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RECENT DECISIONS

TAXATION—ACCUMULATED NET INCOME OF A TRUST ESTATE, HELD FOR THE BENEFIT OF UNASCERTAINED CONTINGENT REMAINDERMEN, IS TAXABLE TO THE TRUSTEE — *Maryland National Bank v. Comptroller*[1]

Testator established a testamentary trust naming plaintiff, Maryland National Bank, as trustee. The terms of the trust provided that the trust income was to be paid to the testator's widow for life, the principal to go to those who would have been testator's "heirs" if he had died immediately after his wife.[2] In 1971 a sale by the trustee of capital assets of the trust realized a capital gain. In compliance with the terms of the trust, the gain was added to the trust principal; this addition thus benefited the remaindermen who were as yet unascertained and contingent[3] because testator's widow was still alive. The Comptroller of the State of Maryland levied an income tax on the gain pursuant to Article 81 section 313(b) of the Maryland Annotated Code. The trustee disputed the levy.

Nearly all states[4] tax income accumulated by a resident trust[5] for unborn or unascertained beneficiaries.[5] This is done by

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1. 264 Md. 536, 287 A.2d 291 (1972).

2. The trust called for the trustee to pay income from the trust corpus to testator's widow for life, then to testator's son, if living at the wife's death, until the son reached thirty-five years of age. The trust provided, however, that the son was to receive one-half of the trust principal upon reaching age thirty. The testator also stipulated that if the son died before the trust terminated, the share of the son was to go to his wife and descendants. If there were no descendants, one third of the son's share was to go to the son's wife, the balance (or all if the son had no wife) to be held for the benefit of testator's sister for her life. Finally, on the death of the sister or the widow, whichever was the latter, the principal was to go to the intestate successors of the testator as if the testator had died immediately after the latter of his wife or sister.

In fact, the son, without wife or descendants, predeceased the testator. The testator's sister also died, but his wife survived. Thus the wife continues as life beneficiary of the trust, the remaindermen being the testator's next of kin who will remain unascertainable until the wife dies. *Id.* at 538-39, 287 A.2d at 292-93.

3. "[A] contingent remainder is one which is either limited to a person not in being or not certain or ascertained, or so limited to a certain person that his right to the estate depends upon some contingent event in the future." Safe Dep. & Tr. Co. v. Bouse, 181 Md. 351, 356, 29 A.2d 906, 909 (1943).

4. Several states assess no income tax on trust income: Nevada, Texas, Washington and Wyoming levy no income tax at all; Connecticut, Florida, New Jersey, Ohio and South Dakota impose tax on some kinds of income, but not on trust income.

5. MD. ANN. CODE art. 81, § 279 (1969) arrives at the definition of "resident trust" by defining "resident" in subsection (i) as an "individual" meeting certain domiciliary standards and then in subsection (e) by defining "individual" as, *inter alia*, "[a]ll

implication in most states by the taxation of all income earned or accumulated by resident trusts.[6] Other states,[7] following a pattern laid down by the federal statute,[8] specifically designate that income accumulated by trusts for unborn or unascertained persons is taxed to the trust. Maryland follows the majority pattern by classifying the fiduciary as an individual[9] and then by imposing an income tax on all resident individuals.[10] However, the Maryland statute imposes no tax on income held for the benefit of nonresidents.[11] The issue in the present case was whether trust income accumulated by the trustee for unascertained beneficiaries but not distributed is taxable to the trustee or is removed from taxation as income accumulated for the benefit of nonresidents.

Resolution of this issue begins with an inquiry into the applicable statutes. Section 288(a) of Article 81 of the Maryland Annotated Code imposes an income tax on all resident "individuals."[12] Section 287(a) places a like tax on "nonresidents," basically for income earned within the state.[13] "Individual" is defined

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fiduciaries, including corporate fiduciaries and the estates they represent." See notes 14 and 15 *infra*.

6. ALASKA STAT. § 43.20.010 (1962); ARK. STAT. ANN. § 84-2005 (1947); DEL. CODE ANN. tit. 30, §§ 1134, 1136, 1137 (Cum. Supp. 1970); GA. CODE ANN. § 92-3103 (1961); HAWAII REV. STAT. § 235-4 (1968); IDAHO CODE §§ 63-3002, 63-3024 (1948); IND. CODE § 6-2-1-13(c) (1971); IOWA CODE ANN. §§ 422.5, 422.6 (1971); KAN. STAT. ANN. § 79-32, 134 (1969); KY. REV. STAT. ANN. § 141.030 (1972); ME. REV. STAT. ANN. tit. 36, § 5163 (Supp. 1972); MISS. CODE ANN. §§ 27-7-5, 27-7-27 (1972); MO. REV. STAT. § 143.341 (1952); NEB. REV. STAT. § 77-2719 (1970); N.M. STAT. ANN. § 72-15A-2-3 (1961); N.Y. TAX LAW §§ 618, 638 (McKinney 1966); OKLA. STAT. ANN. tit. 68, § 2358 (Supp. 1972); ORE. REV. STAT. §§ 316.282, 316.287 (1972); PA. STAT. ANN. tit. 72, § 7305 (Supp. 1973); R.I. GEN. LAWS ANN. § 44-30-16 (1970); S.C. CODE ANN. § 65-223 (1962); TENN. CODE ANN. § 67-2616 (1955) (limits the tax to income from stocks and bonds held for the benefit of residents; thus this statute may be subject to the same difficulties of the present case); VT. STAT. ANN. tit. 32, § 5822 (1970); VA. CODE ANN. § 58-151.022 (1969); W. VA. CODE § 11-21-18 (1966); WIS. STAT. ANN. §§ 71.01, 71.08 (1969).

7. ALA. CODE tit. 51, § 392 (1958); ARIZ. REV. STAT. ANN. § 43-161(a)(1) (1971); CAL. REV. & TAX CODE § 1773 (West 1970); COL. REV. STAT. ANN. § 138-1-4 (2)(a) (1963); ILL. ANN. STAT. ch. 120, § 2-203(c) (Smith-Hurd 1970); LA. REV. STAT. ANN. § 181 (1970); MASS. GEN. LAWS ANN. ch. 62, § 10(a) (1971); MINN. STAT. ANN. § 290.22 (1972); MONT. REV. CODES ANN. § 84-4912 (1966); N.H. REV. STAT. ANN. § 77:11 (1970); N.C. GEN. STAT. § 105-161 (1972); UTAH CODE ANN. § 59-14-47 (1963).

8. INT. REV. CODE OF 1954 § 641(A).

9. MD. ANN. CODE art. 81, § 279(e) (1969).

10. MD. ANN. CODE art. 81, § 288 (1969).

11. MD. ANN. CODE art. 81, § 313(b) (1969); *see* note 15 *infra*.

12. MD. ANN. CODE art. 81, § 288(a) (1969): IMPOSITION OF TAX.

(a) *Tax on individuals.* — There is hereby levied and imposed . . . a tax on the taxable net income as defined in § 280 (a) of every resident individual of this State and on the taxable net income, taxable in this State, of every individual not a resident of this State.

13. MD. ANN. CODE art. 81, § 287 (1969): TAXABLE INCOME OF NONRESIDENT.

in section 79(e) to include all natural persons and all fiduciaries,[14] while section 279(i) states that any individual fulfilling certain domiciliary requirements is a "resident" and any other individual is a "nonresident."[15] In order to avoid double taxation of trust income, section 313(b) limits a fiduciary's liability to undistributed income.[16]

At this point, it would seem that the provision of section 313(b) which removes income accumulated for nonresident beneficiaries from taxation might not pose a problem when a beneficiary is unascertainable.[17] A trustee simply would not be able to show that such a beneficiary was a nonresident and therefore could not benefit from the provision. A problem does arise, however, because section 279(i) states that any individual who does not meet its residency requirements is "deemed a nonresident."[18] A taxpayer would argue that the statute places the burden of proof on the state to show facts which establish that beneficiaries are "residents." The state, on the other hand, would argue that

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A nonresident individual shall be taxable in this State on that portion of his federal adjusted gross income as is derived from tangible property, real or personal, permanently located in this State (whether received directly or from a fiduciary) and income from business, trade, profession or occupation carried on in this State, shall be taxable in this State; provided, however, that income derived from intangible personal property held by a resident or by a domestic corporation as fiduciary, guardian, committee or trustee for an incompetent, or as agent for a nonresident principal (unless such property is used in connection with the trade, business, profession or occupation of such principal) shall not be taxable in this State . . . .

14. MD. ANN. CODE art. 81, § 279(e) (1969):

(e) *"Individual"* means all natural persons, whether married or unmarried; and also all fiduciaries, including corporate fiduciaries and the estates they represent.

15. MD. ANN. CODE art. 81, § 279(i) (1969):

(i) *"Resident"* means an individual domiciled in this State on the last day of the taxable year, and every other individual who, for more than six months of the taxable year, maintained a place of abode within this State, whether domiciled in this State or not; but any individual who, on or before the last day of the taxable year, changes his place of abode to a place without this State, with the bona fide intention of continuing to abide permanently without this State, shall be taxable as a resident of this State for that portion of the taxable year in which he resided in this State and as a nonresident of the State for the remainder of the taxable year. The fact that a person who has changed his place of abode, within six months from so doing, again resides within this State, shall be prima facie evidence that he did not intend to have his place of abode permanently without this State. Every individual other than a resident shall be deemed a nonresident . . . .

16. MD. ANN. CODE art. 81, § 313(b) (1969): "Liability of Fiduciary. A fiduciary shall be liable for income tax only with respect to such portion of the income of the fiduciary estate as is accumulated . . . for the benefit of a beneficiary thereof . . . ."

17. *Id.* The accumulated income which is ". . . to accumulate or apply . . . for the benefit of any nonresident of this State . . . ." is not to be taxed.

18. *See* note 12 *supra*.

in order to enjoy the preferred status of a "nonresident beneficiary" the taxpayer must affirmatively prove that the residency requirements are not met.

Thus when the State Comptroller claimed that an income tax of $11.71[19] was attributable to and due from the sale of the capital asset in the present case, the trustee contested the claim on the assertion that since it could not be determined from section 279(i) that the beneficiary was a "resident," by definition the beneficiary must be deemed a "nonresident." The trial court held that the provision of section 313(b) concerning nonresident beneficiaries was not applicable to unascertained beneficiaries and upheld the state's assessment. The trustee appealed.

Both the trustee and the state argued on appeal that the provision for favorable treatment of nonresidents, and hence the question as to who properly bore the burden of proof, could be resolved by using the maxims of statutory interpretation. The trustee argued that the nonresidents are the objects of an exclusion, *i.e.*, a limitation on the scope of the statute,[20] and therefore the trustee deserved the resolution of any ambiguity in the scope of the statute in its favor.[21] The state asserted that the statute contains an exemption rather than an exclusion, and, thus, any doubt as to whether unascertained persons are nonresidents was to be resolved in the state's favor.

The majority of the Court of Appeals rejected the approach of both parties and found the statute clear on its fact. Since either a "resident" or a "nonresident" must be an "individual,"[23] and an "individual" must be a "natural person,"[24] an unascertained contingent remainderman could not be a "nonresident" for whom the income is accumulated.[25] To include a contingent remainderman in the definition of "nonresident," the court concluded, would be an expansion of that term, which the court, in upholding the assessment, declined to do.[26]

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19. Both parties admitted that this was a test case. 264 Md. at 539 n.1.

20. Baltimore Foundry v. Comptroller, 211 Md. 316, 319-20, 127 A.2d 368, 369 (1956).

21. Comptroller v. Rockhill, Inc., 205 Md. 226, 234, 107 A.2d 93, 98 (1954).

22. *Cf.* Armco Steel Corp. v. State Tax Comm'n, 221 Md. 33, 40, 155 A.2d 678, 681 (1959).

23. See note 15 *supra*.

24. 264 Md. at 536, 287 A.2d at 294. But see note 14 *supra*. As the dissent pointed out, however, "individual" encompasses more than "natural persons." 264 Md. at 545-46, 287 A.2d at 295-96.

25. *See* note 17 *supra*.

26. *Cf.* Department of Motor Vehicles v. Greyhound Corp., 247 Md. 662, 234 A.2d

The dissent, while agreeing that the language was unambiguous, believed that the statute's clarity supported the taxpayer's position. "Residence" and "nonresidence" were of critical importance, the dissent asserted, not just because the present statute allowed an exclusion from income, but also because the "privileges and opportunities" of *residency* formed the principal basis upon which an income tax could be imposed.[27] Here, the contingent remaindermen were of necessity "individuals" since they were the deceased's "heirs."[28] Because "nonresidents" are defined to include all "individuals" who are not "residents," unascertainable contingent beneficiaries, since they could not be shown to be "residents," the dissent concluded, were by definitional necessity "nonresidents." The majority had created a third classification of individuals and had thereby unconstitutionally usurped the powers of the legislature.

The majority noted without comment[29] a suggestion made at oral argument that nonresidents were accorded preferred status under section 313 to make Maryland fiduciaries competitive with fiduciaries in other states. The dissent without citing authority asserted that this was an "envisioned principal purpose"[30] of the provision. The dissent also suggested that the legislature was concerned with limiting taxation to residents because one of the "principal considerations" for imposing the tax is "for the privilege and opportunities of residence in Maryland."[31] But it may be queried if the majority's restrictive or the dissent's expansive interpretation of "nonresident" was the only justifiable conclusion.

An alternative remains which neither the majority nor the dissent discussed. Section 313 imposes a tax on income accumulated but not paid during a taxable year. The same section imposes no tax on income held for a nonresident beneficiary. In the present case the court could have held that the income accumulated during the taxable year was held for those persons who would have been beneficiaries at the end of the year if the trust had then terminated.[32] The trustee-taxpayer would be required to

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255 (1967), for an example of an effort by the State to enlarge the scope of a statute by statutory construction.

27. *See* Fax v. State Tax Comm'n, 212 Md. 296, 299, 129 A.2d 167 (1957).

28. In addition to the broad definition of "individual" in the statute, see note 24 *supra*, this point contravenes the basis of the majority's reading of the statute, 264 Md. at 546-47, 287 A.2d at 295-96.

29. 264 Md. at 540 n.2, 287 A.2d at 294 n.2.

30. *Id.* at 543, 287 A.2d at 295.

31. *Id.* at 544, 287 A.2d at 295.

32. This procedure in effect determines no more than who is the "heir apparent," a

show exactly who among those persons were residents and who were nonresidents. He would then claim the tax benefit, if any.

The supposition, which the majority claims is made by section 279 that all individual taxpayers may be identified as either residents or nonresidents, should be carried over to the concept of beneficiary. This proposition differs somewhat from the dissent's argument that the majority had attached an additional limitation to the meaning of "resident," for the additional limitation imposed by the majority was not on the meaning of "resident" but on the term beneficiary. In any case, section 313(b) has no requirement that a beneficiary be vested, not contingent, or even identifiable within the meaning of trust law.

Thus, the court might have incorporated both the probable purposes of the provision and its desire to identify all individuals within the tax year. This could have been done merely by a determination of the apparent beneficiaries of the trust on the last day of the tax year.[33] Such an interpretation would enhance the competitive position of Maryland trustees without causing the loss of revenues possible under the dissent's interpretation even when residents could be the only possible beneficiaries within the terms of a trust. The most serious drawback to this construction, of course, is that it bases taxability on the fiction that the individual who would have been the beneficiary if the trust had terminated at year's end will also be the beneficiary at the actual termination of the trust. The court may well have viewed this construction as an unwarranted piece of judicial legislation.

In view of the intrinsic ambiguity in the use of the term "nonresident", as defined in section 279(i), with section 313(b)'s provision removing income accumulated by fiduciaries for nonresident beneficiaries, the majority of the Court of Appeals,

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definition of which appears in Reese v. Stires, 87 N.J. Eq., 32, 103 A. 679 (1917); *cf.* Moore v. Littel, 41 N.Y. 66, 40 Barb. 488 (1869).

33. This procedure is followed in Delaware by statute. DEL. CODE ANN. tit. 30, §§ 1134, 1138. A deduction for the proportion of total trust income accumulated for the benefit of nonresident beneficiaries is allowed upon a determination of who would have been nonresident beneficiaries had the trust terminated on the final day of the year. (If none of the beneficiary class is living, residency is determined by presuming "that members of the class were living and residing with the person, relationship to whom determines or defines the membership in the class.") Since Delaware follows the same procedure as Maryland for determining whether an individual is a resident or nonresident (*i.e.*, defining a resident to be an individual with certain domiciliary characteristics and nonresidents as all other individuals), the same problems which faced the Maryland court in the present case would have faced a Delaware court if the Delaware statute had not made provision in this way for contingent beneficiaries in the exclusion for nonresident beneficiaries.

rather than summarily stating that the ambiguity did not exist, should have attempted an analysis of section 313(b) in light of the probable purposes of the statute. While the court may not have reached a different result in the present case, analysis rather than reliance on maxim would have been helpful to future taxpayers, tax collectors, and courts. Hopefully, in light of the close decision in the present case, the Court of Appeals will be open to further evaluation of this statute.

CRIMINAL LAW — POLLING OF JURORS — COURT'S ATTEMPT AFTER JURY'S DISCHARGE TO CURE WRONGFUL DENIAL OF POLLING REQUEST HELD NOT EFFECTIVE — *Keller v. State.*[1]

A jury found defendant Ernest Keller guilty of obtaining and attempting to obtain by false pretenses certain moneys from the Charles County Board of Education. His attorney, after the court hearkened the jury to its verdict,[2] moved the court to poll the jurors.[3] The court, believing that the motion was not timely made, denied the motion and discharged the jury.[4]

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1. 17 Md. App. 609, 304 A.2d 260 (1973) (consolidated with Maloney v. State).

2. "Hearkening the jury to its verdict" is the procedure by which the Clerk verifies the accuracy of the verdict as recorded. At a trial it occurs as follows: When the jury reaches its verdict the court calls the jury back to the box. The Clerk then asks the jury if they have agreed to a verdict. The jury replies that it has. Then, the Clerk asks, "Who shall say for you?" The jury responds, "The foreman." The Clerk then says to the foreman, "What say you? Is the defendant guilty or not guilty of the matters whereof he [or she] stands indicted?" The foreman then delivers the verdict which the Clerk records. The Clerk then states, "Members of the jury: Hearken to your verdict as the court hath recorded it. Your foreman saith that [the defendant] is guilty [or not guilty] as to count _____. And so you say all?" If the jury makes no response, the Clerk then declares, "Verdict recorded." The defendant need not request the court to hearken the verdict, because the Clerk automatically hearkens the verdict after it is announced. However, while Maryland courts view hearkening as a routine practice, it is not required by the Maryland Rules of Procedure. *But see* Givens v. State, 76 Md. 485, 25 A. 689 (1893) where the Court of Appeals held that a court's failure to hearken the verdict was reversible error.

3. "Polling the jury" is the procedure by which the defendant ascertains whether the verdict announced by the foreman is the unanimous verdict of the jury. On a poll each juror is required to stand and state whether the verdict is, or is not, his individual verdict. One court, State v. Cleveland, 6 N.J. 316, 322, 78 A.2d 560, 563 (1951), described the procedure as follows:

> The polling of the jury is a procedure whereby the jurors are asked individually the finding they have arrived at, as denoted by the question posed by the clerk: ". . . how do you find?" The practice of long standing requires each juror to answer for himself, thus creating individual responsibility, eliminating any uncertainty as to the verdict as announced by the foreman.

4. For an explanation of why the judge erred in his ruling, see note 11 *infra* and accompanying text.

Ten days later at the hearing on Keller's motion for a new trial, the court admitted its error in denying Keller his right, under Rule 758(d) of the Maryland Rules of Procedure,[5] to have the jurors polled on their verdict. In an attempt to salvage the trial,[6] the court brought the jurors back two days later to accord Keller his right to have them polled.[7] On the poll each juror replied that the guilty verdict was his individual verdict. Keller then appealed the conviction claiming, *inter alia,* that the trial judge's action constituted reversible error. On appeal, the Court of Special Appeals held that the subsequent action did not cure the trial judge's error in his refusing to have the jury timely polled and that Keller is therefore entitled to a new trial.[8]

Maryland law has traditionally provided criminal defendants the right to have the jury polled on its verdict. Since 1883 Maryland cases have consistently held that a "prisoner [is] entitled, as a matter of right, to a poll of the jury."[9] In addition, the Maryland Rules of Procedure provide that upon a party's timely request the jury "shall be polled" by the court.[10]

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5. MD. ANN. CODE, art. 9B, ch. 700, Rule 758(d) (1970) subtitled, "Poll of the Jury", provides:

> When a verdict is returned and before the jury is discharged it shall be polled at the request of a party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberation or may be discharged.

6. The trial judge, apparently quite annoyed with himself, stated that:

> To have a trial of this length and then go out on a simple error of procedure and perhaps it is not too late to correct, sort of goes against the grain of the Court, especially since it was our error.

17 Md. App. at 617 n.2.

7. As to the validity of this procedure, see note 22 *infra.*

8. Keller also presented seven other questions for appellant review. The court, reversing on the polling question, found it necessary only to consider his claim relating to the indictments, as they were material to the retrial. Keller argued that the indictments were invalid because they were vague, ambiguous and duplicitous. The court, however, finding Keller's claim meritless, upheld the validity of the indictments.

9. Williams v. State, 60 Md. 402, 403 (1883). For other decisions stating that defendants have the legal right to poll the jury, see Coby v. State, 225 Md. 293, 170 A.2d 199 (1960); Hommer v. State, 85 Md. 562, 37 A. 26 (1897); Givens v. State, 76 Md. 485, 25 A. 689 (1893).

10. *See* note 5 *supra.* Rule 758(d), adopted by the Court of Appeals on July 16, 1956, has its source in Rule 40(e) of the Uniform Rules of Criminal Procedure drafted by the National Conference of Commissioners on Uniform State Laws (1952). The only difference existing between Maryland Rule 758(d) and Rule 40(e) concerns the time period in which requests for polling the jury are allowed. While Maryland Rule 758(d) permits requests up until the jury's dismissal, Rule 40(e) only permits requests up until the recordation of the verdict. *See also* FED. R. CRIM. PROC. 31(d) *construed* in Miranda v. United States, 255 F.2d 9 (1st Cir. 1958) which is followed by Rule 40(e). The Rule also authorizes the court to poll the jury on its own motion.

The Rule represents a significant change from Maryland case law in regard to the time period for requesting a polling of the jury.[11] Prior to adoption of the Rule, case law held that the right to poll is waived if not requested before the recordation of the verdict.[12] Under the Rule, however, requests to poll may be made anytime "before the jury is discharged."[13] Although the Court of Appeals did not state a reason for the change,[14] one possible explanation is that the time period between the return of the verdict and its recordation was too limited. The extension of the time period to the discharge of the jury offers defendants a greater opportunity to have the jury polled.

Both the trial judge and the Court of Special Appeals recognized Keller's right to have the jury polled upon his request.[15] The issue was whether the trial judge, by polling the jury after its discharge, cured his error in refusing Keller that right. In deciding this issue, the court first determined the significance of the right to poll the jury and found that while the Constitutions of the United States[16] and Maryland[17] guarantee defendants in all crimi-

11. Keller's trial judge made his erroneous ruling because he was unaware of this change. He ruled Keller's polling request out of order because it came after the recordation of the verdict. As the trial judge ultimately realized, Keller's request was timely under the Rule.

12. *See* Hommer v. State, 85 Md. 562, 564, 37 A. 26, 27 (1897) where the court succinctly stated that the ". . . failure to make the demand at the proper time — that is, before the verdict has been recorded — is equivalent to a waiver." *See also* Ford v. State, 12 Md. 514 (1859). A majority of those states which provide polling as a legal right of criminal defendants still follow this rule today. *See, e.g.*, Brown v. State, 63 Ala. 97 (1879); People v. Nichols, 62 Cal. 518 (1881); People v. Schneider, 154 App. Div. 203, 139 N.Y.S. 104 (1912) (construing Section 450 [now SECTION 451] of the N. Y. CODE OF CRIM. PROC.); Commonwealth v. Martin, 379 Pa. 587, 109 A.2d 325 (1954).

13. *See* note 5 *supra*. A minority of those states which provide polling as a legal right of criminal defendants follow Maryland in permitting requests for polling until the jury's discharge. *See, e.g.*, Bryant v. State, 65 Ga. App. 523, 16 S.E.2d 241 (1941); Pritchett v. State, 195 Ind. 404, 145 N.E. 488 (1924); Bridges v. State, 154 Miss. 489, 122 So. 533 (1929); Commonwealth v. Cano, 182 Pa. Super. 524, 128 A.2d 358 (1956), *aff'd* 389 Pa. 639, 133 A.2d 800 (1957); Watts v. Commonwealth, 129 Va. 781, 106 S.E. 339 (1921).

14. The Court of Appeals, while not providing the reasons for changing the law, did provide the general purpose behind adopting the rules on criminal causes. MD. R. P. 701, which was added January 1, 1962, provides in part:

> The rules in this chapter are intended to provide for the just determination of every criminal cause. They shall be construed to secure simplicity in procedures, fairness in administration and the elimination of unjustifiable expense and delay.

15. The trial judge freely admitted at the hearing on Keller's motion for a new trial that: "I think there can be no matter of the fact that as a matter of right under [Maryland Rule 758 (d)] the Defendant was entitled to have this jury polled. An obvious error on the part of the Court in ruling the way it did, [sic]" 17 Md. App. at 617, 304 A.2d at 265. The Court of Special Appeals likewise agreed that the trial judge had been wrong in refusing Keller's polling request.

16. U.S. CONST. amend. VI provides in pertinent part:

nal proceedings the right to a trial by an impartial jury, Maryland's constitution goes a step further by requiring that all guilty verdicts be unanimous.[18] The court further found that, since polling provides the only means of ascertaining whether unanimity exists, a defendant's right to a poll assures his constitutional right to be convicted only upon a unanimous verdict.[19] The court concluded that to this extent polling is a right of "constitutional dimension".[20]

The court then considered whether the trial judge by his subsequent action had rendered his error harmless[21] and found that the error had not been cured because the action taken by the judge amounted not to taking a poll of the jury but to taking only ". . . an unsworn statement from each juror almost two weeks after the jury was discharged that he agreed to the verdict."[22] The

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In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.

17. MD. CONST. Declaration of Rights, art. 21 provides in pertinent part:

That in all criminal prosecutions, every man hath a right . . . to a speedy trial by an impartial jury, without whose unanimous consent he ought not be found guilty.

18. 17 Md. App. at 622, 304 A.2d at 267.

19. *Id.* at 622-23, 304 A.2d at 268.

20. *Id.* Just how this characterization of polling is relevant to the issue of curative action is not at all clear. The court found the trial judge's subsequent action failed not because a wrongful denial of a constitutional right can never be rendered harmless but because the jury cannot be legally polled once it has been discharged. In this case, following the court's rationale, it would not have mattered whether polling is merely a common law or statutory right or a right of "constitutional dimension," for the judge's action of polling the jury after its discharge will still be ineffective. It appears, therefore, that the court's finding that polling is a right of "constitutional dimension" is unnecessary, if correct, dicta.

21. The State in its brief relied upon two cases for the proposition that a wrongful denial of a request to poll the jury may be cured. *See* People v. Nichols, 62 Cal. 518 (1881) and Russell v. State, 68 Ga. 785 (1811). In *Nichols,* while California Law required that the verdict be read and that the jury be polled upon a party's request before the recordation of the verdict, the trial court refused to have the verdict read and the jury polled until after recording the verdict. The California Court of Appeals held this was not reversible error as the defendant was substantially accorded his right to poll the jury. In *Russell,* the defendant made a timely request to poll the jury, but the court when polling the jury omitted one juror. Realizing its mistake after having discharged the jury, the court immediately called the jury back and polled the remaining juror. The Georgia Supreme Court affirmed the judgment because the omitted juror had remained in the presence of the court and therefore was not improperly influenced by his discharge. The *Keller* court, however, refused to accept these as authority for the trial judge's action in this case, as the facts between the cases were readily distinguishable.

22. 17 Md. App. at 627, 304 A.2d at 270. The court surprisingly made no reference to the old common law rule that once a jury is discharged it is without legal power to alter or amend its verdict, whether by motion to poll or otherwise. *See, e.g.*, Commonwealth v. Cano, 182 Pa. Super. 524, 128 A.2d 358 (1956), *aff'd* 389 Pa. 639, 133 A.2d 800 (1957). However, this rule is implicit in the "unsworn statement" characterization of the judge's

court's rationale was that, as the jury had ceased to exist after the jurors had been discharged and dispersed, the jurors no longer constituted a jury to be polled.[23]

The court, by granting Keller a new trial, upheld long standing Maryland precedent[24] in the first recorded application of Rule 758(d) of the Maryland Rules of Procedure. *Keller v. State* thus draws attention to the change in the case law effected by the Rule and affirms the defendant's right to a new trial if he is deprived of his protection from possible conviction by a non-unanimous verdict.

CRIMINAL LAW—FIFTH AMENDMENT—USE OF THE SILENCE OF THE ACCUSED BEFORE TRIAL TO IMPEACH TESTIMONY IS CONSTITUTIONALLY IMPERMISSIBLE— *Johnson v. Patterson.*[1]

The prisoner, Matthew Johnson, was arrested and tried for rape. At trial Johnson testified in his own defense, and on cross-examination the prosecutor questioned him about his refusal to answer questions while in police custody. Later, in his remarks to the jury, the prosecutor again made reference to Johnson's pre-trial silence. The jury found the defendant guilty, and the Colorado Supreme Court upheld the conviction.[2] The defendant, alleging that the prosecutor's remarks at trial violated his constitutional right to remain silent, sought a writ of *habeas corpus* in the federal district court. The district court granted Johnson's petition, and the state appealed. The Court of Appeals for the Tenth

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action. Additionally, it is obvious that, if the jury is without legal power to change its verdict, the purpose of providing the defendant his right to poll the jury is defeated. *But see* Melton v. Commonwealth, 132 Va. 703, 111 S.E. 291 (1922), where the court said that as long as the jurors are in the actual and visible presence of the court an inadvertent announcement of their discharge may be recalled.

23. 17 Md. App. at 626, 304 A.2d at 270.

24. Givens v. State, 76 Md. 485, 488, 25 A. 689, 689 (1893). *See also* Commonwealth v. Martin, 379 Pa. 587, 109 A.2d 325 (1954) where the court granted defendant a new trial on the deprivation of his right to have the jury polled; 5 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE, § 2142, at 333 (1957) where Wharton states that:

> The wrongful denial of a demand or request for a poll of the jury, or the deprivation of the right to a poll by other wrongful action of the court, has generally been held to constitute prejudicial error, entitling the defendant to a new trial or a reversal of conviction.

See generally note 9 *supra.*

1. 475 F.2d 1066 (10th Cir. 1973), *petition for cert. filed,* 41 U.S.L.W. 3674 (U.S. June 18, 1973) (No. 72-1714).

2. Johnson v. Colorado, 473 P.2d 974 (Colo. 1970).

Circuit held that the prosecutor's questions during cross-examination and his comments during closing argument infringed on the defendant's right to remain silent under the fifth amendment by imposing a penalty on the exercise of that right.

Johnson's *habeas corpus* proceeding challenged the constitutionality of the prosecutor's comment on the defendant's pre-trial silence. At his trial Johnson, having taken the stand, testified that he had in fact had intercourse with the complainant, but had done so with her consent. During cross-examination the following exchange took place without objection by defense counsel:[3]

> Q. Now, Mr. Johnson, you didn't tell the police this, did you?
> A. No, sir.
> Q. The first time then that anyone has heard this is here today in court, is that correct?
> A. No, sir. I told Mr. Hellerstein when he came out to see me in the County Jail.
> Q. Mr. Hellerstein, your attorney, is that correct?
> A. Yes, sir.

Again, during closing argument and without objection the prosecution made reference to Johnson's failure to tell his story to the police: "And isn't it interesting that this is the first time that he has decided to tell the truth other than, of course, he testified that he told his lawyer, and didn't bother to tell the police."[4]

The question presented on appeal was whether the prosecution can use the silence of the accused at the time of arrest against him at trial for purposes of impeachment if the accused testifies in his own defense, when the choice to remain silent was made in the exercise of the constitutional privilege against self-incrimination. Writing for the majority of the Court of Appeals, Chief Judge Lewis relied primarily on *Miranda v. Arizona*[5] and *Griffin v. California*,[6] as well as two other Tenth Circuit cases.[7] In *Griffin* the Supreme Court held that it was reversible error for a prosecutor in a state trial to comment on the failure of a defendant to testify in his own defense as to matters which he could

3. 475 F.2d at 1067.
4. *Id.*
5. 384 U.S. 436 (1966).
6. 380 U.S. 609 (1965).
7. United States v. Arnold, 425 F.2d 204 (10th Cir. 1970); United States v. Nolan, 416 F.2d 588 (10th Cir.), *cert. denied*, 396 U.S. 912 (1969). Both cases involved factual situations similar to that in *Johnson*, and both were similarly resolved.

reasonably be expected to deny and of which he had knowledge. The prosecutor could not suggest to the jury the inference of guilt from the defendant's failure to testify. The Supreme Court reasoned that to make the defendant's exercise of his constitutional right available for use against him by the prosecution would impose a penalty on the exercise of a constitutional right and that the imposition of such a penalty on the exercise of a right "cuts down on the privilege by making its assertion costly."[8]

Griffin can be distinguished from *Johnson:* in *Johnson* the defendant actually took the stand and his pre-trial silence was used, at least arguably, for purposes of impeachment only and not as evidence of guilt.[9] But, the rationale of *Griffin* is equally applicable to *Johnson*, though the purpose of the prosecutor's comment was ostensibly different. Even if the purpose claimed, *i.e.*, for impeachment only, is assumed to be valid, "[a] penalty is levied on the exercise of his constitutional right in any event."[10]

The *Miranda* decision also offers support for the holding in *Johnson.* Dicta in *Miranda* anticipated the specific problem presented in *Johnson*:

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.[11]

This statement is in accord with the rationale of *Griffin* and generally has been followed.[12]

Moreover, the majority opinion in *Johnson* did not rely solely on the rationale of *Griffin* and *Miranda.* It also attacked the

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8. 380 U.S. at 614. *See also* Spevack v. Klein, 385 U.S. 511 (1967).

9. However, as pointed out in Fowle v. United States, 410 F.2d 48, 54, (9th Cir. 1960) it may be psychologically impossible for the jury to restrict its consideration of the examination and the comment to impeachment only, however carefully worded is the court's instruction to the jury.

10. Johnson v. Patterson, 475 F.2d at 1068.

11. 384 U.S. at 468 n.37. The Court did not differentiate between use of silence as part of the case-in-chief and use for impeachment. It could be argued that the Court was addressing itself only to the former, though the cases have generally followed the rule for both uses. *See* United States v. Brinson, 411 F.2d 1057 (6th Cir. 1969); Fowle v. United States, 410 F.2d 48 (9th Cir. 1960).

12. United States v. Brinson, 411 F.2d 1057 (6th Cir. 1969); Fowle v. United States, 410 F.2d 48 (9th Cir. 1969); Gillison v. United States, 399 F.2d 586 (D.C. Cir. 1968); United States v. Nielson, 392 F.2d 849 (7th Cir. 1968). *But see* United States v. Ramirez, 441 F.2d 950 (5th Cir.), *cert. denied*, 404 U.S. 869 (1971).

evidentiary value of the defendant's pre-trial silence in the exercise of a constitutional right. Silence is usually held to be so ambiguous as to have no value as evidence,[13] although there are situations in which a person, facing repeated accusations, would normally speak, either to deny or to explain. Silence in these instances may support an inference that the accusations are true.[14] No such inference can be drawn, however, when the accused has a perfect right to remain silent[15] and when he is informed of this right by police officers pursuant to *Miranda*.[16] It would indeed be anomalous to warn the accused that he has a right to remain silent and that anything he says can be used against him, but that if he remains silent that, too, can be used against him.[17]

The dissent in *Johnson,* while apparently conceding that the prosecution may not comment where the defendant does not testify, argued that, when the defendant takes the stand to testify in his own defense, he waives all fifth amendment rights and he may be cross-examined using all relevant facts having probative value.[18] The dissent gave great weight to *Harris v. New York,* a five to four decision of the Supreme Court in 1971.[19] In *Harris* the

13. Fowle v. United States, *supra* at 50. Because silence is so ambiguous, numerous restrictions and safeguards have developed around its use as evidence. *See* C. MCCORMICK, EVIDENCE § 270 (2d ed. 1972).

14. See United States v. McKinney, 379 F.2d 259, 261 (6th Cir. 1967); 4 J. WIGMORE, EVIDENCE § 1071 (3d ed. 1940).

15. *See, e.g.,* Grunewald v. United States, 353 U.S. 391 (1957), where the Supreme Court held that under the circumstances of a grand jury inquiry, where the accused, without counsel, was being questioned in secret, no inference of guilt or lack of credibility could be drawn from his choice to remain silent.

16. The Supreme Court held in Johnson v. United States, 318 U.S. 189, 197 (1943) that it would be unfair to a defendant who had been informed of his right to remain silent at trial by the court and who had availed himself of that right, to allow his silence to be used against him. There is a similar reliance by the accused after his "*Miranda* rights" have been read to him by the police. *See* C. MCCORMICK, EVIDENCE § 270 (2d ed. 1972).

17. See Fowle v. United States, 410 F.2d at 54. The dissenting opinion also argued that the issue in *Johnson* was one of balancing truth against the rights of the accused. However, the Supreme Court explicitly rejected this reasoning as a remnant of the inquisitorial system that was abolished by the Constitution, particularly by the fifth amendment, Miranda v. Arizona, 384 U.S. at 459-64. If silence could be used against an accused, then he necessarily would feel compelled to speak, regardless of the "truth" of the silence.

18. 475 F.2d at 1068 (dissenting opinion). *See also* United States v. Ramirez, 441 F.2d 950, 954 (5th Cir. 1971). The dissent refused to consider the probative value of Johnson's silence. Because there was no contemporaneous objection by defense counsel, the trial court was not able to exercise its discretion on that issue, and thus, apparently, the dissent believed that the issue of probative value was not a proper subject for review. Moreover, the dissent did not consider the general question of the value of silence maintained in the exercise of a constitutional right.

19. 401 U.S. 222 (1971).

Court allowed the use of pre-trial statements illegally obtained in derogation of rights guaranteed under *Miranda,* which statements were therefore inadmissible as evidence in the prosecution's case-in-chief, to impeach a defendant who took the stand.[20] The dissent treated *Harris* as authority for the proposition that, when a defendant chooses to testify, any and all available evidence can be used to attack his credibility.[21] *Johnson,* however, is distinguishable from *Harris,* which cannot be read so broadly.

In *Harris,* the Court was concerned solely with the application of the exclusionary rule and with its effect on the conduct of the police. The constitutional right of the defendant in *Harris* already had been violated by the police in obtaining an illegal confession; Harris' right to remain silent could no longer be protected. The only question, then, was whether to prohibit — as a deterrent to further possible police misconduct — the use of such illegally obtained evidence, already excluded from the prosecution's case-in-chief, to impeach a defendant who takes the stand. The Court concluded that the deterrent effect of such an application of the exclusionary rule was, at best, speculative, because such evidence was already excluded from the case-in-chief.[22] On the other hand, the defendant made clearly contradictory statements which raised serious doubts as to his credibility. In balancing the speculative value of the exclusionary rule against the clear evidence of perjury, the Court concluded that the evidence was admissible.

However, the right of the defendant in *Johnson* to remain silent was intact at the time of trial. To allow the use of the

20. In allowing such use of illegally obtained statements, the Supreme Court specifically rejected what it called "comments" in *Miranda* which seem to suggest a different result. 401 U.S. at 224.

21. A case more closely on point which was cited by the dissent is Raffael v. United States, 271 U.S. 494 (1926). In that case a defendant declined to testify at his trial. A second trial was necessary when the first jury could not agree. The Supreme Court held that in taking the stand the defendant waived his fifth amendment rights, and thus his silence at the first trial could be used to attack his credibility at the second. However, in light of the changes which have taken place since 1926, and particularly in light of *Miranda* and *Griffin* which seem opposite to the result in *Raffael,* that case should no longer be considered good law. *See, e.g.,* the concurring opinion of Justice Black in Grunewald v. United States, 353 U.S. 391 (1957), where four justices expressed their belief that *Raffael* should be expressly overruled, if it had not already been overruled by implication in Johnson v. United States, 318 U.S. 189 (1943).

22. 401 U.S. at 645. In addition, once an illegal confession has been obtained, it is doubtful that the error can be rectified because of the coercive effect of the illegal confession. Thus, the benefits of an admissible confession may be forever denied to the police. This denial provides the main deterrence to illegal conduct by police. *See* Leyra v. Denno, 347 U.S. 556 (1954).

defendant's silence to impeach his credibility would have the undeniable effect of compelling future defendants to speak. The trial court itself would thus become the occasion for violation of fifth amendment rights. Clearly, then, in *Johnson* the right of a defendant to remain silent while in police custody would be effectively protected only by the exclusion of evidence of the defendant's silence even if such evidence were used solely for purposes of impeachment. Thus, the rationale of *Harris* is inapposite to the situation in *Johnson.*

In conclusion, the clear direction of *Griffin* and *Miranda* is toward protecting the right of an accused to remain silent and, to that end, toward prohibiting the placing of any penalty on the right of an accused to remain silent. Where, as in *Johnson,* the accused has exercised his constitutional right to remain silent, no penalty should thereby be imposed on the exercise of that right.