RECENT CASES

Adverse Possession—Public Lands—Presumption of Lost Grant—In an action by the United States to quiet title to the Pacific island of Palmyra, defendants claimed by possession under a lost grant to their predecessors from the King of Hawaii in 1862, and an Hawaiian Land Court certificate of title duly issued in 1912.[1] The United States claimed title as successor to the King of Hawaii, alleging that a grant was not in fact made, and that the decree of the Land Court in 1912 was not binding upon the United States. Upon this second appeal,[2] the circuit court of appeals, in affirming the decision of the lower court, *held* (two judges dissenting) [3] that the evidence justified presumption of a lost grant to defendants, and that the Land Court decree was conclusive upon the United States.[4] *United States v. Fullard-Leo et al.*, 156 F. (2d) 756 (C. C. A. 9th, 1946).

Whether intermittent occupation and use of land under claim of ownership will vest title in the claimants necessarily depends upon the location and character of the land and the peculiar circumstances of the case. The common law fiction of presumed lost grant, invented to protect long, peaceful possession in situations where the statute of limitations is inoperative, has been invoked against the state as well as against private persons.[5] Where the United States has contested title to land in acquired territories, the Supreme Court, following a policy of resolving doubts in

1. Palmyra is located about 1000 miles south of the Hawaiian Islands. In 1862, two Hawaiian citizens took possession of Palmyra in the name of and in accordance with a commission from the King of Hawaii. Existing Hawaiian documents concerning the transaction do not indicate what interest was acquired by these citizens to whom defendants trace title. The United States contends that it was at most a lease, defendants that subsequent conveyances and possession indicate a lost grant of title. Defendants proved occupation of the island by their predecessors or themselves or lessees for an indefinite period beginning in 1862, one year in 1885-1886, two weeks in 1913, one month in 1914, one year in 1920-1921, 12 days in 1924, the sending of trees and plants in 1933, 1935, 1936, and 1937, and payment of taxes in 1885, 1886, 1887, and from 1913 to the time of suit. United States v. Fullard-Leo *et al.*, 66 F. Supp. 782, 785 (D. C. D. Haw., 1944).

2. For insufficiency of evidence to exhibit title in the United States, the action was first dismissed. United States v. Fullard-Leo *et al.*, 66 F. Supp. 774 (D. C. D. Haw., 1940), *reversed and remanded*, 133 F. (2d) 743 (C. C. A. 9th, 1943), *petition for a writ prohibiting retrial denied*, 142 F. (2d) 465 (C. C. A. 9th, 1944). Upon retrial, title was quieted in defendants, 66 F. Supp. 782 (D. C. D. Haw., 1944).

3. Judges Denman and Bone dissent vigorously on the evidence from the inference of a lost grant, and from the decision that the Land Court decree is conclusive upon the Government.

4. The Supreme Court granted *certiorari* Oct. 14, 1946. (1946) 15 U. S. L. WEEK 3135.

5. The fiction of presumed grant, first applied in favor of immemorial possessors of incorporeal rights (7 HOLDSWORTH, HIST. ENG. LAW (2d ed. 1937) 343 *et seq.*) was later extended to long, peaceful possession of land, in situations where the statute of limitations was inoperative, in favor of private and corporate claimants against the state: Carino v. Insular Gov't of the Philippine Islands, 212 U. S. 449 (1909); United States v. Chavez, 175 U. S. 509 (1899); United States v. Chaves, 159 U. S. 452 (1895); State v. Taylor, 135 Ark. 232, 205 S. W. 104 (1918); State v. Dickinson, 129 Mich. 221, 88 N. W. 621 (1901); People v. Town of Brookhaven, 146 Misc. 473, 261 N. Y. Supp. 598 (Sup. Ct., 1932); *In Re* Title of Kioloku, 25 Haw. 357 (1920); as well as against private persons and corporations: Fletcher v. Fuller, 120 U. S. 534 (1887); Trustees of Schools v. Lilly, 373 Ill. 431, 26 N. E. (2d) 489 (1940); Univ. of Vermont v. Carter, 110 Vt. 206, 3 A. (2d) 533 (1939); *see* Ricard v. Williams, 7 Wheat. 59, 119 (U. S., 1822). Whether the presumption is rebuttable or conclusive has been the subject of some confusion. 9 WIGMORE, EVIDENCE (3d ed., 1940) § 2522.

favor of bona fide private claimants, has confirmed title on the basis of long, continuous and peaceful possession.[6] Is the policy applicable to a possessory claim based upon occupation which has been interrupted for long periods of time? Although continuous occupation is normally required, legal possession has been held to continue when the intermittent acts of the claimant were consistent with the character of the land and its use.[7] The Supreme Court has found the reason for the requirement of "actual possession" in the *notoriety* it gives to the assertion of title, and has applied the fiction of presumed grant when the interruptions did not impair the uses to which the claimant subjected the property and for which it was chiefly valuable.[8] It appears that the circuit court properly minimized interruptions of occupation in the case of an uninhabited island far from civilized communities and chiefly valuable for guano, copra, and military use. The fact that no question of title arose until 1938 when the Navy sought to lease the island appears to have weighed heavily in favor of the private claimants in relation to the brief periods of occupation. Whether or not the Land Court decree is in itself binding upon the United States,[9] the notoriety of claim of title combined with intermittent acts of ownership consistent with the character of the land furnish reasonable

---

But it has been invoked merely for the purpose of quieting title in the possessor by a fiction. Fletcher v. Fuller, *supra;* 4 TIFFANY, REAL PROPERTY (3d ed., 1939) § 1136. It has been suggested that the present validity of the maxim *nullum tempus occurrit regi* is that the state will not lose title by prescription to land subject to a public use, such as a highway. Note (1936) 23 VA. L. REV. 58. See also note (1915) 29 HARV. L. REV. 88.

6. Carino v. Insular Gov't of the Philippine Islands, 212 U. S. 449 (1909) (Possession proved for over 50 years without grant from Spanish Crown); United States v. Chavez, 175 U. S. 509 (1899) (Continuous possession proved from about 1785 to time of suit under claim of title by Spanish grant); United States v. Chaves, 159 U. S. 452 (1895) (Possession proved from 1833 to time of suit with claim of grant from Mexican Gov't); *In Re* Title of Kioloku, 25 Haw. 357 (1920) (Possession proved from 1870 to time of suit).

7. Fletcher v. Fuller, 120 U. S. 534 (1887); Cross v. Seaboard Air Line R. Co., 172 N. C. 119, 90 S. E. 14 (1916); Herndon v. Casiano, 7 Tex. 322 (1851); Webb v. Richardson, 42 Vt. 465 (1869).

8. Fletcher v. Fuller, 120 U. S. 534, 552 (1887) (Entry to quarry rock in 1835, and evidence of quarrying during the period from 1846 to time of suit with occasional interruptions).

9. Under the Hawaiian Organic Act, 31 STAT. 141 (1900), 48 U. S. C. § 511 (1940), public property ceded to the United States by the Republic of Hawaii remained in the "possession, use, and control" of the Territory of Hawaii. The laws of Hawaii relating to public lands were to remain in force, 36 STAT. 443 (1910), 48 U. S. C. § 664 (1940), but the Territory's power of conveyance of public lands was restricted as to size of tracts, citizenship of grantees, and other details. 36 STAT. 444 *et seq.* (1910), 48 U. S. C. § 663 *et seq.* (1940). Nothing is said of the adjudication of title to lands in dispute where a Gov't claim appears. The laws of Hawaii gave jurisdiction of such applications for registration of title to the Land Court, providing further that Land Court decrees should be conclusive upon the world, including the Territory. Rev. Laws Haw. 1905, c. 154, § 2431; *In Re* Rosenbledt, 24 Haw. 298, 307 (1918). Where a public claim appeared, notice to the Att'y General of the Territory was required. § 2425. In the instant case this was done, and the Territory by its Att'y General disclaimed title. The Supreme Court of Hawaii affirmed a similar adjudication of title in *In Re* Title of Kioloku, 25 Haw. 357 (1920). But where the United States, under direction of the President pursuant to 31 STAT. 141 (1900), 48 U. S. C. § 511 (1940), had taken land for its use, the Land Court denied jurisdiction in itself unless the United States submitted to suit. Land Title, Kalena, 34 Haw. 93 (1920). This situation appears to be distinguishable, for the United States had taken the land from the Territory's control before the suit. If, upon claim of interest in itself, the United States may upset properly issued Land Court decrees of long standing, the policy should be to disfavor such action in the interest of security of titles.

ground for extending the policy announced by the Supreme Court in the *Carino* case:[10] "Every presumption is and ought to be against the Government in a case like the present."[11]

Anti-Trust Law—Cement Industry—Legality of Multiple Basing-Point Pricing System—Defendant Cement Institute, cement producers, and individuals petitioned Circuit Court to set aside F. T. C.'s order to cease and desist from carrying out conspiracy to use multiple basing-point price system.[1] *Held* (one judge dissenting), order vacated; no combination to use such system has been clearly found; individual sales at prices determined according to the system violate neither Section 5 of the Federal Trade Commission Act,[2] nor Section 2 of the Clayton Act as amended by the Robinson-Patman Act.[3] *Aetna Portland Cement Co. v. Federal Trade Commission,* 157 F. 2d 533 (C. C. A. 7th, 1946).

The multiple basing-point price system has been described as one by which ". . . the delivered price at any location shall be the lowest combination of base price plus all-rail freight. Thus, if mill A has a base price of $1.50 per barrel, its delivered price at each location where it sells cement will be $1.50 per barrel plus the all-rail freight from its mill to the point of delivery, except that when a sale is made for delivery at a location at which the combination of the base-price plus all-rail freight from another mill is a lower figure, mill A uses this lower combination so that its delivered price at such location will be the same as the delivered price of the other mill."[4] Such price uniformity has long been incident to the cement industry.[5] Agreement to maintain uniform prices at fixed levels

10. Carino v. Insular Gov't of the Philippine Islands, 212 U. S. 449, 460 (1909).

11. The Fullard-Leos paid $15,000 for seven-eighths of the island area in 1922. Since the Navy will probably retain the island for its use, the practical effect of this protracted litigation will be to determine whether the defendants will be reimbursed from the Torrens assurance fund, provided to compensate for loss due to erroneously issued Land Court titles, or by eminent domain proceedings.

1. In the Matter of the Cement Institute *et al.*, 37 F. T. C. 87 (1943).

2. 38 STAT. 719 (1914), 15 U. S. C. § 45 (1940). "Unfair methods of competition in commerce . . . are hereby declared unlawful."

3. 38 STAT. 730 (1914), 15 U. S. C. § 13 (1940), as amended by 49 STAT. 1526 (1936), 15 U. S. C. § 13 (1940). "It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers . . . where the effect . . . may be . . . to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination." The court did affirm that the collection of "phantom freight" by non-base mills from their local customers was an unlawful discrimination. Instant case at 558.

4. In the Matter of the Cement Institute, 37 F. T. C. 87, 147 (1943). The Institute disseminates freight rates to all concerned. *Id.* at 162 *et seq.* Producers ascertain each others' prices through common customers and salesmen in the field. *Id.* at 178. The system has been criticized as one which promotes cross-hauling, inefficient location of plants, and the construction of excessive plant capacity, with consequent increase in expense to consumers. See Hearings before the Temporary National Economic Committee, Part 5, p. 1894.

5. See Cement Manufacturers Protective Assn. v. United States, 268 U. S. 588 (1925) [identity of prices held the result of competition and, therefore, not unlawful under the Sherman Act, 26 STAT. 209 (1890), 15 U. S. C. § 1 (1940)]; F. T. C. ANNUAL REPORT (1933) at 58. The characteristic of uniformity of different sellers' prices at any given point is to be distinguished from that of uniformity of a given seller's price

has been stated to be illegal under the Sherman Act.[6] Such agreement would then, a fortiori, appear illegal under Section 5 of the Federal Trade Commission Act.[7] Aside from the question of whether agreement to peg uniform cement prices at fixed levels had been proved before the Commission, the instant court questioned the sufficiency with which it had even been proved that the uniformity itself was the result of agreement or conspiracy between producers.[8] Such skepticism finds ample support in the fact that, the product being standardized, price uniformity appears inevitable in the industry.[9] However, even assuming that price uniformity is inevitable, the existence of an illegal agreement to maintain such uniform prices at fixed levels is nevertheless possible. Whether it was sufficiently proved is doubtful. Proof of conspiracy to adopt the instant price system does not in itself constitute proof of conspiracy to maintain fixed price levels. It is submitted that fixed price levels are not a necessary consequence of the system. Inducement for unilateral base price reduction is present to a degree approximating that which would exist were f. o. b. pricing the custom in the industry. By lowering his base price, any producer can (a) expand the area within which other producers must meet his price in order to sell, and (b) cause a corresponding contraction of the area within which competitors can profitably meet his price. Indeed, if the reduction in base price be incident to reduced cost of manufacture, the efficient producer will even succeed in (c) contracting the areas within which his competitor's base price will prevail, and (d) expanding the area within which that base price can profitably be met.[10] Can more be

---

at different points. Absorption of freight for the latter purpose has been said not to constitute discrimination within the meaning of the Clayton Act as amended. See Federal Trade Comm. v. A. E. Staley Mfg. Co., 324 U. S. 746, 757 (1945).

6. See Cement Manufacturers Protective Assn. v. United States, 268 U. S. 588, 604, 605 (1925).

7. 38 STAT. 719 (1914), 15 U. S. C. § 45 (1940). In this connection see Federal Trade Comm. v. Beech Nut Packing Co., 257 U. S. 441, 453 (1922).

8. Instant case at 557 *et seq.* The court appears to have relied *inter alia* upon the novel proposition that no conspiracy exists unless each of the alleged conspirators possesses the power to prevent each of his comrades from executing the latter's role in the common plan. See instant case at 558. Regarding proof of agreement to adhere to the instant system, the Commission appears to be on solid ground. Evidence directly proving agreement between producers is not essential to proof of conspiracy. "Singular" unanimity of action where diversity would follow from lack of agreement has been held sufficient. Interstate Circuit, Inc. v. U. S., 306 U. S. 208, 222, 223 (1939). *See also* American Tobacco Co. v. United States, 66 Sup. Ct. 1125, 1139 (1946); Eugene Dietzgen Co. v. Federal Trade Comm., 142 F. (2d) 321, 331 (C. C. A. 7th, 1944), *cert. denied*, 323 U. S. 730 (1944).

9. He who charges one cent more than his competitor, sells no cement. In the Matter of the Cement Institute, 37 F. T. C. 87, 250 (1943). Such being the situation, the reduced cost to dealers resultant at any point from any producer's decrease in mill net must be met by a corresponding cut in the price of those of his competitors who remain in the field. This appears true whether the industry sells f. o. b. or on multiple basing-points.

10. Two diagrams will serve to illustrate the point. In the first diagram, A and B are competing mills connected by rail. X, Y, and Z are points spaced along the line at $ .25 freight-rate intervals from each other, the rate both from A to X and from B to Z also being $ .25. P is a point located midway between X and Y. P_1 is a point located midway between Y and Z. *Ab initio*, A's cost is $ .75, his base price $1.00. B's cost is $ .50, his base price $ .75. Both mills adhere to the multiple basing-point price system. Accordingly, (a) B must absorb freight in order to meet A's price only at points west of P; (b) B can profitably do so at all points east of X. Conversely, (c) A must absorb freight at all points east of P, and (d) cannot profitably do so at

said of f. o. b. pricing? [11] Whether or not the defendant producers have conspired to maintain prices at fixed levels would, therefore, appear to depend less upon their mere adherence to the instant system than upon their alleged failure within the system actually to permit fluctuations in price levels.[12] The Commission's findings on this are meagre.[13]

With regard to alleged discriminatory pricing in violation of the Clayton Act, the court excused the discrimination as not having been between competing purchasers.[14] Furthermore, the discrimination was viewed as a meeting of lower prices in "good faith" [15] within the meaning of the statute's rebuttal provision.[16] The question of whether the instant

any point east of Y. (Waste through cross-hauling clearly results at points between X and Y.)

(A)	Cost plus freight	$ .75	1.00	1.12½	1.25	1.37½	1.50	1.75	(A)
(A)	Base price plus or minus freight	$1.00	1.25	1.37½	1.25	1.12½	1.00	.75	(A)
		A	X	P	Y	P_1	Z	B	
(B)		$1.00	1.25	1.37½	1.25	1.12½	1.00	.75	Base price plus or minus freight (B)
(B)		$1.50	1.25	1.12½	1.00	.87½	.75	.50	Cost plus freight (B)

Should A succeed in reducing his cost to $ .25 and his base price to $ .50, the altered sales picture would be reflected by the following diagram: (a) B must now absorb freight in order to meet A's price at all points west of P_1; (b) B cannot now profitably do so at any point west of Y. Conversely, (c) A must now absorb freight only at points east of P_1, and (d) can profitably do so at all points west of Z.

(A)	Cost plus freight	$ .25	.50	.62½	.75	.87½	1.00	1.25	(A)
(A)	Base price plus or minus freight	$ .50	.75	.87½	1.00	1.12½	1.00	.75	(A)
		A	X	P	Y	P_1	Z	B	
(B)		$ .50	.75	.87½	1.00	1.12½	1.00	.75	Base price plus or minus freight (B)
(B)		$1.50	1.25	1.12½	1.00	.87½	.75	.50	Cost plus freight (B)

11. See diagrams *supra* note 10. If A and B, *ab initio*, sold f. o. b., the situation before A reduced his costs would be such that A could not sell at any point east of P, while B could not sell at any point west of P. (Note well that cross-hauling would be nonexistent.) After A had reduced his costs, the dividing line would simply move from P to P_1, a distance precisely equal to that traversed in the hypothesized case of multiple basing-point pricing. It is true that dealers, under the multiple basing-point price system, have no choice but to accept one of several identical bids (except during levelling-out periods incident to price reductions). *See* (1946) *Basing-Point Pricing and Anti-Trust Policy*, 55 YALE L. J. 558, 565; *cf.* Milk and Ice Cream Can Institute v. Federal Trade Comm., 152 F. (2d) 478, 480, 481 (C. C. A. 7th, 1945) suggesting that price competition, though not eliminated, may thus be seriously impaired. However, it is submitted that, under f. o. b. pricing, dealers would have no choice whatever (except during similar levelling-out periods). See instant case at 557.

12. In one respect the instant system itself appears malignant. Under the system, a base mill, by raising its base price, actually drives up the price which other producers will charge within the former mill's remaining area of freightwise advantage. For authority that adherence to a system involving such price characteristics constitutes evidence of conspiracy to maintain high prices, see Fort Howard Paper Co. v. Federal Trade Comm., 156 F. (2d) 899, 906 (C. C. A. 7th, 1946).

13. See In the Matter of the Cement Institute, 37 F. T. C. 87, 253 (1943).

14. Instant case at 572. The court found it "difficult to discern how there could be any competition, for instance, between purchasers of cement in Chicago and those in Kansas City." *Quaere*, whether, all other things being equal, large scale building will not flow to the city with the cheaper cement? "It is to be observed that § 2 (a) does not require a finding that the discriminations in price have in fact had an adverse effect on competition. . . . It is enough that they 'may' have the prescribed effect." Corn Products Refining Co. v. Federal Trade Comm., 324 U. S. 726, 738 (1945).

15. Instant case at 560.

16. 38 STAT. 730 (1914), 15 U. S. C. § 13 (1940), as amended by 49 STAT. 1526 (1936), 15 U. S. C. § 13 (1940). ". . . nothing . . . shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor. . . ." The existence of

system involves discrimination thus rendered lawful has been expressly left open by the Supreme Court.[17] The same high authority has declared that no producer can rebut a charge of discrimination by proving that freight was absorbed at distant points in order to meet prices unlawfully established at such points by a competitor.[18] Rebuttal efforts in the instant case do not of necessity yield to such riposte.[19] In the last analysis, liability of each cement producer under the Clayton Act may depend upon the reasonableness of his base price.[20]

Criminal Procedure—Indictments—Evidence—Appellants were convicted in United States District Court upon an indictment charging a single general conspiracy. Evidence showed that there were at least five separate conspiracies involving twelve or more persons, and that only one of the defendants could be directly linked to all of the evidence which the prosecution was permitted to apply to each of them. On appeal *held,* conviction of the one appellant linked to all of the evidence affirmed; conviction of the other two defendants reversed on the grounds that application of all of the evidence to the case against them was an impairment of substantial rights. *Canella v. United States,* 157 F. (2d) 470 (C. C. A. 9th, 1946).

Whether a variance between indictment and proof affects the substantial rights of the parties, or is mere harmless error, within the meaning of § 269 of the United States Judicial Code [1] is a question in which courts

---

good faith is a question of fact for the Commission. Federal Trade Comm. v. A. E. Staley Mfg. Co., 324 U. S. 746, 758 (1945).

17. *See* Corn Products Refining Co. v. Federal Trade Comm., 324 U. S. 726, 735 (1945) (Company with plants both in Chicago and Kansas City calculated all delivered prices for glucose with reference to the Chicago base alone. In sustaining cease and desist order the Supreme Court intimated, at 739, that the basis for holding such system discriminatory was that "the prices . . . vary according to factors, phantom freight or freight absorption . . . unrelated to . . . cost." However, said the Court at 735, "We have no occasion to decide whether a basing-point system such as that in the Cement case is permissible under the Clayton Act, in view of the provisions of § 2 (b), permitting reductions in price in order to meet a competitor's equally low price.").

18. *Cf.* Federal Trade Commission v. A. E. Staley Mfg. Co., 324 U. S. 746, 754 (1945) (Staley Co. attempted to rebut discrimination by showing that its prices had resulted from adoption of the competitor Corn Products Refining Co.'s pricing system. *Held,* for the Commission, the Court speaking of ". . . the clear Congressional purpose not to sanction by § 2 (b) the excuse that the person charged with a violation of the law was merely adopting a similar unlawful practice of another.").

19. See diagrams *supra* note 10. The prices of B which A absorbed freight in order to meet were prices in the establishment of which B absorbed no freight. Only by circuity of reasoning may such prices of B be termed part of an unlawful system practiced by B. Reverse circuity would lead to an opposite conclusion.

20. In Federal Trade Comm. v. A. E. Staley Mfg. Co., 324 U. S. 746 (1945) the Court, at 757, denied the existence of "good faith" should a producer establish "such a high factory price as always to admit of reductions in order to meet the prices of competitors . . ." while further asserting ". . . it does not follow that respondents may never absorb freight when their factory price plus actual freight is higher than their competitors' price. . . ."

---

1. 36 STAT. 1163 (1911), as amended by 40 STAT. 1181 (1919), and 45 STAT. 54 (1928), 28 U. S. C. § 391 (Supp. 1945): ". . . On the hearing of any appeal . . . in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." See also 48 STAT. 1064 (1934), 28 U. S. C. following § 723c (1941); FED. RULES CRIM. PROC. 61: "No error in either the admission or the exclusion of evidence and no error . . . in anything

are allowed considerable latitude. Application of this principle is fairly simple where the variance is clearly "technical" in nature, as misspelling a name in the indictment. In such instances, the variance will not be held fatal so long as the indictment properly informs the defendant of the charges, and protects him against another prosecution for the same offense.[2] It is in the conspiracy cases that the courts find difficulty in applying § 269.[3] The cases do not fall into any particular pattern where the variance between indictment and proof involves a greater or lesser number of guilty parties, or more or fewer conspiracies. The decisions tend to move away from the question of variance between indictment and evidence as we trace them from the earlier cases to the more modern ones; and, although the courts speak in terms of variances, it appears that they are far more concerned with evidence alone. If the indictment charges one conspiracy, and it develops on trial that two or more existed, and that the one charged is not established to the clear exclusion of the others proven, the variance has been held to be fatal.[4] The converse of the situation in these cases is that in which two or more conspiracies are proved, one of which is identified as the single conspiracy charged in the indictment. In such a case, the variance is not fatal as against those defendants shown to be guilty of the conspiracy identified.[5] This would indicate that sufficiency of proof, rather than variance, is the chief concern of the courts. Where the variance is fatal, it is generally so held because the evidence linking one defendant to a given conspiracy is applied in such a fashion as might tend to confuse the jury into believing that all of the defendants are equally guilty. In the *Marcante* case, the court stated that "the practice of submitting to a jury, in one trial, the question of the guilt or innocence of thirty or fifty citizens, where the testimony as to each is

---

done or omitted by the court or by any of the parties is ground for . . . disturbing a judgment . . . unless refusal to take such action appears to the court inconsistent with substantial justice. The court . . . must disregard any error or defect which does not affect the substantial rights of the parties." Compare with FED. RULES CRIM. PROC. 52 (a) (1946).

2. In Bennett v. United States, 227 U. S. 333, 338 (1913) the Supreme Court said: ". . . the essential thing in the requirement of correspondence between the allegation of the name of the woman transported and the proof is that the record be in such shape as to inform the defendant of the charge and to protect her against another prosecution for the same offense." See also Valli v. United States, 94 F. (2d) 687 (C. C. A. 1st, 1938); Myers v. United States, 3 F. (2d) 379 (C. C. A. 2d, 1924); Haywood v. United States, 268 Fed. 795 (C. C. A. 7th, 1920); Harrison v. United States, 200 Fed. 662 (C. C. A. 6th, 1912).

U. S. CONST. AMEND. VI provides: ". . . the accused shall be fully and plainly informed of the character and cause of the accusation. . . ."

3. 36 STAT. 1163 (1911), as amended by 40 STAT. 1181 (1919), and 45 STAT. 54 (1928), 28 U. S. C. § 391 (Supp. 1945), UNITED STATES JUDICIAL CODE § 269, quoted *supra* note 2.

4. United States v. Siebricht, 59 F. (2d) 976 (C. C. A. 2d, 1932); Marcante v. United States, 49 F. (2d) 156 (C. C. A. 10th, 1931); United States v. Wills, 36 F. (2d) 855 (C. C. A. 3rd, 1929); Wyatt v. United States, 23 F. (2d) 791 (C. C. A. 3rd, 1928); Terry v. United States, 7 F. (2d) 28 (C. C. A. 9th, 1925); Tinsley v. United States, 43 F. (2d) 890 (C. C. A. 10th, 1931); *accord,* United States v. Beck, 118 F. (2d) 178, 182 (C. C. A. 7th, 1941); Telman v. United States, 67 F. (2d) 716, 718 (C. C. A. 10th, 1933).

5. Parnell v. United Staes, 64 F. (2d) 324 (C. C. A. 10th, 1933); *accord,* United States v. Rosenberg, 150 F. (2d) 788 (C. C. A. 2d, 1945). In Hardy v. United States, 256 Fed. 284 (C. C. A. 5th, 1919) the court said: "Failure to connect all of the defendants with the conspiracy charged is not a fatal variance as against the guilty defendants." *Cf.* United States v. Liss, 137 F. (2d) 995 (C. C. A. 2d, 1943) (Where one conspiracy was charged, and two were proven, the variance, while not fatal, was not necessarily harmless).

different, is not to be encouraged." [6] The conclusion that there is safety in numbers is tempting here.[7] Again, is it in fact the variance which worries the court in such a situation, or is it the difficulty of separating the evidence according to the activities of the individual defendants? In the instant case, the defendant Canella was the central figure in a number of conspiracies involving at least twelve people; and, although the indictment charged only one conspiracy, his conviction was affirmed. On the other hand, defendants Wyckoff and McCormac were actively engaged in only one of the conspiracies. To apply all of the evidence against Canella to the prosecution of the other two defendants was, in the opinion of the circuit court, something more than harmless error. True, it was error; but, was the evidence relating solely to that conspiracy in which Wyckoff and McCormac participated insufficient to sustain a conviction? [8] The court placed the instant case somewhere between two previous cases involving similar situations. In the first, *Berger v. United States,*[9] conviction was upheld where only some of the defendants were proved to be involved, and where one conspiracy was charged, and two were proven. But, each conspiracy established fitted the charges in the indictment and each was participated in by some of the defendants; hence the court held that one defendant, shown by the evidence to be involved in only one of the two conspiracies, had no grounds for complaint since his substantial rights were not impaired by the variance. At the opposite pole is the other case, *Kotteakos v. United States,*[10] where the defendant was indicted for a single conspiracy, and convicted upon evidence showing the involvement of at least thirty-two defendants in no less than eight separate conspiracies. The burden of defending a person connected with only one transaction involved in the complicated structure of the prosecution's evidence was deemed to be far greater than when only two transactions were involved as in the *Berger* case. "The sheer difference in numbers, both of defendants and of conspiracies proven" was the basis of the distinction made by the Supreme Court between the *Berger* and *Kotteakos* cases [11] The court, in referring to the number of persons and conspiracies involved, finds a niche for the instant case, "somewhere between the *Berger* and *Kotteakos* cases." Why this niche is large enough to accommodate only Canella, and not Wyckoff and McCormac, is difficult to see. If it is be-

6. Marcante v. United States, 49 F. (2d) 156, 158 (C. C. A. 10th, 1931), cited *supra* note 4.

7. Obviously, the courts must try to find some concrete basis for distinguishing between a variance which impairs substantial rights, and one which is harmless error. The most popular method is to weigh the number of conspiracies, the number of defendants, and the volume of evidence against the ability of the jury to understand the problem. When the combination of these elements appears too complicated for comprehension by a jury of laymen, courts are likely to find the variance fatal except as against those defendants so clearly connected to all of the evidence that their guilt cannot be doubted. *Query,* whether continued application of this method might not lead to the resolution of cases upon the basis of arithmetical progressions rather than rules of law?

8. Manton v. United States, 107 F. (2d) 834 (C. C. A. 2d, 1938) (Where co-defendant was not criminally connected with the general conspiracy, but with a separate conspiracy, it was ruled that there was not a fatal variance. Proof relating to the conspiracy with which the co-defendant was not connected could be disregarded as incompetent with respect to him, and the jury was instructed to weigh only evidence relating to the co-defendant in passing upon the question of his innocence or guilt).

9. 295 U. S. 78 (1935); *accord,* United States v. Cohen, 145 F. (2d) 82 (C. C. A. 2d, 1944), and Marino v. United States, 91 F. (2d) 691 (C. C. A. 9th, 1937). The *Berger* case is noted in (1935) 48 HARV. L. REV. 515.

10. 66 S. Ct. 1239 (1946).

11. Kotteakos v. United States, 66 S. Ct. 1239, 1246 (1946).

cause of the variance between pleading and proof, why was this variance not fatal as to Canella as well? (Or, was it because the evidence relating only to the conspiracy involving Wyckoff and McCormac was insufficient to sustain the conviction?) If the difficulty is that of confusion of evidence, the shortcut of mass prosecution should not be undertaken when the danger of backfire is so great. Why not weed out the extraneous evidence beforehand, and try each defendant individually? Or, if this is not practical, why not try the case on the same theory as that used in the *Manton* case? [12]

Criminal Procedure—New Trial—Effect of Action of Circuit Court of Appeals on Motion for New Trial—The United States petitioned in the circuit court of appeals for writs of mandamus and prohibition directed to the judges of a federal district court requiring them to vacate an order granting a new trial to accused. The order for a new trial was entered after affirmance by the circuit court of the district court's judgment of conviction and denial of motion for a new trial.[1] *Held,* petition denied.[2] Rule 33 of the Federal Rules of Criminal Procedure does not impose any time limit upon the power of the trial judge to grant a new trial upon consideration of a timely motion.[3] Once a motion for a new trial has been properly filed the district court may exercise its discretion with respect thereto regardless of affirmation on appeal of a prior ruling denying the motion. *United States v. Smith,* 156 F. (2d) 642 (C. C. A. 3rd, 1946).

Where no appeal has been taken after conviction it has been generally held that a trial judge could reconsider his ruling denying a motion for a new trial.[4] After a judgment has been affirmed or an appeal denied on

12. Manton v. United States, 107 F. (2d) 834 (C. C. A. 2d, 1938), cited *supra* note 8.

1. John Memolo, the accused, was convicted for wilfully attempting to evade income taxes, and conviction was affirmed on appeal. United States v. Memolo, 152 F. (2d) 759 (C. C. A. 3rd, 1946), *cert. denied,* 66 Sup. Ct. 902 (1946). On April 4, 1946, the circuit court issued its mandate to the district court affirming the judgment. Memolo was taken into custody. He was released April 9, 1946, on receipt of an order from the trial judge granting a new trial. The order stated that the trial judge had reconsidered the grounds urged in support of the motion and that in the interest of justice a new trial should be granted. Memolo intervened in the petition proceedings as an interested party. Instant case at 643.

2. The court was divided in its decision, two of the five judges dissenting. *Certiorari* has been granted by the Supreme Court. 15 U. S. L. WEEK 3171 (1946), Docket No. 498.

3. The trial court was governed by the new FED. RULES OF CRIM. PROC., 18 U. S. C. § 687 (1946). Rule 33 is as follows: "New Trial. The Court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period."

4. Cases upholding the power of the trial court to reconsider its ruling are: Hefton v. State, 206 Ind. 663, 190 N. E. 847 (1934); People v. Beath, 277 Mich. 473, 269 N. W. 238 (1936); Dimmel v. State, 128 Neb. 191, 258 N. W. 271 (1935). *Contra,* People v. Paysen, 123 Cal. App. 396, 11 P. (2d) 431 (1932); State v. Lubosky, 59 R. I. 493, 196 Atl. 395 (1938). In the state courts this power to reconsider is generally limited to the term at which the motion is made. Rule 45 (c) of the FED. RULES OF CRIM. PROC., provides that the expiration of a term of court in no way affects the

its merits by the appellate court it has generally been held in the federal courts that the trial court cannot thereafter entertain a motion for a new trial without the permission of the appellate court.[5] The federal rule prior to the enactment of the present rules of procedure provided that the trial court could not reconsider a motion unless new evidence was introduced [6] and that, otherwise, the trial court had no authority to entertain a motion for a new trial but must conform to the mandate in further proceedings.[7] The majority of the court in the instant case ruled that the issue before them on appeal was whether or not the trial judge had abused his discretion in denying a new trial.[8] Having found he had not, they necessarily affirmed the decision. The court said, in interpreting the Federal Rules of Criminal Procedure, that the judge was not limited as to time in exercising his discretion on the question of ordering a new trial.[9] He was, then, not disobeying a mandate but merely acting properly outside its scope.[10] That the trial court may reconsider the motion without new evidence, as in the instant case, after the appellate court has held that there was no abuse of discretion in denying a new trial, does not seem to have been contemplated by those who formulated these rules.[11] The first sentence of Rule 33, which states that "The court may grant a new trial to the defendant if required in the interests of justice," would seem to be limited by the sentences following which provide that a motion for a new trial based on the ground of "newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case." [12] The words of the first sentence, when considered with those following, do not appear to confer independent power upon the courts but rather to establish a standard for their guidance in granting new trials upon proper motions. Furthermore, the rules contain no provision authorizing a court to grant a new trial after a remand except on the ground

power of a court to do any act in a criminal proceeding. Some courts have held that a trial court cannot set aside a sentence and appoint a new trial after the defendant has been committed to prison, regardless of error at the trial. *See* People *ex rel.* Lucey v. Turney, 273 Ill. 546, 113 N. E. 105 (1916); Commonwealth v. Sacco, 261 Mass. 12, 158 N. E. 167, *cert. denied*, 275 U. S. 574 (1927).

5. *See* Murphy v. City of Orlando, 94 F. (2d) 426 (C. C. A. 5th, 1938); Flowers v. United States, 86 F. (2d) 79 (C. C. A. 6th, 1936); Swartz v. Kaplan, 50 F. (2d) 947 (App. D. C. 1931). For an exhaustive treatment of the general subject see Note (1942) 139 A. L. R. 340.

6. Rule 2 of the old FED. RULES OF CRIM. PROC., 18 U. S. C. § 688 (1934) provided that ". . . a motion for a new trial solely upon the ground of newly discovered evidence may be made within sixty (60) days after final judgment . . . unless an appeal has been taken and in that event the trial court may entertain the motion only on remand of the case by the appellate court for that purpose, and such remand may be made at any time before final judgment."

7. Sprague v. Ticonic National Bank, 307 U. S. 161 (1939); Mays v. Burgess, 152 F. (2d) 123 (App. D. C. 1945).

8. Instant case at 646. In Crenshaw v. United States, 116 F. (2d) 737 (C. C. A. 6th, 1940), it was held that "the denial of a motion for a new trial is not reviewable except for an error of law or a clear abuse of discretion."

9. Instant case at 644.

10. *See* Sprague v. Ticonic National Bank, 307 U. S. 161 (1939), wherein it was held that a mandate is controlling as to matters within its compass, but on the remand a lower court is free as to other issues. Also *see In re* Sanford Fork and Tool Co., 160 U. S. 247 (1895), and *Ex parte* French, 91 U. S. 423 (1875).

11. There is no doubt that a trial judge should realize better than anyone else whether or not a new trial should be granted in the interests of justice. The question presented here is whether he should be able to reconsider the same motion after an appeal has been taken and judgment has been affirmed, the appellate court having ruled that there had been no abuse of discretion in denying a motion for a new trial.

12. Note 3 *supra*.

of newly discovered evidence.[13] It does not seem to have been intended that the district court would have power to exercise its discretion in ordering a new trial regardless of an appeal.[14] To grant a trial judge of a district court this power would seem to be a revolutionary reform, in that the trial judge in effect would be given appellate power superior to both the circuit courts and the Supreme Court.[15] The instant decision, therefore, does not appear to be consistent with a reasonable interpretation of Rule 33. To give proper effect to the intentions of those who formulated the rule, its application should be limited to those situations where no appeal has been taken.[16]

Enemy Alien—Termination of War—Unconditional Surrender—A German national, interned as an enemy alien since 1939 by order of the Executive Government of Great Britain acting within its discretionary authority on behalf of the King, applied for a writ of *habeas corpus* after Germany's unconditional surrender in 1945 claiming he was no longer an enemy alien because Germany, having no independent government, had ceased to exist as a State and could not, therefore, be at war with Great Britain. A certificate from the Foreign Secretary was produced, which stated, *inter alia,* that a state of war still existed between his Majesty and Germany.[1] *Held,* his Majesty's pronouncement that Great Britain was

13. FED. RULES OF CRIM. PROC., 18 U. S. C. § 687 (1946).

14. Mr. George H. Dession, a member of the United States Supreme Court Advisory Committee on Rules of Criminal Procedure, stated that, "The rules work no revolutionary reforms. Some restate existing law. Others involve substantial changes. By and large those changes consist in adoption of modern practices developed in the more progressive states and in England. A few are new. The prime values sought to be served throughout were, as declared in Rule 2, 'simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." Dession, *The New Federal Rules of Criminal Procedure:1* (1946) 55 YALE L. J. 694, 699.

15. The trial judge, although the appellate court had decided there was no abuse of discretion, could always grant a new trial in the "interests of justice." The power of the appellate court would be nullified, and its determinations rendered worthless.

16. Query: Did those who formulated Rule 33 intend that the power granted a judge exist indefinitely where there was no appeal? Judge Biggs, in his dissenting opinion of the instant case, footnote 6, points out that it might be argued plausibly that ". . . no appeal being taken, a trial judge might reconsider a motion for a new trial filed by a convicted defendant and grant it after the defendant had served, let us say, three years of a five year sentence. Under such circumstances it might be necessary to hold that the source of the motion was spent after the lapse of a reasonable time. . . ."

1. The certificate from Mr. Bevin, Secretary of State for Foreign Affairs, dated April 2, 1946, states as follows:

"(1) That under par. 5 of the preamble to the declaration, dated June 5, 1945, of the unconditional surrender of Germany, the Governments of the United Kingdom, the United States of America, the Union of Socialist Soviet Republics, and France assumed 'supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command, and any State, municipal or local government or authority. The assumption, for the purposes stated above, of the said authority and powers does not effect the annexation of Germany.'

"(2) That, in consequence of this declaration, Germany still exists as a State and German nationality as a nationality, but the Allied Control Commission are the agency through which the government of Germany is carried on.

"(3) That, no treaty of peace or declaration by the Allied Powers having been made terminating the state of war with Germany, his Majesty is still in a state of war with Germany, although, as provided in the declaration of surrender, all active hostilities have ceased."

still at war was conclusive as to questions of law or fact and the state of war could only be ended by his Majesty's making peace; a writ of *habeas corpus* would not lie at the instance of an interned enemy alien. *Rex v. Bottrill; ex parte Kuechenmeister,* 62 T. L. R. 570 (Ct. of App. 1946).

The great weight of American authority coincides with the instant case in holding that it is the province of the Government and not the Courts to determine when a state of war has terminated.[2] A mere cessation of hostilities[3] is generally incapable of effecting the legal consequences[4] that ordinarily follow official recognition of war's end by an executive proclamation[5] or a duly ratified treaty of peace.[6] In the United

2. Bowles v. Ormesher Bros., 65 F. Supp. 791 (D. C. D. Neb. 1946); Dubuisson v. Simmons, 26 So. (2d) 438 (Fla. 1946); Conley, *et al.* v. Sup'rs Calhoun Co., 2 W. Va. 416 (1868). *See* Kneeland-Bigelow Co. v. Michigan Cent. R. Co., 207 Mich. 546, 550, 174 N. W. 605, 608 (1919), "The existence of war and the restoration of peace are determined by action of the legislative, supplemented by the executive, department of government. Such determination is conclusive and binding upon the courts." COOLEY, CONSTITUTIONAL LAW (4th ed. 1931) p. 180: "Over political questions the courts have no authority, but must accept the determination of the political departments of the government as conclusive. Such are the questions of the existence of war, the restoration of peace. . . ." *Cf.* Nelson v. Manning, 53 Ala. 549, 552 (1875), where the court intimated that for purposes of enforcing a promissory note, conditioned for payment after "peace is concluded and declared . . .," they could regard the cessation of hostilities as having terminated the Civil War without looking to decisions of the political department of the government.

3. Kahn v. Anderson, 255 U. S. 1 (1920) (prohibition in 92nd Article of War of trial by court-martial for murder "in time of peace," held not invoked by cessation of hostilities before officially declared "peace"); Hamilton v. Kentucky Distilleries Co., 251 U. S. 146 (1919) (application of Wartime Prohibition Act); Hijo v. United States, 194 U. S. 315 (1904) (Cuban vessel seized by the United States for use during Spanish-American War); Lloyd v. Bowring, 36 T. L. R. 397 (K. B. 1920) (contract to pay a given sum if peace not declared by specified date).

4. In 3 HYDE, INTERNATIONAL LAW (2d rev. ed. 1945) § 921, the following effects of termination of war resulting from principles of international law, are listed: Subsequent warlike acts become illegal; obligation arises to remove forces from adversary's territory, to restore his prisoners of war, and to release interned enemy aliens; diplomatic relations may be resumed; the obligation under contracts between nationals of the former belligerents that had been suspended by war, is revived; impediments barring maintenance of actions by persons previously enemy aliens are removed; communication of intelligence and commercial intercourse between territories of the former belligerents becomes permissible.

Illustrative of actions wherein running of the statute of limitations was suspended until end of the war because the parties were nationals of opposing belligerents, are: The Protector, 12 Wall. 700 (U. S. 1871) (time for appealing judgment); Koswig v. Ellison & Sons, 89 Pa. Super. 208 (1926) (action on contract for goods sold); Siplyak v. Davis, 276 Pa. 49, 119 Atl. 745 (1923) (action for damages under workmen's compensation statute).

Concerning removal of enemy status by termination of war see Zimmerman v. Hicks, 7 F. (2d) 443 (C. C. A. 2d, 1925); Clemens v. Perry, 51 S. W. (2d) 267 (Tex. Comm. App. 1932).

See Adams, *Legal Effects of Termination of War* (1945) 275 INS. L. J. 663.

5. The American Civil War was generally recognized as having terminated upon presidential proclamation that the rebellion had been suppressed in the several southern states: McElrath v. United States, 102 U. S. 426 (1880); The Protector, 12 Wall. 700 (U. S. 1871); United States v. Anderson, 9 Wall. 56 (U. S. 1869).

6. Ratification in April 1899 of the treaty with Spain ended the Spanish-American War: Herrera Nephews v. United States, 43 Ct. Cl. 430 (1908); Hijo v. United States, 194 U. S. 315 (1904). For purposes of municipal law, World War I was generally considered to have ended with the President's approval of Congressional Proclamation of July 2, 1921 (later reinforced by the treaty): Zimmerman v. Hicks, 7 F. (2d) 443 (C. C. A. 2d, 1925); Clemens v. Perry, 51 S. W. (2d) 267 (Tex. Comm. App. 1932); British courts held the date to be that of exchange of ratifications between belligerents: Kotzias v. Tyser, 36 T. L. R. 194 (K. B. 1920); Lloyd v. Bowring, 36 T. L. R. 397 (K. B. 1920).

States, delay in preparing a treaty and bitter disagreement between President Wilson and the Senate deferred formal termination of World War I for almost three years from the cessation of hostilities by armistice.[7] During that time there was some relaxation of restrictions governing intercourse and communication with the enemy[8] and a few courts decided to accept less formal statements by the President as evidence of the war's end for limited purposes.[9] The question of whether World War II was "terminated" by official Allied announcements of unconditional surrender of the former Axis nations,[10] has already inspired considerable litigation;[11] while the wranglings of the victorious powers postpone final disposition of treaty matters, many more cases of this type may be anticipated. How shall the courts treat them? Can the traditional test of looking only to a treaty or formal executive proclamation properly be applied? Obviously, the situation today differs materially from that which followed the 1918 Armistice. The fact that the vanquished powers surrendered unconditionally merits more than passing attention. There is some basis in international law for construing the unconditional surrender instrument itself as essentially a treaty, whereby the surrendering nation agrees to both military and political capitulation, thus effectively terminating the war.[12] Such reasoning is particularly applicable to the case of Germany, as distinguished from the other Axis states,[13] for she

7. The Armistice was effective November 11, 1918. In May of 1920 the President vetoed a joint congressional resolution pronouncing the war at an end. On March 3, 1921, his last day in office, President Wilson approved a joint resolution naming that day as the termination date but excepting certain statutes. Finally on July 2, 1921, a broader resolution declaring the war "at an end" was approved by President Harding and when ratifications of the Treaty were exchanged with Germany on November 11, 1921, the President proclaimed that the war had ended on July 2nd of that year. *See* Hudson, *The Duration of the War Between the United States and Germany* (1926) 39 HARV. L. REV. 1020.

8. *See* 3 HYDE, *op. cit. supra* note 4, at 2388; Hudson, *supra* note 7, at 1032.

9. United States v. Hicks, 256 Fed. 707 (W. D. Ky. 1919), where an act, authorizing suppression of disorderly houses around encampments "during the present war" was held inapplicable to an offence committed after November 11, 1918. On that date President Wilson, before a joint session of Congress had said, "The war thus comes to an end; for, having accepted these terms of armistice, it will be impossible for the German command to renew it." In United States v. Switzer, 6 Alaska 223 (1920), the court looked to the same presidential statement and decided that a 1917 statute making it a criminal offence to utter language disrespectful and contemptuous of the flag in time of war, was inapplicable to utterances made after November 11, 1918. Jennings, J., said: ". . . it is idle to contend that simply because no treaty has been signed, the country is still at war."

10. Such statements as the following have been considered: The United Nations' declaration at Berlin, June 5, 1945, announcing Germany's unconditional surrender (U. S. NAVAL WAR COLLEGE, INTERNATIONAL LAW DOCUMENTS, 1944-45); the proclamation by President Truman on May 8, 1945, to the effect that the allied armies had wrung from Germany a final and unconditional surrender and a similar proclamation on August 16, 1945, relating to the Japanese surrender (U. S. NAVAL WAR COLLEGE, INTERNATIONAL LAW DOCUMENTS, 1944-45). In his message to Congress on September 6, 1945, the President said, *inter alia*, "The end of the war came more swiftly than most of us anticipated" (CONGRESSIONAL RECORD of that day).

11. Citizens Protective League v. Byrnes, 64 F. Supp. 233 (D. D. C. 1946) (action to restrain deportation of German nationals); Bowles v. Soverinsky, 65 F. Supp. 808 (E. D. Mich. 1946) (violation of Price Control Act); The Elqui, 62 F. Supp. 764 (E. D. N. Y. 1945), noted in (1946) 20 TULANE L. REV. 440 (Chilean retention of Danish vessel requisitioned for the "duration of the present European war"); *In re* Cooper [1946] Ch. 109, 62 T. L. R. 65 (substitute provisions in will conditioned on heirs surviving "present war").

12. *See* Balling, *Unconditional Surrender and a Unilateral Declaration of Peace* (1945) 39 AM. POL. SCI. REV. 474; (1945) 89 SOL. J. 484.

13. (1945) 89 SOL. J. 322, 323, points out that the case of Germany is different from that of Italy and the European satellites of the Axis, because each of those states

has been completely stripped of independent sovereignty and her territory carved into four separate governmental units controlled by Allied commanders. Consequently there appears to be no German "State" with which we might arrange a formal treaty of peace, nor any responsible functionaries to represent her. The solution, it is submitted, to the problem of establishing a date of termination of World War II for purposes of municipal law, may well lie with the legislature. New Zealand has, by legislative action,[14] adopted a policy which leaves to the discretion of the courts the proper construction of war-termination phrases in contracts, deeds and other instruments. As early as September 7, 1945, President Truman submitted to Congress an opinion of the Attorney General suggesting measures that might be taken with regard to terminating wartime statutes.[15] Similar action might well be directed toward removing wartime limitations on private contractual relationships.

Insurance—Disability Clause—Alcoholism—Plaintiff was the beneficiary of two life insurance policies issued to her husband, which provided for waiver of premiums and payment of monthly benefits in the event that the insured became totally and permanently disabled. A clause provided that "disability payments shall not be granted if disability is the result of self-inflicted injury." The husband began drinking excessively in 1937 and became totally disabled due to chronic alcoholism in 1942. The beneficiary sued the insurance company for the waiver and benefits under the disability clause. The trial court, in a non-jury trial, gave judgment for the insurance company on the general ground that chronic alcoholism is a self-inflicted injury. Upon appeal *held* affirmed.[1] *Lynch v. Mutual Life Insurance Co. of N. Y.*, 159 Pa. Super. 488, 48A. (2d) 877 (1946).[2]

---

has retained a government with manifest legal continuity since pre-war days, so that there exists a potential contracting party with whom an old-fashioned treaty of peace may be concluded. *See* 3 HYDE, *op. cit. supra* note 4, at 2391, to the effect that recourse to a treaty of peace as a method of terminating war implies in the case of each contracting party a continuance of State life as well as a freedom of power to exact or yield such terms as it deems expedient.

14. As reported in (1945) 21 NEW ZEALAND L. J. 197, § 16 of the FINANCE ACT of 1945 provides that for purposes of any act or regulation referring to the duration or termination of the present war, the war shall be deemed to exist until a date to be named as the date of termination of the war by the Governor-General. It should be noted that this act does not mention contracts, deeds, or other instruments. *Cf.* TERMINATION OF THE PRESENT WAR (DEFINITION) ACT (8 & 9 GEO. V, c. 59) adopted by Great Britain in 1918. This gave his Majesty in Council the power to set a date that would be treated as the date of termination of any statutes as well as any contracts, deeds, or other instruments (except where the context otherwise required) referring in any manner to the termination of the present war.

15. 40 OP. ATT'Y GEN. 100 (September 1, 1945). This opinion considered some 300 statutes, regulations, articles of war, etc., and divided them into about 30 categories with respect to time and method of their termination, some to end on specified dates, others only upon restoration of a formal state of peace, and still others upon a formal proclamation of the President as to the cessation of hostilities. On December 31, 1946, President Truman did officially proclaim the cessation of World War II hostilities, which resulted in the immediate cancellation of 20 wartime statutes and fixed the expiration date of 33 others. This declaration, however, specifically pointed out that a state of war still exists. See The Phila. Legal Intelligencer, Jan. 2, 1947, p. 1, col. 5.

---

1. The court stated that, without holding that chronic alcoholism is as a matter of law a self-inflicted injury, the evidence justified the conclusion that in this case the insured's liability was self-inflicted. Instant case at 494, 48 A. (2d) at 879 (1946).

2. *Accord,* Gaines v. Sun Life Assurance Co., 306 Mich. 192, 10 N. W. (2d) 823 (1943). *Contra,* N. Y. Life Ins. Co. v. Riggins, 178 Okla. 36, 61 P. (2d) 543 (1936).

There are indications in the opinion that the court interpreted the words "self-inflicted injury" as an injury resulting from an act done by the insured to himself of his own free will, knowing or having reason to know that there is a *possibility* that harm may result.[3] This interpretation is, however, so at odds with the reasonable meaning of the term[4] that it is fair to conclude that the court followed a different interpretation: that it is an injury similarly resulting, where the insured acts knowing or having reason to know that there is a *high probability* that substantial harm will result.[5] The court, placing emphasis upon the fact that chronic alcoholism inevitably results from continued excessive drinking, decided *arguendo* that chronic alcoholism resulting from "voluntary" intoxication is a self-inflicted injury even under the latter interpretation. The court observed that "all men . . . know only too well the baneful and inevitable consequences of intemperate and unrestrained indulgence in drink," that the insured "discovered his vulnerability long before he eventually succumbed," and that he nevertheless deliberately continued to drink thereafter.[6] Assuming these observations to be correct, the necessary elements of the interpretation apparently adopted by the court—high probability of harm, knowledge thereof, and an act done of the insured's own free will—were present in this instance.

The observations quoted above seem, however, to be of doubtful validity. Statistics show that it is neither inevitable, nor even probable, that an excessive drinker will become a chronic alcoholic.[7] Thus in any case involving excessive drinking, and therefore in the instant case, it would

3. "The policies provide protection against the insured's misfortunes, not his misdeeds. A misdeed (is) . . . wilful identification of one's self with what is harmful." Instant case at 494, 48 A. (2d) at 879 (1946). The court might have adopted an even stricter interpretation of "self-inflicted injury," *i. e.*, an injury resulting from any act done by the insured to himself under any circumstances. However, the defendant, trial court and appellate court all rejected this interpretation as too inclusive, and excluded injury resulting from accident (drinking poison by mistake) or fraud or duress on the part of another. *See* instant case at 492, 494, 48 A. (2d) at 878, 879 (1946); Record, instant case at 137a, 138a; Brief for Appellee, instant case at 12, 13. On the other hand, the court might have adopted a more liberal interpretation, *i. e.*, that it is an injury resulting where the insured did the act intending that the injury should result. *Cf.* N. Y. Life Ins. Co. v. Riggins, 178 Okla. 36, 61 P. (2d) 543 (1936) (injury was not self-inflicted because, while insured intended to drink, he did not intend to become an alcoholic). The disadvantages of the latter interpretation are obvious. Recently there have been cases of injury caused by the playing of "Russian Poker," *i. e.*, where a person loads one chamber of a revolver, spins the cylinder, points the gun at his head and pulls the trigger. If injury results (and the odds are 1 in 6 that it will) it seems highly doubtful that a court would permit recovery merely because the insured did not intend the injurious result.

4. This interpretation seems clearly at odds with the purpose of such insurance policies; under it, injury resulting from insured's voluntarily driving a car with due care, whittling with a knife, or even going out in the rain, would be self-inflicted because he had reason to know of the possibility that harm might result.

5. The court expressed this interpretation by analogy to the definition of "wantonness" contained in RESTATEMENT, TORTS (1934) § 500. Instant case at 492, 48 A. (2d) at 878 (1946). The decision in other alcoholism cases has centered on this interpretation. *Cf.* New England Mutual Life Ins. Co. v. Hurst, 174 Md. 596, 199 Atl. 822 (1938) (injury was not self-inflicted because while insured intended to drink he did not know of the potential harm therein); Gaines v. Sun Life Assurance Co., 306 Mich. 192, 10 N. W. (2d) 823 (1943) (injury was self-inflicted because it is common knowledge that continual excessive drinking may lead to chronic alcoholism).

6. Instant case at 493, 48 A. (2d) at 879 (1946).

7. Of the 100 million persons of drinking age in the United States, 50 million use alcoholic beverages; of these, 3 million become excessive drinkers; and of these 750,000 become chronic alcoholics. By excessive drinkers is meant those persons who drink to an extent which exposes them to the risk of becoming compulsive drinkers and developing chronic alcoholism. JELLINEK, THE PROBLEMS OF ALCOHOL, in ALCOHOL, SCIENCE AND SOCIETY (Quarterly Journal of Studies on Alcohol, 1945) 23. Thus

be difficult to find the requisite high probability of harm or a knowledge thereof. The court's determination that the insured acted of his own free will in continuing to drink excessively is equally questionable. The conclusion that he could have stopped drinking was not based upon any finding by the lower court, but upon the testimony of one of defendant's witnesses at the trial [8] and upon the court's belief that ordinarily intoxication is voluntary—"they may pass into that state when they will." [9] But prevailing psychiatric opinion holds that in many cases of chronic alcoholism the compulsion to drink springs originally from a psychological illness within the drinker,[10] that this compulsion may exist in him before he realizes it,[11] and that he may be driven to alcohol regardless of an earnest desire to stop drinking.[12] This view negatives any general conclusion that excessive drinkers ordinarily "pass into that state when they will," and in fact supports the counter view that alcoholism is involuntary rather than the result of free will in a large number of cases—and very possibly in the instant case.

Since the medical and sociological data outlined above demonstrate that there is not a high probability that an excessive drinker will become a chronic alcoholic and that in many instances excessive drinking is not in fact the result of the exercise of a free will, and since evidence concerning the insured's ability to stop drinking was exceedingly scanty, it is believed that the case should have been remanded to the lower court for further testimony and for a finding by that court concerning the insured's ability to stop drinking. In any event, it is suggested that in light of the medical view of chronic alcoholism, the general approach and language of the court in the instant case should not be applied to many cases involving chronic alcoholism as a "self-inflicted injury." [13]

---

only 6 per cent. of those who drink, and 25 per cent. of those who drink excessively become chronic alcoholics.

8. This witness further testified, however, that in his opinion *all* alcoholics could stop drinking if they "made up their mind." Record, instant case at 109a. For contrary views see notes 10, 11, and 12 *infra*. The question as to insured's ability to stop drinking was not asked of plaintiff's witnesses. Had they testified upon this point the conclusion might well have been different. The lower court found that the insured was treated for alcoholism in various hospitals from 1940 to 1942. Record, instant case at 135a. But "ordinarily one cannot convince the incipient alcoholic that he is one." JELLINEK, *op. cit. supra* note 7, at 28.

9. Keenan v. Commonwealth, 44 Pa. 55, 58, 84 Am. Dec. 414, 416 (1863).

10. *See* JELLINEK, *op. cit. supra* note 7, at 25-26; SMITH AND HELWIG, LIQUOR THE SERVANT OF MAN (1940) 183-184; CARROLL, WHAT PRICE ALCOHOL? (1941) 9; MAYER, ALCOHOL AS A PSYCHIATRIC PROBLEM, in ALCOHOL AND MAN (Emerson, editor, 1943) 290; and SELIGER, ALCOHOLICS ARE SICK PEOPLE (1945) 2-4. And *see* Bailey v. Life Ins. Co. of Va., 222 N. C. 716, 724, 24 S. E. (2d) 614, 619 (1943), wherein the Court said: ". . . plaintiff's evidence tends to show that . . . from a scientific point of view, whiskey-drinking is not a disease but a symptom of some disease which causes whiskey-drinking."

11. This is sometimes known as "psychic allergy" to alcohol. *See* STRECKER AND CHAMBERS, ALCOHOL—ONE MAN'S MEAT (1938) 37; CARROLL, *op. cit. supra* note 10, at 122; MAYER, *op. cit. supra* note 10, at 293.

12. *See* New England Life Ins. Co. v. Hurst, 174 Md. 596, 199 Atl. 822 (1938); MAYER, *op. cit. supra* note 10, at 288. Also the following: "We think of alcoholism as an illness; an obsession of the mind coupled to an 'allergy' of the body. It is a shattering sickness—physical, emotional and spiritual. How to expel the obsession that compels us to drink against our will is the problem of every alcoholic." ALCOHOLICS ANONYMOUS (The Alcoholic Foundation, 1943) 1.

13. It is submitted that the soundest interpretation of "self-inflicted injury" is one involving a variable standard, based upon three elements—the social utility of the act done, the probability of harm, and the seriousness of the potential harm. A few examples of the operation of such a standard follow:

(a) A, afflicted with heart disease, sees his wife drowning a mile from shore. He swims to rescue her, permanently injuring himself thereby. Recovery should

Taxation—Family Partnership—Allocation of Income—Taxpayer and wife executed an agreement providing for an equal distribution of profits from the joint operation of an automobile agency previously operated by taxpayer alone. Taxpayer contributed $12,543 capital and continued to manage the business. Wife contributed $4,900, but exercised no substantial control and rendered no vital services. Taxpayer made a gift to wife of 50 per cent of the business. *Held,*[1] not a bona fide partnership for tax purposes, but a "business arrangement" in which 75 per cent of the profits were attributable to the personal services of the taxpayer, and therefore taxable to him; 25 per cent of the profits were attributable to capital, and therefore taxable to the parties in proportion to their respective capital contributions. *Claire L. Canfield,* 7 T. C. No. 107, Docket No. 5864, Oct. 11, 1946.[2]

This decision is distinctive in that, while refusing to recognize a family partnership agreement for tax purposes,[3] it disallows the Commissioner's contention that the entire income be taxed to the husband [4] and finds a "business arrangement" in which the agreement between the parties will not dictate the basis upon which the profits of the business are to be divided. In the past, the Tax Court has refused to apply the allocation of income theory to family partnership cases in which the court has recognized the partnership as such, holding that the partnership agree-

be permitted. Though the probability of serious injury to the insured was high, the social utility of the act outweighs these factors.

(b) B plays "Russian Poker" on a dare (note 3 *supra*) and is seriously injured. Recovery should be denied; though the probability of harm is only 1 in 6, the seriousness of the potential injury is obvious and the social utility of the act is nil.

(c) C reaches into a fire to recover a document which is about to burn; he burns his hand thereby. Recovery should be permitted; though the probability of injury was high, the probability of serious harm was small, and C's act was socially useful, or at least excusable.

As applied to chronic alcoholism resulting from continued excessive drinking recovery would usually be denied because though the probability of harm is not great, the potential seriousness of the harm is obvious and the conduct is socially undesirable. Recovery should only be denied, however, provided it is found that the insured's excessive drinking was in fact of his own free will, a situation which will not be true in many alcoholism cases.

1. Four judges dissented on the grounds that the pleadings raised only the issue of whether the husband and wife were partners in the business during the taxable period, and that if allocation was adopted, the wife was entitled to 4,900/17,443 of the whole, in the absence of an agreement that the husband should first be paid for his services to the partnership.

2. The original decision in the instant case, based on the same findings of fact, was promulgated in 7 T. C. No. 18, Docket No. 5864, June 13, 1946. The judgment was that, of the entire income, 80% was taxable to the husband and 20% to the wife. The Presiding Judge of the Tax Court, on July 1, 1946, ordered this original opinion reviewed by the court under INT. REV. CODE § 1118 (b).

3. INT. REV. CODE § 3796 defines the terms "partnership" and "partner." INT. REV. CODE §§ 181, 182 provide: ". . . Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. . . . In computing the net income of each partner, he shall include . . . His distributive share of the ordinary net income or the ordinary net loss of the partnership. . . ." For the requirements necessary for a valid family partnership, see Commissioner of Internal Revenue v. Tower, 66 Sup. Ct. 532, 537 (1946); Lusthaus v. Commissioner of Internal Revenue, 66 Sup. Ct. 539 (1946); (1946) 46 COL. L. REV. 677; (1946) 32 VA. L. REV. 659; 464 C. C. H. 1946 Fed. Tax. Serv. ¶ 8603.

4. "The controlling question is whether the profits taxed are those of the petitioner, and not how they are characterized by the Board or the parties." Champlin v. Commissioner of Internal Revenue, 71 F. (2d) 23, 26 (C. C. A. 10th, 1934). *Accord,* Berkowitz v. Commissioner, 108 F. (2d) 319 (C. C. A. 3rd, 1939); H. D. Webster, 4 T. C. 1169 (1945).

ment itself should determine the distribution of the profits.[5] The allocation of income theory has been applied but generally not in litigation in which validity of a family partnership was squarely in issue.[6] The instant case bases its conclusion that income should be allocated on the oft-stated principle that income is to be taxed to those who earn or otherwise create the right to receive it and enjoy the benefit of it when paid.[7] Capital contributed by the wife earned a proportionate share of the profits produced by capital, and consequently such proportionate share should be taxed to her. But the bulk of the income of the business was produced by the personal services of the taxpayer, and therefore, despite his purported gift to the wife of 50 per cent of the assets, their agreement for equal distribution of the profits "lacked the necessary reality to determine by its terms the taxability of income earned," and is rejected.[8] In its stead, a "business arrangement" is created, in which a reasonable distribution of the profits is recognized. It is submitted, however, that any attempted distinction between a "partnership" and a "business arrangement" is a nebulous one.[9] In reality, the partnership is recognized to the extent that a reasonable division of the profits produced by capital will be countenanced. It is a compromise solution of partial recognition;[10] to give complete effect to the agreement of the parties appeared unreason-

5. In William J. Hirsch, 454 C. C. H. 1945 Fed Tax. Serv. ¶7209 (M) (where the wife contributed capital, skill, and services, and the agreement provided for an equal division of profits), the Commissioner conceded the validity of the partnership but determined that the earnings of the parties should be apportioned to the amount of capital and the value of their separate services. The court in recognizing the partnership, rejected this view, and held that in the absence of agreement to the contrary, partnership profits are to be shared equally; that there is a presumption that each partner devotes all his time to the business and the court will not attempt to evaluate the services of each partner. *Accord,* N. H. Hazlewood, 29 B. T. A. 595 (1933); Harriet A. Taylor, 2 B. T. A. 1159 (1925). *Cf.* Francis A. Parker, 6 T. C. No. 125, p. 11, May 7, 1946: "The proportion (80%-20%) agreed upon between them seems to be entirely fair and reasonable. We see no reason whatever that we should disturb it."

6. Max German, 2 T. C. 474 (1943); *cf.* Berkowitz v. Commissioner, 108 F. (2d) 319 (C. C. A. 3rd, 1939); McKee v. Alexander, 48 F. (2d) 838 (W. D. Okla., 1931); Alfred Hafner, 31 B. T. A. 338 (1934); First National Bank of Duluth, Special Adm'r, Estate of Thomas A. Merritt, 13 B. T. A. 1096 (1928). *See* William J. Hirsh, 454 C. C. H. 1945 Fed. Tax. Serv. ¶7209 (M) (where the Court distinguishes the *German* case); Polisher, *The Family Partnership* (1945) 23 TAX MAG. 46, 49 (criticising allocation in the *German* case).

7. "The dominant purpose of the revenue laws is the taxation of income to those who earn or otherwise create the right to enjoy the benefit of it when paid." Helvering v. Horst, 311 U. S. 112, 119 (1940); *accord,* Commissioner v. Tower, 66 Sup. Ct. 532 (1946); Harrison v. Schaffner, 312 U. S. 579 (1941); Helvering v. Clifford, 309 U. S. 331 (1940); Beazley v. Allen, 61 F. Supp. 929 (N. D. Ga., 1945); *cf.* Lucas v. Earle, 281 U. S. 111 (1930).

8. ". . . taxation is an eminently practical matter; . . . income is normally taxable to him who earns it; and . . . agreements between members of an intimate group are to be closely scrutinized and tested in the light of reality to the end that realism and not mere form shall fix tax consequences. . . ." Instant case, 7 T. C. No. 107.

9. It would seem that this distinction is attempted in order to avoid the holding of the *Hirsh* case, 454 C. C. H. 1945 Fed. Tax. Serv. ¶7209 (M). *See* 464 C. C. H. 1946 Fed. Tax. Serv. ¶8603 (criticising recognition of a "business arrangement").

10. This theory was advanced by Barkan, *Family Partnerships under the Income Tax Law* (1945) 44 MICH. L. REV. 179, 210: "If the partnership derives income from capital and personal services, the partnership should be recognized only to the extent of the contribution by the alleged partner; if the partner contributes capital, he should be permitted to share in the income produced by capital. He ought to receive only such portion of that income as his contribution bore to the total amount of capital invested." *Cf.* Vernon, *Taxation of the Income of Family Partnerships* (1945) 59 HARV. L. REV. 209, 266. *But see* Polisher, *supra* note 6, at 49; cases cited *supra* note 5.

able in view of the very nature of the business; to deny all recognition to the association not only seemed unreasonable in view of the wife's undoubted contribution, but also might well deal a death blow to family partnerships in general.[11] The decision, then, is unquestionably a victory for the taxpayer. Partial recognition is certainly to be preferred over complete rejection,[12] the previous fate of family partnerships that failed to stand up under the close scrutiny of the court.[13] As such, the instant case should encourage family partnerships. However, in pointing up the court's evident partiality toward reasonable division of the profits, it may make for the adoption of such reasonable provisions by the parties themselves. On the other hand, the decision will undoubtedly create considerable administrative difficulty,[14] and may well lead to increased litigation in the already troubled field of family partnerships.[15] Only the application of the theory of the instant case to other factual situations, as, for example, where the wife has contributed services, or both capital and services, will supply the answer to these vexing problems.

Trusts—Preferred Stock—Apportionment of Dividends Between Life Tenant and Remainderman—A testamentary trust contained cumulative preferred stock for the benefit of a life tenant, remainder over. Unpaid dividends had accumulated, and, for the express purpose of extinguishing these arrearages, the corporation effected a merger and recapitalization, whereby each share of old preferred stock was exchanged for one share of new cumulative preferred stock[1] plus one and one-quarter shares of new no-par common stock. Both the new and the old

11. If the income from a *bona fide* contribution of capital by the wife is taxed to the husband, merely because the other attributes of the association do not add up to a partnership, it is hard to see how family partnerships could survive. It would be, in effect, a denial for tax purposes of the wife's right to invest her own funds in a family enterprise. Such a holding would seem clearly in contravention of previous decisions on family enterprises. *See* Commissioner v. Tower, 66 Sup. Ct. 532, 537 (1946) ("There can be no question that a wife and a husband may, under certain circumstances, become partners for tax, as for other purposes"); Gregory v. Helvering, 293 U. S. 465, 469 (1934) ("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"). See also Paul, *The Partnership in Tax Avoidance* (1945) 13 GEO. WASH. L. REV. 121, digested in (1945) 23 TAX MAG. 532, 533; Olsen, *Family Partnerships* (1946) 24 TAX MAG. 743, 745.

12. See, *e. g.*, Abe Schreiber *et al.*, 6 T. C. No. 92, Docket Nos. 3737, 3738, April 12, 1946; Alexander Jarvis, 464 C. C. H. 1946 Fed. Tax. Serv. ¶ 7519 (M); David Wilson, 464 C. C. H. 1946 Fed. Tax. Serv. ¶ 7508 (M).

13. ". . . transactions between husband and wife calculated to reduce family taxes should always be subjected to special scrutiny. . . . By the simple expedient of drawing up papers, single tax earnings cannot be divided into two tax units and surtaxes cannot be thus avoided." Commissioner v. Tower, 66 Sup. Ct. 532, 537-538 (1946). *Accord*, Helvering v. Clifford, 309 U. S. 331, 335 (1940); *cf.* Higgins v. Smith, 308 U. S. 473, 477 (1939).

14. The mere mechanics of determining such apportionment in a mass of ensuing family partnership cases will entail considerable administrative effort. Polisher, *supra* note 6, at 49. But the Commissioner and the Tax Court are already determining the basis of corporate shares, reasonable compensation for corporate officers, and what proportion of a taxpayer's earnings is attributable to invested capital, so that the balance may be reported as community property. Barkan, *Family Partnerships under the Income Tax Law* (1945) 44 MICH. L. REV. 179, 200.

15. Polisher, *supra* note 6, at 49.

1. Each aggregate share of new preferred stock consisted of one-half share Series A and one-half share Series B. Each series had a 5% dividend rate as compared to 7% for the old preferred, and Series B, in addition, was convertible.

preferred stocks were nonparticipating and of equal par value. The merger did not affect the capital or surplus of the corporation, inasmuch as the new common stock given to the holders of the old preferred shares was based on capital value contributed by the common shareholders, who permitted the issuance of an increased number of common shares. As a result, the trustee surrendered the preferred stock and received an equal number of shares of the new preferred and additional shares of common stock. Upon audit of the trustee's account, allocation of the common stock to the life tenant was refused; and it was ruled that apportionment between the life tenant and remaindermen should be deferred, *inter alia,* until such time as the new stock was sold.[2] The trustee then sold some of the new preferred stock and all of the additional[3] common stock, and a second account was filed. The court below ruled there should be no apportionment until all the stock received in the merger had been sold, and the life tenant appealed. *Held,* the life tenant was entitled to an apportionment of the proceeds of such of the shares of the exchanged stock as had actually been sold. *King Estate,* 355 Pa. 64 (1946).

The instant decision is the third in which the Supreme Court of Pennsylvania has considered the applicability of the Pennsylvania rule of apportionment with reference to cumulative preferred stock.[4] In brief, the Pennsylvania rule is that on distribution of an extraordinary dividend, in whatever form such dividend appears, the life tenant is entitled to receive corporate earnings accrued during the life term, except such portion thereof as may be necessary to preserve the intact value of the corpus stock for the remainderman.[5] When the problem of apportionment with respect to dividends on cumulative preferred shares first came before the court in *Fisher's Estate,*[6] where the factual situation was substantially the same as that in the instant case, all the proceeds from the sale of additional shares were awarded to the life tenant. It was there decided that the intact value of preferred shares was limited to par value[7] and that the payment of accumulated dividends out of capital contributions of common stockholders ordinarily would not impair the intact value of the corpus

2. King Estate, 349 Pa. 27, 36 A. (2d) 504 (1944).

3. The word "additional" is used throughout to describe those shares of new no-par common stock which were issued (on a one-and-one-quarter-to-one basis with the old preferred stock) expressly for the purpose of discharging the dividends on the old preferred.

4. The other two are King Estate, 349 Pa. 27, 36 A. (2d) 504 (1944), and Fisher's Estate, 344 Pa. 607, 26 A. (2d) 192 (1942). The problem has been treated in at least two lower court decisions in Pennsylvania. Ormrod's Estate, 28 Pa. D. & C. 245 (1936), and Crozer's Estate, 27 Pa. D. & C. 179 (1936).

5. Cases and comment dealing with the Pennsylvania rule are voluminous. The development and ramifications of the rule in Pennsylvania case law are ably discussed in Waterhouse's Estate, 308 Pa. 422, 162 Atl. 295 (1932); Nirdlinger's Estate, 290 Pa. 457, 139 Atl. 200 (1927); Brigham, *Pennsylvania Rules Governing the Allocation of Receipts Derived by Trustees from Shares of Stock* (1937) 85 U. OF PA. L. REV. 358; Faught, *Statutory Solution of the Problem of Allocation Between Life Tenant and Remainderman* (1937) 11 TEMP. L. Q. 139. For a general treatment of the rule, see RESTATEMENT, TRUSTS (1935) § 236; 2 SCOTT ON TRUSTS (1939) § 236.

For the purposes of the rule, ordinary dividends are generally said to be those paid regularly and at a uniform rate out of earnings of the corporation. RESTATEMENT, TRUSTS (1935) § 236. The distinction between ordinary and extraordinary dividends is discussed in Lueder's Estate, 337 Pa. 155, 10 A. (2d) 415 (1940), and Note (1938) 86 U. OF PA. L. REV. 765. The *prima facie* standard of intact value, under the rule, is book value at the time of the testator's death. Waterhouse's Estate, *supra* at 427, 162 Atl. at 296; Baird's Estate, 299 Pa. 39, 42, 148 Atl. 907, 908 (1930).

6. 344 Pa. 607, 26 A. (2d) 192 (1942), 47 DICK. L. REV. 56.

7. *Id.* at 614-615, 26 A. (2d) at 196.

preferred stock, even though such contributions were not earnings.[8] It is difficult to see how the instant case can be reconciled with *Fisher's Estate*.[9] It would appear from the instant case that the intact value of preferred stock is to be calculated according to the rules applicable to common stock, that is, that unpaid preferred dividends accruing prior to the death of the testator are to be added to intact value.[10] It would seem, also, that capital value contributed by common stockholders will not be made available to life tenants in discharge of the obligation to pay preferred dividends and that life tenants will be restricted to actual earnings during the life term.[11] The dissenting opinion, on the basis of *Fisher's Estate,* urges that the solution here lies in awarding all the proceeds from the sale of the additional shares to the life tenant, rather than in apportioning the proceeds of such of the new shares (both common and preferred) as have been sold.[12] Although the instant case arose prior to the effective date of the Pennsylvania Uniform Principal and Income Act,[13] it does not appear that the problem presented in the case is specifically covered by the Act.[14] It has been noted that, despite the fact that the problem of the instant case has been considered three times by the Supreme Court of Pennsylvania, ". . . the law is now in such a state that the result in any particular case is a matter of pure speculation." [15]

8. *Id.* at 612-613, 26 A. (2d) at 195. *But cf.* Opperman's Estate (No. 1), 319 Pa. 455, 179 Atl. 729 (1935) (common stock dividend paid out of surplus created by reduction of capital stock, held allocable to corpus on ground that it was a contribution from corpus common stock); Buist's Estate, 297 Pa. 537, 147 Atl. 606 (1929), (1930) 78 U. OF PA. L. REV. 570 (new common stock with higher book value than same amount of old common stock for which it was exchanged upon merger, held not apportionable to life tenant until sale, liquidation or dividend distribution).

9. *See* instant case at 70 (dissenting opinion). The cases might be distinguished on the fact that the original corpus stock in the instant case included common as well as preferred shares, but this distinction would seem to be of little value, inasmuch as it does not appear that the trustee's duties in his capacity of preferred shareholder would depend upon the status of the common stock.

10. *See* instant case at 69.

11. *Id.* at 69-70.

12. *Id.* at 71.

13. 1945, May 3, P. L. 416, PA. STAT. ANN. (Purdon, 1941) tit. 20, § 3471.

14. *See* FIDUC. REV., Nov. 1946, p. 4.

15. *Id.* at p. 1. The article here cited contains an excellent analysis of the *Fisher* case and the two *King* cases.