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Recent Decisions

RECENT DECISIONS

CIVIL SERVICE—DISABLED VETERANS—CERTIFICATES OF VETERANS ADMINISTRATION.—The plaintiffs instituted this proceeding to compel the Civil Service Commission to cancel preferences given to certain allegedly disabled veterans and to return them to the position on the Civil Service lists which they had as non-disabled veterans. The allegedly disabled veterans had been given preference over non-disabled veterans on the basis of bare certificates from the Veterans Administration rating their war-incurred disability at "zero percent." Special Term sustained petitioners. Upon appeal, *held,* affirmed on the ground that the Veterans Administration did not certify to the present existence of the disability and that the rating of "zero percent" disability, by itself, had no probative force to establish this fact. As the men whose status is questioned are not parties to the proceeding, however, no ruling is made concerning whether the order will be binding upon them as individuals. *Winternitz v. Morton,* 272 App. Div. 339, 71 N. Y. S. 2d 224 (1st Dep't 1947), *aff'd without opinion,* 297 N. Y. 541, 74 N. E. 2d 473 (1947).

In 1929 an amendment to the New York Constitution was passed which provided that any honorably discharged veteran ". . . disabled in the active performance of duty in any war, to an extent recognized by the United States Veterans' Bureau . . . and whose disability exists at the time of his or application for such appointment or promotion . . ." shall be entitled to preference regardless of his or her standing on any list.[1]

In *Potts v. Kaplan,*[2] the court had before it the question of whether or not disability rated by the Veterans Administration as "zero percent" automatically prohibited the veteran from having a preference. On this point the court stated: "The purpose of the constitutional amendment and the statute enacted in pursuance of it does not, according to our interpretation, refer to disabilities which impair their earning capacity. Rather, as we think, it points towards a reward for one who had, even in the slightest degree, sustained in war service some physical depreciation which the Federal Government had recognized as such and whose impaired physique due to such recognized illness, disease or wound has continued to exist."[3] Furthermore, the court decided that the certificate of the Veterans Administration was final as to the fact that the disability was war inflicted and as to the extent to which the veteran was disabled. On the question as to the present existence of such disability, however, the Civil Service itself had the final word.

The law thus interpreted was not disturbed until 1945, when Article 5, Section 6, of the New York Constitution was again amended. The amendment provided that veterans disabled ". . . to an extent certified by the United States veterans Administration, and whose disability is certified by the United States veterans administration to be in existence at the time of his or her application for appointment or promotion, shall be entitled to preference. . . ."[4] In addition, it provided for a five-year preference for all veterans who served in time of war. This amendment, implemented by Section 21 of the Civil Service Law, makes two obvious changes: first, that the Civil Service no longer has the power to determine whether or not the

1. N. Y. CONST. Art. V, § 6.

2. 264 N. Y. 110, 190 N. E. 201 (1934). A search of the authorities does not reveal any further cases touching upon this particular subject.

3. *Id.* at 117, 190 N. E. at 203.

4. N. Y. CONST. Art. V, § 6.

disability continues to exist at the time of application for appointment or promotion; second, that all veterans now have preference in obtaining appointment or promotion in the New York Civil Service.

The principal case decides a rather narrow point. The advancement of certain allegedly disabled veterans in the Civil Service Commission lists was declared inoperative in theory on the basis that the necessary certificate from the Veterans Administration stated that the veterans in question had a "zero percent" disability, but did not indicate that the disability continued to exist at the time of application for preference. " 'The fact that a service connected disability has been evaluated at 0% disability does not necessarily mean that there are no residuals present.' It may or may not indicate the continued existence of 'residuals.' "[5] These bare certificates, therefore, have no probative force to establish that such disability continued to exist at the time of application. If such a certificate had been implemented by a statement that the disability continued to exist, then it would have been final and binding on the Civil Service.

In *Barry v. Chapman*,[6] decided on August 25, 1947, the facts were somewhat similar. The court, however, assumed that the applicants for preference met all the constitutional provisions precedent to the granting of such preference. It is submitted that this assumption was correctly drawn because the petition did not allege the absence of any of the necessary certificates from the Veterans Administration. The sole question is: if applicants for preference have met all qualifications for preference prescribed by the Civil Service Law, and the Veterans Administration certifies the disability at "zero percent," must such application be denied as a matter of law? The court found that the "zero percent" disability rating referred to ". . . is merely a rating of impaired earning capacity, and may mean anything from no impaired earning capacity up to something less than 10% of impaired earning capacity."[7] The rating has no bearing on the right to preference in the Civil Service.

The instant case is in no way contra to the *Barry* case. There is nothing in the former to indicate that a ten percent disability rating is necessary to entitle a veteran to preferential appointment. That case merely holds that a rating of zero percent, without more, is of no probative force to establish that war incurred disabilities are in existence at the time of application for preference.

This same view is apparently taken by the Federal Civil Service. There, preference will be given to those veterans who ". . . have established the present existence of a service-connected disability and who are receiving compensation, disability retirement benefits, or pensions administered by the Veterans Administration, the War Department or Navy Department. . . ."[8] It would appear from this quotation that any veteran who has proved the present existence of a war incurred disability, whether or not he is entitled to disability compensation, is entitled to preference.

Both the principal case and the *Barry* case, taken together, present a fair picture of the meaning and application of the 1946 amendment to the New York Constitution discussed above,[9] in so far as it applies to disabled veterans who have a rating of zero percent disability. This amendment contains no qualification whatsoever as to the degree of disability necessary for preference and follows the decision of

5. 272 App. Div. 339, 341, 71 N. Y. S. 2d 224, 227 (1st Dep't 1947).

6. 189 Misc. 928, 73 N. Y. S. 2d 142 (Sup. Ct. 1947).

7. *Id.* at 938, 73 N. Y. S. 2d at 153.

8. 58 STAT. 387, 5 U. S. C. A. § 851 (1944).

9. See note 4 *supra*, and accompanying text.

Potts v. Kaplan.[10] The Civil Service can no longer disqualify some veterans by an interpretation of the word "disabled," for the percent of disability is no longer of any moment. If the veteran is certified to have "zero percent" disability *and* such disability continues to exist at the time of application for preference, the Civil Service is bound to honor the Veterans Administration's certificate and give such veteran preference.

While the decisions in these two cases represent a correct interpretation of the law as it stands today, it is submitted that the 1946 constitutional amendment does not provide for all that could be desired. It sets up two classes of preference for veterans applying for appointment or promotion. First and greatest preference is given to disabled veterans. The second class of preference is given to veterans in general who have served during the actual war period.

Thus, there are two groups of persons who receive preference in the Civil Service, and yet there is no priority within the individual groups. It would seem that there should be some scale of preferences so that those with greater disabilities should receive greater preference, for it does not seem fit that a veteran with a minor disability, which is not even compensable, should have equal preference with one who has a major disability. It seems equally unjust that a veteran with four years' service should receive no greater preference than one with a few months' service. In one case, disability is rewarded and in another, service. In neither case is the degree or extent of disability or service taken into account. This amendment was passed to reward those who had suffered for or served their country in times of grave danger, and the intent was laudable. The draftsmen of the amendment and of the implementing Civil Service Law, however, did not proceed far enough. While they helped veterans as a group, they did not give any additional preference to these men, who, due to long service or severe wounds, needed or deserved preference most. A further constitutional amendment would appear to be in order to provide some scale whereby long service or severe disability should be rewarded over short service and slight injury.

CONSTITUTIONAL LAW—TRIAL—COMMENT ON FAILURE OF ACCUSED TO TESTIFY.—During the trial of an indictment for first degree arson, the state's attorney commented upon the defendant's failure to testify. A Vermont statute permits such comment and allows a jury to draw reasonable inferences from a criminal defendant's silence at the trial. To a charge in conformity with this statute, defendant excepted, contending that in effect the provision compelled an accused to offer testimony, such compulsion being prohibited by the clause in the Vermont constitution forbidding compulsory self-incrimination. On appeal, *held,* two justices dissenting, exception overruled on the ground that the Vermont statute in no way contravenes the state constitution. *State v. Baker,* 53 A. 2d 53 (Vt. 1947).

A state common law rule of the same tenor as that of the statute involved in the principal case, authorizing the jury to draw an unfavorable inference from defendant's failure to testify[1] was held not to violate either the "privileges or immunities" or the "due process" clauses of the Fourteenth Amendment of the United States

10. 264 N. Y. 110, 190 N. E. 201 (1934). See also text accompanying notes 2, 3, and 4, all *supra.*

1. See note 10 *infra,* and accompanying text.

Constitution.[2] The Court did not pass on the question whether the privilege against self-incrimination was violated. It was concerned merely with the question whether such privilege was protected by the Fourteenth Amendment against state interference.

Federal prosecutions are restricted by a legislative prohibition of adverse presumptions against a silent defendant,[3] and judicial interpretation thereof outlawing comment.[4] Most states also forbid jury consideration of a defendant's silence.[5] The statutory expressions differ in the several jurisdictions, some providing that a defendant's silence shall not create a presumption of his guilt,[6] others that it shall not be the subject of comment,[7] and others providing both.[8] In at least two states any reference whatever to defendant's silence, even if such reference be intended for the benefit of the defendant, is unlawful.[9]

It has been held in one state that if a defendant fails to contradict facts tending to establish his guilt, which if untrue he could have contradicted, such failure may be commented upon by the court to the jury.[10] The permission here is narrow in scope[11] and carefully limited in operation.[12] When a defendant fails to refute certain evidence,[13] which is incriminating and which it is in his power to disprove,

2. Twining v. New Jersey, 211 U. S. 78 (1908).

3. 20 STAT. 30 (1878), 28 U. S. C. § 632 (1940); *see* Mayer v. United States, 259 Fed. 216, 217 (C. C. A. 6th 1919).

4. Wilson v. United States, 149 U. S. 60 (1893).

5. 8 WIGMORE, EVIDENCE § 2272 (3d ed. 1940).

6. MASS. ANN. LAWS c. 233, § 20 (1933); N. Y. CODE CRIM. PROC. § 393.

7. CONN. GEN. STAT. § 6480 (1930); IND. ANN. STAT. § 9-1603 (1942).

8. ILL. REV. STAT. c. 38, § 734 (1939); N. H. PUB. LAWS c. 336, § 36 (1926).

9. Accused did not testify, and asked the court to instruct the jury that this did not create any presumption against him. Refusal of such instruction was upheld on appeal as proper under Wyoming Compiled Statutes § 7507 (1920), which prohibits *any* reference to a defendant's silence. Kinney v. State, 36 Wyo. 466, 256 Pac. 1040 (1927). Similar to the Wyoming statute is that of Oklahoma which reads: "In the trial of all indictments . . . the person charged shall at his own request, but not otherwise, be a competent witness and his failure to make such request shall not create any presumption against him *nor be mentioned at the trial. . . .*" OKLA. STAT. ANN. tit. 22, § 701 (1937) (italics supplied).

10. Parker v. State, 61 N. J. L. 308, 39 Atl. 651 (Sup. Ct. 1898) (common law rule). Although there is no constitutional privilege against self-incrimination in New Jersey, it is unquestionably a part of the state's common law. *See* State v. Zdanowicz, 69 N. J. L. 619, 622, 55 Atl. 743, 744 (1903).

11. Parker v. State, *supra* note 10, at 314, 39 Atl. at 654, where the court says by way of *dictum*: "His failure to offer himself as a witness when his testimony could not meet or disprove any particular fact or circumstance, and could only consist of a general denial of guilt, probably ought not to affect him, and if so, his silence should not be commented on or considered."

12. Where defendants failed to deny facts which if true established their guilt, a charge that the jury might place such importance upon this as they saw fit was error. Defendants' failure only authorized a presumption that they could not deny those facts, and was not to be taken as conclusive of their guilt. The charge as given permitted an improper evaluation. State v. Kisik, 99 N. J. L. 385, 125 Atl. 239 (1924).

13. *Cf.* State v. Wines, 65 N. J. L. 31, 46 Atl. 702 (Sup. Ct. 1900), where, there being no direct evidence to connect the defendant with the crime, advertence to the accused's failure to *introduce* evidence to establish an alibi was held error.

the court may instruct the jury to consider such failure in determining whether or not the uncontested facts are true.[14]

Some additional limited approval of probative effect being given silence is irregularly manifested in a few states. In one jurisdiction it has been held that comment by the prosecuting attorney did not contravene any state statutory provisions, or the due process clause of the state constitution.[15] In another state, prior to 1879, a statute forbade allusion to defendant's silence by either court or prosecuting attorney,[16] but in that year it was repealed and a new section enacted providing: "The neglect or refusal of an accused party to testify shall not be commented upon *to* the court or jury."[17] This was defined by the supreme court of that state in 1934 as not prohibiting comment by the court, but only by counsel—the legislative intent having been to repeal the prohibition so far as comment by the court was concerned, but to retain it with reference to comment by counsel.[18]

For fifteen years after an accused was afforded the right to testify in his own behalf,[19] it was held proper in one jurisdiction for a jury to weigh a defendant's silence, and for the judge to charge them accordingly.[20] In 1879 legislation was passed providing that "the fact that he [defendant] does not testify in his own behalf, shall not be taken as evidence of his guilt."[21] This provision was interpreted to mean that the jury should exclude entirely from their consideration the fact that the defendant remained silent.[22]

In 1931 the American Bar Association recommended that the prosecution should be permitted to comment upon a defendant's failure to take the stand, and the jury to draw reasonable inferences therefrom.[23] At the time only one state authorized like practice by *statute*,[24] and the constitutionality of this legislation was yet to be determined.

Comment by counsel and court, and jury consideration of an accused's silence

14. Frequently New Jersey has been cited as authorizing comment and resulting inferences, with no exposition of the attendant limitations or the *caveat* in note 11 *supra*. Thus, in the principal case the court, citing Parker v. State, 61 N. J. L. 308, 39 Atl. 651 (Sup. Ct. 1898), says: "Yet the failure of a criminal defendant to exercise his statutory right to testify has been held [in New Jersey] . . . to give rise to an inference against him." 53 A. 2d 53, 59 (Vt. 1947).

15. State v. Ferguson, 226 Iowa 361, 283 N. W. 917 (1939).

16. CONN. GEN. STAT. tit. 20, c. 13, § 7 (1875).

17. CONN. GEN. STAT. § 6480 (1879) (italics supplied).

18. State v. Heno, 119 Conn. 29, 174 Atl. 181 (1934).

19. One writer has said that Maine was the first state to enact such legislation. Reeder, *Comment Upon Failure of Accused to Testify*, 31 MICH. L. REV. 40, 41 (1932).

20. State v. Cleaves, 59 Me. 298 (1871) (early common-law rule).

21. Reeder, *supra* note 19, at 43.

22. State v. Banks, 78 Me. 490, 7 Atl. 269 (1886).

23. 56 A. B. A. REP. 137-152 (1931).

24. In 1927, § 4879 of the Revised Code of South Dakota (1919) was amended by c. 93 of the Session Laws to provide that the failure of a defendant to testify "is hereby declared to be a proper subject of comment by the prosecuting attorney; provided, however, that if such comment is made by the prosecuting attorney in his closing argument, without any previous reference thereto having been made in argument either on behalf of the state or the defendant, the attorney for the defendant may thereafter, if he so request the court, argue upon such comment for such time as the court shall fix."

have been allowed in one state since 1912, but by *constitutional amendment.*[25] Another state adopted a similar amendment in 1934.[26] In New York, where comment of this nature has long[27] been clearly prohibited,[28] proposals in the 1938 State Constitutional Convention for amendment permitting such comment died in committee.[29] The Vermont statute, constitutionality of which is upheld by the principal case,[30] was enacted in 1935.[31] In the following year, interestingly enough, corresponding South Dakota legislation[32] was declared unconstitutional[33] The Supreme Judicial Court of Massachusetts, sounded on the question in 1938, wrote that a pending legislative proposal allowing discretionary court instructions with respect to an accused's silence would violate that state's privilege against self-incrimination.[34]

Heavily relied upon by the majority in the principal case,[35] and by authorities in accord,[36] is an observation that the privilege against compulsory self-incrimination arose in our law as a protest against torture, force and the inquisitorial practices prevalent in sixteenth and early seventeenth century England when an accused was compelled to answer under oath all charges made against him.[37] The

25. OHIO CONST. Art. I, § 10, amended Sept. 3, 1912.

26. CAL. CONST. Art. I, § 13, amended Nov. 6, 1934, provides that "in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury."

27. *See* Ruloff v. People, 45 N. Y. 213, 222-23 (1871).

28. Charge that jury could not draw any unfavorable inferences from defendant's failure to testify, but that they might take most strongly against him circumstances, which if he were innocent he might have explained, was error. People v. Forte, 277 N. Y. 440, 14 N. E. 2d 783 (1938).

29. The failure in 1938 was the climax to a series of similar attempts in both houses of the Legislature beginning in 1934.

30. Vermont Acts 1935, No. 52, p. 69, amending Vermont Public Laws § 2383 ,1933) to provide that "the failure of such person [defendant] to testify may be a matter of comment to the jury and the jury may draw reasonable inferences therefrom," was held not to contravene Vermont Constitution C. I, Art. X, which provides that "in all prosecutions for criminal offenses, a person hath a right to be heard by himself and his counsel . . . nor can be be compelled to give evidence against himself. . . ."

31. The United States Attorney General's Conference on Crime recommended to all state legislatures meeting in 1935 the adoption of "a rule permitting court and counsel to comment to the jury on the failure of the defendant in a criminal case to testify in his own behalf." PROC. ATT'Y GEN. CONF. CRIME 454 (1934).

32. See note 24 *supra.*

33. Holding the legislation in contravention of the South Dakota constitution, Art. VI, § 9, which provides: "No person shall be compelled in any criminal case to give evidence against himself. . . ." The court wrote that such a provision would compel a defendant either to take the stand and be subjected to relentless cross-examination, or have the prosecutor claim before the jury that he was guilty because he remained silent. State v. Wolfe, 64 S. D. 178, 266 N. W. 116 (1936).

34. *In re* Opinion of the Justices, 300 Mass. 620, 15 N. E. 2d 662 (1938).

35. 53 A. 2d 53, 57-61 (Vt. 1947).

36. See Bruce, *The Right to Comment on the Failure of the Defendant to Testify,* 31 MICH. L. REV. 226-27 (1932).

37. This practice was generally known as the *ex officio* oath, first appearing by this

privilege, it is said, was directed against compulsion, not against the coercion to speak resulting from a defendant's knowledge that unfavorable inferences will be permitted to be drawn from his silence. The fact that the original evils giving rise to the privilege no longer obtain does not in itself preclude present applicability. The privilege as we know it today was initially formulated *after* the abolition of the Star Chamber and the *ex officio* oath in 1641,[38] and is well established as one of our most jealously guarded constitutional rights.[39]

In apparent support of its holding, the court in the principal case points out that there is a strong tendency for juries to draw unfavorable inferences from a defendant's silence.[40] Conceding this, such untoward practice should not be further encouraged by legislative sanction. Inferences so drawn rest upon the assumption that silence means guilt; an assumption which might well be false. In many cases the attorney of an accused may insist upon his client remaining silent because of the fear that prejudice will arise from exposure of the accused's past criminal record upon cross-examination, or from his ineptness as a witness because of embarrassment or speech difficulties.[41] In this connection it is significant to note that while the Model Code of Evidence permits judge and counsel comment along with jury inferences,[42] it prohibits the introduction of prior commissions or convictions of crime for the purpose of discrediting a testifying defendant who has introduced no evidence to support his credibility.[43]

Where a statute like that in the principal case permits inferences, an innocent defendant must either take the stand and subject himself to the strong possibility of prejudice springing from the factors mentioned above, or remain silent under his constitutional privilege only to have the jury's inference of his guilt rendered all the more probable by comment from the court or counsel. It is submitted that legislation which in effect presents an innocent defendant with such a dilemma, destroys the substance of his constitutional privilege against compulsory self-incrimination.[44]

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name in 1583. 9 HOLDSWORTH, HIST. ENG. LAW 200 (1926); 8 WIGMORE, EVIDENCE § 2250 (3d ed. 1940).

38. 8 WIGMORE, EVIDENCE § 2250 (3d ed. 1940).

39. *See* McKnight v. United States, 115 Fed. 972, 981 (C. C. A. 6th 1902).

40. 53 A. 2d 53, 60 (Vt. 1947); Comment, 37 MICH. L. REV. 777, 779 (1939).

41. The majority in the principal case says that an innocent defendant has nothing to fear by taking the stand and that "Even in the case of a respondent with mental or language deficiencies, or with a prior criminal record which may affect his credibility as a witness, if his counsel will bare these in his direct examination, rather than wait to have them shown upon cross-examination, the jury will give him fair consideration if his testimony rings true." 53 A. 2d 53, 59 (Vt. 1947). The weakness of such a position is clear. Prudent counsel defending an ex-convict in the face of weighty circumstantial evidence against him would certainly hesitate to have a past criminal record made known to the jury, regardless of whether it was revealed by him or by the state.

42. MODEL CODE OF EVIDENCE, Rule 201 (3) (1942).

43. *Id.* Rule 106.

44. *See* 53 A. 2d 53, 64, 65 (Vt. 1947) (dissenting opinion of Jeffords, J.).

CONVEYANCES—OIL AND GAS—EFFECT OF A RESERVATION OF PROFITS FROM MINERAL DEPOSITS UNDISCOVERED AT THE TIME OF CONVEYANCE.—Plaintiff filed a bill of interpleader to determine adverse claims to a one-eighth royalty due under a mineral lease. The grantor of the leased lands, prior to the lease, had stipulated in his conveyance that: ". . . in the event of any minerals, oil or gas being found in the bounds of the land we are to share the profits equally." The grantee of the land subsequently executed the usual mineral lease to plaintiff giving it the right to explore for and produce oil from the lands and plaintiff in return for this privilege agreed to deliver one-eighth of the oil produced as a royalty. The original grantor and the assignee of a one-half interest in his reservation, contending that the reservation was of one-half the oil in place and that they were therefore not subject to the subsequent lease, filed cross-bills, each claiming a one-half share of the total oil produced by the plaintiff rather than a one-half interest in the one-eighth royalty. Demurrers to the cross-bills were overruled and plaintiff appeals. Upon appeal, *held,* two justices dissenting, judgment reversed upon the ground that a reservation of profits is not a reservation of an interest in minerals in place. *Gulf Refining Co. v. Stanford,* 30 So. 2d 516 (Miss. 1947).

The weight of authority holds that a grant or an exception of "minerals" will include all inorganic substances which can be taken from the land, and to restrict the meaning of the term there must be present qualifying words or language to evidence that something less general was intended by the parties.[1] The minority or Pennsylvania rule holds that the term minerals includes only metals and ores and excludes oil and gas unless an intention to include them is clearly evidenced in the instrument.[2]

The jurisdictions are more widely divided on the possibility of the severance of the title to minerals from that to the realty in which they are contained. The minority view, though holding that minerals other than oil and gas may be severed, refuses to recognize the severance of oil and gas from the realty. These jurisdictions consider oil and gas, because of their vagrant character, as somewhat in the nature of animals *ferae naturae.* Thus they consider them not subject to an absolute but only to a qualified ownership until reduced to possession. There can be no transfer of title to them until they are so reduced.[3] The majority of the jurisdictions, however, recognize the right of the owner of the land in fee to sever the estate in the surface from that in all minerals.[4]

Where it is held that minerals in place may be severed from the remainder of the land, such severance can be effected by a proper conveyance. The severance may

1. "Minerals" held to include diamonds, Kentucky Diamond Mining & Developing Co. v. Kentucky Transvaal Diamond Co., 141 Ky. 97, 132 S. W. 397 (1910); gypsum, White v. Miller, 200 N. Y. 29, 92 N. E. 1065 (1910); oil and gas, Waugh v. Thompson Land & Coal Co., 103 W. Va. 567, 137 S. E. 895 (1923).

2. In Dunham v. Kirkpatrick, 101 Pa. 36 (1882), there being no evidence that the parties intended to include oil and gas, the court held that they were not included in the term minerals. *Accord,* Preston v. South Penn Oil Co., 238 Pa. 301, 86 Atl. 203 (1913).

3. Frost-Johnson Lumber Co. v. Salling, 150 La. 756, 91 So. 207 (1920), where it was held that the owner of land could not convey the ownership of oil and gas because he had no absolute property in them but only the right to draw them from the soil. See also Wagner v. Mallory, 169 N. Y. 501, 62 N. E. 584 (1902).

4. Bodcaw Lumber Co. v. Goode, 160 Ark. 48, 254 S. W. 345 (1923); Texas Co. v. Daugherty, 107 Tex. 226, 176 S. W. 717 (1915).

be effected either by an exception or a reservation of the minerals contained within a grant of the realty, or by a mineral deed which is nothing more than a grant of the minerals apart from the realty.[5]

The court in the principal case states that such conflict and confusion exists among the decisions in other jurisdictions concerning reservations similar to the one before it, that little help would be gained by resorting to them. The existing conflict is a result of the application to such reservations of a doctrine descended from the feudal law and providing, in substance, that the whole beneficial interest in land consists of the right to take rents and profits, and thus a grant of the profits is a grant of the land itself.[6] This doctrine, first expressed by Coke, has been recognized by the United States Supreme Court. In *Green v. Biddle*[7] that Court stated: "A right to land essentially implies a right to the profits accruing from it, since without the latter the former can be of no value. Thus a devise of the profits of land, or even a grant of them, will pass a right to the land itself."

The application of the doctrine that a grant of the profits is a grant of the land itself,[8] has induced most of the courts before which the matter has been litigated to construe a reservation of profits as a reservation of a realty interest in the minerals, the grantor thus reserving to himself a portion of the minerals in place. One of the earliest applications of the doctrine in this country was made in *Weakland v. Cunningham*,[9] in which it was held that a clause in the deed, "excepting the profits from any coal," was a reservation of the corpus of all such minerals in place. This case was cited as authority in *Toothman v. Courtney*[10] where, in determining the validity of a real estate assessment on a reservation of "all oil rental," it was held that the reservation of oil rental was to be regarded as a reservation of a real estate interest consisting of "oil in place" and thus subject to assessment. In the language of the court: "Though he did not reserve by name the oil in place, or any part of it, his reservation of all the rental or royalty to be derived from it compels the court to hold, by construction of the instrument, that it vests in him the title to that thing, the beneficial use whereof has been reserved, namely, the oil in place." The court in *Vandenbark v. Busiek*,[11] one of the more recent cases, considering the word

5. Bodcaw Lumber Co. v. Goode, 160 Ark. 48, 254 S. W. 345, 348 (1923). The court states: "We are of the opinion that the great weight of authority supports the view that mineral rights are subject to separation from the surface rights so as to be the subject of separate sale. What, we think, is the prevailing rule is . . . 'The severance of a mine and the surface of lands may be accomplished by a conveyance of the mines and minerals, or by a conveyance of the land with a reservation or exception as to the mines and minerals. There is no substantial difference between these two methods in the result accomplished; for a reservation will be construed as an exception where that is the plain intent and the grantor will retain in himself a fee-simple estate in the portion served.'"

6. Co. Litt. 4b. This general rule has always been in the language of Coke: "If a man seised of land in fee by his deed granteth to another Profits of these lands, to have and to hold to him and his heirs . . . the whole land itself does pass. For what is the land but the Profits thereof."

7. 8 Wheat. 1, 74 (U. S. 1823).

8. See note 6 *supra*.

9. 3 Sad. 519, 7 Atl. 148 (Pa. 1886).

10. 62 W. Va. 167, 58 S. E. 915, 918 (1907).

11. 126 F. 2d 893 (C. C. A. 7th 1942). Here the federal court in Illinois, in construing a reservation in conjunction with a subsequent stipulation entered into by the parties to

"royalty" as synonymous with profits, concluded that the decisions reached by the *Weakland* and *Toothman* cases represent the weight of authority.

While the majority of the decisions which have thus far considered the problem tend therefore to support the position taken by the dissenting justices in the instant case, it may seriously be questioned whether the application of the Coke doctrine to the field of oil and gas is either necessary or advisable. In this connection it may be noted that although those courts applying the doctrine to grants or reservations of oil cite *Green v. Biddle*[12] as the strongest authority in support thereof, the latter case did not concern either oil or gas and the court merely commented upon the existence of the general doctrine. In the *Toothman*[13] case the language of the court is notably careful and discriminative in referring to and applying the doctrine. The court implies that had the application of the doctrine worked an injustice it would not have been applied. And in the recent case of *Rist v. Toole County*[14] the court departed so far from the Coke doctrine as to hold that the grant of a royalty negatives an intention to convey part of the mineral title itself and that the word "royalty" excludes the concept of a fee simple title to minerals in place.

There is much to recommend the position taken by the court in the instant case. The exploitation of oil and gas present problems quite different from those involved in the attaining of profits from the surface. The expenses of exploring for and drilling oil and gas are far beyond the reach of the average landowner and it is well recognized that in the usual and customary practice the owner leases his land to an oil company which, in return for the privilege of exploitation, pays to

express clearly their intentions in the reservation, concluded that the intention of the parties was to reserve a three-fourths interest in all rents and royalties. Such reservation was held to be a three-fourths interest in the oil and gas in place. Finding no Illinois decisions on the subject this federal court turned to the decisions of other courts for guidance. Citing both the *Weakland* and *Toothman* cases the court stated (at p. 897): "Considering the deed . . . we find that it clearly reserved the three-fourths interest in all rents and royalties both under existing and future leases . . . the reservation of a perpetual interest in the royalty has the effect of reserving the thing for which the royalty is paid. Hence by the deed . . . the grantors reserved for their own use and disposition a three-fourths interest in the oil and gas in place. . . ."

12. This was an action to recover lands. The issue was whether the successful claimant should be liable for the cost of improvements made by the tenant prior to notice of adverse title and whether he might counterclaim against the tenant for rents accrued. The court, merely commenting on the value of rents and profits, states: "A right to land essentially implies a right to the profits accruing from it since without the latter the former can be of no value. Thus a devise of the profits of land or even a grant of them will pass a right to the land itself." 8 Wheat. 1, 74 (U. S. 1823).

13. 62 W. Va. 167, 58 S. E. 915, 918 (1907), where the court states: "Not doubting the soundness of this legal proposition or its applicability in the construction of deeds, as well as wills, I unhesitatingly make use of it here, because it will operate justly, fully effectuating the intention of the parties. The oil was already under lease, and the royalty, or oil rental, is all it can ever yield to its owner."

14. 159 P. 2d 340 (Mont. 1945). This court concluded: ". . . the grant of royalty under future leases is inconsistent with an intention to convey part of the mineral title itself." In reaching this conclusion the court defines the word "royalty" in mining operations as a share of produce or profits from minerals produced and as excluding the concept of a fee simple title to minerals in place.

the landowner as a royalty an agreed share of the oil produced. In a field where profits are traditionally and popularly equated with such royalty the more realistic approach to the construction of instruments of reservation would seem to be one which looks to the intention[15] of the parties through the medium of the ordinary and recognized rules of construction rather than through the slavish application of a doctrine developed at a time when the complexity of modern oil exploitation methods could not have been foreseen.

CRIMINAL LAW—FELONY MURDER—PROXIMATE CAUSE—GUILT OF FELON FOR HOMICIDE OF PERSON KILLED BY INTENDED VICTIM.—The defendant with several conspirators attempted to rob a filling station. During the attempt the filling station attendant was fatally wounded when caught in the ensuing crossfire between the felon and the attendant's employer. The court charged the jury in effect that they could find the defendant guilty of felony murder whether the fatal bullet came from the employer's gun or a gun fired by one of the defendants. The defendants were found guilty of murder. Upon appeal, *held,* judgment affirmed. *Commonwealth v. Moyer,* 357 Pa. 181, 53 A. 2d 736 (1947).

A felon, who, by his own act, causes the death of another, even though accidentally, during the commission of the felony is generally guilty of murder.[1] Since intent to commit the homicide is immaterial to constitute the crime of murder in such a case, the elements of felony murder are generally confined to the following: the felony must be independent in its elements of the homicide;[2] the act resulting in the killing must be done in pursuance of the felony;[3] and the homicide must be contemporaneous with the felony.[4]

The principal case, which is one of first impression in Pennsylvania, raises the question: What is the proximate (*i.e.,* legal[5]) cause of the death of a person killed

15. The construction and effect of instruments conveying mineral property are generally determined in accordance with the rules applicable to conveyances of real property. The intention of the parties will be sought and given effect, Post v. Weil, 115 N. Y. 361, 22 N. E. 145 (1889); where ambiguity exists and such contention is not clear, the deed will be construed against the grantor rather than the grantee, Kentucky Diamond Mining & Developing Co. v. Kentucky Transvaal Diamond Co., 141 Ky. 97, 132 S. W. 397 (1910).

1. People v. Lytton, 257 N. Y. 310, 178 N. E. 290 (1931); Commonwealth v. Lessner, 274 Pa. 108, 118 Atl. 24 (1922). For a discussion of common law felony murder, see Perkins, *A Re-Examination of Malice Aforethought,* 43 YALE L. J. 537, 559 (1934).

2. State v. Fisher, 120 Kan. 226, 243 Pac. 291 (1926); People v. Wagner, 245 N. Y. 143, 156 N. E. 644 (1927).

3. Spies v. People, 122 Ill. 1, 12 N. E. 865 (1887); People v. Giusto, 206 N. Y. 67, 73, 99 N. E. 190, 193 (1912). This principle is frequently applied in cases where there are conspirators. The homicide must be shown to have resulted from an act committed in furtherance of the common object or design for which they combined.

4. There is some conflict between various states as to the precise moment at which the felony is considered terminated. *Compare* People v. Marwig, 227 N. Y. 382, 125 N. E. 535 (1919), *with* State v. Williams, 28 Nev. 395, 82 Pac. 353 (1905). *Compare* also People v. Huter, 184 N. Y. 237, 77 N. E. 6 (1906), *with* Christian v. State, 71 Tex. Crim. Rep. 566, 161 S. W. 101 (1913).

5. In the case of torts, conduct is generally considered to be a legal cause of harm

during the commission of a felony? In a jurisdiction, such as Pennsylvania where the common law crime of felony murder has been, at least to some extent, codified, the answer to the foregoing question must eventually be found by a determination of the common law notion of causation as applied to felony murder. Since it appears that Pennsylvania's statutory definition of felony murder, which provides in pertinent part that "All murder . . . committed in the perpetration of, or attempt to perpetrate any arson, rape, robbery, burglary or kidnapping shall be murder . . . ."[6] is essentially that existing today at common law,[7] the common law principles of proximate cause should apply in the enforcement of the statute, which appears to contain nothing indicating a different legislative concept of felony murder.

Causation is essential to all legal liability.[8] In tort and crime it must first be determined if the plaintiff or the victim has an interest which is legally protected against the particular harm incurred. The former is a private interest while the latter, public. In *Drobner v. Peters*[9] recovery was denied for injuries negligently inflicted upon a child before birth, the court ruling that the defendant owed no duty of care to the unborn child with regard to its bodily welfare. On somewhat similar reasoning a defendant would be held not criminally responsible for having caused the death of deceased by breaking her heart.[10] However, once the violation of a protected private or public interest has been determined, the act of the defendant, to be actionable or criminal, must be the proximate cause[11] of the harm.

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to another if such conduct is a substantial factor in bringing about the harm. RESTATEMENT, TORTS § 431 (1934). In regard to independent, intervening acts, if one does an act which is in normal response to a fear which the actor's negligent conduct is a substantial factor in producing or acts normally to avert such a threatened harm, such act is not a superseding cause of harm to himself or a third person. See RESTATEMENT, TORTS § 443-45. For a complete discussion of causation, see McLaughlin, *Proximate Cause,* 39 HARV. L. REV. 149 (1925).

6. PA. STAT. ANN. tit. 18, § 4701 (1945).

7. For a discussion of the development of the doctrine of felony murder which culminated in the decision of Regina v. Serne, 16 Cox C. C. 311 (1887), see the Law Revision Commission of the State of New York, in its *Communication to the Legislature,* N. Y. LEG. DOC. No. 65, 536-40 (1937). See also note 1 *supra.*

8. "Causal relation is the universal factor common to all legal liability. On the other hand, the constituents of the other elements of legal liability change with every type of action. In assault they are different from what they are in deceit; in contract, different from what they are in crime. They constitute the universal variants. But causation is as much an element in an accident as in battery; in a breach of contract as in murder. And it is exactly the same problem wherever found and is soluble by the same process." GREEN, RATIONALE OF PROXIMATE CAUSE 132-33 (1927).

9. 232 N. Y. 220, 133 N. E. 567 (1921).

10. Regina v. Murton, 3 F. & F. 492, 176 Eng. Rep. 221 (1862).

11. The principle of proximate cause applies as much to crime as to tort. "And one whose wrongful act hastens or accelerates the death of another, or contributes to its cause, is guilty of homicide, though other causes co-operate. And he is guilty if his act was the cause of the cause of death; if the relation was causal, and the injured condition was not merely the occasion upon which another cause intervened not produced by the first injury, or related to it in any other than a casual way, then the person inflicting the injury is guilty of homicide." WHARTON, THE LAW OF HOMICIDE 30-1 (3d ed. 1907).

To give two examples: in the well-known case of *Scott v. Shepard*,[12] defendant threw a lighted squib in the midst of a crowd. Each man, in order to protect himself, threw it in a different direction till the plaintiff was ultimately injured. The court held that the defendant was liable on the principle that he who does the first wrong is answerable for all foreseeable consequential damages. Similarly, in *Keaton v. State*,[13] conspirators attempted to rob a freight car. The fireman, after having been forced to open the car door, crouched beneath the car, afraid of possible shooting from the rear of the train. The felons ordered him to stand between them and the rear of the car during the robbery, whereupon he was killed in an interchange of bullets between the defendants and those attempting to prevent the robbery. The evidence was not conclusive as to who had fired the fatal shot, but the defendants were found guilty on the ground that since such a homicide was reasonably foreseeable by the felons, it proceeded naturally from (*i.e.*, was caused by) the felony and the defendants were accordingly held responsible for the consequential results of their act.

In a jurisdiction such as New York, where the definition of felony murder: "The killing of a human being . . . is murder in the first degree, when committed . . . *by a person* engaged in the commission of, or an attempt to commit a felony, either upon or affecting the person killed or otherwise . . . ."[14] differs from the common law definition of the crime,[15] it is not surprising to find the decisions departing from the common law concept of what constitutes the proximate cause of the death. The New York statute, by its inclusion of all felonies as the basis of felony murder, appears greatly to have expanded the common law definition of felony murder.[16] And yet in another respect the

12. 2 Bl. W. 892, 96 Eng. Rep. 525 (1773). In *Bloom v. Franklin Life Ins. Co.*, 97 Ind. 478 (1884), an assured person made an attack upon a woman. Her husband, in her necessary defense, killed the assailant. The court held that the assured person caused his own death. Likewise where one by threats and show of force compels another, acting reasonably, to leap from a railroad car while it is in rapid motion, the former is criminally chargeable with the consequences. Adams v. People, 109 Ill. 444 (1884). See MAY, LAW OF CRIMES § 176 (4th ed. 1938).

13. 41 Tex. Crim. Rep. 621, 57 S. W. 1125 (1900).

14. N. Y. PENAL LAW § 1044 (italics supplied). For a complete review of felony murder statutes, see Arent and MacDonald, *The Felony Murder Doctrine and its Application Under the New York Statutes*, 20 CORN. L. Q. 288, 294-95. *Compare* WASH. REV. STAT. ANN. § 2392 (1932); MISS. CODE ANN. § 2215 (1942) and OKLA. STAT. tit. 21 § 701 (1941), *with* MINN. STAT. ANN. § 10070 (Mason 1927) and WIS. STAT. § 340.09 (1943). The above statutes all contain provisions to the effect that the homicide be committed by *the felon* in the course of the felony. Some of the states, however, do not require capital punishment or life imprisonment, but limit the offense to third degree murder.

15. See note 7 *supra*.

16. At common law, as it finally developed in England, responsibility for felony murder was confined to those felonies dangerous to life. *Compare* the language of Stephen J. in Regina v. Serne, 16 Cox C. C. 311, 313 (1887): "I think that, instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death done for the purpose of committing a felony which caused death, should be murder," *with* the *dictum* in People v. Enoch, 13 Wend. 159, 174-75 (N. Y. 1834) ". . . as often as the legislature creates new felonies, or raises offenses which

New York statute seems to limit the common law doctrine of felony murder by its restrictive wording—"by a person." The New York courts, therefore, appear to have adopted a strict and narrow application of the common law principles of causality in interpreting the quoted statute.[17] This is understandable for two reasons: (1) the fact that the New York statute, (unlike the Pennsylvania statute), does not limit the felonies to those imminently dangerous to life would naturally lend to a stricter interpretation, particularly on the question of causation;[18] and (2) the New York courts, with proper obedience, apply the proximate (*i.e.*, the legal) cause *designated by the legislature*, which, in defining the crime of felony murder, has power to fix, and has fixed, the legal limit of criminal responsibility.[19]

In *People v. Udwin*[20] convicts attempted to escape from prison. They acquired

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were only misdemeanors at the common law to the grade of felony, a new class of murders is created by the application of this principle to the case of a killing of a human being, by a person who is engaged in the perpetration of a newly created felony. So, on the other hand, when the legislature abolishes an offense which at the common law was a felony, or reduces it to the grade of a misdemeanor only, the case of an unlawful killing, by a person engaged in the act which was before a felony, will no longer be considered to be murder, but manslaughter merely." *But see* Arent and MacDonald, *op. cit. supra* note 14 at 302: ". . . the courts may yet hesitate, despite the broad language of the statute, to apply the rule to non-violent felonies or to acts from which danger to human life is extremely remote."

17. In People v. Giro, 197 N. Y. 152, 90 N. E. 432 (1910), the deceased was killed during an attempted burglary when one of the conspirators struggled with one of the victims of the crime and each managed to possess and fire a pistol at different moments. The judge charged the jury that, notwithstanding the proof beyond a reasonable doubt that the defendants were confederates, it still rested upon the prosecution to prove beyond a reasonable doubt that the deceased had been shot by one of the conspirators. This reasoning prevailed despite New York Penal Law § 21 which provides that the statute be liberally construed.

18. People v. La Barbera, 159 Misc. 177, 287 N. Y. S. 257 (1936). In this case defendant hired decedent to set fire to certain premises for the fraudulent purpose of obtaining the insurance proceeds. While the decedent was arranging the gasoline and electrical apparatus, he caused an explosion and was killed. The court held the decedent died through his own act and consequently that his death was not the result of the act "of another" and hence did not come within the New York definition of criminal homicide. N. Y. PENAL LAW § 1042. "Homicide is the killing of one human being by the act, procurement or omission of another."

19. See note 17 *supra*. The phrase "by a person" in the New York statute is apparently declarative of the legislative intent that the chain of causation shall not be traced backward beyond the act of the one who *immediately* and *directly* causes the death. Note that in the *Giro* case, the felony was not the immediate or direct cause of the death. According to the New York courts' interpretation of the legislative intent it was merely the *occasion*. New York has codified in the Penal Law all the interests which the legislature has considered necessary to be protected. If an interest is violated by a harm not designated as criminal by the legislature, it is not a crime. N. Y. PENAL LAW § 22.

20. 254 N. Y. 255, 172 N. E. 489 (1930); *cf.* Commonwealth v. Moore, 121 Ky. 97, 88 S. W. 1085 (1905); Commonwealth v. Campbell, 7 Allen 541 (Mass. 1863). In the *Campbell* case it was held that a rioter was not guilty of murder or manslaughter by reason of the accidental killing of an innocent person by those engaged in suppressing the riot.

access to the guard room by handcuffing their guards and using them as shields. Other prison guards released tear gas prompting the handcuffed guards and convicts to fall to the floor, whereupon several shots were fired and one of the convicts was killed. The evidence as to who fired the fatal shot was entirely circumstantial. The jury was charged that in order for them to find the defendants guilty of felony murder, it had to be established beyond a reasonable doubt that the shot which killed the inmate was fired by one of the defendants and not by one of the prison guards. The accused were found guilty and on appeal the conviction was affirmed. The dissenting opinion,[21] although agreeing with the majority that the charge given was correct, contended that the evidence in the case did not support the jury's finding that the fatal shot was fired by one of the escaping conspirators.

It would appear from the holdings in the *Udwin* case and other cases that the New York Court of Appeals has concluded that in felony murder cases the legislature intended to restrict the acts which may be considered legally cognizable causes only to those acts of the defendant (or his accomplices) which *immediately* and *directly* cause the death. In a jurisdiction having a felony murder statute similar to that involved in the principal case,[22] it has been held that the robbers of a bank who forced a teller to accompany them as a shield were guilty of murder when the teller was accidentally killed by the town marshal.[23] Here the robber's affirmative act was the direct and immediate cause of the death. It is submitted that if, in the *Udwin* case, the person killed had been one of the guards being used as a shield instead of one of the escaping convicts, the New York courts would have considered it immaterial whether the fatal shot came from the gun held by the convict or guard. In such a case within the measure of the statute the death would have been caused by the convict using the guard as a shield and not by the one firing the shot. The case would be no different from one in which an accused pushes the victim into a line of rifle fire or into the path of a speeding railroad train. In such a case the accused could hardly be successful in claiming, even in New York, that the act of the one firing the shot or of the engineer of the train was an independent, intervening cause which made that actor, rather than the defendant, legally responsible for the death.

It is submitted that in the proper circumstances a defendant in a felony murder case in New York will be guilty of the death of a person killed by a person other than the defendant or a conspirator where the act of the defendant is the direct and immediate cause of the death.

The difference, therefore, between the Pennsylvania and the New York decisions on what appear to be similar facts, results not from conflicting fundamental theories of causation in crimes as from the discrepancy in the statutory definitions of felony murder, particularly as regards identification of the act which shall be considered the criminal (*i.e.*, the legal) cause.

21. People v. Udwin, 254 N. Y. 255, 266, 172 N. E. 489, 493 (1930).

22. See text accompanying note 6 *supra.*

23. Wilson v. State, 188 Ark. 846, 68 S. W. 2d 100 (1934); *accord,* Taylor v. State, 41 Tex. Crim. Rep. 564, 55 S. W. 961 (1900); *cf.* People v. Payne, 359 Ill. 246, 194 N. E. 539 (1935).

EQUITY—CANCELLATION OF GIFTS DUE TO MISTAKE; LEGITIMATE TAX AVOIDANCE.—The plaintiffs transferred to each of their two children, the defendants, an interest in a partnership for the purpose of minimizing federal income taxes. The gift of the partnership interest was disallowed by the Commissioner of Internal Revenue for income tax purposes and the father of the defendants was taxed on the entire income thereof. Plaintiffs seek to revest in themselves title to the property so transferred. *Held,* decree for plaintiffs affirmed. *Stone v. Stone,* 29 N. W. 2d 271 (Mich. 1947).

The principal case is likely to be one of many similar actions which may be brought on by the tax authorities' disregard for legal interests and rights recognized under state law, in the attempt to tax income to its economic owner.[1]

The plaintiffs' position was essentially that they had been mistaken as to their legal ability to transfer the right to the income and with it the tax liability attaching to it, and that since the plan for minimizing the tax imposed on the family income had failed they were entitled to rescission of the gift. It was contended by the defendants that the transfer constituted completed gifts and were therefore irrevocable in the absence of a provision to the contrary and that no transaction would be set aside by equity because of a mistake of law, pure and simple.

In part, therefore, the issue depended upon whether the court would distinguish between a mistake of law and one of fact and whether it would grant relief in a case involving the former. The court found the mistake to have been one of law, not as to the general law of the land, but as to the plaintiffs' own antecedent or existing legal rights at the time of the transaction.

The law on this particular point in most jurisdictions is difficult of definition.[2] In many cases the courts have flatly said that a mistake of law is no ground for relief.[3] On the other hand some jurisdictions have denied any effect to the distinction.[4]

1. So called "family partnerships" are frequently disallowed on audit by the Commissioner of Internal Revenue since the decisions in Lusthaus v. Commissioner, 327 U. S. 293 (1946), and Commissioner v. Tower, 327 U. S. 280 (1946). Likewise the grantors of certain trusts, wherein some of the major elements of economic control of corpus or income have been retained to the grantor in the deed of trust, have been taxed upon the income accruing to the trustees from the corpus following the decision in Helvering v. Clifford, 309 U. S. 331 (1940). The interpretation of § 22(a) of the Internal Revenue Code by both the Treasury Department and the courts has been the source of much comment in legal periodicals. See, *e.g.,* Eisenstein, *The Clifford Regulations,* 2 TAX L. REV. 327 (1947); Lynch, *The Treasury Interprets the Clifford Case,* 15 FORD. L. REV. 161 (1946); Miller, *Husband and Wife Partnerships,* 1 TAX L. REV. 450 (1946). The Supreme Court of the United States has generally treated tax questions as practical questions. "Taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed . . ." is the way it was put by the Court in Burnet v. Guggenheim, 288 U. S. 280, 283 (1933), which quotes Corliss v. Bowers, 281 U. S. 376, 378 (1930).

2. WALSH, EQUITY 536 (1930).

3. A list of such cases is contained in 5 WILLISTON, CONTRACTS § 1582 (rev. ed. 1937).

4. Regio v. Warren, 207 Mass. 525, 527, 93 N. E. 805, 807 (1911). "So it has been said that the important question was not whether the mistake was one of law or of fact, but whether the particular mistake was such as a court of equity will correct. . . ." In this case the court quoted with approval from Renard v. Clink, 91 Mich. 1, 51 N. W. 692 (1892), upon the authority of which the decree in the principal case was based. See note 10 *infra,* and accompanying text.

Legislative enactments have in some states blunted the effect of the distinction.[5]

Pomeroy distinguishes three types of mistake of law:[6] (1) a mistake as to the general law of the land;[7] (2) a mistake as to the legal *effect* of a transaction into which a person enters where he correctly apprehends his own legal rights, interests and relations;[8] (3) a mistake as to a person's own antecedent or existing legal rights, interests, duties, liabilities or other relations where he correctly understands the legal scope of the transaction into which he enters and its legal effect upon his rights and liabilities.[9] Usually, aside from statute, it is only for the third type of mistake that a court of equity will grant relief.[10] Essentially the mistake made by plaintiff in the instant action concerned the effect of Section 22(a) of the Internal Revenue Code upon the income gained through the partnership.

In some respects it is hard to distinguish the cases cited by the defendants from the principal case. *Holmes v. Hall*[11] was a case in which the parties were mistaken as to the legal effect of an instrument and relief such as requested in the principal case was refused. *Martin v. Hamlin*[12] concerned the erroneous belief on the part of the plaintiff that a recitation in a deed constituted a guaranty. Here again no relief was granted. Many of these distinctions between types of mistake upon analysis indicate more a difference in viewpoint than in fact.[13]

Some of the cases in which relief has been granted, while they are cited as falling under the topic mistake, are actually decided on the grounds of hardship, undue influence or misrepresentation. *Walter v. Walter,*[14] one of the cases cited in the

5. When relief against mistake is sought in an action or proceeding or by way of defense or counterclaim, relief shall not be denied merely because the mistake is one of law rather than one of fact. N. Y. CIV. PRAC. ACT § 112f. See citation of statutes in 5 WILLISTON, CONTRACTS § 1582 (rev. ed. 1937). There is no such statute in Michigan.

6. 3 EQUITY JURISPRUDENCE § 842 (5th ed., Symons, 1941).

7. *Id.* § 843.

8. *Id.* § 841.

9. *Ibid.*

10. It was for a mistake of this nature that relief was granted in Cooper v. Phibbs, L. R. 2 H. L. 149, 170 (1867), wherein it was said: "But when the word 'jus' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of a matter of law. . . ." The maxim here spoken of was that no relief will be granted for a mistake of law. See also Barnett v. Kunkle, 256 Fed. 644 (C. C. A. 8th 1919), *aff'd,* 254 U. S. 620 (1921); Renard v. Clink, 91 Mich. 1, 51 N. W. 692 (1892). However, money paid under a mistake of law, with respect to the liability to make payment, with knowledge or means of obtaining knowledge of liability, cannot generally be recovered. Newburgh Sav. Bank v. Town of Woodbury, 173 N. Y. 55, 65 N. E. 858 (1903). In the last cited decision the court quotes extensively from Pomeroy and appears to adopt the rule laid down by him.

11. 8 Mich. 65 (1860). The Michigan cases seem to follow Hunt v. Rousmaniere's Adm'rs, 1 Pet. 1 (U. S. 1828), which laid down the rule that no relief would be granted for a mistake concerning the legal effect of a power of attorney to sell property. This mistake would be one of type number two enumerated in the text.

12. 18 Mich. 354 (1869).

13. See WALSH, EQUITY 538 n. 65 (1930), which criticizes the distinction drawn in Cooper v. Phibbs, L. R. 2 H. L. 149, 170 (1867).

14. 297 Mich. 26, 297 N. W. 58 (1941).

opinion in the principal case, was an action in which a father sought cancellation of a note and discharge of a mortgage which he had given to his son when the son had represented that he had inherited from his mother certain interests in real property actually owned by the father. The father was eighty-five years of age. *Moritz v. Horsman*[15] was a rather peculiar case in which the defendant had received property as a distributee of a decedent under the mistaken belief of all parties that he was an heir of the decedent. Plaintiffs sought to recover the distribution. The court allowed recovery on the theory of mistake and hardship to the extent of the property not yet expended by the defendant. Similar results have been reached in a number of cases where either the grantors did not understand the instrument, or where the instruments had been loosely drawn without regard to instructions, or where people in a fiduciary capacity did not measure up fully to their obligations.[16] Improvidence in the creation of a trust has been the basis for rescission in several New Jersey cases.[17] In other cases where it is bluntly stated that no relief can be given for a mistake of law, no relief could have been given for a mistake of fact.[18] In many of these cases the parties had compromised the issues involved and later when one of them became aware of the actual status of his rights he either sued to set aside the compromise agreement or set up a defense of mistake. He has rather consistently been denied relief.[19]

There is found in some cases the categorical statement that a gift cannot be revoked on the ground that it was made under a mistake, or that a gift *inter vivos* from parent to child, when fully executed, is irrevocable.[20] This is not the position

15. 305 Mich. 627, 9 N. W. 2d 868 (1943).

16. Conkling v. Davies, 14 Abb. N. C. 499 (N. Y. 1878); Dutton v. Thompson, L. R. 23 Ch. D. 278 (1883); Lister v. Hodgson, L. R. 4 Eq. 30 (1867); Meadows v. Meadows, 16 Beav. 401, 51 Eng. Rep. 833 (1853). Equity seems especially gallant in aiding young ladies recently come of age who are persuaded by relatives to turn over control of their finances to others.

17. Fidelity Union Trust Co. v. Parfner, 135 N. J. Eq. 133, 37 A. 2d 675 (Ct. Err. & App. 1944); Reuther v. Fidelity Union Trust Co., 116 N. J. Eq. 81, 172 Atl. 386 (Ct. Err. & App. 1934); Garnsey v. Mundy, 24 N. J. Eq. 243 (Ch. 1873). *Contra:* James v. Aller, 68 N. J. Eq. 666, 62 Atl. 427 (Ct. Err. & App. 1905). In the principal case the partnership arrangement, in light of the subsequent stand taken by the Treasury Department, could easily be called improvident.

18. See RESTATEMENT, RESTITUTION, REPORTERS NOTES § 44 (1937) for citation of such cases.

19. Dupre v. Thompson, 4 Barb. 279 (N. Y. 1848), *aff'd*, 8 Barb. 537 (N. Y. 1850). See WALSH, EQUITY 537 (1930).

20. Pickslay v. Starr, 149 N. Y. 432, 44 N. E. 163 (1896). Although it is quite possible that the court felt that no real mistake had actually been made in this case, its language is rather broad: "So, too, if there is an equitable basis for redress, by reason of some mistake of fact in the contract, due to the ignorance or forgetfulness of the party, equity will not infrequently intervene. The principle is, in such cases, that there is not that consent of the minds which is essential to the perfect agreement. A gift, however, requires no consideration and depends upon no agreement, but upon the voluntary act of the donor only, and is accomplished by a delivery of the subject of the gift." *Id.* at 437, 44 N. E. at 164. Further, in speaking of the intention to make a gift, the court continued: ". . . all that we understand, legally or otherwise, by intention, is the design, or determination, of the mind and that mental condition may exist, when an act is done, irrespec-

of the Michigan courts, however, and it is submitted that it might very well not be the position of other jurisdictions were it clearly shown that a material mistake had occurred. In *Tuttle v. Doty*[21] a gift was revoked on the ground that the grantor had made a mistake. She had thought that a certain stock certificate had been stolen and the supposed fact of the theft was recited in the bill of sale which stated a consideration of love, affection and one dollar. How much this case was affected by matters of undue influence, etc. (the grantee was a daughter of the plaintiff-grantor), cannot be ascertained from the opinion. In other cases where revocation was denied there had been not so much a mistake as a change of outlook after the gift.[22]

The holding of the court in the principal case appears to be sound. There are present the elements of great hardship, of definite mistake whether it be one of law or fact, and to a limited extent of failure of purpose. It might be argued that it was unnecessary, in order to effect equity, to revest the partnership interest in the plaintiffs. On the other hand, however, it appears safer for the court to revoke the gift as a whole rather than give effect to one which, in the circumstances, the parties had not contemplated. The defendants were after all mere donees. From the practical viewpoint, the real subject of the gift was the *income* of the firm; the interest in the partnership was transferred merely to enable the donor of the income to donate the income for the legitimate[23] purpose of avoiding taxation. The prime purpose having failed, the merely incidental and secondary gift—the interest in the partnership—should likewise fail of fulfillment.

MORTGAGES—AFTER ACQUIRED PERSONAL PROPERTY CLAUSE—EFFECT OF, WHERE NEW OWNER DOES NOT ASSUME MORTGAGE.—This was an action to foreclose a mortgage which contained the customary after acquired personal property clause, *i.e.*, "Together with all fixtures and articles of personal property now or hereafter attached to, or used in connection with, the premises, all of which are covered by this mortgage." Defendant, who had purchased the premises subject to the mortgage, installed refrigerators, cooking ranges and portable showers which could be removed simply by pulling electric plugs and disconnecting pipe unions. Judgment for the plaintiff directing that these articles be sold at the foreclosure sale was unanimously affirmed by the Appellate Division. Upon further appeal, *held*, judgment affirmed. *General Synod v. Bonac Realty Corp.*, 297 N. Y. 119, 75 N. E. 2d 841 (1947).

Two fundamental problems of mortgage law are involved in this case, only one of

tive of the fact that, were something else then recalled, it might not have acted in the same manner." *Id.* at 437, 44 N. E. at 164; *accord*, James v. Aller, 68 N. J. Eq. 666, 62 Atl. 427 (Ct. Err. & App. 1905).

21. 203 Mich. 1, 168 N. W. 990 (1918).

22. Price v. Price, 162 Md. 656, 161 Atl. 2 (1932). Here a settlor fearing litigation by his second wife transferred property in trust. Afterward he sought revocation, alleging that he had decided to face any issue which might arise. Relief was denied. *Accord*, Geddes v. Congdon, 262 Mass. 294, 159 N. E. 915 (1928).

23. "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted." Gregory v. Helvering, 293 U. S. 465, 469 (1935).

which was adverted to and treated by the court. The first, which the court does discuss, is: Do chattels which are attached to and used in connection with the premises automatically come under such a mortgage when they are acquired, or is some further manifestation of the parties' intent to consider them under the lien required? The second question, which was neither discussed nor mentioned, is: Is the defendant one of the class of persons against whom the provisions of an after acquired personal property clause[1] can be asserted?

The Court of Appeals, even before considering the first of the two main questions set forth above, had to determine whether the articles in question were "fixtures"[2] or "articles of personal property . . . attached to, or used in connection with, the premises" so as to bring them within the literal requirements of the clause. With little hesitation, the court declared them to be personalty as matter of law, adhering to the rules laid down in *Madfes v. Beverly Development Corp.*[3] and *Cohen v. 1165 Fulton Ave. Corp.*[4] Nor did the court hesitate to hold that the articles were "attached to"[5] and "used in connection with" the premises. The articles in the instant case were "attached to" the premises within the ordinary meaning of that term except perhaps for the refrigerators which were connected only by electric plugs. The court, however, preferred not to rest its decision on that requirement alone but found, in addition, that they were used in connection with the premises since well-equipped apartment houses in New York City normally furnish such conveniences.[6]

There have been cases[7] in New York holding that the phrase "used in connection with the premises" added nothing to the mortgage and was a nullity. The cases of *Shelton Holding Corp. v. 150 E. 48th St. Corp.*[8] and *Matter of Downtown A. C.*[9] suggested that where there was an "organic" unity between the realty and the per-

1. Section 254 of the New York Real Property Law sets out the standard statutory personal property clause, but makes no reference to *subsequently* acquired personalty.

2. The term "fixtures" is almost impossible of definition because the cases use the word in so many different senses. Miller v. Waddingham, 3 Cal. Unrep. Cas. 375, 25 Pac. 688, 689 (1891); see 17 WORDS & PHRASES 119 (perm. ed. 1940). When used with reference to mortgagor and mortgagee, vendor and vendee, the term refers to an article which passes with the land. Milton Friedman, *The Scope of Mortgage Liens in New York*, 7 FORD. L. REV. 331 (1938).

3. 251 N. Y. 12, 166 N. E. 787 (1929).

4. 251 N. Y. 24, 166 N. E. 792 (1929).

5. That part of the after acquired clause referring to chattels "attached to" the premises ordinarily presents no difficulty. Central Chandelier Co. v. Irving Trust Co., 259 N. Y. 343, 182 N. E. 10 (1932). In Rosenthal v. 269 West 72d St. Corp., 148 Misc. 854, 855, 264 N. Y. Supp. 744 (Sup. Ct. 1933), the court held that refrigerators installed in an apartment house are embraced within a mortgage containing an after acquired clause. The court said: "The moment the refrigerators were attached . . . title vested. . . ."

6. See notes 8 and 9 *infra*.

7. *Ex parte* B. P. O. Elks, 69 F. 2d 816 (C. C. A. 2d 1934); City Bank Farmers Trust Co. v. Progress Club, 237 App. Div. 812, 260 N. Y. Supp. 990 (1st Dep't 1932).

8. 264 N. Y. 339, 191 N. E. 8 (1934). The court held that kitchenettes were covered where a mortgagor had agreed to erect a fully equipped apartment hotel.

9. 18 F. Supp. 712 (S. D. N. Y. 1936). A mortgage given to cover a fully equipped men's athletic club with an after acquired clause was held to cover all the furnishings, including table ware used in the dining room.

sonalty, the phrase "used in connection with, etc." would bring the personalty under the lien. The personal property, according to these cases, has an organic unity with the realty when it is used in connection with the realty for the purpose or purposes for which the realty was designed.[10]

But even after it had decided that the personal property met the literal requirements of the after acquired clause by applying the organic unity test, the court in the principal case was faced with what had heretofore been deemed a further essential by the holding in *Manufacturers Trust Co. v. Peck-Schwartz Realty Corp.*[11] In that case, in construing an after acquired personal property clause, the court said that the chattels would not come under the lien even where they met the literal requirements of the clause, unless they were (1) fixtures as matter of law or (2) had become part of the realty or (3) that there was an express agreement making them part of the realty or (4) that it clearly and unequivocally appear that the intent was to make them part of the security for the loan. The court in that case found that the movables did not come under any of the first three requirements and that lacking any agreement other than the after acquired property clause the intent to make them part of the security was not shown.[12] This proposition, *i.e.*, that the after acquired property clause is insufficient in itself to show an intent to make the chattels part of the security for the loan, has been recently reiterated by the Appellate Division.[13]

The instant case has made a change in the interpretation generally given to the *Peck-Schwartz* decision. The court now says that in order to bring the property within the fourth requirement it is not necessary that there be affirmative evidence of intent outside the clause itself "in every case." The court has, it would seem, as between mortgagors and mortgagees at least, distinguished out of existence the necessity of proving intent and the burden of proof has been shifted to the one attacking the clause to show *absence* of intent. The trial judge, with nothing before him but the mortgage clause, was held properly to have ruled that these after acquired movables came under the lien. It may still be true that the clause is not *per se* an indication of such an intent, but as a result of this holding it has become *prima facie* evidence of that fact.

With the necessity of affirmatively showing intent apart from the personal property clause removed by the holding in the instant case, in order today to determine whether the lien of a mortgage containing such a clause covers the chattels in question, it need only be shown in a dispute between a mortgagor and mortgagee, that they are "fixtures" or personal property "attached to" or "used in connection with" the premises as those phrases are interpreted by the *Shelton* and *Downtown A. C.* cases. In the latter case Judge Patterson says, "the clause is given an effect corresponding to the plain sense of the words used."

10. Under this test an interesting question might arise when the realty is used for a purpose for which it was not designed, *e.g.*, when an office building is converted into a school.

11. 277 N. Y. 283, 14 N. E. 2d 70 (1938).

12. *Id.* at 288, 14 N. E. at 72, where the court said: "There was nothing in the written instruments or in any of the dealings between the parties to indicate that it was the intent of the parties to include the furnishings of the hotel or the movables in question within the coverage of the mortgage."

13. Manhattan Co. v. Bankers Trust Co., 264 App. Div. 787, 34 N. Y. S. 2d 867 (2d Dep't 1942), *aff'd without opinion*, 290 N. Y. 550, 47 N. E. 2d 958 (1943).

We now come to the second question which from the report appears to be involved in the instant case but which was not even mentioned by the court. The defendant, as grantee of the original mortgagor, purchased the property *subject to*, but did not *assume* the plaintiff's mortgage. The articles of personalty involved were not placed on the premises by the original mortgagor but by the defendant, and the precise question is: Does the after acquired clause bind the defendant-assignee so as to bring these articles under the lien of the mortgage? If it does, then apparently this case may be cited as authority for a holding that the after acquired clause is a covenant that runs with the land so as to bind a non-assuming grantee.

It must be conceded that at law an after acquired personal property clause is invalid because "It is a common learning in the law that a man cannot grant or charge that which he hath not."[14] In equity, however, such a clause will operate on the proper subject matter to give a lien as between the parties to the agreement when the personalty is acquired.[15] As a corollary, one who *assumes* the mortgage, affirmatively undertakes to perform the mortgagor's obligations and, being in the mortgagor's "shoes" in regard to his rights and duties, would be bound.

There has always been a distinction, however, between one who assumes a mortgage and one who purchases merely subject to a mortgage. In *Guaranty Trust Co. v. Queens R. R.*[16] Judge Cardozo notes this distinction in construing such an after acquired property clause when he states: "There is need to distinguish, however, between the enforcement of the covenant in respect of property thereafter acquired by the mortgagor itself and property thereafter acquired by a successor or a purchaser. Property thereafter acquired by the mortgagor itself will be subject to the mortgage. . . . It is otherwise in respect of purchasers, and even at times successors. To spread the lien of the mortgage to property acquired by these, there must be an independent ground of duty. This may have its origin in a statute or in a covenant of *assumption* . . . or in some other kindred equity."

In the same case, again commenting on the after acquired property clause, Cardozo, J., states: ". . . there is now in this state a settled rule of law that a covenant to do an affirmative act, as distinguished from a covenant merely negative in effect, does not run with the land so as to charge the burden of performance on a subsequent grantee. . . ."[17] In *New York Trust Co. v. Bull*[18] a situation similar to the one presented in the instant case arose and the court was called upon to decide whether a non-assuming grantee was bound by the provisions of an after acquired personal property clause. The court in very clear language held in a dispute over mechanical refrigerators that the mortgagee's lien did not extend to property placed upon the premises by the grantee. The court said[19] that the after acquired property clause in a mortgage is "an affirmative covenant which does not run with the land and bind the grantee unless the grantee has *assumed* the covenant. . . . Inasmuch as the refrigerators in question were acquired not by the obligors

14. Kribbs v. Alford, 120 N. Y. 519, 524, 24 N. E. 811, 812 (1890).

15. *Ibid.* *See* also Rochester Distilling Co. v. Rasey, 142 N. Y. 570, 579, 37 N. E. 632, 634 (1894).

16. 253 N. Y. 190, 170 N. E. 887 (1930), *appeal dismissed*, 282 U. S. 803 (1930) (italics supplied).

17. *Ibid.*

18. 52 N. Y. S. 2d 182 (Sup. Ct. 1944).

19. *Id.* at 184 (italics supplied).

under the . . . mortgage . . . but by Jacobson and Levine [subsequent owners] and inasmuch as there is no evidence that the latter or any subsequent owners of the property assumed the obligations of defendants' . . . mortgage, the defendants can have no claim to the refrigerators based on that mortgage."

In the oft-cited case of *Kribbs v. Alford*,[20] the same question arose. The New York Court of Appeals held that since the defendants had not assumed the mortgage the after acquired property clause could not be exerted against personalty which they themselves had placed on the premises. The court held:[21] "The assignees did not contract that the machinery to be placed upon the property by them should be subject to the provisions of the mortgage. They did not *assume* or agree to pay the mortgage or carry out its provisions. . . . Their acceptance of the lease bound them to fulfill the covenants running with the land. . . . But it did not, in addition, burden them with the obligation to make good the *personal* covenants given by the lessee to third parties. . . ." With the *Kribbs* case, therefore, we have another clear-cut decision that an after acquired personal property clause is a personal covenant that does not run with the land and that a non-assuming grantee is not bound by it.

It is evident that if the defendant in the principal case took subject to, but did not assume the mortgage, the instant case is directly contra to the *Kribbs, Guaranty Trust Co.* and *Bull* cases. We cannot say, however, that these cases are overruled since the court did not even consider them.[22] It is almost impossible to escape the conclusion that the lack of discussion on this point and of these cases was due to an oversight by counsel or by the court. It would appear that these cases are strong authority for arriving at a result directly contra to that reached by the Court of Appeals in the principal case.

RESTRAINT OF TRADE—PROOF REQUIRED UNDER THE ROBINSON-PATMAN AMENDMENT TO THE CLAYTON ACT.—After hearings, the Federal Trade Commission found that appellant's price differential system violated the Clayton Act as amended by the Robinson-Patman Price Discrimination Act prohibiting differentials which tended to lessen competition and which are not based upon costs of manufacture, sale or delivery. On appeal from a cease and desist order issued by the Commission, *held*, one judge dissenting, order set aside on the ground that there was no substantial evidence to support the findings of the Commission. The latter did not, as it must, prove all the elements of price discrimination under the statute, including proof that the differences in price were not based on the cost of manufacture, sale or delivery of the product. *Morton Salt Co. v. FTC*, 162 F. 2d 949 (C. C. A. 7th 1947).

When the FTC has reason to believe that there has been a violation of the Robinson-Patman amendment to the Clayton Act[1] the Commission has the power to

20. 120 N. Y. 519, 24 N. E. 811 (1890).

21. *Id.* at 525, 24 N. E. at 812 (italics supplied).

22. In Matter of Schenasi, 277 N. Y. 252, 269, 14 N. E. 2d 58, 64 (1938), Loughran, J., said: "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."

1. 38 STAT. 730 (1914), as amended, 49 STAT. 1526 (1936), 15 U. S. C. § 13 (a) (1940). The statute provides in part that "It shall be unlawful for any person engaged

hold hearings and determine the facts. If the evidence warrants, the Commission may issue to the offending company a cease and desist order forbidding it to continue its wrongful practices.[2] The Supreme Court in *NLRB v. Columbian E. & S. Co.*[3] laid down the rule, in respect to a similar statutory provision that the evidence required to warrant issuance of a cease and desist order must be substantial, *i.e.*, that as applied in a case such as the principal one, there must be more than the mere possibility of injury to competition. When the Commission has issued its cease and desist order the respondent may, under the provisions of the Clayton Act[4] and the Federal Administrative Procedure Act,[5] appeal to the federal courts. They, in turn, may affirm, modify or set aside the order of the Commission; its findings however, if supported by substantial evidence, of fact, are absolute and binding upon the courts.[6]

The statute[7] has uniformly been interpreted to mean that the FTC must prove that there exists in fact a price discrimination which has, in turn, been held to mean that it is illegal for a seller subject to this statute to maintain a differential in price between two parties buying the same product from him under similar con-

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in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition . . . *Provided*, that nothing . . . shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery. . . ."

2. 38 STAT. 730 (1914), as amended, 49 STAT. 1526 (1936), 15 U. S. C. § 13 (b) (1940). The statute provides, in so far as is here relevant, that "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, that nothing . . . shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

3. 306 U. S. 292 (1939); *accord*, Consolidated Edison Co. v. NLRB, 305 U. S. 197, 229-30 (1938), where the Court stated that "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

4. 38 STAT. 734 (1914), as amended, 54 STAT. 1235, 15 U. S. C. § 21 (1940).

5. 60 STAT. 243, 5 U. S. C. A. § 1009 (b) (Supp. 1947). The Administrative Procedure Act is the result of some ten years labor by Government agencies, interested private parties and the courts. It is an attempt to clarify administrative law and it is designed to afford to parties affected by administrative powers a means of knowing what their rights are and how they may be protected. By the same token, administrators are provided with a simple course to follow in making administrative determinations. Also the role of the federal courts on appeals is clearly defined. Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review*, 33 A. B. A. J. 434 (1947).

6. FTC v. Algoma Lumber Co., 291 U. S. 67 (1934); *accord*, FTC v. Pacific States Paper Trade Ass'n, 273 U. S. 52 (1927).

7. See note 1 *supra*.

ditions.[8] It is not necessary to prove that the discrimination charged has actually injured competition; it is sufficient to show that it may injure competition.[9] The statute is designed to reach such discriminations "in their incipiency" before the harm to competition occurs.[10] There has been some doubt, however, as to whether the burden of proving that the discrimination will injure competition is on the Commission or whether, after it has shown discrimination, it is then incumbent on the accused to go forward and show that the discrimination does not have an adverse effect upon competition.[11] Prior to the Robinson-Patman Amendment, the courts held that the Commission must prove that the discrimination charged tended to lessen competition.[12] After the amendment it was held that the language of the statute indicated that the burden of proof was on the accused and that he must show that the alleged discrimination did not tend to lessen competition.[13]

In recent years, however, there appears to be a tendency to return to the original interpretation of the statute. The language of some of the recent Supreme Court decisions on this point indicates that the Commission must prove the likelihood of injury to competition.[14] It is submitted that this rule, which has been consistently urged by legal authors,[15] represents a sounder interpretation of the statute since the legislature should be taken to have intended that result which is more equitable and since it is patently easier for the governmental agency to prove the effect of discrimination upon competition than it is for the accused to disprove it.

The court in the principal case not only requires the Commission to prove all the component elements of price discrimination, *i.e.,* show that there is a price difference tending to lessen competition, but in this case of quantity price differentials, even to prove that the differences in price are not related to the cost of manufacture, sale or delivery of the product.[16] This appears to put the burden of proof *entirely*

8. General Shale Products Corp. v. Struck Construction Co., 37 F. Supp. 598 (D. C. Ky. 1941).

9. See note 14 *infra.*

10. Standard Fashion Co. v. Magrane-Houston Co., 258 U. S. 346 (1921), wherein it appears that the decision turned upon the Commission's failure affirmatively to prove that the discrimination had lessened competition.

11. Samuel H. Moss, Inc. v. FTC, 148 F. 2d 378, 379 (C. C. A. 2d 1945). In an interesting decision a unanimous court held that "Congress adopted the common device in such cases of shifting the burden of proof to anyone who sets two prices, and who probably knows why he has done so, and what has been the result." The court here was obviously not referring to the true burden of proof but rather to the burden of explanation.

12. See note 10 *supra.*

13. See note 11 *supra.*

14. Corn Products Refining Co. v. FTC, 324 U. S. 726 (1945); FTC v. A. E. Staley Mfg. Co., 324 U. S. 746 (1945). Both of these cases were appeals from cease and desist orders issued by the FTC. The main question was whether there was sufficient evidence for the Commission to declare the petitioners base point system of sales illegal. In each case the Supreme Court held that there was and upheld the order.

15. See Sawyer, *The Commission's Administration of Paragraph 2 (a) of the Robinson-Patman Act: An Appraisal,* 8 GEO. WASH. L. REV. 469 (1940). The author stated that it was squarely on the Commission to prove the injury to competition as the result of the alleged price discrimination. See Note, 54 HARV. L. REV. 670 (1941).

16. In the instant case the court said: "The general and all-inclusive legal conclusion and findings . . . 'That the effect of the discrimination in price, including discounts, re-

on the Commission in spite of the language of the statute and the purpose of Congress in enacting the Robinson-Patman Amendment.[17]

There is strong authority to the effect that the burden of proving that price differences are not related to the manufacture, sale or delivery of the product is on the accused rather than the Commission.[18] From a practical standpoint, the Commission should have the burden to prove the tendency of the price differential to lessen competition, but certainly the costs of manufacture, sale and distribution are within the peculiar knowledge of the accused. He could readily disprove a false charge of discrimination in price not based on such cost of manufacture, sale or delivery.

The significance of the court's decision lies in its *expression* of a judicial attitude that has recently developed with respect to the powers of administrative agencies. The tendency in the past has been to allow those agencies a liberal interpretation of their respective statutes.[19] The principal case and others have strictly limited the powers of such agencies and have even restricted their use of powers freely enjoyed in the past.[20] The probable effect of the decision, if permitted to stand, will be to make it more difficult for the FTC to prosecute alleged violators of the Robinson-Patman Amendment to the Clayton Act.

TAXATION—FEDERAL INCOME TAX—DEDUCTION OF GAMBLING LOSSES IN DETERMINING NET INCOME.—In determining net income for the purpose of computing his federal income tax, the petitioner sought to deduct annual gambling losses from annual gambling gains. The Tax Court disallowed this deduction because petitioner had failed to show that the losses were sustained in transactions entered into for profit. On appeal, *held,* one judge dissenting, judgment reversed. The deduction of wagering losses is allowed to the extent of wagering gains whether or not the transac-

bates and allowances, generally and specifically described herein may be substantially to lessen competition,' is insufficient. The burden of proving the wrongful discrimination as defined by Section 2(a) upon the evidence in this case did not shift by reason thereof under Section 2 (b) of the Act." 162 F. 2d 949, 958 (C. C. A. 7th 1947). The court stated that the defense of justification (see note 2 *supra*) only applies to a wrongful and harmful discrimination and that in the case of quantity price differentials unless the Commission proves they are unrelated to reasonable cost allowances "the defense of justification would not be in order." *Id.* at 957.

17. *See* General Shale Products Corp. v. Struck Construction Co., 37 F. Supp. 598, 602 (D. C. Ky. 1941), where the court said: "The report of the Senate Committee on the Judiciary, which considered this amendment to the Clayton Act stated the purposes of the bill as follows: 'The bill proposes to amend Section 2 of the Clayton Act, so as to suppress more effectually discriminations between customers of the same seller not supported by sound economic differences in their business position or in the cost of serving them."

18. Standard Brands, Inc., 29 F.T.C. 121 (1939), *modified* May 1, 1940, 30 F.T.C. 1117 (1940). Here the defense was principally cost justification, apparently the only case where this has been the sole defense. And see 8 GEO. WASH. L. REV. 469, 480, 484 (1940).

19. *In re* Precision Scientific Co., 53 NLRB 860 (1943); NLRB v. New Era Dye Co., Inc., 118 F. 2d 500 (C. C. A. 3d 1941).

20. NLRB v. Montgomery Ward & Co., 157 F. 2d 486 (C. C. A. 8th 1946), 16 FORD. L. REV. 135 (1947).

tions from which they resulted were entered into for profit. *Humphrey v. Commissioner,* 162 F. 2d 853 (C. C. A. 5th 1947), *cert. denied,* 92 L. Ed. 78 (1947).

The Internal Revenue Code provides for the taxing of net income,[1] which it defines as gross income less certain statutory deductions.[2] If a taxpayer is unable to avail himself of any of these deductions, his gross income becomes his taxable income.[3] The broad definition of gross income[4] has been interpreted to include gambling gains[5] regardless of the legality of the transactions from which they accrued.[6]

Deductions from gross income are a matter of legislative grace,[7] and prior to 1934 there was no section of the Internal Revenue Code dealing specifically with the deduction of gambling losses.[8] Although some early authority permitted such a deduction if the losses were suffered in a jurisdiction where gambling was lawful,[9] it soon became firmly established that the deduction was not allowable unless the taxpayer could show, in addition to the legality of his operations, that the losses were sustained in transactions entered into for profit.[10]

The question of the permissibility of offsetting gambling losses against gambling gains, as distinguished from deducting such losses from gross income, arose in the case of *James P. McKenna,*[11] an early decision of the Board of Tax Appeals. In

1. INT. REV. CODE § 11.

2. *Id.* § 21(a).

3. *See* James P. McKenna, 1 B. T. A. 326, 330 (1925).

4. INT. REV. CODE § 22(a), defining gross income, embraces, *inter alia,* "gains or profits and income derived from any source whatever."

5. See note 3 *supra.* BLACK'S LAW DICTIONARY 835 (3d ed. 1933), in defining "gaming," says: "In general, the words 'gaming' and 'gambling,' in statutes, are similar in meaning, and either one comprehends the idea that, by a bet, by chance, by some exercise of skill, or by the transpiring of some event unknown until it occurs, something of value is, as the conclusion of premises agreed, to be transferred from a loser to a winner, without which latter element there is no gaming or gambling." *But cf.* Commissioner v. Covington, 120 F. 2d 768 (C. C. A. 5th 1941), *cert. denied,* 315 U. S. 822 (1942), where it was held that contracts for the future purchase and sale of commodities are not "gambling contracts." Such contracts, however, are to be distinguished from financial dealings between grain speculators and brokers off the regular exchange. The latter transactions have been held to be gambling. Burke Grain Co. v. Indemnity Co., 94 F. 2d 458 (C. C. A. 8th 1938).

6. Most of the tax cases concerned with wagering income involve the deductibility of losses, but the taxability of gambling gains, whether legal or illegal, is implicit in many of the holdings. A. L. Voyer, 4 B. T. A. 1192 (1926); James P. McKenna, 1 B. T. A. 326 (1925). See also 1 MERTENS, FEDERAL INCOME TAXATION § 4.11 (1942).

7. *See* Deputy v. DuPont, 308 U. S. 488, 493 (1940).

8. See text accompanying note 23 *infra.*

9. S. M. 2680, III-2 CUM. BULL. 110 (1924).

10. Citizens & Southern Nat. Bank v. United States, 14 F. Supp. 915 (Ct. Cl. 1936) (concerning 1931 income); G. C. M. 10873, XI-2 CUM. BULL. 85 (1932). If the taxpayer could show that the gambling transaction was entered into for profit, the loss was allowable under § 23(e) of the Internal Revenue Code (or like sections of earlier acts) which provides for the deduction of losses "if incurred in any transaction entered into for profit. . . ."

11. 1 B. T. A. 326 (1925).

this case the petitioner, a bookmaker, was allowed to off-set the amount paid out to bettors from gross receipts in computing his annual gross income. The Board took the position that such a set-off was necessary in order properly to fix the taxpayer's actual yearly gains. The amounts paid out were not viewed as "losses," the deductibility of which had to be determined, nor were they regarded as expenses.[12] Rather, the taxpayer's yearly bookmaking operations were considered as one long transaction, the net monetary result of which was arrived at by setting off amounts paid out against gross receipts.[13]

Shortly after this decision, the Board, in *Mitchell M. Frey*,[14] was presented with a case in which a taxpayer had listed small gains and large losses resulting from illegal gambling transactions during two tax years. These losses were sought as an allowable deduction from gross income for the periods in question on the ground that they were incurred in transactions entered into for profit.[15] In its review of the returns, the Board, holding that the losses were not incurred in profit transactions,[16] disallowed the deduction, but, citing the *McKenna* case in support, also held that the small gains were not taxable. The theory was that in view of the large losses, there weren't any *actual* gains.[17] It is interesting to note that the losses allowed here, as an off-set to the extent of gains, were the result of *several varied transactions*,[18] and so were distinguishable from those in the *McKenna* case.[19]

Although in both the *McKenna* and the *Frey* cases the Board in effect allowed an off-set of gambling losses to the extent of gambling gains without regard to whether the transactions were entered into for profit or were legal,[20] it must not be

12. In Israel Silberman, 44 B. T. A. 600 (1941), the Board held that expenses incurred in illegal bookmaking (expenditures in connection with the operation of betting booths) could not be deducted from legal business income. Whether these expenses could be deducted from gambling gains was not decided, as petitioner showed no net gain from his bookmaking.

13. 1 B. T. A. 326, 333 (1925). The Board says: ". . . his system of operations is predicated on a percentage of profit covering a long series of books . . . he does not bet to win on each book but trusts to his skill in so arranging the series that a percentage of gain may result. We conclude therefore that the actual gain or profit derived from the taxpayer's operations in laying wagers on horse racing under his system of handbooks . . . is the aggregate of his receipts less the amounts paid out to bettors."

14. 1 B. T. A. 338 (1925).

15. See note 10 *supra*.

16. 1 B. T. A. 338, 340-41 (1925), the Board says that "a thing *incurred* is something that can be legally enforced," and that a "transaction" must be legal in order to come within the contemplation of the revenue act. It concludes, therefore, that losses from illegal gambling operations are not "incurred in transactions entered into for profit."

17. *Id.* at 341-42, the Board says: "It now remains for us to consider the amount of losses sustained by the deceased from his gaming. In his returns he asserted that he had won $900 during the year 1919 and $26,588 during 1920. [These were the years in which he had reported losses of $26,105 and $64,996 respectively.] As a matter of fact he won nothing and his reported winnings should be disregarded in computing the tax. . . . In consequence of his gambling, [he] actually lost $25,205 in 1919 and $38,408 in 1920."

18. *Id.* at 338. The gains and losses arose from betting on races, playing poker and playing roulette.

19. See note 13 *supra*, and accompanying text.

20. It has been said that the rule in the *Frey* case is perhaps one of necessity. It has

assumed that gambling losses were judicially recognized as deductible to the extent of gambling gains prior to 1934. More than ten years after the *McKenna* and *Frey* decisions the Board reviewed a case in which the petitioner sought to deduct illegal gambling losses from legal gambling gains.[21] Applying the law as it was before 1934 (the transactions had taken place in 1929), the Board disallowed the deduction saying: "There is, in our opinion, no greater reason to permit the application of the losses in illegal gambling to off-set the gains from legal gambling than there is for their direct deduction."[22]

Since 1934 the Internal Revenue Code has dealt specifically with the deduction of gambling losses by what is presently Section 23 (h). It provides that "Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions."[23]

Both the majority and the dissent in the principal case agree that this Section was intended to restrict the deduction of legal gambling losses incurred in transactions which actually were entered into for profit.[24] Prior to 1934 such losses were deductible *in full* under Section 23(e),[25] but now, under the specific wording of subdivision (h) and the apparent legislative intent in its enactment,[26] these losses probably are allowed only to the extent of gambling gains.[27] A more interesting and difficult question is whether this subdivision was also intended to provide for the deduction of gambling losses, to the extent of gambling gains, regardless of whether they resulted from profit transactions or whether they were legal. The majority hold that it was so intended on the ground that wagering losses are now dealt with separately and were not placed under Section 23(e).[28] One case has held under

been criticized because, in effect, it amounts to allowing a deduction in part of losses which might be illegal. 1 MERTENS, FEDERAL INCOME TAXATION § 4.11 n. 2 (1942).

21. H. S. Anderson, 35 B. T. A. 10 (1936). The losses arose in Florida where gambling was illegal; the gains in Mexico where gambling was legal.

22. *Id.* at 11.

23. This same language appeared as § 23(g) in the Revenue Act of 1934, 48 STAT. 689 (1934), and the Revenue Act of 1936, 49 STAT. 1659 (1936).

24. 162 F. 2d 853, 855 (C. C. A. 5th 1947).

25. Francis M. Cronan, 33 B. T. A. 668 (1935) (concerning losses suffered in 1932). See note 10 *supra,* and accompanying text.

26. "Existing law [1932 Act] does not limit the deduction of losses from gambling transactions where such transactions are legal. Under the interpretation of the courts, illegal gambling losses can only be taken to the extent of the gains on such transactions. A similar limitation on losses from legalized gambling is provided for in the bill [1934 Act]." H. R. REP. No. 704, 73d Cong., 2d Sess. 22 (1934); SEN. REP. No. 558, 73d Cong., 2d Sess. 25 (1934).

27. *Contra:* 1 CCH 1947 FED. TAX REP. ¶ 200 C-3, in a discussion of the principal case, states: "Excess of gambling losses over gambling gains, though not deductible under Sec. 23(h), may be deducted under Sec. 23(e) (2) as from a transaction entered into for profit by a professional gambler who is dependent upon the success of his gambling ventures for his livelihood."

28. 162 F. 2d 853, 855 (C. C. A. 5th 1947) the court says: "Wagering losses are made a class to themselves. . . . No longer need it be enquired whether the wagers were illegal . . . nor what the state of mind of the taxpayer was as respects his purpose to win a profit. All wagers are by Par. (h) gathered into a class of their own and dealt with as the paragraph states."

subdivision (g)[29] that a partner's individual wagering losses may be deducted from his share of the partnership's wagering gains,[30] but the narrower question of the deductibility of such losses *at all,* unless they resulted from legal profit transactions, was not passed on. The language of both the Tax Court[31] and the circuit court in that case indicates that they regarded subdivision (g) as providing for the deduction of wagering losses to the extent of gains,[32] but neither opinion goes so far as to say that such a deduction should be allowed regardless of legality or profit motive.

The dissent in the principal case, concurring with the Tax Court,[33] contends that the only effect of Section 23 (h) is to limit the deduction of losses, and not to allow them where they were not allowed before.[34] This view, although criticized,[35] is certainly not without merit. Under our present law losses by individuals are deductible only if incurred in a person's trade or business, in profit transactions, or if they result from some uncontrollable event, *e.g.,* fire, storms, theft, etc.[36] A taxpayer suffering a loss from the legal sale of personal property would not be permitted to deduct it, and yet, under the majority rule, one suffering an illegal gambling loss would be allowed a deduction. Such a result seems unsound and unjust.[37]

On the other hand, it must be remembered, that although *in theory* all gambling losses were not allowed as a deduction from gambling gains before 1934, they were allowed *in fact* in the *McKenna* and *Frey* cases.[38] On this ground it could be argued that subdivision (h), in so far as it provides for the deduction of losses, is simply a codification of prior law. Such a contention has some force, but it is submitted that the Congress never intended to restrict *all* gambling losses on the one hand, and provide for the partial deduction of those that were never allowed on the other.

29. See note 23 *supra,* and accompanying text.

30. Jennings v. Commissioner, 110 F. 2d 945 (C. C. A. 5th 1940), *cert. denied,* 311 U. S. 704 (1940).

31. Zelda Baker Jennings, P-H 1939 TC MEM. DEC. SERV. ¶ 39,366 (1939).

32. Jennings v. Commissioner, 110 F. 2d 945, 946 (C. C. A. 5th 1940), the court saying: "If 'individuals carrying on business in partnership' . . . make gains in wagerng transactions, the share of each is a wagering gain; and when it is entered on his individual return to be taxed, a deduction of his losses in other wagering transactions is allowed by the statute, [Section 23 (g)] but only to the extent of such gains."

33. Anne P. Humphrey, P-H 1946 TC MEM. DEC. SERV. ¶ 46,004 (1946).

34. See 5 MERTENS, FEDERAL INCOME TAXATION § 28.85 n. 58 (to the same effect).

35. "This decision [principal case] overrules the Tax Court's absurd holding that no offset for losses is allowed if the taxpayer was gambling primarily for 'sport or recreation.'" RABKIN & JOHNSON, FED. INCOME GIFT AND ESTATE TAXATION 151 (1947).

36. INT. REV. CODE § 23(e).

37. See 1 MERTENS, FEDERAL INCOME TAXATION § 4.11 n. 2 (1942).

38. Many cases in which the Board or court disallowed the deduction of gambling losses from gross income indicate that the loss was a *net* loss, arrived at by prior offsetting. Beaumont v. Helvering, 73 F. 2d 110 (App. D. C. 1934), *cert. denied,* 294 U. S. 715 (1935) (concerning 1925, 1926 and 1927 income); E. F. Simms, 28 B. T. A. 988 (1933); M. L. Heide, 2 B. T. A. 451 (1925).

TORTS—NEGLIGENCE—TERMINATION OF CARRIER'S RESPONSIBILITY TO MINOR PASSENGERS.—Plaintiff, a boy of six, was with other children discharged from a school bus across the highway from his home into the custody of a ten-year old boy, a member of the schoolboy patrol. The latter had allowed one child to cross but had prevented the others from so doing immediately upon noticing a car was approaching. The driver of that car, in applying his brakes, skidded across the icy highway and struck the plaintiff, who had been standing in front of the left front fender of the bus. The jury returned a verdict in favor of the plaintiff against both the driver of the automobile and the owner of the bus. Upon appeal, *held*, two justices dissenting, judgment affirmed on the ground that the bus driver's negligence toward plaintiff was a question of fact properly decided by the jury. *Vogel v. Stupi*, 53 A. 2d 542 (Pa. 1947).

That there exists between a carrier and its passengers a contractual relationship[1] from which a duty on the part of the carrier toward the passenger arises is well established. Its duty consists in the exercise of the highest degree of care for its passengers' safety,[2] particularly where minor children are concerned.[3] Exercising care includes not only safe transportation to the passenger's destination[4] but also a discharge of the passenger at a safe place.[5] When that place is reached and the passenger has had adequate time to leave the carrier's premises, its duty toward him is terminated.[6]

If a clear concept of what is a "safe place" can be determined, the problem presented by factual situations comparable to that in the instant case will find uniform and just solution. In *Stuckwish v. Hagan Corp.*[7] a bus driver who saw no traffic approaching[8] discharged an eight-year old girl on the far side of a highway opposite her home. The bus had resumed its motion when the child was struck by an automobile. The court held as matter of law that there was insufficient evidence to establish the carrier's negligence. *Mississippi City Lines v. Bullock*[9] presented a situation where a bus driver allowed a boy of twelve to alight on the gravel shoulder of a heavily-traveled highway, which he had to cross to reach his destination, while a car in sight was approaching from the opposite direction. The boy passed rapidly around the rear of the bus and into the path of the oncoming car. It was held as matter of law that the boy was discharged in a safe place and, therefore, that the carrier-passenger relationship had been terminated; the proximate cause of the in-

1. Chicago, R. I. & P. Ry. v. Thurlow, 178 Fed. 894 (C. C. A. 8th 1910).

2. Teche Lines v. Keyes, Inc., 187 Misc. 780, 193 So. 620 (1940); Southern Ry. v. Hussey, 42 F. 2d 70 (C. C. A. 8th 1930).

3. Taylor v. Patterson's Adm'r, 272 Ky. 415, 114 S. W. 2d 488 (1938); Phillips v. Hardgrove, 161 Wash. 121, 296 Pac. 559 (1931).

4. Palmer v. Delaware & H. Canal Co., 120 N. Y. 170, 24 N. E. 302 (1890); Cline v. Pittsburg Rys., 226 Pa. 586, 75 Atl. 850 (1910).

5. Vanderbeck v. Chicago, M. St. P. & P. Ry., 210 Iowa 230, 230 N. W. 390 (1930).

6. Choquette v. Key System Transit Co., 118 Cal. App. 643, 5 P. 2d 921 (1932); Cooke v. Elk Coach Line, 180 Atl. 782 (Del. 1935).

7. 316 Pa. 513, 175 Atl. 381 (1934).

8. The evidence showed that the maximum visibility to a turn in the road in front of the bus was five hundred and fifty feet. The bus driver's testimony, accepted by the court, was that he scanned the full five hundred and fifty feet of the road and saw no car approaching.

9. 194 Miss. 630, 13 So. 2d 34 (1943).

jury was held to be the boy's own act, an intervening agency. A similar decision was reached in *Greeson v. Davis*.[10] As the driver of a school bus opened the door to allow a fourteen-year old girl to alight onto the shoulder of a highway opposite her home, he saw a truck approaching, then about one thousand feet away. The girl left the bus, walked behind it, ran out into the highway and was struck by the truck. The court ruled as matter of law that the driver having selected a safe place to discharge his passenger had fully performed his duty toward her. In *Jordan v. Wiggins*,[11] another case involving a fourteen-year old girl, a traction company was held not liable as matter of law for death caused by an oncoming car, the court saying: "The duty of the bus driver was discharged when she reached the place of safety he had arranged for her by causing her to alight on the shoulder of the road, and no duty rested upon him to warn her of the danger of approaching automobiles which in the exercise of ordinary care she could have avoided."[12]

In the *Greeson* and *Jordan* cases it was pointed out that it is not the bus driver's duty to wait for approaching automobiles to stop before discharging passengers, nor is any duty imposed upon him to warn passengers of "usual dangers of traffic" which in the passengers' exercise of ordinary care would be avoidable.

It would seem fair to infer from the cases cited that the place chosen to discharge passengers was a "safe place" because there was no *reasonably* apparent danger.[13] It is also clear that when such a place is chosen and passengers are there discharged, the carrier's duty toward its passengers ceases. The place chosen for the plaintiff's discharge in the principal case falls within the concept of a "safe place" formulated in the foregoing cases. The plaintiff was discharged on the highway six inches from the edge of the concrete beside which there was a three foot macadam strip. The car approximately one thousand feet away was approaching from the opposite direction at a speed of about fifty miles per hour. The monitor, who the evidence disclosed had exercised his duties as well as an adult, restrained the children, including the plaintiff, from crossing the street when he saw the car. The driver of the automobile realizing when only two hundred feet away that he was approaching a school bus applied his brakes, skidded across the icy highway and struck plaintiff with the rear of his car. It cannot reasonably be said that the school bus driver should have foreseen the negligence of the automobile driver and the consequent loss of control of his car.[14]

There is in this case an additional fact which strengthens even further the belief that the carrier's duty toward its passenger had terminated. The plaintiff was in the charge of a member of the schoolboy patrol, one chosen by school officials to care for the other children. When minors are discharged into the custody of their parents or their parents' representatives the primary duty of care for the children's safety evolves upon the parents or their representatives.[15] It would seem,

10. 62 Ga. App. 667, 9 S. E. 2d 690 (1940).

11. 66 Ga. App. 534, 18 S. E. 2d 512 (1942).

12. *Id.* at 515.

13. In each case the "safe place" was the side or shoulder of the road, and in three of the four cases there were approaching automobiles in sight.

14. Rosella v. Paxinos, 110 Cal. App. 299, 294 Pac. 39, 40 (1930): ". . . it is not negligence to fail to anticipate danger which can come only from a violation of law or duty on the part of another." See also Demjanik v. Kultau, 242 App. Div. 255, 274 N. Y. Supp. 387 (4th Dep't 1934).

15. Schneidau v. New Orleans & C. Ry., 48 La. Ann. 866, 19 So. 918 (1896). In

therefore, that discharging a minor in what was apparently a safe place and, furthermore, discharging him into the custody of his parents' representative was, if anything, more than the carrier was obliged to do.

The rule established by the cases mentioned and adopted by the dissenting justices in the principal case would seem to have been disregarded by the majority of the court which in effect extends the liability of a carrier to that of an insurer.[16] The carrier's duty, as matter of law, should be deemed to have been terminated when the carrier discharged its passenger in a safe place.

TRIAL—JURY VOIR DIRE EXAMINATION—EFFECT OF PLAINTIFF'S QUESTIONING RE INSURANCE IN AUTOMOBILE ACCIDENT CASES.—Action to recover damages for personal injuries sustained when the automobile driven by plaintiff collided with one owned by the defendant. The jury returned a verdict for the plaintiff. The defendant appealed on the ground that the plaintiff was permitted to ask improper questions concerning insurance in the examination of the jurors on their *voir dire. Held,* two justices dissenting, judgment reversed. *Wheeler v. Rudek,* 397 Ill. 438, 74 N. E. 2d 601 (1947).

The general rule undoubtedly is that in a personal injury action the plaintiff's attorney may interrogate the prospective jurors on their *voir dire* with reference to their own or their relatives' interest in or connection with insurance companies.[1] This rule is based on the fundamental principle that both litigants have an equal right to a disinterested, impartial jury. Insurance companies with their vast holdings have numerous citizens financially interested in their operations,[2] thus creating a right in the plaintiff to protect himself from such persons sitting in judgment on issues which would affect the finances of the insurance company involved. Some courts have expressed the view that the plaintiff's counsel has not only the right but the duty to protect his client from such possible prejudice.[3]

The rights of the defendant are also to be presented. He, too, is entitled to a disinterested, impartial jury. In this connection it is maintained that there is a tendency prevalent among jurors more readily to award damages to a plaintiff in cases where they have knowledge that an insurance company and not the individual defendant will

cases where the minor passenger and parent or guardian are still in transit, however, although the presumption arises that the duty of care of the children is upon the parent or guardian, the carrier still has a duty to use reasonable care where it sees or should see that the children are in danger. *See* St. Louis I. M. & S. Ry. v. Reproad, 59 Ark. 180, 26 S. W. 1037, 1038 (1894); Longacre v. Yonkers R. R., 236 N. Y. 119, 124, 140 N. E. 215, 217 (1923), *modifying* 202 App. Div. 845, 194 N. Y. Supp. 952 (2d Dep't 1922).

16. It is well settled that a carrier is not an insurer of the safety of its passengers. Weiner v. May Dep't Stores, 35 F. Supp. 895 (S. D. Cal. 1940).

1. Levens v. Stocco, 5 Cal. App. 2d 693, 43 P. 2d 357 (1935); Bauer v. Reavell, 219 Iowa 1212, 260 N. W. 39 (1935); Stalcup v. Ruzic, 185 P. 2d 298 (N. M. 1947).

2. Shareholders, stockholders, directors, officers, employees, agents and others.

3. Smithers v. Henriquez 368 Ill. 588, 15 N. E. 2d 499, 501 (1938). "Under his duty as a lawyer and to his client, plaintiff's counsel was required to exercise all lawful means known to him to see that no interested party sat as a juror in the case." Similar language was used by a court in a prior case, Rinklin v. Acker, 125 App. Div. 244, 249, 109 N. Y. Supp. 125, 129 (2d Dep't 1908).

bear the loss.[4] This has caused the courts to limit the right of the plaintiff's counsel in his interrogation of the jurors concerning insurance to instances where he evidences *good faith* in his questioning.[5] This limitation is for most purposes based upon a rationale which has been rendered obsolete by the expansion of the coverage of liability insurance. In recent years the insurance companies have made use of such extensive advertising with respect to the merits of owning insurance that today it is common knowledge that the vast majority of automobile owners carry insurance and that in the trial of cases the defense is usually conducted by the insurer. As a practical matter, there is very little, if any, chance that defendant's being insured would or could be kept from the jury. In *Rinklin v. Acker*[6] this was pointed out as follows: ". . . the same is true of the notion that if such questions [insurance connections or interests of jurymen on *voir dire* examination] were not asked the jurymen would never know during the trial that the defendant was so insured. It must be humiliating to jurymen to learn that such a low estimate of their intelligence and alertness is entertained anywhere, let alone by the judges who review their verdicts on appeal. Every trial judge knows instantly whether the defendant is insured; and I know of no trial judge who is under the vain conceit that while he knows his jurymen do not."

The connotations involved in the phrase "in good faith" present the crux of the entire problem. When, in what manner, and to what degree plaintiff's counsel can refer to insurance on the *voir dire* examination without impairing the defendant's right to have his insurance policy concealed from the jurors is the issue to be decided in each case. Determinations have not been uniform. In *Hoge v. Soissons*[7] it was held that a continual repetition of questions, apparently to individual jurors, with respect to any connection he might have with a named insurer, or any possible indirect connection of his company with it, was regarded as at least questionable. A general question to the jurors as to whether any of them were employed by or interested in any insurance company whose business it was to insure automobiles against the personal injury of the owner was in the same case upheld as asked in good faith. *Hoagland v. Dolan*[8] held that it was not improper to place before the jury the information that defendant was insured and that such damages as might be allowed to plaintiff (suing for personal injuries) would be paid by some insurance company. In *Stalcup v. Ruzic*[9] the plaintiff's counsel asked each prospective juror two questions which concerned his interest in or connection with particular insurance companies, and two questions which pertained to his family's interest in or connection with the same companies. Each of the questions was thereafter asked of the jury collectively. This was held to be within the bounds of good faith.

4. See, *e.g.*, note 6 *supra*.

5. See note 1 *supra*.

6. 125 App. Div. 244, 249, 109 N. Y. Supp. 125, 129 (2d Dep't 1908). The opinion goes on to express its view on the subject in another regard, "And the notion that our jurymen are so lawless or weak or corrupt that if they find out that the defendant is insured against damages for accidents they will render a verdict against him, when they would not have done so if that fact had been kept from them, is so false and so unjust to them that it should not be dignified by discussion. It never arose in the mind of any lawyer or judge who had a considerable or fair experience in the trial courts."

7. 48 Ohio App. 221, 192 N. E. 860 (1933).

8. 259 Ky. 1, 81 S. W. 2d 869 (1935).

9. 185 P. 2d 298 (N. M. 1947).

Great discretion is given the trial judge in determining the good faith of the plaintiff's counsel, and it is further held that the trial judge's discretion will not be disturbed unless there has been an abuse thereof.[10] It might be noted, however, that since the discretion of each trial judge is not confined within definite limits any particular exercise of the discretion is apt to be called an abuse—or a correct exercise—on appeal. Decisions noted above are the result.[11]

In New York an attempt has been made to solve the problem by a statute[12] which provides in substance that an inquiry of a prospective juror's connections with or interest in insurance companies is pertinent and proper and should not be excluded simply because it might permit the jury to infer that the defendant is insured. There is no mention of good faith in the statute and certain questions concerning the insurance connections of the prospective jurors have been sanctioned regardless of the motives of counsel.[13]

Smithers v. Henriquez[14] is the leading Illinois case on this subject. Therein the court analyzed the law relative to interrogation as regards insurance on the *voir dire* examination, and laid down the rule that the plaintiff could show good faith by filing an affidavit in which it would be alleged on information and belief that the defendant was insured, that the insurance company was conducting the defendant's case, that the insurance company had offices in the county and that there was a reasonable possibility that one of the prospective jurors had some interest in or connection with the insurance company. A preliminary hearing would then be held outside the presence of the jury and the trial judge would either permit or forbid the interrogation of the jurors on insurance. This case was followed by *Edwards v. Hill-Thomas Lime & Cement Co.*[15] wherein the plaintiff filed no preliminary affidavit and a question was asked of the jury relative to their insurance affiliations. The court, while reversing a judgment for the plaintiff on the ground that the question was asked in bad faith, stated: "While there is nothing in the record to show the request for question was not made in good faith, the record is equally barren of any fact to show that it was so made."[16] The court in another case, *Kavanaugh v. Parret*,[17] ruled that the plaintiff showed bad faith in the questioning, though an affidavit had been filed. A strong dissent contended that the decision was, in effect, overruling the *Smithers* case. In the more recent case of *Moore v. Edmonds*[18] the affidavit was filed and certain questions asked with reference to insurance. The court affirmed a judgment for plaintiff and reaffirmed the principles announced in the *Smithers* case. In the instant case the plaintiff filed the

10. Some courts append two conditions to the overruling of the trial judge's decision. These are: (1) the amount of damages awarded by the jury must not be disproportionate to that which the evidence reasonably justifies; and (2) the defendant's liability under the evidence must not be a close question. Stalcup v. Ruzic, 185 P. 2d 298, 301 (N. M. 1947).

11. See cases cited in notes 7, 8 and 9 *supra*.

12. N. Y. CIV. PRAC. ACT § 452.

13. Odell v. Genesee Construction Co., 145 App. Div. 125, 129 N. Y. Supp. 122 (4th Dep't 1911).

14. 368 Ill. 588, 15 N. E. 2d 499 (1938).

15. 378 Ill. 180, 37 N. E. 2d 801 (1941).

16. *Id.* at 185, 37 N. E. 2d at 803.

17. 379 Ill. 273, 40 N. E. 2d 500 (1942).

18. 384 Ill. 535, 52 N. E. 2d 216 (1943).

affidavit and asked questions on *voir dire* which were closely parallel to those asked in the *Moore* case. The court, however, distinguished the two cases by indicating that in the *Moore* case the defendant's counsel had acquiesced in the procedure that led to the questioning. This distinction would seem to be ill-founded, however, as the court's opinion in the *Moore* case made no mention of such acquiescence as a material factor in their decision.[19]

The court in the principal case based its reversal on the ground that the affidavit was insufficient as a proper attestation of good faith. "In the quoted part of the affidavit it is said affiant has 'reasonable grounds for believing' that persons who are interested in the company may be among the panel of jurors called into the jury box. Affiant did not set forth what her reasonable grounds were and without them the court had no way of determining whether she was justified in her belief that persons interested in the insurance company would be called into the jury box."[20] This basis destroys the efficacy of the affidavit and negatives one of the fundamental principles set down in the *Smithers* case, *i.e.*, "It is a well-known fact that there are numerous liability insurance companies with offices and widespread business connections in the city of Chicago. How plaintiff could be expected to obtain information as to any affiliation of prospective jurors with the interested insurance company before knowing what jurors would be called into the box is not suggested. In any case, to say that as a basis for such inquiry, litigants must, before the trial, examine the jury list and investigate and determine the qualifications of prospective jurors, would impose an onerous and unreasonable task upon them, and, in effect, nullify the statutory provision and time-honored custom of examining the jurors upon the trial. The affidavit made a sufficient showing to warrant the granting of a proper inquiry."[21] The requirement that the plaintiff investigate each prospective juror before the examination would, if fully carried out in each case, completely nullify the theory underlying a *voir dire* examination.

It is suggested that the correct procedure in respect to insurance in *voir dire* examinations should be standardized somewhat as follows:[22] 1. An affidavit should be filed in which affiant should allege the same matter required by the *Smithers* case. This affidavit will serve as an *objective* standard for the plaintiff's "good

19. This point was brought out solely by the concurring opinion in the *Moore* case.

20. 397 Ill. 438, 445, 74 N. E. 2d 601, 604-05 (1947).

21. Smithers v. Henriquez, 368 Ill. 588, 591, 15 N. E. 2d 499, 501 (1938).

22. The court in Avery v. Collins, 171 Miss. 636, 157 So. 695, 699 (1935), gave the following procedure as the correct guide: The plaintiff's counsel may ask of each prospective juror the nature of his business, and if, for example, the latter states that his business is that of a farmer, the next question would be to ask whether he has any other business connections. If the answer to this is "No," the Mississippi court would end the privilege. The court, however, goes on to say: "There may be cases, nevertheless, wherein it will happen that there will be no reasonable method of getting at the question of the juror's qualification on the issue of his insurance connections except by interrogatories which will disclose that the defendant in the particular case is probably insured, but the trial judge should see to it that the necessity exists in the particular case, and, when such interrogatories are put to a juror, the trial judge in the plain interest of fair trials must, upon request of the defendant admonish the jury that the matter of insurance shall have nothing to do with the decision of the case either upon the issue of liability or upon the amount of damages." Quoted as correct procedure in Stalcup v. Ruzic, 185 P. 2d 298, 301 (N. M. 1947) (dissenting opinion).

faith," and the mere fact that he cannot show reasonable grounds for his belief that a prospective juror might be an interested party should not bar his interrogation of the jurors concerning insurance. 2. When the trial judge has passed on the sufficiency of the affidavit, plaintiffs counsel should be allowed to ask standard questions of the prospective jurors in the presence of the trial judge. 3. The exercise of the trial judge's discretion, although concededly cut to the minimum by this procedure, should be most strongly upheld in fact rather than in theory only by the appellate courts.

The standardized procedure will eliminate the perplexing problem of determining the "good faith" of the plaintiff, and will go far toward settling the law on the subject. No longer will a plaintiff complete his case and obtain a judgment only to have his case reversed on appeal because he had relied on and followed rules of procedure theretofore sanctioned by the courts of that state.

UNEMPLOYMENT COMPENSATION—THE MEANING OF THE TERM "AVAILABLE FOR WORK."—The plaintiff had lived in Kansas City, Missouri, for thirteen years during which time she had been employed as a skilled clerical worker in a large office. Plaintff's husband, for business reasons, moved to a farm which he owned near a small town. The plaintiff voluntarily left her job to live with her husband in the town which was beyond commuting distance from Kansas City. She registered for employment as a clerical worker and applied for unemployment compensation. At the time some clerical work was performed in the local courthouse but no vacancies existed. The unemployment commission declared that the plaintiff was not eligible for compensation because she was not "available for work" under the terms of the Missouri statute. A lower court had reversed that ruling, and from that reversal the commission appealed. *Held,* judgment reversed upon the ground that there was some evidence to support the commission's finding. *Wiley v. Carroll,* 201 S. W. 2d 320 (Mo. 1947).

The court in the principal case was faced with two separate and distinct issues: first, whether the plaintiff left her job for "good cause"; second, whether she was "available for work" when she applied for compensation. At the outset it might be well to bear in mind that this legislation has presented entirely new problems to the courts and it is not surprising to find in the cases an absence of uniformity of well established legal principles.[1]

"Good cause" is the expression used to describe the conditions under which the claimant must have left his last job in order to be eligible for unemployment compensation.[2] If there was no valid reason for leaving his employment the claimant is not entitled to compensation. The requirements of "good cause" and "availability for work" are usually defined explicitly by statute. The latter requirement refers to the conditions the claimant must satisfy at the time he applies for compensation.[3]

1. Bliley Elec. Co. v. Unemployment Comp. Bd. of Rev., 158 Pa. Super. 548, 45 A. 2d 898, 901 (1946).

2. MO. REV. STAT. § 9431a (1939): "An individual shall be disqualified for benefits . . . for the week in which he has left work without good cause. . . ."

3. *Id.* § 9430c (1943): "An unemployed individual shall be eligible for benefits with respect to any week only if the commission finds that . . . he is able to work and is available for work. . . ."

Thus, if a worker leaves his job because of poor health it may be ruled that he left for "good cause," but if he is still sick when he applies for compensation he will be ineligible because he is not "available for work."[4]

The court in the principal case apparently did not distinguish between "good cause" and "availability for work"[5] since it treated the circumstance that plaintiff voluntarily left her job and her "availability for work" as one and the same question,[6] basing its ruling explicitly on that section of the Missouri law[7] which relates to "availability for work."

Claimants were adjudged not "available for work" and consequently were refused compensation in the following instances when the claimant: was out of work because of a strike;[8] could not work because of poor health;[9] refused several offers of employment which claimant was able to perform;[10] could not work because he was a full time student;[11] was a seasonal worker who refused to find any kind of off-season job;[12] insisted on getting a type of employment for which claimant was not trained.[13] There is little conflict in holding these claimants unavailable for work since it follows logically that unemployment compensation is intended only for those persons who are employable and who want employment but, because of economic conditions, cannot find work.

The cases referred to above, though involving factual situations readily distinguishable from the one in the principal case, nevertheless, serve to clarify the phrase, "available for work." In all of them the claimant's "availability for work" was determined by the individual's *willingness, capacity* and *ability* to work, but the instant case appears to introduce a new element into the test, *i.e.*, "reasonable prospect of employment."[14] It appears that claimants' "availability *for* work" is measured in terms of the "availability *of* work." Compensation is being denied the claimant because of the unavailability of work.

In *Reger v. Administrator*[15] another court, in applying a Connecticut statute[16]

4. See note 9 *infra.*

5. See notes 2 and 3 *supra.*

6. 201 S. W. 2d 320, 322 (Mo. 1947): ". . . whatever the purpose of Unemployment Compensation Law . . . it is certain that it was not intended that its benefits should be extended to one who not only voluntarily and because of personal affairs quit her employment but in addition moved into a community in which there was no reasonable prospect of employment. . . ."

7. See note 3 *supra.*

8. Board of Review v. Mid-Continent Petroleum, 193 Okla. 36, 141 P. 2d 69 (1943).

9. D'Yantone v. Unemployment Comp. Bd. of Rev., 159 Pa. Super. 15, 46 A. 2d 525 (1946).

10. Welch v. Review Bd. of Employment Security Division of Indiana, 115 Ind. App. 230, 58 N. E. 2d 363 (1944). The claimant said he was not interested in work in the state of Indiana and refused to accept several offers of suitable work.

11. Keen v. Texas Unemployment Comp. Commission, 148 S. W. 2d 211 (Tex. Civ. App. 1941).

12. *In re* Leshner, 268 App Div. 582, 52 N. Y. S. 2d 587 (3d Dep't 1944).

13. Donnelly Garment Co. v. Keitel, 354 Mo. 1138, 193 S. W. 2d 577 (1946).

14. See note 6 *supra.*

15. 132 Conn. 647, 46 A. 2d 844 (1946).

16. CONN. GEN. STAT. § 1339e (2) (Supp. 1939): "An unemployed individual shall be eligible to receive benefits with respect to any week only if he shall have been found . . . physically and mentally able to work and . . . 'available for work'. . . ."

to facts essentially similar to those in the instant case, has reached an opposite conclusion. The plaintiff was employed for about a year as a bookkeeper in New Haven, Connecticut. In January, 1944, she left her job and went to live in a small town near the army camp in which her husband was stationed. When plaintiff failed to get a clerical job she applied for unemployment compensation. The claim was refused on the ground that she was not "available for work" when she left her job in order to relocate in a place where she could not reasonably expect to obtain suitable work. On appeal, however, it was held that she was "available for work" and entitled to compensation. The court defined availability in these words: "The availability requirement is said to be satisfied when an individual is willing, able and ready to accept suitable work which he does not have good cause to refuse, that is, when he is genuinely attached to the labor market."[17] This definition differs radically from that laid down in the instant case. The Connecticut court reasons that if we are to test the availability of the individual claimant, the labor market[18] must be described in terms of the individual. In such terms a labor market exists when the type of work which the claimant is capable of doing is performed in the community in which he is able to work.[19] In short, the test laid down by the Connecticut court is subjective as compared to the objective test employed in the instant case. The rationale which supports the decision in the Connecticut case is based on the finding that a labor market did exist for work done by the plaintiff. It is not material, the court explained, that the plaintiff has or has not a reasonable prospect of employment. Since a labor market did exist for the plaintiff's services she was held to be "available for work" and eligible for compensation.[20] The Connecticut court does not stand alone in rejecting the "reasonable prospect of employment" test of availability.[21]

It is submitted that the subjective test of "availability for work" is better supported by reason than the objective test applied in the principal case. It might be argued by the supporters of the latter test that the adoption of the subjective test will exhaust the insurance fund,[22] but this does not appear to be a sound basis upon which to decide cases of this type. The unemployment compensation law is de-

17. Reger v. Administrator, 132 Conn. 647, 46 A. 2d 844, 845 (Conn. 1946).

18. FUNK & WAGNALLS NEW STANDARD DICTIONARY defines labor market as "the opportunity for finding employment or for hiring workmen; the relative demand for and supply of labor."

19. The opinion in the *Reger* case cites employment figures which indicate that less than three percent of all work in that area was clerical work. This indicates that a "labor market" does not require a large percentage of the total work which is being done.

20. *Ibid.*

21. Bliley Elec. Co. v. Unemployment Comp. Bd. of Rev., 158 Pa. Super. 548, 45 A. 2d 898 (1946). This case again concerns a wife who left her job to join her husband in the Army. No employer would hire her because she was only a temporary resident. The court held that she was "available for work." The question appears to be unsettled in New York. *See* Smith v. Murphy, 267 App. Div. 468, 470, 46 N. Y. S. 2d 774, 775 (3d Dep't 1944). *Contra:* Salvarria v. Murphy, 266 App. Div. 933, 43 N. Y. S. 2d 899 (3d Dep't 1942).

22. *Cf.*, however, the fact that the insurance fund in New York is so large ($1,065,000,000) that the legislature has passed a bill limiting the size of the fund to nine hundred million dollars and returning one hundred and sixty-five million to state business firms. N. Y. Post, March 4, 1948, p. 5, col. 1.

scribed as remedial, humanitarian legislation, which must be broadly and liberally construed if it is to serve its purpose.[23] This means a "construction in the interests of those whose rights are to be protected . . . by which the letter of the statute is enlarged or restrained so as more effectually to accomplish the purpose intended."[24]

If the statute is construed in favor of the persons for whose benefit it was intended, it follows logically that a claimant to be disqualified for compensation, must be explicitly disqualified by the provisions of the statute.[25] The plaintiff in the principal case was not so disqualified, but the court, by apparently refusing to give the statute a liberal construction, appeared to construe it against the very person for whose benefit it was enacted.

The test of "reasonable prospect of employment" is a legalistic attempt to solve a social problem and, as such, is legally and economically impractical. In a highly complex industrial society it is difficult to determine with any appreciable degree of accuracy whether or not there is a "reasonable prospect of employment." The test applied in the principal case is not only so indefinite and uncertain as to make its uniform application extremely difficult, but also tends to defeat the purpose for which unemployment legislation was enacted.

VETERANS' SENIORITY—CONFLICT WITH COLLECTIVE BARGAINING AGREEMENT.—A veteran returned from service to his former position, where, during his absence, a new contract had been negotiated between his employer and the union which was the authorized bargaining agent for employees in that plant. Under the terms of the new agreement, the seniority provisions which formerly existed were modified so that certain union officials were now entitled to higher seniority than anyone else, regardless of actual seniority. A lay-off occurred and union officials who, under the contract, were accorded seniority superior to the veteran, but who, in point of service were actually junior to him, were given preference over the veteran. The veteran claimed that this was a violation of the rights guaranteed him under the Selective Training and Service Act of 1940. *Held,* one judge dissenting, the lay-off of the veteran was justified, as the courts should uphold the provisions of the collective bargaining agreement. *Gauweiler v. Elastic Stop Nut Corp.,* 162 F. 2d 448 (C. C. A. 3d 1947).

There are two separate provisions in the Selective Training and Service Act[1] which are of immediate concern in this problem. Under Section 308(b)(B)[2] the Act provides that if a veteran had left his job to enter service, then upon his return, his employer "shall restore such person to such position or to a position of like seniority, status and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. . . ." Under Section 308(c)[3] the Act pro-

23. Bliley Elec. Co. v. Unemployment Comp. Bd. of Rev., 45 A. 2d 898, 904 (Pa. 1946).

24. Glenn Falls Portland Cement Co. v. Van Wirt Const. Co., 132 Misc. 95, 103, 228 N. Y. Supp. 289, 299 (Sup. Ct. 1928).

25. See note 21 *supra.*

1. 54 STAT. 890, 50 U. S. C. § 308 (1940), as amended, 60 STAT. 341 (1946), 50 U. S. C. A. § 308 (Supp. 1947).

2. *Id.* § 308.

3. *Id.* § 308 (c): "Any person who is restored to a position in accordance with the provisions of paragraph . . . (B) of subsection (b) shall be considered as having been

vides that any person so restored shall be considered as having been on leave of absence during the period he was in service and shall receive all benefits he would have received under the rules of the company existing at the time of his entry into service as if he had been on an ordinary leave of absence or furlough from active work.

As the minority opinion in the instant case points out, the "change in circumstances" clause in Section 8(b) does not apply to seniority but relates solely to restoration of the position and it would appear that an interpretation of it to limit restoration to "like seniority" is contrary to the intent and the wording of the Section.[4] It also must be remembered that the words "impossible or unreasonable to do so" mean more than merely inconvenient or undesirable.[5]

The right of the veteran to be restored to his position without loss of seniority as guaranteed in Section 8(b) should not be limited by the other protective benefits given him by the Act.[6] This right is one which is independent of the rights guaranteed in Section 8(c) relating to participation in insurance and other benefits which he would have received pursuant to established practices relating to employees on furlough or leave of absence in effect when the person was inducted into the armed forces.[7] Section 8(c), therefore, cannot be interpreted as cutting down the restoration section of 8(b) so as to have it read "restoration to such position or to a position of like seniority as he would have been restored to had he been on an ordinary leave of absence from his plant." So to interpret it would unquestionably bind the veteran by collective bargaining provisions which were made while he was on such "leave of absence." It would not, however, be giving the statute the liberal construction in favor of the veteran which the courts have consistently emphasized in the past.[8]

A collective bargaining agreement is an agreement between an employer and a labor union which regulates the terms and conditions of employment. By this agreement an employee obtains rights which he can enforce individually against the employer. He obtains these rights under one of two theories. Either the union is acting as the employee's agent or the employee is a third party beneficiary of the agreement.[9] Only under the former, it would seem, could the union or employer hold the individual employee obligated to perform the conditions so laid down

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on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

4. Market Co. v. Hoffman, 101 U. S. 112, 115 (1879). "We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word."

5. Kay v. General Cable Corp., 144 F. 2d 653 (C. C. A. 3d 1944).

6. Trailmobile Co. v. Whirls, 154 F. 2d 866 (C. C. A. 6th 1946).

7. *Ibid.*

8. Salter v. Becker Roofing Co., 65 F. Supp. 633, 635 (N. D. Ala. 1946). "These sections should be construed as liberally as possible, so that military service should entail no greater setback in the private pursuit or career of returning soldier than is unavoidable."

9. TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING § 154 (1940).

by the agreement because a third party beneficiary is not considered bound by an obligation created by someone else. Under the first theory it has been held that recovery by an employee depends upon his showing either that he initially authorized the making of the contract or that he subsequently ratified the contract.[10] Conversely, it would seem that in order to hold a veteran subject to a collective bargaining agreement made between the employer and a union, it should be shown that he initially authorized the contract or that he later ratified it. It must be held that his initial membership in the union was an implied authorization to obligate himself to all future bargaining agreements made by the union, or that his return to work, after leaving service, was a ratification of the bargaining agreement in question. Although many objections could be made to either of these two propositions, the majority opinion in the instant case, proceeds on the assumption that the veteran is bound by the agreement unless he is protected by statute.

The problem presented by the principal case is one on which there is no federal precedent squarely in point. The majority, however, in reaching their decision, rely upon two previous federal decisions to aid them in determining the purpose and effect of the Selective Training and Service Act. They are *Fishgold v. Sullivan Drydock & Repair Corp.*[11] and *Trailmobile Co. v. Whirls.*[12] With this aid the majority in the principal case reached the conclusion that the Act gives the veteran protection, while away, to the same extent as if he had remained all the time at his job, or had been on furlough or leave of absence for some personal reason. If he had remained on the job or had been on personal leave of absence he would have been subject to the collective bargaining agreement between the employer and the union. The majority indicates that if this is so, then it logically follows that he should be bound by it while away in service and after he has returned. The court concludes that this result is the only practical one from the standpoint of both plant operation and collective bargaining.

In the *Fishgold* case the Court decided that a returning veteran does not have "super-seniority" and cannot displace a non-veteran who has more seniority than himself, even when counting the veteran's service years towards his seniority status. This decision is not to be questioned, but it should be remembered that when the Court in the *Fishgold* case states that the veteran is protected as "if he had been continuously employed," and that he is not to be granted an "increase in seniority" over what he would have had if he had never entered the armed forces, it is referring to the "super-seniority" which is the issue in that case. Moreover, the statement by that Court that "no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the act"[13] would seem to indicate that the Court in the *Fishgold* case would not support a collective bargaining agreement which cuts into the veteran's statutory seniority rights.

The *Trailmobile Co.* case presented a state of facts more in line with those of the principal case but would seem to support the position taken by the minority in the principal case. There the veteran returned to his company which was controlled by a parent corporation. The two companies were merged and a new collective

10. Gary v. Central of Ga. Ry., 44 Ga. App. 120, 160 S. E. 716 (1931). See also TELLER, *op. cit. supra,* note 9, § 167.

11. 328 U. S. 275 (1946).

12. 154 F. 2d 866 (C. C. A. 6th 1946).

13. Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275, 285 (1946).

bargaining agreement drawn up whereby the seniority rights of the former employees of the junior company were fixed as commencing the day of the merger. The distinction between that case and the principal case is that the veteran in the *Trailmobile Co.* case was being deprived of his seniority status as it existed at the time he was inducted into the armed forces. The court there said that "The Act was passed by Congress and approved by the President with full knowledge of the existence of the Labor Relations Act. This Act was not amended; but surely it should not be presumed that Congress in failing to amend the Wagner Act, intended to permit the concerted action of a collective bargaining agency and an employer to destroy or whittle down the statutory right of the returning soldier."[14] Commenting on the *Fishgold* decision in the *Trailmobile Co.* case, the court said that the veteran was to be kept in the same position as if he had not gone to war but had remained continuously employed, and that this "is an independent and additional right, not to be impaired by the other protective benefits accorded him by statute" and one which was not to cease when the first year of employment ends.[15] And again this statement: "Collective bargaining agreements entered into pursuant to the terms of the Wagner Act must recognize the statutory right of the veteran to the seniority granted him by the selective service statute"[16] would seem to be more than sufficient to indicate that this court is also opposed to placing collective bargaining agreements above the statutory seniority granted to the veteran.

Both the principal case and *Payne v. Wright Aeronautical Corp.*,[17] decided the same day by the same court, seem to indicate that one of the main reasons for the decisions is "the utter impracticability of enforcing in the same plant two conflicting systems of seniority."[18] The *Payne* decision stated that it would be an impossible task for the employer to attempt to carry out his collective bargaining agreement and also give the veteran the seniority which the minority opinion in the instant case feels is due him under the Act. As pointed out in the minority opinion of the *Payne* case, however, even if the "employer does find himself in a dilemma, it is because he has attempted to do that which he had no right to do, namely, to enter into an agreement which disregards the statutory rights of the veteran, and in his absence."[19] Certainly the veteran should not be penalized for the employer's disregard of rights existing under the Training and Service Act. Both the union and the employer knew of the Act when they made their agreement and, therefore, such agreement, must necessarily be read "in the light of such existing law."[20] Moreover, it is not really the impossible task that the majority opinion suggests. The non-veteran, by his active participation in the collective bargaining agreement, has certainly waived his seniority rights to the union officials and has no cause of complant if he is now replaced by an official. The veteran, on the other hand, should not be said to have waived his rights to his statutory seniority by his initial membership in the union, nor by the mere fact of his return to his old position after the completion of his term of active service in the armed forces.[21] The only just solu-

14. Trailmobile Co. v. Whirls, 154 F. 2d 866, 869 (C. C. A. 6th 1946).
15. *Id.* at 870.
16. *Ibid.*
17. 162 F. 2d 549 (C. C. A. 3d 1947).
18. *Id.* at 551.
19. 162 F. 2d 549, 553 (C. C. A. 3d 1947).
20. *Ibid.*
21. In Niemiec v. Seattle Rainier Baseball Club, 67 F. Supp. 705 (N. D. Wash. 1946),

tion would seem to be to allow the veterans at all times to hold their statutory positions of seniority while, at the same time, non-veterans yield their respective positions in accordance with the agreement which they have presumably endorsed.

The purpose of the Selective Training and Service Act was to bolster and sustain the morale of our troops while in service. By promising them the security of returning to their former positions without loss of seniority Congress succeeded in its intent to alleviate partially the serviceman's apprehension concerning problems he would have to face on his return home. And as the circuit court said in *Grubbs v. Ingalle Iron Works Co.*:[22] "The considerations, which impelled the Congress to act, likewise require a liberal construction of this legislation. It is not the proper function of courts to emasculate the provisions of remedial legislation because of difficulty in recalling an intent inspired by the urgency of a national emergency."[23]

a returning baseball player did not waive his right to be continued in employment for one year by signing a contract which gave the club the right to terminate the contract by giving official notice of release to player. The court said (at 709): "It is a rule of law that when someone is held to having waived his legal rights that the waiver must be clearly established."

22. 66 F. Supp. 550 (N. D. Ala. 1946).

23. *Id.* at 554.