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Case Comments

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CASE COMMENTS

Criminal Law—Driving While Intoxicated—Farm Tractor Held Vehicle

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The defendant was convicted of violating a statute prohibiting operation of a motor vehicle by an intoxicated person.[1] Appeal was taken to the Supreme Court of Missouri on the ground that the farm tractor he was driving was not a "motor vehicle" within the purview of the statute. Attorneys for the appellant urged that a farm tractor was not a motor vehicle since tractors were exempted from statutes dealing with registration requirements and motor vehicle safety responsibility regulations. The court rejected this argument because, while those statutes specifically exempted tractors, the statutes further specified tractors must comply with all other vehicular regulations. The court stated that it was obviously the intent of the legislature that tractors should be generally classified as motor vehicles. If tractors are not motor vehicles, why should it be necessary to exclude them specifically from some regulations concerned only with motor vehicles? It was held that a farm tractor is a motor vehicle within the meaning of the "driving while intoxicated" statute. *State v. Powell,* 306 S.W.2d 531 (Mo. 1957).

All states expressly prohibit intoxicated persons from driving either a "motor vehicle" or else a "vehicle." Superficially, it seems obvious just what a "motor vehicle" or "vehicle" is. But as simple and straightforward as these terms appear to be, they have been the subject of much litigation. Generally the difficulties in interpreting these terms arise in negligence and damage suits. A large number of contract and taxation claims also have involved the definition of these terms. Just where has the line been drawn?

Motorcycles have been a popular subject of definition since their invention. In many suits involving insurance claims, it has been held that a motorcycle is neither an automobile,[2] nor a motor-driven car,[3] nor a horse-drawn vehicle.[4] Likewise, a motorcycle with a sidecar is neither an automobile nor a motor-driven car.[5] Two contrary decisions, one with a dissenting opinion, ruled that the indefinite terms of an accident policy would be interpreted in favor of the insured and that a

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[1] Mo. Rev. Stat. § 564.440 (Vernon 1949).

[2] Neighbors v. Life & Cas. Ins. Co., 182 Ark. 356, 31 S.W.2d 418 (1930); La Porte v. North American Acc. Ins. Co., 161 La. 933, 109 So. 767 (1926); Salo v. North American Acc. Ins. Co., 257 Mass. 303, 153 N.E. 557 (1926); Moore v. Life & Cas. Ins. Co., 162 Tenn. 682, 40 S.W.2d 403 (1931).

[3] Perry v. North American Acc. Ins. Co., 104 N.J.L. 117, 138 Atl. 894 (1927); Anderson v. Life & Cas. Ins. Co., 197 N.C. 72, 147 S.E. 693, 695 (1929); Deardorff v. Continental Life Ins. Co., 301 Pa. 179, 151 Atl. 814 (1930).

[4] Perry v. North American Acc. Ins. Co., supra note 3.

[5] Landwehr v. Continental Life Ins. Co., 159 Md. 207, 150 Atl. 732, 735 (1930); McDonald v. Life & Cas. Ins. Co., 168 Tenn. 418, 79 S.W.2d 555 (1935). Contra, Burrus v. Continental Life Ins. Co., 225 Mo. App. 1129, 40 S.W.2d 493 (1930).

motorcycle was considered to be in the same category as automobiles and motor-driven cars.[6] An early case, in which a motorcycle operator was charged with frightening a team of horses, also held that a motorcycle was to be considered a motor vehicle.[7]

Animal-drawn devices, such as a horse-drawn road grader,[8] a mowing machine,[9] and a threshing machine,[10] have been held to be vehicles. However, a wagon pulled by a dog is not a vehicle.[11] A horse-drawn wagon is not a motor vehicle,[12] but is subject to inclusion in statutes prohibiting driving while intoxicated.[13] A saddle horse, which the insured was riding,[14] and a mule unattached to a conveyance[15] were found not to be vehicles. However, it has been decided that horses are vehicles within the meaning of a statute requiring vehicles on highways to carry lights after dark.[16] Two similar cases concerning accidents involving policemen's horses decided that a horse is not a vehicle,[17] but was a "facility of transportation."[18]

Motor vehicle statutes generally exclude human-powered devices from the scope of their regulation. Bicycles have been frequent subjects of controversy. They have been held not to be motor vehicles by implication,[19] and specifically.[20] Even though it has been settled for many years that a bicycle is a vehicle,[21] at least two cases have ruled that a person pushing a bicycle still has the rights of a pedestrian.[22]

In accord with this, it has been decided that two-wheeled carts pushed by a person,[23] a boy's scooter,[24] sleds,[25] and coaster wagons[26] are not subject to motor vehicle regulations. However, in a town where the local ordinances defined vehicles as including every mobile device except baby carriages and street cars, a boy's coaster wagon was thought to be subject to vehicle regulations.[27] Another case decided that although

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[6] Womack v. Life & Cas. Co., 184 So. 357 (La. Ct. App. 1938). It was held that an enclosed motorcycle with a driver's cab and a storage compartment was a 'motor truck' because it was used to make deliveries. Bolt v. Life & Cas. Ins. Co., 156 S.C. 117, 152 S.E. 766, 770-71 (1930) (one judge dissented).

[7] Bonds v. State, 16 Ga. App. 401, 85 S.E. 629, 631 (1915).

[8] Sant v. Continental Life Ins. Co., 49 Idaho 691, 291 Pac. 1072, 1074 (1930). The court held that a horse-drawn road grader was a vehicle since the deceased was riding on it to work, but did not pass on the status of such a grader in operation.

[9] Trussell v. Ferguson, 122 Neb. 82, 239 N.W. 461, 463 (1931).

[10] Vincent v. Taylor Bros., 180 App. Div. 818, 168 N.Y. Supp. 287 (3d Dep't 1917).

[11] Jackson v. Hammersley, 72 Idaho 301, 240 P.2d 829, 832 (1952).

[12] Bandos v. Philadelphia, 304 Pa. 191, 155 Atl. 279 (1931).

[13] State v. Stewart, 57 Ariz. 82, 111 P.2d 70, 71 (1941).

[14] Riser v. Federal Life Ins. Co., 207 Iowa 1101, 224 N.W. 67 (1929).

[15] State ex rel. Almon v. One Black Horse Mule, 207 Ala. 277, 92 So. 548 (1922).

[16] Conrad v. Dillinger, 176 Kan. 296, 270 P.2d 216, 218 (1954).

[17] Douglass v. City of New York, 266 App. Div. 717, 41 N.Y.S.2d 935 (1st Dep't 1943).

[18] Bernardine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945).

[19] Bank for Savings & Trusts v. United States Cas. Co., 242 Ala. 161, 5 So. 2d 618 (1942).

[20] Niedzinski v. Coryell, 215 Mich. 498, 184 N.W. 476 (1921); Taylor v. United Traction Co., 184 Pa. 465, 40 Atl. 159 (1898).

[21] Molway v. Chicago, 239 Ill. 486, 88 N.E. 485 (1909); Mercer v. Corbin, 117 Ind. 450, 20 N.E. 132, 134 (1889); Thomas v. Dahl, 293 Ky. 808, 170 S.W.2d 337, 338 (1943); Thompson v. Dodge, 58 Minn. 555, 60 N.W. 545 (1894); Thompson v. Philadelphia Transp. Co., 357 Pa. 3, 53 A.2d 120 (1947); State v. Collins, 16 R.I. 371, 17 Atl. 131 (1888).

[22] Holmes v. Blue Bird Cab, 227 N.C 581, 43 S.E.2d 71 (1947); Benson v. Anderson, 129 Wash. 19, 223 Pac. 1063 (1924).

[23] Gallardo v. Luke, 33 Cal. App. 2d 230, 91 P.2d 211 (1939); People v. Weinberger, 165 N.Y.S.2d 229 (N.Y.C. Magis. Ct. 1957); Lewis v. Watson, 229 N.C. 20, 47 S.E.2d 484 (1948); Flaumer v. Samuels, 4 Wash. 2d 609, P.2d 484 (1940).

[24] Jermane v. Forfar, 108 Cal. App. 2d 849, 240 P.2d 351, 354 (1952).

[25] Illingworth v. Madden, 135 Me. 159, 192 Atl. 273, 276 (1937); Idell v. Day, 273 Pa. 34, 116 Atl. 506, 507 (1922). Contra, Long v. Hicks, 173 Wash. 17, 21 P.2d 281 (1933) (statute included sleds in definition of vehicles).

[26] Wright v. Salzberger & Sons, 81 Cal. App. 690, 254 Pac. 671, 676 (1927).

[27] Hattie v. Shaheen, 37 Ohio App. 50, 174 N.E. 20 (1930); cf. Spears Dairy v. Bohrer, 54 S.W.2d 872, 875 (Tex. Civ. App. 1932).

a horse-drawn sleigh was subject to vehicle regulations, a coaster sled was not.[28]

Miscellaneous items considered not to be vehicles include ferry boats,[29] wheel chairs,[30] and elevators.[31] A potato digger towed by a tractor is an "implement of husbandry" and not a vehicle.[32] It was decided that a front-end loader was not a vehicle and therefore was not subject to attachment of a mechanics' lien.[33] However, a motorized carry-all for hauling dirt was a vehicle and subject to vehicular registration requirements.[34] Towed pavement finishers are not subject to vehicle regulations,[35] but motorized road graders[36] and fork-lift trucks [37] are motor vehicles.

A novel case, in which the plaintiff's deceased husband was shot while walking down the street, held that a pistol bullet, though moved or carried by compressed gases, was not a vehicle as considered by an insurance policy covering accidental death caused by any vehicle.[38]

It has been decided that airplanes are not motor vehicles under the guest statute,[39] automobile accident policies,[40] the National Motor Vehicle Theft Act,[41] negligence cases,[42] or statutes requiring the recording of chattel mortgages on all items except vehicles.[43] However, an airplane is a motor vehicle within the Tariff Act of 1930[44] and the Mississippi Motor Carrier Regulatory Act of 1938.[45]

Trolley busses,[46] street cars,[47] and trains[48] are usually held not to be motor vehicles either because they are not self-powered or because they run on fixed rails or tracks. Apparently trailers occupy an uncertain status. Some have been considered motor vehicles when connected to a towing vehicle,[49] but some trailers have been held not to be motor vehicles even when towed.[50]

Tractors have had their day in court before the instant case. In insurance claim suits, it has been decided that a farm tractor was not

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28 Terrill v. Virginia Brewing Co., 130 Minn. 46, 153 N.W. 136 (1915).
29 Duckwall v. City of New Albany, 25 Ind. 283, 286 (1865).
30 Stevenson v. United States Express Co., 221 Pa. 59, 70 Atl. 275 (1908).
31 Wilson v. C. Dorflinger & Sons, 218 N.Y. 84, 112 N.E. 567 (Ct. App. 1916).
32 Turner v. Purdum, 77 Idaho 130, 289 P.2d 608, 613 (1955).
33 Wilson v. Robert A. Stretch, Inc., 44 N.J. Super. 52, 129 A.2d 599, 603 (1957).
34 People v. Pakchoian, 114 Cal. App. 2d 831, 250 P.2d 767 (1952).
35 Fitzpatrick v. Service Const. Co., 227 Mo. App. 1074, 56 S.W.2d 822, 824 (1933).
36 Peterson v. King County, 199 Wash. 106, 90 P.2d 729 (1939).
37 National Gas. Co. v. Thompson, 96 So. 2d 708 (Ala. Ct. App. 1957).
38 Scott v. Life & Cas. Ins. Co., 18 So. 2d 58 (La. Ct. App. 1944).
39 In re Hayden's Estate, 174 Kan. 140, 254 P.2d 813, 817 (1953); Hanson v. Lewis, 5 Ohio Supp. 195, 1938 U.S. Av. R. 73 (1937).
40 Monroe's Adm'r. v. Federal Union Life Ins. Co., 251 Ky. 570, 65 S.W.2d 680, 682 (1933).
41 McBoyle v. United States, 283 U.S. 25 (1931).
42 Rich v. Finley, 325 Mass. 99, 89 N.E.2d 213, 218 (1949).
43 DiGuilio v. Rice, 27 Cal. App. 2d, 70 P.2d 717 (1937).
44 United States v. One Pitcairn Biplane, 11 F. Supp. 24 (W.D.N.Y. 1935).
45 South Mississippi Airways v. Chicago & Southern Airlines, 200 Miss. 329, 26 So. 2d 455, 461 (1946).
46 City of Dayton v. De Brosse, 62 Ohio App. 232, 23 N.E. 2nd 647, 650 (1939).
47 Chicago v. Keogh, 291 Ill. 188, 125 N.E. 881 (1919).
48 Grover v. Sharp & Fellows Contracting Co., 82 Cal. App. 2d 515, 186 P.2d 682, 685 (1947).
49 See, e.g., Vest v. Kramer, 158 Ohio St. 78, 107 N.E.2d 105 (1952); Kern v. Contract Cartage Co., 55 Ohio Ct. App. 481, 9 N.E.2d 869, 875 (1936) (dictum).
50 See, e.g., Miller v. Berman, 55 Cal. App. 2d 569, 131 P.2d 18 (1942); Liberty Highway Co. v. Callahan, 24 Ohio Ct. Ap. 374, 157 N.E. 708, 712 (1926); Hennessy v. Walker, 279 N.Y. 94, 17 N.E.2d 782, 784 (1938).

covered by a fire insurance policy on automobiles[51] or an automobile liability policy.[52] On the other hand, an accident policy covering mishaps due to fire or vehicles was found to include damages caused by a bulldozer tractor knocking down a building.[53] Also, an accident policy excluding motorcycles and aerial devices was considered to cover accidents on a farm tractor.[54] An accident caused by a logging tractor was covered by an accident policy excluding motorcycles and farm machinery.[55] A farm tractor was found subject to state sales taxes on motor vehicles,[56] and tractors were also held to be subject to motor vehicle fuel taxes.[57] It has been held that tractors are considered motor vehicles requiring mufflers.[58]

The most commonly accepted definition of a vehicle includes every device except those moved by human power or used exclusively upon stationary rails or tracks.[59] Some statutes[60] prohibiting the driving of "any vehicle" while intoxicated expressly state that, for the purposes of the statute defining certain vehicle offenses, persons riding bicycles[61] or riding, or leading, or driving an animal[62] shall be subject to all provisions applicable to the driver of a vehicle. The Colorado statute includes both bicyclists and drivers of animal-drawn vehicles.[63] It is of interest that some states, in which it is prohibited to drive "any motor vehicle" while intoxicated, have expressly exempted farm tractors and some other devices from their statutory definitions of motor vehicles.[64]

Despite these variations in application and definition, very few cases concerned with driving while intoxicated have been carried into the appellate courts. Two cases where the main issue was the definition of "motor vehicle" were appealed on the ground that steering a car while being pushed or towed did not constitute operator of a *motor* vehicle.[65] Another case was appealed on the question of whether or not a pickup truck was a motor vehicle as defined by the statute.[66] However, all three convictions were sustained by the higher courts.

It is axiomatic that criminal statutes are construed strictly. However, decisions from many states have held that statutes prohibiting operation of motor vehicles while intoxicated should be liberally construed so

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51 Jernigan v. Hanover Fire Ins. Co., 235 N.C. 334, 69 S.E.2d 847 (1952).
52 Bowers v. Continental Life Ins. Co., 214 Cal. 166, 5 P.2d 608 (1931); Washington Nat'l Ins. Co. v. Burke, 258 S.W.2d 709, 711 (Ky. 1953); Brown v. Fidelity & Cas. Co., 241 N.C. 666, 86 S.E.2d 433, 437 (1955).
53 Golding-Keene Co. v. Fidelity-Phenix Fire Ins. Co., 96 N.H. 64, 69 A.2d 856, 859 (1949).
54 Koser v. American Cas. Co., 162 Pa. Super. 63, 56 A.2d 301 (1948).
55 Johnson v. Continental Cas. Co., 127 Mont. 281, 263 P.2d 551 (1953).
56 Burford-Toothaker Tractor Co. v. Curry, 241 Ala. 350, 2 So. 2d 420 (1941).
57 State v. Louisiana Oil Corp., 174 Miss. 585, 165 So. 423 (1936).
58 Johnson v. Bergquist, 184 Minn. 576, 239 N.W. 772 (1931).
59 E.g., Colo. Rev. Stat. § 13-1-1 (1) (1953). "Vehicle, every device in, upon or by which any person or property is or may be transported or drawn upon a public highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks."
60 Boyd, An Analysis of the Drunken Driving Statutes in the United States, 8 Vand. L. Rev. 888, 892-93 (1955) is an excellent article which gives the wording of each state's statute.
61 E.g., North Carolina.
62 E.g., Arizona, Georgia, and Oregon.
63 Colo. Rev. Stat. § 13-4-5 (1) (1953). "Every person riding a bicycle or driving any animal drawing a vehicle upon a roadway shall be subject to the provisions of this article applicable to the driver of a vehicle, except those provisions of this article which, by their nature, can have no application."
64 E.g., Connecticut, New York, and Vermont.
65 Chamberlain v. State, 294 S.W.2d 719 (Tex. Crim. App. 1956); Rogers v. State, 147 Tex. Crim. 602, 183 S.W.2d 572 (1944).
66 Nichols v. State, 156 Tex. Crim. 364, 242 S.W.2d 396 (1951).

that the public may be protected while on the highways.[67] It is obvious from the opinions in these and other cases that the judiciary intends to protect the public as far as possible from the dangers of intoxicated drivers.

What has Colorado done to protect the public from these hazards? The Colorado statute appears to be as strict and inclusive as that of any other state. Colorado statutes prohibit driving while intoxicated of "any vehicle" upon the highways and "elsewhere through the state."[68] The statutory definition of "vehicle" excludes only devices moved by human power or used exclusively upon stationary rails or tracks.[69] Motor vehicles include every self-propelled vehicle[70] with all types of tractors[71] being specifically designated as motor vehicles. As mentioned before, Colorado expressly includes bicyclists and drivers of animal-drawn vehicles in the applicable sections.[72]

Indicative of what Colorado's stand probably would be in this matter is the decision handed down in an interesting case brought before the Colorado Supreme Court several years ago. *People v. Rapini*,[73] involving an issue similar to the instant case, was concerned with a violation of the state statute prohibiting the use of vehicles with metal cleats on state highways. The defendant alleged that the offending machine, a binder, did not violate the statute since it was not a vehicle, but instead was an "instrument of husbandry." The court granted that the binder was an instrument of husbandry, but held that it was also a vehicle within the meaning of the statute.

Should a case on all fours with *Powell v. State* be brought before the Colorado courts, it is likely that a conviction for driving a vehicle while intoxicated would be sustained. The prosecution could rely upon the statute as written with little difficulty.

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67 See, e.g., State v. Mann, 143 Me. 305, 61 A.2d 786 (1948); People v. Rue, 166 Misc. 845, 2 N.Y.S.2d 939, 942 (City Ct. of Middletown 1938); Luellen v. State, 64 Okla. Crim. 382, 81 P.2d 323 (1938).

68 Colo. Rev. Stat. § 13-4-30 (1) (Supp. 1955) (driving while intoxicated statute). Colo. Rev. Stat. § 13-4-1 (2) (1953). declares that the penalty sections, including those for driving while intoxicated, apply upon the highways and elsewhere through the state.

69 See note 59 supra.

70 Colo. Rev. Stat. § 13-1-1 (2) (1953). "Motor vehicle, every vehicle, as herein defined, which is self-propelled."

71 Colo. Rev. Stat. § 13-1-1 (6), (7) (1953).

72 See note 63 supra.

73 107 Colo. 363, 112 P.2d 551 (1941).

Mines and Minerals—Discovery—Scientific Discovery of Uranium Ore

BY GERALD STARBUCK

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On February 27, 1955, the defendants, while prospecting on state land, detected with a geiger counter a radioactive count of four or five times the normal background count. There was evidence that the defendants obtained geiger counter readings at four points, posted four notices, and dug four discovery pits. A sample was taken from one of the pits and a chemical assay disclosed 1.24 percent uranium and 0.4 percent vanadium. On April 4, 1955, the plaintiffs secured from the State Board of Land Commissioners a mining lease to a half section of land which included the defendant's four claims. In an ejectment action brought by the plaintiffs, the defendants claimed a portion of the land by alleging valid prior lode mining locations under state law.[1] In the trial court the issue narrowed down to the validity of the initial discovery and a judgment was entered for the defendants. The Colorado Supreme Court, affirming the trial court, held that, when the controversy is between two mineral claimants, the statutes requiring discovery should be liberally construed. The court further held that where, as in a group of contiguous claims lying in similar ground, competent radiometric readings coupled with an assay disclose mineral in place on at least one of the claims, similar radiometric findings on the other claims would constitute valid discoveries within the meaning of the statute if such other discoveries are "capable of competent radiometric delineation in similar rock in place or along the same vein or lode."[2] A dissenting opinion felt the decision was revolutionary in the field of mineral law and pointed out that geiger counters could not distinguish between mineralized rock in place and mineralized rock in float or wash. *Dallas v. Fitzsimmons,* 323 P.2d 274 (Colo. 1958).

Prior to this Colorado decision two other state supreme courts had faced the question of the validity of discoveries made with geiger counters or scintillators and a split of authority had evolved.

In a 1958 Utah case the defendant offered evidence that ore bodies had been found in strata on both sides of his claims and that one of these ore bodies was supporting a producing mine.[3] He also showed that certain channeling of a type along which uranium is often found ran through his claims and on these claims favorable geiger counter readings had been obtained. The court upheld the claims and stated that it was perfectly legitimate to rely on radiometric indications as one of the means for locating uranium. It further stated that, in testing the validity of a discovery, consideration may be given not only to the mineral found, but also to the geology of the area, the locations of other ore bodies or mines in the area, the opinions of experts, and any other information which miners regard as having an influence upon the possibility

[1] Colo. Rev. Stat. § 112-3-42 (1953).
[2] Dallas v. Fitzsimmons, 323 P.2d 274, 279 (Colo. 1958).
[3] Rummel v. Bailey, 320 P.2d 653 (Utah 1958).

of developing a mine, and in the case of uranium, the geiger counter may be considered.

The Wyoming Supreme Court in 1957 was faced with a fact situation similar to that of the main case.[4] In the Wyoming case, the plaintiff staked ten adjoining claims in an area showing radiometric readings of two to seven times the normal background count. From three of these claims samples were taken from rock in place and assays of these samples showed the presence of uranium. The defendants subsequently staked claims on the same ground. The court recited that to establish a valid location of a mining claim there must be a discovery of valuable mineral in a lead, lode, ledge, vein, or rock in place. It stated that on seven of the claims there had been no sampling or assaying and therefore no discovery of mineral in place. The court refused to recognize the readings of scintillators or geiger counters as sufficient to support discovery stating that such readings could not be depended upon as the only test, for in some areas these instruments would give indications of a high background count yet assay would show no uranium. Judgment allowed the plaintiff only the three claims which had been sampled and assayed.

In a recent Colorado case involving uranium mining claims, the validity of discovery was not an issue, but the Colorado Supreme Court discussed at some length the problems facing the courts in attempting to apply mining laws developed years ago to modern controversies over lands containing uranium ore.[5] There it was explained that one of the most successful ways of discovering secondary uranium ore bodies where no outcrops are visible is with the use of radio detecting instruments. It was pointed out that uranium ore bodies are often subject to thick layers of overburden and that, although radiometric readings above the normal may be found on the surface, yet no single piece of rock picked up from the surface will react or give a count. This phenomenon has resulted in the practice among prospectors of staking claims over a large area when a radiometric anomaly is found. Notices are posted and location certificates filed with the hope of establishing subsequent legal discoveries to validate the claims before intervening rights have arisen. The court recognized that no legislation had been enacted expressly providing for valid discoveries by radio detection and this was attributed to fear of inoperative or defective instruments,[6] mistakes, and the fact that radioactive ore bodies are far from consistent in their response to the various instruments. Some deposits of uranium are in balance and either do not give a count or give one entirely different from that to be expected when compared to assayed samples taken from the same area. The court terminated this discussion by stating that chemical assay was the conclusive test.

The problem of defining the requirements for discovery is by no means a new one. The general rule, which evolved from the early mining days, is that, where minerals have been found and the evidence is of such

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4 Globe Mining Co. v. Anderson, 318 P.2d 373 (Wyo. 1957).
5 Smaller v. Leach, 316 P.2d 1030 (Colo. 1957) (dictum). See also Waldeck, Discovery Requirements and Rights Prior to Discovery on Uranium Claims on the Colorado Plateau, 27 Rocky Mt. L. Rev. 404 (1955); Note, 4 Utah L. Rev. 239 (1954).
6 Note, 9 Wyo. L. J. 214 (1955).

character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, the requirements of the statute have been met.[7]

In 1865, the manner of locating lode claims in Colorado was governed by the rules and customs of the miners and they all recognized discovery, followed by appropriation, as the foundation to the discoverer's title.[8] However, the enactment of the statutes requiring the discoverer to sink a discovery shaft upon the lode to show a well defined crevice within sixty days from initial discovery tended to reduce the importance of initial discovery.[9] This was evidenced in a decision which held that the mere discovery of some other vein within the limits of the claim would not supply the requirement of the discovery to be exposed in the discovery shaft.[10] Initial discovery coupled with notice properly made and posted became an appropriation of the claim for a period of sixty days.[11] During that time a discovery shaft was to be dug and the Colorado Supreme Court held that the shaft must show a well defined crevice containing mineral bearing rock in place.[12] This rule of discovery has been somewhat more restrictive than the general rule as construed by the federal courts and states not requiring discovery shafts.[13]

In 1955, legislation was enacted in Colorado enabling claim locators to submit a map prepared in a prescribed manner in lieu of sinking the discovery shaft.[14] Thus, today, if a locator elects to submit the map instead of digging a discovery shaft, the validity of his initial discovery becomes of primary importance in establishing his rights within the statute. It is of interest to note that in *Dallas v. Fitzsimmons* the court cited federal authority in defining the requirements for initial discovery,[15] indicating possible attachment to the general rule.

Dallas v. Fitzsimmons represents a forward step in reconciling modern prospecting and locating practices to the requirements of the law. By requiring at least one assay to substantiate radiometric discoveries on a number of adjacent lode claims, the Colorado Supreme Court has insured against many of the shortcomings of radio detecting instruments and the unpredictable physical characteristics of uranium ore deposits, and at the same time has given locators more latitude in establishing enough claims to warrant a mining operation. On the other hand, problems still exist where the deposit lies beneath several hundred feet of overburden and the obtaining of a sample for assay is a difficult and expensive matter. However, the decision appears to be a reasonable one enhancing the probability of development of public lands and offering protection to the rights of bona fide locators of uranium deposits.

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[7] Crisman v. Miller, 197 U.S. 313 (1905); Pitcher v. Jones, 71 Utah 453, 267 Pac. 184 (1928).
[8] Erhardt v. Boaro, 113 U.S. 527 (1885); Consolidated Republic Min. Co. v. Lebanon Min. Co., 9 Colo. 343, 12 Pac. 212 (1886).
[9] Colo. Rev. Stat. §§ 92-22-6, 92-22-9 (1953).
[10] Beals v. Cone, 27 Colo. 473, 62 Pac. 948 (1900).
[11] Sierra Blanca Mining and Reduction Co. v. Winchell, 35 Colo. 13, 83 Pac. 628 (1905).
[12] Bryan c. McCaig, 10 Colo. 309, 15. Pac. 413 (1887).
[13] See note 8 supra.
[14] Colo. Rev. Stat. § 92-22-6 (Supp. 1955).
[15] Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673 (1899).

Securities—Securities Act of 1933—Purchaser of Securities As Underwriter

BY LEON A. ALLEN, JR.

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A corporation engaged in the publication of books and magazines sold $4,000,000 principal amount of ten-year convertible debentures without registering under the Securities Act of 1933 either the debentures or the common stock into which they were immediately convertible. The selling corporation acted in reliance upon exemptions from registration claimed under section 4 (1) of the Securities Act of 1933 as "transactions by an issuer not involving any public offering."[1] Twenty-seven purchasers, including four broker-dealer firms, were contacted privately through the corporation's underwriter and subscribed to over $3,000,000 of the issue. These purchasers signed and submitted to the selling corporation an investment letter representing that the debentures were purchased for investment with no intention of distribution.

The Securities and Exchange Commission, after an investigation, stated that the issue did involve a public offering and that no exemption existed under section 4 (1). The Commission maintained that the investment letter was signed by persons having no clear understanding of its meaning and did not protect the issuer. Since the original purchaser had acquired the debentures in order to convert them into common stock which was then distributed to the public, the Commission held that these purchasers were to be considered underwriters and registration by the issuer was necessary. It was additionally stated that holding for the six months' capital gains period of the tax statutes, holding in an "investment account" rather than a "trading account," holding for a deferred sale, holding for a market rise, holding for sale if the market does not rise, or holding for a year, does not afford a statutory basis for exemption and should not be relied upon in issuing securities. The corporation then submitted a registration statement which the Commission accepted. *Crowell-Collier Publishing Company,* SEC, Securities Act of 1933 Release No. 3825 (1957).

[1] 15 U.S.C. § 77d (1952).

Shortly after the enactment of the Securities Act of 1933, congressional and administrative study evolved some early interpretations of the statutory definition of an underwriter.[2] The House of Representatives committee studying the matter had this to say about the definition:

> "The term is defined broadly enough to include not only the ordinary underwriter who for a commission promises to see than an issue is disposed of at a certain price, but also includes as an underwriter the person who purchases an issue outright with the idea of then selling that issue to the public."[3]

The theory upon which future decisions would be based was outlined by the General Counsel of the Securities and Exchange Commission in 1935.[4] His opinion maintained that if the original purchaser had purchased with the intent of distributing the securities, he would be an underwriter and sales by a dealer of securities bought by him from the initial purchaser would generally not be exempt until at least a year after the purchase of the securities by the dealer. He also noted that the size and manner of the offering should be considered. It has been judicially affirmed that the burden of the proof of exemption falls upon the party claiming the exemption.[5]

The first important administrative decision on this interpretation held that the president of a corporation who received securities from the

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[2] 15 U.S.C. § 77b (1952).
[3] H.R. Comm. Rep. No. 85, 73d Cong., 1st Sess. 15 (1934).
[4] Securities Act Release No. 285 (1935).
[5] SEC v. Sunbeam Gold Mines Co., 95 F.2d 699 (9th Cir. 1938).

corporation and resold in appreciable volume to the public was an underwriter, even though he received no price differential and was not treated differently from the other stockholders.[6] In a subsequent ruling the Commission held that a firm was an underwriter where it had loaned money to an individual to enable him to exercise an option to buy the issuer's stock and the firm was to share in the profits and risks of the undertaking.[7] The general question was considered of sufficient importance for the Commission to issue a release interpreting the definition to exclude persons who purchase for investment unsold securities at a discount from the original underwriters.[8] The opinion considered the intention of the purchaser at the time of purchase the crucial point and held that this intention was a question of fact. For example, if the purchaser was a professional securities broker, the inference might be that the securities were purchased with a view towards distributing them. This rule was later applied by the Commission in holding that changed circumstances could permit resale without the seller being classed as an underwriter.[9]

A further expansion of the definition occurred in 1941 when a court of appeals held, in reversing a district court, that there did not have to be a fiduciary or other contractual relationship between the issuer and underwriter.[10] A Chinese benevolent association gratuitously promoting and assisting in the sale of bonds of the Republic of China was thus held to be an underwriter. The Commission received added support for its position when the Supreme Court held in *SEC v. Ralston Purina Co.*[11] that the Commission was under no duty to use any specific numerical test in determining whether a public offering existed. Although the court did not consider the position of the purchaser, it may be inferred that it would similarly support the Commission's refusal to delineate specific requirements for an underwriter.

In its latest decision the Commission categorically denies that any of the usual tests as to the private offering purchaser can be used to completely exclude him from being labeled an underwriter. The investment letter and the holding of securities for a year had previously been

6 Kinner Airplane and Motor Corp., 2 S.E.C. 943 (1937).
7 Sweet's Steel Co., 4 S.E.C. 689 (1939).
8 Securities Act Release No. 1862 (1938).
9 Comstock-Dexter Mines, Inc., 10 S.E.C. 358 (1941).
10 SEC v. Chinese Consolidated Benevolent Ass'n, 120 F.2d 738 (2d Cir. 1941).
11 346 U.S. 119 (1953).

relied upon as a fairly reliable protection against the terms of the statute. It is now evident that the Commission will not permit these safeguards to be used as a positive defense.[12] This is the first case to specifically hold purchasers with no relationship to the issuer beyond the fact of purchase as underwriters, although the possibility had always been present.

In the future, therefore, it will certainly continue to become more difficult for an issuer to take advantage of exemptions within the Securities Act. The Commission has been consistently upheld by the Courts in its refusal to specify positive requirements for exemptions, and it thus remains free to act in any case where it may feel that action is necessary. This means that it will be very difficult for the issuer to determine if he may qualify under an exemption from the act. The extensive reliance on investment letters in the past may prompt issuers in the future to revise the form of the letter to inform purchasers of the Commission's interpretation of purchasing for distribution. Whether a disclosure of this nature to initial purchasers will satisfy the Commission's requirements remains to be seen. If this form of letter is rejected by the Commission, the difficulty of sustaining the burden of proof that the securities have been acquired by initial purchasers for investment only, in the face of a possible subsequent resale, places a treacherous obstacle in the path of the issuer. Counsel for the issuer must either recommend that the securities be registered in all borderline cases, or he will be forced to sustain a very difficult proof of exemption in case the Commission decides to act.

[12] The Commission reiterated this position in suspension actions against three of the broker-dealer firms involved in the Crowell-Collier issue. Securities Exchange Act Releases No. 5688, 5689, 5690 (May 7, 1958).