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NOTES AND COMMENTS

Constitutional Right of Privacy

In recent years the provisions of the first[1] and the fourteenth[2] amendments relating to freedom of association and freedom of speech have raised questions concerning the extent of the protection of individual privacy.[3] This article will examine these two provisions in light of the decided cases to determine if constitutionally protected rights of privacy[4] exist for individuals in regard to their associational relationships[5] and their speech.

Associations

The idea that privacy of the individual underlies the limitations upon governmental action contained in the first amendment was first articulated by Justice Brandeis in a dissenting opinion to *Gilbert v. Minnesota.*[6] Gilbert, a member of the Non-partisan League, was convicted of violating a Minnesota statute[7] which made the teaching or advocation that men should not enlist in the armed forces of the United States a crime. He had made such a speech at a public rally. On appeal of this case to the United States Supreme Court it was

[1] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, . . . or the right of the people peaceably to assemble." U.S. CONST. amend. I.

[2] "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

[3] For other recent articles which have dealt with this same general area, see Robinson, *Protection of Associations From Compulsory Disclosure of Membership,* 58 COLUM. L. REV. 614 (1958); Comment, *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil,* 70 YALE L.J. 1084 (1961); Comment, 66 YALE L.J. 545 (1957). This article will not be concerned with the tort action for the invasion of the right of privacy. See generally for the elements of the tort action Nizer, *The Right of Privacy,* 39 MICH. L. REV. 526 (1941); Prosser, *Privacy,* 48 CALIF. L. REV. 383 (1960); Warren & Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193 (1891).

[4] The constitutionally protected right of privacy in regard to search and seizure is beyond the scope of this article since the primary focus is on the first amendment. For cases which illustrate how individual privacy is considered in relation to search and seizure cases see generally Mapp v. Ohio, 367 U.S. 643 (1961); Elkins v. United States, 364 U.S. 206 (1960); Wolf v. Colorado, 338 U.S. 25 (1949); Weeks v. United States, 232 U.S. 383 (1914); Boyd v. United States, 116 U.S. 616 (1886).

[5] As used in this article, the term associational relationships means the relations between the various members of associations, both as between themselves and as between outsiders.

[6] 254 U.S. 352 (1920).

[7] Minn. Laws 1917, ch. 463 (now 40 MINN. STAT. ANN. § 612.08 (1947)).

argued that the statute was unconstitutional because it was in conflict with the "inherent right of free speech respecting the concerns, activities and interests of the United States . . . and its Government."[8] The Court, for purposes of decision, assumed that such an inherent right existed, but held that such a right was not absolute and that a state, by virtue of its police power, could in time of war constitutionally enact such a statute.

Justice Brandeis, dissenting, first noted that the Minnesota statute was not a war measure because it was not restricted in its application to times when the nation was at war.[9] Moreover, the statute, by its broad sweep, prohibited teaching the doctrines of pacifism to any one, at any time, and in any place. "Thus the statute invades the privacy and freedom of the home. Father and mother may not follow the promptings of religious belief, of conscience or of conviction, and teach son or daughter the doctrine of pacifism."[10] Finally, Justice Brandeis argued that such rights as freedom of speech are given to citizens of the states as a part of the liberty guaranteed by the fourteenth amendment.[11] One of the underlying premises upon which this dissent was based was that the individual citizen had a right of privacy in regard to his beliefs[12] and in regard to his actions in his home. Also, this right of privacy is a part of liberty given to individuals by the first and fourteenth amendments.[13]

Privacy in regard to one form of associational relationship was before the Court for the first time in *Prudential Ins. Co. v. Cheek.*[14] Prudential was held liable for damages in a civil suit for violation

[8] 254 U.S. at 328.
[9] *Id.* at 334.
[10] *Id.* at 335.
[11] *Id.* at 336.

[12] The idea that an individual's belief's are private and beyond the scope of governmental action was alluded to in two early cases which involved prosecution of members of the Mormon church for bigamy. Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1878).

[13] The scope of the limitation upon state action which violates privacy was not spelled out in the dissent. However, in regard to speech, Justice Brandeis followed the view that in times of emergency speech could be limited in order to prevent a clear and present danger to the nation. It seems therefore that in similar situations more intrusion into the privacy of the individual would be tolerated. Perhaps Justice Brandeis believed that the right of privacy and the right of freedom of speech should be identical in scope since the former was derived from the latter. The clear and present danger test in regard to speech was first announced by Justice Holmes in Schenck v. United States, 249 U.S. 47 (1919). For discussions of the clear and present danger test, see generally Chafee, *Freedom of Speech in Time of War,* 32 HARV. L. REV. 932 (1919); Nathanson, *The Communist Trial and the Clear and Present Danger Test,* 63 HARV. L. REV. 1167 (1950).

[14] 259 U.S. 530 (1921).

of the Service Letter Law of Missouri.[15] This statute required every corporation doing business in the state to furnish upon request to any employee when the employee was discharged a letter which set forth the nature and duration of his service and which stated truly the cause of the employee's departure. Prudential had refused to give such a letter to Cheek, a former employee. One defense which Prudential set up was that the statute in question violated the fourteenth amendment because it deprived persons of their "liberty of silence." The Supreme Court rejected this contention and held that no provision of the Constitution conferred any liberty of silence or any right of "privacy upon either persons or corporations."[16] This holding, that corporations have no rights of privacy under the Constitution, has been reaffirmed in a number of later cases.[17]

The weight to be given to *Prudential* upon the question of an individual's right to keep some of his associational relationships private can best be determined by considering subsequent decisions.[18] *De Jonge v. Oregon*[19] is the leading case decided by the Court where associational relationships in the area of political action were involved. This case involved an Oregon statute[20] which provided that any person who presided at, conducted, or assisted in conducting any assembly which taught or advocated the doctrine of criminal syndicalism would be guilty of a felony. The Communist Party sponsored a public rally in Portland to protest police violence in connection with a longshoremen's strike then in progress. De Jonge, who was a member of the Communist Party, was the second speaker at the rally. In his speech he protested against conditions in the city jail, the actions of the city police, and urged people at the rally to take home Communist literature. While the rally was in progress police arrived and arrested several of the participants, including De Jonge. He was subsequently indicted, tried and convicted under the pro-

[15] Mo. STAT. ANN. tit. 18, § 290.140 (1952).

[16] 259 U.S. at 542.

[17] See, *e.g.*, United States v. Morton Salt Co., 338 U.S. 632 (1950); United States v. White, 322 U.S. 694 (1944); Hale v. Henkel, 201 U.S. 43 (1906).

[18] It is interesting to note that the corporation was the only party in *Prudential* asserting any claims to privacy; therefore, the reference to "persons" could be considered as a dictum. Moreover, Gitlow v. New York, 268 U.S. 652, 666 (1925), characterized the Court's reference to freedom of speech and the fourteenth amendment as "incidental" and not determinative of that question. Regardless, this broad language still stands because it has never been expressly overruled.

[19] 299 U.S. 353 (1937).

[20] Ore. Laws 1933, ch. 459, §§ 1-4.

visions of this statute. As construed by the Oregon Supreme Court,[21] this indictment charged that De Jonge participated in a meeting called by the Communist Party and that the party advocated criminal syndicalism. The conviction was reversed on appeal by the United States Supreme Court on the ground that it violated the rights given to citizens of the states under the first amendment as made applicable to the states by the fourteenth amendment.

In support of its decision, the Court first noted that "freedom of speech and of the press are fundamental rights . . . . The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."[22] Then it observed that these rights are not absolute but that they may be subject to reasonable regulation by a state where they are used "to incite violence and crime."[23] However, the rights themselves may not be curtailed; a state may only prohibit the abuses which flow from their exercise. Finally, the Court concluded that "peaceable assembly for lawful discussion cannot be made a crime," that a state has no power to inquire as to the relations of the speakers to the association, and that mere participation in an otherwise lawful and peaceable assembly cannot be made a crime.[24]

De Jonge established the concept that where individuals assemble peaceably for a lawful purpose a state government has no power to inquire into the relations between the participants. Clear recognition of the necessity for some privacy in regard to the relations between the members of associations was accorded by the Court; however, this right of privacy was limited to associations which had a lawful purpose and which involved activities of a political nature. Moreover, the sweeping language used in the *Prudential* decision was limited.

The emphasis upon the lawfulness of the association and its effect upon the degree of privacy afforded to its members is illustrated by the earlier case of *New York ex rel. Bryant v. Zimmerman*.[25] A New York statute[26] required that every membership corporation and unincorporated association which required an oath as a condition of membership file with the secretary of state a sworn copy of a roster of its members and a list of its officers. The statute further

[21] State v. De Jonge, 152 Ore. 315, 51 P.2d 674 (1935).
[22] 299 U.S. at 364.
[23] *Id.* at 364.
[24] *Id.* at 365.
[25] 278 U.S. 63 (1928).
[26] N.Y. CIVIL RIGHTS LAW §§ 53-56.

provided that any person who remained a member with knowledge that the organization had failed to comply with the registration provisions would be guilty of a misdemeanor. Bryant was a member of the Ku Klux Klan who knew that this association had failed to register. He was prosecuted and convicted under the statute. Later, he brought a habeas corpus action to obtain his release from jail, contending, *inter alia,* that the statute was unconstitutional in that it deprived him of the liberty guaranteed by the fourteenth amendment. On appeal the United States Supreme Court rejected this contention and held the statute to be a constitutional exercise of the state's police power because this was a reasonable disclosure in view of the nature and purpose of the organization involved. To support this conclusion the Court cited hearings before the United States Congress[27] which tended to show that the Klan was conducting a crusade against Catholics, Jews and Negroes, stimulating religious and race prejudice and committing various acts of violence and breaches of the peace. However, the Court recognized that such disclosure of the membership to the public would be "an effective or substantial deterrent" upon the association which would prevent it from carrying out its purposes.[28]

Since the decision in *Zimmerman,* two federal registration and disclosure statutes have been upheld against attacks on their constitutionality in relation to the first amendment. The first was the Foreign Agents Registration Act[29] which requires that every person acting as an agent of a foreign principal in certain listed capacities, such as public relations counsel or publicity agent, file a registration statement with the Attorney General. The statement must contain such data as a copy of the agent's contract with his principal, the compensation he received from his principal, and the names of all persons who have contributed or promised to contribute to the compensation received; further, willful failure to file the required statement is made a crime. The Supreme Court, in a case which raised no constitutional issue,[30] construed the statute to mean that no purely personal information was required of the registrant; thus again the Court by implication recognized that disclosure of an individual's private affairs must be strictly limited. Later, a lower

[27] 278 U.S. at 72.
[28] *Id.* at 72.
[29] 52 Stat. 631 (1938), 22 U.S.C. §§ 611-621 (1958).
[30] Viereck v. United States, 318 U.S. 236 (1943).

federal court, in *United States v. Peace Information Center*,[31] held the statute to be constitutional as a regulation of the nation's foreign affairs and as a national defense measure; further, the court observed that the statute merely regulated a vocation and did not prohibit speech or the expression of ideas.[32]

In *Communist Party of the United States v. Subversive Activities Control Board*[33] the Supreme Court held that the registration provisions of the Subversive Activities Control Act[34] did not violate the first amendment. This statute requires any organization which has been found by the Subversive Activities Control Board to be either a "Communist-action organization" or a "Communist-front organization" to register with the Attorney General. The Communist Party in the United States was found to be a Communist-action organization and ordered to register. The Party, appealing from this determination, contended that the registration provision was unconstitutional because it deprived the members of the Party of their freedom of association by forcing them to disclose their membership. Rejecting this contention, the Court pointed out that the Communist Party was directed by a foreign nation and that its main purpose is to overthrow the government by force and violence. Thus the purpose of the organization was illegal and the danger which it presented was of such a magnitude that Congress had the power to regulate it. Also, the statute under consideration did not prohibit speech or association of the members; all that it did was to require them to register. However, the Court recognized that in many circumstances enforced disclosure could act as a deterrent to the organization and an infringement upon the member's rights of association. But in this case, the nature and purposes of the association over-rode any claims to privacy that its members may have had.

Where neither the Communist Party nor acts of Congress have been involved, three recent decisions[35] have given clear recognition to the idea that the Constitution imposes some limitation on the power of state governments to expose the members of lawful associations. These cases involved the National Association for the Advancement of Colored People. In these cases, southern states

[31] 97 F. Supp. 255 (D.D.C. 1951). (No appeal was taken.)
[32] *Id.* at 262.
[33] 367 U.S. 1 (1961).
[34] 64 Stat. 987 (1950), 50 U.S.C. §§ 781-797 (1958).
[35] Louisiana v. NAACP, 366 U.S. 293 (1961); Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958).

were attempting to force the NAACP to disclose the names of individuals who were members within the state. In the first and leading case in this series, *NAACP v. Alabama,* Alabama brought suit to enjoin the NAACP from doing business in the state because of alleged violation of a statute[36] which required all foreign corporations doing business in the state to register with the secretary of state. During the course of the trial, the trial judge, upon motion by the state of Alabama, made an order which required the NAACP to produce a large number of its records, including the Association's membership lists. All of the required records where produced except the membership lists which the Association refused to produce. For this failure to comply with the court's order, the NAACP was found to be in contempt and ordered to pay a heavy fine.[37] On appeal the United States Supreme Court struck down this order of the trial court and the contempt conviction based on it as being in violation of the first and fourteenth amendments. Again, the Court recognized that in some instances a state may have a legitimate reason to expose the membership of associations; however, the Court clearly stated that compelled disclosure may act as a restraint on freedom of association. Thus "inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[38]

In the latest case which has dealt specifically with freedom of association, *Shelton v. Tucker,*[39] the Court held that an Arkansas statute[40] which required all school teachers to disclose all organizations to which they had belonged for the past five years was an unconstitutional interference with the teacher's freedom of association. While recognizing the state's legitimate need to investigate the teacher's qualifications, still "to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association."[41]

Speech and Individual Privacy

The cases discussed above give clear recognition to the fact that in many lawful associations, the individual members have a right to

[36] ALA. CODE tit. 10, §§ 192-198 (1959).
[37] *Ex parte* NAACP, 265 Ala. 349, 91 So. 2d 214 (1956).
[38] 357 U.S. at 463.
[39] 364 U.S. 479 (1960).
[40] ARK. STAT. ANN. § 80-1229 (1960).
[41] 364 U.S. at 485.

keep the fact of their membership private. A related area of an individual's privacy is in regard to speech by other individuals. Thus, in regard to free speech, which the first amendment protects, the individual's privacy is a factor considered by the Court in determining the extent of this speech. The earlier cases that involved constitutionally protected speech tended to put the right to speak above all other considerations. Thus, in *Martin v. City of Struthers*[42] it was held that a city ordinance which made criminal the act of summoning people in private residences to their door to receive circulars or other advertising matter was unconstitutional when applied to members of Jehovah's Witnesses. While the Court rested its decision primarily on the fact that the ordinance as applied prohibited the free exercise of religion,[43] it also relied on the fact that the ordinance tended to curtail free speech because the distribution of speech was restricted.[44] However, the Court did note that this ordinance was designed to protect a legitimate interest, that of privacy in the home, but in balancing the interests, the considerations of free speech and the free exercise of religion out-weighed this interest.[45]

These ideas were carried over in the later case of *Saia v. New York*.[46] In this case the city of Lockport had an ordinance which made it a crime to operate a loud-speaker which cast sound on a public street except where matters of public concern were broadcast and provided that advance permission must be obtained from the chief of police. Saia obtained permission and proceeded to give lectures on religious subjects in the town park by way of a loud-speaker system on his car. Due to protests from some of the patrons of the park, this permission was revoked. Saia continued to give his lectures and to use his loud-speaker; as a result, he was convicted under the terms of this ordinance. On appeal the Court split, the majority holding that this ordinance was unconstitutional on its face because it was a prior restraint of speech.[47] Four Justices dissented pointing out the difficulty of escaping from this type of noise[48] and the obvious fact that the ordinance only prohibited one means

[42] 319 U.S. 141 (1943).
[43] *Id.* at 142.
[44] *Id.* at 147.
[45] *Id.* at 144.
[46] 344 U.S. 558 (1948).
[47] *Id.* at 559.
[48] *Id.* at 563 (Dissenting Opinion of Justice Frankfurter jointed by Justices Reed and Burton).

of distribution of speech.[49] The dissent felt that the individual's privacy out-weighed the right to speak in this manner.

The extreme position of the majority was repudiated by the Court at its next term in *Kovacs v. Cooper*[50] where it was held that a city ordinance which prohibited the use of loudspeakers which emitted "loud and raucous" noises on the public streets was constitutional. The majority and concurring Justices all were of the opinion that cities could impose some reasonable restraints on the means of distribution of speech when these means tended to unduely disturb the privacy of others. *Saia* was distinguished on the ground that it involved licensing left to the uncontrolled discretion of the chief of police without adequate standards.[51] Where adequate standards are written into the ordinance, it will be sustained. Thus the standard of "loud and raucous" was held to be sufficiently definite and certain to guide administrative action in regard to speech. Also, the Court distinguished the loudspeaker situation from the hand-bill situation, noting that the individual cannot be forced to take and read the paper whereas, in the case of loud noise, he has no choice except to listen; thus "he is practically helpless to escape this interference with his privacy by loud-speakers."[52] Accordingly, privacy of the individual was recognized by the Court as a legitimate interest which deserves protection. Speech must be so limited that it does not unduely disturb the privacy of others, and the first amendment guarantees in regard to speech were not designed to give speakers an unlimited license to disturb the privacy of others.

An individual's right to be free from loud speech is not absolute, however, and other factors will be balanced in the resolution of the particular controversy. This was illustrated in *Public Utilities Comm'n v. Polk*.[53] Here, a privately owned transit company in the District of Columbia installed loud-speakers in its streetcars and buses to provide "music as you ride" for its patrons. Out of every half-hour of music provided, there was about a minute of commercials extolling the virtues of the transit company. Acting in response

[49] *Id.* at 568. (Dissenting Opinion of Justice Jackson.)
[50] 336 U.S. 77 (1949).
[51] *Id.* at 82. The Supreme Court of New Jersey had construed the standard in the ordinance to be strictly limited to sound trucks with "loud and raucous" noises. Kovacs v. Cooper, 135 N.J.L. 64, 66, 50 A.2d 451, 452 (1946). This construction the United States Supreme Court followed. *Id.* at 84.
[52] *Id.* at 86.
[53] 343 U.S. 451 (1952).

to complaints from some of the patrons to this innovation, the Commission found as facts (1) use of such devices was "consistent with public comfort and safety"; (2) such devices presented no hazard in regard to safety of the operation of vehicles; and (3) an overwhelming majority of the patrons approved of the installation.[54] Pollak appealed from this determination on the ground that the Commission made errors of law in its determination. One error assigned was that the decision was in violation of rights given to citizens under the first amendment. The court of appeals reversed the Commission[55] holding that the constitutional issue was properly raised because the federal government was the agency which gave the transit company an exclusive monopoly to operate in the District and, as a result, there was governmental action involved. Also, this court held that these devices violated the patron's liberty as secured by the first and fifth amendments.[56]

The Supreme Court sustained the Utilities Commission and reversed the court of appeals. The majority rejected any claims that the first amendment alone was violated by this practice. They pointed out that no objectionable propaganda was put forth over these speakers and the volume of the sound emitted by the speakers was not loud enough to prevent conversation between passengers.[57] To objections raised in connection with the commercials broadcast, the Court said that these did not sustain a claim that passengers were a captive audience forced to listen to commercial advertising against their will.[58] Finally, the Court rejected the contention that the fifth amendment, when read with the first amendment, gave the patrons a right of privacy in this situation. The Court pointed out that in a public place, such as a streetcar or a bus, an individual's rights of privacy are not as great as in his home; the interests of all concerned must be taken into account in the drafting of regulations for public vehicles, and the interests of the few cannot override the interests of the many in this situation.[59] In its decision, the Court gave recognition to an individual's right to be free from loud and annoying noises but, in balancing these against the interests of the public in general, determined that on a public streetcar where the

[54] Capital Transit Co., 81 P.U.R. (n.s.) 122, 126 (1949).
[55] Pollak v. Public Utilities Commission, 191 F.2d 450 (D.C. Cir. 1951).
[56] *Id.* at 453.
[57] 343 U.S. at 463.
[58] *Ibid.*
[59] *Id.* at 464.

majority of the patrons had no objection to the loudspeakers their interests should prevail.

That privacy in the home will be protected by the Court in some situations against certain types of speech was demonstrated in *Breard v. Alexandria.*[60] This case involved a "Green River ordinance"[61] which was enacted by the city of Alexandria to prohibit any "solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise" from going onto property used for private residences without the owner's consent.[62] Breard was in charge of a group selling subscriptions to magazines; this group was conducting a sales campaign in Alexandria. Members of the group went to a number of private residences without invitation from the owners in order to make sales; as a result, they were convicted under the provisions of the ordinance. Breard contended that the ordinance was unconstitutional as applied to him because it acted as a restrain on the distribution of speech. This was rejected by the Supreme Court which said that the test was "a balancing of the conveniences between some householders' desire for privacy and the publisher's right to distribute publications" since the rights to free speech given in the first amendment are not absolute.[63] Here, since the restriction was merely on one means of distribution it was reasonable and the interest of the individual in his privacy prevailed.

In two areas where first amendment rights are involved, there has been a recognition and protection of a right of privacy to the individuals. Thus, where individuals associate themselves in lawful groups which aim to achieve lawful ends, they have a right to keep the fact of their membership private and governmental agencies cannot force them to disclose this fact. And, where the right of free speech is being exercised, it must be exercised in such a manner that it will not disturb the privacy of individuals in their home or in public. In both situations, the Court will balance the interests of the individual to his privacy against the interest of the public in having the membership of the association or the speech disseminated

[60] 341 U.S. 622 (1951).

[61] So named because the prototype was enacted by the town of Green River, Wyoming, in 1931. For an earlier case involving the prototype see Town of Green River v. Fuller Brush Co., 65 F.2d 112 (10th Cir. 1933), which held that the ordinance was not arbitrary or unreasonable and that it did not constitute a burden on interstate commerce or deprive business of property without due process of law.

[62] 341 U.S. at 624.

[63] *Id.* at 644.

to all. But, it seems clear that privacy of the individual is one factor that the Court will take into consideration in the determination of cases which arise in these areas.

CHARLES M. HENSEY

Contracts—Cost-Plus Building and Construction Contracts—Interpretation of "Cost"

Perhaps the most frequently litigated issue arising from construction contracts on a cost-plus basis[1] is the proper interpretation of the word "cost." In *Lytle, Campbell & Co. v. Somers, Fitler & Todd Co.*,[2] the leading case in this area, the Pennsylvania Supreme Court formulated the general rule[3] that, unless a definition is expressly written into the contract, "cost" must be interpreted to mean only those expenses which can be said to be "operative" or of a productive nature in actually completing the construction, as distinguished from non-productive, indirect and general expenses or "overhead."[4] The latter are presumed to have been provided for in the agreed percentage of profit.[5]

[1] A "cost-plus contract" is one in which the contractor agrees to do certain work at cost plus a stated percentage of the cost as profit. It is different from a "cost-plus-a-fixed-fee contract" where the agreement is to do work at cost plus a fixed amount of compensation, but for the purposes of this note no distinction will be made between them since the problems attendant to the interpretation of the word "cost" are the same in each. See, *e.g.*, Continental Copper & Steel Indus. v. Bloom, 139 Conn. 700, 96 A.2d 758 (1953). See generally 17 C.J.S. *Contracts* § 367(b) (1939); Annot. 27 A.L.R. 48 (1923).

[2] 276 Pa. 409, 120 Atl. 409 (1923).

[3] Since the *Lytle, Campbell* case purported to lay down a general rule for the interpretation of *all* cost-plus contracts no attempt has been made to reconcile the cases on the basis of the precise wording of the contract before the court. Those courts citing and relying on the *Lytle, Campbell* case have tended to look to the class of contract involved, rather than the particular words employed. See, *e.g.*, Vinson & Pringle v. Lanteen Medical Lab., 63 Ariz. 115, 159 P.2d 612 (1945); Jensen v. Manthe, 168 Neb. 361, 95 N.W.2d 699 (1959); Washington Const. Co. v. Spinella, 8 N.J. 212, 84 A.2d 617 (1951); Nolop v. Spettel, 267 Wis. 245, 64 N.W.2d 859 (1954). *Cf.* Dunn v. Hammon Drug Co., 79 Ariz. 101, 284 P.2d 468 (1955).

[4] The rule of *Lytle, Campbell* has been cited with approval in many cases, none of which have questioned its validity. See, *e.g.*, Advance Auto Body Works, Inc. v. Asbury Transp. Co., 10 Cal. App. 2d 619, 52 P.2d 958 (Dist. Ct. App. 1935); Michelson v. House, 54 N.M. 197, 218 P.2d 861 (1950).

[5] The normal definition of the word "profit," in the absence of circumstances tending to show otherwise, is "net profit," that is, the remainder after all expenses of whatever nature have been paid. Buie v. Kennedy, 164 N.C. 290, 80 S.E. 445 (1913); Thomas v. Columbia Phonograph Co., 144 Wis. 470, 129 N.W. 522 (1911). Yet the word "profit" in a cost-plus agreement is given a different meaning in that certain types of expenses, those