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Recent Cases

Joseph M. Kolmacic

Nancy-Nellis Warner

Rosemarie Serino

Kenneth I. Laprade

George J. Bertain Jr.

See next page for additional authors

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Authors

Joseph M. Kolmacic, Nancy-Nellis Warner, Rosemarie Serino, Kenneth I. Laprade, George J. Bertain Jr., and Philip C. Valenti

CONSTITUTIONAL LAW—CAPTIVE AUDIENCE—PUBLIC UTILITIES—RIGHT OF PRIVACY NOT VIOLATED BY TRANSIT RADIO—Capital Transit gave Washington Transit Radio, Inc., the right to install radios in its passenger vehicles after a sample poll had convinced the former that approximately 92% of its passengers were not opposed to Transit radio. The radio programs consisted of about 90% music, 5% announcements, and 5% advertising. After this service was instituted the inevitable complaints arose and were referred to a hearing of the Public Utilities Commission, a Federal agency. Pollak intervened for the complainants at the hearing. The nature of the complaints varied (e.g. interference with reading, studying, talking, thinking, etc.) but could generally be considered as an invasion of the privacy of the passengers. The Commission dismissed the complaints with the conclusion that Transit radio was consistent with the public convenience, comfort, and safety. 81 P. U. R. (N. S.) 122, 126.

Pollak appealed, and the District Court dismissed the action. The Court of Appeals for the District of Columbia Circuit vacated the Commission's order, *Pollak v. Public Utilities Commission,* 191 F. 2d 450 (D. C. Cir. 1951). The Supreme Court granted certiorari, 342 U. S. 848 (1951).

HELD: Neither the First nor the Fifth Amendments have been violated by the Commission's order, inasmuch as Pollak's freedom of conversation and right of privacy had not been substantially infringed. It was further stated that the rights of a majority of passengers must be respected and cannot be overridden by a few individuals. *Public Utilities Commission v. Pollak,* 343 U. S. 451 (1952).

Justice Douglas, in a strongly worded dissenting opinion, pointed out that "This is a case of first impression. There are no precedents to construe; no principles previously expounded to apply. We write on a clean slate." p. 367. The dissent continued on to inspect not only the loss of privacy, but also the potential control over men's minds by compulsory listening and attention to radio programs. Justice Douglas admonished the Court to be aware of undue invasion of the right of privacy:

> When we force people to listen to another's ideas, we give the propagandist a powerful weapon. Today it is a business enterprise working out a radio program under the auspices of government. Tomorrow it may be a dominant political or religious group. Today the purpose is benign; there is no invidious cast to the programs. But the vice is inherent in the system. *Once privacy is invaded, privacy is gone.* (italics supplied). Once a man is forced to submit to one type of program, he can be forced to submit to another. It may be but a short step from a cultural program to a political program. p. 469.

The Public Utilities Commission is a government agency set up in the District of Columbia by Congress. It has control over the Capital Transit franchise; it has given Capital Transit a virtual monopoly; it can allow Capital Transit to broadcast or not to broadcast. D. C. Code §§ 43-101 et seq. "When authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself." *American Communications Ass'n v. Douds,* 339 U. S. 382, 401 (1950), as quoted by the majority opinion in the principal case.

Free speech by the speaker is not an absolute right under the Constitution and can be regulated. See *Dennis v. United States,* 341 U. S. 494 (1951); *Schaefer v. United States,* 251 U. S. 466 (1920); *Frohwerk v. United States,* 249 U. S. 204 (1919). The Fifth Amendment includes the right of privacy and the right "to be let alone." *Breard v. Alexandria,* 341 U. S. 622 (1951); *Olmstead v. United States,* 277 U. S. 438, 478 (1928). The very purpose of the First and Fifth Amendments is to prevent Federal Government interference with the rights enumerated therein. *Grosjean v. American Press Co.,* 297 U. S. 233, 235 (1936); *Corrigan v. Buckley,* 271 U. S. 323, 330 (1926); *Talton v. Mayes,* 163 U. S. 376, 382, 384 (1896). The Constitutional guarantee of liberty refers to freedom of all the faculties and not merely physical freedom. *Grosjean v. American Press Co., supra,* 244. "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect." *Meyer v. State of Nebraska,* 262 U. S. 390, 399, 400 (1923).

The Supreme Court has established the principle that the right to foist advertisements on the public is subservient to the public's right not to be disturbed. *Valentine v. Chrestensen,* 316 U. S. 52 (1942). Justice Frankfurter who announced himself too prejudiced to partake in the decision of the *Pollak* case, had earlier said in a dissenting opinion:

> . . . modern devices for amplifying the range and volume of the voice, or its recording, afford easy, too easy, opportunities for aural aggression. If uncontrolled, the result is intrusion into cherished privacy. The refreshment of mere silence, or meditation, or quiet conversation, may be disturbed or precluded by noise beyond one's personal control. . . . Surely there is not a constitutional right to force unwilling people to listen. *Saia v. New York,* 334 U. S. 558, 563 (1948).

In *Kovacs v. Cooper,* 336 U. S. 77 (1949), the Supreme Court held that the public's freedom not to listen was more important than an individual's right to speak from a sound truck on a public street.

It seems evident that the right of privacy and the freedom of speech have *prima facie* been invaded and there is a failure to show good cause for this invasion. The passengers ride Capital Transit more from necessity than from choice. See *United States v. Capital Transit Co.,* 325 U. S. 357, 359 (1945). Because of very practical reasons, economic and otherwise, they are compelled to ride, and compulsion to ride Capital Transit is a compulsion to hear WWDC-FM. The passengers are a "captive audience" and are so advertised by the trade in the 1949 *Radio Annual,* p. 363, which goes on to claim that "If they can hear, they can hear your commercial."

It is submitted: Freedom of speech involves at least two parties, the speaker and the listener. Both parties are entitled to freedom; the speaker, freedom to speak; and the listener, freedom to listen. The speaker is not obliged to speak, but once he exercises his right to speak he cannot thereby violate the listener's right, if the listener chooses not to listen or to listen to someone or something else. This is especially true where the speaker is a large corporation, speaking with the approval of the Federal Government.

JOHN F. HUGHES

CORPORATIONS — AGENCY — ATTORNEY AND CLIENT.—Appellant was the owner of certain shares of common stock of the Darco Corporation, a firm which merged with the defendant corporation on July 31, 1950. The appellant, being dissatisfied with the merger, sought an appraisal of his shares under Section 61, the General Corporation Law of Delaware, Del. Rev. Code 1935, § 2093. Briefly stated, the statute allows a dissenting stockholder to redeem his stock for cash if he complies with certain required steps, namely, (1) that he object in writing to the contemplated merger, (2) not vote in favor of the proposed merger, and (3) make a written demand for payment of his stock within 20 days after the recording of the merger agreement. Upon official notice of the proposed merger, the appellant sent a letter in the form of an absolute objection to the consolidation. This letter, however, was signed only by an attorney-at-law purporting to be acting in behalf of the appellant.

The question was whether the appellant had complied with the statute, in particular, whether the agent's written objection, unaccompanied by evidence of authority to act, was an objection within the statute. The lower court held that this letter was not a valid objection in writing because no evidence of authority of the agent was furnished the corporation during the statutory period within which such a dissent could be entertained.

In reversing the decision, the Supreme Court of Delaware held that a stockholder has no obligation to exhibit proof of delegation of authority, but that the burden is upon the corporation to determine the scope of the agent's authority if it has doubt of the fact, unless there is some special consideration which would require otherwise. *Zeeb v. Atlas Powder Co.,* —— Del. Ch. ——, 87 A. 2d 123 (1952).

At common law a merger of two corporations could be prevented by a single stockholder, but as it becomes evident that the complex mechanism of commerce and business activity should not be stifled by minority stockholders, statutes were enacted in state after state permitting corporate mergers without opposition from an individual stockholder. *Chicago Corp. v. Munds,* 20 Del. Ch. 142, 172 Atl. 452 (1934). The statutes, while varying in detail of procedure, do not differ in substance. 15 *Fletcher Cyclopedia Corporations,* § 7157-67 (1938 Rev. Vol.). A majority of the courts have declared that these statutes are to be liberally construed, the theory being that the shareholder has been deprived of his right to prevent a consolidation and that the appraisal statute is the sole remaining remedy of the dissenting stockholder. *New Jersey & H. R. Ry. & Ferry Co. v. American Electrical Works,* 82 N. J. L. 391, 81 Atl. 989 (1911). The Supreme Court of Delaware declared that merger statutes were enacted not only to protect the dissenting stockholder, but the majority stockholders as well. *Schenk v. Salt Home Oil Corp.,* 28 Del. Ch. 433, 41 A. 2d 583 (1945). Similarly, the highest court in Ohio stated such construction should be placed as would carry out the intent and objectives of the statute. *Klein v. United Theatres Co.,* 148 Ohio St. 306, 74 N. E. 2d 319 (1947).

The leading case in Delaware, prior to the case in consideration, involving the question whether a written objection signed and submitted by an agent acting for a dissenting stockholder was within the framework of the appraisal statute, was *In re Universal Pictures Co.,* 28 Del. Ch. 72, 37 A. 2d 615 (1944). The court there upheld the contention of the corporation that such an objection, unsupported by evidence of authority to act as an agent, was not valid in that,

"it was vital for the corporation to know whether, at the time when the objections were filed, the objections were by bona fide stockholders or were the acts of interlopers who, for collateral reasons, desired to be obtrusive." The court went on to say that "it would seem unreasonable to require consenting stockholders, or the corporation, to assume the existence of an agency and take action upon that assumption." *Accord, Friedman v. Booth Fisheries Corp.,* 28 Del. Ch. 211, 29 A. 2d 761 (1944), and *Lewis v. Corron & Reynolds Corp.,* 30 Del. Ch. 200, 57 A. 2d 632 (1948).

In the foregoing cases, it was conceded that a stockholder could act through an agent and that the rules of agency should govern. It is a general rule of agency that the party asserting the agency has the burden of proving the fact. However, granting that the agent is authorized to act for the principal, when a statute requires the stockholder or his agent to act within a prescribed period, must the agent submit proof of his authority during this period in the absence of a demand, or is it incumbent upon the corporation, if it is skeptical of the agency, to challenge the purported authority? In *Lewis v. Corron & Reynolds Corp., supra,* the court stated:

> The corporation was under no legal duty, contrary to contention, to seek, them out and ask them to submit within the statutory period proper evidence of their purported agent's authority.

In the principle case, however, it was held that the rules of agency ordinarily do not require submission of proof, that the corporation has the burden of making the first move by challenging the authority, "unless there is some *special consideration* which would require otherwise." *In re Universal Pictures Co., supra,* deemed the special consideration necessary was the unreasonable burden placed upon the corporation. The appellee in the *Zeeb* case relied strongly upon the case of *Klein v. United Theatres Co.,* wherein it was held that Ohio General Code, § 8623-72, required a dissent and demand in writing made in person or through an agent who must exhibit his authority within the statutory period. There it was stated:

> Under the statute, when the shareholder has dissented, he cannot withdraw his demand for payment for his stock unless the board of directors of the corporation consents thereto, or unless it abandons the sale . . . Obviously it is essential that the corporation know the dissent of the shareholder is genuine and in such form that it cannot be disavowed.

Perhaps the Ohio statute can be distinguished from the Delaware statute, in that the former holds that objections to mergers are binding and cannot be withdrawn, whereas the latter, regards such objections to be mere preliminary steps and not binding upon anyone.

> The filing of an objection in writing by a dissenting stockholder prior to the vote on the proposed merger is binding upon no one. While it is a prerequisite to the right to an appraisal, the objecting stockholder is in no way finally committed to a dissent . . . The only purpose of requiring a written objection is to give notice. *Zeeb v. Atlas Powder Co., supra.*

In all the aforementioned cases the agents have been attorneys. In *Friedman v. Booth Corp., supra,* it was asserted that there is a presumption that an attorney-at-law as an officer of the court is, in general, duly authorized to act for a client whom he professes to represent. The presumption, however, is one that exists only in regards to proceedings before court. *Doeller v. Mortgage Guarantee Co.,* 166 Md. 500, 171 A. 856 (1934). In *Friedman v. Booth Corp., supra,* the court said:

> It may be that presumptions of authority are indulged in where an attorney enters an appearance in a proceeding in a court before which he is admitted to practice; but where, as here, the asserted agency is not one which can be performed only by an attorney at law, the authority of a lawyer is no more presumed than that of a layman.

An analysis of the *Zeeb* and *Klein* cases would lead to the conclusion that, in the absence of *special considerations,* an agent need not submit proof of his authority to act for a principal when filing an objection to a proposed merger. Where the filing of an objection is merely a preliminary step and not binding, as in Delaware, the burden of requiring a corporation to challenge the representations of the agent is not unreasonable and therefor not a special consideration. However, where an objection is binding and final, as in Ohio, it is a special consideration that would necessitate proof of the agent's authority to act for his principal. But in neither case, where the transaction is such that it can be performed by either an attorney or layman, does an attorney stand in a better position than a layman.

JOSEPH M. KOLMACIC

CRIMINAL LAW—SUBNORMAL MENTALITY AS AFFECTING CRIMINAL RESPONSIBILITY—Defendant, a mental defective, was convicted of first degree murder for the killing of a police officer during an armed robbery and was sentenced to death. On appeal, it was contended by defendant that the Court must consider and be controlled by psychiatric reports of appellant's extreme mental deficiency, and that these reports justified a sentence no higher than life imprisonment. The State Supreme Court adopted the lower court's finding that this case raised a problem of penology, and that, of the four theories upon which punishment might be based, namely, reformation, restraint, retribution, and deterrence, the deterrent theory should be applied here. The State Supreme Court rejected the defendant's plea, based on the theory of "diminished responsibility," whereby it was contended that defendant should not be held fully responsible for his crime. Held: (1) that while appellant's mental deficiency should be taken into consideration by the trial court in fixing sentence, it is not necessary for the appellate court to reduce sentence from death to life imprisonment because appellant is a moron; (2) that the court considers, but is not controlled by, psychiatric reports, makes its own appraisal of appellant's mental capacity from facts, evidence, and observation; and upon such basis, makes an appropriate sentence. *Commonwealth v. Elliott,* 371 Pa. 70, 89 A. 2d 782 (1952).

The authorities agree that criminal responsibility does not depend on a defendant's mental age or whether his mind is above or below that of the average or normal man. *Commonwealth v. Stewart,* 255 Mass. 9, 151 N. E. 74 (1926); *State v. Gardner,* 219 S. C. 97, 64 S. E. 2d 130 (1951). Since the famed *M'Naghten's Case,* 10 Clark & F 200, 8 Eng. Rep. 718 (1843), it has been well settled that subnormal mentality is not a defense to crime unless the accused is unable to distinguish between "right and wrong" in respect to the particular act in question. *Griffin v. State,* 208 Ga. 746, 69 S. E. 2d 192 (1952). Further, the majority of courts have refused to hold "weakness of mind" as an excuse or a palliation reducing the degree of crime. If the accused cannot distinguish between right and wrong in relation to the act, he is deemed incapable of entertaining a wrongful state of mind requisite to commit the crime, and may plead insanity. Thus, a person is either "sane" and fully responsible for his

acts, or "insane" and wholly irresponsible. See Weihofen and Overholser, *Mental Disorders Affecting the Degree of a Crime,* 56 Yale L. Rev. 959, 964 (1947).

Between these two extremes of "sanity" and "insanity" lie all shades of disordered mental conditions. There are those who, although not totally insane, possess poor judgment and inability to foresee the consequences of their acts. In many cases of borderline mental deficiency, it can hardly be said that knowledge of the nature and quality of the act or its wrongfulness exists. See Glueck, *Psychiatry and the Criminal Law,* 14 Va. L. Rev. 155; 171 (1928). As pointed out by Mr. Justice Murphy in his dissenting opinion in *Fisher v. U. S.,* 328 U. S. 463 (1947), the jury must either condemn such persons to death on the false premise that they possess the mental requirements of a first degree murderer, or free them completely from criminal responsibility; the jury may not find the accused guilty of a lesser degree of murder by reason of a weakened or disordered intellect.

In the principal case, Judge Musmanno vigorously dissented from the deterrent doctrine, by which the punishment is made to fit the crime not the criminal. He quoted medical, clinical, and psychiatric reports which showed that Elliott had

> . . . no capacity for intelligent reasoning . . . (or) for mastering new ideas. . . . He is childish, irresponsible, and easily led, with very superficial ideas or moral values. . . . This boy is mentally deficient, and now rates, reacts, and reasons on a middle-grade moron basis. . . . Diagnosis: Middle-grade Moron, Constitutional Psychopathic Inferior.

The punishment should be applied according to the capability of the convicted, as well as to the enormity of the delinquent act, says Judge Musmanno, and the measure of the penalty should equal, and not exceed, the measure of the responsibility. He feels that law and society cannot justly ask for expiation of Elliott's crime in the electric chair. He must be restrained, not by death, but by life imprisonment.

According to the theory of Partial or Diminished Responsibility, a criminal who is the victim of a proven abnormal mental condition is held responsible for a *lesser grade* of offense. For an extensive list of cases accepting and rejecting this theory in which mental deficiency is taken into consideration, see 166 A. L. R. 1183. A defendant charged with murder, who is not so insane as to be irresponsible for crime and thus not entitled to be acquitted, may still be suffering from such mental disorder or "feebleness of mind or will" as to render him incapable of "malice aforethought," "premeditation," or "deliberation" required to constitute murder in the first degree. See Weihofen, *Partial Insanity and Criminal Intent,* 24 Ill. L. Rev. 505, 506 (1930). Inquiry into "premeditation" and "deliberation" might rightly include an examination into the capabilities of that mind itself. See *Premeditation and Mental Capacity,* 46 Col. L. Rev. 1005, 1011 (1946). A person who is mentally incapable of entertaining the wrongful state of mind required to constitute a crime would not be held guilty of that crime under application of this theory of Diminished Responsibility. See *Mental Disorders Affecting the Degree of Crime, supra.*

Those objecting to this theory point out that there is difficulty in determining whether "partial insanity" exists, and, if so, whether it had any connection with the offense. There is the difficulty in knowing to what extent the criminal act charged was prompted by a feeble mental condition, and to what extent by

sane, but criminal, motives. The greatest legal difficulty is that of drawing the line between that degree of pathological mental condition which should exempt from responsibility and that which should not. See *Psychiatry and the Criminal Law, supra.*

In conclusion it may be pointed out that, while some legal writers are in favor of the adoption of the Partial Responsibility theory, the majority of the courts refuse to disturb past precedents. Until more definite standards are established to prove the relation between mental deficiency and responsibility, the "social desirability" of the Partial Responsibility theory is questionable.

NANCY-NELLIS WARNER

FUTURE INTERESTS—HABENDUM CLAUSE—CONDITION SUBSEQUENT—BASE OR DETERMINABLE FEE—X executed and delivered to A, trustees of a church, a deed to one-half acre of land. The deed contained full covenants and warranties, and was regular in form. The last line of the habendum clause contained the phrase, "for church purposes only." The church took possession of the land under the deed and erected a wooden structure which was used for church purposes. The lot became unsuitable for the purpose intended. A negotiated a sale of the lot to B. When a fee simple title was prepared and tendered, B refused to accept on the ground that the provision in the habendum clause prohibited A from conveying an indefeasible title. Held: A acquired indefeasible title and could convey the realty in fee simple, and the phrase, "for church purposes only," did not reduce the estate from an indefeasible title to a lesser state by creating a condition subsequent. *Ange v. Ange,* 71 S. E. 2d 19 (N. C. 1952).

Before the effect of the phrase "for church purposes only" may be determined, its presence in the habendum clause will first be considered. The habendum is a continuation of the premises. Since the premises are that part of the deed which precedes the habendum and in which are recited the considerations, agreements, or matters of fact, it is here that the certainty of the estate granted should be set down. *Sumner v. Williams,* 8 Mass. 162 (1811). Thus "anything in the habendum which tends to destroy the object and purpose of the grantor as shown in the grant would of necessity be void." *Yeager v. Farnsworth,* 163 Iowa 537, 145 N. W. 87, 88 (1914). Since the terms of the habendum defines the premises it is subsidiary to those of the premises and must yield to them. *Freudenberger Oil Co. v. Simmons,* 75 W. Va. 339, 83 S. E. 995 (1914). As a result, the habendum has deteriorated into a mere useless form, and the deed is effectual without any habendum. 4 Kent's *Comm.* 468 (1832). It is not an essential fact of the deed. *Hart v. Galdner,* 74 Miss. 153, 20 So. 877 (1896).

Since the habendum is an unnecessary form, and since it is the office of the premises to name the grantor and grantee, and to describe with certainty the estate granted, *Clapp v. Byrnes,* 3 App. Div. 38 N. Y. S. 1063, 1067 (2d Dep't. 1896), the deed is to be interpreted in its entirety. Thus the question to be answered is whether the words, "for church purposes only," create an estate less than an estate in fee simple absolute.

"An estate in fee simple is defeasible when it is subject to a condition subsequent, a special limitation, an executory limitation, or a combination of such restrictions." Restatement, Property § 16 (1936). Whether such a phrase constitutes any of the foregoing limitations will now be considered.

"An estate in fee simple subject to a condition subsequent is created by any limitation which provides that, upon the occurrence of a stated event, the conveyor or his successor in interest shall have the power to terminate the estate so created." Restatement, Property, § 45 (1936). No precise technical words in a deed are required to create a condition subsequent. *Jones v. Williams,* 132 Ga. 782, 64 S. E. 1081, 1082 (1909); *Rustin v. Butler,* 195 Ga. 389, 24 S. E. 2d 318 (1943). There are certain usual words which, if included in the deed, tend to establish the grant as subject to a condition subsequent; they are: "but if," "so that," "provided," "if it shall happen," or "upon condition;" but no form of expression is essential. The phrase in the principal deed does not contain any of the usual words which would lead to its construction as a condition. If it is doubtful as to whether a clause is a condition, the court will not construe it as a condition, *Chapin v. School Dist. No. 2 in Winchester,* 35 N. H. 445 (1857), since courts look on conditions subsequent with disfavor. *Byars et ux. v. Byars,* 11 Tex. Civ. App. 565, 32 S. W. 925 (1895). If there is any reasonable construction which can be given a deed so as to avoid forfeiture, it ought to receive such construction. *Wier v. Simmons,* 55 Wis. 637, 13 N. W. 837 (1882). To clear up doubtful clauses, some courts hold that the presence of an express reservation is necessary for the creation of a condition subsequent, meaning the reservation must appear plainly in the deed. *Braddy v. Elliott,* 146 N. C. 578, 60 S. E. 507 (1908). Other courts hold that it is of primary importance to have an express reservation of the right of reentry in the premises, *Rooks Creek Evangelical Lutheran Church v. First Lutheran Church of Pontiac,* 290 Ill. 133, 124 N. E. 793 (1919), because such a reservation, while not indispensable, is always important as evidence of the intention to impose a condition subsequent, and will make certain that which otherwise would be a matter of construction.

Other courts hold that the express reservation is one of several important factors to be considered in a deed. *Libby v. Winston,* 207 Ala. 681, 93 So. 631 (1922). In this instance, the courts will construe the phrase as resulting in a covenant, rather than a condition subsequent. Thus, much stress is laid on an express reservation, or a provision for a right of reentry upon breach. Without it, a statement of the motive or purpose of the grant is insufficient to create a condition subsequent. *First Presbyterian Church of Wilmington v. Bailey,* 11 Del. Ch. 116, 97 A. 583 (1916). In *Beran v. Harris,* 91 Cal. App. 2d 562 P. 2d 107, 109 (1949), a provision that "the property is to be used for residence and service station purposes only" would not be construed as creating a condition subsequent, especially in the absence of any provision for forfeiture, or right of reentry or a power of termination. Where the habendum clause in a deed provided "that the said land shall be held, used and reserved as a cemetery, and for no other purpose," with no words of condition or right of reentry used, a condition subsequent is not created. *Toole v. Christ Church, Houston,* Tex. Civ. App., 141 S. W. 2d 720 (1940). A deed conveying land "for levee purposes," without more, was held not to create a condition subsequent. *Nicholson v. Myers,* 170 Miss. 441, 154 So. 282 (1934). From a review of the above cases, the court here correctly decided that a statement of the purpose, without more, did not create a condition subsequent.

Whether the phrase denotes a "special limitation," namely, that which causes the created interest automatically to expire (as contrasted with divestment in a condition subsequent) upon the occurrence of a stated event will next be discussed.

A "special limitation," usually called a "qualified," "base," or "determinable fee," is an interest or fee which may continue forever, but is apt to be terminated without the assertion of the right of reentry. The uncertainty of the event and the possibility that the fee may last forever render the fee determinable. *Scobey v. Beckman,* 111 Ind. App. 574, 41 N. E. 2d 847 (1942). In order to create a determinable fee, it is necessary that the words in the grant by which the limitation is expressed relate to time in the sense of the concurrency of a specified event. Such appropriate words are "until," "during," "so long as," and the like. *Holekamp Lumber Co. v. State Highway Commission,* 173 S. W. 2d 938 (Mo. 1943). In *Regular Predestinarian Baptist Church of Pleasant Grove v. Parker,* 373 Ill. 607, 27 N. E. 2d 522 (1940), a deed to the trustees of a church which contained the clause "to have and to hold for church purposes as long as the same is used for a meeting place" created in the grantee a base or determinable fee. One who is seized of such a fee may convey his estate, but the grantee takes subject to the defects. *Carpenter v. City of New Brunswick,* 135 N. J. Eq. 397, 39 A. 2d 40 (1944). When a limitation merely states the use for which the land is conveyed, such limitation usually does not indicate an intent to create a fee simple which is to expire automatically upon cessation of the use named. Restatement, Property § 44, Comment M (1936). As stated in *Allen v. Trustees of Great Neck Free Church,* 240 App. Div. 206, 269 N. Y. S. 341 (2d Dep't 1934), where the granting clause of a deed conveyed a fee, the provision of the habendum clause which limited the use to a specified purpose did not lessen the effect of the granting clause; and the repugnancy must be resolved in favor of the granting clause, in the absence of words creating a base fee or a condition subsequent.

By the weight of authority, it is not necessary to state in the instrument that the property is to revert to the transferor on the happening of the named event. In *Staack v. Detterding,* 182 Iowa 582, 161 N. W. 44 (1917), a devise to a widow "in fee simple so long as she will be my widow" gave the widow a defeasible title. In *Copps Chapel v. Methodist Episcopal Church,* 120 Ohio St. 309, 166 N. E. 218 (1929), where a grant was made "so long as said lot is held and used for church purposes," without any provision for forfeiture or reversion, such a statement was held not to be a condition or limitation.

Since the phrase "for church purposes only" in the principal case does not consist of the usual words that create a determinable or base fee, nor express an intention to create a fee simple estate which is to expire automatically upon the cessation of the use named, the estate in fee simple absolute was not thereby reduced to a lesser estate.

Can the phrase in question be construed as having the effect of an executory limitation? "The term 'executory limitation' denotes that part of the language of a conveyance, by virtue of which the interest subject thereto, upon the occurrence of a stated event, is to be divested, before the normal expiration thereof, in favor of another interest in a person other than the conveyor or his successor in interest." Restatement, Property, § 25, (1936). The deed in the principal case did not provide that upon the happening of a specified event, title to the fee would pass to a third person.

It is clear that the phrase "for church purposes only" did not in and of itself create a condition or limitation which would defeat the fee simple conveyed by X to A.

STANLEY J. ZLOCKI

INSURANCE-CONSTITUTIONAL LAW—Two recent cases, *Harding v. Pennsylvania Mutual Life Ins. Co.,* 171 Pa. 236, 90 A. 2d 589 (1952) and *Beley v. Pennsylvania Mutual Life Ins. Co.,* 171 Pa. 253, 90 A. 2d 597 (1952), have required determination on a question not heretofore raised in any appellate court, *viz.,* Does the Korean action constitute "war" for the purpose of making the "war clauses" in insurance policies operative? Judge Dithrich, who wrote the majority opinion in both cases, said that this was not only a question of first impression in the Commonwealth of Pennsylvania, but that these cases were the first appellate court decisions on the subject in the United States.

The cases differ only in the manner in which the insured met death. Harding was killed in a railroad accident while enroute to camp for military training, whereas, Beley was killed in action in Korea. Both life insurance policies, issued by the defendant company, provided for double indemnity in case of accidental death. It was expressly stated however that (1) the provision would be inapplicable "if said death shall result by reason of . . . military . . . service in time of war;" and (2) that the policy would terminate "if insured shall . . . engage in military . . . service in time of war."

The defendant company paid the face values of the policies but resisted payment of the double indemnity benefits, contending that insureds' deaths resulted from "war" and were, therefore, within the exception clauses of the policies. Plaintiff's, as beneficiaries, claimed the accidental death benefits under the double indemnity clauses.

The Superior Court of Pennsylvania, in both cases, reversed the lower courts' findings and held that the fighting in Korea is at most an "undeclared war" and that the plaintiffs were, therefore, entitled to recover the full amount of the policies, including the accidental death benefits.

It is significant that the provisions "in time of war" as used in the principal policies are susceptible of more than one meaning. *Edwards v. Life & Casualty Ins. Co. of Tennessee,* 210 La. 1024, 29 So. 2d 50 (1946). This uncertainty develops when the liability of the insurer is made to depend on the interpretation of the particular terminology in the provisions. One view of interpretation is that the mere "status" of the insured as a member of the Nation's armed forces is sufficient to limit or exempt the liability of the insurer. *Jorgenson v. Metropolitan Life Ins. Co.,* 136 N. J. L. 148, 55 A. 2d 2 (1947). In this group the death of the insured, while in the military service in time of war, makes the double indemnity clause inapplicable. *Life & Casualty Ins. Co. v. McLoed,* 70 Ga. App. 181, 27 S. E. 2d 871 (1943). Another view is that before the limiting or exempting provision should become operative, the cause of the insured's death must be shown to have been a direct or incidental "result" of military service. *Smith v. Soverign Camp,* 204 S. C. 193, 28 S. E. 2d 808 (1944). There is also a third view of construction: that the exemption of liability is construed as meaning death of the insured while "engaged" in the duties of military service. *Long v. St. Joseph Life Ins. Co.,* 248 S. W. 923 (Mo. 1923); *Wolford v. Equitable Life Ins. Co. of Iowa,* 162 Pa. 259, 57 A. 2d 581 (1948).

In life insurance policies of this character, the intention of the contracting parties as to the meaning of "war" is the basic issue. Where such provisions import various meanings, necessitating construction, the general holding is that the words are construed in their legal sense. *Rosenau v. Idaho Mutual Benefit Association,* 65 Idaho 408, 145 P. 2d 227 (1944). On the other hand, if the

terms are unambiguous, it is presumed that the parties intended their plain and ordinary meaning. *Aetna Life Ins. Co. v. Reed,* 251 S. W. 2d 150 (Texas 1952).

As brought out in the *Beley Case, supra,* this nation is not at "war" in Korea in the technical or legal sense, in the manner in which the words are used in the policy; therefore, the meaning which permits recovery must be applied.

War, in the legal sense, can never exist without an act or declaration by Congress. Under Art. I, sec. 8, clause 11, of the Constitution of the United States, Congress is vested with the war-making powers. The existence or non-existence of a state of war is a political question to be determined by the political department of the government. *In re Wulzer,* 235 Fed. 362 (S. D. Ohio 1916). Until there has been some act or declaration by this authorized department of the government, that a war does exist, the courts cannot take judicial notice that a state of war exists. *Rosenau v. Idaho Mutual Benefit Association, supra.* But once the date of a war, i.e., its commencement or termination is fixed by Congress, the courts are bound by this determination. *United States v. Anderson,* 9 Wall. 56 (1869). Since there has been no act or declaration by Congress that may be characterized as a formal recognition or creation of a state of war in Korea, it follows that the conflict in Korea is not a declared war.

The crucial question then arises as to whether the courts must give judicial notice to an undeclared war for the purpose of relieving the insurer from liability under these policies. The decisions are not in accord as to whether a formal declaration by Congress of the existence of a state of war is an essential pre-requiste to judicial notice: *West v. Palmetto,* 202 S. C. 422, 25 S. E. 2d 475 (1943); *Savage v. Sun Life Assurance Co.,* 57 F. Supp. 620 (W. D. La. 1944); or whether the existence of a war is determined by existing conditions: *New York Life Ins. Co. v. Bennion,* 158 F. 2d 260 (10th Cir. 1946), *Mutual Life Ins. Co. v. Davis,* 79 Ga. App. 336, 53 S. E. 2d 571 (1949). There is a valid distinction between declared and undeclared war, as pointed out in *New York Life Ins. Co. v. Durham,* 166 F. 2d 874 (10th Cir. 1948). Where this distinction has been recognized, the insurance companies in drawing up the policies, especially since Pearl Harbor, have extended the term "war" to include undeclared war. *Stinson v. New York Life Ins. Co.,* 167 F. 2d 233 (D. C. Cir. 1948); *New York Life Ins. Co. v. Durham, supra.*

A review of the cases shows that the construction of such provisions depends on the particular phraseology of the policy contract. Where the construction or interpretation by the courts is necessary because the policy contains ambiguous language, the courts have usually adopted the meaning which is more favorable to the insured. *Williams v. National Life & Accident Ins. Co.,* 220 Mo. App. 355, 1 S. W. 2d 1034 (1928). It is a rule of insurance law that every doubtful clause must be construed liberally in favor of the insured and strictly against the insurer. *Atkinson v. Indian National Life Ins. Co.,* 194 Ind. 563, 143 N. E. 629 (1924); *Caruso v. John Hancock Mutual Life Ins. Co.,* 25 N. J. 318, 53 A. 2d 222 (1947). It is incumbent upon the insurer, therefore, to make the meaning clear. As stated in *Aschenbrenner v. United States Fidelity & Guaranty Co.,* 292 U. S. 80 (1934):

> The phraseology of contracts of insurance is that chosen by the insurer and the contract in fixed form is tendered to the prospective policy holder who is often without technical training and who rarely accepts it with a lawyer at his elbow. So if its language is reasonably open to two constructions, that more favorable to the insured will be adopted. . . .

The court in the *Harding Case, supra,* concluded that so long as the term "war" imported various meanings, and the insurer failed to make clear the intended meaning, it failed to prove that the term "war" as used in the policy applied to an undeclared war as well as to a declared war.

It is clear that the insurance companies are faced with a difficult task in framing war exclusion clauses due to the ambiguity inherent in word usage. The remedy for this apparent difficulty would be a uniform war clause for life insurance policies in which the word "war" is unambiguously defined, thereby eliminating the necessity of judicial interpretation.

ROSEMARIE SERINO

TORTS—ALIENATION OF AFFECTIONS—RIGHT OF CHILDREN TO RECOVER DAMAGES FROM ONE WHO HAS ENTICED A PARENT FROM THE HOME.—Plaintiffs, the wife and two children of John Kleinow, brought suit against defendant Jean Ameika for having enticed him away from their home. They sought to recover damages against the defendant for deprivation of their rights to his love, bounty, and affection.

Held: the action cannot be maintained. The suit as to the wife is in substance an alienation of affections action barred by the state's Heart Balm Act. The children are also prevented from suing on the grounds that no precedent exists to substantiate a cause of action, and it would be unwise for the court to create one. *Kleinow v. Ameika,* 19 N.J. Super. 165, 88 A. 2d 31 (1952).

Whether or not a minor child may recover damages from a third person for alienation of a parent's affection is a relatively novel question. It has received more attention in the past six years than ever before. The increase in cases is indubitably due to the changing conception modern society has placed upon the family relationship.

Previously, the husband was lord and master; all other members of the family claimed their rights through him. *Daily v. Parker,* 152 F. 2d 174 (7th Cir. 1945). Consequently, the right of a husband to maintain an action against one who wrongfully alienated his wife's affections, and thus deprived him of his marital rights to her consortium, has long been recognized in England as well as in this country. Cf. *Boland v. Stanley,* 88 Ark. 562, 115 S. W. 163 (1909). The wife, although denied the same action previously, is now generally allowed to sue as a result of the Married Women's Acts. *Nolin v. Pearson,* 191 Mass. 283, 77 N. E. 890 (1906). Since the gist of an alienation of affections is loss of "consortium", which is usually defined as the conjugal affections, society, companionship, fellowship, and assistance of the wife, *Boland v. Stanley, supra,* and since there can be no such consortium rights in a child as regards his parents, what are the rights of a child against a third person who has alienated the affections of a parent?

At common law "the child hath no property in his father or guardian." 3 Blackstone's Commentaries 143. Hence the child could have no right against a third person who injured his relation with the parent. Prosser, Torts 101 (1941). Today, still, in accordance with this common law precedent, the great majority of courts that have passed upon the question are in agreement with the principal case in holding that the child cannot maintain an action for alienation of a

parent's affections. This lack of precedent seems to be the main dissuading factor, but the Heart Balm acts also play an important part in states that have enacted such legislation.

For the most part, the decisions have been ones of first impression in the states deciding them. A sample list of the courts refusing to allow an alienation of affections action by the child against a third person who has enticed a parent from the home, follows:

An action for alienation of affections must grow out of the marriage relation. *Coulter v. Coulter,* 73 Colo. 144, 214 Pac. 400 (1923). The loss of affection is a matrimonial wrong only, and a minor child has no legal right to the personal presence or care of a parent; *the parent* may be bound to support the child by other proceedings. *Nelson v. Richwagen,* 326 Mass. 485, 95 N. E. 2d 545 (1950). If the action did exist, the Heart Balm Act prohibits the children as well as the spouse from enforcing it. *Katz v. Katz,* 197 Misc. 412, 95 N. Y. S. 2d 863 (1950). Although a previous statute conferred the right in the child, the statute's revision with consequent omission of the child's right, read in conjunction with the Heart Balm Act of 1939, excludes the action. *Rudley v. Tobias,* 84 Cal. App. 2d 454, 190 P. 2d 984 (1948). No cause of action existed at common law, and no statute creates one. *Henson v. Thomas,* 231 N. C. 173, 56 S. E. 2d 432 (1949).

Most of the courts bluntly state that they do not wish to engage in judicial empiricism. Cf. *Rudley v. Tobias, supra; Katz v. Katz, supra.* A few courts, though, have felt that the decision was theirs to make, yet refused to sanction the action on the ground that it would be unwise to do so. *Morrow v. Yannantuono,* 152 Misc. 134, 273 N. Y. S. 912 (1934); *Taylor v. Keefe,* 134 Conn. 156, 56 A. 2d 768 (1947).

Finally, there are a few courts that thought the decision theirs to make and chose to allow the action. Judge Evans, in reversing the order of the district court dismissing the complaint, stated in *Daily v. Parker,* supra:

> The father, the mother, and the children ordinarily constitute the family. Each is entitled to the society and the companionship of the others. Within limits . . . each is entitled to shelter, food, clothing, and schooling and to the social, the moral support, guidance, and protection of their father, though in turn they can contribute only companionship and inspiration . . . Even in the common law, in 1945, if no precedents be found, courts can hardly be advisedly called radical if they divulge in law-making by decisions, or in a word, engage in judicial empiricism.

Similar reasoning was used in *Johnson v. Luhman,* 330 Ill. App. 598, 71 N. E. 2d 810 (1947), where much weight was placed upon Sec. 19 of Art. II of the Illinois Constitution, which provides: "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation. . . ."

Another decision, primarily based on premises similar to the Daily case, held that the Heart Balm Act prohibits only the injured spouse from suing, not the child, since a statute in derogation of common law rights should be strictly construed. *Russick v. Hicks,* 85 F. Supp. 281 (W. D. Mich. 1949). In *Miller v. Monsen,* 37 N. W. 2d 543 (Minn. 1949), the action was also allowed, the court saying that: "Many rights formerly vested in the husband are now vested in

other members of the family. We cannot refuse to recognize such changes without ignoring the obvious."

It is submitted that the preservation of the family unity is a laudable and praiseworthy object that the law almost always endeavors to safeguard. Allowing the action under consideration would be a step in that direction, since the fear of paying damages to the whole family would act as a deterrent to those who would entice a parent from the family.

However, the end result of sanctioning such a cause of action would only be, in actuality, circumventing the Heart Balm acts where such legislation has been passed: the parent, merely by bringing the suit on behalf of the minor child, could thus sue indirectly for alienation of affections. Even more, in all states, the precedent would be a dangerous one: if the children could sue for the loss of affection, then the action might be allowed a brother, sister, grandparent, etc. It was to prevent just such a flood of litigation that many legislatures passed the Heart Balm acts which have achieved commendable results in curtailing many useless and harassing lawsuits. As was said in *Morrow v. Yannantuono, supra*: "To uphold this complaint . . . would mean that everyone whose cheek is tinged by the the blush of shame would rush into court to ask punitive damages to compensate them for their distress of body and mind . . ."

KENNETH I. LAPRADE

TORT—POLITICAL LIBEL—PRIVILEGED COMMUNICATION—During the 1950 Utah political campaign defendant, Farm Bureau, distributed a two-page letter to its members concerning action taken and opinions reflected by its Board of Directors at a recent meeting. Also disseminated were copies of the Congressional Record containing a speech by Senator Styles Bridges which commented on the "Farmers Union". Additional information, in the form of a mimeographed enclosure, entitled the "Farm Bureau Position on Election of Senators and Congressmen, was forwarded. In reference to the House Granger Bill, this enclosure continued, "Representative Granger has exhibited his evident animosity toward farm organizations (except the communist-dominated Farmers Union)." This enclosure was distributed by Farm Bureau Secretary, Frank Shelley, not only to the Farm Bureau members, but also to certain Utah newspapers for publication and circulation.

Farmers Union brought this libel action against Farm Bureau for compensatory damages arising out of an alleged defamatory publication that Farmers Union was "communist-dominated". The defendants pleaded defensively that, in public interest and truth, the publication was fair comment and privileged. The trial court held, as a matter of Utah law, that it was *libelous per se,* leaving it to the jury to decide whether the libelous statement was true or false, and if false, whether its publication resulted in damage to the plaintiff. The jury found for the Farmers Union, awarding $25,000 thereon. Farm Bureau then appealed, stating that the trial court had erroneously refused to admit in evidence material tending to prove plaintiff-appellee communist-dominated. The United States Court of Appeals, Tenth Circuit, affirmed the judgment awarded by the trial court. *Utah State Farm Bureau Federation v. National Farm Union Life Insurance Corporation,* 198 F. 2d 20 (10th Cir., 1952).

In respect to the principal case the issue to be examined, therefore, is "whether it is *defamatory per se* to charge a person as being a communist or an organization as being communist-dominated"?

In order for a communication or publication to be privileged, as defendant alleged in the principal case, the communication must be by and to one who has a right, duty, or interest in the matter. *People v. Faber,* 29 Cal. App. 2d 751, 77 P. 2d 921 (1938); *Briggs v. Brown,* 55 Fla. 417, 46 So. 325 (1908); *Smith v. Smith,* 194 S. C. 247, 9 S. E. 2d 584 (1940). Thus, if the speaker or publisher of the alleged slanderous or libelous words has an interest or duty in the subject matter of the communication, and the hearer or reader a simultaneous concern, the doctrine of qualified privilege applies. *Williams v. Standard Examiner Publishing Co.,* 83 Utah 31, 27 P. 2d 1 (1933). A qualified privileged communication extends to all communications made bona fide upon any subject matter in which a communicating party has an interest, or in reference to which he has a duty to a person having a corresponding interest or duty; and the privilege embraces cases where the duty is not a legal one, but where it is of a moral or social character of imperfect obligation. *Spielberg v. A. Kuhn and Brothers,* 39 Utah 276, 116 Pac. 1027 (1911).

A further projection of this pattern of legal reasoning demonstrates that comment or criticism ordinarily immune from liability for defamation, deals only with such things as invite public attention or call for public comment or criticism, and does not follow a public man into his private life or domestic concerns. If such an attack pursues an individual further, the writer writes at his peril for defamation. *Patten v. Harper's Weekly,* 93 Misc. 368, 158 N. Y. S. 70 (1916).

In necessary further distinction between a privileged communication, an absolutely privileged communication, and a defamatory communication, it was held in *Abraham v. Baldwin,* 52 Fla. 151, 42 So. 591 (1906), that a privileged communication or statement in libel or slander is one which, except for the occasion, or the circumstances under which it is made, would be defamatory and actionable. An absolutely privileged communication is one in respect to the occasion and the matter to which it is made, no remedy can be had in civil action, however hard it may bear upon a person who claims to be injured thereby, *Reid v. Thomas,* 99 Cal. App. 719, 279 P. 226 (1929); and even though it may have been made maliciously.

Thus, a communication is defamatory if it tends to harm or prejudice the reputation of another as to lower him in the estimation of the community, including even a substantial and respectable minority thereof. Restatement, Torts, § 559 (1938). In continuing this path of analysis there is substantial conclusion that any false and malicious writing published about another is *libelous per se,* when its tendency is to render the person contemptible in public estimation, or expose him to public hatred or contempt. *Talbot v. Mack,* 41 Nev. 245, 169 Pac. 25 (1917).

Thus, with the preceding legal principles as established criteria and premises, further consideration must be given to relevant cases of the "Communist-political libel" question. The effectiveness of this substantiation continues to such extent that the courts hold defamatory and libelous per se a publication which refers to a person as "red", if the word is understood by the readers as referring to a person who believes in disobedience to law and forcible appropriation of all property by the state. *Toomey v. Jones,* 124 Okla. 167, 254 Pac. 736 (1927).

In contemporary consideration as to liabilities involved, Judge Learned Hand, in *Grant v. Readers' Digest Association,* 151 F. 2d 733 (2nd Cir., 1945), *cert. denied,* 66 S. Ct. 492 (1946), affirmed the supposition that libel was the arousing of "hatred, contempt, scorn, or obloquy, or shame," and that to be actionable the words must be such as would affect "right-thinking" people. Judge Hand further asserted that under New York Law it was libelous to write of a lawyer that he has acted as agent of the Communist Party and is a believer in its aims and methods.

Parallel to New York law, it is established Illinois law that it is libelous per se to write that a man or a corporation is a communist or a communist sympathizer, " . . . because the label of communist today in the minds of many average and respectable persons places the accused beyond the pale of respectability, and makes him a symbol of public hatred." *Spanel v. Pegler,* 160 F. 2d 619 (7th Cir. 1947).

Similarly, in a libel action arising out of the refusal to testify before the House Un-American Activities Committee, Judge Yankwich, in *Cole v. Loew's Inc.,* 8 F. R. D. 508 (1948), declared:

> I have stated that in California an accusation of communist against a person is libelous. This is so because, under California law, every false and unprivileged publication which exposes a person to hatred, contempt, ridicule, or obloquy, or causes him to be shunned or avoided, or which has a tendency to injure him in his occupation is *libelous per se.*

Today, coincident with the great danger of injuring a person's character and reputation by an accusation of communist relationship, an increasing concern is being manifested by the courts to protect these rights to a good name. The preceding cases substantiate this intention.

Correlatively, the most recent cases decided on this issue affirmed, as in *Spanel v. Pegler, supra,* that writing that a man is a communist is *libelous per se,* since the minds of many average persons will be affected to such extent that he will be labeled beyond the pale of respectability and will be made a symbol of public hatred. *Ward v. League for Justice,* 154 Ohio St. 367, 93 N. E. 2d 723 (1950). Parallel also, to the principal case the court in Pennsylvania Common Pleas held in *Americans for Democratic Action v. Meade,* 72 D & C 306 (1951), it was libelous to write that:

> . . . The organization was flirting with communism, was infiltrated with communists, and was a communist front organization, must be regarded as fairly and reasonably capable of charging that the organization had Communist Party members, has harboured communists, espoused Communist doctrines, was influenced in its policies by communists or communism, and that candidates for public office supported by it were receiving support from communists.

In distinguishing subsequent or further publication, it was held in *Dilling v. Illinois Publishing and Printing Co.,* 340 Ill. App. 303, 91 N. E. 2d 635 (1950), that although the name of plaintiff was read in a resolution of the California State American Legion Convention charging her with being a communist, and defendants printed a release thereon, this matter was not libelous per se.

Although chiefly concerned with the weight of authority on the issue, it is nevertheless necessary to consider the minority view. The courts of New York have given the outstanding opinions on the points of view. This consideration

of the minority opinion, although overruled by subsequent cases, *Levy v. Gelber,* 175 Misc. 746, 25 N. Y. S. 2d 148 (1941), and *Grant v. Readers' Digest Ass'n, supra,* is succinctly found in the words of Judge Pecora in *Garriga v. Richfield,* 174 Misc. 315, 20 N. Y. S. 2d 544 (1944), to this effect:

> The fact remains, however, that the Communist Party, under *existing* law, may function as a political party. It may place upon our ballots its candidates for public office—even for the highest in the land—and seek support for them.
> It may, like any other established political party, proclaim its principles and invite public approval of them. At least, while it possesses that status and those rights, it cannot be held that it is defamatory per se to say of one that he is affiliated with, or a member of, the Communist Party, any more than it would be to say that he is a member of any other legally recognized political party.
>
> . . . To deprive our citizens of the right freely to debate political issues, or to allude to the political affiliations of others, is to make a breach in the dike which protects our cherished institutions. Far better it is to preserve that right unhampered—even with the abuses which frequently attend its exercise in the heat of political passion—than to limit it at the possible loss of our constitutional liberties.

An altogether different matter, in relation to the instant issue, presents itself in slander. Words allegedly uttered orally charging plaintiff with being a communist and a communist "plant" are not *slanderous per se. Gross v. Malland,* 200 Misc. 5, 108 N. Y. S. 2d 822 (1951). Similarly, in *McAndrews v. Scranton Rep. Publishing Co.,* 364 Pa. 502, 72 A. 2d 780 (1950), the court held that saying that a man is a communist or a socialist is not defamatory. Likewise, in *McDonald v. Lieber,* 184 Pa. 812, 167 So. 450 (1936), it was stated that it was *not* libelous or slanderous per se to charge one with being a member of, or affiliated with, the Communist Party.

Thus, it is submitted, the issue must be decided in the affirmative, according to prevailing judicial determination, that it is libelous per se to call a person a "communist," or an organization "communist-dominated."

GEORGE J. BERTAIN, JR.

TORTS—WARRANTIES—RES IPSA LOQUITUR—NEGLIGENCE—Action by Rose M. Day against the Grand Union Company and the F. & M. Schaefer Brewing Co. for injuries sustained when a bottle of beer exploded as she picked it off the counter of the first named defendant's self-service store. From a judgment of the Supreme Court, Schenectady County, dismissing her complaint, the plaintiff appealed. The Supreme Court, Appellate Division, reversed and ordered a new trial on the grounds that the evidence established a *prima facie* case of negligence against the storekeeper. *Day v. Grand Union Co.,* 113 N. Y. S. 2d 436 (1952).

Contrary to the above decision, the court in *Lasky v. Economy Stores,* 319 Mass. 224, 65 N. E. 2d 305 (1946) held there could be no recovery for personal injuries upon a breach of implied warranty of fitness and merchantability because the plaintiff sustained the injury before the purchase price was paid to the cashier, at which time title will pass and the delivery becomes absolute. It has been held that, until the customer paid for the merchandise he wishes to purchase at the checking counter, the merchandise is in the undisputed possession of the store. *Gargaro v. Kroger Grocery & Baking Co.,* 22 Tenn. App. 70, 118 S. W. 2d 561

(1938). Also *cf.* Restatement, Contracts 58 (1932). The courts, in these two cases, embrace the well established principle of law that there can be no recovery upon a breach of implied warranty resting on contract, for delivery is conditional, and becomes absolute on payment to the cashier, at which time title passes.

In *Alagood v. Coca Cola Bottling Co.,* 135 S. W. 2d 1056 (Tex. Civ. App. 1940) the court denied the plaintiff relief because the bottle of coca cola that exploded and injured him was not in the possession and control of the defendant, but had been in the possession of the plaintiff a short time before the accident; therefore, the doctrine of *res ipsa loquitur* was not applicable. In *Curley v. Ruppert,* 272 App. Div. 438, 71 N. Y. S. 2d 578 (1947), the defendant delivered to the plaintiff, three days before the explosion, the bottle of beer that caused his injury. The court held *res ipsa loquitur* would not apply in this instance because the beer was not under the control or management of the defendant at the time the injury incurred. *Cf. Ruffin v. Coca Cola Bottling Co.,* 311 Mass. 514, 42 N. E. 2d 259 (1942); *Seven-Up Bottling Co. v. Gretes,* 182 Va. 138, 27 S. E. 2d 925 (1943); *Winfree v. Coca Cola Bottling Works,* 19 Tenn. App. 144, 83 S. W. 2d 903 (1935).

If the court in *Day v. Grand Union Co.* would have strictly adhered to the principles of law, as set out in the above-mentioned cases, it would have had before it an injured plaintiff seeking compensation for that which someone is ostensibly responsible. If he had then asked relief under the theory of implied warranty, he would have been denied recovery since there was no sale at the time of the injury; if he had asked relief under the doctrine of *res ipsa loquitur,* the court would deny him relief since the defendant had no control or management over the bottled beverage at the time of the accident.

Acknowledging these principles of law, the court in *Day v. Grand Union Co., supra,* stated:

> The relationship of the parties had been set in the direction of entering into a contract by the storekeeper's general invitation to the public to come in; and the customer was acting upon the invitation, but if the classic tests to be applied to contracts are to be employed here there was yet no contract, and, of course, no implied warranty resting upon contract. . . . When, therefore, a self-service store invites the customer both to come on the premises and to take physical possession of merchandise in the course of entering into a purchase and sale contractual relationship, and the customer is injured by the unexpected dangerous behavior of the article which until the instant had been in the exclusive possession of the storekeeper, enough has been shown, we think, to make admissible an inference of negligence without proof of active negligence.

The court further stated that the injured plaintiff had sufficient grounds to state a cause of action based on implied warranty; that the very purpose of our modern self-service markets is such that, when the plaintiff took physical possession of the bottle in question, this amounted to an acceptance of the defendant's offer; that nothing more remained for the plaintiff to do but to pay the purchase price to the cashier; that since the plaintiff was ready, willing, and able to do this, enough was shown to support the finding of a sale or a contract to sell.

The court justly held, in the principal case, that the plaintiff's complaint stated sufficient facts to proceed to trial.

PHILIP C. VALENTI