine of public interest.[35] Certainly, considerations of public interest, modernly, tend to favor the expediency of trial before the court alone,[36] and even if the public be regarded as having some interest in the life and liberty of the accused, that interest would be better served in many cases by trial by the court without a jury, as in cases of highly aroused local prejudice.[37] This lends support to the proposition that the only public interest involved consists in insuring a fair trial to the accused.

It is frequently argued that the force of the public interest argument is destroyed by the fact that an accused may dispense with jury trial, in effect waiving it, by a plea of guilty, in which case the court gives its judgment without the intervention of a jury; and the conclusion is drawn that the accused may, in this fashion, surrender his life or liberty in a virtual defiance of the public interest that neither shall be surrendered except by the approved method, calculated to safeguard the public as well as the accused.[38] The assumption seems to be that an accused is likely to plead guilty when he is in fact innocent. In those rare cases in which, due to popular prejudice, an accused person might be led to plead guilty through fear of a more severe

32. Article II provides for impeachment by the House of Representatives, and trial by the Senate, of the Congress of the United States.

33. Hopt v. Utah, *supra* note 14, at 579; Cancemi v. People, *supra* note 3, at 137; Commonwealth v. Dailey, *supra* note 7; 1 BLACKSTONE, *op. cit. supra* note 17, at 133; COOLEY, *op. cit. supra* note 3, at 576.

34. Low v. United States, *supra* note 6; Commonwealth v. Dailey, *supra* note 7; Hill v. People, 16 Mich. 351, 357 (1868); State v. Mansfield, *supra* note 3; Cancemi v. People, *supra* note 3; State v. Lockwood, 43 Wis. 404 (1877).

35. State v. Worden, *supra* note 19; People v. Fisher, *supra* note 19; State v. Kaufman, 51 Iowa 578, 2 N. W. 275, 33 Am. Rep. 27 (1879); Hack v. State, 141 Wis. 346, 124 N. W. 492 (1910).

36. 21 HARV. L. REV. 212; 17 VA. L. REV. 77.

37. Aronson, *Would a Statute Providing for the Waiver of a Jury in Felony Cases Be Constitutional in Missouri?* 14 ST. L. L. REV. 34.

38. People v. Fisher, *supra* note 19; State v. Kaufman, *supra* note 35, at 579.

penalty at the hands of a jury, the right to waive the jury and be tried by the court would no doubt better safeguard his rights. Nor does an accused, by plea of guilty, dispense with *jury* trial only; instead, he dispenses with *any* trial whatever. There is no *"trial"* on a plea of guilty; there is no *issue* between the parties to be the subject of a "trial."[39]

If no public interest exists sufficient to interpose an obstacle to a plea of guilty which thus dispenses with trial altogether, it seems highly inconsistent to say that such public interest is an insurmountable obstacle to a choice between court and jury as a method of trial.[40] Conceding the existence of public interest to the extent of insuring a fair trial to the accused, it seems that it would be quite as adequately protected by trial before the court as by trial before a jury.

Except for these three principal objections, nothing stands in the way of allowing waiver of jury trial in any criminal prosecution in the federal courts, whether the crime charged be a misdemeanor or a felony.[41] This was the conclusion of the court in the principal case, and it is in harmony with the modern trend in criminal procedure.[42] It is only necessary that the court, in permitting the accused to exercise his right of waiver, be satisfied that he is doing so expressly and intelligently.[43]

The doctrine of waiver in the state courts is based upon (a) constitutional provisions expressly permitting it in specified cases,[44] (b) construction of constitutional provisions not requiring trial by jury in all criminal cases,[45] or (c) statutes providing for waiver.[46] Missouri falls within the latter group, having a statute expressly permitting waiver of jury trial in misdemeanors,[47] under a constitutional provision which has been held to be mandatory only as applied to felonies.[48]

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39. See dissenting opinion of Harlan, J., in Schick v. United States, *supra* note 8.

40. Patton v. United States, *supra* note 1, at 260.

41. There seems to be no justification for drawing a distinction between felonies and misdemeanors insofar as waiver of jury trial is concerned, although such a distinction is frequently drawn. See *post* note 44. *Contra*, *supra* note 11.

42. Note, 17 VA. L. REV. 77; NATIONAL CRIME COMMISSION; CODE OF CRIMINAL PROCEDURE, 12 AM. B. A. J. 690 (1926), at 693, XIII; BOND, *The Maryland Practice of Trying Criminal Cases at the Election of the Accused*, 11 AM. B. A. J. 699, 6 MASS. L. QUART. 89, showing an overwhelming preference for trial before the court rather than by jury.

43. People v. Spinato, 280 Pac. 691 (Cal. 1929); People v. Barba, 280 Pac. 549 (Cal. 1929); People v. Fisher, *supra* note 19, citing with approval Patton v. United States.

44. Arizona, Bill of Rights, I:8; Ark., II:7 (allows waiver in all cases; interpreted as being limited to misdemeanors, in criminal trials); California, I:7 (as amended, 1928; waiver allowed in all criminal cases); Idaho, I:7 (less than felony); Okla., VII:20 (less than felony); Vermont, X:1 (less than felony; as amended, 1921); Virginia, I:8 (less than felony).

The following state constitutions provide for a jury of less than twelve in the trial of criminal cases: Col. II:23 (in courts not of record); Idaho, I:7 (in the trial of misdemeanors); Utah, I:10 (in crimes less than capital); Washington, I:21 (in courts not of record); Wyoming, I:9 (in courts not of record).

45. State v. Rankin, 102 Conn. 46, 127 Atl. 916 (1925); People v. Fisher, *supra* note 19; People v. Harris, 302 Ill. 590, 135 N. E. 75 (1922); State v. Graves, 161 Minn. 422, 201 N. W. 933 (1925); Marino v. State, 111 Neb. 623, 197 N. W. 396 (1924); State v. DeMuth, 96 Ohio St. 519, 118 N. E. 98 (1917). *Contra*: State v. Stricker, 196 Iowa 290, 194 N. W. 60 (1923) State v. Williams, 195 Iowa 374, 191 N. W. 790 (1923); State v. Smith, 184 Wis. 664, 200 N. W. 638 (1924).

46. Maryland Code of Public General Laws, 1924 ed., Article 27, sec. 549; R. S. Mo. 1929, § 3663 (waiver allowed in trial of misdemeanors); Michigan Public Acts 1927, § 175, c. 3, No. 3.

47. R. S. Mo., 1929, § 3663.

48. "In criminal prosecutions the accused shall have the right to * * * a speedy, public trial by an impartial jury * * *." Mo. Const. 1875, Art. II, Sec. 22. "The right of trial by jury, as heretofore enjoyed, shall remain inviolate * * *." *Id.*, Sec. 28. Interpreted as mandatory in the trial of felonies: State v. Sanders; State v. Mansfield, both *supra* note 3. As to whether a statute allowing waiver in felony cases would be constitutional under this constitutional provision, see Aronson, *op. cit. supra*, note 37.

LANDLORD AND TENANT—SURRENDER BY OPERATION OF LAW.

Von Schleinitz v. North Hotel Co. et al.[1]

The defendant leased a hotel from the assignor of the plaintiff but abandoned it before the expiration of the term. The lease contained the usual covenants to pay rent and to make repairs, and further provided that upon breach of any of the foregoing covenants and agreements, "the lessor shall have the right to re-enter upon the premises hereby let and take possession thereof, ... and it shall any day be lawful for the lessor, his agents, attorneys, successors and assigns, at his or their election, to declare said term ended, and to enter into the premises, or any part, either with or without process of law, ... but for this cause, the obligation to pay rent for the full period of this lease shall not cease." The plaintiff, upon abandonment by the defendant, took possession of the premises, made certain necessary repairs to the interior, repaired or replaced some of the carpets, furniture, and equipment thereof and ran the hotel for his own benefit. The plaintiff also made various attempts to rerent the same. In resuming possession of the premises, the plaintiff in no manner notified the lessee that he was doing so for the benefit and account of the tenant and that he would look to the tenant for payment of any loss or deficiency in the stipulated rent. In an action to recover rents due after the abandonment, the court held that under these facts there was a surrender of the lease by operation of law; and, in order to prevent the acceptance of a surrender by operation of law, the landlord must, either by word or act, convey to the tenant notice that the landlord resumes possession of the premises for the benefit of the tenant, and not for the benefit of the landlord.

When a lease of land is given, an estate vests in the lessee and the lessor becomes a reversioner. Consequently, in case the lessor and the lessee wish to abandon the position they have attained in relation to the leased premises by virtue of the lease, and desire to regain their former position, they cannot do so simply by cancelling or rescinding the lease.[2] In order to terminate the tenancy, the lessee must either reconvey or the parties must place themselves in such a position as will constitute a surrender by operation of law.[3]

An express surrender, sometimes called a surrender "in fact" or "in deed" must be in writing to satisfy the Statute of Frauds.[4] No particular words are neces-

1. 23 S. W. (2d) 64 (1929).

Section 2168 of the Revised Statutes of Missouri, 1919, provides: "No leases, estates, interests either of freehold or term of years, or any uncertain interest of, in, to or out of any messuages, lands, tenements or hereditaments, shall at any time hereafter be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents lawfully authorized by writing, or by operation of law." This language is practically verbatim of the old English Statute of Frauds on this question.

2. "It seems that before the Statute of Frauds, a cancellation of the lease, in pursuance of an agreement by the parties, would have been sufficient as a surrender, this showing, as strongly as an oral surrender, the intention of the tenant of the particular estate to relinquish his interest to the reversioner, and the intention of the latter to accept the relinquishment." 2 TIFFANY, LANDLORD AND TENANT (2d ed. 1910) 1315.

3. TIFFANY, REAL PROPERTY (2d ed. 1920) 1579.

4. MO. REV. STA.. (1929) §2966. Where the portion of the lease unexpired is not within the Statute of Frauds there is a question as to whether or not a writing is necessary in express surrenders of these unexpired terms. On reason is seems that the length of the unexpired portion and not the length of the original term should control. Then if the unexpired term is not within the statute of frauds, it seems that no writing would be necessary for the making of an effective surrender, and that it might be surrendered by oral agreement. See note (1913) 4 A. L. R. 666, at 672; Schnebly, *Operative Facts in Surrender* (1927) 36 U. OF MO. BULL. LAW SER. 3, at 11.

"The third section of the English Statute of Frauds. requiring a surrender to be in writing, contains no exception in reference to leases for short term such as, by the previous sections, exists in connection with the requirement of a writing for the creation of a leasehold interest. And the English cases are to the effect that the requirement of a writing applies to a surrender of a leasehold interest, which under the previous sections, is susceptible of creation orally." 2 TIFFANY, *op. cit. supra* note 2, at 1314.

sary; it is sufficient if the intention to transfer the leasehold interest to the reversioner clearly appears.[5]

A surrender by act and operation of law, which is expressly excepted from the Statute of Frauds, logically results where the landlord and tenant join together in some open and notorious transaction which is inconsistent with the continued district existence of the relationship under the old lease.[6] In some instances the theory of surrender by operation of law has been based upon the intention of the parties or because the acts of the parties show an agreement that the leasehold interest shall be surrendered.[7] The court in the instant case approves of the doctrine that intention underlies surrenders by operation of law. The court said: "While a surrender of the leased premises by the tenant and an acceptance thereof by the landlord must be consummated by mutual consent and agreement of the parties, yet such may be accomplished by implied, as well as by express, agreement of the parties. If accomplished by implied agreement of the parties, it is said to be done by operation of law, and the intention of the parties is to be implied from the acts and conduct of the respective parties, as disclosed by the attending facts and circumstances."

Estoppel has been more widely accepted as the underlying principle of surrenders by operation of law; that is, where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued.[8] The classic pronouncement of this principle was made by Baron Parke, in the case of *Lyon v. Reed*:[9] "It is needless to multiply examples; all the old cases will be found to depend on the principle to which we have adverted, namely, an act done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist. The law there says, that the act itself amounts to a surrender. In such case it will be observed there can be no question of intention. The surrender is not the result of intention. It takes place independently and even in spite of intention." It is perhaps true that all the elements of an estoppel are not to be found in every case of such a surrender. Perhaps it would be more accurate and descriptive to say that a surrender by operation of law is the necessary implication from the existence of certain facts analogous to a technical surrender.[10]

The cases involving a surrender by operation of law may be classified into about four different types in so far as the fact element is concerned. The first type is where the tenant accepts a new lease from the landlord to take effect during the continuance of the interest created by the previous lease. Here the lessee "is estopped from saying that his lessor had no power to make a new lease; and, as the lessor could not grant the new lease until the prior one has been surrendered, the acceptance of such new lease is, of itself, a surrender of the former one.[11]" Here are overt acts of both parties inconsistent with the continuance of the term under the first lease.

5. 2 TIFFANY, *op. cit. supra* note 3, at 1580; Shepard v. Spaulding, 4 (Metc.) Mass. 416 (1842).

6. D. A. Schulte, Inc., v. Haas, 287 S. W. 816 (Mo. App. 1926). "Surrender of lease by operation of law occurs by reason of acts indicating consent of landlord to accept surrender." See 2 TIFFANY, *op. cit. supra* note 3, at 1581.

7. Tobener v. Miller, 68 Mo. App. 569 (1897); Brewer v. National Union Bldg. Assn., 166 Ill. 221, 46 N. E. 752 (1897); Updegraff, *The Element of Intent in Surrender by Operation of Law* (1924) 38 HARV. L. REV. 64; Schnebly, *op. cit. supra* note 4; note (1917) 15 MICH. L. REV. 659, at 660.

8. Felker v. Richardson, 67 N. H. 509, 32 Atl. 830 (1894); 2 TIFFANY, *op. cit. supra* note 2, at 1321.

9. 13 Mees & W. 285 (1844); Coe v. Hobby, 72 N. Y. 141, 28 Am. Rep. 120 (1898); Gray v. Kaufman Dairy and Ice Cream Co., 162 N. Y. 388, 56 N. E. 903 (1900). But see, Schulte v. Hass, *supra* note 6.

10. Schnebly, *op. cit. supra* note 4, at 16.

11. Bedford v. Terhune, 30 N. Y. 453 (1864); Chamberlain v. Dunlop, 126 N. Y. 45, 26 N. E. 966. (1891); 16 R. C. L. 1156; 2 TAYLOR, LANDLORD AND TENANT, (9th ed. 1904) 507.

The second mode of surrender by operation of law results where the tenant vacates the leased premises and the landlord resumes possession. This is regardless of whether or not there is any agreement between the parties. The resumption shows acceptance of possession. Tiffany says that "the theory of such a surrender would seem to be that the revesting of possession in the landlord to the exclusion of the tenant, by the action of both parties, being inconsistent with the continuance of an outstanding leasehold in the tenant, both are estopped to assert that the relation of landlord and tenant still exists."[12] Mere abandonment by the tenant, however, cannot effect a surrender, no matter how much he intends or wishes to be relieved from his obligations under the lease. And before the revesting of possession in the landlord shows an inconsistency of estates for the estoppel to work, it must be shown that there was a resumption of exclusive possession. Whether or not the re-entry by the landlord was such a resumption of possession depends upon the facts of each case.[13] The courts look to see whether the lessor took possession with the intention of occupying and controlling the premises as his own, to the exclusion of the tenant.[14] To enter for the purpose of protecting the property from injury,[15] or for the purpose of making repairs,[16] is not an exclusive resumption of possession to the exclusion of the tenant should he desire to return.[17] Nor should the fact that the landlord retains the key which the tenant sent to him on abandoning the premises prove more in the absence of other facts.[18]

In the principal case, the landlord entered the premises and made necessary repairs to the interior, but in addition he repaired or replaced some of the carpets, furniture and equipment thereof, and ran the hotel for his own benefit. Had the landlord made the necessary repairs to the interior and then quitted the premises, it seems an exclusive resumption of possession would not have been established.[19] But the fact that he repaired or replaced furnishings on which he had only a lien for rent and remained in possession and ran the hotel for his own benefit, without giving notice to the tenant that he was running the hotel for the tenant's benefit, are additional facts showing an intention on the part of the landlord to occupy and control the premises as his own, to the exclusion of the tenant in case the latter desired to return. The fact that the lease contained a provision providing that, upon nonpayment of the rent or other breach of covenant by the tenant, the landlord should have the power to re-enter and thereby terminate the leasehold estate is of some weight in finding that the re-entry by the landlord, after abandonment by

12. 2 TIFFANY, *op. cit. supra* note 2, at 1332.

13. Sander v. Holstein Commission Co., 121 Mo. App. 293, 99 S. W. 12 (1906).

14. Sharon v. American Fidelity Co., 172 Mo. App. 309, 157 S. W. 972 (1913); Sander v. Holstein Comm. Co., *supra* note 13; Duffey v. Day, 42 Mo. App. 638 (1890); Welcome v. Hess, 90 Cal. 507. 27 Pac. 369, 25 Am. St. Rep. 145 (1891); Meeker v. Spalsbury, 66 N. J. L. 60, 48 Atl. 1026 (1901); Hargrove v. Bourne, 47 Okla. 484, 150 Pac. 121 (1915).

15. Duffey v. Day, *supra* note 14; Joslin v. McLean, 99 Mich. 480, 58 N. W. 467 (1898); Rucker v. Mason, 61 Okla. 270, 161 Pac. 195 (1916).

16. Sessinghaus v. Knocke, 127 Mo. App. 300. 105 S. W. 283 (1907); Duffey v. Day, *supra* note 14; Cook v. Anderson, 85 Ala. 99, 4 So. 713 (1888); Brewer v. National Union Bldg. Assn., *supra* note 7; Haynes v. Aldrich, 133 N. Y. 287, 31 N. E. 94 (1892)

17. 2 TIFFANY, *op. cit. supra* note 3; Livermoore and Cooley v. Eddy's Adm'r, 33 Mo. 547 (1863).

18. Leggett v. Louisiana Purchase Exposition Co., 121 Mo. App. 70 97 S. W. 976 (1906), 134 Mo. App. 175, 114 S. W. 92 (1908), 157 Mo. App. 108, 137 S. W. 893 (1911); Rieger v. Royal Brewing Co. 106 Mo. App. 513, 80 S. W. 969 (1904); Buck v. Lewis, 46 Mo. App. 227 (1891); Fehringer v. Wagner Stockbridge Co., 61 Colo. 359, 157 Pac. 1071 (1916); Brewer v. National Union Bldg. Assn., *supra* note 7; Underhill v. Collins, 132 N. Y. 269, 30 N. E. 576 (1892); Auer v. Penn, 99 Pa. 370, 44 Am. Rep. 114 (1882). That the landlord for the purpose of making repairs, obtained the key from the tenant, was held not to relieve the tenant, he having been notified that he would still be held liable. Smith v. Hunt, 32 R. I. 326, 79 Atl. 826 (1911).

19. Sessinghaus v. Knocke, *supra* note 16; Cook v. Anderson, *supra* note 16; Brewer v. National Union Bldg. Assn., *supra* note 7; Haynes v. Aldrich, *supra* note 16.

the tenant when the tenant was in default for rent, was for the purpose of forfeiting the tenant's estate.[20] However, the court did not stress this fact in the instant case. Nor does the additional fact that the landlord tendered possession of the premises to the chattel mortgagee of the equipment owned by the tenant constitute a tender of possession to the tenant; nor did the written tender to the chattel mortgagee contain any statement to the effect that the plaintiff had resumed actual possession for the benefit of the tenant. And the mere fact that the landlord, after the tenant's abandonment, made an effort to lease the premises to others, does not in itself show a resumption of possession terminating the tenancy.[21]

A third mode of surrender by operation of law may result where, upon an abandonment of the premises by tenant, the landlord relets to another. Many courts take the position that the landlord may, when the tenant has abandoned the premises, lease the premises to others and still hold the original tenant for the difference in the rent received.[22] Other courts have held that the reletting will terminate the liabilities under the previous lease, without mentioning any requirement of notice to the previous tenant.[23] Still a third position has been taken by a number of courts which have held that the landlord may relet the premises to others and still hold the original tenant under the terms of lease, provided the reletting be done upon notice to the tenant that it is for the latter's benefit and for the purpose of minimizing the damages, and that the landlord does not relinquish his claim to the rent.[24]

This mode of surrender by operation of law was not involved in the instant case but the writers of the head notes have erroneously stated that that question was decided and that the court held with the courts adopting the last mentioned view. In addition to calling attention to this error, some discussion of the above views may be warranted, even though any reference to the question found in the opinion may not even be considered as dictum.

Various reasons have been given by the courts adopting the view that the lessor may relet and still hold the tenant liable for the agreed rent. Since the lessor is virtually forced to relet in mitigation of damages, it is said that he must not, from the act of reletting, be prevented from recovering the balance due after the mitigation; and this applies to leases just as it does to any other form of contract.[25] Another theory in which this result is reached, is that the lessee impliedly authorizes the lessor to relet for him and thus by implication a principal-agent relationship is established.[26] It is sometimes said, since this is done for the tenant's benefit in reducing his liability for rent, his assent is presumed.[27] But it is difficult to see on what basis this

20. International Trust Co. v. Weeks, 203 U. S. 364 (1906); Woodbury v. Sparrel Print, 198 Mass. 1, 84 N. E. 441 (1908). That the entry may be consistent with the purpose to merely preserve the premises, see Locascio v. Barber, 205 Ala, 86, 87, So. 704 (1920).

21. Buck v. Lewis, *supra* note 18; Gains v. McAdam, 79 Ill. App. 201 (1898); Vincent v. Frelich. 50 La. Ann. 378, 23 So. 373, 69 Am. St. Rep. 436 (1898); Joslin v. McLean *supra* note 15; Haynes v. Aldrich, *supra* note 16.

22. Wolffe v. Wolff & Bros., 69 Ala. 549 (1881); Martin v. Stearns, 52 Iowa 345, 3 N. W. 92 (1879); Humiston, Keiling & Co. v. Wheeler, 175 Ill. 514, 51 N. E. 893 (1898); Marshall v. John Grosse Clothing Co., 184 Ill. 421, 56 N. E. 807 (1900); Merrill v. Willis, 51 Neb. 162, 70 N. W. 914 (1897); Higgins v. Street, 19 Okla. 45, 92 Pac. 153 (1907). See Schnebly, *op. cit. supra* note 4, at 7.

23. Matthews Admr. v. Tobener, 39 Mo. 115 (1886); Smyth v. Boroff, 156 Mo. App. 18, 135 S. W. 973 (1911); Huling v. Roll, 43 Mo. App. 234 1890); Rice v. Dudley, 65 Ala. 68 (1880); Welcome v. Hess. *supra* note 14; Rucker v. Tabor, 127 Ga. 101, 56 S. E. 124 (1906); Haycock v. Johnston, 97 Minn. 289, 106 N. W. 304 (1906); Witman v. Watry, 31 Wis. 638 (1872). See 2 TIFFANY, *op. cit. supra* note 2, at 1339; Schnebly, *op. cit supra* note 4, at 6.

24. Hays v. Goldman, 71 Ark. 251, 72 S. W. 563 (1903); Williamson v. Crossett, 62 Ark. 393; 36 S. W. 27 (1896); Brown v. Cairns, 107 Iowa 727, 77 N. W. 478 (1898); Palmer v. Meyers, 79 Ill. App. 409 (1898). See note (1915) 14 MICH. L. REV. 82; Schnebly, *op. cit. supra* note 4, at 7; 2 TIFFANY, *op. cit. supra* note 2, at 1338.

25. Respini v. Porta, 89 Cal. 464, 26 Pac. 967 (1891); Whitcomb v. Brant, 90 N. J. L. 245, 100 Atl. 175; (1917).

26. Note (1930) 15 Iowa L. REV. 213; Underhill v. Collins, *supra* note 18.

27. 2 TIFFANY, *op. cit. supra* note 2, at 1340,

authority may be inferred. Still another reason has been suggested for the rule, to the effect that the tenant loses his rights but not his liabilities under the covenants of the lease. "It is true that a new tenancy is inconsistent with the old tenancy and that they are mutually exclusive. But it does not follow that the new tenancy is so inconsistent with the continuance of the obligations in the covenants to pay rent, i. e., the contractual obligations in the lease, that they are mutually exclusive."[28]

Directly opposed to this view are the cases which hold that a reletting by the lessor of the abandoned premises will terminate the liabilities under the previous lease.[29] There seem to be two important reasons supporting such a doctrine. The first is that both parties to the lease intended to effect a surrender, the lessee showing his intention by his act of abandonment, and the intention of the lessor to accept the surrender appearing from the fact that he reassumes possession and attempts to relet.[30] It is suggested, however, that the act of reletting does not necessarily manifest an intention to extinguish the tenancy and to release the tenant from further liability for the rent. "It is doubtful whether the lessor considers this possibility at all; the thing he is intent upon, is to get a new tenant who will be more likely to pay the rent."[31] But intention does not seem to be an entirely satisfactory basis for a surrender by operation of law in that it approaches express surrenders which come under the Statute of Frauds. The second and seemingly more logical reason supporting this view is that there has been a surrender by operation of law on the principle of estoppel; for if the second lease is to be regarded as valid to confer a present right of possession, the previous lease must have come to an end, since two persons cannot each be entitled to the exclusive possession of the same premises at the same time.

In view of the reasons just given, it is difficult to see why the mere giving of notice to the original tenant that the new lease will not act as a release of his liability would seem to make any real difference on principle. The courts adopting this doctrine are undoubtedly desirous to avoid imposing what seems to be a hardship upon the landlord.[32] If the abandoning tenant is either not accessible for suit, or is of doubtful pecuniary responsibility, the lessor is thus enabled to avoid a possible loss of the entire rent by leasing to another. It may also be desirous from the standpoint of the community to have property "constantly in use rather than be unproductively vacant." Furthermore, the original lessee is not in as bad a position as he is where the landlord makes no effort to relet or to resume possession. It would seem to be more desirable on principle that the parties be compelled to insert in their lease provisions whereby the landlord is constituted the agent of the tenant to make an assignment or sublease for the tenant in case of abandonment, or that the personal liability of the tenant remain on the covenant. This of course would base the liability not on the old lease but purely upon contract.[33] And it has been thought that such an action would lie without express provision.[34]

28. See Updegraff, *supra* note 7, at 79; (1929) 14 IOWA L. REV. 359.

29. *Supra* note 23.

30. Schnebly, *op. cit. supra* note 4, at 7.

31. *Ibid.*

32. *Supra* note 1, at 75; 2 TIFFANY, *op. cit supra* note 2, at 1340.

33. 2 TIFFANY, *op. cit. supra* note 2, at 1341; Granite Building Corp. v. Reubin, 40 R. I. 208, 100 Atl. 310 (1917).

34. "It is believed that these judicial expressions are in consonance with historical precedent and lead to a socially desirable result in declining to penalize a andlord who rents his premises after the tenant'. abandonment. It is thought that most courts, if the landlord after reletting the premises places his claim squarely on the basis of an action for damages for breach of contract and not on the basis of a debt for rent, would recognize and affirm the tenants liability. We shall see, however, that the destruction of the term, even though under correct principles it does not destroy the tenant's liability for breach of contract, is still a factor of great importance to the landlord as it may vitally effect the measure of his recovery against the tenant." MCCORMICK, *The Rights of the Landlord upon Abandonment of the Premises by the Tenant* (1925) 23 MICH. L. REV. 211.

After all, it seems that the real cause for the conflicting decisions on questions involving surrenders by operations of law results from the lack of agreement as to the underlying principle of surrenders by operation of law, depending upon whether or not intention or estoppel is that principle.[35]

E. C. O. Jr.

ADVERSE POSSESSION—LIFE TENANT AND REMAINDERMEN.

Crismond et al. v. Kendrick et al.[1]

Sarah L. Crismond was the grantee of certain lands under valid deeds dated May 10, 1860, and recorded May 15, 1860, purporting to convey the land to her and her bodily heirs, who are the respondents herein. The grantor of this property did not have "good record title." Mrs. Crismond moved upon the land as early as 1865 and with her family resided thereon continuously until her death in 1926. Appellants, Commerce Trust Company and the Phoenix Mutual Life Insurance Company, hold trust deeds to this land, given by Mrs. Crismond in 1925, purporting to convey title in fee. This is an appeal from an interlocutory judgment and order of sale in partition of the land covered by the trust deeds among the bodily heirs of Mrs. Crismond.

The appellants contended that Mrs. Crismond had acquired the fee-simple title by adverse possession. The court found that Mrs. Crismond entered into possession under the deeds and retained that possession claiming under the deeds until her possession "ripened into title" by virtue of the statute of limitations; that when her possession "ripened into title" it was in accordance with the deeds, and that a life estate became vested in her with remainder in fee to her bodily heirs; and that when title thus became fixed, the life tenant could not thereafter hold adversely to the remaindermen so as to destroy their title and acquire it for herself, even had she sought to do so, as the remaindermen could maintain no action for possession until the life estate had terminated.[2]

The facts in this case are not clear and for this reason the decision of the case raises many questions pertaining to the rights of a life tenant and remaindermen under principles of adverse possession. The court seemingly discussed the case from two different positions: (1) the first position seemed to be that some interest passed under the conveyances to the life tenant; (2) the second position seemed to be that no interest passed under the deeds but that the life tenant claimed under the deeds and acquired title by adverse possession. It is the purpose of this comment to examine the rights of the life tenant and remaindermen as between themselves on the basis of the above positions and to notice that on principle entirely different results might be reached.

In order to more clearly discuss the question four hypothetical cases may be considered.[3]

35. Another set of facts which may amount to a surrender by operation of law, though not discussed here, is found in those cases where a new lease by the landlord is made to a third person, accompanied by the former tenant's relinquishment of possession in favor of such third person. A splendid discussion of this point is found in 2 TIFFANY, *op. cit. supra*, note 2, at 1343.

1. 29 S. W. (2d) 1100 (Mo. 1930).

2. Under Missouri statutes a conveyance of an estate in fee-tail gives a life estate to the grantee and the remainder passes to the bodily heirs. REV. STAT. (1929) sec. 3108.

3. These hypothetical cases and a very full and interesting discussion thereof will be found in Balantine, *Claim of Title in Adverse Possession* (1919) 28 YALE L. J. 219, at 224.

1. Suppose that A, who has held possession of Blackacre for five years adversely to B, the true owner, executes a deed granting a life estate to X and the remainder to Z in fee. A delivers possession to X who holds for six years and dies. The statute of limitations is ten years. After X's death, leaving an heir P, B reenters. Both P and Z bring ejectment against B. The questions presented here, and in the three hypothetical cases to hereinafter follow, are: (a) Does the adverse possession of X, claiming title under an instrument purporting to give him only a life estate, if continued for the statutory period, bar and destroy the entire title and estate of B, the true owner, or does it only give X a life estate? (b) If B is barred does X, the adverse holder under such instrument, acquire the fee for himself, his heirs and assigns, or are he and his heirs estopped to deny the title of Z who is given a future estate by the instrument which he claimed?

It seems clear that B would be barred when the statutory period has run. The remainderman, Z, could tack the grantors' and life tenant's possession to make out the statutory period.[4] The possession of the life tenant, X, enures to the benefit of the remainderman Z. They can both trace their possession back to the grantor and the adverse possession which he initiated continues to run in Z's favor. When a grantor, having an inchoate possessory title, carves it up into successive estates by limitations in a will or deed, the transfer is valid and effective against all those claiming under the possessory title. When this title is perfected by the statute against anyone claiming under the true title the rights of those claiming under the grantor remain *inter se* according to the instrument of conveyance.[5] Then since P is claiming under X, the life tenant, he inherits nothing. He cannot be permitted to dispute the title of the remainderman, which goes back by valid conveyance to the same source as that of his ancestor. It is in this sense that he is estopped to deny the title of the remainderman. However, it is to be noticed that some interest, however small or defective, passed from A under his deed to X.

2. Suppose A's deed is invalid because of the incapacity of the grantor, or for some other reason. The result of this case would be different. Z can derive nothing from the adverse possession of A or X because he does not connect with A as a source of title. The de facto delivery of possession by A to X creates a sufficient privity between them, in spite of the defective instrument, but there is no reason why X's adverse possession should enure to the benefit of Z.[6] Hence there would seem to be no ground for the doctrine of estoppel here.

3. Suppose A never had possession or title but X enters under a valid deed claiming under color of title. This is the second possible position of the court in the instant case. The supposed life tenant, X, would derive nothing from the deed, even though valid in form, because the grantor had nothing to give. Therefore there is no ground for permitting the remainderman to assert that the heir of the life tenant should be estopped, because there is no interest passing to such remainderman.[7] The life tenant is merely using his deed to show that he is claiming an interest in fee out of the true owner; it is to show the extent of his claim. The fact that he later learns that no interest passed under the deed and that he has been an adverse possessor during the statutory period would not seem to confer any rights on the remainderman named in such a deed or estop the life tenant from denying such rights. There is no relationship between these parties, no basis for an estoppel can be found, and the adverse possessor would seem to hold the fee.

4. Suppose A is the lawful owner of the land, but the deed by which he pur-

4. Charles v. Pickens, 214 Mo. 212, 112 S. W. 551 (1908).
5. Ballantine, *loc. cit. supra* note 3; Charles v. Pickens, *supra* note 4.
6. Ballantine, *loc. cit. supra* note 3.
7. *Ibid.*

ported to convey to X and Z was invalid by reason of incapacity or informality and X holds under it for ten years. Here it would seem that neither the life tenant nor the remainderman acquires anything under the instrument. The life tenant then is not bound to refer his possession to the instrument and there is no reason why he or his heirs should be estopped to set this up.[8]

The distinction attempted to be brought out by the above illustrations is clearly defined by the English cases.[9] Where the instrument of conveyance, being valid, even though the grantor has only an incomplete possessory title, creates limited estates, such instrument governs the title which is later perfected. Where the instrument is wholly inoperative the result in otherwise, for the possession of the supposed life tenant, although named in the instrument as such, is independent of the instrument and does not enure to the benefit of those named as remaindermen.[10] The theory of the former rule is based upon the principle of *estoppel.* It is treated as similar to the estoppel of a tenant to deny the title of his lessor.[11] It seems that the idea is that ". . . . the intended life tenant, having acquired possession by force of the devise or conveyance as a lessee acquires possession by force of the lease, he, and those in privity with him, are precluded from asserting, as against any person such as a remainderman, who is in privity with the testator or grantor, that the title in fee was at the time in another, and was so capable of being acquired by the intended life tenant by force of the statute of limitations."[12] It has been suggested that the English view in refusing to apply the doctrine of estoppel to the cases where the instrument of conveyance was wholly inoperative harmonizes with the common law principle that disseisin does not operate to create a particular estate.[13]

The American cases have failed to make the distinction spoken of in connection with the English cases.[14] It has been pointed out by writers on the subject that the distinction is a valid one but that there should be some reason other than estoppel found for holding that the possession of the supposed life tenant is not adverse to the remainderman.[15]

The instant case, if our assumption is correct under the first position seemingly taken by the court, that at least some interest passed under the deeds to Mrs. Crismond, may be classified under the first hypothetical case above in that it presents the problem of the effect of adverse possession of one claiming title to a limited estate under a valid instrument of conveyance.[16] The result reached by the court is in accord with the established rule that a life tenant cannot hold adversely to his remaindermen,[17] and is justifiable under the discussion of the hypothetical cases above, which are based upon the doctrine of estoppel. But if the second position is followed, namely, that no interest passed under the deeds, the supposed life tenant would derive nothing from the deed, even though valid in form, because the grantor

8. *Ibid.*

9. Dalton v. Fitzgerald, (1897) 1 Ch. 440.

10. Ballantine, *loc. cit. supra* note 3.

11. 2 TIFFANY, REAL PROPERTY (2d. ed. 1920) 1985.

12. *Ibid.*

13. *Ibid.*

14. For the English cases see Re Anderson, (1905) 2 Ch. 70; Dalton v. Fitzgerald, *supra* note 9; Re Stringer's Estate, (1877) 6 Ch. D. 1, 10; Paine v. Jones, L. R. 18 Eq. 320 (1874); Board v. Board, L. R. 9 Q. B. 48 (1874). See the following American cases: Reynolds v. Trawick, 201 Ala. 449, 78 So. 827 (1918); Hanson v. Johnson, 62 Md. 25 (1883); Anderson v. Rhodus, 12 Rich. Eq. 104, 109 (S. C. 1860); Brown v. Brown, 82 Tenn. 253 (1884).

15. Ballantine, *loc. cit. supra* note 3.

16. If these were the facts, the court could have found support for deciding the instant case in accordance with the theory proposed in the earlier Missouri cases of Charles v. Pickens, *supra* note 4.

17. Falvey v. Hicks, 286 S. W. 385 (Mo. 1926); Wells v. Egger, 303 Mo. 26, 259 S. W. 437 (1924); Coulsom v. La Plant, 196 S. W. 1144 (Mo. 1917), McMurtry v. Fairley et al., 194 Mo. 502, 91 S. W. 902, 905 (1906); Graham v. Stafford, 171 Mo. 692, 72 S. W. 507 (1903); Hall v. French, 165 Mo. 430, 65 S. W. 769 (1901); Rothwell v. Jameison, 147 Mo. 601 49 S. W. 503 (1899); Carr v. Diggs, 54 Mo. 95 (1873); Salmon's Admr. v. Davis, 29 Mo. 176, 181 (1859); 2 TIFFANY, *supra* note 11, at 1984.

had nothing to grant; and there is no ground for permitting the remaindermen to assert that the life tenant should be estopped because no interest passed to such remaindermen. The case would then fall under the third hypothetical case above.

The court in the instant case, however, without clearly showing that good title passed under the deeds, or that any interest passed, based its decision on the theory that possession cannot be adverse to one until his right to possession had accrued as shown by the following statement of the court: "A person having a life estate in property cannot by his act or declarations, set up pretensions to an absolute estate, so as to make his possession an adverse one to the reversioner or remainderman. The reason for this is that there is no right of action in the reversioner until the particular estate has determined, and the possession of the life tenant is entirely consistent with the title of the reversioner. . . . . It is impossible, therefore, for the tenant for life to make his possession an adverse one to the claim of one who has the remainder or reversion."[18] It is submitted that this theory is preferable to the theory of estoppel as set forth in the English cases, if some interest actually passed under the deeds. However, the court does not distinguish instances where the conveyance is operative or where it is inoperative. If the latter, the theory of the court would seem to have no application.[19]

R. H. M.

18. *Supra* note 1, at 1110.

19. It may be contended that the remaindermen might assert a forfeiture of the life estate where the life tenant disclaims any interest in the remainderman, but he is under no obligation to do so and the statute of limitations will not run in such case. 2 TIFFANY, *Supra* note 11, at 2013. However, it is interesting to note the situation which has arisen in two of our sister states from what is believed to be a misconceived idea of the effect of statutes giving a remainderman or a reversioner an action to quiet title. IOWA CODE (1919) Section 8102 provides: "An action to determine and quiet the title of real property may be brought by any one, whether in or out of possession, having or claiming an interest therein, against any person claiming title thereto, though not in possession." NEBRASKA COMPILED STATUTES (1922) Section 5676 provides: "An action may be brought and prosecuted to final decree, judgment or order, by any person, or persons, whether in actual possession or not, claiming title to, or an interest in real estate against person or persons who claim, or apparently have, an adverse estate or interest, for the purpose of determining, and cancelling unenforceable liens, or claims against, or which appear to be against said real estate, and quiet the title to real estate." Section 5681 provides: "Any person or persons having an interest in remaindr or reveision. in real estate shall be entitled to all the rights and benefits of this act." In these states it has been held that if the life tenant executes a deed to a third party purporting to convey the fee and such is known to the remainderman he must bring suit to quiet title within the statutory period or else, not only the right to bring such action is barred, but also his right to assert his estate in remainder. Garrett v. Olford, 152 Iowa 265, 132 N. W. 379 (1911); Murray v Quigley, 119 Iowa 6, 92 N. W. 869 (1902); Criswell v. Criswell. 101 Neb. 349, 162 N. W. 302 (1917); Mauer v. Reifschneider, 89 Neb. 673, 132 N. W. 197 (1911). The courts of these two states have evidently lost sight of the difference between actions for possession of realty and actions to quiet title to the same. These decisions have been criticized and it is difficult to see how possession can be adverse to one's interests when he has no right to possession. Note (1918) 2 MINN. L. REV. 137.

The Missouri courts, under a similar statute, (MO. REV. STAT. (1929) sec. 1459), have reached the contrary, and what is believed to be, the correct result. The court, in the case of Armor v. Frey, 253 Mo. 447, 161 S. W. 829 (1913), laid down the rule that the statute of limitations for the recovery of possession of land does not start to run simply because under a statute the remaindermen may bring a suit to quiet title. This seems to be correct since the remainderman has no right to possession until the life estate has terminated. The court also said, "A suit to quiet title seeks simply to ascertain the status quo of the title or titles to the property. It does not ask for the recovery of real estate or the possession thereof."