CASE NOTES

Constitutional Law—Equal Protection Clause—Public Required to Pay Publication Costs for Poor Litigant in Divorce Action.—Plaintiff petitioned the court for a divorce from her husband pursuant to the newly enacted divorce law which permits an aggrieved party to maintain an action on the grounds of abandonment "by the defendant for a period of two or more years."[1] An obvious indigent, she sought and obtained an order permitting her to sue as a poor person.[2] Service of a summons being necessary to commence the action,[3] plaintiff was allowed, after a diligent but fruitless attempt to locate her husband, to serve by publication, the cost of which was about three hundred dollars. With the city's consent, plaintiff obtained an order directing the payment of the expense by the city. Because of the magnitude of the expense, however, the city asked that the order be withdrawn. At the rehearing, the court held that denial of payment for such auxiliary expenses as publication, when they are required by law, would be an invidious discrimination against poor persons in violation of the equal protection clause of the federal[4] and state[5] constitutions, and ordered payment of the expense. *Jeffreys v. Jeffreys*, 58 Misc. 2d 1045, 296 N.Y.S.2d 74 (Sup. Ct. 1968).

"Equal justice for the poor actually is one of the gravest social and legal problems of our times . . . ."[6] There have been at least[7] three distinct approaches toward its resolution: the common law, *in forma pauperis* statutes, and the equal protection clauses found in many state constitutions as well as in the Federal Constitution.

There has been some disagreement as to whether there exists any common law right to sue *in forma pauperis*, *i.e.*, without payment of the various costs of litigation imposed by procedural statutes or court rules.[8] The courts finding such a right rely on British common law[9] and on such basic principles of Anglo-

1. N.Y. Dom. Rel. Law § 170(2) (Supp. 1968).
2. See note 17 infra.
3. N.Y. C.P.L.R. 304, 315-16; cf. id. 3031.
4. U.S. Const. amend. XIV, § 1.
5. N.Y. Const. art. I, § 11.
6. Jacoby, Legal Aid to the Poor, 53 Harv. L. Rev. 940, 976 (1940).
7. For a discussion of other approaches to this problem, see Jacoby, supra note 6; Maguire, Poverty and Civil Litigation, 36 Harv. L. Rev. 361 (1923); Comment, The Right to Counsel in Civil Litigation, 66 Colum. L. Rev. 1322 (1966); Comment, Litigation Costs: The Hidden Barrier to the Indigent, 56 Ga. L. Rev. 516 (1968).
8. See Maguire, supra note 7; 56 Ga. L. Rev., supra note 7, at 520-21; 6 Calif. L. Rev. 226 (1918).
9. Brunt v. Wardle, 133 Eng. Rep. 1254 (C.P. 1841); see Majors v. Superior Ct., 181 Cal. 270, 184 P. 18 (1919); Martin v. Superior Ct., 176 Cal. 289, 168 P. 135 (1917); McClenahan v. Thomas, 6 N.C. 175 (1813); Lewis v. Smith, 21 R.I. 324, 43 A. 542 (1899); Spalding v. Bainbridge, 12 R.I. 244 (1879) (per curiam); Hickey v. Rhine, 16 Tex. 576 (1856).

American jurisprudence as that stated in the Magna Carta: "[W]e will not deny or defer to any man either Justice or Right."[10] Opposition to the existence of such a right at common law has been led by the Supreme Court, which has held that the right to sue *in forma pauperis* exists only where granted by statute.[11] The weight of authority against the existence of this right at common law and the varied interpretations given the right where it is recognized,[12] make it, at best, a nebulous right of small practicality to an indigent who is unable to afford the expense of winning his action, much less to participate in extensive motion pleading to establish this right.[13]

Statutory relief for a poor litigant is not a new development. The forerunner to modern *in forma pauperis* statutes was passed in 1494, and provided that, at the Chancellor's discretion, poor persons could be granted writs without payment for seals or writing and could be assigned counsel to prosecute their suits without reward.[14] Some thirty-two states, the District of Columbia and the federal government have adopted *in forma pauperis* statutes or court rules.[15] While these provisions vary considerably, the New York statute,[16] a somewhat typical example,[17] has not significantly advanced the position of the poor person over the position conferred on him by the 1494 enactment. In New York if a litigant qualifies as a poor person,[18] the court may assign him a free attorney, and provide him with a stenographic transcript paid for by the county or city in which the action is tried; he is liable for court costs and fees only if he recovers. The cost of publication in the present case was originally held to be a fee within the meaning of the statute and relief was granted on that basis.[19] Upon rehearing, however, the court decided that auxiliary expenses such as "publication costs, witness fees, printing expenses, expert witnesses and general investigation costs"[20] were not within the purview of the statute. Since the present New York

10. 1 Hen. 3, c. 29, § 2(b) (1225); see Hickey v. Rhine, 16 Tex. 576 (1856). Such propositions have long been recognized in admiralty cases. Berhaus v. The Georgeanna, 31 F. 405 (S.D.N.Y. 1877).

11. Bradford v. Southern Ry., 195 U.S. 243, 251 (1904). See also Ownbey v. Morgan, 256 U.S. 94 (1921); Bristol v. United States, 129 F. 87 (7th Cir. 1904); Roy v. Louisville N.O. & T. Ry., 34 F. 276 (C.C.W.D. Tenn. 1888); Hoey v. McCarthy, 124 Ind. 464, 24 N.E. 1038 (1890); Campbell v. Chicago & Nw. Ry., 23 Wis. 490 (1868).

12. See cases cited note 9 supra.

13. See note 17 infra.

14. 11 Hen. 7, c. 12 (1494).

15. 56 Ga. L. Rev., supra note 7, at 523 (1968).

16. N.Y. C.P.L.R. 1102.

17. E.g., the federal in forma pauperis statute provides for essentially the same relief, except that specific provision is made for process serving. 28 U.S.C. § 1915 (1964).

18. To qualify as a poor person, one must file an affidavit listing the amount and sources of his income and stating that he cannot afford the costs, fees and other expenses of the action or appeal. The affidavit must also state the nature of the action and present sufficient facts to allow the court to ascertain the merit of his contentions. N.Y. C.P.L.R. 1101.

19. Jeffreys v. Jeffreys, 57 Misc. 2d 416, 292 N.Y.S.2d 767 (Sup. Ct. 1968).

20. 58 Misc. 2d at 1048, 296 N.Y.S.2d at 79.

in forma pauperis statute is " 'merely a recodification of the former statute and rules,' "[21] this determination was based on an examination of the history of New York *in forma pauperis* statutes. While noting that no other jurisdiction has a statutory provision for payment of such auxiliary expenses out of public funds,[22] the court acknowledged that the legislature has not been reluctant to aid the poor litigant in New York. The problem in the subject case, however, was novel.[23] The right to base an action for divorce on abandonment, thereby requiring service by publication, did not exist in New York until June 16, 1968.[24] Prior to this time auxiliary expenses were not required by procedural statutes in order to prosecute a divorce action. Auxiliary expenses have been required in other civil actions but they were either minimal or, as in a personal injury action, paid by the attorney under a contingent retainer.[25] The problem of the instant case had not, therefore, previously arisen.[26]

Unable to grant relief under the *in forma pauperis* statute, the court broadened its investigation to determine whether the denial of relief solely because of inability to pay was inconsistent with the state or federal equal protection clauses.[27] "The essence of the right to equal protection of the laws is that all persons similarly situated be treated alike."[28] In *Griffin v. Illinois*[29] the Supreme Court held that an Illinois statute, which granted the right of appeal in all criminal cases[30] but provided a free transcript only to indigent defendants who were sentenced to death,[31] was discriminatory, because "a State can no more discriminate on account of poverty than on account of religion, race, or color."[32]

Even though *Griffin* was a criminal case it has civil implications.[33] Mr. Justice Douglas, dissenting to denial of certiorari in *Williams v. Shaffer*,[34] argued that denial of the right to contest an eviction proceeding violated the equal protection clause. He compared the denial of a hearing to a denial of "the right to

21. Id. at 1047, 296 N.Y.S.2d at 79.
22. Id. at 1049, 296 N.Y.S.2d at 80.
23. Id. at 1050, 296 N.Y.S.2d at 81.
24. N.Y. Dom. Rel. Law § 170 (Supp. 1968).
25. 58 Misc. 2d at 1050, 296 N.Y.S.2d at 81.
26. Id. at 1050, 296 N.Y.S.2d at 81.
27. The equal protection clause of the fourteenth amendment has been "characterized by Mr. Justice Holmes as 'the last resort of constitutional lawyers' . . . ." Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341 (1949).
28. Myer v. Myer, 271 App. Div. 465, 472, 66 N.Y.S.2d 83, 90 (1st Dep't 1946), aff'd mem., 296 N.Y. 979 (1947). See generally Barbier v. Connolly, 113 U.S. 27 (1885); Frank & Munro, The Original Understanding of "Equal Protection of the Laws," 50 Colum. L. Rev. 131 (1950); Tussman & tenBroek, supra note 27.
29. 351 U.S. 12 (1956).
30. Id. at 13.
31. Id. at 14.
32. Id. at 17.
33. Note, Discriminations Against the Poor and the Fourteenth Amendment, 81 Harv. L. Rev. 435, 446 (1967).
34. 385 U.S. 1037 (1967).

appeal," "the right to file a habeas corpus petition," or, citing *Griffin*, "the right to obtain a transcript necessary for appeal."[35]

Clearly, the equal protection clause does not apply solely to criminal prosecutions.[36] It has been cited to require equal voting power regardless of income[37] and to find a $1.50 poll tax requirement unconstitutional.[38] Likewise, property ownership as a qualification to holding office has been held violative of the equal protection clause as an invidious discrimination based on wealth.[39] Application of the equal protection clause to civil cases[40] was explicitly provided for in *Barbier v. Connolly*,[41] the court holding that all persons "should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts . . . ."[42] There can be no doubt, therefore, as to its application to marital cases.[43]

The instant court held that it was "manifestly discriminatory under *Griffin* standards to deprive Mrs. Jeffreys of that right [of access to the courts in a divorce action] while affording it to others with money."[44]

While the decision accords with a series of Minnesota cases,[45] it is not without opposition. In *Boddie v. State*[46] a three judge district court found no constitutional mandate to excuse indigents the fees and costs incident to a divorce action. That court distinguished cases involving imprisonment and voting rights from "ordinary civil actions," pointing out that in the latter "the state has no . . . direct participation . . . ."[47] In the present case, however, the court rebutted the premise of the *Boddie* decision: "[O]ur State Constitution . . . mandates that divorces may be granted only by 'due judicial proceedings.' Furthermore State statutes dictate . . . the grounds for separation or divorce and the obligations of the parties after the termination of the marriage. For all purposes the State is very much . . . a 'party' in a matrimonial action."[48] The implication of the instant case is a rule requiring the state to pay all expenses required by statute to

35. Id. at 1039-40.
36. Id. at 1039.
37. Gray v. Sanders, 372 U.S. 368, 379 (1963); see Baker v. Carr, 369 U.S. 186 (1963).
38. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).
39. Landes v. Town of N. Hempstead, 20 N.Y.2d 417, 231 N.E.2d 120, 284 N.Y.S.2d 441 (1967).
40. Carrington v. Rash, 380 U.S. 89 (1965) (voter qualification); Uberman v. Lasner, 55 Misc. 2d 1027, 287 N.Y.S.2d 464 (Sup. Ct. 1968) (right to dwell in a rent controlled building).
41. 113 U.S. 27 (1885).
42. Id. at 31.
43. Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Smith v. Smith, 2 N.Y.2d 120, 138 N.E.2d 790, 157 N.Y.S.2d 546 (1956).
44. 58 Misc. 2d at 1056, 296 N.Y.S.2d at 87.
45. See Munkelwitz v. Hennepin County Welfare Dep't, 280 Minn. 377, 159 N.W.2d 402 (1968).
46. 286 F. Supp. 968 (D. Conn. 1968).
47. Id. at 973.
48. 58 Misc. 2d at 1051, 296 N.Y.S.2d at 82 (citations omitted); see Foster, Marriage: A "Basic Civil Right of Man," 37 Fordham L. Rev. 51 (1968).

prosecute or defend a cause of action by a party qualifying as a poor person. It seems unlikely, however, that this rule would be expanded to include expenses not required by statute since denial of such expenses would not, under present holdings,[49] be deemed discriminatory.

The instant case may prove to be a costly precedent, but justice has no eyes for silver.

Estate Tax—Life Insurance Proceeds—Premium Payments by Decedent Held a Transfer of Pro Rata Share of Proceeds and Includible in Gross Estate.—Eight years prior to his death the decedent and his wife purchased two $10,000 insurance policies on his life, one for each of his daughters, who were named as owners and initial beneficiaries. The annual premium payments on the two policies were paid with community funds of the decedent and his wife. The executors having offered no proof of decedent's state of mind, the court found that decedent's payment of premiums on the two policies within three years of his death was "in contemplation of death."[1] By reason of his participation in the payment of premiums on the policies, the court concluded that a percentage of their proceeds were includible in his gross estate. The proper percentage, the court found, was controlled by Revenue Ruling 67-463[2] which computes the percentage as the amount of the decedent's payment of premiums within three years of his death divided by the overall payment of premiums on the policies. Because the court was in a community property state and the premiums were paid out of community funds, it was presumed that decedent contributed one-half of each premium payment. Hence, the amount of the proceeds included in decedent's gross estate was three-eights of one-half of the total proceeds of $20,000. *First National Bank v. United States*, 2 CCH Fed. Est. & Gift Tax Rep. ¶ 12,574 (W.D. Tex. Dec. 11, 1968).

The decision in the instant case is startling only because of its application of Revenue Ruling 67-463 without so much as an indication of the controversy which surrounds the ruling or the fact that its conclusion was directly contrary to that recently reached by a Michigan district court in *Gorman v. United States*.[3] The Michigan court held that where the insured deceased paid the premiums on a nine-month-old life insurance policy at all times owned by his wife only the dollar value of the premiums were deemed transferred "in contemplation of death" and none of the proceeds were includible. The court rejected Revenue Ruling 67-463 because it ignored the legislative history and intent relating to the elimination of the premium payment test from the 1954 Code.[4]

Under section 2042 of the present federal estate tax law, proceeds of life

49. See Waldon v. District Ct., 256 Iowa 1311, 130 N.W.2d 728 (1964).

1. See Int. Rev. Code of 1954, § 2035, and text accompanying notes 14-18 infra.
2. Rev. Rul. 463, 1967-2 Cum. Bull. 327.
3. 288 F. Supp. 225 (E.D. Mich. 1968).
4. Id. at 226.

insurance are expressly made includible in decedent's gross estate, if (1) the proceeds are payable to the executor, or (2) the decedent died possessed of any incidents of ownership although the proceeds are receivable by other beneficiaries. Incidents of ownership include not only title but also the powers, among others, to change beneficiaries, to assign or cancel the policy and to receive its cash surrender value.[5] The possibility that the estate will obtain a reversionary interest in the proceeds may also be deemed an incident of ownership.[6] The 1939 Code had also included insurance proceeds in decedent's gross estate where the decedent, directly or indirectly, paid the premiums on the policy.[7] This became known as the premium payment test because not all the proceeds were included in the gross estate but only "in proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance . . . ."[8] The premium payment test was eliminated by the adoption of the 1954 Code because it was thought that the test was discriminatory in its treatment of life insurance as compared to other property transferred by the decedent.[9] Three years later, an attempt was made to reinstate a limited premium payment test in the Technical Amendments Act of 1957[10] because of fear of widespread avoidance of estate tax by assigning ownership of policies before death.[11] The amendment did not gain approval by the House. It appears therefore that Congress has declared its intention that payment of premiums is no longer a factor in determining taxability under this section of the Code.[12]

5. For other examples of powers included within the term "incidents of ownership" see Treas. Reg. § 20.2042-1(c)(2-3) (1964).

6. Id.

7. Int. Rev. Code of 1939, § 811(g)(2)(A), 53 Stat. 122.

8. Id.

9. S. Rep. No. 1622, 83d Cong., 2d Sess. 124 (1954) describes the changes effected by the 1954 Code as follows: "No other property is subject to estate tax where the decedent initially purchased it and then long before his death gave away all rights to the property and to discriminate against life insurance in this regard is not justified.

"The House and your committee's bill retains the present rule including life-insurance proceeds in the decedent's estate if the policy is owned by him or payable to his executor, but the premium test has been removed. To place life-insurance policies in an analogous position to other property, however, it is necessary to make the 5-percent reversionary interest rule, applicable to other property, also applicable to life insurance."

10. See H.R. 8381, 85th Cong., 1st Sess. § 56 (1957).

11. The possible grounds for tax avoidance was explained to the House in H.R. Rep. No. 775, 85th Cong., 1st Sess. 37 (1957) as follows: "Your committee believes that there are possible abuses under the existing provision where a decedent transfers a policy shortly before his death or where a policy is purchased on his life shortly before his death, because in such instances it is possible to plan the avoidance of the Federal estate tax. Moreover, where death occurs shortly after the transfer, the value of the amount transferred is greatly increased."

12. The result, therefore, after the adoption of the 1954 Code was the propensity of estate planners to advise their clients to transfer their life insurance policy and retain no incidents of ownership, thereby avoiding the inclusion of the proceeds into the gross estate. Brown & Sherman, Payment of Premiums as Transfers in Contemplation of Death, 101 Trusts & Estates 790 (1962).

The question remains whether insurance proceeds can be included in the gross estate under other sections of the 1954 Code such as section 2035 concerning transactions in contemplation of death. A number of commentators have warned that section 2042 is not exclusive[13] and that a transfer of a life insurance policy can easily be deemed a gift in contemplation of death because of the inherent testamentary nature of such life insurance.[14] Section 2035 provides that, as a general rule, "[t]he value of the gross estate shall include the value of all property . . . to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, in contemplation of his death."[15] Because of the huge administrative problems presented by such a general rule,[16] the section sets up a rebuttable presumption that any transfer of property, for less than fair consideration, within three years of decedent's death shall be deemed made in contemplation of death.[17] Any transfer before such a three year period is conclusively presumed not in contemplation of death.[18]

Where the decedent has made an actual gift of an insurance policy on his life and dies within three years of the gift, the face amount of the policy is included in his gross estate in the absence of evidence to rebut the presumption.[19] A more difficult problem is presented where the insured survives the three-year period after the transfer and continues the payment of premiums, or, where the insured

13. See, e.g., 1. A. Casner, Estate Planning 328 (3d ed. 1961); 2 J. Mertens, Federal Gift and Estate Taxation 348-49 (1959).

14. Schwartz, Life Insurance Estate Planning, 35 S. Cal. L. Rev. 1, 10-11 (1961).

15. Int. Rev. Code of 1954, § 2035(a).

16. C. Lowndes & R. Kramer, Federal and Estate Gift Taxes 64 (1956).

17. Int. Rev. Code of 1954, § 2035(b). This statutory presumption can be rebutted by proof that the transfer was not in contemplation of death but, rather, sprung from a life motive. A transferor's intention to financially assist his family or friends has been held to constitute a life motive, see, e.g., Boyd v. United States, 192 F. Supp. 242 (E.D. Ky. 1961). Also the intention to provide financial independence and a sense of security to the transferor's children has likewise been held to be a living motive. See Hull v. Commissioner, 325 F.2d 367 (3d Cir. 1963); Parish's Estate v. Commissioner, 187 F.2d 390 (7th Cir. 1951). Living motives were attached to a transfer where decedent intended to put the policies beyond the reach of possible judgment creditors in Estate of Verne C. Hunt, 14 T.C. 1182 (1950).

Transfers of insurance policies made to avoid estate taxes are generally deemed to be in contemplation of death. See, e.g., Vanderlip v. Commissioner, 155 F.2d 152 (2d Cir.), cert. denied, 329 U.S. 728 (1946). However, if a transfer of property is made to reduce income tax, it may be sufficiently life motivated so as to be excluded from decedent's gross estate. See Commissioner v. Sharp, 91 F.2d 804 (3d Cir. 1937).

As the instant case pointed out the estate must rebut not only the statutory presumption that a transfer within three years of death is in contemplation of death but also the presumption of correctness of the Commissioner's position. 2 CCH Fed. Est. & Gift Tax Rep. at 8875; see Goodson, Are Life Insurance Proceeds Gifts in Contemplation of Death?, 103 Trusts & Estates 25 (1964).

18. Int. Rev. Code of 1954, § 2035(b).

19. Stoeber, Tax and Non-Tax Factors in Ownership and Transfer of Life Insurance, 21 Tax Law. 205, 214 (1967).

never owned the policies but made the premium payments.[20] Should there be included only the dollar value of the last three years' premiums, or the insurance proceeds attributable to those premiums, or all the insurance proceeds?[21] Revenue Ruling 67-463 was aimed at these questions and takes the second position, *viz.*, "[T]he value of that proportion of the amount receivable as insurance that the premiums paid within three years of death bear to the total premiums paid is includible in the decedent-insured's gross estate under the provisions of section 2035 of the Code."[22] In other words, a premium payment test will be applied.

The *Gorman* court, after reviewing the history of the premium payment test under section 2042, refused to apply Revenue Ruling 67-463 because it saw the Service attempting to do administratively what the legislature had consciously refused to do.[23] While many commentators agree with *Gorman* and feel that Revenue Ruling 67-463 is a revival of the old premium payment test against legislative intent,[24] there is no unanimity. For some, the elimination of the test from section 2042 is no bar to its application in section 2035.[25] Still others simply accepted the idea of a pro rata test where the deceased paid the premiums.[26]

The critics of Revenue Ruling 67-463 mount their attack not only on grounds that the rule is against congressional intent but also because they deem it unsupported in case law, contrary to the literal language of section 2035 and indifferent to actuarial realities. In order for the payment of premiums to carry a proportionate amount into the decedent's estate under 2035, the Service must prove that a "transfer" of the proceeds has taken place. The Service contends that a "premium payment is a gift of insurance protection, a transfer of an interest in the policy which is transmuted at death into the proceeds of the policy."[27] The Revenue Ruling cites *Chase National Bank v. United States*[28] for

20. The latter situation was that presented to the courts in both the instant case and Gorman v. United States, 288 F. Supp. 225 (E.D. Mich. 1968).

21. B. Harnett, Taxation of Life Insurance (1957).

22. Rev. Rul. 463, 1967-2 Cum. Bull. at 329.

23. 288 F. Supp. at 230.

24. Brown & Sherman, supra note 12; see Simmons, IRS Rules Premium Payments Within Three Years of Death Puts Proceeds into Estate, 28 J. Taxation 146 (1968); Stoeber, supra note 19.

25. See Hill, Living With R/R 67-463, 107 Trusts & Estates 621, 622 (1968), where it was said, "The classic premium payment test then, has not been revived by the new ruling since it is relying on Section 2035 for its theory of inclusion." (Emphasis omitted.)

26. Some writers who considered the question of the inclusion of life insurance proceeds under section 2035 before the issuance of Rev. Rul. 67-463 concluded that the premium payment test would continue to be applied. See B. Harnett, supra note 21, at 93; Mannheimer, Wheeler & Friedman, Gifts of Life Insurance by the Insured, N.Y.U. 13th Inst. on Fed. Tax. 247, 260; Schwartz, supra note 14, at 11.

27. Rev. Rul. 463, 1967-2 Cum. Bull. 328. This theory receives some support from United States v. Manufacturer's Nat'l Bank, 363 U.S. 194 (1960), the case which upheld the constitutionality of the old premium payment test. It was said there that "[t]hat disposition, which began with the payment of premiums by the insured, is completed by his death. His death creates a genuine enlargement of the beneficiaries' rights. It is the 'generating source' of the full value of the proceeds." Id. at 198 (citation omitted).

28. 278 U.S. 327 (1929).

the theory that the valuation of a transfer can take place at the time of death.[29] But *Chase* involved the constitutionality of taxation of life insurance proceeds, the estate contending that it was a direct tax on property and void because not apportioned. The relationship of premium payments to policy proceeds was not considered by the court.[30] Also, the decedent retained incidents of ownership after the transfer.[31] In the hypothetical problem[32] assumed by the Revenue Ruling, the decedent paid premiums on a policy that he completely transferred to his wife more than three years earlier. If he has made a complete gift, and divested himself of ownership sufficiently to avoid includibility under section 2042, how can he be deemed to "transfer" in contemplation of death a property interest in something he no longer owns?[33] It would appear that the most he can be deemed to have transferred is the actual dollar amount of the premiums he paid after the gift and within three years of death.[34]

A more serious "transfer" problem occurs where the policy was originally issued to a third person but the insured pays the premiums, as in the instant case and *Gorman*. It would appear obvious that the Service could not prove a "transfer" of the policy in such a situation and in fact such has been offered in the past as advice.[35] Unfortunately, Revenue Ruling 67-463 was intended to cover this situation as well as one where the decedent pays premiums after making a gift of the policy.[36] One critic notes that no reason is given in Revenue Ruling 67-463 for including proceeds in decedent's estate when the insured decedent was never the owner.[37] It appears that the "Service proceeds on the theory that

29. "It would not, we assume, be seriously argued that its [the former in contemplation of death section] provisions could be evaded by the purchase by a decedent from a third person of property, a savings bank book for example, and its delivery by the seller directly to the intended beneficiary on the purchaser's death, or that the measure of the tax would be the cost and not the value or proceeds at the time of death." Id. at 337. Contra, McGehee v. Commissioner, 260 F.2d 818, 820 (5th Cir. 1958).

30. See Simmons, supra note 24, at 148.

31. See Comment, In Contemplation of Death Life Insurance Premiums: Arguments Against Revenue Ruling 67-463, 3 U. San Francisco L. Rev. 116 (1968).

32. Internal Revenue Rulings are guidelines handed down by the Service based upon questions and hypothetical situations. They are not binding on the court or the Commissioner.

33. Brown & Sherman, supra note 12, at 793, 843.

34. Post-gift premium payments were held to be nothing more than simple gifts of money with no effect on the proceeds in Lamade v. Brownell, 245 F. Supp. 691 (M.D. Pa. 1965); accord, Hull v. Commissioner, 325 F.2d 367 (3d Cir. 1963); Goodnow v. United States, 302 F.2d 516 (Ct. Cl. 1962). It should also be noted that the Service's position in Rev. Rul. 67-463 is inconsistent with its position for federal gift tax purposes. There the Service holds that payment of premiums by the insured on a policy to which he holds no incidents of ownership (presumably because of an earlier transfer or the fact that he was never the owner) constitutes a transfer or a gift "to the extent of the premium paid." See Treas. Reg. § 20.2511-1(h)(8) (1964).

35. Stoeber, supra note 19, at 215.

36. The second question covered by Rev. Rul. 67-463 reads "The Internal Revenue Service has also been asked to consider a similar situation wherein the original application for insurance on the life of the decedent was made by the wife." Rev. Rul. 67-463, 1967-2 Cum. Bull. 327.

37. Simmons, supra note 24, at 148.

when the insured does everything necessary for the issuance of a policy on his life . . . and [provides] the funds for payment of at least the first premium, the insured has . . . in substance, if not also in form, transferred the policy on his life to his wife or to his children, as the case may be."[38]

The Service looks to *Liebman v. Hassett*[39] to sustain the argument that a premium payment works a pro rata transfer of the proceeds. In *Liebman* a policy for $50,000 was issued to decedent in 1916. In 1935 he transferred it to his wife in consideration of love and affection. Thereafter, the wife paid the two premiums which fell due prior to decedent's death. The wife, as executrix, argued that only the cash surrender value of the policy at the time of assignment should have been included in the gross estate. The court held, agreeing with the Commissioner, that the full $50,000, less the portion which the wife's two premium payments bore to total cost of the policy was included in his gross estate. While the decision could be read to support the Service's position that the proper time to evaluate the effect of premium payments is at the death of decedent, it cannot be read as a ground for the pro rata test because the decision rested on section 302(g) of the 1926 Code which made proceeds taxable to the extent "taken out" by decedent. Thereunder, proceeds were includible to the extent the premiums were paid for by decedent. The proportion of the proceeds attributable to the two premiums paid for by the wife thus had to be excluded.[40]

Most critics readily admit that there is some relation between premium payments and proceeds received at death. In support of the pro rata test, the Service appears to contend that the two are intimately related because if the insured donor failed to pay the premiums his gift of the policy would fail.[41] This continuing gift theory, however, should not be pushed to its logical extreme, because, if it were, it would appear that the decedent's last premium payment supported the whole policy and provided for all the proceeds. Therefore, the full face amount would be includible in the gross estate.[42] This was not the law even under the old premium payment test.[43]

It has also been pointed out that although there is a relation between premiums and proceeds of life insurance, the assumption that it is a pro rata one disregards actuarial realities.[44] The ordinary premium on a policy is composed of three actuarial elements: cost allocation in case of a cash surrender, cost of death risk, and cost of doing business risk.[45] Only the portion of the premium payment

38. Id. at 149. Such an opinion by the Service is opposite to that of the decision in Estate of Miran Karagheusian, 23 T.C. 806, 814 (1955), rev'd on other grounds, 233 F.2d 197 (2d Cir. 1956) where it was said the "[d]ecedent, never having owned the policy, could not and did not make any transfer of it in contemplation of death or otherwise."

39. 148 F.2d 247 (1st Cir. 1945).

40. See Brown & Sherman, supra note 12, at 791; Simmons, Contemplation of Death and the New Premium Payment Test, 53 A.B.A.J. 475 (1967).

41. Brown & Sherman, supra note 12, at 843.

42. This would be the case especially where the policy was term or straight life insurance. See Simmons, supra note 40, at 476.

43. See Goodnow v. United States, 302 F.2d 516 (Ct. Cl. 1962).

44. Simmons, supra note 40, at 476.

45. Id.

allocated to the cost of death risk is logically to be included in decedent's estate, assuming a premium payment test.[46] The problem is compounded where the policy calls for an extended term insurance or has an automatic premium loan provision which may carry the policy for three years or more after a default in premium payments.[47]

A number of ways to avoid the inclusion of proceeds in the estate under the new premium payment test have been suggested. The most obvious means would be the attachment of living motives to premium payments enough to satisfy the court that they were not made in contemplation of death and remove it from section 2035.[48] Because of the testamentary character of premium payments on life insurance, the rebuttal of the presumption of contemplation of death for premium payments made within three years may be an "insuperable burden."[49] Where such evidence is not available to the estate, another device—one more intriguing than time-tested—would be an initial pre-payment of three annual premiums. In such a situation, none of the proceeds should be included in the gross estate if the decedent lives for three or more years after the prepayment because the proceeds were paid for with premiums paid more than three years in advance of death.[50]

Cash gifts by the insured to the new policy owner, used by the latter to pay the premiums is not a positive way to avoid the new premium payment test. Such devices, for instance, where the wife-owner paid premiums with her checks but husband-insured funded wife's checking account, have been held under the old premium payments test of the 1939 Code to be an indirect payment by the insured.[51] Under Revenue Ruling 67-463, indirect payments by the insured would still presumably carry a part of the proceeds into decedent's estate.[52] The irrevocable transfer of income-producing assets to the donee without restriction, the income of which may be used to pay premiums, have avoided the premium payment test in the past.[53] Yet, the establishment of an irrevocable, inter vivos trust with directions to the trustees to pay the insurance premiums out of the

46. Id.

47. Id.

48. For examples of living motives which have been accepted by courts in the past see note 17 supra.

49. Goodson, supra note 17, at 25.

50. See Simmons, supra note 24, at 148.

51. See Estate of Clarence H. Loeb, 29 T.C. 22 (1957); Estate of Charles B. Wolf, 29 T.C. 441 (1957). Contra, Estate of Julius Selling, 24 T.C. 191 (1955) (cash gifts to wife to pay premiums were held not in contemplation of death).

52. This would probably be the Service's approach not only because the old premium payment test covered indirect transfers but also because Revenue Ruling 67-463 cites Lehman v. Commissioner, 109 F.2d 99 (2d Cir.), cert. denied, 310 U.S. 637 (1940) involving an indirect transfer of consideration to support the new premium payment test.

53. In Ford v. Kavanaugh, 108 F. Supp. 463 (E.D. Mich. 1952), the son of decedent cashed the policy transferred to him and purchased two new policies on his father's life. Held: new policies were not includible in father's gross estate. Contra, Estate of E.A. Showers, 14 T.C. 902 (1950).

principal of the trust may run the risk of the inclusion of proceeds under the theory of indirect payments.[54]

The instant case and *Gorman* represent the chaos caused by Revenue Ruling 67-463. Because the ruling has only shallow support from congressional intent and case law, the ruling should not be followed blindly. Indeed, an examination of some of the problems involved in a premium payment test, suggests that the court was not justified in following it.

Securities Regulation—Punitive Damages Awarded Under Section 17(a) of the Securities Act of 1933.—Law Research Service, Inc. commenced operations in 1964, engaging in the business of legal research by computer, and entered into an exclusive five-year contract with the Univac Division of the Sperry Rand Corporation for programming, computer time and related services. On January 29, 1965, however, Sperry Rand terminated the contract for nonpayment of a balance due in excess of $82,000, and refused to provide the services any longer. Law Research then instituted an action against Sperry Rand for breach of the contract. *Subsequent to the termination of the contract and the commencement of the action*,[1] an Offering Circular[2] for 100,000 shares of common stock of Law Research, containing prominent references to the "Sperry Rand contract," was distributed to the public, but without any mention of the termination of that contract or of the resulting lawsuit. When the dispute was later revealed to the public, the shares fell in price. Plaintiffs, thirteen purchasers of the shares, charged Law Research, its president, Hoppenfeld, and the underwriter, Blair & Co., Granbery, Marache, Inc., with violation of section 17(a) of the Securities Act of 1933[3] (hereinafter the 1933 Act), of section 10(b) of the Securities Exchange Act of 1934[4] (hereinafter the 1934 Act), and with common law fraud. Blair & Co. was also charged with violation of sections 12(2) of the 1933 Act,[5] and 15(c) of the 1934 Act.[6] The jury found for plaintiffs on all counts except the common law fraud count, and, in addition to compensatory damages, awarded punitive damages against Blair & Co. and Hoppenfeld under 17(a). The court

54. Carlton's Estate v. Commissioner, 298 F.2d 415 (2d Cir. 1962) rev'g 34 T.C. 988 (1960) (insurance trust); Bennett v. United States, 185 F. Supp. 577 at 586-87 (N.D. Ill. 1960) (dicta); Estate of Edmund W. Mudge, 27 T.C. 188 (1956); Estate of Frank A. Vanderlip, 3 T.C. 358 (1944).

1. Sperry Rand terminated the contract effective January 29, 1965, and the lawsuit was commenced by Law Research on February 23, 1965, while the Offering Circular was made public on March 15, 1965.

2. This offering was exempted from the requirement of a Registration Statement because of its small size (100,000 shares), under Regulation A, promulgated by the Securities Exchange Commission under § 3(b) of the Securities Act of 1933, 15 U.S.C. § 77(b) (1964).

3. 15 U.S.C. § 77q(a) (1964).

4. 15 U.S.C. § 78j(b) (1964).

5. 15 U.S.C. § 77*l*(2) (1964).

6. 15 U.S.C. § 78o(c) (1964).

sustained this award, and also refused to enforce the indemnification clause in the underwriting agreement in favor of Blair & Co. *Globus v. Law Research Service, Inc.*, 287 F. Supp. 188 (S.D.N.Y.), *appeal docketed*, No. 32766-68 (2d Cir., Oct. 4, 1968).

"The purpose of the federal securities acts is to insure that the public investor . . . will obtain the benefit of a thorough investigation of the facts set forth in a prospectus or offering circular . . . so that prospective investors will have access to the truth."[7] To achieve this end, both false or misleading statements and omissions of fact are prohibited.[8] The offering circular in the instant case clearly violated the latter prohibition, and defendants were quite properly held liable for the resulting damage to purchasers. The reference in the circular to the Sperry Rand contract was highly misleading, when not accompanied by some mention of the dispute that had arisen thereunder, since such a contract would be a highly attractive feature of the issuing corporation due to Sperry Rand's well known position in the computer field.

However, the court went beyond previous securities law decisions in permitting the award of punitive damages. Punitive damages are prohibited under the 1934 Act,[9] but no such limitation appears in the 1933 Act, and, since the court found that there was adequate evidence from which an inference of wanton, willful and fraudulent misconduct involving some degree of moral turpitude could be drawn, the issue of punitive damages was permitted to go to the jury. In then sustaining the jury's award, the court reasoned that since civil liability itself was implied under section 17(a),[10] punitive damages could also be awarded thereunder.[11] Furthermore, since the jury had found the requisite misconduct on the part of defendants, and since the awarding of punitive damages would serve to deter fraud in the sale of securities generally, the court stated that the award would be both proper and beneficial, and would accord with the purposes of the securities acts.[12]

Blair & Co. alleged that for punitive damages to be awarded, all elements of common law fraud need be shown.[13] The court rejected this argument, stating: "[P]rovided plaintiff can establish wanton dishonesty, high moral culpability and a gross fraud aimed at the public generally . . . punitive damages can be awarded for violation of § 17(a) of the 1933 Act, even in a case in which plaintiff has not brought himself within the technical elements of common law deceit."[14] The court specifically held that an actual intent to defraud need not

7. 287 F. Supp. at 199.

8. See, e.g., statutes cited notes 3-6 supra.

9. 15 U.S.C. § 78bb(a) (1964).

10. 287 F. Supp. at 194. See authorities cited therein.

11. The sole authority cited by the court is A. Bromberg, Securities Law: Fraud—SEC Rule 10b-5 § 9.1 n.20 (1968); see 287 F. Supp. at 197.

12. 287 F. Supp. at 194-95.

13. See id. at 195. The elements of common law fraud are: (1) false or misleading statements or omissions of fact; (2) in respect to material facts; (3) with an actual intent to defraud; (4) justifiable reliance by plaintiff; (5) with damage resulting therefrom.

14. Id. at 196.

be proven for punitive damages under 17(a),[15] but only that defendants had actual knowledge that the material facts in question were misleading or false,[16] since the more rigorous standard is not even required in criminal cases under the securities acts.[17] In addition, the court stated that plaintiff need not show justifiable reliance on defendants' misconduct, since the standard under the securities acts is actual reliance, *i.e.*, plaintiff would have been influenced to act differently had there been disclosure by defendant.[18]

Therefore, in order to recover punitive damages in a private civil action under section 17(a), plaintiff need prove that defendants made false or misleading statements of material facts with actual knowledge of their falsity or misleadingness, with resulting damage or loss due to actual reliance thereon, as part of a scheme or course of conduct engaged in by defendants with wanton dishonesty, high moral culpability and a generally fraudulent purpose against the public as a whole. Clearly this standard announced by the court will require some clarification for application to cases involving facts between mere negligent misstatements[19] and the extreme presented in the instant case, if the new weapon of punitive damages is to be an effective adjunct to federal securities regulation.

The court refused to enforce the indemnification clause in the underwriting contract between defendants on grounds of public policy.[20] Reasoning that the public policy embodied in federal securities legislation would be contravened by permitting a party guilty of the misconduct shown here to be indemnified for its liability, the court refused to lessen the motivation of an underwriter to properly perform, "at least under circumstances where [the underwriter] has been found guilty of misconduct evincing actual knowledge or reckless disregard of the falsity of the offering circular . . . ."[21] Such a holding, the court stated, would give greater incentive to underwriters to properly investigate and be as certain as is reasonably possible that the prospectus bearing their name is truthful, thereby properly performing their duty under the federal securities acts.

In overturning the jury's verdict in favor of Blair & Co. on the cross-claim, the court rejected the claim of Blair & Co. that it was entitled to indemnification because it was less guilty than Law Research, finding that Blair & Co. had sufficient knowledge of the facts to be precluded from indemnification because it was a co-wrongdoer. While the court cited no authority for its holding here, the reasoning of the court may be based on the case of *Kaiser-Frazer Corp. v. Otis & Co.*[22] There the court refused to grant plaintiff damages for breach of a contract whereby defendant was to sell common stock of plaintiff, because the prospectus (incorporated into the contract) contained material misstate-

15. Id. at 198.
16. Id.
17. Id.
18. Id. at 196.
19. Such statements are the only statements clearly excluded from punitive damages liability by the instant case. See 287 F. Supp. at 197-98.
20. Id. at 199.
21. Id.
22. 195 F.2d 838 (2d Cir. 1952).

ments of fact. The court reasoned: "[I]t is clear that a contract which violates the laws of the United States and contravenes the public policy as expressed in those laws is unenforceable."[23] The court also stated that such a contract is void "regardless of the equities as between the parties"[24] since public policy comprehends the interests of others and overrides the interests of the parties.[25] Additional support for the court's holding in the instant case may be found in section 14 of the 1933 Act,[26] which renders void and unenforceable any contract or clause in derogation of the Act, and in section 11(f) of the 1933 Act,[27] which prohibits contribution between persons guilty of fraudulent misrepresentation.

While the court's refusal to enforce the indemnification agreement in the instant case may be a just result, the opinion of the court gives no standard and little authority under which the result was attained. The opinion as a whole seems to indicate that the standard for refusing indemnification is the same as that for an award of punitive damages, but the decision does not expressly so state, merely stating that to permit indemnification would be contrary to public policy.[28]

Much clearer guidelines must be promulgated if the beneficial result sought by the instant decision is to be attained. Particular care should be given to separating the standards for awarding punitive damages and those for refusing indemnification—or, it should be made clear that these standards are identical if such is the case, as the instant case seems to indicate, but does not so state.

Torts—Reasonable Man Test Determines Landowner's Liability.—Plaintiff, while a social guest in defendant's apartment, informed her that he intended to use the bathroom. Defendant knew that a porcelain faucet handle on the bathroom sink had cracked, creating a dangerous condition, but did not warn plaintiff of the defect. As plaintiff twisted the handle, it broke, causing severe injuries to his hand. The Supreme Court of California denied defendant's motion for summary judgment and held that an occupier of land[1] should be governed by a reasonable man test in determining his liability towards all types of intruders upon his property, regardless of their status as trespasser, licensee

23. Id. at 843.

24. Id. at 844.

25. See Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173 (1942); E.E. Taenzer & Co. v. Chicago, R.I. & Pa. Ry., 191 F. 543 (6th Cir. 1911).

26. 15 U.S.C. § 77n (1964), cited by the Kaiser-Frazer court as additional support for its holding. 195 F.2d at 843 n.8.

27. 15 U.S.C. § 77k(f) (1964).

28. Cf. Kroll, Some Reflections on Indemnification Provisions and S.E.C. Liability Insurance in the Light of Barchris and Globus, 24 Bus. Law. 681, 690-92 (1969).

1. The tenant rather than the owner was sued because historically liability arising out of conditions or activities on the land have been focused on possession. The reasoning behind this is the belief that the man in possession is usually in the best position to make sure other persons are not injured. W. Prosser, Torts § 57, at 358 (3d ed. 1964).

or invitee. *Rowland v. Christian,* — Cal. 2d —, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

Traditionally, a landowner's liability for tortious injury to a person who comes upon his land has been predicated on the status of the plaintiff as licensee,[2] invitee[3] or trespasser.[4] A "social guest," as was plaintiff in the instant case, is a type of licensee. The duty traditionally owed to such a plaintiff is similar to that owed a trespasser: the defendant in possession need only refrain from intentional, willful or wanton acts of injury.[5]

This rigid, common law classification system has led to some unfortunate results.[6] Consequently, most jurisdictions developed exceptions to the traditional doctrine for cases involving, *e.g.*, a "dangerous instrumentality"[7] or active

2. A licensee has a privilege to enter or remain upon the land of another by virtue of the possessor's consent, whether given by invitation or permission. Restatement (Second) of Torts § 330 (1965); W. Prosser, supra note 1, § 60, at 385.

3. "An invitee is either a public invitee or a business visitor." The former is one on land by invitation as a member of the public "for a purpose for which the land is held open to the public," while the latter "is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." Restatement (Second) of Torts § 332 (1965).

4. A trespasser is a person who enters the land of another without being privileged to do so. Id. § 329.

5. W. Prosser, supra note 1, at § 60. The original concept behind this minimal standard of care was the sovereignty of the landowner, which allowed him to do what he wished on or with his own property. F. Bohlen, Studies in the Law of Torts 163 (1926). The occupier's duty is greater when an invitee or "business visitor" comes upon the land. Here the defendant is required to inspect the premises and render them reasonably safe for the visit. Illinois Cent. R.R. v. Nichols, 173 Tenn. 602, 118 S.W.2d 213 (1938); American Nat'l Bank v. Wolfe, 22 Tenn. App. 642, 125 S.W.2d 193 (1938). A higher standard of care is "the price which the man in possession must pay for the economic benefit, present or prospective, to be derived from the visitor's presence . . . ." Prosser, Business Visitors and Invitees, 26 Minn. L. Rev. 573, 574 (1942).

6. E.g., in Reardon v. Thompson, 149 Mass. 267, 21 N.E. 369 (1889), plaintiff, a licensee, fell into a hole on defendant's land which had been dug by the defendant. The court held that a person goes onto the land of another at his own risk and must accept the premises as he finds them. The Reardon court felt that a hole not concealed is a danger which the plaintiff must accept. There was some discussion as to whether or not plaintiff might have been a trespasser, but the court said that in either case the result would be the same. The court stated: "No doubt a bare licensee has some rights. The land-owner cannot shoot him." Id. at 268, 21 N.E. at 370; accord, Ford v. United States, 200 F.2d 272 (10th Cir. 1952). Plaintiff sued for injuries suffered by his son when a booby-trap on government land exploded. The federal court applied Oklahoma law which said that an owner of real property is not liable for injuries to adults or infants and owes no duty of active care unless he knew of the dangerous condition and the injured person was unaware of such dangerous condition. The court refused to apply the "dangerous instrumentality" doctrine. See note 7 infra.

7. A dangerous instrumentality is anything which, when brought upon the property of another, increases the likelihood that any person entering upon said property is in danger of being injured by such instrument. See generally 12 Rutgers L. Rev. 599 (1958). One who brings a dangerous instrumentality upon his property is liable for negligence and lack

negligence.[8] Indeed, courts have often placed rather forced constructions upon these exceptions in order to permit recovery by a plaintiff who would otherwise have been barred because of his common law status.[9]

The present court's ruling placed the common law classifications in proper perspective as one circumstance to consider in determining whether a duty of care has been breached.[10] This rationale had been approximated by the United States Supreme Court a decade earlier: "Through this semantic morass the common law has moved, unevenly and with hesitation, towards 'imposing on owners and occupiers a single duty of reasonable care in all the circumstances.' "[11] The majority in the instant case, realizing that its result could have been reached by applying California precedents,[12] went on to state: "[W]e

of skill in its use even if plaintiff is a trespasser or licensee. Van Winkle v. American Steam-Boiler Co., 52 N.J.L. 240, 19 A. 472 (Sup. Ct. 1890).

8. Active negligence imposes liability regardless of plaintiff's status when there is negligent conduct by means of active operations. Bylling v. Edwards, 193 Cal. App. 2d 736, 14 Cal. Rptr. 760 (Dist. Ct. App. 1961); see, e.g., De Haven v. Hennessey Bros. & Evans Co., 137 F. 472 (6th Cir. 1905) (operating machinery); Louisville & Nashville R.R. v. Blevins, 293 S.W.2d 246 (Ky. 1956) (running a train); Lordi v. Spiotta, 133 N.J.L. 581, 45 A.2d 491 (Sup. Ct. 1946) (shutting off gas); Brigman v. Fiske-Carter Constr. Co., 192 N.C. 791, 136 S.E. 125 (1926) (backing up a truck); Potts v. Amis, 62 Wash. 2d 777, 384 P.2d 825 (1963) (swinging a golf club). Other exceptions to the common law system include the "trap doctrine" and the concept of "attractive nuisance." See Patterson v. Proctor Paint & Varnish Co., 21 N.Y.2d 447, 235 N.E.2d 765, 288 N.Y.S.2d 622 (1968); James, Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees, 63 Yale L.J. 605 (1954).

9. Rowland v. Christian, — Cal. 2d at —, 443 P.2d at 565, 70 Cal. Rptr. at 101. E.g., Hansen v. Richey, 237 Cal. App. 2d 475, 46 Cal. Rptr. 909 (Dist. Ct. App. 1965). In Hansen, a youth drowned in a pool during a party and the court held the owner liable, not for maintaining a dangerous pool, but for negligence in actively conducting a party for young people around a dangerous pool. In Barbarisi v. Caruso, 47 N.J. Super. 125, 135 A.2d 539 (App. Div. 1957), the court held that a washing machine could be considered a dangerous instrumentality.

10. — Cal. 2d at —, 443 P.2d at 568, 70 Cal. Rptr. at 104. The court applied Cal. Civ. Code § 1714 (1954): "Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself." Significantly section 1714 states a civil law rather than a common law principle. See C. Civ. art. 1386 (65e ed. Petits Codes Dalloz 1966). See also Fernandez v. Consolidated Fisheries, Inc., 98 Cal. App. 2d 91, 219 P.2d 73 (Dist. Ct. App. 1950).

11. Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 631 (1959) (footnotes omitted).

12. — Cal. 2d at —, 443 P.2d at 569, 70 Cal. Rptr. at 105; e.g., in Demmon v. Smith, 58 Cal. App. 2d 425, 136 P.2d 660 (Dist. Ct. App. 1943), plaintiff was an employee in the same market where defendant leased his meat counter. Plaintiff came behind defendant's counter to serve coffee as was his custom, and was injured when defendant's employee pivoted around with a knife in his hand. Defendant contended that plaintiff was a licensee and, therefore, the only duty owed him was to refrain from wantonly or wilfully injuring him. The court held this rule applies only to passive as opposed to active negligence. But when

are satisfied that continued adherence to the common law distinctions can only lead to injustice or, if we are to avoid injustice, further fictions with the resulting complexity and confusion."[13] While the present court was not the first court to present this criticism, it was the first to set down a viable alternative rule.[14]

Our society is no longer rooted to the land, a fixation which tended to justify the common law classification doctrine. Coming upon the land of another with or without permission does not make a person's life or limb less valuable. Furthermore, reasonable people do not act differently depending upon the status of another.[15] Rather than presaging different results in future cases, the court here has brought the theory behind landowners' liability into harmony with legal realities.[16]

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active negligence is involved, and here the pivoting around the knife was deemed to amount to active negligence, the court said that the defendant has the duty to exercise ordinary care to avoid injuring anyone upon his premises. In the instant case, the court could have found that the defendant, being aware of the cracked faucet, was actively negligent in authorizing the plaintiff to use her bathroom. Perhaps the court could have stretched the "trap doctrine" and said that the cracked faucet was inherently dangerous and deceptively safe looking. The court could also have considered holding that allowing the cracked faucet to remain unrepaired in her bathroom amounted to the maintenance of a "dangerous instrumentality" by the defendant.

13. — Cal. 2d at —, 443 P.2d at 568, 70 Cal. Rptr. at 104.

14. In Potts v. Amis, 62 Wash. 2d 777, 384 P.2d 825 (1963), a Washington court came close to throwing out the classifications but by their language restricted the decision to its peculiar facts. The court found active negligence but indicated "a willingness to accept the rule of reasonable conduct under the circumstances." Id. at 785, 384 P.2d at 830. The Potts court cited Sherman v. Seattle, 57 Wash. 2d 233, 356 P.2d 316 (1960), wherein the court stated: "In view of the peculiar facts of this case, we feel that the standard of care owed respondent by appellant cannot be made to depend upon respondent's technical status on appellant's premises at the time of the accident." Id. at 239, 356 P.2d at 320. These two earlier cases are narrower than the instant case and are, by their own language, restricted to their particular facts. See also Comment, Land Occupant's Liability to Invitees, Licensees, and Trespassers, 31 Tenn. L. Rev. 485, 495 (1964).

15. — Cal. 2d at —, 443 P.2d at 568, 70 Cal. Rptr. at 104.

16. England has abandoned the classification system by legislation. Occupier's Liability Act of 1957, 5 & 6 Eliz. 2, c. 31.