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LEGISLATION

THE PROPOSED AMENDMENT TO THE NATURAL GAS ACT

The natural gas industry has long been recognized as affected with the public interest. Exercising the federal government's right to regulate quasi-public industries, the Natural Gas Act was enacted by Congress in 1938.[1] It gave the Federal Power Commission sweeping authority over the natural gas industry. The effect of this act is of current import due to the recent passage of a much discussed amendment which would have exempted independent natural gas producers from federal regulation where sales in interstate commerce were made as part of the "production or gathering of natural gas."[2] This amendment was subsequently vetoed by the President.[3]

Prior to the enactment of the Natural Gas Act, regulation of the production and distribution of natural gas was regarded as a matter of local concern, and state regulation was usually justified as a conservation measure.[4] The early statutes were aimed at preventing the waste of dry gas[5] and the later statutes introduced the concept of prorationing.[6] State commissions attempted to determine over-all market demand, a production quota was then established and an "allowable" determined for each well.[7] Rate regulation was generally confined to efforts to prevent monopolistic price practices.[8] It was to "plug the gaps" in areas of state regulation that the Federal Natural Gas Act was passed.[9]

The Natural Gas Act conferred on the Federal Power Commission broad regulatory powers.[10] The Commission was invested with authority to examine and regulate rates and charges,[11] approve exportation and importation of natural gas to and from foreign countries[12] and determine costs of production.[13] This authority extends generally to the ". . . business of transporting and selling natural gas for ultimate distribution to the public. . . ."[14]

The grant of jurisdiction to the Commission reads as follows:

1. 15 U.S.C.A. §§ 717-717w (1948).
2. H.R. 6645, 84th Cong., 2d Sess. (1956).
3. H.R. Exec. Doc. No. 342, 84th Cong., 2d Sess. (1956).
4. Federal Price Control of Natural Gas Sold to Interstate Pipelines, 59 Yale L.J. 1468, 1471 (1950).
5. Id. at 1472.
6. Id. at 1473.
7. King, Pooling and Unitization of Oil and Gas Leases, 46 Mich. L. Rev. 311, 323 (1948).
8. Federal Price Control of Natural Gas Sold to Interstate Pipelines, 59 Yale L.J. 1468, 1474 (1950).
9. Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954).
10. See note 1 supra.
11. 15 U.S.C.A. § 717c (1948).
12. 15 U.S.C.A. § 717b (1948).
13. 15 U.S.C.A. § 717d (1948).
14. 15 U.S.C.A. § 717(a) (1948).

"....

"(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution *or to the production or gathering of natural gas.*"[15] (Emphasis added) [Thus, the act specifically exempted from the Commission's jurisdiction ". . . the production, gathering or processing activities of independent producers." It was the interpretation of this phrase that caused the Commission much difficulty.]

The administrative problems presented by the general grants of authority in sections 717-717w shall not be dealt with here. Rather, discussion will be confined to one of the principal jurisdictional problems which faced the Federal Power Commission in the administration of the act, that is, are sales of natural gas by an independent producer at the mouth of an interstate pipeline subject to regulation by the Commission under the act?

To appreciate the problem presented to the Commission it is necessary to understand that a large part of the supply of natural gas is so-called "casinghead-gas", i.e., gas which is produced in connection with the recovery of oil. The remainder is "dry gas", so-called because oil is not recovered with the gas. After the gas is captured it moves through field pipes, usually under its own pressure, to a gathering point. There it is processed to remove impurities and recover by-products. Some of the gas is used as fuel by the producers themselves; the rest is sold either to local utilities or moved to the gathering points of pipeline companies who, by artificially increasing the pressure of the gas, distribute it to utility companies in various parts of the country.

Since "casinghead-gas" is a valuable by-product of the process of oil production, most of the major integrated oil companies also market natural gas. These companies, along with the dry field producers, are considered "independent producers" when they do not themselves own or operate the interstate pipelines, though in fact they sell to the interstate pipeline companies.[16]

State regulatory measures affecting the natural gas producers were initially aimed at conservation through the regulation of production. This aim, even when achieved, provided only the spottiest control over the natural gas companies. The sales of gas in interstate commerce were virtually under no regulation whatsoever since the Supreme Court, in a series of decisions prior to the passage of the Natural Gas Act, had held that the regulation of wholesale rates of gas and electricity moving in interstate commerce was beyond the constitutional powers of the states.[17] The basic purpose of Congress in passing

15. 15 U.S.C.A. § 717(b) (1948).

16. Alper, The Controversy Over Federal Regulation of Independent Producers of Natural Gas, 8 Vand. L. Rev. 589, 592 n. 16 (1955).

17. State Corp. Comm'n v. Wichita Gas Co., 290 U.S. 561 (1934); Public Utilities

the Natural Gas Act was to occupy this field in which the Supreme Court has held the states may not act.[18] It was through the instrumentality of the Federal Power Commission, acting under the authority of the Natural Gas Act, that "the gap" in state regulation was to be filled.[19]

Under the provisions of the act, if the Federal Power Commission is to assert its regulatory authority over the natural producers, it must be able to show a positive basis for jurisdiction, viz., that the company engages in the ". . . sale in interstate commerce of natural gas for resale . . ."[20] and also a negative basis, that is, that the company is not engaged solely in ". . . the production or gathering of natural gas."[21] Thus through its interpretation of the act, subject to judicial review, the burden was placed on the Commission of determining just what "gaps" it is to fill.

A determination that natural gas sales are sales in interstate commerce is usually not a difficult one for the Commission. The Supreme Court has held that sales of electric power made at the state line are sales in interstate commerce where the seller had knowledge that the buyer would utilize the energy extra-state.[22] In *Jersey Central Power & Light Co. v. Federal Power Commission*,[23] where the sale of energy was made in the producing state to another company which transmitted the power across the state line, the sale was held to be in interstate commerce and the Court said, "we see no distinction between a sale made at or before reaching the state line."[24] Again, the Supreme Court in *Interstate Gas Co. v. Federal Power Commission*,[25] stated that "there is nothing in that language [of the Natural Gas Act] to suggest that Congress intended that sales consummated before gas crosses a state line should not be regarded as being in such [interstate] commerce."[26] From the reasoning of these and similar cases, the Commission is justified in its liberal interpretation of the phrase ". . . in interstate commerce."

The Commission has had more difficulty in defining the limitations upon its authority imposed by the exclusionary language in the jurisdictional section of the act. In 1940, in the case of *In re Columbian Fuel Corp.*,[27] the Commission was for the first time presented with the problem of price regulation of gas produced by interstate pipelines from independent producers. The Commission decided that it did not have jurisdiction over the prices charged by the independents, basing its decision on the legislative history of the Natural

Comm'n v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927); Missouri v. Kansas Natural Gas Co., 265 U.S. 298 (1924).

18. H.R. Rep. No. 709, 75th Cong., 1st Sess. (1937).

19. Federal Price Control of Natural Gas Sold to Interstate Pipelines, 59 Yale L.J. 1468, 1478 (1950).

20. See note 15 supra.

21. Ibid.

22. Public Utilities Comm'n v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927).

23. 319 U.S. 61 (1942).

24. Id. at 69.

25. 331 U.S. 682 (1946).

26. Id. at 688.

27. 2 F.P.C. 200 (1940).

Gas Act and concluding that Congress had intended to regulate only the interstate pipelines and their sales to local distributing companies.[28] Thus, for the first time the Commission decided what "gap" it was bound to close, a stand it maintained for more than a decade.

This view was abandoned in the case of *In re Interstate Natural Gas Co.*[29] The company here involved was an interstate pipeline which sold gas to another interstate pipeline. Sales were made, however, within the producing state. The Commission asserted jurisdiction for the purpose of ordering rate reductions on the ground that this was a sale made in interstate commerce for resale.[30] On the appeal to the Supreme Court, this contention was abandoned and jurisdiction was asserted on other grounds, but the Supreme Court, in denying petitioner's contention that the sales were part of the gathering process and thus not within the Commission's jurisdiction, said "by the time the sales are consummated, nothing remains to be done. We have held that these sales are in interstate commerce."[31] Thus the Court seemed to feel that all such sales in interstate commerce were covered by the act and within the jurisdiction of the Commission. However, the Court also said ". . . where sales, though technically consummated in interstate commerce, are made during the course of production and gathering and are so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory functions, the jurisdiction of the Federal Power Commission does not attach."[32] Such language coupled with the previously quoted statements could not help but create doubt and confusion.

The doubt surrounding the right to jurisdiction over the independent producer was seemingly resolved by the case of *Phillips Petroleum Co. v. Wisconsin.*[33] In October, 1948 the Commission began an investigation to determine whether Phillips was a natural gas company within its jurisdiction and, if so, whether its rates were unreasonable. The Commission found that Phillips was not a "natural gas company" within the meaning of the act and therefore the Commission had no jurisdiction over its rates.[34] This decision was reversed by the Court of Appeals for the District of Columbia,[35] and the Supreme Court granted certiorari.[36] The Court discussed the problem created by the wording of section 717-b and decided that ". . . the legislative history indicates a congressional intent to give the Commission jurisdiction over the rates of all wholesalers of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during,

28. Id. at 205-7.
29. 3 F.P.C. 416 (1943).
30. Id. at 421.
31. Interstate Natural Gas Co. v. F.P.C., 331 U.S. 682, 692 (1946).
32. Id. at 690.
33. See note 9 supra.
34. 10 F.P.C. 246 (1951).
35. 205 F.2d 706 (D.C. Cir. 1953).
36. 346 U.S. 934 (1954).

or after transmission by an interstate pipeline company. There can be no dispute that the overriding congressional purpose was to plug the 'gap' in regulation of natural-gas companies resulting from judicial decisions prohibiting, on federal constitutional grounds, state regulation of many of the interstate commerce aspects of the natural-gas business."[37] The Court thus decided that the purpose of the act was to fill in any hole in the legislative dike created by the previous Supreme Court decisions[38] and expressly refused to consider the *sale* of gas as part of the production and gathering process.

The dissent, written by Mr. Justice Douglas, took violent issue with the majority's interpretation of the congressional intent behind the act. Justice Douglas said "Congress was concerned with interstate pipelines, not with *independent producers*, . . . little or no consideration was given to . . . regulating the sales by *independent producers* to the pipelines. The gap to be filled was that existing before the pipelines were brought under regulation—sales to distributors along the pipelines, as the opinion of Mr. Justice Clark demonstrates."[39]

The *Phillips* decision, while still paying lip-service to the exceptions provided by section 717-b of the Natural Gas Act, effectively stripped them of any real meaning. Only "the physical activities, facilities, and properties" remained under state control.[40] It is difficult to believe that this was in fact the congressional intent and proponents of the natural gas interests raised a cry for congressional succor.

This was not the first time that the independent producers had sought congressional aid. In 1947 the independents sought amendment of the Natural Gas Act to exclude Commission regulation of their activities. Their efforts provoked much discussion but not legislation.[41] By 1950, however, the independents gained sufficient support to pass a bill,[42] which would have removed the independents from Commission jurisdiction, only to have the bill vetoed by President Truman.[43]

The decision in the *Phillips* case spurred the natural gas interests to new activity. A number of bills were introduced in the 84th Congress.[44] These bills were all referred to the Committees on Interstate and Foreign Commerce. These committees reported out a clear bill[45] which was subsequently passed

37. Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 682-83 (1954).

38. Ibid.

39. Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 688 (1954).

40. Id. at 678.

41. Federal Price Control of Natural Gas Sold to Interstate Pipelines, 59 Yale L.J. 1468, 1481-82 (1950).

42. H.R. 1758, 81st Cong., 1st Sess. (1950).

43. H.R. Doc. No. 555, 81st Cong., 2d Sess. (1950).

44. H.R. 3703, 84th Cong., 1st Sess.; H.R. 3902, 84th Cong., 1st Sess.; H.R. 3940, 84th Cong., 1st Sess.; H.R. 3941, 84th Cong., 1st Sess.; H.R. 4214, 84th Cong., 1st Sess.; H.R. 4560, 84th Cong., 1st Sess. (1955).

45. Report of the Committee on Interstate and Foreign Commerce on S. 1853, 84th Cong., 1st Sess. (1955).

and sent to the President. The bill would have exempted independent producers and gatherers from strict regulation under the Natural Gas Act. In the words of the committee it would have written "the law for the future as it had been generally believed to be for 16 years prior to the Supreme Court's decision in the *Phillips* case."[46] President Eisenhower though agreeing with its general aims, vetoed the bill, for reasons which do not concern us here.[47]

It seems clear that some congressional clarification of the Natural Gas Act would be desirable. The legislative intent behind section 717(b) of the present act is far from certain and there is indeed serious doubt whether this intent was correctly interpreted in the *Phillips* case.[48] Even assuming that Congress did mean to include the independent producers and gatherers within the terms of the act, it is questionable whether such inclusion was either desirable or practical.

The production of natural gas has been, at least until the present, a competitive industry. While it is true that the large integrated oil companies do control huge gas reserves, the concentration ratio of the industry is less than that of any major extracting industry with the exception of bituminous coal, and less than in 382 of the total 452 manufacturing industries.[49] The market of the independent is far from protected and entry into the industry is relatively unrestricted. If this non-monopolistic market structure is correctly reported, it would seem that in theory, such regulation is not required at the present time.

Proponents of the amendment have also argued that regulation is undesirable from a practical point of view. Entry into the natural gas industry is fraught with financial pitfalls stemming from the nature of the business rather than the economic structure of the market. There is, to be sure, the hope of finding a large pool of natural gas and the financial rewards which are thereby offered. But often the drilling produces numerous "dry holes" before a producing well is brought in. Thus the financial reward for success must be large enough to create an incentive sufficient to justify the risk. In view of the growing industrial and residential demand for natural gas any regulation which would seriously hamper exploration and drilling would be economically and socially undesirable.

Opponents of the measure argue that removal of all federal control over the independent producer, rather than resulting in greatly enlarged drilling operations, would instead cause an immediate rise in the price of natural gas. This increase would, of course, be borne for the most part by the ultimate consumer.[50] Since over 21 million homes and innumerable businesses are served by natural gas, a substantial increase would have widespread effect. Such a price increase would undoubtedly be a possibility if federal regulation were removed. In his veto message President Eisenhower recognized the need for

46. Id. at 2.
47. See note 3 supra.
48. 347 U.S. 672, 688 (1954) (dissent).
49. See note 45 supra.
50. Id. at 15.

specific safeguards in any such legislation to protect the right of consumers to fair prices.[51]

Problems presented by a measure which could free producers from federal regulation and yet provide adequate price controls are myriad since the interests of both the gas companies and the public should be protected. The bill vetoed by the President provided that rates charged must be the "reasonable market value"[52] of the gas. Regulation of this "reasonable" price is achieved through the Commission's admitted authority over the transmission companies. Unless the price paid by the transmission company was "reasonable," the Commission would allow the company to "expense" (charge as an operating expense in computing the regulated resale price of natural gas) only that portion of the price paid as is considered "reasonable" by the Commission. This method of control would have operated on new contracts and existing contracts with so-called "escalator" provisions, which now exist between the producers and the transmission companies.[53] In determining the reasonable market price, the Commission was authorized to consider ". . . among other things whether such price had been competitively arrived at, the effect of the contract upon the assurance of supply, and the reasonableness of the provisions of the contract as they relate to existing or future prices."[54]

Doubt has been expressed that these provisions provide adequate safeguards for the consumer or for that matter whether they provide a sufficiently definite standard to guide the Commission in its determination of a "reasonable market price."[55] To be sure, the standards are vague and subject to conflicting interpretations. The pressure of a growing sellers' market on field prices would be felt not only in new contracts between the producers and transmission companies but also on the escalator clauses in existing contracts. It would be difficult for the Commission to reject rate increases under these clauses where the field prices, as reflected by new contracts, were as high or higher.

The danger anticipated by the opponents of the bill may not be as great as it would seem. Until the present, at least, the pricing practices of the industry have not been monopolistic. Industry spokesmen have indicated their desire that the well-head price of natural gas be allowed to reach levels competitive with other fuels. This would mean a well-head price of about twenty cents per thousand cubic feet. While this would be about double the 1953 price,[56] there seems to be no pressing economic or social purpose to be served by discriminating pricewise against natural gas. In addition, any price structure which did not consider the financial hazards involved in natural gas prospecting and recovery would be manifestly unfair and could well result in a diminution of activity in this field.

51. See note 3 supra.

52. See note 2 supra.

53. Ibid.

54. Report of the Committee on Interstate and Foreign Commerce on S. 1853, 84th Cong., 1st Sess. 40 (1955).

55. Id. at 20.

56. Id. at 18.

It would appear then, that if a similar amendment is subsequently passed by the present or a succeeding Congress, one of the most difficult tasks will be the creation of pricing regulation which will protect the interests of the consuming public without unduly prejudicing the producers.

PROPOSED RIGHT OF COMMENT ON FAILURE OF DEFENDANT TO TESTIFY IN A CRIMINAL TRIAL

Section 393 of the New York Code of Criminal Procedure prevents an adverse presumption from arising where a defendant either neglects or refuses to testify in his own behalf. The proposed amendment here considered would delete the section's express prohibition and make defendant's failure to testify the subject of comment by the court, the prosecuting attorney and counsel for the defendant.[1] At the same time section 393-c of the Code of Criminal Procedure would be repealed and replaced by provisions affording greater protection to the accused if he chooses to take the stand.[2] Similar legislation has been proposed in the past in New York.[3]

In 1641 the *Twelve Bishops' Trial* affirmatively asserted that no man is bound to incriminate himself.[4] The English history of the privilege against self-incrimination and the strong influence of the Egalitarian movement in France at the close of the Eighteenth Century were probably the dominant factors which influenced the colonies to include the privilege in the Bill of Rights.[5]

In 1908 the United States Supreme Court, in *Twining v. New Jersey*[6] decided that neither the historical meaning nor the current definition of the due process clause of the Fourteenth Amendment,[7] gave protection against a state's denial of the privilege. The Fifth Amendment,[8] the Court stated, oper-

1. The proposed amendment reads: "§ 393. Defendant as witness. The defendant in all cases may testify in his own behalf, [but his neglect or refusal to testify does not create any presumption against him]. *His failure to testify may be the subject of comment by the court, the prosecuting attorney and counsel for the defendant.*" (matter in brackets to be deleted; matter in italics added). N.Y. Senate Int. 41 (1956).

2. The proposed § 393-c would restrict questions concerning the defendant's commission of other crimes or of his prior criminal convictions, except for the crime of perjury, to three situations: first, where proof of the commission or conviction of such other crime would otherwise be admissible in evidence to show his guilt of the crime charged; second, where such proof would otherwise be admissible to affect the defendant's sentence; and third, where defendant has himself placed his good character in issue. N.Y. Senate Int. 41 (1956).

3. New York Judicial Council Report, 1937. The bill proposed in the present session was referred to the Committee on Judiciary but was not reported out.

4. 4 How. St. Tr. 63, 75 (1641).

5. Williams, Problems of the Fifth Amendment, 24 Fordham L. Rev. 19, 20 (1955).

6. 211 U.S. 78 (1908).

7. U.S. Const. Amend. XIV.

8. U.S. Const. Amend. V.

ates only to restrain the federal government. In a state court, therefore, the trial judge, in the absence of state law to the contrary, is permitted to instruct the jury that they might draw an unfavorable inference from the failure of a defendant to comment on the prosecutor's evidence. It is significant that the Court's opinion indicated that the privilege was not to be considered "an immutable principle of justice" or a "fundamental right." The rationale of the *Twining* decision has continued to prevail and in dicta the Supreme Court has gone so far as to state that "the privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state."[9] Consistent with this view, the Court in *Palko v. Connecticut*[10] declared that the concept of "ordered liberty" implicit in the Fourteenth Amendment does not include all the guarantees enumerated in the Bill of Rights.

Thus, in *Adamson v. California*,[11] it was held that a California law,[12] which permits comment to be made upon a defendant's failure to testify, does not involve such a denial of due process as to invalidate a conviction in a state court. Hence it is probable that the proposed New York legislation does not violate the Federal Constitution. Nevertheless, the foregoing rules are applicable only to convictions obtained in state courts. Where the action originates in the federal courts, defendants are protected by the Fifth Amendment, and it has been expressly held that failure to testify in such an action does not create any presumption against the accused.[13]

The New York Constitution provides that no person in a criminal case shall be compelled to be a witness against himself.[14] In New York, the defendant in a criminal action was incompetent as a witness until 1869.[15] Even after the passage of the statute enabling such a defendant to testify if he so chose, the courts sought zealously to protect his constitutional privilege against self-incrimination. Indeed, the court in *Ruloff v. People*[16] felt that simply allowing the defendant to testify at all might abrogate his constitutional right.[17] Though the *Ruloff* decision was subsequently modified,[18] it is illustrative of the concern of the courts that the defendant should not be forced to testify. It can hardly be doubted that the proposed legislation makes

9. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

10. 302 U.S. 319 (1937).

11. 332 U.S. 46 (1947).

12. Cal. Const. art. I, § 13; Cal. Penal Code § 1323 (1935).

13. Wilson v. United States, 149 U.S. 60 (1893), 18 U.S.C.A. § 3481 (1948).

14. N.Y. Const. art. I, § 6 (1894).

15. N.Y. Sess. Laws 1869, c. 678; see also People ex rel. Woronoff v. Mallon, 222 N.Y. 456, 119 N.E. 102 (1918).

16. 45 N.Y. 213 (1871).

17. "If, with this statute in force, the fact that he is not sworn can be used against him, and suspicion be made to assume the form and have the force of evidence, and circumstances, however slightly tending to prove guilt, be made conclusive evidence of the fact, then the individual is morally coerced, although not actually compelled to be a witness against himself." Id. at 222.

18. People v. Courtney, 94 N.Y. 490 (1884).

it incumbent upon the defendant to testify. Indeed, the very exercise of the statutory option of testifying or not testifying where the jury is permitted to draw an inference, would be a self-incriminating act. In South Dakota, where there is a constitutional privilege against self-incrimination, a statute such as the proposed amendment here discussed was held unconstitutional.[19] Hence it is probable that passage of the amended section 393 of the Code of Criminal Procedure would also require a constitutional amendment to sustain it.

In the majority of the states and in the federal courts, no presumption or inference unfavorable to the defendant arises from his failure to testify and neither the court nor counsel may comment thereon.[20] In New York, the defendant is not entitled, in the absence of erroneous comment, to demand a charge regarding his right to remain silent.[21] If adverse comment be made, failure to charge the jury concerning the prohibition of an adverse inference where defendant remains silent constitutes reversible error.[22]

Proponents of the right to comment argue primarily upon three grounds: first, that since it is undeniably true that a jury draws an adverse inference when a defendant remains silent, it is a form of legal hypocrisy to instruct the jury to negate its logic;[23] second, that the burden of proof is not shifted and the prosecution must still prove defendant's guilt beyond a reasonable doubt;[24] third, that the jury would be sympathetic to the defendant who willingly takes the stand.[25]

Although it may be impossible to prevent a jury from making an adverse inference where a defendant remains silent, that, certainly, is not a tenable ground for encouraging it to make such inference by giving it the dignity of judicial sanction. Giving the prosecuting attorney the right to comment upon the silence of the accused is not conducive to an exhaustive investigation of the facts which tend to prove the defendant's guilt.

Where comment is allowed, it cannot of itself be the basis of conviction; therefore the burden of proof is not shifted. In *State v. Jefferson*,[26] a New Jersey court said it was not error for the trial page to charge that the "... failure of the accused to testify raises a strong presumption that he could not truthfully deny the facts testified to."[27] Conceding that no actual shift in the burden of proof takes place, an added significance is given in the minds of the jury to the rest of the prosecutor's evidence. Consider the hypothetical situation where the evidence is in balance, that is, the prosecution has pre-

19. State v. Wolf, 64 S.D. 178, 266 N.W. 116, 121 (1936).

20. 8 Wigmore, Evidence § 2272 n. 2 (3d ed. 1940).

21. People v. Manning, 278 N.Y. 40, 15 N.E. 2d 181 (1938).

22. People v. Minkowitz, 220 N.Y. 399, 115 N.E. 987 (1917).

23. Bruce, The Right to Comment on the Failure of the Defendant to Testify, 31 Mich. L. Rev. 226 (1932).

24. Hiscock, Criminal Law and Procedure in New York, 26 Colum. L. Rev. 253, 260 (1926).

25. 13 J. Crim. L. & C. 295.

26. 131 N.J.L. 70, 34 A.2d 881 (1943).

27. Id. at 884.

sented its case and the defense's rebuttal leaves the jury unable to decide; here, strong comment on defendant's failure to testify may give rise to an inference of guilt of such disproportionate weight as to tip the scale in favor of the prosecution. It is also noteworthy that if comment were made by the prosecutor to the effect that defendant's failure to testify is indicative of his guilt and counsel for the defendant seeks to rebut this by showing that there are other reasons for defendant's silence, the problem of a distracting collateral issue might well arise.

The third contention, namely, that the jury would be sympathetic to the defendant who willingly takes the stand, is supported by the proposed legislation's protection of the defendant's reputation if he chooses to testify. At present, the general rule is that the character of the defendant cannot be presumed to be either bad[28] or good and the prosecution should not be permitted to raise the question of bad character until defendant has placed the question in issue by attempting to establish his own good character.[29] But in interpreting the statute which establised the defendant's competency as a witness the court in *People v. Webster*[30] stated, "It is now an elementary rule that a witness may be specially interrogated upon cross-examination in regard to any vicious or criminal act of his life, and may be compelled to answer unless he claims his privilege. A party who offers himself as a witness in a criminal cause is not exempt from the operation of the rule."[31] The criterion as to what is admissible in an attack on the credibility of the defendant as a witness was left to the sound discretion of the judge.[32] Proof of other crimes and convictions has been held to be admissible when it tends to establish motive,[33] intent,[34] accident or mistake,[35] common plan[36] or identity.[37] The provision that such evidence is to be admissible to affect sentence has direct significance in a case such as felony murder where the presence or absence of previous character would influence the jury in making a recommendation for mercy.[38] The proposed limitation of the instances wherein defendant's criminal convictions may be shown is in accord with statutes in effect in England[39] and follows the rule of the Model Code of Evidence.[40] It is submitted, however, that the proposed section 393-c attempts to encourage a defendant to take the stand by anticipating and removing one of the reasons why he would not; but it cannot envisage every sound reason why a defendant may decide

28. People v. Lingley, 207 N.Y. 396, 101 N.E. 170 (1913).
29. People v. Sharp, 107 N.Y. 427 at 457, 14 N.E. 319 at 338 (1887).
30. 139 N.Y. 73, 34 N.E. 730 (1893).
31. Id. at 84, 34 N.E. at 733.
32. See note 30 supra.
33. People v. Scott, 153 N.Y. 40, 46 N.E. 1028 (1897).
34. People v. McKane, 143 N.Y. 455, 38 N.E. 950 (1894).
35. People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901).
36. People v. Duffy, 212 N.Y. 57, 105 N.E. 839 (1914).
37. People v. Hill, 198 N.Y. 64, 91 N.E. 272 (1910).
38. People v. De Santis, 305 N.Y. 44, 110 N.E. 2d 549 (1953).
39. Criminal Evidence Act, 1898, 61 & 62 Vict., c. 36.
40. Model Code of Evidence rules 306, 311 (1942).

to remain silent. The defendant and his counsel should best be able to judge whether a jury would look upon him sympathetically should he testify. Furthermore, his refusal to testify may be because of his psychological instability and entirely unrelated to his guilt or innocence.

Insofar as the suggested changes allow comment by the court, and the attorneys on the defendant's failure to testify at a criminal trial its dubious benefits would be greatly exceeded by the resulting creation of collateral issues and inequities. In addition, the proposal prohibiting the prosecution from questioning a testifying defendant relative to any former convictions for crimes other than perjury gives a right to the defendant not afforded to an ordinary witness and denies the jury of facts essential to a proper evaluation of the credibility of the defendant's testimony. These envisioned difficulties far outweigh any possible salutary effects of the proposed legislation.

PRIVILEGE OF RADIO AND TELEVISION STATIONS PUBLISHING DEFAMATORY REMARKS OF POLITICAL CANDIDATES

Chapter 452 of the Session Laws of 1956 amends a recently enacted (1955) section of the New York Civil Practice Act relating to the liability of radio and television station owners for defamatory statements made over their networks by candidates for public office.[1] Under section 337-a, the owner, operator, or licensee of a visual or sound broadcasting station and their agents and employees are conditionally absolved from liability for a defamation arising from any broadcast made over their facilities by a legally qualified candidate[2] for public office whose statements, under regulations of the Federal Communications Commission, are not subject to the station's censorship.[3]

To be afforded this protection, it was required prior to the present amendment that at the beginning and end of each broadcast a statement be made that the remarks of the speaker were not subject to censorship and that they should not be interpreted as reflecting the views of the station's ownership or management. Chapter 452 of the 1956 Session Laws relaxes these requirements by dispensing with the aforementioned announcement at the end of a broadcast of five minutes or less duration[4] and by dispensing entirely with the statement regarding the absence of censorship. In addition, the station's statement can be "in substance" rather than verbatim under the amendment.[5]

1. N.Y. Civ. Prac. Act § 337-a (1955).

2. Section 337-a requires that for a speaker to be considered a legally qualified candidate he must have announced to the public ". . . that he is a candidate for nomination or election in a primary, special, or general election, municipal, county, state, or national. . . ." In addition he must meet ". . . the qualifications prescribed by the applicable laws to hold the office for which he is a candidate . . ." and must have either qualified for a place on the ballot or be eligible by law to receive write-in votes.

3. N.Y. Civ. Prac. Act § 337-a (1955).

4. If the broadcast extends over five minutes the announcement is still required to be made at both the beginning and end.

5. N.Y. Sess. Laws 1956, c. 452.

Before the enactment of section 337-a in the 1955 session the only New York statutory provision relating to the liability of a broadcast station for defamation was contained in section 337 of the Civil Practice Act entitled *Privilege in Action for Libel.* This section protected any person, firm or corporation from a civil suit arising from its having published a report of a specified public proceeding provided such report was fair and true.[6]

With several notable exceptions,[7] candidates for public office have seldom sought legal relief from defamatory abuse directed at them. Numerous reasons have been offered in explanation, among them the candidate's expected aversion to being cross-examined at trial and also the general feeling that politics is a livelihood in which the willing participant assumes the risks of the contest. The pragmatic answer has also been suggested by one authority that ". . . a jury will regard a politician plaintiff with a suspicious eye, without the same sympathy for his damaged reputation as for the more tangible injury suffered by such a claimant as the victim of a negligent automobile driver who has been careless with respect to life or limb."[8] While these reasons explain to some degree a candidate's reluctance to sue his defamer a number of defenses to such an action in New York serve as juridical deterrents.

At common law it was recognized that a qualified privilege attached to matters of public concern[9] where the statements made relative to them were expressions of opinion rather than misstatements of fact.[10] In New York, therefore, the defense of *fair comment* was and is available to persons making or publishing statements of a defamatory nature directed at public figures provided the statement is: ". . . (1) a comment; (2) based on facts truly stated; (3) free from imputations of corrupt or dishonorable motives on the part of the person whose conduct is criticized, save in so far as such imputations are warranted by the facts truly stated; and (4) the honest expression of the writer's real opinion.[11]

New York courts in an effort to allow the greatest possible latitude to the public discussion of the qualifications of political candidates or public officials have gone to great lengths in finding defamatory statements directed at such persons "fair comment". In fact, unless the defamatory statement goes so far as to impute to the plaintiff ". . . an unworthiness in his office, or of being susceptible to the construction or meaning that he was a betrayer of his pub-

6. Section 337 was enacted in 1940 replacing old sections 337 and 337-a which referred to newspapers and radio broadcast stations respectively. In its consolidated form section 337 extends the privilege to all persons and not merely to the press and radio.

7. Donnelly, The Law of Defamation; Proposals for Reform, 33 Minn. L. Rev. 609, 627 (1949).

8. Noel, Defamation of Public Officers and Candidates, 49 Colum. L. Rev. 875, 876 (1949).

9. Evans, Legal Immunity for Defamation, 24 Minn. L. Rev. 607 (1940).

10. Mencher v. Chesley, 297 N.Y. 94, 75 N.E.2d 257 (1947).

11. Foley v. Press Publishing Co., 226 App. Div. 535, 544, 235 N.Y. Supp. 340, 351 (1st Dep't 1929).

lic trust, or guilty of a disgraceful charge," the defense of "fair comment" will prevail.[12]

There is still a further consideration which may afford protection to the radio or television station. It may be questioned whether a station is a primary publisher and therefore absolutely liable or merely a disseminator and consequently immune to suit on a showing of due care and good faith. American courts are split on this question.

In the early case of *Sorensen v. Wood*[13] the broadcast station was held to strict liability for a libelous statement of a political candidate. This case held that the station's good faith was no defense, thereby putting the broadcast station in the same position as a newspaper as regards liability for publishing a defamation. In view of the possibility of the "ad lib" or interpolation by a speaker and also of the federal censorship regulations, to be discussed later, this decision has often been severely criticized for its harshness. Nevertheless, a number of jurisdictions still hold the broadcast station strictly liable on the basis of a close analogy between the principles of law involved in the publishing of remarks in a newspaper and disseminating them over the airwaves.[14]

Other jurisdictions have used a variety of theories to find the station free from liability—some suggesting that defamation by radio was an entirely new tort calling for new rules,[15] others, including New York, finding that the station was a disseminator and thus free from guilt in the absence of bad faith or negligence.[16] Opposing positions have been taken by leading writers on the question.[17] In any case, since New York regards the station as a disseminator, due care and the absence of malicious motive would constitute good defenses in that jurisdiction to an allegation of defamation.

In addition to these common law defenses protection is afforded, as previously mentioned, to the *publisher* of a fair and true report of certain public proceedings by section 337 of the Civil Practice Act. Under this section though the original utterance was of a defamatory nature when made at the proceeding and may have opened the defamer to suit, the publisher is absolved from liability provided he accurately and fairly reports the remarks.[18] By its very terms the application of this statute is extremely narrow and would seldom

12. Hills v. The Press Co., 122 Misc. 212, 215, 202 N.Y. Supp. 678, 682 (Sup. Ct. 1924), aff'd, 214 App. Div. 752, 209 N.Y. Supp. 848 (3d Dep't 1925).

13. 123 Neb. 348, 243 N.W. 82 (1932).

14. Coffey v. Midland Broadcasting Co., 8 F. Supp. 889 (W.D. Mo. 1934); Irwin v. Ashurst, 158 Ore. 61, 74 P.2d 1127 (1938); Miles v. Wasmer, Inc., 172 Wash. 466, 20 P.2d 847 (1933).

15. Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 182, 8 A.2d 302 (1939).

16. Kelly v. Hoffman, 137 N.J.L. 695, 61 A.2d 143 (1948); Josephson v. Knickerbocker Broadcasting Co., 179 Misc. 787, 38 N.Y.S.2d 985 (Sup. Ct. 1942).

17. See Remmers, Recent Trends in Defamation by Radio, 64 Harv. L. Rev. 727, 756 (1951); Donnelly, Defamation by Radio: A Reconsideration, 34 Iowa L. Rev. 12 (1948); Bohlen, Fifty Years of Torts, 50 Harv. L. Rev. 725, 729-31 (1937); Vold, The Basis for Liability for Defamation by Radio, 19 Minn. L. Rev. 611 (1935).

18. N.Y. Civ. Prac. Act § 337 (1940).

if ever aid the publisher of a political candidate's remarks made under the usual circumstances of a political campaign.

While, prior to the enactment of section 337-a, there were several common law and statutory defenses available in New York to any publisher of a defamatory remark directed at a political candidate, the unique nature of the media of radio and television raised some question as to the sufficiency of these defenses.

Section 315 of the Federal Communications Act,[19] the so-called "forced broadcast" statute, requires in part that: "if any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcast station, he shall afford equal opportunity to all other such candidates for that office in the use of such broadcasting station *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section."[20] Therefore, the station, once it accepts one candidate as a client, is obliged by law to let any other candidate speak. It has no censorship privilege under the act and as a consequence it may be forced, in the absence of a relieving statute, to open itself to a libel suit in jurisdictions following the *Sorenson* rule. A more sensible result would be more likely to occur in states recognizing the "due care" principle.

The New York Supreme Court, in the only case directly in point, held, that "since this statute [section 315] creates certain obligations and limitations, it is proper that the owner of the radio station be given corresponding qualified privileges against liability for statements which it has no power to control."[21] The court went further in stating that "the physical aspects of radio broadcasting warrant a rule that if the management of a radio station has used due care in the selection of the lessee of its facilities and in the inspection of the script, it should not be liable for extemporaneous defamatory remarks."[22] It should be noted that in this case the remarks were interpolations not included in the submitted script. The court is silent as to the station's liability should the script have been defamatory on its face and the station under section 315 have been obliged to allow its publication without the right to censor. In a later New York case involving a political script the court granted a mandatory injunction requiring a broadcast company to allow a client to broadcast where the script was not defamatory on its face.[23] It hinted that it would not have done so if the script had been libelous.[24] However, this would have been only half a solution for the station since sec-

19. 47 U.S.C.A. § 315 (1954).

20. Ibid.

21. Josephson v. Knickerbocker Broadcasting Co., 179 Misc. 787, 788, 38 N.Y.S. 2d 985 (Sup. Ct. 1942).

22. Id. at 788, 38 N.Y.S. 2d at 986.

23. Rose v. Brown, 186 Misc. 553, 58 N.Y.S. 2d 654 (Sup. Ct. 1945).

24. Though at 558 the court states ". . . the station should not be compelled to transmit this Sunday's program if any part of it could reasonably be construed as opening the door to suits against it for slander or libel," it is questionable whether a court could officially sanction such "censorship" in face of the federal prohibition.

tion 315 might still be the basis for a complaint by the enjoined speaker possibly resulting in the forfeit of the station's license.

Seldom, therefore, could a New York broadcast station accept and publish with impunity an *obviously* defamatory political speech. If it were defamatory on its face and the "fair comment" defense was inapplicable the station would be deemed not to have exercised due care and therefore would not be protected under the *Josephson v. Knickerbocker Broadcasting Co.*[25] case. And only in an extreme fact situation would section 337 afford protection.

A problem, albeit not a common one, has been thus created through a combination of circumstances: the lack of privilege accruing to the broadcast stations on the one hand and the obligation to broadcast political addresses under the Federal Communications Act on the other. The broadcaster's dilemma has become more pronounced in recent years due to a Commission decision which strictly interprets the censorship requirement.[26] The broadcaster has met this situation in several fashions; first, by individual indemnity provisions in contracts between the candidate and the station[27] and second, by state legislation along the general lines of section 337-a.[28] Both methods are effective to some degree but leave unsolved the basic problem. A Supreme Court decision upholding the Commission's strict interpretation of the censorship requirement could render statutes like section 337-a completely effective. On the other hand if partial censorship (of libelous material) by the station were to be allowed under federal interpretation the New York statute would be inapplicable since as it is now worded section 337-a only applies to "utterances *not* subject to censorship under rules and regulations of the Federal Communications Commission by the owner."[29] Should the Supreme Court rule that defamatory material could be censored out by a station perhaps no need for such a statute as 337-a would exist. Since New York applies the "disseminator" doctrine due care and good faith would, in the face of such a Court interpretation, constitute complete defenses. Likewise, a Supreme Court decision declaring the field of broadcast censorship to be preempted by the federal government might well exempt the stations from liability in a state action. Should no Supreme Court decision be forthcoming, and there is none presently in sight, Congressional legislation might provide uniformity. While the present New York statute, 337-a, taking cognizance of the federal "forced broadcast" statute, has obviated to a large degree the possibility of a station being held liable in a New York State court for complying with a federal statute, a complete and final solution must await higher legislative authority or judicial determination.

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25. See note 21 supra.

26. In re Port Huron Broadcasting Co., 12 F.C.C. 1069 (1948).

27. Vold, Defamatory Interpolations in Radio Broadcasts, 88 U. Pa. L. Rev. 249, 278 (1940).

28. Remmers, supra note 17, at 739-46.

29. N.Y. Civ. Prac. Act § 337-a (1956).

GIFTS OF SECURITIES TO MINORS

Chapter 35 of the Session Laws of 1956 amends the Personal Property Law of New York by adding article 8-a (sections 265-70) which sets out a method of making gifts of securities to minors.

Prior to passage of article 8-a a gift of securities could be made directly to a child and registered in the child's name. However, a transfer of the stock made thereafter by the infant could be potentially ineffective since an infant might disaffirm any transfer made by him during his minority.[1] Should such a disaffirmance occur the transferee would be bound to retransfer the securities to the infant,[2] and his failure to do so would leave him open to a civil action.[3] However, no such duty or liability falls upon a bona fide purchaser for value without notice, at the time of sale, that he was dealing with an infant.[4] Moreover, a transfer agent may incur similar liability if he knew or should have known that he was dealing with the property of a minor.[5] Understandably, a transfer agent would be reluctant to take such a risk and would normally refuse to accept a security registered in the name of a minor, unless he was indemnified. Consequently, the transfer of securities *directly* to a minor, though theoretically possible, is in fact a seldom used procedure.

Other forms of transfer have been utilized to overcome these difficulties such as registering the security to a nominal owner, thereby enabling the nominee to trade it in his own name. However, such informal procedures also involve risks rendering them largely impracticable.[6] Since the securities would be registered in the name of a third person and on their face would bear no reference to the actual ownership by the minor, such a transfer might not be interpreted as a legally completed gift and obviously would afford little protection to the child. Then, too, questions could arise as to the tax consequences of dividends earned or of capital gains or losses attributable to a security registered in this fashion.

To avoid the risks and uncertainties of direct transfers or informal procedures, gifts of securities to minors are most commonly made in trust or through a guardian. Securities given in either of these forms could be sold and the proceeds re-invested without the danger of a subsequent disaffirmance of the sale by the minor.[7] Furthermore, the danger of the infant finding his property dissipated or misappropriated under such arrangements is held to a minimum by a public policy requiring strict accountability of fiduciaries deal-

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1. Casey v. Kastel, 237 N.Y. 305, 142 N.E. 671 (1924), N.Y. Personal Property Law § 163 (1913).
2. Casey v. Kastel, 237 N.Y. 305, 142 N.E. 671 (1924).
3. Ibid.
4. N.Y. Personal Property Law §§ 105 (1911), 169 (1913).
5. Casey v. Kastel, 237 N.Y. 305, 142 N.E. 671 (1924); cf. Steel v. Leopold, 135 App. Div. 247, 120 N.Y. Supp. 569 (1st Dep't 1909).
6. See Rogers, Some Practical Considerations in Gifts to Minors, 20 Fordham L. Rev. 233 (1951).
7. Field v. Schieffilin, 7 Johns. R. 150 (N.Y. 1823).

ing with the funds of infants.[8] However, the creation of a trust or guardianship is comparatively expensive. Usually, legal services are recurring expenses from the creation of a trust to the rendering of a final accounting. A guardianship also, by its very nature, necessitates a variety of legal expenses for the court procedures required by law.[9] Unless the guardian or trustee waives the fees legally due for fiduciary services rendered, these too can create additional charges against the trust or guardianship and a consequent depletion of the infant's assets.[10] Therefore, while a trust or guardianship may be the course providing maximum protection in any case of a gift to a minor, the size of the gift may not justify the attendant expense.

In an attempt to encourage the giving of small, moderate gifts of securities to minors the New York Stock Exchange has sponsored the Uniform Gifts of Securities to Minors Act.[11] New York, by adding article 8-a to the Personal Property Law has become the tenth state to adopt this statute.[12] Under this new law either the donor, or an adult member of the minor's family or the minor's guardian would be able to serve as custodian. Registered securities are required to be placed in the name of the custodian "as custodian for" the donee. If the securities are in bearer form they are to be accompanied by a simple deed of gift, the form for which is set out in the statute. In this event, the donor may not act as custodian. Once the gift has been completed by delivery to the custodian, acceptance by the minor being presumed, the minor has legal title to the securities and upon his death before majority they pass to his estate.[13]

The relationship between the custodian and donee, while similar to that of guardian and ward, is in many ways a completely new one.[14] The position of custodian is created mainly with an eye toward making the transfer and retransfer of securities easy and inexpensive. A custodian may sell and reinvest the property at his discretion and is not bound, as are trustees and guardians, by the statutes relating to permissible investments by fiduciaries.[15] An accounting is only required when, after the infant reaches majority, either he, his legal representative, or a parent or successor custodian so petitions the appropriate court.

8. Delafield v. Barrett, 270 N.Y. 43, 200 N.E. 67 (1936).

9. N.Y. Surr. Ct. Act §§ 172-83 (1920); N.Y. Rules of Civil Procedure § 290 (1921).

10. N.Y. Surr. Ct. Act §§ 180-81, 190-93 (1920).

11. See N.Y. Stock Exchange, Association of Stock Exchange Firms, Stock Gifts to Minors, A Guide to Recent Legislative Action (1956).

12. The other nine are California, Colorado, Connecticut, Georgia, New Jersey, North Carolina, Ohio, South Carolina and Wisconsin.

13. In the case of a trust, legal title is in the trustee, the minor being merely equitable owner. Whiting v. Hudson Trust Co., 234 N.Y. 394, 138 N.E. 33 (1923).

14. N.Y. Personal Property Law § 266 (1956) states that: ". . . in addition to the rights, powers and duties expressly ascribed . . . by this article, [the custodian] shall have all the rights, powers and duties with respect to the subject matter of the gift of a guardian of the property of an infant, except that the custodian shall be required to qualify and account only as specified in this article. . . ."

15. N.Y. Personal Property Law § 21 (1952); N.Y. Domestic Relations Law § 85 (1950).

In place of the high degree of care and good faith required of trustees and guardians, the custodian is not deemed liable for any losses to the property held by him unless they result from his bad faith, his intentional wrongdoing or from his having invested the minor's property in securities other than those that would be acquired ". . . by prudent men of discretion and intelligence who are seeking a reasonable income. . . ." It seems to be the feeling of the new article's sponsors that, since the custodian, unless he is also the infant's guardian, is required to serve without compensation he should be relieved of many of the duties and liabilities of trustees and guardians who normally are compensated for their services.

When dealing with a trustee or guardian a transfer agent is on notice as to the scope of the trustee's or guardian's authority and may be held liable if he fails to investigate.[16] Consequently, he may refuse to make a transfer until he is shown proof of the fiduciary's authority.[17] Under the new statute the transfer agent is not liable, in the absence of actual knowledge, for the custodian's acts in excess of his authority.[18]

The act further seeks to avoid the uncertainties concerning the annual gift tax exclusion that are present when a gift of securities is made in trust or through a guardian. Under the Internal Revenue Code the first $3000 of a gift of a *present* interest in property to any person is excluded from the total amount of taxable gifts made by the donor during the year.[19] Whether a gift made in trust or through a guardian for a minor's benefit is to be considered the gift of a present or future interest is not entirely certain.[20] However, the Internal Revenue Code specifically sets forth a type of gift that will *not* be considered one of a future interest. Such a gift: "(1) may be expended by or for the benefit of, the donee before his attaining the age of 21 years, and (2) will to the extent not so expended (A) pass to the donee on his attaining the age of 21 years, and (B) in the event the donee dies before attaining the age of 21 years, be payable to the estate of the donee or as he may appoint under a general power of appointment. . . ."[21] These provisions are exactly met by article 8-a. Therefore, the gift of a donor utilizing this article will in all probability qualify for the annual gift tax exclusion.

As regards income tax liability, dividends earned by securities given under the new statute or capital gains or losses resulting from their sale or transfer, will probably be considered as income of the minor rather than the donor unless the latter has the obligation to support the minor.[22] Where such an obligation exists it seems likely that only that portion of the income will be taxable to the donor personally that is actually utilized for the minor's sup-

16. Kirsch v. Tozier, 143 N.Y. 390, 38 N.E. 375 (1894).
17. 12 Fletcher, Cyclopedia Corporations §§ 5533-35.
18. N.Y. Personal Property Law § 266(2)(e) (1956).
19. Int. Rev. Code of 1954 § 2503(b).
20. 3 U.S. Code Cong. & Ad. News 5122 (1954).
21. Int. Rev. Code of 1954, § 2503(c).
22. Int. Rev. Code of 1954, § 677(b). Though this section applies to trusts the relationships appear comparable.

port. In either event it is doubtful whether the custodianship would be considered a separate taxable entity, as is a trust.[23] Consequently, the tax disadvantages encountered by a taxpayer utilizing the "trust" method of gift would not be present.

Since only ten states have to this date adopted similar acts some questions of conflict of laws are presented. Only court interpretation can decide the applicability of the statute when the securities involved are those of foreign corporations or where the infant is the resident of a state not recognizing the "custodian" status. When attempting to utilize any statute similar to article 8-a a donor can insure having his intention carried out if he is careful to specify the state whose law he wishes to apply and couples this stated intent with "substantial contacts" with the specified state.[24] In the light of analogous trust cases such substantial contact might be deemed present if the donor were a resident of the state,[25] if the minor or custodian were domiciled in the state,[26] if the securities were located in the state,[27] or if the delivery of the securities to the custodian occurred within the state.[28] To prevent any uncertainty the donor should attempt to couple as many of these elements as possible with the gift.[29]

The principal objection to the new statute is that it affords insufficient protection to the minor since the custodian and transfer agent, as mentioned previously, are relieved of many of the duties and obligations which would be theirs under the laws of trust or guardianship. No bond is required of the custodian and the only requirement for an accounting is provisional. It should be remembered, however, that the law was passed with an eye, not toward the large gift of securities but toward the gift not extensive enough to justify the costs and burdens of a trust or guardianship. In actual fact the scales are not weighted by a trust or guardianship on the one side and article 8-a on the other, but by article 8-a as opposed to some informal arrangement affording little or no protection to the minor. In the case of the large gift, a trust or guardianship can still be utilized since the statute specifically states that it shall not be construed as an exclusive method for making gifts of securities to minors.[30]

A further objection can be made that since a new relationship has been created extensive case law will be required to define the respective rights and duties of the parties. While it is arguable that the statute could have been more explicit in its definitions of the custodian's responsibility, statutory

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23. Int. Rev. Code of 1954, § 641.

24. Shannon v. Irving Trust Co., 275 N.Y. 95, 9 N.E. 2d 792 (1937).

25. Ibid.

26. Curtis v. Curtis, 185 App. Div. 391, 173 N.Y. Supp. 103 (1st Dep't 1918).

27. Irving Trust Co. v. Natica, 157 Misc. 32, 284 N.Y. Supp. 343 (Sup. Ct. 1935).

28. Hutchison v. Ross, 262 N.Y. 381, 187 N.E. 65 (1933).

29. For a discussion of the significant contact or "center of gravity" theory of conflict of laws see Rubin v. Irving Trust Co., 305 N.Y. 288, 305, 113 N.E.2d 424, 431 (1953).

30. The pamphlet published by the New York Stock Exchange cited at note 12 supra suggests that large gifts of securities should still be placed in trust.

amendments can always accomplish this end should experience prove the need for greater preciseness.

Although all these objections are no doubt valid in some degree, it is very likely that the statute will accomplish its basic purpose, the expedition of gifts of securities to minors, with no undue sacrifice of protection. Its employment will, beyond argument, afford greater security than the informal *nominee* methods heretofore extensively used. This comparative benefit, coupled with the desirable tax features of the new statute lead to the conclusion that its overall effect will be salutary.