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Constitutional Law - Due Process - Failure to Apprise Defendant of Legal Rights

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CASE NOTES

CONSTITUTIONAL LAW — DUE PROCESS — FAILURE TO APPRISE DEFENDANT OF LEGAL RIGHTS. The defendant was convicted of the crime of first degree murder in 1935, after entering a plea of guilty at his arraignment in district court. In 1948, he made a motion to set aside his conviction on the grounds that he was not accorded the right of assistance of counsel, that he was not informed of his constitutional rights or the consequences of a plea of guilty, and that the conviction was obtained by fraud and deceit. The facts developed at the hearing showed that he was arrested on November 25, 1935, appeared before a grand jury investigating the crime the same day, was held overnight, waived his preliminary hearing the next day and was immediately arraigned. A relative was denied the right to see him until after the arraignment, at which the guilty plea was entered, had ended and the defendant was on his way to the penitentiary. On this set of facts, the Supreme Court of North Dakota *held*, in view of the defendant's youth, misleading statements made to him by the attendant officials, and extreme haste displayed in the case, that the defendant's waiver of his rights was not freely and understandingly made. The conviction was set aside. *State v. Magrum*, 38 N.W.2d 358 (N.D. 1949).

The instant case is in harmony with the spirit of the Constitutional provisions regarding due process of law as these have been recently construed by the United States Supreme Court.[1] In *Upshaw v. United States*,[2] a conviction for grand larceny based on confessions made during a 30-hour period while the prisoner was held after police had arrested him without a warrant was reversed, the Supreme Court stating that the case was controlled by *McNabb v. United States*.[3] The *McNabb* case turned upon the effect to be given confessions secured by illegal detention, and reversed a conviction based on confessions secured while the defendants were so detained. It was stated that the requirement of the federal court rules[4] that prisoners should promptly be taken before committing magistrates was to check resort by officers to "secret interrogation of persons accused of crime."[5] This ruling, however, obviously

[1] See, *e.g.*, Watts v. State of Indiana, 69 Sup. Ct. 1347 (1949); Turner v. Commonwealth of Pennsylvania, 69 Sup. Ct. 1352 (1949); Harris v. South Carolina, 69 Sup. Ct. 1354 (1949); Upshaw v. United States, 335 U.S. 410 (1948).

[2] 335 U.S. 410 (1948).

[3] 318 U.S. 332 (1943).

[4] "An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States . . . ." Fed. R. Crim. P. 5(a).

[5] McNabb v. United States, 318 U.S. 332, 344 (1943). The decision is obviously aimed at the use of "third degree" methods. "Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an improtant safeguard — not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. For this procedural requirement checks resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use." Mr. Justice Frankfurter, *id.* at 343-44.

is not binding on the states since it rested on the interpretation of federal law.[6] The North Dakota court has stated that ". . . the better rule is that mere delay in taking a defendant before a committing magistrate as required by statute, will not render a confession made in the meantime inadmissible." [7] This ruling is apparently in conflict with the *McNabb* decision, since the North Dakota court has indicated that the North Dakota statutes on the point, which provide that the arrested person be taken before the most accessible magistrate without necessary delay when an arrest is made by a peace officer without a warrant,[8] is in effect the same as the federal statute construed in the *McNabb* case.[9] An explanation suggested by the court was that the case wherein these statements were made differed widely on its facts from the *McNabb* holding.[10]

Several recent cases in the United States Supreme Court have indicated the court intends to throw rigorous safeguards about the constitutional rights of an accused person.[11] It is clear, as the instant North Dakota case also indicates, that ". . . a confession by which life becomes forfeit must be an expression of free choice . . . (and) if it is the product of sustained pressure by police it does not issue from a free choice." [12] However, mere advice or admonition to an accused person to speak the truth will not render a resulting confession involuntary so long as the confession was not induced by hope of some advantage or compelled by fear of some consequence.[13] In other words, the confession must not be obtained in circumstances which deprive the accused of his mental freedom.[14]

The factor of youth of the accused in criminal cases involving confessions appears to carry substantial weight with the courts in considering the question of whether a confession is voluntary.[15] Of course, where

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[6] State v. Nagel, 75 N.D. 495, 28 N.W.2d 665 (1947); Fry v. State, 78 Okla. 299, 147 P.2d 803 (1944); State v. Folkes, 174 Ore. 568, 150 P.2d 17 (1944).

[7] State v. Nagel, 75 N.D. 495, 520, 28 N.W.2d 665, 679 (1947).

[8] N.D. Rev. Code §29-0625 (1943).

[9] State v. Nagel, 75 N.D. 495, 519, 28 N.W.2d 665, 679 (1947).

[10] In the *McNabb* case, two defendants were arrested for the shooting of a federal officer on a Thursday morning, and were held and questioned intermittently until Friday noon. A third defendant surrendered Friday morning, was questioned for five or six hours and then confronted with the statement that the others accused him of firing the fatal shots. He then admitted firing at least one shot. The questioning of all three continued until Saturday morning, when the officers got all the discrepancies straightened out. The record did not show when the defendants were taken before a committing magistrate. 318 U.S. 332 (1943). In *State v. Nagel*, the defendants were arrested about 5 a.m. on July 10. They were taken to the city jail and confined until the afternoon, when they were questioned and made and signed written statements admitting guilt. A preliminary examination was had two days later. 75 N.D. 495, 28 N.W.2d 665 (1947).

[11] See note 1, *supra*.

[12] Watts v. State of Indiana, 69 Sup. Ct. 1347, 1350 (1949).

[13] State v. Kerns, 50 N.D. 927, 198 N.W. 698 (1926).

[14] *See* Lyons v. Oklahoma, 322 U.S. 596, 602 (1943).

[15] In Haley v. Ohio, 332 U.S. 596 (1947), a widely discussed case, a fifteen-year-old defendant was arrested for the murder of a shop keeper. He was questioned for approximately five hours until he confessed, and then held incommunicado for three days, and his mother was not allowed to see him until five days after the arrest. During the first three days he was not allowed to see a lawyer. In reversing the conviction, the Supreme Court indicated that it was

physical punishment is used, the authorities are unanimous to the effect that confessions are inadmissible.[16]

The ruling of the North Dakota court on the effect of the so-called prompt arraignment statute[17] seems opposed in its rationale to the position taken by the Minnesota Supreme Court in *State v. Schabert.*[18] In that case, a feeble-minded woman accused of shooting her husband was held for two days, being refused counsel, advice, or even allowed to see a priest. The conviction was reversed, the court holding that a confession obtained during the two-day interval was involuntary. It was said that ". . . fundamental fairness to the accused requires that he should with reasonable promptness be taken before a magistrate in order to prevent the application of methods approaching what is commonly called the 'third degree'." [19] But whatever the conflict of authority on the effect of delay in bringing the accused before a magistrate, it is clear that excessive speed in forcing a defendant to trial violates the due process requirement. A leading case on this subject is *Commonwealth v. O'Keefe* [20] in which it was held that where a defendant was arrested at 11 a. m., indicted the same day, and was forced to trial in the afternoon and convicted, the due process requirement was not met. This holding seems squarely in point with the instant case.

The effect of a refusal to accord an accused person the assistance of counsel has occasioned much disagreement among the experts. The Massachusetts courts have adopted the rule that even where the defendant is indigent, it is not necessary to appoint counsel in his defense unless the case is a capital one.[21] The Supreme Court has sustained this position.[22] But where the accused is able to procure counsel, it is clear that a waiver of his rights in this respect must be freely and understandingly made, a point which was stressed in the instant case. It might also be mentioned that the instant case clears up a technical point which has previously been mentioned in the *North Dakota Bar Briefs.*[23] In 1947, the United States Supreme Court set aside the conviction of a prisoner sentenced to a life term in Illinois on the ground that the ap-

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very doubtful that a boy of 15 would understand his constitutional rights even if told of them.

[16] Malinski v. New York, 324 U.S. 401 (1945); Lyons v. Oklahoma, 322 U.S. 596 (1944) (use of terrorization by placing a pan of the victim's bones in the lap of the accused); Brown v. Mississippi, 297 U.S. 278 (1936) (Negro defendants in this case were whipped, beaten and even hanged for short periods until they confessed. The Supreme Court reversed, 9-0); Ziang Sung Wan v. United States, 266 U.S. 1 (1924). *Cf.* Ward v. Texas, 316 U.S. 547 (1942).

[17] N.D. Rev. Code §29-0625 (1943).

[18] 218 Minn. 1, 15 N.W.2d 585 (1944).

[19] *Id.* at 4, 15 N.W.2d at 588.

[20] 298 Pa. 169, 148 Atl. 73 (1929). "What we here decide is that to force a defendant, charged with a serious misdemeanor, to trial within five hours of his arrest, is not due process of law, regardless of the merits of the case. If it can be done here, it can on a charge of any other misdemeanor; if so, a man may be walking the streets, free, in the morning, and on his way to prison, a convicted criminal, in the afternoon." *Id.*148 Atl. at 75.

[21] Commonwealth v. Blondin, 324 Mass. 564, 87 N.E.2d 455 (1949); Allen v. Commonwealth, 324 Mass. 558, 87 N.E.2d 192 (1949).

[22] Bute v. Illinois, 333 U.S. 640 (1948); Foster v. Illinois, 332 U.S. 134 (1947); Betts v. Brady, 316 U.S. 455 (1942).

[23] See Note, 24 N.D. Bar Briefs 156 (1948).

peal system of Illinois was inadequate in that it did not provide for adequate review by a higher court in the case of a convicted person who claimed factual errors in the proceedings.[24] It has been pointed out that the same defect existed in the appeal system of the North Dakota courts.[25] By treating the defendant's motion to set aside the conviction in the instant case as analogous to a writ coram nobis, the North Dakota court has remedied this deficiency.

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CONSTITUTIONAL LAW — DUE PROCESS — VALIDITY OF ORDINANCES SETTING CLOSING HOURS FOR BARBER SHOPS. Under a Poughkeepsie, N. Y., city ordinance prescribing business hours for barber shops, the plaintiff was arrested for cutting hair before opening time. On writ of habeas corpus to the New York Supreme Court, it was *held*, that the ordinance was an "unconstitutional invasion of the right to earn a living," guaranteed by the "due process" clauses of both the United States and New York Constitutions. *People* ex rel. *Pinello v. Leadbitter*, 194 Misc. 481, 85 N.Y.S. 2d 287 (Sup. Ct. 1948).

It is undisputed that barbering is subject to stringent regulations, licensing and inspection to protect the public from communicable diseases.[1] Regulation of maximum work-hours per day or week for individual barbers has also been upheld to protect the public from the sharp shears and razors wielded by tired tonsorialists.[2] So-called "questionable businesses" are likewise subject to regulation of business hours under the police power to protect public morals and prevent crime.[3] All these regulations tend to promote the public health, morals, comfort or welfare and are thus valid exercises of the police power. However, barbering in itself is not a questionable business.[4] In fact, a late-hour shop performs a distinct public service.[5] The instant opinion properly recognizes that an ordinance setting opening and closing hours for barber shops has no legitimate relation to the protection of the public health, morals, comfort or welfare. "It is but an arbitrary and unwarranted interference with a merchant's business. One, or a number of barbers . . . cannot, by legislation, compel every other proprietor to open or close at the same hours . . . ." [6] A contrary view — that a closing ordinance should be held

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[24] Marino v. Ragen, 332 U.S. 561 (1947).
[25] See Note, 24 N.D. Bar Briefs 156 (1948).

[1] *In re* Opinion of the Justices, 300 Mass. 615, 14 N.E.2d 953 (1938); Hanzal v. City of San Antonio, 221 S.W. 237 (Tex. Civ. App. 1920); Note, 98 A.L.R. 1089 (1935).

[2] *See* Knight v. Johns, 161 Miss. 519, 137 So. 509, 510 (1931); 7 Geo. Wash. L. Rev. 242, 244 (1938); *cf. In re* Twing, 188 Cal. 261, 204 Pac. 1082 (1922) (hours for pharmacists upheld); *In re* Ten Hour Law, 24 R. I. 603, 54 Atl. 602 (1902) (hours for street car employees upheld).

[3] State v. Calloway, 11 Idaho 719, 84 Pac. 27 (1906) (saloon); Hyman v. Voldrick, 153 Ky. 77, 154 S.W. 369 (1913) (pawnshop); *Ex parte* Brewer, 68 Tex. Crim. Rep. 387, 152 S.W. 1068 (1913) (billiard parlor).

[4] State v. Paille, 90 N.H. 347, 9 A.2d 663 (1939).

[5] Chaires v. City of Atlanta, 164 Ga. 755, 139 S.E. 559 (1927).

[6] 85 N.Y.S. 2d at 293.

valid if a majority of shop-owners so desire — is expressed by a writer for the *Michigan Law Review*.[7] The author appears to confuse the taxing power, which may be applied to a particular class, with the police power, which must promote the welfare of the public, as distinguished from the interest of a particular class.[8] An ordinance setting business hours for an entire community might well be upheld as promoting the general welfare,[9] but there is no just cause for singling out barber shops for such regulation.[10] For this reason, the instant case appears to be abundantly supported by sound and logical authority.[11] A typical example of the type of ordinance condemned in the instant case is found in a Grand Forks, North Dakota, ordinance which forbids barber shops to be open before 8 a. m. or after 6 p. m., with certain exceptions on Saturdays and days preceding holidays.[12] While North Dakota has no case in point, the instant opinion obviously places the constitutionality of this and similar ordinances fixing business hours in serious doubt.

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CONSTITUTIONAL LAW — SEARCH AND SEIZURE — APPLICABILITY OF SEARCH AND SEIZURE PROVISIONS OF FEDERAL CONSTITUTION TO STATES UNDER DUE PROCESS CLAUSE. The defendant, a physician, was convicted by a Colorado court of conspiring with others to commit abortions. He appealed, contending that the state court erred in admitting evidence illegally obtained by the state officers, and arguing that the admission of such evidence violated his rights under the Fourteenth Amendment to the United States Constitution. The United States Supreme Court *held*, that the Judgment be affirmed. *Wolfe v. People of State of Colorado*, 69 Sup. Ct. 1359 (1949). The guaranties of the Fourth Amendment are applicable to the states under the "due process" clause of the Fourteenth Amendment, but the protection thus afforded does not extend so far as

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[7] 36 Mich. L. Rev. 850, 855 (1938).

[8] Fevold v. Board of Sup'rs., 202 Iowa 1019, 210 N.W. 139 (1926); *See* State v. City of Laramie, 40 Wyo. 74, 275 Pac. 106 (1929).

[9] State v. Safeway Stores, 106 Mont. 182, 76 P.2d 81 (1938).

[10] *Ex parte* Jentzsch, 112 Cal. 468, 44 Pac. 803 (1896).

[11] See *e.g.*, Ganley v. Claeys, 2 Cal. 2d 266, 40 P.2d 817 (1935); City of Denver v. Schmid, 98 Colo. 32, 52 P.2d 388 (1935); Charles v. City of Atlanta, 164 Ga. 755, 139 S.E. 559 (1927); City of Louisville v. Kuhn, 284 Ky. 684, 145 S.W. 2d 251 (1940); City of Alexandria v. Hall, 171 La. 595, 131 So. 722 (1930); Eanes v. Detroit, 279 Mich. 531, 272 N.W. 896 (1937); State v. Johannes, 194 Minn. 10, 259 N.W. 537 (1935); Knight v. Johns, 161 Miss. 519, 137 So. 509 (1931); State v. Paille, 90 N.H. 347, 9 A.2d 663 (1939); City of Cincinnati v. Correll, 141 Ohio St. 535, 49 N.E.2d 412 (1943); Amitrano v. Barbaro, 61 R.I. 424, 1 A.2d 109 (1938); City of Huron v. Munson, 67 S.D. 88, 289 N.W. 416 (1939); State v. Greeson, 174 Tenn. 178, 124 S.W.2d 253 (1939); Patton v. City of Bellingham, 179 Wash. 566, 38 P.2d 364 (1934); State v. City of Laramie, 40 Wyo. 74, 275 Pac. 106 (1929). *Contra*: Feldman v. City of Cincinnati, 20 F. Supp. 531 (S.D. Ohio 1937); Pearce v. Moffat, 60 Idaho 370, 92 P.2d 146 (1939); Falco v. Atlantic City, 99 N.J. L. 19, 122 Atl. 610 (1939).

[12] Grand Forks, N.D., Revised Ordinances §22-0812 (1948).

to require exclusion of evidence illegally obtained in criminal actions in state courts.

The instant case represents the most direct attack yet made on the rule proclaimed by thirty states,[1] including North Dakota,[2] that an illegality in obtaining evidence is not ground for its exclusion. While the result might have been predicted, the case is interesting in its consideration of the interrelationship of the Fourth and Fourteenth Amendments to the Constitution.[3] For the purpose of ascertaining the restrictions imposed upon the state in the enforcement of their criminal law, the court relied on *Palko v. Connecticut*,[4] in which it held that ". . . immunities that are valid as against the federal government by force of the specific pledges of the particular amendments have been found to be implicit in the concept of ordered liberty, and thus thru the Fourteenth Amendment, become valid as against the states." [5] In the instant case the court pointed out that "The security of one's privacy against arbitrary intrusion by the police — which is at the core of the Fourth Amendment — is basic to a free society . . ." and as such is implicit in the concept of ordered liberty and enforceable against the states through the due process clause.[6]

The Fourth Amendment itself was adopted at a time when the abuses permitted under common law regarding general warrants and writs of assistance were fresh in the minds of the framers of the Amendment. The practice had obtained in the colonies of issuing writs of assistance to the English revenue officers which empowered them, in their discretion, to search suspected places for smuggled goods.[7] In England, the controversy over the use of general warrants allowing officers to search private houses for papers which might be used to obtain convictions for libel had culminated in the famous case of *Entick v. Carrington*,[8] which decided

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[1] Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Utah, Vermont and Virginia.

[2] State v. Fahn, 53 N.D. 203, 205 N.W. 67 (1925); State v. Dinger, 51 N.D. 98, 199 N.W. 196 (1924); State v. Pauley, 49 N.D. 486, 192 N.W. 91 (1923) (use of evidence obtained illegally does not violate defendant's right not to incriminate himself).

[3] Mr. Justice Murphy and Mr. Justice Rutledge dissented in the instant case on the ground the guaranties of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. It is, of course, elementary that many fundamental freedoms are so protected, including freedom of speech, Terminiello v. City of Chicago, 69 Sup. Ct. 894 (1949), 26 N.D. Bar Briefs 55 (1950); Near v. Minnesota, 283 U.S. 697 (1931); Gitlow v. New York, 268 U.S. 652 (1925), and freedom of religion, People *ex rel.* McCollum v. Board of Education, 333 U.S. 203 (1948), 25 N.D. Bar Briefs 214 (1949); Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105 (1943). For a discussion of this phase of the Fourteenth Amendment's operation with regard to civil rights, see Owen, *The McCollum Case*, 22 Temple L.Q. 159 (1948).

[4] 302 U.S. 319 (1937).

[5] 302 U.S. 319, 324-25 (1937).

[6] 69 Sup. Ct. 1359, 1361 (1949).

[7] *See* Boyd v. United States, 116 U.S. 616, 625 (1886), for a consideration of the historical basis of the Fourth Amendment.

[8] 19 How. St. Tr. 1030, 95 Eng. Rep. 807 (1765).

two things: (1) that general warrants were void for uncertainty, and (2) that any exploratory search to obtain evidence was illegal.[9] It was manifestly the intent of the framers of the Amendment to prevent the federal government from assuming the arbitrary powers which had been exercised by the English authorities by enacting a provision aimed specifically at the general warrant.[10] Considerable light is shed on the true nature of the Amendment when it is noted that it was not until many years later that the rule excluding illegally obtained evidence gained a foothold in the federal courts through the decision of *Boyd v. United States*,[11] which held that the admission of such evidence violated a defendant's constitutional right not to be compelled to testify against himself. It is thus obvious that in its inception the Fourth Amendment did not contemplate the exclusionary rule; the rule as adopted by the federal court is ". . . not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate." [12] The philosophy underlying the rule is well stated in *Weeks v. United States*,[13] which held that if evidence obtained as the result of an illegal search and seizure was allowed to be used in the trial of the accused, ". . . the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value . . ." [14] But to extend the exclusionary rule to the states would be to pass beyond the scope of the Fourth Amendment as originally drafted, and would mean the imposition of a mere federal rule of policy upon the states.[15]

The states which rejected the federal rule of exclusion are following the common law doctrine that evidence is admissible in court no matter how obtained.[16] Their decisions are based on the theory that such evidence does not cease to be competent because it was secured by an unlawful search and seizure.[17] Should the court take notice of the manner in which evidence was obtained in each case coming before it, it is argued, a collateral issue unconnected with the main problem of guilt or innocence would arise.[18] It should be noted that neither the Fourth Amendment nor any of the corresponding provisions of various state constitutions makes any specific reference to the admissibility of evidence ob-

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[9] See Note, *Legal Search and Arrest Under the Eighteenth Amendment*, 32 Yale L.J. 490 (1923); Comment, 25 N.D. Bar Briefs 187, 193 n. 27 (1949).

[10] Boyd v. United States, 116 U.S. 616 (1886).

[11] *Ibid.*

[12] Wolfe v. People of the State of Colorado, 69 Sup. Ct. 1359, 1367 (1949) (concurring opinion of Mr. Justice Black).

[13] 232 U.S. 383 (1914).

[14] *Id.* at 393 (1914).

[15] Fraenkel, *Concerning Searches and Seizures*, 34 Harv. L. Rev. 361 (1921); Harno, *Evidence Obtained by Illegal Search and Seizure*, 19 Ill. L. Rev. 303 (1925); Knox, *Self-Incrimination*, 74 U. of Pa. L. Rev. 139 (1925).

[16] Williams v. State, 100 Ga. 511, 28 S.E. 624 (1897); *see* Stevison v. Earnest, 80 Ill. 513, 518 (1875). "It has long been established that the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence. The illegality is by no means condoned, it is merely ignored." 3 Wigmore, Evidence §2183 (1904).

[17] Adams v. New York, 192 U.S. 585 (1904); People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926). *Cf.* Shields v. State, 104 Ala. 35, 16 So. 85 (1894).

[18] People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926); Commonwealth v. Dana, 2 Metc. 329 (Mass. 1841).

tained by illegal means.[19] Those states which follow the federal rule do so on the ground that the constitutional inhibitions against unreasonable searches are limitations on the powers of government and therefore the prosecution in a criminal case should not be permitted to do without sanction of law that which it could not do even if authorized by statute since such a statute would be unconstitutional.[20]

The Supreme Court reiterated in the instant case that at least some of the protections afforded by the Fourth and Fifth Amendments are incorporated into the Fourteenth Amendment by the due process clause,[21] but it is clear from the foregoing discussion that the prohibition against evidence illegally obtained is not one of the protections so included.[22] In a distum in the instant case, the Supreme Court has plainly indicated that if a state should affirmatively sanction police intrusion into privacy it would run contra to the guaranty of the Fourteenth Amendment.[23] It would follow from this that the same principle would hold good even more strongly as to the federal government. Despite the dictum contained in *McNabb v. United States*,[24] that congress could negate the exclusionary rule, it might be argued that under modern conditions this would amount to the affirmative sanction of police intrusion into privacy, thereby violating the constitutional guaranty.[25]

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INSURANCE — INSURABLE INTEREST — INTEREST POSSESSED BY INNOCENT PURCHASER OF STOLEN AUTOMOBILE. The plaintiff purchased an automobile upon which the defendant issued a policy covering upsets and other hazards. An accident occurred in which the automobile was damaged. Subsequently it developed that the automobile had been stolen and resold several times before coming into the plaintiff's hands. The original owner's insurance company reclaimed the automobile. Thereafter the plaintiff brought an action on the policy to recover for the damage to the car caused by the accident. The defense was that the plaintiff was not

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[19] Atkinson, *Unreasonable Searches and Seizures*, 25 Col. L. Rev. 11 (1925). Texas has by statute, passed in 1925, made such evidence inadmissible. Texas Code Crim. Proc. §727a (Vernon 1948).

[20] State v. George, 32 Wyo. 223, 231 Pac. 683 (1924). *Cf.* Hughes v. State, 144 Tenn. 544, 238 S.W. 588 (1922).

[21] *See* Wolfe v. People of the State of Colorado, 69 Sup. Ct. 1359, 1361 (1949).

[22] Even at common law under such decisions as *Entick v. Carrington*, 19 How. St. Tr. 1030, 95 Eng. Rep. 807 (1765), evidence illegally obtained could not be kept out of court. The technical holding of *Entick v. Carrington* was merely that a suit would lie to recover damages caused by an illegal search and seizure. See also Grumon v. Raymond, 1 Conn. 40, 6 Am. Dec. 200 (1814).

[23] Wolfe v. People of the State of Colorado, 69 Sup. Ct. 1359, 1361 (1949).

[24] 318 U.S. 332 (1943). The *McNabb* case, however, can be distinguished on its facts from the situation presented by the search and seizure cases, since the problem raised by that case was as to the effect to be given to a confession secured after a prolonged detention by federal officers before the accused person was brought before a magistrate.

[25] The majority opinion in the instant case, while mentioning the question, studiously leaves it open.

the sole owner of the car as the insurance policy required him to be. It was *held*, that if the proof established the car had been stolen, there could be no recovery on the policy since the plaintiff had no insurable interest in the automobile. The case was remanded for a new trial because of errors in the admission of evidence. *Southern Farmers Mutual Ins. Co. v. Motor Finance Co.*, 222 S.W.2d 981 (Ark. 1949).

Where a person has no legal or equitable interest in the thing insured, the principle has been laid down that an insurance contract is viewed as a mere wager and the courts will not enforce it.[1] It is generally held that one has an insurable interest where he derives a benefit from the existence of the property insured, or would suffer loss should it be injured or destroyed by the peril against which it is insured.[2] At common law, the plaintiff in the instant case apparently had a sufficient "interest," "relationship," or "property right" to allow him to recover, as the common law gave an insurable interest in a stolen chattel to its bona fide vendee.[3] It has been stated that the term "insurable interest" is a misnomer; the property term is "insurable relationship."[4] Unfortunately the court in the instant case did not define "insurable interest" but merely stated that since the plaintiff was not the unconditional owner he had no insurable interest even though he was an innocent purchaser. Had the court interpreted "insurable interest" to mean "insurable relationship" or "jural relationship" a different finding could easily have been reached,[5] with perhaps a more equitable result. However, the instant decision is clearly in accord with the leading case of *Hessen v. Iowa Automobile Ins. Co.*,[6] which held that the purchaser of a stolen automobile, though in good faith, for value, and without notice, did not have a sufficient title to enable him to assert any claim under an insurance policy upon the machine which required sole and unconditional ownership. This holding has been severely criticized on the theory that since the innocent purchaser had a right of possession which was good against all the world except the true owner, his beneficial use of the automobile was a sufficient basis for expecting benefit from its con-

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[1] *See* Warren v. Davenport Fire Ins. Co., 31 Iowa 464, 466-67 (1871).

[2] Anderson v. U.S. Fire Ins. Co., 57 N.D. 462, 222 N.W. 609 (1928); Hecker v. Commercial State Bank, 35 N.D. 12, 159 N.W. 97 (1916); Bird v. Central Manufacturer's Mut. Ins. Co., 168 Ore. 1, 120 P.2d 753 (1942); Cherokee Foundries v. Imperial Assur. Co., 219 S.W.2d 203 (Tenn. 1949). Section 26-0204, N.D. Rev. Code (1943), provides that, "The sole object of insurance is the indemnity of the insured, and if the insured has no insurable interest, the contract is void."

N.D. Rev. Code §26-0206 (1943), provides: "Every interest in property, or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might damnify directly the insured is an insurable interest, and may consist in:

"1. An existing interest;

"2. An inchoate interest founded on an existing interest; or

"3. An expectancy coupled with an existing interest in that out of which the expectancy arises."

[3] 15 Geo. L.J. 71, 73 (1926). See also Bordwell, *Property in Chattels*, 29 Harv. L. Rev. 374 (1916).

[4] Harnet and Thornton, *Insurable Interest in Property: A Socio-Economic Revaluation of a Legal Concept*, 48 Col. L. Rev. 1162, 1166 (1948).

[5] See 36 Yale L.J. 276 (1926).

[6] 195 Iowa 141, 190 N.W. 150 (1922).

tinued existence, or loss from its destruction.[7] A number of related factual situations have been decided on the basis of the theory underlying this decision. If there has been a breach of warranty, as where the insured warranted that he was the sole owner but actually held only bare legal title, it has been held recovery will be denied.[8] The Massachusetts court has held that where one member of a family took out insurance upon an automobile owned by another member of the family, recovery on the insurance policy could not be had because the holder of the policy had no insurable interest in the car.[9] Provisions in automobile insurance policies requiring that the insured be the sole and unconditional owner are often construed to mean just that.[10] Conversely, it has decided that an innocent purchaser of a stolen automobile has an insurable interest where his possession is not disputed by the original owner.[11] The court in the instant case drew a distinction between an innocent purchaser whose title is disputed and an innocent purchaser whose title is not disputed by the original owner. In the present case, of course, the plaintiff's title was disputed, furnishing a ground for distinguishing this case from cases where the original owner never claimed the car, either because he was unknown or lacked proof that the subsequent purchaser's title was invalid.[12] In the case of In re *Schenderlein*,[13] X in good faith bought a stolen automobile. Being insolvent he transferred it to one of his creditors. It was held that this was an act of bankruptcy, on the theory that X had "property" in the stolen automobile although the title was in dispute.[14] The court of Maryland has said that a person without legal or equitable ownership in fact nevertheless has an insurable interest in a motor vehicle where he permits the record title to be placed in his name, because he thereby assumes the legal liability of an owner.[15] It has been held that the husband of a wife who was sole owner of an automobile had an insurable interest under a liability policy since the husband would be liable for injuries sustained by others due to his negligent operation of the automobile.[16] Other courts have held that complete ownership of an automobile is not an essential to obtaining a liability insurance policy.[17] It has been argued that the "sole and unconditional ownership" clause commonly found in automobile insurance

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[7] 32 Yale L.J. 497 (1922); 15 Geo. L.J. 71 (1926).

[8] *See* Automobile Underwriters v. Tite, 85 N.E.2d 365, 367 (Ind. App. 1949).

[9] O'Neil v. Queen Ins. Co., 230 Mass. 269, 119 N.E. 678 (1918).

[10] Builders & Manufacturers Mut. Casulty Co. v. Paquette, 21 F. Supp. 858 (D.Maine 1938). But compare Anderson v. U.S. Fire Ins. Co., 57 N.D. 462, 222 N.W. 609 (1928).

[11] Savarese v. Hartford Fire Ins. Co., 99 N.J.L. 435, 123 Atl. 763 (1923). *See* Norris v. Alliance Ins. Co. of Philadelphia, 1 N.J.Misc. 315, 123 Atl. 762, 763 (1923). *Cf.* Barnett v. London Assur. Co., 138 Wash. 673, 245 Pac. 3 (1926).

[12] Norris v. Alliance Ins. Co., 1 N.J.Misc. 315, 123 Atl. 762 (1923); Barnett v. London Assur. Co., 138 Wash. 673, 245 Pac. 3 (1926).

[13] 268 Fed. 1018 (D.Mass. 1920).

[14] The case is noted in 34 Harv. L. Rev. 681 (1921). For a historical review of the concept of property in chattels, see Bordwell, *Property in Chattels*, 29 Harv. L. Rev. 374 (1916); Ames, *The Disseisin of Chattels*, 3 Harv. L. Rev. 23 (1889).

[15] Commonwealth Casulty Co. v. Arrigo, 160 Md. 595, 154 Atl. 136 (1931).

[16] Howe v. Howe, 87 N.H. 338, 179 Atl. 362 (1935).

[17] Hunt v. Century Indemnity Co., 58 R.I. 336, 192 Atl. 799 (1937).

contracts is to be construed as a warranty of good faith on the part of the insured and not as an absolute warranty of perfect title necessary for an insurable interest.[18] The violation of statutory provisions in transferring automobiles usually prevents purchasers from having an "insurable interest," [19] but a minority of courts hold that such purchasers have an insurable interest notwithstanding the violations.[20] False representations as to the amount of interest in property usually preclude any insurable interest or recovery,[21] although a statement in a policy schedule that the car in question was owned by the insured person has been held not to avoid the policy where not made with intent to deceive.[22] It is submitted that although the decision in the instant case rests on substantial authority, a more equitable result would have been attained by an opposite holding.

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NEGLIGENCE — MANSLAUGHTER — DEFINITION OF CULPABLE NEGLIGENCE. The defendant was convicted of manslaughter in the second degree for causing the death of a bicycle rider by the negligent operation of an automobile. Section 12-2719, N.D. Rev. Code (1943) provides that: "Every killing of one human being by the . . . culpable negligence of another which . . . is not murder nor manslaughter in the first degree, nor excusable nor justifiable homicide, is manslaughter in the second degree." The trial court charged the jury that the defendant was guilty of culpable negligence in the operation of the automobile if he operated the vehicle ". . . without due care, in a reckless and heedless manner, with utter disregard for the lives and limbs of persons upon the highway, at a rate of speed greater than was reasonable and proper, having regard to the width, condition and use of the highway at the time . . ." The Supreme Court of North Dakota affirmed the conviction, holding that the term "culpable negligence" as applied to the operation of an automobile implied a "total lack of care" that was well defined in the instruction. *State v. Gulke*, 38 N.W.2d 722 (N.D. 1949).

The instant case apparently clarifies, to some extent, a point of law on which courts of other jurisdictions have fallen into disagreement.[1] The North Dakota Code provides for three general degrees of negligence, slight, ordinary and gross.[2] Each of the latter two degrees includes any lesser degree.[3] The code states that slight negligence consists of the want

[18] 15 Geo. L.J. 71 (1926); 32 Yale L.J. 497 (1922).

[19] Barton v. Merchantile Ins. Co., 127 Kan. 271, 273 Pac. 408 (1929). *See* Personal Finance Co. of Missouri v. Lewis Inv. Co., 138 S.W.2d 655, 656 (Mo. App. 1940).

[20] Crawford v. General Exchange Ins. Co., 119 S.W.2d 458 (Mo. App. 1938); Hennessy v. Automobile Owners Ins. Assn., 282 S.W. 791 (Tex. App. 1926). *See* Green v. Connecticut Fire Ins. Co., 61 N.D. 376, 381, 237 N.W. 794, 796 (1931).

[21] Kobzina v. Empire State Ins. Co., 289 Ill. App. 157, 6 N.E.2d 895 (1937).

[22] Lindstrom v. Employers Indemnity Co., 146 Wash. 484, 263 Pac. 953 (1928).

[1] See Note, 161 A.L.R. 10 (1946); 8 Blashfield, Cyclopedia of Automobile Law and Practice §§5387, 5388 (Perm. ed. 1935).

[2] N.D. Rev. Code §1-0116 (1943).

[3] *Ibid.*

of great care and diligence, ordinary negligence of the want of ordinary care and diligence, and gross negligence of the want of slight care and diligence.[4] Culpable negligence is nowhere defined, and as already stated, there is disagreement among the courts which have tried to define it. At common law, negligence sufficient to support a criminal prosecution was required to consist of more than mere inadvertence. It has been held that there must be some action from which the jury may reasonably infer *mens rea*.[5] It has also been stated that to render a person criminally liable for neglect of duty, there must be such a degree of culpability as to amount to gross negligence.[6] The courts consistently assert, expressly or by implication, that something more is needed than the bare negligence which might be sufficient to support a civil action.[7] The courts seem to agree on the proposition that slight negligence is not culpable. It has been held that culpable negligence is something more than the slight negligence which would support a civil action for damages.[8] A few decisions have held that ordinary negligence is culpable. The Wisconsin court defined culpable negligence as ordinary negligence, consisting of a want of that care and prudence that the great mass of mankind exercises under the same or similar circumstances. Under this rule, any form of ordinary negligence resulting in death was sufficient to support a conviction under the fourth degree manslaughter statute of Wisconsin.[9] It is significant, however, that the Wisconsin manslaughter statute was subsequently amended to require gross negligence before a conviction for fourth degree manslaughter could be had. As the law now stands in Wisconsin, gross negligence consists of either a wilfull intent to injure, or that wanton and reckless disregard of the rights of others and the consequences of the act to the actor, as well as to others, which the law deems equivalent to an intent to injure.[10]

The Missouri courts have held that culpable negligence is the omission to do something which a reasonable, prudent, and honest man would do, or the doing of something which such a man would not do under all the circumstances surrounding each particular case.[11] This was repudiated later when the same court added that culpable negligence was more than mere negligence, and that to support a conviction there must be facts and circumstances tending to prove that an accused person was actuated by a reckless disregard for the consequences of his act from which the jury could infer criminal intent.[12] This rule seems well founded

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[4] *Id.* §1-0117.

[5] State v. Bates, 65 S.D. 105, 271 N.W. 765 (1937).

[6] Regina v. Finney, 12 Cox C. C. 625 (1874).

[7] People v. Angelo, 246 N.Y. 451, 159 N.E. 394 (1927).

[8] People v. Angelo, *supra* note 7.

[9] Clemens v. State, 176 Wis. 289, 185 N.W. 209 (1921).

[10] Bussard v. State, 232 Wis. 669, 288 N.W. 187 (1939).

[11] State v. Emery, 78 Mo. 77, Am. Rep. 92 (1883); State v. Coulter, 204 S.W. 5 (Mo. 1918). The theoretical difficulty in the law of negligence is underscored in the Coulter case, which reversed a manslaughter conviction because the trial court charged the jury in effect that any act of negligence was culpable. As a matter of abstract reasoning, this is correct. The courts have consistently held, however, that as applied to manslaughter cases culpable negligence is more than simple negligence.

[12] State v. Millin, 318 Mo. 553, 300 S.W. 694 (1927).

since the majority of courts require the defendant to have been guilty of something in the nature of reckless disregard or at least gross negligence.

It has been repeatedly stated that culpable negligence is such recklessness, proximately resulting in injury and death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others.[13] The Minnesota court held in *State v. Lester*[14] that culpable negligence means gross negligence with a superimposed implication of recklessness. A subsequent case reinforced this definition, saying that the difference between gross and culpable negligence is that the latter involves the idea of recklessness and the former does not.[15]

It is obvious from the foregoing summary that culpable negligence is largely a matter of degree and incapable of precise definition. However, North Dakota has defined gross negligence as, ". . . to all intents and purpose, no care at all. It is the omission of the care which even the most inattentive and thoughtless seldom fail to take of their own concerns. It evinces a reckless temperament. It is a lack of care which is practically wilfull in its nature. It is an omission of duty which is akin to fraud. It is the absence of even slight care."[16] It seems obvious that the charge of the court in the instant case, that culpable negligence involved "utter disregard for the lives and limbs of persons upon the highway," also connoted the absence of even slight care. It would seem, therefore, that in North Dakota negligence to be culpable must rise to the level of gross negligence.

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TAXATION — INCOME TAX — REDUCTION OF DEBT — GIFT OR INCOME? The plaintiff executed several notes to a creditor in consideration of a loan. The notes remained unpaid and the Statute of Limitations eventually barred action on them. The plaintiff eliminated entries showing liability for the notes on its books, thereby indicating an increase of assets over liabilities. The gain was reported in the plaintiff's income tax return. Thereafter the plaintiff brought suit to recover the tax paid on the theory that the gain was a gift from the creditor. It was *held*, that there was no affirmative act on the part of the creditor which could have given rise to a gift, but rather that the Statute of Limitations merely afforded a defense to the plaintiff in any action on the notes, thereby rendering the plaintiff's increase in assets a taxable gain. *Securities Co. v. United States*, 85 F.Supp. 532 (S.D.N.Y. 1948).

Section 22 (a) of the Internal Revenue Code broadly provides that

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[13] People v. Lynn, 385 Ill. 165, 52 N.E.2d 166 (1944); Carnes v. Commonwealth, 278 Ky. 771, 129 S.W.2d 543 (1939); Shows v. State, 175 Miss. 604, 168 So. 862 (1936); State v. Carter, 342 Mo. 439, 116 S.W.2d 21 (1938); State v. Millin, 318 Mo. 553, 300 S.W. 694 (1927); State v. Lancaster, 208 N.C. 349, 180 S.E. 577 (1935); Bussard v. State, 232 Wis. 669, 288 N.W. 187 (1939).

[14] State v. Lester, 127 Minn. 282, 149 N.W. 297 (1914).

[15] State v. Bolsinger, 221 Minn. 154, 21 N.W.2d 480 (1946).

[16] Farmer's Mercantile Co. v. Northern Pacific Ry., 27 N.D. 302, 310, 146 N.W. 550, 552 (1914).

". . . 'gross' income includes . . . gains or profits and income derived from any sources whatever," and §22 (b) (3) excludes therefrom ". . .the value of property acquired by gift." It is well settled, as indicated by the instant case, that there can be no gift from a creditor to a debtor by means of a debt reduction when there is no affirmative act on the part of the creditor, since an affirmative act of some kind is necessary for the elementary concept of a gift.[1] Where there is an affirmative act on the part of a creditor in the reduction of a debt, the question arises whether the resulting gain accruing to the debtor is to be treated as a gift or as taxable income. The apparent diversity of cases on the subject has created an extremely confused area of law.[2] A landmark case, *United States v. Kirby Lumber Co.*,[3] held that where the taxpayer had issued bonds and later purchased the same bonds in an open market transaction it realized income to the extent of the difference between the face value of the bonds and the purchase price since there was an increase in the net assets of the corporation. Conversely, *Helvering v. American Dental Co.*,[4] another leading case, held that where there was no consideration for the cancellation of indebtedness and the transaction was between the original parties, the motive of the debtor was unimportant in cancelling the debt; therefore the cancelled debt should be treated as an exempt gift for tax purposes. Later cases distinguished the *American Dental* case from the *Kirby* case on either of two grounds: (1) that the rule of the *Kirby* case should be held applicable where the transaction is "open market" [5] as distinguished from a direct transaction between the debtor and creditor,[6] or (2) that the rule of the *Kirby* case should also be applicable where there is an adequate consideration [7] given for the reduction of the debt as distinguished from a gratuitous forgiveness.[8] Apart from a segregation of the cases into "gift" or "income" categories, reduction of debt does not result in taxable income (1) where the transaction as a whole has resulted in a loss,[9] (2) where a shareholder's cancellation of the debt of a corporation is considered as a contribution to capital rather than income,[10] (3) where the reduction of indebtedness subsequent to the sale

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[1] Schweppe v. Commissioner, 8 T.C. 1224 (1947); Lynch, *Some Tax Effects of Cancellation of Indebtedness*, 13 Ford. L. Rev. 145, 162 (1944).

[2] See Warren and Sugarman, *Cancellation of Indebtedness and its Tax Consequences*, 40 Col. L. Rev. 1326 (1940), wherein this field of law is termed "chaotically developed."

[3] 284 U.S. 1 (1931).

[4] 318 U.S. 322 (1943).

[5] 5th Ave.-14th St. Co. v. Commissioner, 147 F.2d 453 (2d Cir. 1945). *Cf.* Central Paper Co. v. Commissioner, 158 F.2d 131 (6th Cir. 1946).

[6] Campau Realty Co. v. United States, 69 F. Supp. 133 (1947).

[7] Reliable Incubator and Brooding Co. v. Commissioner, 6 T.C. 919 (1946).

[8] Chenango Textile Co. v. Commissioner, 148 F.2d 296 (1st Cir. 1945).

[9] Bowers v. Kerbaugh-Empire Co., 271 U.S. 170 (1926). But see Warren and Sugarman, *supra* note 2 at 1329, citing Burnet v. Sanford and Brooks, 282 U.S. 359 (1931), to the effect that the accounting period rather than the transaction should be the test for determining loss.

[10] Commissioner v. Auto Strop Safety Razor Co., 74 F.2d 226 (2d Cir. 1934). Cf. Carrol-McCreary Co. v. Commissioner of Internal Revenue, 124 F.2d 303 (2d Cir. 1941). But tax exemption under this theory was restricted by Helvering v. Jane Holding Co., 109 F.2d 933 (8th Cir. 1940).

of property is in effect a reduction of the purchase price of the property,[11] (4) where there is a tax-free reorganization under the Bankruptcy Act,[12] (5) where there is a reduction under the Bankruptcy Act,[13] or (6) where a taxpayer is insolvent, in which case taxable income is realized only so far as the debt reduction renders the taxpayer solvent.[14]

The most recent case on the point, *Commissioner v. Jacobson*,[15] held that the objective standards set up by the *American Dental* case were not controlling;[16] on the contrary, it is the intent of the creditor in allowing the debt reduction which determines whether or not taxable income is realized by the debtor.[17] The Supreme Court's decision in the *Jacobson* case turned in part on the apparent intention of congress when it amended §22 (b) of the Internal Revenue Code so as to exclude the reduction of corporate indebtedness [18] from the category of taxable income in certain situations.[19] If it was the intent of congress that such gains should be excluded from taxable income by way of gift exemption,[20] there should have been no necessity for enacting this amendment. It may therefore be inferred that it was the intent of congress that the gains of individuals by way of reduction of debt should be taxed. In the words of the court, "The situation in each case is a factual one. It turns upon whether the transaction is in fact a transfer of something for the best price available or is a transfer or release of only a part of a claim for cash and of the balance for nothing." [21] It is interesting to note that the treasury has never assessed a gift tax on this type of forgiving creditor.[22] The *Jacobson* case represents a realistic view of business transactions, apparently marking a judicial trend away from the viewpoint expressed in the *American Dental* case. Where businessmen dealing at arm's length voluntarily cancel indebtedness for purely commercial reasons, it would seem a strained construction of the law to term the transaction a gift.

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[11] Helvering v. A. L. Killian Co., 128 F.2d 433 (8th Cir. 1942). *Cf.* Hirsch v. Commissioner, 115 F.2d 656 (7th Cir. 1940). This theory is also restricted. Helvering v. American Chicle Co., 291 U.S. 426 (1934); Commissioner v. Coastwise Transportation Co., 71 F.2d 104 (1934), *cert. denied*, 293 U.S. 595 (1934).

[12] 52 Stat. 904 (1938), 11 U.S.C. §668 (1940) (Chandler Act).

[13] 26 Code Fed. Regs. §29.22 (a) — 13 (Cum. Supp. 1944).

[14] Cf. Lakeland Grocery Co. v. Commissioner, 36 B.T.A. 289 (1937). But see Warren and Sugarman, *supra* note 2, at 1351 *et seq.* Giving preference to an insolvent debtor is inconsistent with the net assets theory, but the court sympathizes with the insolvent debtor. Liberty Mirror Works v. Commissioner, 3 T.C. 1018 (1944).

[15] 336 U.S. 28 (1949).

[16] *See* Commissioner v. Jacobson, *supra* at 52. Mr. Justice Rutledge felt that the majority opinion was in conflict with the *American Dental* case but nevertheless joined in the result. Justices Reed and Douglas dissented because of the conflict with the *American Dental* case.

[17] Bogardus v. Commissioner of Internal Revenue, 302 U.S. 34 (1937).

[18] Int. Rev. Code §22 (b) (9).

[19] *Ibid.* §113 (b) (3).

[20] *Ibid.* §22 (b) (3).

[21] Commissioner v. Jacobson, *supra.*

[22] Stanley and Killcullen, the Federal Income Tax 26 (1948).