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Notes and Comments

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NOTES AND COMMENTS

IS RENEGOTIATION CONSTITUTIONAL?

Since the last World War, continual pressure has been exerted upon Congress to enact legislation which would eradicate the thought that financial profit can be made out of war. Many methods have been suggested,¹ but the one hit upon as being the most expedient was that of renegotiating all war contracts so as to compel the contractor to give back all that he had made above what would be considered a fair and equitable profit. Legislation incorporating that idea was enacted in the Sixth Supplemental National Defense Appropriations Act,² subsequently to be amended by the Revenue Act of 1943,³ which abrogated all legislation that had been enacted in the interim between two wars. That statute, as amended, has become the sole means of curtailing profits for competitive bidding has been done away with, not because it was not a tried and well-seasoned method of obtaining necessary supplies at a fair price, but because it was too slow and cumbersome a device to meet the needs of the emergency.

A brief resume of the renegotiation statute may prove helpful to an understanding of the legal issues herein discussed. The method by which the government was to be permitted to recapture excessive profits was to authorize the appropriate governmental official,⁴ when making a contract, to insert therein a provision for the renegotiation thereof.⁵ If excessive profits were subsequently determined to exist, the official was authorized and directed to eliminate the excess either (1) by revising the terms of the contract, (2) by withholding money due to the contractor under the terms thereof, (3) by withholding money due to a subcontractor, (4) by obtaining repayment or credit, (5) by directing the contractor to withhold money from the subcontractor, or (6) by any combination of these methods. By express language, the statute was made applicable to all contracts and subcontracts theretofore made, whether containing a renegotiation or recapture clause, unless final payment thereon had been made before the effective date of the statute.⁶

The sole definition of "excessive profits" to be found in the act states that such term means "the portion of the profits derived from

¹ Approximately 170 bills and resolutions were offered in Congress between 1919 and 1942. One of the factors leading to legislation on the subject was the decision in *United States v. Bethlehem Steel Corp.*, 315 U. S. 289, 62 S. Ct. 581, 86 L. Ed. 855 (1942), in which a recovery of 22% of cost was allowed to a corporation engaged in the manufacture of wartime shipping, the court there declaring that if "the executive is in need of additional laws to protect the nation from war profiteering, the Constitution has given to Congress, not the Court, the power to make them." See 315 U. S. 289 at 309, 62 S. Ct. 581, 86 L. Ed. 855 at 868.

² 56 Stat. at L. 245, Title IV, §403; 50 U. S. C. A. §1191.

³ H. R. 3687, Title VII, §701 et seq.; 1 U. S. Cong. Serv. 83 (1944).

⁴ The list of officials entitled to call for renegotiation of contracts is set forth in 56 Stat. at L. 245(a); 50 U. S. C. A. §1191(a).

⁵ The statute applies, however, only to contracts or subcontracts in excess of \$100,000: 56 Stat. at L. 245(b); 50 U. S. C. A. §1191(b).

⁶ 56 Stat. at L. 245(c) (6); 50 U. S. C. A. §1191(c) (6).

contracts with the Departments and subcontractors which is determined in accordance with the section to be excessive," but in arriving at that determination certain factors are to be taken into consideration such as the efficiency of the contractor, the reasonableness of costs and profits, the amount and source of public and private capital employed, the extent of risk assumed, the nature and extent of contribution to the war effort, the character of the business, and such other factors as fair and equitable dealing might require.⁷

Several aspects of this legislation must have consideration, if possible, in arriving at a determination of its constitutionality. The first of these, of course, is the national emergency which produced such a law. Following the attack on Pearl Harbor, a nation of peaceful people, unprepared for world-wide conflict, had to be converted into a fighting machine with all possible dispatch. The older method of competitive bidding was perforce set aside for the time being. Great quantities of materiel had to be obtained, so industries had to cease their peacetime pursuits and equip themselves for the output of military weapons and supplies. The manufacture of peacetime commodities was, in large part, prohibited so industry was forced to turn to the federal government for contracts and orders if it wanted to continue in business, even if it had not patriotically proffered its help.

The early contracts let by the government contained no renegotiation clauses, nor even the suggestion of any, and were made by both contracting parties in all good faith and on a purely voluntary basis. After the passage of the statute in question, however, all contracts thereafter let contained renegotiation provisions which the contractors had to accept. The only alternatives were to enter into some other form of civilian business for which the contractors were probably totally unsuited and lacking in experience, or else not do business at all. The first question that arises, then, is whether these more or less unilateral contracts, forced upon contractors in an emergency, are even enforceable. Had the absence of freedom to contract arisen between ordinary persons, the answer would be obvious. Should it be different because a sovereign government is concerned? When the statute is applied to contracts made prior to its effective date, there is the additional question as to whether or not the federal government is bound by the terms of its own contracts or is free to say that a provision may be subsequently interpolated therein, without consent, calling for renegotiation in order to prevent the contractor from making more than a just and fair profit.

In that regard, it should be remembered that Alexander Hamilton once said: "When a government enters into a contract with an individual, it deposes as to the matter of the contract its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may be justly considered as excepted out of its power to legislate...It is, in theory, impossible to reconcile the two ideas of a promise which obliges

⁷ H. R. 3687, Title VII, §701(b)(4)(a); 1 U. S. Cong. Serv. 84 (1944).

with a power to make a law which can vary the effect of it.”⁸ If that remark is true, then the government, when making a contract for war supplies, enters into an obligation to which it is presumably bound as closely as is the contractor yet, through the idea of renegotiation, it may seek to hold the contractor to his end of the bargain while not performing according to the tenor of its own obligations.

To say that, because of a war emergency, it would be unconscionable to hold the government to its promises has the effect of placing it in the category of the infant or the incompetent person. Certainly, one who deals with persons of that character must deal at his own peril. But it would take an unusually bold individual to assert that the same thing ought to be said of a person who deals with a sovereign government. That such is far from being the case is illustrated by language in the case of *Chicago & Northwestern Railway Company v. United States*,⁹ where the court said: “The Government...cannot impose new contracts upon those with whom it deals. It might, by a repeal of the contract expressly stipulated, restore the previous state, and claim the bare rights it had before; but it cannot do more than that. It certainly cannot retain the obligation of the contract as against the Company, and at the same time vary its own, unless it has reserved the right to do so, in the contract itself.”¹⁰

If, then, the federal government, when attempting to enter into a contract with a private contractor, departs from its position as a sovereign power and takes upon itself the attributes and moral obligations of an individual, it has the power to bind itself as would an individual. Rights arising under such contracts are rights which must be protected by constitutional guarantee, for in *Lynch v. United States*¹¹ it was declared that: “The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State, or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment.”¹² That point of view is borne out by the majority opinion in the “Sinking Fund” cases,¹³ wherein the court said: “The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much a repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.”¹⁴ Even the dissenting opinion to that case spoke most strongly on this point, for Mr. Justice Strong declared that it is “as much beyond the power of a Legislature, under any pretense, to alter a contract into which the government has entered with a private individual, as it is

⁸ Hamilton, Works (Constitutional Edition, G. P. Putnam's Sons, New York, 1903), Vol. 3, p. 236-7, from Report on Public Credit, Jan. 20, 1795.

⁹ 104 U. S. (14 Otto) 680, 26 L. Ed. 891 (1882).

¹⁰ 104 U. S. (14 Otto) 680 at 684, 26 L. Ed. 891 at 892.

¹¹ 292 U. S. 571, 54 S. Ct. 840, 78 L. Ed. 1434 (1934).

¹² 292 U. S. 571 at 579, 54 S. Ct. 840, 78 L. Ed. 1434 at 1440.

¹³ 99 U. S. (9 Otto) 700, 25 L. Ed. 496 (1879).

¹⁴ 99 U. S. (9 Otto) 700 at 719, 25 L. Ed. 496 at 501.

for any other party to contract to change its terms without the consent of the person contracting with him. As to its contracts the government in all its departments has laid aside its sovereignty, and it stands on the same footing with private contractors... Now, where is the power of Congress to add new terms to any contract made with the United States, or made between any two private individuals? Where is the power to annul vested rights? It is certainly not to be found in the Constitution. True, the provision that no State shall pass any law impairing the obligations of contracts applies only to state legislation. For such legislation the prohibition was necessary; for State Legislatures have all legislative power which is not expressly denied to them. But no necessity existed for imposing such a limitation on the power of Congress... Congress has no power except such as is necessary or proper for carrying into execution the powers specified... I search in vain for any express or implied grant of power to add new terms to any existing contracts made by or with the government, or any grant of power to destroy vested rights. No power has been given to Congress to lessen the obligations of a contract between private parties by direct legislation, except in the enactment of uniform laws on the subject of bankruptcy... Much less can it change the stipulations of the contract and impose additional liabilities upon a contractor with the government. Such an exercise of power would be making a contract for parties to which they never assented."¹⁵

The inescapable conclusion that follows is that the government, when it enters into a contract and agrees to compensate the contractor for services rendered, is bound to pay for those services as agreed and cannot, by any theory of sovereignty, alter or avoid that obligation. Nowhere in the Constitution is the power to alter the terms of a contract delegated to Congress, and until that power is so delegated, Congress does not have it.¹⁶

Another aspect of the problem of constitutionality concerns itself with the question of whether or not the renegotiation statute involves a proper delegation of legislative power.¹⁷ Primarily, the question is whether Congress has the power under the Constitution to delegate to the executive department the work of determining what shall constitute and what shall not constitute excessive profits. A solution may be obtained by examining the problem from either of two points of view. One is that the measurement of excessive profits is a matter of adminis-

¹⁵ 99 U. S. (9 Otto) 700 at 732-6, 25 L. Ed. 496 at 506-8.

¹⁶ In the Gold Clause cases, particularly *Nortz v. United States*, 294 U. S. 317, 55 S. Ct. 428, 79 L. Ed. 907, 95 A. L. R. 1346 (1935), it was stated that the joint resolution of Congress prohibiting the payment of an obligation in gold was unconstitutional as applied to government contracts.

¹⁷ In that regard, it should be borne in mind that 56 Stat. at L. 245(c)(1), 50 U. S. C. A. §1191(c)(1), reads: "Whenever, in the opinion of the Secretary of a Department, the profits realized or likely to be realized from any contract with such Department, or from any subcontract thereunder whether or not made by the contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price."

tration; that Congress, in passing the renegotiation statute, has protected the contractor as far as possible in allowing an appeal to the Tax Court in case he is dissatisfied with the results of the renegotiation procedure on which appeal there shall be a trial de novo from the outcome of which there shall be no further appeal;¹⁸ and that, in providing for only one renegotiation at the behest of the government, the contractor will not be harassed.¹⁹ While it is reasonably safe to assume that the government will be fair in its dealing with contractors, at least so far as it is possible to be, yet a great many people question the ability of governmental officials to be fair, however well-meaning their intentions might be, when there is no set standard for determining what amounts to an excessive profit without the official measuring that profit on a cost-plus-a-percentage-of-cost basis.

In the course of the administration of the renegotiation power to date, there are no known instances where suit has been filed and adjudicated in which the government has sought to recapture what it sees fit to call "excessive profits." Subsequent to the passage of the act in question, however, the authority conferred thereby was re-delegated to certain price adjustment boards set up to do the actual work of renegotiating the contracts. To such boards were distributed certain scales of profit to be allowed each contractor figured on a percentage basis of the cost of the business being done. Their work then came merely to be a matter of determining the amount of business done and then multiplying that figure by the appropriate percentage, and all money realized by the contractor above that amount would be the sum to be recaptured. But the First War Powers Act²⁰ and Executive Order 9001²¹ specifically prohibit the cost-plus-a-percentage-of-cost method of contracting, so it would seem that the government violated its own statute in forcing the contractor into a contract where the profits to be realized would, as a matter of fact, and according to government dictate, be computed on that forbidden basis. There is little wonder, then, that few people support that approach to the problem.

The other point of view would treat the delegation of power as highly improper when examined in the light of all existing precedents. It was

¹⁸ H. R. 3687, Title VII, §701(e)(1), 1 U. S. Cong. Serv. 93 (1944), declares that: "Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits . . . may, within ninety days . . . after the mailing of the notice of such order . . . file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits . . . and such determination shall not be reviewed or redetermined by any court or agency. . . . A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo." Section 701(e)(2), 1 U. S. Cong. Serv. 94 (1944), permits a similar petition as to contracts made prior to the enactment of the Revenue Act of 1943.

¹⁹ H. R. 3687, Title VII, §701(b)(c)(4), 1 U. S. Cong. Serv. 90 (1944).

²⁰ 55 Stat. at L. 839, 50 U. S. C. A. §611.

²¹ 6 Fed. Reg. 6787, Title II, §6, appended to 50 U. S. C. A. §611.

Montesquieu who said: "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."²² His words were echoed by Blackstone when he wrote: "In all tyrannical governments, the supreme magistracy, or the right both of *making* and *enforcing* the laws, is vested in one and the same man, or one and the same body of men; and whenever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power which he, as legislator, thinks proper to give to himself. But, where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power, as may tend to the subversion of its own independence, and therewith of the liberty of the subject."²³

Despite such warnings, there has been an ever-growing tendency to merge the three branches of the government, particularly the legislative and the executive ones, through a system of administrative bodies, resulting in the placing of almost unlimited discretion in the hands of administrators. Such may be a simple way to handle a difficult situation especially when standards of measurement of authority are not easy to fix. But the fact that the problem is difficult should not create the right to alter, without due process of law, the very safeguards set up to protect the people. It may be that a closer union between the legislative and executive branches would be desirable, but until that occurs the question remains as to whether Congress has the power to say to the contractor, "You shall not make excessive profits out of the national emergency, but we will leave it to another branch of the government to say what part of your profit is excessive."

An answer to that question may be provided by the case of *Panama Refining Company v. Ryan*,²⁴ wherein the National Industrial Recovery Act was challenged on the ground that an unconstitutional delegation of legislative authority had been attempted by Congress.²⁵ When declaring the statute unconstitutional, the court said: "Section 9(c) does not state whether, or in what circumstances or under what conditions,

²² Montesquieu, *The Spirit of the Laws* (Nugent trans., D. Appleton & Co., New York, 1900), Vol. 1, p. 137-8.

²³ *B1. Com.*, I, 146.

²⁴ 293 U. S. 388, 55 S. Ct. 241, 79 L. Ed. 446 (1935).

²⁵ The immediate challenge was directed to Section 9(c) of the National Industrial Recovery Act, 48 Stat. at L. 195, 15 U. S. C. A. §701(9)(c), wherein the president was authorized to "prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State." The statute also provided that violation of any such order should be visited with criminal penalties.

the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the State's permission. It establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action... it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit. And disobedience to his order is made a crime punishable by fine or imprisonment."²⁶ As applied to the immediate problem, it should be remembered that the Revenue Act of 1943 declares that whenever in the opinion of the renegotiation board profits are considered excessive, then and in that case, the board is to take certain steps to renegotiate the contract.²⁷ Nothing is said as to what is a reflection of excessive profits, but that determination is left entirely to the executive branch of the government.

It was also argued, in the Panama Refining case, that the preamble of the statute, which contained a "declaration of policy," should be treated as providing sufficient standards to guide the administrator. That argument was rejected, however, when the court failed to find, in such general outline of policy, the detailed circumstances and conditions which would be essential to form a guide to administration. The factors said to be important, in the renegotiation statute, as a guide to the determination of "excessive profits"²⁸ would seem to be no more specific than those held insufficient in the Panama Refining case. The probable honesty or good motive of the administrator there was held no substitute for constitutional requirement,²⁹ and will probably be no more effective to overcome challenge to the renegotiation statute, if one is made.

Other illustrations of opposition to uncontrolled delegation of authority may be found in *Marshall Field & Company v. Clark*³⁰ and *J. W. Hampton & Company v. United States*.³¹ It should not be thought, however, that all delegation is improper, for as was once said by an eminent court, "To assert that a law is less than a law because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare, whenever a law is passed relating to a state of affairs not yet developed, or to things future, and impossible to be fully known... The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There

²⁶ 293 U. S. 388 at 415, 55 S. Ct. 241, 79 L. Ed. 446 at 456.

²⁷ H. R. 3687, Title VII, §701(b)(c)(1), 1 U. S. Cong. Serv. 83 (1944).

²⁸ H. R. 3687, Title VII, §701(b)(4)(A), 1 U. S. Cong. Serv. 84 (1944).

²⁹ The court, on that point, in *Panama Refining Co. v. Ryan*, 293 U. S. 388 at 420, 55 S. Ct. 241, 79 L. Ed. 446 at 458, said: "The question whether such a delegation of legislative power is permitted by the Constitution is not answered by the argument that it should be assumed that the President has acted, and will act, for what he believes to be the public good. The point is not one of motives but of constitutional authority, for which the best of motives is not a substitute."

³⁰ 143 U. S. 649, 12 S. Ct. 495, 36 L. Ed. 294 (1892).

³¹ 276 U. S. 394, 48 S. Ct. 348, 72 L. Ed. 624 (1928).

are many things upon which wise and useful legislation must depend, which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation."³²

So, in order to secure the exact effect intended by acts of legislation, the vesting of discretion in administrative officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalty in case of breach thereof, has been held to be a valid exercise of the legislative power.³³ But a cardinal distinction must be observed between the law-making and the administrative functions. That distinction was admirably set forth in the case of *Cincinnati, Wilmington and Zanesville Railroad Company v. Commissioners*,³⁴ where the court noted that the "true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law."³⁵ It would seem, then, that the authority delegated by the renegotiation statute impinges more closely on the former when it places in the hands of the administrator the power to determine the "excessive profit" to be recaptured.

Lest a determination of the unconstitutionality of the Revenue Act of 1943, insofar as this problem is concerned, appear too simple, one more case of recent date should be considered—that of *Yakus v. United States*,³⁶ which dealt with the validity of the Emergency Price Control Act,³⁷ as amended by the Inflation Control Act.³⁸ A declaration of policy found in those statutes stated the congressional purpose to be one designed, among other things, to "stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency. . . ."³⁹ The standard according to which the administrator was to exercise his authority to fix prices was reasonably confined to the maximum prices obtaining during a given period of time with some leeway for unusual conditions. In concluding that such statute was valid, the court said: "The Act is thus an exercise by Congress of its legislative

³² *Locke's Appeal*, 72 Pa. 491 at 498-9 (1873).

³³ *J. W. Hampton & Co. v. United States*, 276 U. S. 394, 48 S. Ct. 348, 72 L. Ed. 624 (1928); *United States v. Grimaud*, 220 U. S. 506, 31 S. Ct. 480, 55 L. Ed. 563 (1911); *Oceanic Steam Nav. Co. v. Stranahan*, 214 U. S. 320, 29 S. Ct. 671, 53 L. Ed. 1013 (1909); *Union Bridge Co. v. United States*, 204 U. S. 364, 27 S. Ct. 367, 51 L. Ed. 523 (1907); *Buttfield v. Stranahan*, 192 U. S. 470, 24 S. Ct. 349, 48 L. Ed. 525 (1904); *Ex parte Kollock*, 165 U. S. 526, 17 S. Ct. 444, 41 L. Ed. 813 (1897).

³⁴ 1 Ohio St. 77 (1852).

³⁵ 1 Ohio St. 77 at 88.

³⁶ — U. S. —, 64 S. Ct. 660, 88 L. Ed. (adv.) 653 (1944).

³⁷ 56 Stat. at L. 23, 50 U. S. C. A. §901 et seq.

³⁸ 56 Stat. at L. 767, 50 U. S. C. A. §901 et seq.

³⁹ 56 Stat. at L. 23(a), 50 U. S. C. A. §901(a).

power. In it Congress has stated the legislative objective, has prescribed the method of achieving that objective—maximum price fixing—and has laid down standards to guide the administrative determination of both the occasions for the exercise of price-fixing power, and the particular prices to be established. . . The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate. The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct. . . These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective.”⁴⁰ Although, in the *Yakus* case, the United States Supreme Court may be said to have gone far in recognizing that the legislative function may be limited to a determination of policy, leaving details and norms and standards of measurement to the executive branch of the government, particularly where the essential data could not readily be assembled by Congress but might be more rapidly and efficiently gathered by an administrative agency, still it has not broken down the requirement that reasonably adequate standards must accompany such delegation of authority.

The clear lines of division between the three branches of the federal government, existing at the time when the Constitution first went into effect and continued for some sixty years thereafter, have gradually given way under the proddings of expediency so as to form a twilight area where the distinctions now present only a vague and indefinite blur. The powers exercised by the executive branch have undoubtedly reached a peak at the expense of those once deemed clearly belonging to the legislature, contrary to the intent of the framers of the Constitution. But it cannot be said that this has been accomplished by fiat, or without the knowledge and consent of the people for whose preservation that Constitution was formulated. If they are content to permit such unhampered delegation of power as is contained in the renegotiation statute, however, there is no limit to the length to which such practice might be put.

P. E. THURLOW

SECURITY THROUGH ASSIGNMENT OF PROCEEDS OF LIFE INSURANCE

Death and taxes have frequently been declared to be the most certain of events, yet their approach often finds the average person financially ill-prepared. In the case of death, often the largest and most readily available source of money to discharge funeral expenses is apt to be a life insurance policy carried by the deceased, but as some lapse of time

⁴⁰ — U. S. — at —, 64 S. Ct. 660 at 667, 88 L. Ed. (adv.) 653 at 659.

is likely to occur between death and payment thereon, the undertaker is likely to require some more certain assurance of payment. Where there is no other estate, and the living relatives present but an uncertain credit risk at best, the undertaker is inclined to seek protection by taking some form of assignment of the benefits of such insurance policy, whether partial or total.

But he, in turn, to prevent the tying up of a disproportionate amount of his own capital even for a short period, may seek to reassign such security to a finance company which, seeking new fields of profitable investment,¹ may accept the same in expectation that the funds so advanced will be speedily and surely returned. The whole arrangement, then, appears to be not only legitimate but also a reasonably prudent way of handling the inevitable consequence of death in a civilized society. Yet the simple transaction thus outlined may develop some unpleasant legal complications for the parties concerned, judging from three recent and conflicting decisions handed down by the Illinois Appellate Court.² They raise important questions as to whether or not the benefits of life insurance policies are assignable and, if so, by whom they may be assigned. They also suggest some special cautions which may need to be observed if litigation is to be based on such transactions.

The primary problem is, of course, whether an assignment of the policy benefits may be made, for if not, all other questions are thereby rendered inconsequential. As there is no standard form for a life insurance contract,³ the language of the particular policy must be taken into consideration. It may expressly authorize assignment and the manner of making the same effective,⁴ or may impliedly sanction the same through negative words forbidding assignment in the event the policy has been pledged to the insurer as security for loans made thereon. For that matter, the contract may be entirely silent on the question, in which case, following the view that restraints on alienation will not be presumed,⁵ there should be no question of the right of either the insured or the beneficiary to give an assignment.

In the case of the so-called "industrial" policy, however, the insurer

¹ A service charge of 7% was noted in the case of *Morticians' Acceptance Co. v. Metropolitan Life Ins. Co.*, 321 Ill. App. 277, 53 N.E. (2d) 30 (1944). If an average transaction takes one month to complete, the rate of profit is simple to calculate.

² *Standard Discount Co. v. Metropolitan Life Ins. Co.*, 321 Ill. App. 220, 53 N.E. (2d) 27 (1944); *Morticians' Acceptance Co. v. Metropolitan Life Ins. Co.*, 321 Ill. App. 277, 53 N.E. (2d) 30 (1944); *Lain v. Metropolitan Life Ins. Co.*, 322 Ill. App. 643, 54 N.E. (2d) 736 (1944). It is understood that leave to appeal has been granted in the *Morticians' Acceptance Co.* case.

³ The Illinois Insurance Code makes no provision for a standard form of life insurance contract. Ill. Rev. Stat. 1943, Ch. 73, §925, dealing with funds exempt from process, has been interpreted as being inapplicable to voluntary assignments: *Standard Discount Co. v. Polish Women's Alliance*, 301 Ill. App. 512, 23 N.E. (2d) 199 (1939).

⁴ A common provision requires that the same be in writing and filed at the home office of the insurance company. See Vance, *Handbook of the Law of Insurance* (West Pub. Co., St. Paul, 1930) 2d Ed., p. 966.

⁵ *Postal Telegraph Cable Co. v. Western Union Tel. Co.*, 155 Ill. 335, 40 N.E. 587 (1895); *Traders Safety Building Corp. v. Shirk*, 237 Ill. App. 1 (1925).

has usually inserted a provision which commonly reads: "Any assignment or pledge of this policy or of any of its benefits shall be void."⁶ It was the existence of this clause which provoked the disagreement in the cases above referred to; the First Division of the First District Appellate Court holding that it did not prevent assignment by the beneficiary,⁷ while the Third Division was equally emphatic that it did so operate.⁸ The latter view proceeds on the theory that as the terms of insurance policies are purely a matter of contract it was competent for the parties, in the absence of statutory inhibition or public policy against the same; to contract against assignment.⁹

There would seem to be merit, however, in the opposite view which rests upon the principle that when money becomes due to the beneficiary under a policy it, like any other vested property right, should be freely transferable.¹⁰ If the rights of the beneficiary under the policy can be said to be vested, there is a definite public policy in favor of alienation,¹¹ and the argument that the burdens thereby placed upon the company would be onerous is scarcely one for courts to consider.¹² By recognizing

⁶ Such language is found in all policies of this type issued by the Metropolitan Life Ins. Co. The exact provision is quoted in all three cases referred to in note 2, ante. It is likely to be present in policies issued by other companies: *Tyler v. National Life & Accident Ins. Co.*, 48 Ga. App. 338, 172 S.E. 747 (1934).

⁷ *Standard Discount Co. v. Metropolitan Life Ins. Co.*, 321 Ill. App. 220, 53 N.E. (2d) 27 (1944); *Morticians' Acceptance Co. v. Metropolitan Life Ins. Co.*, 321 Ill. App. 277, 53 N.E. (2d) 30 (1944).

⁸ *Lain v. Metropolitan Life Ins. Co.*, 322 Ill. App. 643, 54 N.E. (2d) 736 (1944).

⁹ That view has the support of at least intermediate appellate decisions in other jurisdictions where the precise provision has been held binding: *Tyler v. National Life & Accident Ins. Co.*, 48 Ga. App. 338, 172 S.E. 747 (1934); *Morkel v. Metropolitan Life Ins. Co.*, 297 N. Y. S. 962 (1934); *Oleska v. Kotur*, (Ind. App.) 48 N.E. (2d) 88 (1943). See also *Sacks v. Neptune Meter Co.*, 263 N. Y. S. 462 (1933), and *Heffernan v. Prudential Insurance Co.*, 150 N. Y. S. 644 (1914).

¹⁰ Such was the holding in *Standard Discount Co. v. Polish Women's Alliance*, 301 Ill. App. 512, 23 N.E. (2d) 199 (1939), where death benefits under a fraternal life insurance policy were held recoverable by an assignee despite a by-law which provided that the same could not be "pledged, transferred or assigned by either the members or their beneficiaries." Italics added. The court, in the *Lain* case, drew a distinction on the ground that the fraternal death benefits were payable to a named beneficiary whereas in the case before it the policy also contained a "facility of payment" clause making it doubtful, at the time of the insured's death, just who would be entitled thereto. It appears to have overlooked the fact that when the insurer chose the assignor as beneficiary, his rights became vested.

¹¹ *Goit v. National Protection Ins. Co.*, 25 Barb. (N.Y.) 189 (1855); *Beck-Brown Realty Co. v. Liberty Bell Ins. Co.*, 241 N. Y. S. 727 (1930); *West Branch Ins. Co. v. Helfenstein*, 40 Pa. 289, 80 Am. Dec. 573 (1861); *Pennebaker v. Tomlinson*, 1 Tenn. Ch. 598 (1874); *J. M. Radford Grocery Co. v. Estelline State Bank*, (Tex. Civ. App.) 66 S.W. (2d) 1110 (1934); *National Life & Accident Ins. Co. v. Lucas Funeral Home*, (Tex. Civ. App.) 89 S.W. (2d) 468 (1936).

¹² The interesting data furnished by defendant in *Lain v. Metropolitan Life Ins. Co.*, 322 Ill. App. 643 at 654, 54 N.E. (2d) 736 at 741 (1944), regarding the magnitude of its operations and the consequent delay in payment if it had to respect such assignments, could be matched by any large corporation plagued by wage assignments and garnishment proceedings. There seems to be no public agitation to relieve them of such annoyances by abolishing wage assignments or repealing statutes relating to garnishment or attachment.

the assignment and treating such policy provisions as null and void, courts would serve to make the policy benefits available more readily to meet the needs of the moment than could even the most expeditious claim department of any insurance company located in some other state.

Intimately connected with that problem is the subordinate one as to who may make an assignment, assuming that one is permitted. If the policy names an absolute beneficiary and such person is competent to contract, it goes without saying that only the assignment of that person would be recognized. A not uncommon provision found in policies, however, is one which permits of contingent beneficiaries, hence close attention must be given to the policy language. This is particularly the case where the "industrial" type of policy is concerned for such policies usually contain a "facility of payment" clause under which the insurer is given an option to pay either the named beneficiary or some other person within certain expressed limits. Again, these provisions are not uniform¹³ so no general rule can be announced with regard thereto. Prior to the time the company exercises the option provided by such a clause, all persons concerned may well have only an expectancy rather than a vested interest. But it is possible to transfer such expectancy,¹⁴ at least by equitable if not by legal assignment,¹⁵ so if assignment is taken from the one whom the company later elects to treat as beneficiary, the assignee's rights should be respected.¹⁶ It is clear, however, that the exer-

¹³ In the *Lain* case, the privilege conferred by the clause seemed to depend upon (a) the named beneficiary's failure to surrender the policy and make proof of loss within thirty days of death, or (b) being legally unqualified to give a valid release, or (c) being dead prior to the death of the insured: 322 Ill. App. 643 at 645, 54 N.E. (2d) 736 at 737. If none of these eventualities occurred, the right of the named beneficiary would seem to be absolute. By contrast, the provision in the *Morticians' Acceptance Co.* case seems to have given the insurer the unqualified right to make payment to any one of a large class who might have an insurable interest: 321 Ill. App. 277 at 279, 53 N.E. (2d) 30 at 31.

¹⁴ Assignments of expectancies in other than insurance cases have long been recognized. As to assignments by an heir apparent, see *In re Landis*, 41 F. (2d) 700 (1930), cert. den. in *Farmers' Bank of Mount Pulaski, Ill. v. Bickenbach*, 282 U. S. 872, 51 S. Ct. 77, 75 L. Ed. 770 (1930); *Hudson v. Hudson*, 222 Ill. 527, 78 N.E. 917 (1906); *Donough v. Garland*, 269 Ill. 565, 109 N.E. 1015 (1915); *Brown v. Cunningham*, 303 Ill. App. 307, 25 N.E. (2d) 113 (1940). The effect of a warranty deed on an after-acquired estate in land is well known: *Montana Wheat Land Co. v. Northern Pac. Ry. Co.*, 308 Ill. 620, 139 N.E. 876 (1923); *Remington v. Krenn & Dato*, 289 Ill. App. 548, 7 N.E. (2d) 618 (1937); *White v. Bates*, 234 Ill. 276, 84 N.E. 906 (1908).

¹⁵ Although it may be necessary that property be in existence and be legally owned to support a legal assignment, *Associated Seed Growers v. Geib*, 125 F. (2d) 683 (1942), *Southern Kraft Corp. v. Standard Capital Corp.*, 40 N. Y. S. (2d) 947 (1943), *Mueller v. Emigrant Industrial Sav. Bank*, 41 N. Y. S. (2d) 799 (1943), there is no difficulty in supporting the same in equity, as the intent to transfer both a present and any after-acquired interest will there be given effect if clearly expressed: *Williams v. West Chicago St. R. R.*, 199 Ill. 57, 64 N.E. 1024 (1902); *Tennis v. Midkiff*, 55 Ill. App. 642 (1894). The analogy to a trust, calling for equitable enforcement, is strong.

¹⁶ *Warren v. First Nat. Bank of Columbus*, 149 Ill. 9, 38 N.E. 122, 25 L. R. A. 746 (1893); *Graham v. Southern Ry. Co.*, 173 Ga. 573, 161 S.E. 125 (1931). In

cise of such option cannot be trammled by any outstanding assignment, so that it is within the power of the insurer to elect to pay some other beneficiary.¹⁷ If, then, the person extending credit has failed to obtain an assignment from all potential beneficiaries, he may likely fail to attain his objective.

Enforcement of such assignments, if valid, will also pose problems. It is fundamental that no assignment is binding on the debtor until he is given notice thereof,¹⁸ so that if the assignee fails to give such notice of his rights he cannot complain should payment be made to the assignor. Proper notice would require the insurer to withhold payment at least until it is satisfied that the assignment is a genuine one, and, in all cases of doubt, the company could seek protection by instituting an interpleader action.¹⁹ It might even properly stipulate in the policy that, to be effective, such notice should be binding only if, and when, delivered at the home office of the company,²⁰ so the policy should be closely scrutinized in that regard. Of course, if the company waives such notice, either expressly or by its own conduct in rejecting the tendered assignment,²¹ it cannot later complain of the absence of notice and will not be permitted to act in derogation of the rights of the assignee.

After notice has been given, the company may still refuse to honor the assignment and suit by the assignee may then become essential. When contemplating action, the person extending the credit should be particularly careful to discriminate between the two kinds of assignment, i.e. legal and equitable; should determine the proper person to sue as plaintiff; and should also observe the jurisdictional power of the court in which the suit is to be brought.²² A fundamental distinction exists between a

Morticians' Acceptance Co. v. Metropolitan Life Ins. Co., 321 Ill. App. 277, 53 N.E. (2d) 30 (1944), the court denied recovery on three such assignments because the insurer ultimately elected a different person as beneficiary than the one who gave the assignment.

¹⁷ That may have been the motive, in the *Morticians' Acceptance Co.* case, for the company's choice of the named beneficiary in his representative capacity as administrator rather than paying the proceeds to him in his individual right under which style he had given the assignment.

¹⁸ *Savage v. Gregg*, 150 Ill. 161, 37 N.E. 312 (1894); *Immel v. Travelers Ins. Co.*, 373 Ill. 256, 26 N.E. (2d) 114 (1940), reversing 300 Ill. App. 96, 20 N.E. (2d) 804 (1939).

¹⁹ The right to institute such action might be open to question for lack of a dispute between the beneficiary and the assignee: *Kile v. Goodrum*, 87 Ill. App. 462 (1899), *Supreme Council of Western Catholic Union v. Murrin*, 154 Ill. App. 465 (1910). If the beneficiary should indicate a purpose to repudiate the assignment, and he would be prone to do so if the company were to indicate a willingness to pay despite the assignment, the necessary conflict of interests to support interpleader would not be hard to find.

²⁰ See standard form of life insurance policy in Vance, *Handbook of the Law of Insurance* (West Pub. Co., St. Paul, 1930), 2d Ed., p. 966. See also *Brady v. Loring*, 70 Ill. App. 191 (1897).

²¹ In *Morticians' Acceptance Co. v. Metropolitan Life Ins. Co.*, 321 Ill. App. 277, 53 N.E. (2d) 30 (1944), the insurer did return the assignments with a statement that it did not consider the same effective, but liability was imposed despite this.

²² A failure to observe these requirements tends to weaken the decision in *Standard Discount Co. v. Metropolitan Life Ins. Co.*, 321 Ill. App. 220, 53 N.E. (2d) 27 (1944), and certain expressions therein might not stand the test of criticism.

total, or legal, assignment on the one hand, and a partial, or equitable, assignment on the other. The former has long been recognized in courts of law,²³ and action thereon in the name of the assignee is specifically authorized by the Illinois Civil Practice Act provided the complaint discloses the facts therein made necessary.²⁴ Such action may well be brought in an inferior court depending on the amount sought to be recovered,²⁵ and no power of attorney would be required to support such suit as the mere giving of the assignment operates to transfer the right of action.²⁶

Suits upon equitable, or partial, assignments can only be maintained before courts possessing equitable jurisdiction.²⁷ Confusion seems to have led the court, in the Standard Discount Company case, to fail to recognize this fact and led it to affirm a judgment in favor of an assignee holding a partial assignment rendered by the Municipal Court of Chicago. That court lacks equitable jurisdiction in the true sense of that term,²⁸ and the existence of a power of attorney authorizing the assignee to sue for the demand should not operate to convert an equitable claim into a legal one.²⁹ The power thereby given might warrant suit at law by the assignee-attorney-in-fact for the whole of the demand, but if such action is brought it should be instituted in the name of the assignor-principal who holds the legal title to the cause of action.³⁰ Although the Illinois Civil Practice Act permits the joinder of several parties in one action who have claims arising out of the same transaction,³¹ that statute does not aid such decision

²³ *Ball v. Chadwick*, 46 Ill. 28 (1867); *State Street Furniture Co. v. Armour & Co.*, 259 Ill. App. 589 (1931), affirmed in 345 Ill. 160, 177 N.E. 702 (1931).

²⁴ Ill. Rev. Stat. 1943, Ch. 110, §146.

²⁵ In the Municipal Court of Chicago, for example, the case would be a fourth-class action under Ill. Rev. Stat. 1943, Ch. 37, §357, if the amount involved was less than \$1000. Smaller claims might be brought before a justice of the peace, under Ill. Rev. Stat. 1943, Ch. 79, §16, provided service could be obtained in the county.

²⁶ *Townsend v. Gregory*, 132 Ill. App. 192 (1907); *Gallagher v. Schmidt*, 231 Ill. App. 168 (1924), reversed in 313 Ill. 40, 144 N.E. 319 (1924); *People, for use of Vancil Motor Co. v. Weaver*, 313 Ill. App. 317, 40 N.E. (2d) 83 (1942).

²⁷ *Safford v. Miller*, 59 Ill. 205 (1871); *Chandler v. Green*, 101 Ill. App. 409 (1902); *Warren v. First Nat. Bank of Columbus*, 149 Ill. 9, 38 N.E. 122 (1893); *Phillips v. Edsall*, 127 Ill. 535, 20 N.E. 801 (1889).

²⁸ Its jurisdiction rests solely upon Ill. Rev. Stat. 1943, Ch. 37, §357, which does not confer power in equitable actions. Attempts to exercise such jurisdiction have been rejected in *Maiss v. Met. Amusement Ass'n*, 146 Ill. App. 196 (1909), affirmed in 241 Ill. 177, 89 N.E. 268 (1909); *People ex rel. Dr. Pierre Chemical Co. v. Municipal Court of Chicago*, 297 Ill. App. 431, 17 N.E. (2d) 999 (1938).

²⁹ The whole theory behind the use of a power of attorney is that the agent is not seeking to enforce his own claim, assuming he has one, but rather is pursuing the claims of his principal. Such theory begs all questions regarding assignments.

³⁰ *Wey v. Dooley*, 134 Ill. App. 244 (1907); *Olson v. Peterson*, 50 Ill. App. 327 (1893); *Creighton v. Village of Hyde Park*, 6 Ill. App. 272 (1880); *Dazey v. Mills, for use of Pinkham*, 10 Ill. 67 (1848).

³¹ Ill. Rev. Stat. 1943, Ch. 110, §147. The court, in the *Standard Discount Co.* case, intimated that the existence of such statute had changed the distinctions between legal and equitable assignments. The authorities cited in support of such view fail to justify any such conclusion. Supreme Court Rule 10, Ill. Rev. Stat. 1943, Ch. 110, §259.10, on the other hand, specifically declares that "all matters

for there was no apparent attempt therein to join the assignor, either as plaintiff or defendant,³² it does not purport to change the nature of the respective interests of the parties, and, in any event, it does not have operative effect in the Municipal Court of Chicago.³³

A person holding an equitable assignment, therefore, should be alert to bring the correct type of action before the proper court, suing in his own name on the equitable chose in action and joining the assignor, either as plaintiff or defendant, if necessary, in order that the court might protect the rights of all the parties. If, in addition to taking an equitable assignment, he should receive a power of attorney to sue for the whole demand,³⁴ he may have a choice to proceed in the name of the principal by legal action predicated thereon. But, as payment to the principal could well be a defense to a suit based on the power of attorney,³⁵ the equitable assignee would do well to use the equitable remedy in preference to the legal one, or see that he attains the position of a legal assignee from the outset.³⁶

It might well be gathered that financing a funeral in the fashion indicated herein is a business not lacking in risk, but as long as there seems to be profit in the venture as well as a service to be rendered in time of acute need, it is not unlikely that the practice will continue. For the sake of clarity in the law, therefore, it is to be hoped that these suggestions will be followed and prove helpful in protecting the rights of all concerned.

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which, prior to January 1, 1934, were within the jurisdiction of a court of equity . . . shall be heard and decided in the manner heretofore practiced in courts of equity." Even more enlightening is the recent case of *Freese v. Streicher*,—Ohio App.—, 55 N.E. (2d) 131 (1942), involving an almost parallel set of facts.

³² One who should be joint plaintiff may be made a party defendant, on proper showing, under Ill. Rev. Stat. 1943, Ch. 110, §147.

³³ Procedure therein is regulated by separate statute and rules adopted pursuant thereto: Ill. Rev. Stat. 1943, Ch. 37, §§374-5. The Civil Practice Act was expressly declared inapplicable in *Sherman v. Green*, 152 Ill. App. 166 (1909); *Kellogg v. Kellogg*, 302 Ill. App. 604, 24 N.E. (2d) 260 (1939), cause transferred 371 Ill. 241, 20 N.E. (2d) 585 (1939).

³⁴ There might be doubt as to the ability of the attorney-in-fact to delegate the authority conferred thereby: *Doggett v. Greene*, 254 Ill. 134, 98 N.E. 219 (1912). In *Standard Discount Co. v. Metropolitan Life Ins. Co.*, 321 Ill. App. 220, 53 N.E. (2d) 27 (1944), however, the question was obviated by the use of a printed form, probably furnished by the finance company, in which the power was conferred directly on the plaintiff rather than upon the undertaker and by him assigned over.

³⁵ As a power of attorney is revocable by the principal at will, unless it be a power coupled with an interest consonant with *Gilbert v. Holmes*, 64 Ill. 548 (1871), the principal would be free to make collection personally. Suit by the agent in the principal's name would clearly be subject to the defence of payment: *Holden v. Rutland R. R. Co.*, 73 Vt. 317, 50 A. 1096 (1901).

³⁶ This may require the finance company to advance the face value of the policy, paying part to the undertaker and the balance to the beneficiary. In view of the uncertainty in cases of contingent beneficial interests, it is doubtful if the risk would warrant such action, hence partial assignments will probably continue to be taken. Some form of non-transferrable note, given to the beneficiary and payable only from a specific fund, if collected, might serve the purpose.

MODIFICATION OF LUMP-SUM ALIMONY DECREES

Notice has previously been taken of the fact that the act of placing a label on a legal concept is generally sufficient to foreclose further independent thought about it.¹ Once the concept is cataloged, judicial minds are prone to apply the inevitable consequences of the label so affixed rather than to examine the concept anew in the light of the differing circumstances thrown up by a particular case. Such an idea would seem to be amply illustrated by the decision in the recent case of *Banck v. Banck*² in which the majority of the court, having concluded that alimony was involved, proceeded to the inevitable conclusion that the remarriage of the recipient thereof demanded a modification of the decree to bar further payments. The facts of that case disclosed that, after a divorce suit had been started, the wife filed a counterclaim charging wilful desertion. The parties mutually agreed to a settlement under which the husband was to pay to the wife the gross sum of \$4,500 in designated installments in full of all claims for alimony and other property rights in addition to giving up his interest in certain real estate. A divorce was subsequently granted upon the counterclaim. The decree recited such settlement, approved the terms thereof, and imposed a lien on the ex-husband's interest in other real estate to insure payment of the deferred installments. After some \$2,100 had been paid pursuant to the decree and the settlement, the ex-wife married again. Thereupon the ex-husband petitioned to be relieved from further payments.³ The trial court granted such petition and, upon appeal to the Appellate Court for the Third District, the majority thereof affirmed such order on the ground that as the provision was one for alimony it was subject to the express mandatory language of the statute. Had the court been more observant of the actual intent of the parties and less concerned with the label placed thereon, however, an entirely different result might well have been achieved.

While the lump-sum settlement in lieu of alimony is not infrequently referred to as "alimony" or "alimony in gross," it is clearly something distinct from alimony as that term is used in divorce cases. The latter term originally comprehended that allowance which was made to a woman on a decree of divorce for her support out of the estate of her husband.⁴ While the term used to signify the allowance judicially granted to the wife under a divorce *a mensa et thoro*,⁵ it has come generally to describe that provision judicially made to a spouse upon an absolute divorce.⁶ Its con-

¹ See Hutcheson, Jr., "This Thing Men Call Law," 2 U. of Chi. L. Rev. 1 (1934), and Chafee, Jr., "The Disorderly Conduct of Words," 41 Col. L. Rev. 381 (1941).

² 322 Ill. App. 369, 54 N.E. (2d) 577 (1944). Dady, P. J., wrote a dissenting opinion. Leave to appeal has been denied.

³ He relied on Ill. Rev. Stat. 1943, Ch. 40, §19. A proviso added in 1933, prior to the decree of divorce, declares: "Provided further that a party shall not be entitled to alimony and maintenance after remarriage." See Laws 1933, p. 492.

⁴ *Stillman v. Stillman*, 99 Ill. 196 at 201, 39 Am. Rep. 21 at 24 (1881).

⁵ *Prichard v. Prichard*, 3 Sw. & Tr. 523, 164 Eng. Rep. 1378 (1864).

⁶ *Lennahan v. O'Keefe*, 107 Ill. 620 at 626 (1883).

notation usually suggests an independent investigation of the circumstances of the parties and an exercise of discretion in determining the extent of the award, both as to amount and duration,⁷ proceeding on the ground of the fault and breach of duty of the person ordered to pay the same.⁸ Being designed as a substitute for that duty, about to be terminated by the divorce,⁹ it usually takes the form of a periodic payment open to such revision as the equities of the case may, from time to time, require.¹⁰

Gross alimony, on the other hand, though sometimes ordered by the court,¹¹ is generally thought of as a lump sum paid not so much as support money but as a property settlement between the parties in lieu of all claims growing out of the marriage relation whether for release of inchoate dower and right of homestead or for alimony in the normal sense.¹² Though usually paid at one time, it may be made payable in installments and this fact does not, and should not, alter its nature or effect.¹³ Whatever may be the case with regard to the judicial right to modify the usual alimony provision,¹⁴ subsequent modification of alimony in gross is generally not permitted¹⁵ unless, upon examination of the decree as a whole, it appears that the allowance was intended as a substitute for the duty of support previously owed.¹⁶

The majority of the court in the *Banck* case, while admitting that a property settlement agreement would be absolute and binding if it be legal in all other respects, especially if kept separate and apart from the decree, nevertheless rested its decision on two major propositions, to-wit: (1) that the incorporation of the provisions of the settlement in the divorce decree rendered the agreement nugatory by merger,¹⁷ and (2) that the court possesses a continuing power to supervise and modify its

⁷ *Cole v. Cole*, 142 Ill. 19, 31 N.E. 109, 19 L. R. A. 811, 34 Am. St. Rep. 56 (1892).

⁸ *Audubon v. Shufeldt*, 181 U. S. 575, 21 S. Ct. 735, 45 L. Ed. 1009 (1901); *Barclay v. Barclay*, 184 Ill. 375, 56 N.E. 636, 51 L. R. A. 351 (1900).

⁹ It is fundamental that alimony must be granted at the time of the divorce, for if not then included in the decree it may not be sought at some later date, even though the court lacked the necessary personal jurisdiction to make such an award: *Kelley v. Kelley*, 317 Ill. 104, 147 N.E. 659 (1925).

¹⁰ On the right to revise a decree calling for periodic alimony, as well as the factors to be considered when revision is sought, see *Cole v. Cole*, 142 Ill. 19, 31 N.E. 109, 19 L. R. A. 811, 34 Am. St. Rep. 56 (1892).

¹¹ *Plaster v. Plaster*, 47 Ill. 290 (1868). But see *Bissett v. Bissett*, 375 Ill. 551, 31 N.E. (2d) 955, 133 A. L. R. 855 (1941).

¹² *Cole v. Cole*, 142 Ill. 19, 31 N.E. 109, 19 L. R. A. 811, 34 Am. St. Rep. 56 (1892).

¹³ *Smith v. Rogers*, 215 Ala. 581, 112 So. 190 (1927); *Jones v. Jones*, 216 Ky. 810, 288 S.W. 737 (1926); *Scott v. Robertson*, 212 Ky. 392, 279 S.W. 625 (1926); *Guess v. Smith*, 100 Miss. 457, 56 So. 166, Ann. Cas. 1914A 300 (1911); *Beard v. Beard*, 57 Neb. 754, 78 N.W. 255 (1899). See also annotation in 71 A. L. R. 723.

¹⁴ On that point, Ill. Rev. Stat. 1943, Ch. 40, §19, confers broad power on the court to modify the decree from time to time "as shall appear reasonable and proper."

¹⁵ *Plaster v. Plaster*, 47 Ill. 290 (1868); *Buck v. Buck*, 60 Ill. 241 (1871); *Maginnis v. Maginnis*, 323 Ill. 113, 153 N.E. 654 (1926); *Smith v. Smith*, 334 Ill. 370, 166 N.E. 85 (1929). See also cases cited in note 13, ante.

¹⁶ *Welty v. Welty*, 195 Ill. 335, 63 N.E. 161, 88 Am. St. Rep. 208 (1902).

¹⁷ The court cited *Adler v. Adler*, 373 Ill. 361, 26 N.E. (2d) 504 (1940), and *Maginnis v. Maginnis*, 323 Ill. 113, 153 N.E. 654 (1926), on this point.

decrees, insofar as alimony is concerned, whenever a change in circumstance arises¹⁸ or an event occurs calling for the application of the recent amendment to the Divorce Act.¹⁹ The court relied principally on the comparatively recent Illinois Supreme Court decision in *Adler v. Adler*²⁰ wherein it was indicated that parties to agreements respecting alimony and property settlements have two avenues open to them. The first is to make their settlement independent of the divorce decree and to rely upon their ordinary contract rights to secure enforcement. The second method suggested is to incorporate such agreement into the decree, merging the one in the other, and thereby secure the aid of the court for enforcement through the use of the contempt power. It had been there determined that if the parties chose to travel the latter avenue, they were bound thereby in all respects so that the court must, under the statute, upon the remarriage of the recipient of alimony, order the cessation of alimony payments.²¹

It is submitted, however, that the court in the Banck case erred in applying the rule of the Adler case to the situation before it, for the installment payments in the Adler decree were not fixed and certain in number but were dependent upon the duration of the life of the recipient, hence clearly designed as alimony. In the Banck case, on the other hand, not only was the total sum to be paid fixed by settlement and decree, but the amount of each installment and its due date was explicit. A basis for differentiation, had the majority of the court desired one, was clearly present but it seemed to prefer the view that public policy was opposed to the idea that the recipient of alimony, no matter what kind, should obtain financial assistance from an ex-spouse while also being entitled to support from a new one.²²

They might have argued that, regardless of the type of provision for support or in lieu thereof, the fact of incorporation in the decree should be the sole factor in determining the power of the court to order subsequent modification. Pressed to its logical conclusion, such argument would mean either that the parties were not free to settle their differences out of court,²³ or must be considered as surrendering their freedom to make absolute contracts as the price of obtaining equitable enforcement for the obligations thereof.²⁴ It is true that, by incorporation in the decree, the

18 *Herrick v. Herrick*, 319 Ill. 146, 149 N.E. 820 (1925). That case, however, discloses that the incorporated property settlement was not one for a lump sum but rather contemplated an agreed payment for life.

19 *Laws* 1933, p. 492; Ill. Rev. Stat. 1943, Ch. 40, §19.

20 373 Ill. 361, 26 N.E. (2d) 504 (1940).

21 373 Ill. 361 at 371, 26 N.E. (2d) 504 at 508.

22 The dissenting judge expressed the view that he could see no sound basis for such a policy if it permitted the spouse, who had collected a cash settlement, to retain the same after remarriage while denying another, who could collect only on an installment basis, to enforce the settlement so made: 322 Ill. App. 369 at 398, 54 N.E. (2d) 577 at 589-90.

23 The law is too plain that settlement out of court is to be favored rather than hampered: *Frank v. Heaton*, 56 Ill. App. 227 (1894). In divorce cases, however, the agreement must not involve collusion: Ill. Rev. Stat. 1943, Ch. 40, §11, and see also *Smith v. Smith*, 334 Ill. 370, 166 N.E. 85 (1929).

24 *Welty v. Welty*, 195 Ill. 335, 63 N.E. 161, 88 Am. St. Rep. 208 (1902).

alimony settlement receives not only judicial approval but gains a powerful sanction not given to the ordinary contract for the payment of money. But a distinction could be, and perhaps ought to be, drawn between those decretal provisions respecting alimony in which the court merely approves as fair and reasonable the acknowledgement of fixed indebtedness by the guilty spouse as contrasted with provisions imposed by the court when called upon to exercise its discretionary power to award alimony against the protest of the party ordered to pay. The former type, regarded as being absolute and vested, might be treated as being entitled to no more than ordinary judicial backing by execution process such as would be the case, for example, on a stipulated deficiency judgment in a mortgage foreclosure case. The latter, because discretionary and contingent, could well be favored with the support of the most potent weapon in the arsenal of equity.²⁵ So long as alimony is treated as something other than a debt, however, it is unlikely that any court would be willing to draw such a distinction, hence incorporation of any settlement in a divorce decree must probably continue at the price and upon the terms indicated by the decision in the Banck case.

Assuming the incorporated settlement to be alimony in the accepted sense of that term, the problem still remains as to whether subsequent changes in the status of the parties, such as remarriage of the recipient, warrant a holding as drastic as that laid down by the Appellate Court. It was the view of the majority that the proviso contained in the Divorce Act applied without question to every form of alimony, whether periodic or in gross, if encompassed within the decree of divorce. As a qualification upon the power of a court to award periodic alimony, the proviso is no doubt a complete and definite limitation well within the power of the legislature.²⁶ But if there is a distinction in the function of a court when approving a lump sum alimony settlement in contrast to its exercise of power in awarding alimony in accordance with its discretion, it does not follow that a limitation on the latter power also operates to delimit the former. It seems more likely, as viewed by the dissenting justice,²⁷ that the legislative intent was merely to give formal ratification to the previously expressed judicial attitude that as periodic alimony was a substitute for support the same should cease when the burden of support was assumed by another.²⁸ It does not appear that the legislature contemplated banning

²⁵ Enforcement by contempt process will probably have to be retained, even though it smacks somewhat of imprisonment for debt, as experience has shown that the alimony payer who is forced to pay against his will is less likely to respect that order if not so coerced.

²⁶ Since the sole power of the Illinois courts to award alimony or even to deal with divorce matters rests upon statutory grounds: *Floberg v. Floberg*, 358 Ill. 626, 193 N.E. 456 (1934), *Trenchard v. Trenchard*, 245 Ill. 313, 92 N.E. 243 (1910), *Thomas v. Thomas*, 51 Ill. 162 (1869), it follows that the legislature may abrogate or amend the statute at will except insofar as vested rights may be concerned.

²⁷ 322 Ill. App. 369 at 398, 54 N.E. (2d) 577 at 590.

²⁸ *Stillman v. Stillman*, 99 Ill. 196, 39 Am. Rep. 21 (1881), ably expresses the judicial policy as to termination of periodic alimony on remarriage. The majority of the court in the Banck case acknowledge that the 1933 amendment of the Divorce Act was merely a crystallization of such policy into legislative language:

lump-sum settlements or placing any impediments in the way of their operation. If that was the case, it would have been easy to express that purpose with more certainty than can be gathered from an examination of the statute. To read in a doctrine that such settlements are illegal to the extent that, and if, by reason of an extension of credit, payment would occur after remarriage of the recipient, as has been done,²⁹ goes farther than the legislative language would seem to warrant.

More consistent with the idea that the contractual right to lump-sum alimony is a vested rather than a contingent one is the decision in *McKey v. Willett*³⁰ which upheld the transfer of the beneficiary's right to such alimony to her trustee in bankruptcy against the argument that the settlement therein was not final because open to possible modification. The decision in *In re Fiorio*³¹ also treated alimony of this type as amounting to a vested property right which could be dealt with as an asset of the estate of the bankrupt recipient. The vitality of such holdings is thrown open to attack should the Banck decision stand, for it is difficult to conceive how future payments under such a settlement can be both vested and contingent at one and the same time.³² To suggest that the right to the benefits of the settlement are to be treated as vested but subject to be divested upon remarriage of the recipient would seem to be adding a term to the settlement that the parties themselves either did not or could not agree upon. By holding that such should be regarded as an implied provision of the settlement if the same becomes incorporated in the decree, as was suggested in the Banck case, seems to be exacting too high a price for the privilege of securing equitable enforcement of that contract.

Fortunately, the even more recent decision in *Drangle v. Lindauer*³³ seems to point a way out for those who seek a binding settlement of a potential alimony liability at a time when they are unable to make an immediate cash settlement. In that case, the husband bound himself to pay his wife, should divorce be granted, a stipulated sum in the event of her remarriage within a specified time with a correspondingly lesser sum, on a sliding scale, if the remarriage did not occur until an even more postponed date. Such contract was not incorporated in the decree, although there was a provision therein for periodic alimony. Following the decree, the ex-wife remarried, thereby terminating the liability under the provi-

322 Ill. App. 369 at 376, 54 N.E. (2d) 577 at 581. Though the majority opinion cites *De La Cour v. De La Cour*, 363 Ill. 545, 2 N.E. (2d) 896 (1936), in support of its decision, that case does not seem to be in point, for the Supreme Court did not disturb the original decree for the payment of a lump sum payable in monthly installments nor did the petition seek to set aside that provision of the decree.

²⁹ In *Miller v. Miller*, 317 Ill. App. 447, 46 N.E. (2d) 102 (1943), it was declared that a provision in a settlement agreement requiring the payments to continue despite remarriage of the payee would be regarded as illegal. See also *Adler v. Adler*, 373 Ill. 361, 26 N.E. (2d) 504 (1940).

³⁰ 248 Ill. App. 602 (1928).

³¹ 128 F. (2d) 562 (1942).

³² Congressional action in taxing alimony to the recipient for income tax purposes, under 26 U. S. C. A. §22(k), while not strictly in point, tends to indicate a purpose toward regarding the same as a vested right, particularly if the taxpayer is on an accrual basis.

³³ 323 Ill. App. 23, 54 N.E. (2d) 751 (1944).

sion for periodic payments. She thereafter brought suit upon the contract to pay in the event of her remarriage, and was met by the contention that the contract was invalid by reason of the provision of the Divorce Act above referred to. It was held, nevertheless, that since such contract did not call for the payment of alimony but was, in effect, a property settlement it did not fall within the operation of that statute and recovery on the contract was permitted. By applying a slight amount of knowledge on the subject of annuities, it is possible to see how these parties eventually arrived at the place which the Banck decision says they could not reach.

Such subterfuge would be entirely unnecessary if courts would recognize that, despite terminology, lump-sum settlements even though payable in installments and approved by judicial decree should be given the effect intended by the parties thereto, to-wit: as conferring a vested but deferred right to a precise sum of money in full and final settlement of all obligations arising from the former marital status. As such settlements are intended to be something different from the previously existing obligation to support they should not be considered in that light, or even treated as alimony, but rather should be dealt with as would any other compromise agreement. To deny them this effect is tantamount to requiring the recipient to remain unmarried until after the deferred installments have been paid in full.

T. F. BAYER

CIVIL PRACTICE ACT CASES

HUSBAND AND WIFE—SEPARATION AND SEPARATE MAINTENANCE—WHETHER, UNDER ILLINOIS CIVIL PRACTICE, AN ACTION TO ADJUDICATE THE PROPERTY RIGHTS OF THE SPOUSES MAY BE JOINED WITH AN ACTION FOR SEPARATE MAINTENANCE—The plaintiff, in the case of *Petta v. Petta*,¹ sued her husband for separate maintenance. He filed a counterclaim seeking an absolute divorce. The trial court found for the plaintiff and against the defendant on the counterclaim but denied the plaintiff any right to support money by reason of a provision contained in the decree constituting a division of certain real estate between the parties. No such relief had been sought by the plaintiff, however, nor had any agreement with regard thereto been made by the parties. Plaintiff appealed from that portion of the decree which provided for the division of property rights on the ground that the court lacked power to adjudicate such matters. In reversing such decree, the Appellate Court for the First District distinguished the holdings of certain earlier Illinois decisions² by pointing out that the statements therein were mere dicta, hence did not change the rule laid down in other cases to the effect that a court has no jurisdiction,

¹ 321 Ill. App. 512, 53 N.E. (2d) 324 (1944).

² In *Spalding v. Spalding*, 361 Ill. 387, 198 N.E. 136 (1935), and *Moore v. Moore*, 335 Ill. 517, 167 N.E. 792 (1929), separate maintenance proceedings were subsequently amended into divorce cases. They are, therefore, no authority for the rule as to separate maintenance. In *Decker v. Decker*, 279 Ill. 300, 116 N.E. 688 (1917), the lower court had settled the property rights of the parties in an action for separate maintenance but, on appeal, the exercise of such jurisdiction was

in a separate maintenance proceeding, to settle property rights.³

To obviate the hardships of the common law, which furnished the wife who was forced to live separate and apart from her husband with only an uncertain remedy,⁴ the legislature, in 1819, passed a statute which gave her an equitable remedy against her spouse to compel support.⁵ Being a statutory remedy and one unknown to the common law, the scope of the jurisdiction is limited. As a consequence, when granting relief thereunder, the court cannot exercise its general equity powers and provide complete relief but is limited by the authority conferred on it through the statute.⁶

That proceeding must be carefully distinguished from the one provided by the Divorce Act⁷ for the former merely contemplates a temporary separation of the spouses while the latter is designed to procure a dissolution of the marriage bond.⁸ In some respects, though, the relief granted by both proceedings is similar. For example, the court has the power in either action to provide the wife with temporary support pending a final adjudication of the cause so long as it does not appear that the separation was produced by the fault of the wife.⁹ It is also possible, in each action, to award the wife an allowance of attorney's fees to enable her to carry on the proceeding.¹⁰ But such similarity rests upon express provisions in the two statutes.¹¹ Only the Divorce Act contains a provision for the settlement of the property rights of the parties in case a divorce is granted,¹² while the separate maintenance statute is silent on the subject. It would seem reasonable, then, to suppose that had the legislature intended to confer such jurisdiction on the court hearing a separate maintenance matter, it would have expressly provided the power as it did in the Divorce Act. In the absence of such provision, the instant case appears rightly decided, especially

not questioned, hence anything said with regard thereto was mere dicta. *Glennon v. Glennon*, 299 Ill. App. 13, 19 N.E. (2d) 412 (1939), was decided on the basis of the dicta found in the *Decker* case, while *Grossman v. Grossman*, 304 Ill. App. 507, 26 N.E. (2d) 678 (1940), was based on the authority of the *Glennon* case.

³ *Spor v. Kraus*, 197 Ill. App. 348 (1916); *McAdams v. McAdams*, 267 Ill. App. 124 (1932); *Pearsons v. Pearsons*, 282 Ill. App. 92 (1935), petition for leave to appeal denied: 282 Ill. App. xlviii.

⁴ In *Ross v. Ross*, 69 Ill. 569 (1873), the court noted that her only privilege was to purchase necessaries on his credit.

⁵ See Laws 1819, p. 35, § 3. The statute was amended, in 1935, to extend the remedy to the husband as well as the wife: Laws 1935, p. 913. The amended statute now appears as Ill. Rev. Stat. 1943, Ch. 68, §§ 22-3. The scope of the action is well illustrated by *Schneider v. Schneider*, 312 Ill. App. 59, 37 N.E. (2d) 911 (1941).

⁶ *Smith v. Smith*, 334 Ill. 370, 166 N.E. 85 (1929).

⁷ Ill. Rev. Stat. 1943, Ch. 40, § 1.

⁸ *Bushnell v. Cooper*, 289 Ill. 260, 124 N.E. 521, 6 A.L.R. 1517 (1919); *McAdams v. McAdams*, 267 Ill. App. 124 (1932).

⁹ *Reifschneider v. Reifschneider*, 241 Ill. 92, 89 N.E. 255 (1909).

¹⁰ *Harding v. Harding*, 144 Ill. 588, 32 N.E. 206 (1892); *McAdams v. McAdams*, 267 Ill. App. 124 (1932).

¹¹ Compare Ill. Rev. Stat. 1943, Ch. 40, § 16, with Ill. Rev. Stat. 1943, Ch. 68, § 22.

¹² Ill. Rev. Stat. 1943, Ch. 40, § 18.

since there was no prayer for such relief.¹³

Conceding, then, that a proceeding for the settlement of property rights between the spouses¹⁴ and one for separate maintenance would constitute two distinct causes of action, the question presents itself as to whether or not these two distinct claims may be asserted in one suit. That question has never been directly passed upon in Illinois,¹⁵ but the court in the instant case seemed to intimate that such joinder would not be possible.¹⁶ Although the joinder of such causes of action might have been regarded as improper under former practice, the liberal provisions of the Civil Practice Act specifically authorize the joining of several claims, whether legal or equitable, subject to the limitation that the court might, in its discretion, order separate trials where it is inconvenient to try the actions together.¹⁷ Under these provisions, the Illinois Supreme Court has sanctioned the joining of an action for absolute divorce with one for the partition of real estate jointly owned by the parties,¹⁸ the court pointing out that such joinder was proper because both causes of action grew out of the same difficulties, the parties were the same, and both causes could be conveniently tried in a single suit thus avoiding a multiplicity of suits.

In view of the liberality shown in that case, and other causes,¹⁹ it might well be assumed that the court would not object to the joinder of an action for separate maintenance with some other action between the parties if the latter is presented as an independent claim cognizable by the court on some other ground than the separate maintenance statute. Such joinder should not inconvenience the court but rather aid it since, when asked to determine what would be a reasonable amount to be allowed for support, the court would have before it the evidence as to any property owned by the spouses, whether owned separately or jointly.²⁰ It would also convenience the parties, for it would be possible to settle in one action what would otherwise require two or more suits.

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¹³ It is axiomatic that a court should grant no other relief than is prayed for: Ill. Rev. Stat. 1943, Ch. 110, § 158. See also *Bauer v. Lindgren*, 279 Ill. App. 397 (1935), and *Kaifer v. Kaifer*, 286 Ill. App. 433, 3 N.E. (2d) 886 (1936), noted in 15 CHICAGO-KENT REVIEW 72.

¹⁴ Suits between them over property matters are sanctioned by Ill. Rev. Stat. 1943, Ch. 68, § 10.

¹⁵ In *Glennon v. Glennon*, 299 Ill. App. 13, 19 N.E. (2d) 412 (1939), the court incidentally expressed its belief that such joinder might be allowed under the provisions of Ill. Rev. Stat. 1943, Ch. 110, § 168.

¹⁶ The court stated: "The argument that it is unfair that a wife who seeks separate maintenance, only, cannot have her property rights settled in that proceeding, might properly be made to the legislature, but not to the courts." See 321 Ill. App. 512 at 520, 53 N.E. (2d) 324 at 327. The court did note that a separate proceeding could clearly be maintained for it cited *Kartun v. Kartun*, 347 Ill. 510, 180 N. E. 423 (1932), which authorizes a suit for partition and accounting between spouses.

¹⁷ Ill. Rev. Stat. 1943, Ch. 110, § 168(1).

¹⁸ *Hitchcock v. Hitchcock*, 373 Ill. 352, 26 N.E. (2d) 108 (1940).

¹⁹ *Duncan v. Suhy*, 378 Ill. 104, 37 N.E. (2d) 826 (1941), and *Borman v. Oetzell*, 382 Ill. 110, 46 N.E. (2d) 914 (1943).

²⁰ *Harding v. Harding*, 144 Ill. 588, 32 N.E. 206 (1892).