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# COMMENTS

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## CONFLICT OF LAWS—DIVERSITY JURISDICTION—ACQUISITION OF DOMICILE OF CHOICE*

The determination of the domicile of a party to a suit has always presented a difficult problem in the area of diversity jurisdiction of the federal courts. This problem has recently arisen in *Milliken v. Tri-County Elec. Co-op., Inc.*[1] Jurisdiction of the federal district courts over civil actions may be based, among other grounds,[2] on diversity of citizenship of the parties,[3] this basis applying to suits removed to the federal courts from state courts as well as suits originating in the federal courts.[4]

In *Milliken* it was undisputed that the defendant, a corporation, was a citizen of South Carolina. It was also conceded that the plaintiff, a natural person, had been a citizen of South Carolina until a very few days before filing of the suit and was at the time of the hearing of the jurisdictional issue a citizen of South Carolina. The sole question was whether the plaintiff on the date suit was filed was a citizen of South Carolina or Maryland.

The plaintiff, whose alleged change of domicile was challenged by the defendant, was a student in South Carolina at the time of the injury giving rise to the suit. He was a minor and unmarried. His parents lived in Columbia, South Carolina. In January 1965, he transferred from Clemson College to the University of South Carolina in order to be near his parents during

* Milliken v. Tri-County Elec. Co-op., Inc., 254 F. Supp. 302 (D.S.C. 1966).

1. 254 F. Supp. 302 (D.S.C. 1966).

2. See 28 U.S.C. §§ 1331, 1333-1361 (1964).

3. 28 U.S.C. § 1332 (1964). Subsections (a) and (d) read as follows:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State, and foreign states or citizens or subjects thereof; and
>
> (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.
>
> (d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

A State cannot be a citizen of a State. Stone v. South Carolina, 117 U.S. 430 (1886).

4. 28 U.S.C. § 1441 (1964).

the periods between each of a series of operations, which were to be conducted in Baltimore, Maryland. He attended the first session of summer school at the University of South Carolina in 1965.

On July 16, 1965, the plaintiff went to Baltimore and rented an apartment for three months. (He later rented it for the month of October as well). He opened a bank account there, shipped most of his clothes to Baltimore, and applied for a Maryland driver's license which was refused because of his physical condition. He also registered to vote, although he may not have been entitled to do so.

On July 18, 1965, two days after arriving in Baltimore, the plaintiff became twenty-one. On that same day he entered Johns Hopkins Hospital for an operation. On July 20, 1965, the plaintiff filed suit in the federal district court seeking damages for the personal injury giving rise to the operations. He was released from the hospital on July 27, 1965, and several days later came to Columbia. He spent some time with his parents at their home and at the beach. Thereafter he returned to Baltimore to prepare for a trip to Canada with his uncle. He returned to Baltimore after the trip and entered the hospital there on September 12, 1965. During the four months for which the rent was paid on the apartment in Baltimore the plaintiff lived in his father's home *more* than he lived in the apartment.

Since the operation in September left him unable to care for himself, he returned to South Carolina to live. In the fall term of 1965 he enrolled in the University of South Carolina, stating on his application that he was a citizen of South Carolina.

The finding of the court that the plaintiff was a citizen of Maryland when suit was filed on July 20, 1965, seems to be based primarily on two factors. The plaintiff and his parents testified that after his transfer to the University of South Carolina in January 1965, to be near his parents, they decided that due to the possible emotional impact of successive operations "it would be best for his own adjustment for him to go it on his own."[5] This apparently is the reason he moved to Baltimore. He stated that he expected to make Baltimore his home. Secondly, no one expected the operation in September 1965 to leave him in such a helpless condition. The first factor evidently was taken as proof of a bona fide intent to establish a domicile in Baltimore despite

5. 254 F. Supp. at 304.

the evidentiary facts indicating the plaintiff went to Baltimore merely for the purpose of the operation. The second factor was apparently accepted as outweighing the impression given by the plaintiff's return to South Carolina after the September operation that he never intended to become a citizen of Maryland.

Citizenship as used in the context of federal diversity jurisdiction embodies the concept of domicile[6] and may be distinguished from residence.[7] As used in this discussion citizenship will refer to that in a state of the United States. Domicile may be thought of as the principal place of abode of a person or as that place to which he has the intention of returning whenever he is absent therefrom.[8] Residence may mean a temporary place of abode or one of several places in which one actually lives from time to time.[9] It is well recognized that one can have but a single domicile at any given time.[10] One must acquire a new domicile in order to lose the old domicile.[11] The change, however, requires no particular period of residence but can be instantaneous.[12] It is to be noted that the determination of domicile as giving rise to federal jurisdiction is a federal question and the court is not bound by the law of any state on the subject.[13]

Several types of domicile have been recognized, the difference lying in the manner of acquiring each type. Domicile of origin is that domicile with which one is born, generally being the domicile of his parents.[14] In this latter respect the domicile of origin is a specie of domicile by operation of law. Thus generally the domicile of a minor follows the domicile of his parents although

6. Russell v. New Amsterdam Cas. Co., 325 F.2d 996 (8th Cir. 1964).

7. Jeffcoat v. Donovan, 135 F.2d 213 (9th Cir. 1943).

8. See 13 WORDS AND PHRASES, "Domicile" 423-429 (perm. ed. 1965) and cases cited therein.

9. See Stine v. Moore, 114 F. Supp. 761 (W.D. La. 1953) (dictum), *aff'd*, 213 F.2d 446 (5th Cir. 1954).

10. Two jurisdictions can, of course, make conflicting findings as to the domicile of a person. *Compare In re* Dorrance's Estate, 309 Pa. 151, 163 Atl. 303, *cert. denied*, 287 U.S. 660 (1932), *cert. denied*, 288 U.S. 617 (1933) (deceased domiciled in Pennsylvania for inheritance tax purposes), *with In re* Dorrance's Estate, 115 N.J. Eq. 268, 170 Atl. 601, *supplemented* 116 N.J. Eq. 204, 172 Atl. 503 (Prerogative Ct. 1934), *decree sustained per curiam sub nom.* Dorrance v. Martin, 13 N.J. Misc. 168, 176 Atl. 902 (Sup. Ct. 1935), *aff'd per curiam*, 116 N.J.L. 362, 184 Atl. 743 (Ct. Err. & App.), *cert. denied*, 298 U.S. 678 (1936) (same deceased domiciled in New Jersey for inheritance tax purposes).

11. Desmare v. United States, 93 U.S. 605 (1877).

12. Cooper v. Galbraith, 6 Fed. Cas. 472 (No. 3193) (C.C.D. Pa. 1819).

13. Taylor v. Milan, 89 F. Supp. 880 (W.D. Ark. 1950).

14. Gates v. Commissioner, 199 F.2d 291 (10th Cir. 1952).

the minor may never have been present in the state of domicile.[15] A married woman is said to assume the domicile of her husband by operation of law despite the fact that she may never have been in the state of her husband's domicile.[16]

The domicile of choice requires physical presence in the state of domicile concomitant with the intention to make that state a home for an indefinite period. It is not necessary that the intent be to establish a permanent home but that there be no present intention to depart therefrom.[17]

The intent required to establish a domicile of choice is often presumed to be absent in the concept of domicile by operation of law. Thus it has been held that a married woman does not establish a domicile of choice by living apart from her husband[18] unless he has given her cause for separation.[19] The more modern view is that she may establish a separate domicile by showing actual intent.[20] A child usually retains his parents' domicile until his majority, but if he has been emancipated he may establish a domicile of choice.[21]

One ordered to military service is generally held to retain his domicile on entering the service.[22] However, by a proper showing of intent, such as requesting and obtaining assignment in a particular locality, he can acquire a domicile of choice.[23]

Physical presence in the domicile of choice is essential. However, there need not be a home established. If the requisite intent to establish domicile in the state exists, it is not necessary that a fixed local residence be adopted, and the new domicile is acquired upon entering into the state.[24]

15. Lamar v. Micou, 112 U.S. 452 (1884); Schultz v. McAfee, 160 F. Supp. 210 (D. Me. 1958) (by implication).

16. Thompson v. Stalmann, 139 Fed. 93 (C.C.D. Nev. 1905); Wise v. Bolster, 31 F. Supp. 856 (W.D. Wash. 1939).

17. Gilbert v. David, 235 U.S. 561 (1915); Chaney v. Wilson-Benner, Inc., 165 F. Supp. 64 (M.D. Pa. 1958).

18. Seegers v. Strzempek, 149 F. Supp. 35 (E.D. Mich. 1957).

19. Williamson v. Osenton, 232 U.S. 619 (1914).

20. Taylor v. Milam, 89 F. Supp. 880 (W.D. Ark. 1950) (alleged intent not factually supported); see also Gallagher v. Philadelphia Transp. Co., 185 F.2d 543 (3d Cir. 1950) (woman whose husband incarcerated for five to ten years obtained new domicile).

21. Spurgeon v. Mission State Bank, 151 F.2d 702 (8th Cir. 1945), *cert. denied*, 327 U.S. 782 (1946). While determination of plaintiff's domicile requires the use of federal law, this case used Missouri law to determine whether the minor plaintiff had been emancipated. See text accompanying note 11 *supra*.

22. Wise v. Bolster, 31 F. Supp. 856 (W.D. Wash. 1939).

23. Ellis v. Southeast Constr. Co., 260 F.2d 280 (8th Cir. 1958).

24. Marks v. Marks, 75 Fed. 321 (C.C.D. Tenn. 1896).

While some cases have explored technical aspects of presence, such as when one owns a home which straddles a state line,[25] the crucial issue seems to be intent. Intent must be distinguished from motive, however. Even where the motive for moving one's residence is to gain access to the federal courts in a certain dispute, there can be a change of domicile if there is a real intent to establish a home in the new domicile.[26]

The time at which the jurisdictional requisites must be met is the time of the commencement of suit.[27] A change in domicile subsequent to filing of the suit in federal court does not divest the court of jurisdiction.[28] However, facts occurring after the filing but prior to the hearing of the jurisdictional issue certainly bear on the issue of intent at the time of filing. In the leading case of *Morris v. Gilmer*,[29] the Court, while stating that citizenship can be changed instantly and that motive is not important, found that the plaintiff had moved to Tennessee solely for the purpose of bringing suit in the federal courts and intended to return to Alabama as soon as it was possible to do so without losing his access to the federal courts through diversity of citizenship. The Court held that the plaintiff did not have the requisite intent to establish a new domicile and dismissed the suit for want of jurisdiction.

In *Milliken* it is significant that the testimony showed that the plaintiff's reason for returning to South Carolina to live after the September 1965 operation arose out of a condition unforeseen at the time of his move to Baltimore—the physical helplessness to care for himself following the operation. Otherwise it would be difficult to reconcile the facts with the alleged intent. Where the facts belie the intent, the facts must control.[30]

The question of domicile is a mixed question of fact and law.[31] If the facts are undisputed it is for the judge to determine the question as a matter of law. However, the question of intent will frequently be at issue and is a factual matter which may be

25. See generally 28 C.J.S. *Domicile* § 14 (1941) and cases cited thereunder.
26. Paudler v. Paudler, 185 F.2d 901 (5th Cir. 1950), *cert. denied,* 341 U.S. 920 (1951).
27. Conolly v. Taylor, 27 U.S. (2 Pet.) 556 (1829).
28. Morgan's Heirs v. Morgan, 15 U.S. (2 Wheat.) 290 (1817).
29. 129 U.S. 315 (1889).
30. Russell v. New Amsterdam Cas. Co., 325 F.2d 996 (8th Cir. 1964).
31. Maple Island Farm, Inc. v. Bitterling, 196 F.2d 55 (8th Cir.), *cert. denied,* 344 U.S. 832 (1952).

decided by a jury in the court's discretion.[32] There is no right to a jury trial on the issue of diversity jurisdiction.[33]

Jurisdiction of the federal courts is never presumed[34] and the burden of proof of diversity of citizenship is on the party alleging diversity.[35] The establishment of a new domicile must be shown by clear and convincing evidence as a presumption exists against a new domicile having been acquired.[36]

Basically the *Milliken* case reaffirms the proposition that concurrent presence and intent are all that is required to constitute a change of domicile for a party *sui juris*. Finding the true intent of a party poses a difficult question. While, as in this case, the observable facts may seem to indicate otherwise, the court as trier of fact "must give credence to and weigh the evidence before it."[37] Where the evidence apparently forming the basis of the court's decision consists of testimony given before the court as to the subjective intent of the party alleging a change of domicile, the party losing the jurisdictional issue at the district level will have great difficulty prevailing on appeal. The appellate courts will not reverse findings of the trial court unless they are clearly erroneous, recognizing that the trier of fact, who had an opportunity to observe the witnesses, is in a better position to judge their credibility than is a reviewing court.[38] This rationale of the "clearly erroneous" rule would seem to make it less applicable to a decision based on demonstrable evidence of the conduct of the party allegedly changing his domicile, as here the credibility of the witness is less important. Since it will not always be possible to convince the judge at the trial level of the subjective intent of the party claiming a changed domicile, and in order to enhance the chances of the claimant on appeal, the attorney in advising a client desirous of changing his domicile should have that client establish demonstrable evidence of his intent to make the change.[39]

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32. Seideman v. Hamilton, 275 F.2d 224 (3d Cir.), *cert. denied*, 363 U.S. 820 (1960).

33. Gilbert v. David, 235 U.S. 561 (1915).

34. Miller v. Lee, 241 F. Supp. 19 (W.D.S.C. 1965).

35. *In re* Chaney, 39 F. Supp. 696 (W.D. Va. 1941).

36. Maple Island Farm, Inc. v. Bitterling, 196 F.2d 55 (8th Cir. 1952), quoting with approval from 28 C.J.S. *Domicile* §§ 16.a, 18.a (1941).

37. 254 F. Supp. at 305.

38. Walden v. Broce Constr. Co., 357 F.2d 242 (10th Cir. 1966); Mid-Continent Pipe Line Co. v. Whiteley, 116 F.2d 871 (10th Cir. 1941).

39. Chrystie, *Where Is or Was or Will Be Your Client's Domicile?*, PRAC. LAW. Oct. 1955, p. 13 lists a number of steps one can take to demonstrate his intent to establish a domicile.

## CRIMINAL LAW—CONFESSIONS—THE RESTRAINTS SOCIETY MUST OBSERVE CONSISTENT WITH THE FEDERAL CONSTITUTION IN INTERROGATING SUSPECTS*

If, indeed, "lightning struck" our system of criminal justice[1] in the 1964 case of *Escobedo v. Illinois*,[2] then one might say that an earthquake shook its very foundations when on June 13, 1966, in an opinion dealing with four cases, speaking for a court sharply divided five to four, Chief Justice Warren announced the decision in *Miranda v. Arizona*.[3] The essence of that decision, more concerned with a definitive examination of the relationship of the fifth amendment privilege to police interrogation than with a specific concentration on the facts of the cases before the court, was that before custodial interrogation has commenced, the suspect must be warned that he has the right to remain silent, that anything he says can be used against him in court, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him. These rights attach on custody, but may be waived if the suspect does so *voluntarily*, *knowingly*, and *intelligently*. The state has the burden of proving both that warnings were given and followed by the police and that, if waived, the waiver was voluntarily, knowingly, and intelligently made; all this must show affirmatively for a silent record will not suffice. These rules apply to exculpatory as well as inculpatory statements by a suspect.

The decision marks what is perhaps the final stage in the metamorphosis of the criteria for determining the admissibility of confessions. To fix the Court's present position in this long voyage, it is useful to chart its previous course. The test of admissibility by the Due Process clause began in 1936 with *Brown v. Mississippi*.[4] The "voluntariness" theme running through the entire line of decisions has never been susceptible of a single meaning but rather has been infused with a number of different factors, the general test being best summarized as whether the totality of the circumstances deprived the suspect of a "free choice to admit, deny, or refuse to answer"[5] and whether physi-

*Miranda v. Arizona, 86 Sup. Ct. 1602 (1966).

1. HALL & KAMISAR, MODERN CRIMINAL PROCEDURE 161 (1965).
2. 378 U.S. 478 (1964).
3. Miranda v. Arizona, 86 Sup. Ct. 1602 (1966).
4. 297 U.S. 278 (1936).
5. Lisenba v. California, 314 U.S. 219, 241 (1942).

cal and psychological coercion attained such a degree that "the defendant's will was overborne at the time he confessed."[6] Important factors bearing on the inquiry were repeated or extended interrogation,[7] threats or imminent danger,[8] physical deprivation such as lack of sleep or food,[9] limits on access to counsel or friends,[10] length and illegality of detention under state law,[11] individual strengths and capacities of suspects[12] and the suspect's individual weaknesses or incapacities.[13] Under the totality of circumstances approach, no single one of these factors guaranteed exclusion; the court measured their impact in an ambulatory fashion, determining to what degree they affected the confession in each case.

As a matter of strict interpretation, it is difficult to place *Escobedo* within the synthesis; it is anomalous in that it arose under the assistance of counsel clause of the sixth amendment. A general view of the corollary reasoning of the court in that decision, however, makes it quite relevant, for there the court, in affording the right to counsel prior to indictment, premised its argument on the overview that a system of law enforcement that depends on confession is inherently subject to abuse by police officers and that the adversary system begins operation when interrogation is commenced. *Escobedo* put one foot of the federal Constitution (the sixth amendment) in the door of the station house, and by implication, opened that door for subsequent complete entry.

The great change that *Miranda v. Arizona*[14] makes in the criteria for determining the admissibility of confessions is best revealed by an examination of its premises. The major premise is a strong suspicion of police tactics[15] and, accordingly, what dissenting Justice White portrays as a "deep-seated distrust of all confessions."[16] This leads to the conclusion that all police

6. Haynes v. Washington, 373 U.S. 503, 513 (1963); Lynumn v. Illinois, 372 U.S. 528, 534 (1963).

7. Chambers v. Florida, 309 U.S. 227 (1940).

8. Payne v. Arkansas, 356 U.S. 560 (1958).

9. Reck v. Pate, 367 U.S. 433 (1961).

10. Cicenia v. La Gay, 357 U.S. 504 (1958).

11. Haynes v. Washington, 373 U.S. 503 (1963).

12. Crooker v. California, 357 U.S. 433 (1958).

13. Lynumn v. Illinois, 372 U.S. 528 (1963).

14. 86 Sup. Ct. 1602 (1966).

15. Described by dissenting Justice Harlan as "a generally black picture of police conduct painted by the court." *Id.* at 1649.

16. *Id.* at 1661 (White, J., dissenting).

interrogations are inherently coercive and that all such pressure on the suspect should be eliminated. The holding is tantamount to saying that once in custody the first response to the first question is presumed to be the product of an overborne will. Thus the court replaces all the previous factors employed in resolving whether a suspect's will was, in fact, overborne with the absolute presumption that it was in the absence of an affirmative showing that warnings were given and that the suspect knowingly and intelligently waived his rights. "Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."[17] In fairness to the court, two things should be pointed out. The first is that the majority makes no pretense to the effect that they are following precedent in determining admissibility, admitting that "in these cases, we might not find the defendants' statements to have been involuntary in traditional terms."[18] The second is that the court had a compelling reason for rejecting the earlier test of totality of circumstances; i.e., the possibility that a violation of the sanctity of the constitutional guarantees of the fifth amendment by the police could be irredressable because of problems of proof imposed on the defendant. That is to say, that under the previous test, defendants were saddled with the burden of proving an overborne will, a grave task considering the fact that the police, the defendant's adversary, have the only means of corroborating testimony. Or, in the words of the Court, shifting the burden of proof to the state:

> Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.[19]

Thus, it is submitted that the Court's absolute presumption of coercion in the absence of warnings, rejecting the former criteria for determining admissibility, was motivated by the fact that under the traditional rule, injustice might be done some defendants who, while in fact coerced, could not prove it. This seems a commendable objective when one, casually examining the

17. *Id.* at 1619.
18. *Id.* at 1618.
19. *Id.* at 1628.

aforementioned criteria under the previous test, realizes that those criteria were all external standards, such as the length of interrogation, which necessarily fail to measure the psychological impact of a given interrogation tactic on a given defendant, in a given place and time. In essence, they fail to consider what transpires in the interrogation room itself.

*A. Progression from Escobedo*

As a convenient method of compassing the scope of *Miranda*,[20] an examination of the progress it marked from *Escobedo* is offered. In scrutinizing the principal questions left open by *Escobedo*, initial treatment will be accorded those explicitly answered by the majority in *Miranda*[21]; subsequently, questions implicitly addressed by the Court's reasoning in the latter decision will be explored.

The most debated areas left open by *Escobedo* revolved around the right to counsel: whether the suspect must request counsel, whether he is entitled to the *continued presence* of counsel, and whether counsel will be appointed for indigent defendants. Not only were the scholars divided on these questions, the courts were as well. Some state courts confined *Escobedo* strictly to its facts, stating that it does not apply unless counsel is trying to get into the interrogation room or unless he has instructed police to stop questioning his client,[22] a narrow interpretation indicative of obdurate refusal to discard the old standards, which, incidentally, portends a confusing fate for some of the less clear areas of *Miranda*.[23] Most state courts held that the *Escobedo* rationale does not come into play unless and until the suspect has specifically requested counsel.[24] Both a prominent state court[25] and the Third Circuit[26] held that the right was not dependent upon a

20. Miranda v. Arizona, 86 Sup. Ct. 1602 (1966).

21. *Ibid.*

22. State v. Fox, 151 Iowa 479, 131 N.W.2d 684 (1964); State v. Howard, 383 S.W.2d 701 (Mo. 1964); People v. Gunner, 15 N.Y.2d 226, 205 N.E.2d 852 (1965).

23. Miranda v. Arizona, 86 Sup. Ct. 1602 (1966).

24. People v. Hartgraves, 31 Ill. 2d 375, 202 N.E.2d 33 (1964), *cert. denied*, 380 U.S. 961 (1965); State v. Smith, 43 N.J. 67, 202 A.2d 669 (1964), *cert. denied*, 379 U.S. 1005 (1965); Linde v. Maroney, 416 Pa. 331, 206 A.2d 288 (1965); Browne v. State, 24 Wis. 2d 491, 131 N.W.2d 169 (1964), *cert. denied*, 379 U.S. 1004 (1965).

25. People v. Dorado, 42 Cal. Rptr. 169, 398 P.2d 361 (1965), *cert. denied*, 381 U.S. 946 (1965).

26. United States *ex rel.* Russo v. New Jersey, 351 F.2d 429 (3d Cir. 1965).

request. *Miranda*[27] holds that the suspect doesn't have to request counsel; that he will be warned of his right to counsel and will get counsel unless he waives that right; that if he is indigent, counsel will be appointed, and, apparently, that he is entitled to the continued presence of counsel. The last assertion is supported by the court's reasoning that "even preliminary advice given to the accused by his attorney can be swiftly overcome by the secret interrogation process."[28]

In an ancillary fashion, *Escobedo* directed attention to several other questions: whether the suspect should be warned of his rights to silence and counsel; whether rewarnings were necessary with each new interrogation technique; and finally, whether the rights that attach at custody apply to misdemeanants. *Miranda*[29] answered the first two questions by requiring warnings and prohibiting further questioning and use of subsequent interrogation techniques in the absence of a waiver of rights. The possible availability to misdemeanants of these rights is still unresolved.

*Miranda*[30] breaks with *Escobedo* also in that it constitutes a shift in the treatment of the right to counsel. In both *Gideon v. Wainwright*[31] and *Escobedo*, the right to counsel had been treated as rising under the sixth amendment. In the instant case, the right is viewed under the fifth amendment; the court reasoning that the indispensable safeguard against a coerced confession is the presence of an attorney.

### *B. Problem Areas*

The two aspects of the decision that most obviously promise disagreement and confusion are the questions of when the suspect's rights attach and what might constitute a "knowing and intelligent" waiver.

It is simplistic to say that the rights attach when custodial interrogation begins. Custody occurs when the suspect is detained against his will, either through an explicit arrest or detention brought about through duress, coercion, or threats.[32] Although courts have often used the word "custody" as synonymous

27. Miranda v. Arizona, 86 Sup. Ct. 1602 (1966).
28. *Id.* at 1625.
29. Miranda v. Arizona, 86 Sup. Ct. 1602 (1966).
30. *Ibid.*
31. 372 U.S. 335 (1963).
32. United States v. Mitchell, 179 F. Supp. 636 (D.D.C. 1959).

with "arrest,"[33] it is submitted that the court in the instant case views it as occurring when the suspect is removed from familiar surroundings against his will. The thrust of the Court's reasoning in this area seems to be that it is the intimidating, coercive aura of the station house that acts as a compulsion on the suspect and that, conversely, in field interrogation "the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present."[34] Elsewhere the court ventured that an individual in familiar surroundings might not feel himself under any compulsion. In stating that the compelling atmosphere is "not necessarily" present outside the station house, the court apparently left the question of the admissibility of confessions obtained in the field ambulatory, subject to the impact of particular facts on particular cases. For instance, a police car would probably be held to have a compelling atmosphere; it certainly is far removed from familiar surroundings. However, a confession in response to mild questioning in a suspect's home, absent warnings and waivers, when he is clearly not restrained would probably be admissible.

Without doubt, the greatest problem posed by the decision is the question of what constitutes a "knowing and intelligent" waiver of the right to silence and the right to counsel. The previous requirement had been only that the confession be voluntary; now, it must be made knowingly and intelligently as well.

A waiver of the right to silence obviously would be accepted as knowing and intelligent if it were made in the presence of the suspect's attorney.

> The presence of counsel in all cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion.[35]

Much greater difficulty is posed by a waiver of the right to counsel. If such a waiver is followed by interrogation and con-

33. United States v. Scott, 149 F. Supp. 837, 840 (D.D.C. 1957). Judge Youngdahl quoted authorities to the effect that "the term arrest may be applied to any case where a person is taken into custody or deprived of his full liberty . . . ."

34. Miranda v. Arizona, 86 Sup. Ct. 1602, 1630 (1966).

35. *Id.* at 1623.

fession as previously indicated, the state has the burden of demonstrating that the defendant knowingly and intelligently waived his privilege against self incrimination and his right to counsel. Waiver will not be presumed from a silent record. The record must affirmatively show that the accused was offered counsel but intelligently and understandingly rejected it. The individual does not waive his right to silence by answering some questions before invoking that right. All questioning must cease once the right to silence has been invoked; the same applies to the right to counsel with the exception that once counsel is present, in the absence of overbearing, some further questions may be permitted. Further, the mere fact that a defendant signs a statement containing a typed-in clause admitting that he has full knowledge of his legal rights, doesn't approach the knowing and intelligent waiver required to relinquish constitutional rights.

The rationale of the court in viewing counsel as the shield against the compelling atmosphere virtually presumes that there can be no knowing and intelligent waiver of the right to counsel. The opinion lists only one circumstance in which such a waiver might be upheld as valid; that is that "an express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver."[36] The important words here are "followed closely." However, other language in the opinion casts doubt upon even the foregoing qualifying as a waiver. For instance, in discussing the coercive atmosphere of the station house, the Court points up the great importance of the presence of an attorney thusly:

> The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today.[37]

And further:

> Whatever the testimony of the authorities as to the waiver of rights by the accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made

36. *Id.* at 1628.
37. *Id.* at 1625.

> is strong evidence that the accused did not validly waive his rights. In these circumstances, the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so.[38]

The problem is most sharply pointed up in the dissents of Justices Harlan and White. The former urges that "those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about [warnings and] waivers."[39] The latter inquires "if a defendant may not answer without a warning a question such as 'Where were you last night?' without having his answer be a compelled one, how can the court ever accept his negative answer to the question of whether he wants to consult his retained counsel or counsel whom the court will appoint?"[40] He concludes that in claiming a waiver of counsel "the State faces a severe, if not impossible burden of proof."[41]

### *C. The Possibility of Statutory Alternatives*

Here, it is enough to say that the procedures established by the Court are not absolute, in the sense that the Court indicates a willingness to accept adequate alternatives.

> It is impossible for us to foresee the potential alternatives for protecting the privilege which might be desired by Congress or the states in the exercise of their creative rule-making capacities. Therefore, we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional strait-jacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the states to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a

38. *Id.* at 1629.
39. *Id.* at 1644 (Harlan, J., dissenting).
40. *Id.* at 1660 (White, J., dissenting).
41. *Ibid.*

continuous opportunity to exercise it, the [following] safeguards must be observed.[42]

The fact that the Court did not foreclose the possibility of state action is important because it is probable that the former sharp conflict between the police and a suspect over how the police asked the questions will now shift to a dispute as to how they gave the requisite warnings, when they gave them, and whether they subsequently undermined them. Similar contention will doubtless arise over the question of whether waivers were knowingly and intelligently made. It is thus manifest that state action stripping the interrogation process of its secrecy will be necessary to insure its efficacy; further, since the burden of proof, a high one, is now on the state, such action would be in the best interests of the police. Proposals such as taping and filming the interrogation or having a judicial party present could meet this need. Such schemes, of course, would merely supplement rather than replace the safeguards promulgated by the court.

*D. General Guidelines for Police and Prosecutors*

In virtually eviscerating the custodial interrogation process, the decision has added greatly to the problems of adjustment already faced by our law enforcement officers as a consequence of the recent revolution in criminal justice. Accordingly, several minimal, general guidelines are offered:

1. Immediately upon taking a suspect into custody, an unequivocable warning of the right to silence and counsel, appointed or retained, together with an admonition that any statements made can be used in court against the defendant, should be made. The warning should be made immediately upon arrest to avoid such a situation as incarcerating the suspect without warning or interrogating him, then later eliciting a confession after warnings had been made and rights had been waived. In such a case, the confession would probably be inadmissible because the incarceration would be viewed as compulsion.

2. Before interrogating a suspect, a qualified independent party, such as a magistrate should re-issue the warnings. This is necessary both because the fact that warnings were given must show affirmatively on the record and because the police will probably lose any "swearing contest" with a defendant who

42. *Id.* at 1624.

denies that the warnings were given or asserts that they were improperly given. This heavy burden on the police is a logical outgrowth of the Court's rationale that since the state established the isolated circumstances of interrogation and has the only means of corroborating evidence, it should bear the yoke in this area.

If counsel for the suspect is on hand, making the warnings in his presence would serve the same purpose as having an independent party do so.

3. If the suspect wishes to waive any rights as to the existence of which he has been warned, this waiver should take place before an independent party unless counsel for the suspect is present. The state has the burden of proof here and should make certain that it has independent, corroborating authority that the defendant knowingly and intelligently waived.

4. In any case where conviction is unusually important to law enforcement officials, a waiver of the right to counsel by the suspect should not be accepted, and counsel should be appointed despite defendant's wishes. As previously suggested the state will have great difficulty proving a knowing and intelligent waiver of the right to counsel, if indeed, it can be proved at all. Law enforcement officials should exercise extreme caution in this area until further decisions clarify it.

This decision, predicated on the premise that police interrogation is inherently subject to abuse without adequate legal safeguards, goes far in the direction of moving the courtroom into the station house. It is manifest that interrogtaion is well on the way to becoming a quasi-judicial process.

JAMES L. MANN

## INSURANCE—LIABILITY OF INSURER FOR UNREASONABLE DELAY IN ACTING UPON AN APPLICATION FOR INSURANCE*

A common problem facing the courts is the liability, if any, that an insurance company incurs for failure to pass upon an application for insurance within a reasonable period of time. The classic situation is generally as follows: the plaintiff has made his application and paid a premium; the application and the premium have been forwarded to the home office for action thereon; the home office has failed to take prompt action, and during the delay the applicant-plaintiff suffers the injury he sought to insure against; the plaintiff, because the insurance company did not act, has nothing to help defray the expenses of his injury. Relying on the insurance company to act, he has not sought insurance elsewhere.[1]

Recently this problem arose in South Carolina in *Hinds v. United Ins. Co. of America*.[2] Because of the delay of the insurer in acting the policy issued to the plaintiff did not cover the plaintiff's heart attack. The plaintiff brought suit in tort alleging that due to the insurer's negligence in failing to act within a reasonable time the plaintiff's illness was not covered by the policy. The plaintiff further sought punitive damages, alleging that the insurer's delay was of sufficient length, taken with other facts, to give rise to the inference of willful and wanton conduct which would support an award of punitive damages. The court

*Hinds v. United Ins. Co. of America, 149 S.E.2d 771 (S.C. 1966).

1. This fact situation may be varied. Among the more common fact situations are failure of the agent to forward the application and failure of the insurance company to notify the applicant of rejection within a reasonable time.

2. 149 S.E.2d 771 (S.C. 1966). The fact situation here varies somewhat. The plaintiff had let a second policy issued by the defendant lapse because it did not cover that the plaintiff had understood it would. An agent of the defendant told the plaintiff that if he, the plaintiff, applied and paid a premium before March 15, 1963, the first policy the plaintiff had acquired from the defendant could be reinstated. The plaintiff did this on February 19. The defendant, by another agent, notified the plaintiff that the policy could not be reinstated, this notice not coming until July 23, 1963, approximately five months later. The plaintiff thereupon applied for a new policy, as the defendant's agent said he would have to do, and paid an additional amount, which together with the premium from the prior application, would be the premium for the new policy. The new policy was not issued until September 25, 1963, and was to be effective only from the date issued. The plaintiff suffered a heart attack March 20, 1964, but, by a provision excluding from the defendant's liability any expense suffered within six months of the effective date of the policy, the plaintiff was not covered therefor.

held that the plaintiff had stated facts, not only sufficient to give rise to a cause of action in tort, but also sufficient to support an award of punitive damages.

While there have been a number of similar causes of action brought in other courts,[3] and a remedy allowed in tort, this decision is important because of its ruling as to punitive damages. The ruling is unique,[4] for no other court has ever allowed an award of punitive damages in this type of action. It is the purpose of this comment to consider the decisions of other courts facing this factual situation and to note briefly where South Carolina stood at the time of *Hinds*.

### *A. Liability under the Contract Theory*

Before any remedy may be invoked in reliance upon the contract theory, the existence of a contract must first be established. Under the contract theory the general rule is "that mere delay in passing upon an application for insurance cannot be construed as an acceptance of it by the insurance company which will support an action ex contractu."[5] Where, however, the insurance company accepts the premium and retains it for an unwarranted length of time an inference of acceptance may be raised,[6] though this is not always true.

In *Hartford Fire Ins. Co. v. Garvin*,[7] the South Carolina Supreme Court coupled retention of premium with a misleading act, though not intentionally misleading, to imply acceptance of the contract by the insurance company.[8] In other South Carolina cases the court has emphasized that along with the retention of the premium there was a misleading act or representation, and that taken together they give rise to the inference of acceptance.[9]

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3. The first was Carter v. Manhattan Life Ins. Co., 11 Hawaii 69 (1897). *Hinds* was only the second occasion South Carolina granted a tort remedy in this situation, the first being in Tobacco Redrying Corp. v. United States Fid. & Guar. Co., 185 S.C. 162, 193 S.E. 426 (1937).

4. Hinds v. United Ins. Co. of America, 149 S.E.2d 771, 776 (S.C. 1966).

5. Raymond v. National Life Ins. Co., 40 Wyo. 1, ___, 273 Pac. 667, 674 (1929). See also Linnastruth v. Mutual Ben. Health & Acc. Ass'n, 22 Cal. 2d 216, 137 P.2d 833 (1943); Bradley v. Federal Life Ins. Co., 295 Ill. 381, 129 N.E. 171 (1920).

6. 12 APPLEMAN, INSURANCE LAW & PRACTICE, § 7226 (1943).

7. 136 S.C. 307, 133 S.E. 29 (1926).

8. Hartford Fire Ins. Co. v. Garvin, 136 S.C. 307, 133 S.E. 29 (1926).

9. Ward v. Liberty Life Ins. Co., 232 S.C. 582, 103 S.E.2d 48 (1958); Moore v. Palmetto State Life Ins. Co., 222 S.C. 492, 73 S.E.2d 688 (1952).

Similar results obtain in some other jurisdictions.[10] A few courts have gone further by determining that if the application provided for the prompt return of premiums if the application was rejected, failure to return the premiums within a reasonable time implied acceptance.[11]

The most important factor in these cases is the delay of the insurer. Although there is no standard formula by which the question of unreasonableness of delay may be phrased, it is generally held to be a question for jury determination regardless of its phrasing.[12] If unreasonableness is established and liability found, the amount of damages the jury may award the plaintiff in a suit on the contract of insurance and its breach is limited to the face amount of the policy.[13] South Carolina is the only state that allows an exception to this rule.[14] Closer attention to this exception is reserved for later consideration.

From the material in this area it is clear that the courts agree only that there may be a recovery and that whether there was an unreasonable delay is a question for the jury. In making this determination, the courts often confuse the contract theory with the tort theory of recovery. This was exemplified in *American Life Ins. Co. v. Hutcheson*[15] where the court indulged in a recitation of the fundamentals underlying the tort theory of recovery and then held for the plaintiff in contract. Another court went further and found a legal duty, a fundamental of the tort theory, and used it as grounds to imply acceptance in its decision under the contract theory.[16] This disparity of opinion, however, is not to be found in the contract theory alone.

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10. Bellak v. United Home Life Ins. Co., 211 F.2d 280 (6th Cir. 1954); Fitzgerald v. Colorado Life Co., 233 Mo. App. 235, 116 S.W.2d 242 (1938); Preferred Acc. Ins. Co. v. Stone, 61 Kan. 48, 58 Pac. 986 (1899).

11. Cloyd v. Republic Mut. Fire Ins. Co., 137 Kan. 869, 22 P.2d 431 (1933); Reck v. Prudential Ins. Co. of America, 116 N.J.L. 444, 184 Atl. 777 (1936).

12. Home Ins. Co. v. Swann, 34 Ga. App. 19, 128 S.E. 70 (1925) (reasonableness of delay question for jury); Hartford Fire Ins. Co. v. Garvin, 136 S.C. 307, 133 S.E. 29 (1926); Fitzgerald v. Colorado Life Co., 233 Mo. App. 235, 116 S.W.2d 242 (1938).

13. No state except South Carolina allows punitive damages in a suit for breach of an insurance contract. Mooney, *Punitive Damages for Breach of Insurance Contracts in South Carolina,* 1957 INS. L. J. 20.

14. *Ibid.*

15. 109 F.2d 424 (6th Cir.); *cert. denied,* 310 U.S. 625 (1940).

16. Robinson v. United States Ben. Soc'y, 132 Mich. 695, 94 N.W. 211 (1903).

*B. Liability under the Tort Theory*

The tort theory, which arose because there was only slight chance of recovery in contract, did not appear until 1897[17] and failed to achieve significant recognition until 1913.[18] In that year *Duffy v. Bankers' Life Ass'n*,[19] the leading case in this area and the one which laid the basis for the development of the tort theory, was decided.

The court, in *Duffy*, in imposing a legal duty on the insurance company, stated:

> But it is said that a certificate or policy of insurance is simply a contract like any other, as between individuals, and there is no such thing as negligence of a party in the matter of delay in entering into a contract. This view overlooks the fact that the defendant holds and is acting under a franchise from the state. The legislative policy, in granting this, proceeds on the theory that chartering such association is in the interest of the public to the end that indemnity of specific contingencies shall be provided those who are eligible and desire it, and for their protection the state regulates, inspects, and supervises their business. Having solicited applications for insurance, and having so obtained them and received payment of the fees or premiums exacted, they are bound either to furnish the indemnity the state has authorized them to furnish or to decline to do so within such a reasonable time . . . or suffer the consequences flowing from their neglect so to do.[20]

In imposing this legal duty upon the insurance company, the court called attention to the public interest and the franchise granted therefor. The idea was simply that there was public interest in insuring contingencies, such as death, in a life insurance policy. The legislature acted to provide the public with insurance if they were eligible and desired it, and to protect the public from any capriciousness the insurance companies might practice on the public by requiring the insurance company to act within a reasonable time. This reasoning is supported by

17. Carter v. Manhattan Life Ins. Co., 11 Hawaii 69 (1897).

18. Duffy v. Bankers' Life Ass'n, 160 Iowa 19, 139 N.W. 1087 (1913). It should be noted that one other case imposing tort liability was decided prior to *Duffy*. Boyer v. State Farmers' Mut. Hail Ins. Co., 86 Kan. 442, 121 Pac. 329 (1912).

19. Duffy v. Bankers Life Ass'n, *supra* note 18.

20. *Id.* at 1087-88.

cases[21] and by authors[22] and it seems to be the prevailing view for the imposition of tort liability.[23] This legal duty was found in *Tobacco Redrying Corp. v. United States Fid. & Guar. Co.*[24] and reaffirmed by the South Carolina court in *Hinds*.

Some courts, though granting the same remedy as *Duffy*, have adopted their own reasons which may be divided into five distinct classes:[25]

1. Contracts of insurance and negotiations therefore, by their purpose and nature, are impressed with characteristics unlike any other contracts and negotiations for contracts.[26] This seems to imply that the parties are of unequal standing; therefore, the insurance company is held to a higher standard.

2. From the nature of the risk "a reasonably prudent businessman, guided by considerations which ordinarily regulate conduct, would have acted with diligence."[27] The court here adds a new twist to the prudent man theory of torts.

3. An implied contractual relationship is created, based on the solicitation and receipt by the insurance company of an offer to enter into a contractual relationship, whereby the insurance company is said to have assented to act with diligence and to return the premium if the application is rejected.[28]

4. Where the applicant has paid a premium and the policy is to be in effect from the date of application (if the insurance company approves the application) the insurance

21. *E.g.*, Stark v. Pioneer Cas. Co., 139 Cal. App. 577, 34 P.2d 731 (1934); Republican Nat'l Life Ins. Co. v. Chilcoat, 368 P.2d 821 (Okl. 1961); Columbian Nat'l Life Ins. Co. v. Lemmons, 96 Okl. 228, 222 Pac. 255 (1923).

22. 12 APPLEMAN, *op. cit. supra* note 6, § 7226; Funk, *The Duty of Insurer to Act Promptly on Applications*, 75 U. PA. L. REV. 207 (1927).

23. See generally Annot., 32 A.L.R.2d 487 (1953).

24. 185 S.C. 162, 193 S.E. 426 (1937).

25. This classification is from Annot., 32 A.L.R.2d 487 (1953).

26. Bekken v. Equitable Life Assur. Soc'y of United States, 70 N.D. 122, 293 N.W. 200 (1940).

27. Boyer v. State Farmers Mut. Hail Ins. Co., 86 Kan. 442, 444, 121 Pac. 329, 331 (1912). It should be noted that Kansas decided cases in contract both before and after *Boyer;* Harvey v. United Ins. Co., 173 Kan. 227, 245 P.2d 1185 (1952); Preferred Acc. Ins. Co. v. Stone, 61 Kan. 48, 58 Pac. 986 (1899).

28. Travelers Ins. Co. v. Taliaferro, 176 Okl. 242, 54 P.2d 1069 (1935). See also Kukuska v. Home Mut. Hail-Tornado Ins. Co., 204 Wis. 166, 235 N.W. 403 (1931).

company should not be allowed to unduly prolong retention of the premium without incurring risk.[29]

5. The insurance company, by receipt of the premium conditioned on its acceptance of the offer, becomes a trustee for the return of the premium if the offer is not accepted and for unconditional acceptance of the premium if the application is approved.[30]

Generally, the courts imposing liability in tort have held that the question of unreasonable delay was one of fact to be decided by a jury.[31] The amount of damages that may be awarded by the jury has been held to be no more than the face amount of the policy.[32] But it must be remembered that none of these courts has been faced with the issue of punitive damages. The decision in *Hinds* could, in this respect, mark a significant milestone in the area of tort liability.

### *C. The Theory of No Liability*

The theory of no liability proceeds under the assumption that silence and delay will not imply acceptance,[33] but, rather should arouse the presumption of rejection.[34] The retention of the premium is regarded as immaterial.[35] From these assumptions the courts generally follow a line of disputing one or more of the reasons set forth for imposing tort liability. The leading case under the no liability theory is *Savage v. Prudential Life Ins. Co. of America*,[36] which takes aim at the "legal duty" reasoning in *Duffy* by stating that a franchise imposes no special duties. *Munger v. Equitable Life Assur. Soc'y of United States*[37] enlarges the attack made by *Savage* in arguing that all other cor-

29. DeFord v. New York Life Ins. Co., 75 Colo. 146, 224 Pac. 1049 (1924).

30. Strand v. Bankers' Life Co., 115 Neb. 357, 213 N.W. 349 (1927).

31. Stark v. Pioneer Cas. Co., 139 Cal. App. 577, 34 P.2d 731 (1934); Duffy v. Bankers' Life Ass'n, 160 Iowa 19, 139 N.W. 1087 (1913).

32. *E.g.*, Stark v. Pioneer Cas. Co., *supra* note 31. See also Funk, *supra* note 22.

33. United Ins. Co. of America v. Headrick, 275 Ala. 599, 157 So. 2d 19 (1963); Cauthen v. National Bankers Life Ins. Co., 228 Miss. 441, 88 So. 2d 103 (1956).

34. Home Ins. Co. v. Swann, 34 Ga. App. 19, 128 S.E. 70 (1925); Ross v. New York Life Ins. Co., 124 N.C. 395, 32 S.E. 733 (1899).

35. Hayes v. Durham Life Ins. Co., 198 Va. 670, 96 S.E.2d 109 (1957). These assumptions alone dispute the contract theory.

36. 154 Miss. 89, 121 So. 487 (1929).

37. 2 F. Supp. 914 (W.D. Mo. 1933).

porations are franchised by the state but no one had seriously considered imposing such a duty on them. *Swentusky v. Prudential Ins. Co. of America*,[38] arguing that there was no fundamental legal basis for imposing a duty because of public interest, also stated:

> But to hold that, because of these facts alone (franchise and public interest), there are imposed upon it duties or liabilities having no sanction in the established principles of law or in the statutes governing the insurance business would be to open a field of legal liability the limits of which we cannot encompass, and which would go far to introduce chaos in the entire business of insurance. . . .[39]

These cases give a fairly complete picture as to what the "no liability" courts have held in regard to legal duty as a basis for recovery in tort. A series of reasons other than that of legal duty has been considered by the no liability courts for granting a remedy in tort.

1. To impose a duty to exercise reasonable care in dealing with an offer of an applicant runs afoul of the basic legal principles governing all contracts, including contracts of insurance.[40] In other words the court doesn't think the nature of insurance makes it subject to any different rules than other contracts.

2. The prudent man theory is clearly an inadequate basis on which to rest the liability of an insurance company in tort.[41] This is apparently the extent of the comment on the prudent man theory.

3. To imply a contract to act promptly on an application for insurance is a promise for future action and requires consideration. No legal benefit was bestowed on the insurance company and no intended legal detriment was suffered by the applicant.[42]

4. Making the insurance company trustee for the premium . . . assumes a trust agreement, including an agreement, expressed or implied, that what has been paid will not be

38. 116 Conn. 526, 165 Atl. 686 (1933).
39. Swentusky v. Prudential Ins. Co., 116 Conn. 526, 528, 165 Atl. 686, 688 (1933).
40. *Ibid.*
41. Zayc v. John Hancock Mut. Life Ins. Co., 338 Pa. 426, 13 A.2d 34 (1940).
42. Swentusky v. Prudential Ins. Co., 116 Conn. 526, 165 Atl. 686 (1933).

> held indefinitely if the application is not accepted. If this be granted the full duty of the trustee is to return the premium advanced. The further assumption that the trustee has agreed to act one way or the other on the application and has therefrom a contractual duty to act begs the whole question as to whether there is such a duty. Moreover, the enforcement of a trust, and the awarding of damages incidental to its violation, is for equity, not for a court of law.[43]

5. As to the reason that the insurance company should not be allowed to unduly prolong the retention of the premium without incurring risk the only answer is that "no liability" courts consider retention of premiums immaterial.[44]

The one argument that covers the entire tort liability area is that courts that impose liability are engaging in judicial legislation.

> It is apparent if liability is here to be imposed in an action ex delicto this court will be compelled to engage in judicial legislation. If and when it is desirable to impose upon insurers additional burdens as requirements, the same should come through the legislative department and not by virtue of judge-made law.[45]

The idea seems to be that under the franchise the insurance company submits to regulation by the legislature under its police powers, and that the court does not have the power to "legislate" a legal duty upon the insurance company. To this end such a statute enacted in North Dakota has been upheld by the United States Supreme Court.[46]

### *D. South Carolina Law at the Time of Hinds v. United Ins. Co. of America*

The contract theory was firmly entrenched in South Carolina when *Hinds* reached the court. In *Hartford Fire Ins. Co. v.*

43. Munger v. Equitable Life Assur. Soc'y of United States, 2 F. Supp. 914, 917 (W.D. Mo. 1933).

44. Hayes v. Durham Life Ins. Co., 198 Va. 670, 96 S.E. 2d 109 (1957).

45. Schliep v. Commercial Cas. Ins. Co., 191 Minn. 479, ____, 254 N.W. 618, 622 (1934).

46. National Fire Ins. Co. v. Wanberg, 260 U.S. 71 (1922). The statute, COMP. LAWS N.D. § 4902 (1913), made the policy applied for go into effect if the insurance company had not notified the applicant of rejection within the required time.

*Garvin*[47] and in *Moore v. Palmetto State Life Ins. Co.*,[48] the court had held for the plaintiff in contract based on estoppel or implied acceptance. The court had set out the usual set of requirements, retention of premium and misleading representations.[49] Significantly, the court had also shown its adoption of the idea that the insurance business was affected by public interest and as a result it was under a legal duty to act within a reasonable time on applications.[50] The court had also granted a remedy in tort in *Tobacco Redrying*, there also adhering to the doctrine that an insurance company was under a legal duty.[51] It is apparent, therefore, that the court had entertained both theories and found both acceptable.

Further, the court had disposed itself to be more liberal towards the insured in the area of suits for the breach of contracts of insurance. No other jurisdiction has allowed punitive damages in a suit for breach of an insurance contract.[52] The disposition of the court in this area is indicated by the fact that given a fraudulent act[53] the court has not hesitated to affirm a judgment of punitive damages.[54] Since a suit for breach of contract in which punitive damages are sought presupposes the existence of a contract, it is not likely that punitive damages would be allowed in a delay situation. There is no authority for wholly discounting such a possibility however.

With this background, the decision in *Hinds* allowing a remedy in tort can hardly be termed a surprise. The court merely carried out its established policy. The decision allowing punitive damages, also no surprise, is significant because it purifies the tort by removing the stigma of damages limited by the policy.

*E. Conclusion*

It is submitted that the decision in *Hinds* is clearly correct. It cannot be subjected to the argument that it is judicial legisla-

47. 136 S.C. 307, 133 S.E. 29 (1926).
48. 222 S.C. 492, 73 S.E.2d 688 (1952).
49. Ward v. Liberty Life Ins. Co., 232 S.C. 582, 103 S.E.2d 48 (1958); Moore v. Palmetto State Life Ins. Co., 222 S.C. 492, 73 S.E.2d 688 (1952).
50. Moore v. Palmetto State Life Ins. Co., *supra* note 49.
51. Tobacco Redrying Corp. v. United States Fid. & Guar. Co., 185 S.C. 162, 193 S.E. 426 (1937).
52. Mooney, *supra* note 13.
53. Blackmon v. United Ins. Co., 233 S.C. 424, 105 S.E.2d 521 (1958) (dictum); Monroe v. Bankers Life & Cas. Co., 232 S.C. 363, 102 S.E.2d 207 (1958) (dictum).
54. Howser, *The Awarding of Punitive Damages for Breach of Insurance Contracts in South Carolina*, 1 S.C.L.Q. 150 (1948).

tion because there is an established legislative policy against allowing insurance companies to delay unreasonably in acting on an application. The legislature by statutes governs the insurance business in South Carolina,[55] and the Chief Insurance Commissioner is empowered to administer these laws.[56] The commissioner, if he finds an insurance company acting capriciously on applications as a practice, as opposed to an isolated incident, may call a hearing on the practice of the insurance company. If the insurance company cannot sustain the validity of its actions by evidence that it was acting in good faith, the commissioner may revoke the insurance company's license to do business in South Carolina.[57] With this established policy present, though the court took no specific notice of it, the decision in *Hinds* served to enforce the policy declared by the legislature, clearly within the realm of the court's authority. Because the court is enforcing the legislative mandate, all other arguments against this remedy seem to dissolve.

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55. S.C. CODE ANN. tit. 37 (1962).

56. S.C. CODE ANN. § 37-56 (1962).

57. Interview with Chief Deputy Insurance Commissioner of South Carolina, Mr. Howard Clark, in Columbia, Nov. 16, 1966. It should be added that the power of the commissioner to do this is not found in express terms, but from a reading of the statutes the power becomes evident, *e.g.*, S.C. CODE ANN. § 37-107(d) (1962), where the commissioner can refuse to license a foreign insurance company to do business in South Carolina if it has a history of improper insurance practice.

## TAXATION—CHANGE OF ACCOUNTING METHOD—TAXPAYER USING UNIT-LIVESTOCK-PRICE METHOD CANNOT CHANGE TO CASH BASIS TO ACCOUNT FOR SALES OF BREEDING CATTLE*

The recent case of *United States v. Catto*[1] involved ranchers who sought refunds of income taxes paid, claiming that they had the right to change from the accrual unit-livestock-price method to the cash method in accounting for gains derived from sales of their breeding cattle. The unit-livestock-price method, which the ranchers had used to compute their taxes, is a system of accounting for cattle inventory under which a herd is divided into categories according to kind and age with each animal considered a unit. "If a cattle raiser determines that it costs approximately $15 to produce a calf and $7.50 each year to raise the calf to maturity, his classifications and unit prices would be as follows: calves, $15; yearlings, $22.50; 2-year olds, $30; mature animals, $37.50."[2] Each year the increase in the cattle inventory resulting from the increased unit value is taken into ordinary income. This income is offset, however, by expenses which the rancher incurs for feed and other costs in raising the animal. Under this method of accounting, theoretically, expenses incurred by the rancher in raising the livestock are accumulated in the inventory values until the animals are sold, whereas under the cash method of accounting for livestock there is no accumulation of inventory costs and the amounts spent for raising the cattle are deducted as expenses in the year that they are incurred.

Livestock which are held for breeding purposes are taxed at a capital gains rate[3] (25%), which is normally lower than the rate for ordinary income. It can be seen that in accounting for breeding animals a rancher using the cash basis has a tax advantage over a rancher who uses the unit-livestock-price method because not only does a cash basis rancher get an earlier deduction, but also he is able to offset his expenses incurred in raising the livestock against ordinary income rather than offset capital gains income.[4]

* United States v. Catto, 86 Sup. Ct. 1311 (1966).

1. 86 Sup. Ct. 1311 (1966).

2. Treas. Reg. § 1.471-6(e) (1944).

3. Int. Rev. Code of 1954, § 1231(b)(3). Capital gains treatment is also available to livestock held over twelve months for draft or dairy purposes.

4. 3B MERTENS, LAW OF FEDERAL INCOME TAXATION 569 § 22.130 (1958).

In *Catto* there was no question that the cattle were breeding animals (as opposed to animals raised for slaughter which are taxed as ordinary income) and deserved capital gains treatment. The sole issue was whether the taxpayer should use the unit-livestock-price method or the cash method to determine his gain in the sale.

In 1958 the Fifth Circuit was faced with this same issue in *Scofield v. Lewis*.[5] The ranchers wanted to remove their breeding livestock from the unit-livestock-price inventory and give those cattle a zero basis to be used in determining the capital gains from their sale. This was in direct conflict with Treas. Reg. § 1.471-6(f)[6] which specified that if a taxpayer used the unit-livestock-price method he must apply it to *all* livestock raised. Another regulation[7] stipulated that a taxpayer may not change his method of accounting without securing the consent of the Commissioner of Internal Revenue. The court allowed the taxpayer to use the zero basis (the result of the cash method) to determine the gain. The court held that the regulation that required a rancher to include a breeding animal in inventory was invalid because it was in direct conflict with section 117(j) of the Internal Revenue Code.[8] Not only did section 117(j), as amended in 1951, say that livestock held for breeding purposes was property used in trade or business and "not property of a kind which would properly be includible in the inventory of the taxpayer . . .,"[9] but also the court felt that when Congress amended section 117(j), its intention was to allow all livestock raisers to have the full benefit of a capital gains treatment rather than to make some accrual taxpayers reduce their capital gains upon disposition by decreasing ordinary income in earlier years. The court also reasoned that since the regulation which required the taxpayer to use the unit-livestock-price method for his breeding animals was invalid, the taxpayer's use of the cash method did not constitute a change in accounting methods and thus it was not necessary to obtain permission from the Commissioner.

When met with the same problem in 1961, the Eighth and Ninth Circuits rejected the *Scofield* decision. After a detailed

5. 251 F.2d 128 (5th Cir. 1958).

6. Treas. Reg. 111, § 29.22(c)-6 as amended by T.D. 5423, 1945 CUM. BULL. 70.

7. Treas. Reg. 111, § 29.41-2 [now Int. Rev. Code of 1954, § 446(e)].

8. Now Int. Rev. Code of 1954, § 1231.

9. Int. Rev. Code of 1954, § 1231(b)(1).

analysis of the history of the statutes and regulations in question the Eighth Circuit Court of Appeals in *United States v. Ekberg*[10] concluded that the 1951 amendment allowing capital gains treatment to breeding livestock regardless of age, although enacted subsequent to the promulgation of § 1.471-6, did not invalidate the regulation. The court felt that the intent of Congress when it passed the 1951 amendment was to clarify the confusion that had existed and to codify the case law in the area of gains from the sale of breeding animals.[11] The court also noted that *Scofield* had been limited to its facts within its own circuit;[12] that the accrual basis had some advantages over the cash basis which were not brought out in *Scofield*; and that the taxpayer must assume the burdens as well as the benefits of the system that he had selected of his own free choice. Having deduced from its analysis that *Scofield* was wrong in holding § 1.471-6(f) invalid, the court concluded that the taxpayer's actions in *Ekberg* were a change in accounting method and required the Commissioner's consent, which he was justified in refusing.

When the Ninth Circuit rejected the *Scofield* reasoning in *Little v. Commissioner*,[13] it emphasized that regardless of the accounting method used (cash or accrual), "costs attributable to items receiving capital gains treatment are customarily capitalized throughout their life and are reflected in the ultimate adjusted basis of the goods at the time of their sale or disposition,"[14] and including the breeding cattle in the inventory was a simpler way of obtaining this result. Having reached this conclusion, the court then sought to explain why taxpayers using the cash method did not have to capitalize their costs in raising breeding livestock, and the only explanation offered was that each system has its own benefits and that a taxpayer should not get the benefits of both but should adhere to a unified system as prescribed by the Commissioner.

10. 291 F.2d 913 (9th Cir. 1961).

11. See H. REP. No. 586, 82d Cong. 1st Sess. 32, 1951-2 CUM. BULL. 380.

12. In Carter v. Commissioner, 257 F.2d 595 (5th Cir. 1958), the taxpayer tried to use the cost of breeding animals that he had *purchased* (as opposed to raised) as the basis of his gain from sale rather than the unit-livestock-price inventory value. The court in limiting *Scofield* to its facts pointed out that a rancher who used the unit-livestock-price method is permitted by § 1.471-6 to keep purchased cattle out of inventory; and once the taxpayer adopted the method of including them in inventory, he could not change at will.

13. 294 F.2d 661 (9th Cir. 1961).

14. *Id.* at 663-64.

In *United States v. Catto*[15] the United States Supreme Court had to resolve the conflict between the Fifth Circuit and the Eighth and Ninth Circuits. The District[16] and Circuit Courts[17] had allowed the *Catto* taxpayers the refund, following the *Scofield* decision. The Supreme Court reversed, agreeing with the Eighth and Ninth Circuits and holding (1) that the costs of raising breeding livestock were of a capital nature and therefore should be deferred by accrual-method taxpayers; (2) that Treas. Reg. § 1.471-6(f) requiring ranchers who used the unit-livestock-price method to include their breeding animals in inventory was a valid Regulation; (3) that it was within the Commissioner's discretion to refuse to allow the taxpayers to make this change and that in doing so, he had not acted arbitrarily; and (4) that the discriminatory tax advantage afforded a cash basis taxpayer over an accrual taxpayer was not a sufficient reason to allow the taxpayers to change methods. The taxpayers were not entitled to take advantage of every shift in the revenue laws and, moreover, they were not asking to switch entirely to the cash method but rather to have a hybrid system offering the advantages of both.

The taxpayers' strongest contention in this case was that the costs of raising breeding livestock were not to be deferred in inventory but should be expensed currently. To support this position they cited a forty-five year old Regulation[18] which specified that feed and other costs of raising livestock may be deducted currently. The government argued that this regulation must be considered in connection with Regulation § 1.161-4(b) which requires that this expense be offset by income resulting from the increase in inventory due to the increased value of livestock. But the taxpayers pointed out that § 1.161-4 also indicates that breeding livestock need not be in inventory, and it follows that once freed from inventory the current expenses are not balanced by the ordinary income. The only statute or regulation that requires a taxpayer to include breeding livestock in inventory is § 1.471-6(f), but this applies only to accrual basis taxpayers who use the unit-livestock-price method. The court, despite this lack of administrative or statutory authority, con-

15. 86 Sup. Ct. 1311 (1966).
16. Catto v. United States, 223 F. Supp. 663 (D.C.W.D. Tex. 1963); Wardlaw v. United States, 223 F. Supp. 631 (D.C.W.D. Tex. 1963).
17. United States v. Catto, 344 F.2d 227 (5th Cir. 1965); United States v. Wardlaw 344 F.2d 227 (5th Cir. 1965).
18. Now Treas. Reg. § 1.162-12 (1958).

cluded that the expenses of raising breeding livestock should be capitalized. Its reasoning was based upon the broad policy that costs incurred in the acquisition, production or development of property used in trade or business must be deferred.[19]

Once it is stated that *all* costs of raising breeding livestock should be capitalized, the question arises why are cash method taxpayers not required to defer them? Theoretically, the only difference between the cash basis and the accrual basis should be the timing of deductions; if costs are to be deferred, both systems should be required to defer them.[20]

The reason for this difference might be explained by the history of the statutes and regulations concerning farmers. Early in the history of the income tax law the Secretary of the Treasury and the Commissioner liberalized the cash method to allow a current deduction for the cost of raising animals in the interest of giving the farmers a more simplified method of accounting.[21] At that time capital gains treatment was not allowed for breeding livestock and therefore there was no difference in the two methods.[22] Then in 1942 § 117(j) was enacted[23] allowing capital gains on property used in trade or business, but even after the amendment "the Commissioner as a practical matter and largely without success, . . . consistently resisted and attempted to limit the allowance of capital gains treatment to breeding livestock."[24] Finally the case law that had developed was codified into the 1951 amendment to § 117(j) and livestock held for draft, breeding, or dairy purposes, regardless of age, was allowed capital gains treatment.[25] When this amendment was passed, both Congressional Committee Reports emphasized that gains from sales should be computed in accordance with the method *presently* employed.[26] After the 1951 amendment the Secretary of the Treasury asked Congress to make cash basis taxpayers capi-

19. The court cited Int. Rev. Code of 1954, §§ 263 (capital expenditures), 471 (inventories), 1011-13, 1016(a)(1) (the various basis statutes); Treas. Reg. §§ 1.263(a)-2(a) (1958), 1.471-1 (1958), 1.1016-2 (1957).

20. See Treas. Reg. § 1.446-1(c) (1957).

21. United States v. Catto, 86 Sup. Ct. 1311, 1315-16 (1966).

22. *Id.* at 1316.

23. Now Int. Rev. Code of 1954, § 1231.

24. United States v. Ekberg, 291 F.2d 913, 921 (8th Cir. 1961).

25. Ch. 521, 65 Stat. 452, § 324 (1951) [now Int. Rev. Code of 1954, § 1231(b)(3)].

26. S. REP. No. 781, 82d Cong. 1st Sess. 42, 1951-2 CUM. BULL. 488; H. REP. No. 586, 82d Cong. 1st Sess. 32, 1951-2 CUM. BULL. 380.

talize costs.[27] Ranching interests introduced a bill to allow accrual taxpayers a current deduction for the cost of raising breeding cattle.[28] Neither faction won and § 1231 was enacted without changing the livestock provision.

The Court had to use this historical background to explain an exception that immediately arose once it held the cost of raising livestock must be capitalized. Also in holding this the Court chose the broad policy and accounting concept that all "costs incurred in the acquisition, production, or development of capital assets, inventory, and other property used in the trade or business may not be currently deducted, but must be deferred until the year of sale"[29] rather than a specific regulation[30] which provides that the costs of feed and other costs in raising livestock may be expensed.

Since the Court felt that the costs of raising livestock were of a capital nature, it had little trouble in upholding the validity of Treas. Reg. § 1.471-6. This, of course, overruled *Scofield.* Next, it held that the Commissioner's refusal to allow this change in method was within his discretion and not arbitrary. The discretion of the Commissioner in granting a change in accounting method has been held repeatedly to be very broad.[31]

The fortunate advantage of the cash basis taxpayer in this situation bothered the Court somewhat, but despite the difference in the two systems, it felt that the Commissioner is not required to allow a change in method every time a fluctuation occurs in the tax law; once a taxpayer has selected an accounting method, he takes it with the risk that the law or the Commissioner's rulings might change.[32] There might be a case in which it would be completely inequitable to compel a taxpayer to adhere to a method, but in *Catto* since the taxpayers sought a hybrid cash and accrual system with the benefits of both rather

27. Brief for Petitioner, Writ of Certiorari, p. 15 United States v. Catto, 86 Sup. Ct. 1311 (1966).

28. *Ibid.*

29. United States v. Catto, 86 Sup. Ct. 1311, 1315 (1966).

30. Treas. Reg. § 1.162-12 (1958).

31. *E.g.,* Auto Club of Mich. v. Commissioner, 353 U.S. 180 (1957); Brown v. Helvering, 291 U.S. 193 (1934); American Co. v. Commissioner 317 F.2d 604 (2d Cir. 1963); Commissioner v. O. Liquidating Corp. 292 F.2d 225 (3d Cir. 1961); United States v. Ekberg, 291 F.2d 913 (8th Cir. 1961); Irvine v. United States, 212 F. Supp. 937 (1963); Peterson Product Co. v. United States, 205 F. Supp. 229 (1962) *aff'd,* 313 F.2d 609; Broida, Stone & Thomas, Inc. v. United States, 204 F. Supp. 841 (1962) *aff'd,* 309 F.2d 486.

32. Commissioner v. South Texas Lumber Co., 333 U.S. 496 (1947); Helvering v. Wilshire, 308 U.S. 90 (1939).

than a consistent application of one method, the Court felt that there was no such inequity.

There was no inequity despite the fact that the taxpayer in *Wardlaw*[33] had not "elected"[34] the unit-livestock-price method. In 1944 when the unit-livestock-price method was promulgated, the *Wardlaw* taxpayer was required to use the unit-livestock-price method because of a previous method that he had used. His original choice of accounting system was without the benefit of any knowledge of capital gains treatment of breeding livestock or of the requirement that he use the unit-livestock-price method. So it can be seen that the Supreme Court's holding extends not only to a method of accounting which a taxpayer has selected, but also to a method which he was required to follow due to a previous election.

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33. The Wardlaw and Catto cases were consolidated for hearing before the Supreme Court. See Wardlaw v. United States, 223 F. Supp. 631 (D.C.W.D. Tex. 1963) *aff'd*, 344 F.2d 225 (5th Cir. 1963).

34. Compare Treas. Reg. § 1.471-6(f) (1958): "A taxpayer who *elects* to use the unit-livestock-price method must apply it to all livestock raised whether for . . . breeding . . . purposes."