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Recent Decisions

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RECENT DECISIONS

WILLS — STATUTORY ELECTION OF SURVIVING SPOUSE — DISAPPOINTED SPECIFIC LEGATEES INDEMNIFIED BY RESIDUARY LEGATEES. — Reginald G. Mobray died owning an estate of $493,000, $43,000 in real estate and $450,000 in personalty. Of the personalty, $212,000 was in 106 shares of stock, valued at $2,000 each, in a close corporation with a total of 210 shares outstanding. To his widow Mobray left ten shares of stock, in compliance with an antenuptial agreement. To nine employees of the corporation, in recognition of their loyalty and devotion, Mobray left the remaining ninety-six shares of the stock subject to the conditions that each be alive and in the employ of the corporation and that they execute among themselves an irrevocable agreement that any stock passing from them or their estate would be offered first to the others at 40 per cent of book value. To various relatives and charities Mobray left the residue in a three-tiered arrangement.

After her husband's death, Mrs. Mobray, having succeeded in having the antenuptial agreement set aside, elected to take her statutory share against the will.[1] The Circuit Court for Baltimore County awarded her $4,000 cash and one-half of all other assets including the stock. The court decreed that the remaining stock left to the employees was, despite the widow's election, to be subject to the testator's conditions; the first tier of the residue was to be left intact; the lower two tiers were to be contingent upon the payment of debts and expenses and satisfaction of the widow's statutory share; and there was to be no indemnification of the specific legatees from the residue.

On appeal, the employees, specific legatees, contended: that the widow was to be satisfied from the residue and not in kind, *i.e.,* the stock; that, in any event, the specific legatees were entitled to be indemnified by sequestration[2] of the widow's share under the will and by the residue; and that the testator's conditions were destroyed by the widow's taking in kind. The residuary beneficiaries contended that the widow's taking in kind was in the nature of an ademption,[3] and that, therefore, the specific legatees were not entitled to indemnification from the residue. The Court of Appeals of Maryland, in a split decision, *held:* (1) that the widow can elect to take in kind under the Maryland statute,[4] (2) that the will showed a preference for the specific legatees entitling them to indemnification from the residue as well as sequestration of five of the ten shares of stock left to the widow under the will, and (3) that the conditions imposed upon the specific legatees are binding despite the widow's taking her share in kind. *Hall v. Elliott,* 202 A.2d 726 (Md. 1964).

The question presented by *Hall* is: should a surviving spouse have the option to elect to take her share of a legacy in kind, and if so, which beneficiaries under the will must suffer the loss occasioned by such an election?

In most states there are statutes which allow a surviving spouse to elect to take a prescribed statutory share of the deceased spouse's estate in lieu of her testa-

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1 MD. ANN. CODE art. 93, § 329 (Supp. 1964).

2 When a surviving spouse elects to take against the will, that which she was left under the terms of the will is used to indemnify that part of the estate from which her statutory share was taken. Dowell v. Dowell, 177 Md. 370, 9 A.2d 593 (1939); Sellick v. Sellick, 207 Mich. 194, 173 N.W. 609 (1919).

Acceleration is also used to reimburse, out of the spouse's testamentary share, those beneficiaries who are disappointed by the surviving spouse's election. If the will provides such spouse with a life estate, her estate is sometimes "accelerated" for the benefit of the disappointed remaindermen. Hauschild v. Hauschild, 176 Neb. 319, 126 N.W.2d 192 (1964).

3 "[A]demption connotes the taking away of the subject matter of a specific legacy or devise by its destruction or disposition by testator in his lifetime." *In Re* Atkinson's Estate, 19 Wis.2d. 272, 273, 120 N.W.2d 109, 110 (1963).

4 MD. ANN. CODE art. 93, § 329(b) (Supp. 1964).

mentary share.[5] The question of who bears the loss when the widow elects against the will is a judicial determination in most jurisdictions.[6] All courts faced with the problem agree that their decisions are made in seeking to effectuate the will as much as possible.[7] The intention of the testator, therefore, is controlling.[8] Pomeroy, in setting out generally the state of the law on this subject, writes:

> The court will, however, endeavor to ascertain the testator's primary intention and to carry it into effect as far as it can be done with the minimum disturbance of the general plan of the will. *The renunciation of the widow should not be allowed to defeat such intention, unless it be impossible to give it fulfillment.*[9]

A testator may always provide in his will which portion of the estate will suffer if the widow elects against the will, and such a provision will be honored.[10] In the absence of such a specific provision, the testator's intent may be judicially construed as was done by the Maryland court in the *Hall* decision holding that Mobray's intent was to favor the employees since he named these beneficiaries first as specific legatees of the stock and since he provided that the residue should abate before the specific legacy could be touched by any shrinkage of the estate. The court justifies its construction[11] with the *Restatement of Property:*

> When an attempted succeeding interest is ineffective, the operation of that part of the limitation which purports to create prior interests is determined by the judicially construed intent of the conveyor . . . [which] consists often of judicially crystallized conclusions as to what a conveyor, under the circumstances of the particular conveyance normally would have intended, if he had actually considered the possibility of the partial ineffectiveness of his expressed complete plan.[12]

In construing a testator's intent some courts consider only the words of the will itself,[13] but, generally in cases of doubt and ambiguity the courts will also consider the circumstances surrounding the testator when the will was executed.[14]

The majority rule, in cases where no intention of the testator is manifest and none is judicially construed, is that the widow's elected statutory share is in the nature of an abatement[15] with the residue being first to disappear.[16] In some states this rule is enunciated by statute.[17] It is generally held that there is a pre-

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5 *E.g.*, ARK. STAT. ANN. § 60-501 (Supp. 1963); IOWA CODE ANN. § 633.238 (1964); N.Y. DECED. EST. LAW § 18; OHIO REV. CODE ANN. § 2107.39 (1953).

6 Topic discussed: Annot. 36 A.L.R.2d 291 (1954).

7 "The election to take against the will defeats the intention of testator in part, and the court will endeavor to ascertain his primary intention and to carry it into effect as far as it can be done with the minimum disturbance of the general plan of the will." 5 PAGE, WILLS § 47.44, at 681-82 (Bowe-Parker rev. 1962).

8 "The overriding consideration, in any event, is the intention of the testator. . . ." Hall v. Elliott, 202 A.2d 726, 736 (Md. 1964).

9 2 POMEROY, EQUITY JURISPRUDENCE § 517(d), at 472 (5th ed. 1941). (Emphasis added.)

10 Although the precise point has been before the courts infrequently, it seems clear that it is competent for a testator to direct specifically what portion of the estate disposed of in his will shall bear any loss that may be occasioned by a beneficiary's rejection of a testamentary provision made for him therein, and where such a direction has been made, it will be controlling.

Annot. 36 A.L.R.2d 291, 295 (1954).

11 Hall v. Elliott, 202 A.2d 726, 733 (Md. 1964).

12 RESTATEMENT, PROPERTY § 228, comment *a* (1936).

13 Longeran's Estate, 303 Pa. 142, 154 Atl. 387 (1931).

14 *E.g.*, Warner v. Baylor, 204 Va. 867, 134 S.E.2d 263 (1964); Kjosness v. Lende, 389 P.2d 280 (Wash. 1964); ATKINSON, WILLS, § 146, at 810 (2d ed. 1953).

15 There is an abatement where an estate has grown smaller since described by the testator in his will. This could happen through the testator's making expenditures and/or contracting debts during his lifetime. *In re* Buck's Estate, 32 C.2d 372, 196 P.2d 769 (1948).

16 Marriott v. Marriott, 120 Md. 567, 3 A.2d 493 (1939); Longeran's Estate, 303 Pa. 142; 154 Atl. 387 (1931).

17 *E.g.*, ARK. STAT. ANN. § 62-2903-04 (Supp. 1963); COLO. REV. STAT. ANN. §§ 152-14-10, 152-14-17 (Supp. 1961); MICH. STAT. ANN. § 27.3178(103) (1962); See A.B.A., MODEL PROBATE CODE § 184 (1946).

sumption that the testator knew of the widow's right to elect against the will and therefore intended by his silence as to the effect of such that the general legal rules take effect.[18]

In New York, where the testator has expressed no preference and none is judicially construed, all legacies must abate ratably to make up any deficiency caused by election.[19] This rule is enunciated by statute in at least one state,[20] but has been changed recently in two others[21] to conform with the majority rule.

The Maryland Court of Appeals in *Hall* treated the issue of the widow's right to take her share in kind only briefly, basing its decision that she could do so solely on strong precedent.[22] The Maryland election statute says nothing about taking in kind. It states only that a widow in Mrs. Mobray's situation is entitled to "four thousand dollars . . . and one half of the residue of the lands as an heir and one half of the surplus personal estate remaining . . . and no more."[23] Page states that the general rule, where a surviving spouse is entitled to a statutory share, is that the share is "ordinarily taken from the entire estate rather than from any particular portion, although the property renounced is first allotted for such purpose."[24] This rule, it would seem, is contrary to the result in *Hall,* since Mrs. Mobray was awarded one-half of the stock, which was a "particular portion."

The statutes in at least one state provide that when a widow elects against the will the court must select her statutory share first out of her share under the will and then from other property of the estate following the order of abatement.[25] The widow in that state seems to have no right to take her share in kind from specific legatees if her share can be satisfied from the rest of the estate. However, in another state, where the widow can elect to take under the will or under the statute of descent and distribution,[26] the descent and distribution statute provides that heirs take an estate as tenants in common,[27] thereby giving the widow the right to take in kind by authority of statute.[28] Most election statutes are like the Maryland statute in that they give no indication whatever regarding the widow's right to take in kind.[29] Unfortunately, there are few cases discussing this right.[30]

It seems that if, as reasoned by the court in *Hall,* a testator often expresses his primary intention in the form of specific bequests, and, if the intention of the testator is to be of paramount concern to a court in effectuating a will subject to election, a decision giving the widow the right to take her share in kind would often conflict with these considerations. While normally a widow's election against the will frustrates the testator's intent to a certain extent, there is no reason why

18 Webster v. Scott, 182 Md. 118, 32 A.2d 475 (1943); *In re* Povey's Estate, 271 Mich. 627, 261 N.W. 98 (1935); Winters Nat'l Bank & Trust Co. v. Riffe, 93 Ohio L. Abs. 171, 27 Ohio Op.2d 261, 194 N.E.2d 921 (P. Ct. Montgomery C. 1963).

19 *In re* Tannenbaum's Estate, 9 Misc. 2d 95, 205 N.Y.S.2d 390 (Surr. Ct. Kings County 1960); *In re* Meyer's Estate, 119 N.Y.S.2d 737 (Surr. Ct. Erie County 1953).

20 N.C. GEN. STAT. § 30-3(c) (Supp. 1963) was applied in Bank of North Carolina v. Melvin, 259 N.C. 255, 130 S.E.2d 387 (1963).

21 COLO. REV. STAT. ANN. § 152-14-17 (Supp. 1961); IOWA CODE ANN. § 633.436 (1964).

22 202 A.2d at 731, citing Evans v. Iglehart, 6 Gill & J. 171, 192-93 (1834); Kuykendall v. Devecmon, 78 Md. 537, 543, 28 A. 412 (1894).

23 MD. ANN. CODE art. 93, § 329(b), at 112-13 (Supp. 1964).

24 5 PAGE, WILLS § 47.46 (Bowe-Parker rev. 1962).

25 COLO. REV. STAT. ANN. §§ 152-14-10, 152-14-17 (Supp. 1961).

26 OHIO REV. CODE ANN. § 2107.39 (1953).

27 OHIO REV. CODE ANN. § 2105.06 (Supp. 1964).

28 Winters Nat'l Bank & Trust Co. v. Riffe, 93 Ohio L. Abs. 171, 27 Ohio Op.2d 261, 194 N.E.2d 921 (P. Ct. Montgomery C. 1963).

29 *E.g.,* IND. STAT. ANN. § 6-301 (1953); MICH. STAT. ANN. §§ 27.3178(139)-(144) (1962); N.Y. DECED. EST. LAW § 18.

30 However, there are cases which hold that the surviving spouse must take from the entire estate rather than from a particular portion, see 5 PAGE, WILLS § 47.46, note 3 (Bowe-Parker rev. 1962). *Contra,* Gowling v. Gowling, 405 Ill. 165, 90 N.E.2d 188 (1950); Webster v. Scott, 182 Md. 118, 32 A.2d 475 (1943).

his intent should be frustrated any more than is necessary for the purpose of the statute, which is to assure the surviving spouse of ample means for his or her care and comfort.[31] A widow can be as adequately provided for in dollars as in shares of stock.

If the Maryland Court had allowed Mrs. Mobray to take her share, not in kind, but from the residue, the widow would have been well provided for with one half of her husband's estate, the beneficiaries under the three-tiered residuary provision would have been as well off as they were under the Court's decision allowing indemnification, and Reginald Mobray's primary intent in making the will would have been effectuated.

The majority detracts from the logic of its decision that the widow should take in kind by asserting as one of its reasons for indemnification of the specific legatees that the widow indicated that she *might* be willing to sell the stock to the specific legatees.[32] If the testator's intent is to be effectuated in this circuitous manner, then the decision is absurd. The court takes one-half of the stock from the specific legatees and awards it to the widow and then it awards indemnification to the specific legatees from the residue so that they can thereafter purchase the very stock deprived them by the court.

The Court's decision regarding the specific legatees' right to indemnification from the residue follows what Page calls "probably a majority" rule.

> Some states, probably a majority, hold that if a beneficiary who has lost a specific gift cannot be adequately compensated out of the property which has been renounced, he is then entitled to be compensated out of the residuary estate. . . . This rule does not prevail where it appears that the testator did not intend the beneficiaries of specific gifts to have preference over residuary legatees. Such intent is sometimes drawn from the fact that specific devisees or legatees are not primary objects of the testator's bounty, and the only gift to the testator's nearest relatives is in the residuary clause. There are a number of jurisdictions holding that specific devisees or legatees are entitled to no preference in the matter of compensation over general or residuary beneficiaries, but that specific gifts must be presumed to be made with reference to the possibility that they may be diminished by election.[33]

Hall presents a close question of intent; the majority deciding that the specific legatees were intended by Mobray to be preferred over the residuary beneficiaries and therefore, were entitled to indemnification from the residue. The dissenter found no such preference. Since none of Mobray's relatives, except Mrs. Mobray, were mentioned as other than residuary beneficiaries, the dissent found instead *only* an intention that a corporation be perpetuated in a certain manner. It appears that the weight of Maryland authority is contrary to the *Hall* decision and holds that the loss suffered by a specific legatee caused by a widow's election is not compensable.[34]

Hall v. Elliott is anomalous. It ignores the manifest intent of Reginald Mobray in making his will by allowing Mrs. Mobray to take the stock as part of her statutory share, and at the same time it either finds (after a strained search) or conjures up a not-so-manifest intent to indemnify those specific legatees who suffered losses. It honors a precedent to the detriment of an intent, and then it *construes* an intent to circumvent a precedent.

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31 *E.g.*, Turner v. First Nat'l Bank & Trust Co. of Muskogee, 262 P.2d 897 (Okla. 1953).
32 202 A.2d at 737.
33 PAGE, WILLS § 47.46, at 693 (Bowe-Parker rev. 1962).
34 See 202 A.2d at 740 (dissenting opinion).

CONSTITUTIONAL LAW — CRIMINAL LAW — LINE-UPS. — Plaintiffs, arrested on various criminal charges and detained for want of bail,[1] sought injunctive relief to prevent the police from placing them in a line-up for possible identification by victims of other crimes. Plaintiffs claimed infringement of their constitutional rights and brought suit in a federal district court under the Civil Rights Act of 1871.[2] *Held:* Preliminary injunction granted. Insofar as bailed defendants are not compelled to participate in line-ups, to force non-bail defendants to do so is an invidious discrimination in violation of the equal protection clause of the Fourteenth Amendment. *Butler v. Crumlish,* 229 F. Supp. 565 (E.D. Pa. 1964).

The identification of criminals is an ever growing problem — especially acute in large metropolitan areas. Within our population centers, the criminal enjoys an anonymity and freedom of movement which make his apprehension difficult. The line-up is one frequently used method of identification. A valuable police procedure, it enables several victims of crimes to view many possible offenders. It is particularly effective in solving many "street crimes" such as: muggings, purse-snatchings, and sex offenses which plague our large cities. Since this type of offender is likely to commit many similar crimes before arrest, the line-up facilitates his identification as the perpetrator of previous offenses.[3]

There are many other advantages to the use of the line-up. When conducted properly,[4] it is a protection for the accused.[5] The possibility of mistaken identification is decreased when a witness selects the defendant from among several men of similar appearance and dress. The identification itself is much more reliable than

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1 Legal writers question whether the denial of bail to an indigent accused, for financial reasons alone, is not a violation of the equal protection and due process clauses of the Fourteenth Amendment.

> To continue to demand a substantial bond which the defendant is unable to secure raises considerable problems for the equal administration of the law. . . . Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom? Bandy v. United States, 81 Sup. Ct. 197, 197-98, 5 L. Ed. 2d 218 (Douglas, Circuit Justice, 1960) (dictum).

See Bandy v. United States, 82 Sup. Ct. 11, 7 L. Ed. 2d 9 (Douglas, Circuit Justice, 1961); Pannell v. United States, 320 F.2d 698 (D.C. Cir. 1963).

On May 14, 1964, a bill was introduced in the Senate to "assure that no person charged with an offense . . . shall be denied bail solely because of his financial inability to give bond or collateral security." S. 2838, 88th Cong., 2d Sess. (1964).

See generally FREED & WALD, BAIL IN THE UNITED STATES: 1964 (1964); Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole,* 38 N.Y.U.L. REV. 67 (1963); Foote, *Foreword: Comment on the New York Bail Study,* 106 U. PA. L. REV. 685 (1958); Foote, *Introduction: The Comparative Study of Conditional Release,* 108 U. PA. L. REV. 290 (1960); Comment, *The Institution of Bail as Related to Indigent Defendants,* 21 LA. L. REV. 627 (1961); Note, *A Study of the Administration of Bail in New York City,* 106 U. PA. L. REV. 693 (1958); Note, *Compelling Appearance in Court: Administration of Bail in Philadelphia,* 102 U. PA. L. REV. 1031 (1954); Note, *Bail: An Ancient Practice Reexamined,* 70 YALE L.J. 966 (1961).

2 42 U.S.C. § 1983. For a history and analysis of this section of the Civil Rights Act see Note, NOTRE DAME LAWYER (1964). The District Court had jurisdiction under 28 U.S.C. § 1343.

3 Placing an accused in a line-up does not violate his privilege against self-incrimination. People v. Lopez, 32 Cal. Rptr. 424, 384 P.2d 16 (1963), *cert. denied,* 375 U.S. 994 (1964); Meriwether v. State, 63 Ga. App. 667, 11 S.E.2d 816 (1940); Commonwealth v. Sliva, 202 Pa. Super. 455, 198 A.2d 354 (1964). This privilege has long been held to apply only to testimonial compulsion. See generally INBAU, SELF INCRIMINATION 30-31 (1950); 8 WIGMORE, EVIDENCE § 2265 (3rd ed. 1940).

4 For proper method of conducting line-up, see 1 ALEXANDER, THE LAW OF ARREST, § 249, at 808-09 (1949); 3 WIGMORE, EVIDENCE § 786 a, at 164-65 (3rd ed. 1940). British methods and regulations seem superior to our own. See generally Williams, *Identification Parades,* 1955 CRIM. L. REV. (Eng.) 525 (1955).

5 In the opinion in the principal case, Justice Freedman seems to forget this fact. He mentions that it is permissible to identify an accused by viewing him in his cell or in the prison exercise yard, but seemingly has no apprehensions concerning the fairness of these means. 229 F. Supp. at 566. One could hardly imagine worse conditions for an identification.

one made from a photograph or by viewing the accused when he is unaccompanied by others and there is no basis for comparison. In addition, an identification resulting from a properly conducted line-up will be worth more to the prosecution, since it will undoubtedly carry more weight with a jury than if made by other, less desirable means.[6]

If adhered to, the *Butler* opinion will threaten the usage of the police line-up,[7] and possibly force law enforcement officers to rely on less satisfactory procedures.[8]

The rights, privileges, and immunities guaranteed every citizen are no less enjoyed by suspected criminals in the custody of the authorities.[9] While their freedom, of necessity, is limited, the presumption of innocence protects them from any "unlawful invasion" of their person.[10] The purpose of pre-trial confinement is to insure the presence of the accused at the trial, not to punish him before he is found guilty by placing unnecessary burdens upon him.[11]

Often, non-bail defendants are forced to participate in line-ups merely to complement their ranks, and not because the police suspect them of having committed other crimes. In effect, this practice requires non-bail "fill-ins" to play an active role in police investigation — a role which neither the bailed defendant nor any citizen can be compelled to assume. They are required to submit themselves to the degradation accompanying their exposure to strangers — under bright lights — in the company of various criminal types, and to answer the questions and follow the commands of the officer conducting the line-up.[12] To force non-bail defendants to join in this procedure as "fill-ins" without requiring like participation by bailed defendants is clearly a violation of their constitutional right to equal protection. Furthermore, it constitutes an unwarranted intrusion into their privacy.[13] In a closely analogous situation some courts have granted injunctive relief based on the right to privacy against the exhibition of an accused's photograph in a "rogues' gallery" open to public view.[14] Certainly one's person should be accorded greater sanctity than one's picture. The right to privacy is guaranteed to every citizen by

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6 There is some disagreement whether a prior, extra-judicial identification of an accused in a line-up (or otherwise) should be admitted as evidence at the trial. The majority rule is that such an identification may be admitted through the testimony of either the identifier, or a third party who witnessed the identification, when the identifier is available for cross-examination at the trial, not as original evidence, but to corroborate the identification of the defendant by the identifying witness at the trial. The cases are collected in Annot., 71 A.L.R.2d 442.

7 229 F. Supp. at 568.

8 Since there is no legal requirement that the accused be identified in a line-up, [People v. Hood, 140 Cal. App. 2d 585, 295 P.2d 525 (Dist. Ct. App. 1956); People v. Boney, 28 Ill.2d 505, 192 N.E.2d 920 (1963)]; the police often use more expedient and less formal methods of identification which are not as fair to the accused. Of these methods, the most routine probably are the use of photographs and the confrontation between suspect and victim at police headquarters. The manner of identification affects only its weight. People v. Wilson, 1 Ill.2d 178, 115 N.E.2d 250 (1953), *cert. denied,* 347 U.S. 928 (1954).

Dean Wigmore suggested the use of movie films in identification procedures. 3 WIGMORE, EVIDENCE § 786 a, at 165-66 (3rd ed. 1940); 25 ILL. L. REV. 550 (1930-31). However, with increased costs of movie taking Wigmore's method would cost a city approximately $219,000 a year for an average of three suspects a day. Comment, 2 U.C.L.A. L. REV. 552, 555 (1955).

9 *Ex parte* Bommarito, 270 Mich. 455, 259 N.W. 310 (1935).

10 *Cf.,* Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944), *cert. denied,* 325 U.S. 887 (1945).

11 Morton v. State, 105 Ohio St. 366, 138 N.E. 45, 47 (1922) (dictum).

12 229 F.Supp. at 566-67.

13 See generally Nizer, *The Right to Privacy: A Half Century's Developments,* 39 MICH. L. REV. 526 (1940-41).

14 Itzkovitch v. Whitaker, 115 La. 479, 39 So. 499 (1905); *Accord,* State *ex rel.* Mavity v. Tyndall, 224 Ind. 364, 66 N.E.2d 755 (1946), *reaffirmed,* 225 Ind. 360, 74 N.E.2d 914 (1947), *appeal dismissed,* 333 U.S. 834 (1948); *Cf.,* Downs v. Swann, 111 Md. 53, 73 Atl. 653, 656 (1909) (dictum); *Contra,* Fernicola v. Keenan, 136 N.J. EQ. 9, 39 A.2d 851 (ch. 1944); Owen v. Partridge, 40 MISC. 415, 82 N.Y. Supp. 248 (Sup. Ct. 1903).

the due process clause of the Fourteenth Amendment.[15] It should be no less enjoyed by the incarcerated accused.

While the use of non-bail "fill-ins" could be discontinued by the substitution of police officers and employees in the line-up, the more perplexing problem is determining whether the police should be authorized to compel non-bail defendants whom they suspect of the commission of other crimes to appear in a line-up for possible identification by the victims of those other crimes. The public interest and safety are definitely served by allowing the police to do so. The present practice, however, appears to force *only* non-bail defendants to participate and is clearly discriminatory. To be sure, bailed defendants often take part voluntarily, but, as the *Butler* opinion points out, they cannot be compelled to join a line-up except by rearrest,[16] and for this the police must ordinarily have new probable cause.[17]

The equal protection clause of the fourteenth amendment requires that the law operate equally on those who may be charged and convicted of a crime.[18] "[A]ll people must stand on an equality before the bar of justice" is a basic principle of the American constitutional system.[19] The state can provide for differences in treatment, consistent with the Fourteenth Amendment, so long as the resulting classification is reasonable and does not constitute an "invidious discrimination."[20] When the classification does not include all who are similarly situated or "tainted with the mischief" with respect to the administration of the law, there is a "prima facie violation" of the equal protection clause.[21] To allow greater incursions into the rights of a presumably innocent person merely because he is unable to obtain bail would seem an unreasonable discrimination. In the granting and protection of legal rights, a state cannot arbitrarily discriminate in favor of the bailed defendant and against the jailed defendant without violating the Constitution.[22]

The distinction discussed here is especially unjust since it very often subjects indigents who are unable to meet their bail bonds to the humiliations of the line-up while defendants of better financial means are released unscathed.[23] The judiciary of the United States, under the leadership of the Supreme Court, has come to realize that classifications based on financial ability alone, which affect the due administration of criminal justice are unreasonable.[24] It has been held that requiring an indigent defendant to provide information which subjects him to greater jeopardy as a condition to the acquisition of free legal process is a violation of equal protection.[25] Likewise, a practice of conducting secret ex parte interrogations *only* of indigents without counsel constitutes an "invidious discrimination."[26] Therefore,

15 York v. Story, 324 F.2d 450 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964).
16 229 F. Supp. at 567.
17 United States *ex rel.* Heikkinen v. Gordon, 190 F.2d 16 (8th Cir. 1951), *vacated on other grounds*, Gordon v. Heikkinen, 344 U.S. 870 (1952).
18 Barbier v. Connolly, 113 U.S. 27, 31 (1885) (by implication).
19 Chambers v. Florida, 309 U.S. 227, 241 (1940).
20 Douglas v. California, 372 U.S. 353, 356 (1963).
21 See Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 348 (1949).
22 Morton v. State, 105 Ohio St. 366, 138 N.E. 45 (1922).
23 A four district survey of bail practices in federal courts illustrated that 23% of defendants could not post bail in the District of Connecticut, 43% in the Northern District of Illinois, 58% in San Francisco, and 83% in Sacramento. FREED & WALD, BAIL IN THE UNITED STATES: 1964, at 17 (1964).
After the decision in the principal case, both petitioners obtained their release after being incarcerated for nearly six months. Petitioner Butler's bail was reduced and Petitioner Smith was allowed to sign his own bond. Their release has probably rendered the issue in this case moot. Letter From Bernard L. Segal, Assistant Defender, Defender Association of Philadelphia, to the *Notre Dame Lawyer*, November 2, 1964, on file in the *Notre Dame Lawyer* Office.
24 Gideon v. Wainwright, 372 U.S. 335 (1963); Smith v. Bennett, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252 (1959); Griffin v. Illinois, 351 U.S. 12 (1956).
25 Bailey v. State, 76 Fla. 213, 79 So. 730 (1918).
26 Lee v. United States, 322 F.2d 770 (5th Cir. 1963).

it would seem a violation of equal protection to force a defendant to endure the risk of a line-up merely because his indigency prevented him from obtaining bail.

On the other hand, the *Butler* mandate, barring the authorities from compelling non-bail defendants whom they suspect of the commission of other crimes to participate in line-ups, creates problems which are not easily solved. Its effect is to deprive the police of a very useful method of identification and to make effective law enforcement even more difficult. The *Butler* opinion is undoubtedly correct. Our Constitution demands its result. The end of the law must be the protection of the basic rights of man — rich or poor, incarcerated or free. The disparate treatment accorded bail and non-bail defendants cannot be justified. Thus, if the police are to continue to use non-bail defendants in the line-up, they must also be empowered to summon bailed defendants for such purposes. Such an extension of power would result not only in the guarantee of equal protection to non-bail defendants, but would make the line-up a more useful and thorough procedure as well.

The fiction of "constructive custody" which has previously been used to allow the authorities to fingerprint a defendant mistakenly released on bail before fingerprints were taken[27] could also be effectively employed to enable the police to obtain a court order obliging the bailed defendant to appear for possible identification when the police have good reason to believe that he might have committed other crimes. Another means which might prove helpful would be to make release on bail conditional upon the principal's adherence to reasonable police requests that he submit himself to a line-up or other identification procedures.

Admittedly either of these methods would necessarily involve an incursion into the privacy of the bailed defendant, it is submitted, however, that such intrusion would be warranted in the public safety and interest. As our society grows more complex and law enforcement becomes increasingly difficult, certain individual rights must bend. This is because there must always be a balancing of the individual's rights and freedom against the needs and consequent freedom of others. But, some rights are inalienable. They are the basis of our freedom. They can never be abridged. Such a right is recognized in *Butler* — the right of every man to be treated equally under the law.

Martin F. Idzik

ADMINISTRATIVE LAW — BLACKLISTING OF GOVERNMENT CONTRACTORS — PROCEDURAL SAFEGUARDS REQUIRED FOR VALIDITY OF DEBARMENT PROCEEDINGS. — In January 1960, Thomas P. Gonzales Corporation and certain of its officers, including appellants Carmen and Thomas P. Gonzales, received notice by telegram that they were temporarily debarred from continuing in any further contractual relationships with the Commodity Credit Corporation,[1] a governmental agency under the auspices of the Department of Agriculture. The temporary suspension was to continue pending this agency's investigation of the alleged misuse of its official inspection certificates relating to agricultural commodities exported to Brazil by the Gonzales Corporation. Following receipt of the telegram announcing their temporary suspension, appellants were restricted in their capacity to contest this action of the CCC to the presentation of explanatory statements concerning their position and oral arguments relating to the merits of this position which were held in informal conferences with officials of the appellees. Despite their objections that the CCC had no regulations authorizing or governing debarment and had not provided them with procedural safeguards traditionally associated with administrative agency determinations, appellants received further notification by letter in

27 Shannon v. State, 207 Ark. 658, 182 S.W.2d 384, 385 (1944); State v. La Palme, 104 N.H. 97, 179 A.2d 284, 286 (1962).

1 Hereinafter Commodity Credit Corporation will be designated CCC.

May, 1962 that they were suspended for a period of five years, retroactive from the date of their original temporary suspension. This letter stated no reasons or grounds for the final debarment action. In reversing the district court's summary judgment for appellees, the United States Court of Appeals for the District of Columbia *held:* that absent regulations establishing standards and procedures governing debarment and absent notice, hearing, and findings in this case, the debarment is invalid. *Gonzales v. Freeman,* 334 F.2d 570 (D.C. Cir. 1964).

With this decision the District of Columbia Circuit has virtually eliminated summary government "blacklisting," one of the last strongholds of unbridled agency adjudication. In its place the Court has substituted the requirements of procedural fairness in terms of regulations and standards where governmental exclusionary action may substantially affect private interests.

Freedom from procedural unfairness as well as from arbitrary or capricious determinations of administrative agencies has long been recognized by the federal courts.[2] In the area of government debarment, however, the courts have been slow, and sometimes obstinate, in their recognition of procedural protection for the debarred contractor.[3] Contracting with the government or with one of its various agencies was deemed to be a privilege[4] and not a legally protected interest. Consequently, summary suspension of such a privilege, even if coupled with elements of procedural unfairness, did not entitle the aggrieved contractor to judicial review nor did it give him standing to sue. Much less so did the debarment order enable him to participate in the actual administrative proceeding as a matter of right in defense of his position.[5] In the absence of an explicit agency regulation or congressional act governing a debarment proceeding, the extent of a contractor's right to contest the debarment rested almost solely in the discretion of the agency head.[6]

With the advent of *Copper Plumbing & Heating Co. v. Campbell,*[7] the prominence of the "Privilege-Right" doctrine appropriately came to an end. There was a transition in judicial thinking, and subsequent shift of emphasis, from the notion of a privilege to contract with the government to the idea of private interests which are directly and substantially affected by government debarment. If an agency has directly curtailed the legitimate interests of a government contractor without affording him adequate measures to contest the suspension, the agency

2 See *e.g.,* Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168-69 (1951) (concurring opinion of Justice Frankfurter); Morgan v. United States, 304 U.S. 1, 14-15 (1938); Dismuke v. United States, 297 U.S. 167, 172 (1936). In the *Morgan* case the United States Supreme Court has particularly emphasized the requisites of administrative adjudication.

> [I]n administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand "a fair and open hearing," — essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an "inexorable safeguard." at 14-15.

3 The main bulwark against procedural protection in debarment proceedings has undoubtedly been Perkins v. Lukens Steel Co., 310 U.S. 113 (1940).

4 For a concise discussion of the privilege-right dichotomy, see Davis, *Requirement of a Trial Type Hearing,* 70 HARV. L. REV. 193, 222-32 (1956); Miller, *Administrative Discretion in the Award of Federal Contracts,* 53 MICH. L. REV. 781, 801-05 (1955).

5 See Perkins v. Lukens Steel Co., 310 U.S. 113, 125-26 (1940).

6 The General Services Administration has promulgated specific regulations for most civilian agencies prescribing the policies and procedures to be followed relative to debarment and ineligibility of bidders. (GSA Gen. Reg. No. 15, 1954) 41 U.S.C. §§ 5-1.602-1.607-51 (1960). Relatively few agencies, of which the Department of Labor is one, have no regulations providing even the rudiments of procedural protection in debarment proceedings (29 C.F.R. § 5) (Supp. 1964). Here offensive recourse against a debarment order is discretionary in the Secretary of Labor who has permitted informal conferences with the debarred contractor but has not allowed hearings as a matter of right.

7 290 F.2d 368 (D.C. Cir. 1961).

has infringed on a legal right which gives the contractor standing to sue and entitles him to judicial review.[8]

In the course of its decision the *Copper Plumbing* court clarified the nature of this right.

> While they (plaintiffs) do not have a right to contract with the United States on their own terms, appellants do have a right not to be invalidly denied equal opportunity under applicable law to seek contracts on government projects, if deprived of this right they suffer a "legal wrong" which gives them access to the courts under section 10 of the Administrative Procedure Act.[9]

Thus the court seems to give implicit recognition to the principle originally enunciated by Professor Davis that while one may lack a "right" to a government gratuity, he may nevertheless have a "right" to fair treatment in the distribution or deprivation of the gratuity.[10]

The *Gonzales* court has attempted to protect the contractual interests enunciated in *Copper Plumbing* within the framework of the debarment proceeding itself. The touchstone is the concept of fairness, an elusive quality yet an essential one if one is to avoid a conflict with due process.[11] In view of the substantial impact of government suspension on a contractor's legitimate business interests, the court afforded the appellants the "right not to be debarred except in an authorized and procedurally fair manner."[12] Practically this requires that the parties adversely affected by an administrative determination be fairly advised of whatever action the government proposes and be accorded a hearing to contest such action. Failure to provide even these rudiments of fair procedure[13] in effect converts the agency

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8 *Id.* at 370-71. The notion that direct governmental interference with private interests entitles one to some procedural safeguards is not entirely new. In Kukatush Mining Corp. v. Securities Exchange Commission, 309 F.2d 647, 650 (D.C. Cir. 1962), for example, plaintiff, a Canadian corporation, demanded the procedural safeguards of notice and hearing following SEC action which placed its stock on a special "listing" containing questionable SEC-unapproved stocks. The District of Columbia Court of Appeals stated that plaintiff was not entitled to these procedural safeguards because the SEC "listing" formed no basis of direct or adverse action against the plaintiff, but was only a cautionary warning to the public to make sure that their transactions in such securities were not illegal. See also Hannah v. Larche, 363 U.S. 420, 442(1960), where the United States Supreme Court explicitly recognized the necessity of procedural protection.

> [W]hen governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process.

9 Copper Plumbing & Heating Co. v. Campbell, 290 F.2d 368, 370-71. Administrative Procedure Act § 10(a), 60 Stat. 243 (1946), 5 U.S.C. § 1009(a) (1950) provides for the right of judicial review:

> Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

10 Davis, *supra* note 4, at 225.

11 Of particular note is the concurring opinion of Justice Frankfurter in Anti-Fascist Committee v. McGrath, 341 U.S. 123, 161 (1951), in which he equates fairness of procedure with due process and describes it as the mainstay of our legal tradition. See also Morgan v. United States, 304 U.S. 1, 19 (1938), where the Supreme Court voided an order of the Secretary of Agriculture fixing stockyards' rates when parties adversely affected by the Secretary's determination were not accorded a hearing. "Congress, in requiring a 'full hearing,' had regard to judicial standards — not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature."

12 Gonzales v. Freeman, 334 F.2d 570, 576 (D.C. Cir. 1964).

13 The notion that an adequate defense necessitates at the very minimum the procedural requirements of notice and hearing is not new. See Greene v. McElroy, 360 U.S. 474, 496-97 (1959); see also FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, DIVISION OF PUBLIC CONTRACTS (1941).

> Before adverse action is to be taken by an agency, whether it be denying privileges to an applicant or bounties to a claimant . . . the individual immediately concerned should be apprised not only of the contemplated

proceeding into an *ex parte* determination, and leaves the isolated contractor with a barren defense should he have one in his favor.[14] Such a proceeding would certainly be repugnant to our traditional belief that the government should attempt to reach the best decision possible in a case, yet this would be virtually impossible to achieve since the parties, whose conduct warranted the proceeding in the first place, are deliberately excluded from participation in it.[15]

The notion of fairness also requires that an administrative agency be strictly limited in its imposition of sanctions unless they are effectuated in conformity with regulations promulgated by that agency.[16] To allow a contractor at best to surmise what consequences may result from his misconduct is to repose undue discretion in the administrative agency. The absence of any regulation in *Gonzales* authorizing or prescribing the method of debarment was a determinative criterion in the court's decision.[17] Such a haphazard, discretionary approach to the seriousness of a debarment proceeding nullified the mandate of the Administrative Procedure Act, requiring the publication of administrative procedure before an agency can act efficaciously.[18] Informal procedures, such as the argumentative type hearing and presentation of evidence, permitted by the Secretary of Agriculture at his own discretion do not meet the exacting standards of section 3(a) of the Administrative Procedure Act. Where a debarment proceeding hinges on the determination of adjudicative facts, that is, those pertaining to the parties and their activities, fundamental concepts of fairness require that such facts should not be determined without

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> action with sufficient precision to permit his preparation to resist, but, before final action, he should be apprised of the evidence and contentions brought forward against him so that he may meet them. He must be offered a forum which provides him with an opportunity to bring his own contentions home to those who will adjudicate the controversy in which he is concerned.

14 See, *e.g.*, Parker v. Lester, 227 F.2d 708 (9th Cir. 1955), where plaintiff could not continue his employment upon any merchant vessel due to Coast Guard noncertification. He contested the action and was accorded only an appellate type of hearing and an opportunity to offer evidence, but was never apprised of the specific grounds for the government action nor confronted with the government's case. The Court voided the noncertification order and required notice and hearing before the final agency order would become effective. The Coast Guard subsequently amended its regulations to comply with the Court's determination, and the amended procedure parallels to a great extent that set out in *Gonzales*, 33 C.F.R. §§ 121.11(a), 19 (Supp. 1961).

15 One commentator has recently observed that to modern scholars the propriety of a hearing on both sides is required by our judicial system's elementary commitment to *fairness*. He further notes that the Romans historically accorded a hearing to both parties, not so much for the sake of achieving a *fair* decision as a wise one. Kelley, *Audi Alteram Partem*, 9 NATURAL LAW FORUM 103 (1964).

16 See, *e.g.*, Schlesinger v. Gates, 249 F.2d 111, 113 (1957). Here the court upheld a Department of Navy blacklisting of a contractor for default in the performance of a contract where a Navy regulation authorized the debarment proceeding and standardized procedural safeguards available to the aggrieved contractor; see also L. P. Steuart & Bro., Inc. v. Bowles, 322 U.S. 398, 402 (1944). Final suspension order in this case was upheld since it was issued after notice and hearing provided for by agency regulations.

17 This defect is particularly glaring in the present case inasmuch as the Secretary of Agriculture has on at least three other related occasions promulgated regulations governing procedure in connection with debarment of government contractors. 7 C.F.R. §§ 55.30(a)(1)(iii)(1957), 58.58(a)(1)(iii)(1957), 54.45(b)(e)(1959).

18 Administrative Procedure Act, § 3(a), 60 Stat. 238 (1946), 5 U.S.C. § 1002(a) (1958).

> Every agency shall separately state and currently publish in the Federal Register . . . (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available . . . (3) No person shall in any manner be required to resort to organization or procedure not so published.

giving the affected parties an opportunity to rebut or explain evidence that bears on the adjudicative facts.[19]

In *Gonzales v. Freeman,* the District of Columbia Circuit in curt terms stressed this peculiar applicability of the Administrative Procedure Act in debarment proceedings.

> The command of the Administrative Procedure Act is not a mere formality. Those who are called upon by the government for a countless variety of goods and services are entitled to have notice of the standards and procedures which regulate these relationships. Neither appellants nor others similarly situated can turn to any official source for guidance as to what acts will precipitate a complaint of misconduct, how charges will be made, met or refuted, and what consequences will flow from misconduct if found.[20]

The procedural scheme dictated by *Gonzales* is broad enough to encompass other "legal wrongs." The magnitude of the stigma which may attach to a debarred contractor or other victim of governmental exclusionary action may be a potent factor in determining the availability of procedural safeguards.[21] On the other hand, the presence of an overriding government interest may supersede the allowance of otherwise requisite safeguards.[22] Each case necessarily demands a balance of the competing interests sought to be protected. In his concurring opinion in *Hannah v. Larche,*[23] Justice Frankfurter explicitly set forth the test of adequate procedural safeguards.

> The precise nature of the interest alleged to be adversely affected or of the freedom of action claimed to be curtailed, the manner in which this is to be done and the reasons for doing it, the balance of individual hurt and the justifying public good—these and such like are the considerations, avowed or implicit, that determine the judicial judgment when appeal is made to "due process."[24]

If the government interest is relatively weak when compared to the economic hardship and loss of dignity[25] a debarred contractor may face, the full procedural panoply should be allowed. To allow less would be to sacrifice fairness at the price of

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19 See, *e.g.,* Greene v. McElroy, 360 U.S. 474, 496-97 (1959). See generally Davis, *supra* note 4 at 199.

20 Gonzales v. Freeman, 334 F.2d 570, 578 (D.C. Cir. 1964).

21 In related areas of government exclusionary action this concept becomes quite clear. Thus in Greene v. McElroy, 360 U.S. 474 (1959), plaintiff's exclusion from a highly skilled employment as an aeronautical engineer due to government revocation of his security clearance was deemed a sufficiently important interest to entitle him to confront and cross-examine adverse government witnesses; Homer v. Richman, 292 F.2d 719 (1961), denial of radio licenses to plaintiff by virtue of FCC noncertification, because of alleged association with subversive groups, entitled plaintiff to test the accuracy of the grounds upon which the denial was based, since the agency sanction would narrowly limit his opportunity for other similar employment.

22 See, *e.g.,* Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895-96 (1961). Summary denial of plaintiff-cook's access to a defense installation for unrevealed security reasons did not hamper her employment opportunities elsewhere, and therefore denial of a hearing and advice as to the specific grounds for her exclusion did not violate due process. The interest of the government in the maintenance of security within the base outweighed the minimal loss to plaintiff. In R. A. Holman & Co., Inc. v. Securities and Exchange Commission, 299 F.2d 127, *cert. denied* 370 U.S. 911 (1962), protection of the public from questionable securities outweighed plaintiff's right to notice and hearing following suspension of his exemption from certain registration requirements. Plaintiff's loss of business from the suspension was only slight.

23 Hannah v. Larche, 363 U.S. 420, 487 (1960).

24 *Id.* at 487-88.

25 It is significant to note that economic hardship in terms of decrease of earning capacity was not the sole basis of the court's decision in *Gonzales v. Freeman.* The court considered other factors such as contraction of bank credit, skepticism of the contractors's creditors, and loss of dignity or reputation in the business community which result from a debarment. These factors intensify the stigma which attaches to a final debarment order and thereby require the maximum of procedural protection. Gonzales v. Freeman, 334 F.2d 570, 574 (1964). Injury to one's business or personal reputation is a particularly potent factor in determining procedural adequacy. Wieman v. Updergraff, 344 U.S. 183, 190-91 (1952).

expediency in adjudication.[26] The establishment and maintenance of a systematic procedural program providing notice and hearing and other safeguards to a debarred contractor would necessarily involve a great deal of governmental time and expense, yet this factor should be balanced against the individual interest which would warrant such notice and hearing.

Analyzed in terms of the foregoing concepts, the governmental interest in *Gonzales* cannot be arbitrarily classified as weak. One of the specific statutory aims of the CCC is that of aiding in the development of foreign markets for agriculture commodities.[27] The alleged misconduct of the appellants, if factually substantiated, would essentially impair the integrity of the CCC and the reliability of its certificates, and would minimize its ability to implement foreign markets.[28] Protection of such an interest would certainly seem to warrant imposition of a temporary debarment sanction which would inhibit further loss of CCC prestige.[29] Competing interests of the contractor, however, become predominant at this point. The focal point must shift to the drastic losses of the Thomas P. Gonzales Corporation contingent on this debarment.[30] The extent of these consequences would demand at the very least procedural steps sufficient to enable the Gonzales Corporation to offer some semblance of a defense before a final debarment order should become effective.

James E. Hakes

TORTS — EXTENSION OF RES IPSA LOQUITUR. — A three-year, ten-month-old child who had been in good health when she was left at a nursery school at 9:00 A.M. appeared downcast and depressed when her parents called for her at 6:00 P.M. that evening. At home one hour later, the parents noticed that the child's eyes were crossed and that she had a large bump on her forehead beneath her bangs. Subsequent medical examination disclosed that the child had suffered a brain concussion which caused her eyes to become crossed — a condition that could only be remedied by several intricate operations. The child, by her father as guardian ad litem, sued the owner-operator of the nursery for negligence, basing her claim on res ipsa loquitur. A nonsuit was entered by the trial court. On appeal the California Supreme Court, in reversing this judgment, *held:* that a jury could reasonably find that the doctrine of res ipsa loquitur is applicable. *Fowler v. Seaton,* 39 Cal. Rptr. 881, 394 P.2d 697 (Cal. 1964).

This decision is a very significant extension of the res ipsa loquitur doctrine — even by California standards[1] — which does violence to the old legal axiom (honored more by citation than by observance) that "res ipsa loquitur should be

26 Expediency and facility in operation as arguments for summary debarment action would seem to merit little attention when weighed against the severe economic injury and possible damage to reputation which may accrue to a debarred contractor.

27 62 Stat. 1072 (1948), as amended 15 U.S.C. § 714 c(f) (1958).

28 . See Brief for Appellee, p. 13.

29 The court seems to sustain this argument of the appellees only insofar as it may constitute authorization for the sanction of debarment. See Gonzales v. Freeman, 334 F.2d 570, 577 (1964).

30 See Brief for Appellant, p. 15. The affidavit of Thomas P. Gonzales indicated that the Thomas P. Gonzales Corporation had sustained a loss of approximately $100,000 as a result of the government's debarment, and would sustain an average annual loss of approximately $50,000.

1 Res ipsa loquitur appears to be more widely used in California than in any other jurisdiction. Critics of the extension of res ipsa loquitur contend that the doctrine applied in California under the name of res ipsa loquitur bears so little resemblance to the conventional doctrine that it should be referred to as "California res ipsa." Adamson, *Medical Malpractice — Misuse of Res Ipsa Loquitur,* 46 MINN. L. REV. 1043 (1962).

strictly limited and cautiously applied."[2] The court appears to indulge in great leaps of faith to find that the evidence could reasonably satisfy those requirements of the doctrine which could only be doubtfully met. It then employs the defendant's failure to explain the accident satisfactorily — an obligation that can only be placed upon a defendant after it is ruled that res ipsa loquitur could reasonably be found to be in the case by the jury[3] — as the grounds for holding that res ipsa loquitur could reasonably be found to be in the case.

Res ipsa loquitur or "the thing speaks for itself" is a type of circumstantial evidence which, on the basis of "the happening of an accident and a description of some of the facts surrounding it, may permit an inference of defendant's negligence without any direct testimony as to his conduct at the very time that such negligence occurred."[4] Further, "if the plaintiff has made out a res ipsa loquitur case, he succeeds in avoiding a motion for nonsuit or directed verdict at the close of his own case."[5] In most jurisdictions, the procedural effect of res ipsa loquitur is to create an inference of negligence which the jury is permitted but not compelled to accept.[6] The particular procedural effect given to res ipsa loquitur is of little practical significance, as once the plaintiff has made out a res ipsa loquitur case, he is entitled to go to the jury, and his greatest obstacle to recovery has been overcome.[7]

The importance of the *Fowler* case on the applicability of the res ipsa loquitur doctrine is best indicated by analyzing its factual situation in the light of the requirements for the application of the doctrine. The conditions that are generally required for the application of res ipsa loquitur are:

> (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence;
> (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;
> (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.[8]

Whether the accident in question is, "in the light of common experience,"[9] more probably than not the result of someone's negligence is a very close question. The child was

> of an age where she was able to walk, talk, play and generally conduct herself independently of the assistance and support of others, spending the

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2 Clark v. Vardaman Mfg. Co., 162 So. 2d 857, 858 (Miss. 1964).

3 Fowler v. Seaton, 39 Cal. Rptr. 881, 394 P.2d 697, 707 (Cal. 1964) (dissenting opinion), Galbraith v. Busch, 267 N.Y. 230, 196 N.E. 36 (Ct. App. 1935) (by inference). *Accord,* Vanity Fair Paper Mills, Inc. v. F.T.C., 311 F.2d 480 (2d Cir. 1962).

4 2 HARPER & JAMES, TORTS § 19.5, at 1075 (1956).

5 *Id.* § 19.11, at 1099.

6 PROSSER, TORTS § 40, at 232-33 (3d ed. 1964). A minority hold that it creates a presumption of negligence which the defendant must meet to avoid a directed verdict for the plaintiff. An even smaller minority holds that it "shifts to the defendant the ultimate burden of proof, requiring him to introduce evidence of greater weight than that of the plaintiff." PROSSER, *supra* § 40 at 234. California subscribes to this view of the procedural effect of res ipsa loquitur. 2 HARPER & JAMES, *op. cit. supra* note 4, § 19.11, at 1103 n. 16. However, this did not influence the decision in this case because the applicability of res ipsa loquitur, not its procedural effect, was at issue here.

7 2 HARPER & JAMES, *op. cit. supra* note 4, § 19.11, at 1104.

8 PROSSER, *op. cit. supra* note 6, § 39, at 218. It is not a fourth condition that the evidence of the true explanation of the accident must be more accessible to the defendant than to the plaintiff. PROSSER *supra* § 39 at 229. The reason is that the theory of the doctrine is that "the thing speaks for itself," and not primarily that the cause of the injury is known by the defendant but not known by the plaintiff. Weller v. Worstall, 50 Ohio App. 11, 197 N.E. 410 (1934), *aff'd,* 129 Ohio 596, 196 N.E. 637 (1935).

9 The applicability of the doctrine of res ipsa loquitur depends on whether it can be said, *in the light of common experience,* that the accident was more likely than not the result of defendant's negligence. Where no such balance of probabilities in favor of negligence can be found, res ipsa loquitur does not apply. *Tucker v. Lombardo,* 47 Cal.2d 457, 465, 303 P.2d 1041, 1046 (1956). (Emphasis added.)

> day at school with other children. This child was clearly in a position of exposure to many persons, things and situations whereby and wherein injury could have occurred without any fault whatever on the part of defendants and respondents.[10]

The fact that a child does not ordinarily receive a brain concussion while at nursery school is immaterial. The criterion, when such an injury is received, is whether it is more probably than not due to someone's negligence.[11] Res ipsa loquitur may not be applied where, on proof of the occurrence, negligence is not the more reasonable and probable deduction from the facts shown, as negligence would then rest on conjecture, not probability.[12]

The facts of the case do not readily lend themselves to a clear satisfaction of the requirement that the injury be caused by an agency or instrumentality within the exclusive control of the defendant, since the injury-causing instrumentality is unknown. Some cases require that the injury-causing instrumentality be identified as a prerequisite for the satisfaction of this "exclusive control" requirement.[13] The requirement as it is more generally applied, however, is that "the evidence must afford a rational basis for concluding that the cause of the accident was probably such that the defendant would be responsible for any negligence connected with it."[14] Even this more liberal statement of the requirement is not manifestly met by the evidence. It may be quite probable, from the viewpoint of common experience, that the child was injured by running into another child, or by any other cause, either negligent or non-negligent in itself, for which the defendant would not be responsible, nor negligent because of its occurrence.[15]

For these same reasons, whether or not the third requirement is satisfied is also questionable. Even though the child is too young as a matter of law to have been contributorily negligent,[16] common experience may reasonably suggest that, more probably than not, the child's non-negligent voluntary action in running into another child, or some object, was the cause of her injury.

It is apparent that the single most important factor which prompted the California Supreme Court to refuse to find that res ipsa loquitur was not in the case is what the majority refers to as the defendant's "inferably false explanations"[17] of the cause of the plaintiff's injury. The defendant first attempted to explain the child's downcast and dejected mood to her parents when they called for her as being due to her having wet her pants earlier in the day. One hour later, when

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10 Brief for Respondents, pp. 5-6.

11 Siverson v. Weber, 57 Cal.2d 834, 22 Cal. Rptr. 337, 372 P.2d 97 (1962).

12 Stewart v. Crystal Coca-Cola Bottling Co., 50 Ariz. 60, 68 P.2d 952 (1937).

13 U.S. v. Ridolfi, 318 F.2d 467 (2d Cir. 1963); Wolf v. Reynolds Elec. & Eng'r. Co., 304 F.2d 646 (9th Cir. 1962); Downs v. Longfellow Corp., 351 P.2d 999 (Okla. 1960). *But see* Frost v. Des Moines Still College of Osteopathy & Surgery, 248 Iowa 294, 79 N.W.2d 306 (1956).

14 2 HARPER & JAMES, *op. cit. supra* note 4, § 19.7, at 1086.

15 The duty which a school principal owes to her pupils is only that of "reasonable supervision." Cianci v. Board of Educ., 18 App. Div.2d. 930, 238 N.Y.S.2d 547 (1963). "Reasonable supervision" does not mean "constant and unremitting scrutiny." Nestor v. City of New York, 28 Misc.2d 70, 211 N.Y.S.2d 975 (Sup. Ct. Trial Term, Kings County 1961). In order for a teacher to be liable to a pupil for negligence, "there must be a proximate causal connection between the inadequacy of the supervision and the accident." Woodsmall v. Mt. Diablo Unified School Dist., 188 Cal. App.2d 262, 10 Cal. Rptr. 447, 449 (1961). Thus, a willful act of another student may not, in itself, be a sufficient intervening cause to relieve the teacher of her own liability. Beck v. San Francisco Unified School Dist., 37 Cal. Rptr. 471 (Cal. Dist. Ct. App., 1st Dist., Div. 2, 1964).

It would seem that the fact that the defendant operates a nursery school whose purpose is supervision rather than a regular school whose purpose is education should only require a standard of care which differs in degree only. Her duty would remain that of providing "reasonable supervision," but since this duty is owed to very young children, this "reasonable supervision" would require the exercise of a greater amount of care than would "reasonable supervision" of grade or high school pupils.

16 Fowler v. Seaton, 39 Cal. Rptr. 881, 885, 394 P.2d 697, 701 (Cal. 1964).

17 *Id.* at 886, 394 P.2d at 702.

phoned by the parents, who were then aware of the child's injury, and asked for an explanation of what had happened to the child that day, defendant said that another pupil of the same age suddenly struck her on the forehead with his bare hand. Yet, plaintiff offered to prove by medical testimony that a boy less than five years old could not possibly have delivered a bare-handed blow of sufficient force to have caused the plaintiff's brain concussion. From this evidence, the court drew the conclusion that the defendant knew more about the cause of the plaintiff's injury than she revealed. The defendant's failure to give what the court considered to be a true explanation of the cause of plaintiff's injury was interpreted as meaning that a true explanation would probably reveal defendant's negligence. Thus, defendant's "guilty knowledge" of the cause triggered a response of moral indignation on the part of the court which was responsible, to a significant extent, for its refusal to rule that plaintiff had not made out a res ipsa loquitur case.

However, according to res ipsa loquitur doctrine, the defendant's failure to give evidence which would explain plaintiff's injury allows no inference of negligence until the plaintiff has proved enough evidence of the defendant's negligence to cause the judge to rule that res ipsa loquitur may reasonably be found to be in the case.[18] The nature of the accident and its surrounding circumstances must, in the light of common experience, be more consistent with negligence than with due care before res ipsa loquitur may be applied.[19] Gratuitous explanations offered by the defendant prior to the judge's finding that res ipsa loquitur is in the case cannot be considered to be part of the "surrounding circumstances" which bespeak negligence.[20] Evidence of the "surrounding circumstances" may only be used to prove that the requirements for the application of res ipsa loquitur, such as exclusive management and control and probability of negligence, are met.[21] Nevertheless, the court chose to ignore this precedent from a sister state.[22]

This extension of res ipsa loquitur is not surprising in view of certain trends which have long exerted a subtle influence on the application of this doctrine. It has been noted that courts tend to apply res ipsa loquitur much more readily, often in circumstances in which it is quite questionable as to whether the plaintiff has satisfied the requirements of making out a res ipsa loquitur case, when the chief evidence of the true cause of the injury, whether culpable or innocent, is practically accessible to the defendant but inaccessible to the injured plaintiff.[23] Special relationships which call for the exercise of great care by the defendant toward the plaintiff also have a bearing on the applicability of the doctrine.[24] Not only is it more probable in these special relationships that the plaintiff's injury is due to the defendant's negligence, but the courts are much more willing, as a matter of public policy, to decide that the probabilities weigh more heavily in favor of the

18 Cases cited note 3 *supra.*

19 Thompson v. Burke Eng'r. Sales Co., 252 Iowa 146, 106 N.W.2d 351 (1960).

20 The term "surrounding circumstances" in connection with the rule res ipsa loquitur:

> refers not to circumstances directly tending to show lack of care in handling, such as excessive speed, lack of proper control of the car, and the like, which tend in themselves to establish plaintiff's case, but only to mere neutral circumstances of control and management by the defendant, which may, when explained, appear to be entirely consistent with due care.

Plumb v. Richmond Light & R. Co., 233 N.Y. 285, 288, 135 N.E. 504, 505 (Ct. App. 1922).

21 *Ibid.*

22 *Ibid.*

23 Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687 (1944); Kahalili v. Rosecliff Realty Inc., 26 N.J. 595, 141 A.2d 301 (1958); PROSSER, *op. cit. supra* note 6, § 39, at 230.

"One of the considerations that has made it easier to assume doubtful premises in favor of liability has been the desire to lighten the accident victim's burden of proof in some classes of situations where it is apt to be particularly onerous." 2 HARPER & JAMES, *op. cit. supra* note 4, § 19.9, at 1095.

24 2 HARPER & JAMES, *op. cit. supra* note 4, § 19.6, at 1084.

defendant being negligent.[25] The bailor-bailee and common carrier-passenger relationships represent instances of what was once a mere tendency and is now a rule of law, namely, to apply res ipsa loquitur where such relationships exist. In such cases, the mere proof of injury to a passenger of a common carrier as a result of an accident,[26] or of damage or nondelivery of goods which were delivered to the bailor in good condition,[27] makes out a res ipsa loquitur case.

In the *Fowler* case, the facts that the defendant probably possessed the sole knowledge as to the true cause of the plaintiff's injury and that a commercial relationship existed between the parties which the court felt ought to be characterized by a very high standard of care prompted the court to hold that the defendant's failure to divulge this information which it felt she either knew or should have known was sufficient grounds for the application of res ipsa loquitur. In effect, the court decided that there are certain commercial relationships which should be governed by a degree of care sufficient to justify res ipsa loquitur upon proof of an injury to a plaintiff when the defendant, by virtue of this relationship, has superior access to the evidence. Thus, a classification has been created which lies midway between the ordinary res ipsa loquitur cases, where res ipsa loquitur is applied chiefly upon successful satisfaction of the probability requirements, and the common carrier and bailor-bailee cases, where res ipsa loquitur is applied solely because of the relationships involved.

If the *Fowler* case is followed, this new category of cases will be delineated by the case-by-case determination of the individual judge. Each case will be characterized by the determination that the particular commercial relationship existing between the parties requires a sufficiently high duty of care to justify invoking res ipsa loquitur, without inquiring into the probabilities too extensively, upon proof of an injury to the plaintiff and of the defendant's superior knowledge of the true cause of the injury.

This case illustrates that res ipsa loquitur is being increasingly utilized as a tool to enable the common law judge to work what he considers to be justice in the particular circumstances of a given case. It is said that "whether the res ipsa doctrine . . . should apply is largely a question of how justice in such cases is most practically and fairly administered."[28] The listed requirements for the application of the doctrine are generally found to be present if the judge concludes that the basic equities[29] of the situation urge that the plaintiff be allowed to take his case to the jury.[30] This appears to be a legitimate exercise of the common law judge's

25 *Id.*, § 19.6, at 1084-85.

26 Missile Cab Assoc. v. Rogers, 184 A.2d 845 (D.C. Mun. Ct. App. 1962); Crozier v. Hawkeye Stages, Inc., 209 Iowa 313, 228 N.W. 320 (1929).

27 Big "D" Auction Sales, Inc. v. Hightower, 368 S.W.2d 881 (Tex. Civ. App. 1963); Jones v. Warner, 57 Wash.2d 670, 359 P.2d 160 (1961).

28 Kleinman v. Banner Laundry Co., 150 Minn. 515, 518, 186 N.W. 123, 124 (1921).

29 It is to be noted in passing that the court, in making its determination of the equities of the situation in the *Fowler* case, relied rather heavily on the statements of the defendant which appeared to be inferably false and aroused the court's moral indignation. It is questionable whether this type of conduct — "inferably false statements" or "guilty silence" — on the part of the defendant, which would stir the court to moral indignation, is a prerequisite for the determination that the equities of the situation require the application of res ipsa loquitur. I feel that it is not. A determination that the equities require the application of res ipsa loquitur could result solely from a situation in which a commercial relationship of the *Fowler* type exists and the defendant has significantly greater access to the evidence of the cause of plaintiff's injury.

30 "My advice would be to ignore supposed precedents, and look at your particular accident with an intensive application of as much common sense as you can summon." Address by Hon. Wilfred Bolster, C.J. of the Mun. Ct. of Boston, "Municipal Court Practice," Feb. 8, 1938, in 9 WIGMORE, EVIDENCE § 2509, at 391 (3d ed. 1940).

The theory which underlies the doctrine of res ipsa loquitur "is that the rights of the person who is injured in an accident under circumstances which leave the cause of the accident unknown to him must be protected." Hawayek v. Simmons, 91 So.2d 49, 52 (La. Ct. App. 1956). *Accord*, Ybarra v. Spangard, 25 Cal.2d 486, 490, 154 P.2d 687, 689 (1944).

power to extend existing legal principles to encompass new factual situations in order to attune the law to modern society's expectations as to the rules of liability which should prevail for injuries occurring within certain relationships.[31]

The expansion of res ipsa loquitur to include this kind of commercial relationship is not strict liability. The application of res ipsa loquitur, as it exists in most jurisdictions, only results in an inference of negligence which the jury is free to accept or disregard.[32] The defendant then has the opportunity of going forward with evidence to give an explanation of the accident consistent with his use of due care, or merely of presenting evidence of his due care, in an attempt to exonerate himself by defeating the inference of negligence. In jurisdictions following the majority rule, he may even rest his case in the hope that the jury will choose to ignore this inference and return a verdict for him.[33] However, due to the tendency of a jury to decide for the plaintiff on the basis of the inference of negligence allowed when res ipsa loquitur is in the case,[34] the practical effect is to require the defendant to explain the accident in a manner which most probably shows that it was not caused by his negligence. Since the rule in the *Fowler* case will only apply where a certain commercial relationship exists and the evidence indicates that the defendant either knows or has superior accessibility to the facts surrounding the plaintiff's injury, this does not burden the defendant unduly. Certainly, where, "given an accident, the attainment of justice requires that the defendant be made to talk first, why not make him talk, even at the risk of doing occasional violence to our time-honored maxim that he who alleges must prove. . . ."[35]

Stephen A. Seall

EMINENT DOMAIN — ECONOMIC SAVING TO THE GOVERNMENT AS THE SOLE MOTIVATION FOR THE TAKING.

Pursuant to 23 U.S.C. § 107 (1958), which authorizes the acquisition of land or interest in land required in the construction of any section of the Interstate Highway System, the United States brought a civil action for the condemnation of the defendant's property. The government desired to use the property, which was situated near the proposed route of the highway, only as a source of fill for the construction of the highway. The government could have purchased the earth on the local commercial market, although additional costs would have been incurred had they done so. The United States District Court for the Western District of Michigan *held:* the United States could condemn in fee simple absolute the property which would be used only as a source of materials for the construction of the highway, even though the sole motive for the taking was to avoid the expense which would be incurred if the material was purchased commercially. *United States v. Certain Parcels of Land in Ingham County,* 233 F. Supp. 544 (W.D. Mich. 1964).

May the government condemn private property for the purpose of realizing an economic saving even though no other necessity is manifested? This vital question, which surprisingly has not been frequently litigated, is clearly presented in *Ingham County.* To provide its answer, one must consider not only the nature of eminent domain and the limitations, or the lack of them, which has been placed

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31 Since modern society desires that more stringent rules of liability be applied to defendants in certain commercial relationships, it is only equitable that these defendants arrange to meet whatever liabilities may result therefrom by obtaining liability insurance. Part or all of the costs of such insurance may then be passed along to society as a whole in the form of increased prices for the services rendered by defendants within these relationships.

32 PROSSER, *op. cit. supra* note 6, § 40, at 232-33.

33 *Id.*, § 40, at 233.

34. *Ibid.*

35 Address by Hon. Wilfred Bolster, *op. cit. supra* note 30.

on its exercise but also the nature of private property and the position that it occupies in our society.

The power of eminent domain is an inherent attribute of the sovereign which is required to enable the State to implement its other powers and perform its proper functions.[1] The Supreme Court has lucidly stated the justification for this awesome power: "[Government's] independent existence and perpetuity. . . . cannot be preserved if the obstinacy of a private person . . . can prevent the acquisition of the means or instruments by which alone governmental functions can be performed."[2] Thus, the power of eminent domain exists independent of any constitutional grant; on the contrary, the Constitution serves only as a limitation upon that inherent power.[3]

The Constitution has no *express* provision making necessity a prerequisite for the taking of land for a public use. But since the *raison d'être* of the power of eminent domain is that it is an indispensable means to the fulfillment of the government's functions, and because the individual's right to private property is still valued in our society, it follows that this power should not be exercised unnecessarily. Indeed, one jurist has contended that the Constitution implicitly forbids a taking which is not necessary for the public improvement[4] and Nichols, the foremost authority in the field of eminent domain, has stated: "It follows from the very nature of the power of eminent domain that property cannot be taken by the exercise of the power except when it is *needed* for the public use."[5] The state legislatures are evidently aware of this limitation, for the various enabling statutes usually allow the condemnor to acquire land only when it is reasonably necessary for the construction of the highway.[6] Suprisingly, there are few cases which categorically state that a taking must be because of necessity. However, in *Schneider v. District of Columbia*,[7] the court must have agreed that the Constitution implicitly forbids an unnecessary taking when it likened the government's power to take private property to its ability to infringe on other rights guaranteed by the Constitution: "Congress can suppress free speech if a clear and present danger necessitates it, but the suppression can go only as far as the necessity. In these principles lies one of the critical differences between our system of government and the totalitarian systems."[8]

Assuming that there is at least some theoretical limitation on the government's ability to take property without necessity, there should also be a means of assuring that this limitation will be observed. Unfortunately, our system does not seem to provide such assurance. The condemning authority itself determines the necessity of the taking and the cases indicate that, provided the taking is for a public use, the courts will rarely attempt to restrain the condemnor.[9] It has

1 Georgia v. Chattanooga, 264 U.S. 472, 480 (1924); Kohl v. United States, 91 U.S. 367, 371-72 (1875).

2 Kohl v. United States, *supra* note 1 at 371.

3 Hanson Lumber Co. v. United States, 261 U.S. 581, 587 (1923); Boom Co. v. Patterson, 98 U.S. 403, 406 (1878).

4 See 2 LEWIS, EMINENT DOMAIN § 600 at 1060-61 (3rd ed. 1909).

5 1 NICHOLS, EMINENT DOMAIN § 4.11[1] at 551 (3rd ed. 1964). (Emphasis added.)

6 See e.g., ARIZ. REV. STAT. ANN. § 18-155 (1956); MICH. COMP. LAWS § 213.174 (1948); N.D. CODE ANN. ch. 24-01-18 (1960); S.C. CODE § 33-122 (1962); VT. STAT. ANN. tit. 19, § 222 (1959).

7 117 F. Supp. 705 (D.D.C. 1953), *modified*, 348 U.S. 26 (1954).

8 *Id.* at 716-17.

9 Since there is a constitutional requirement that the taking be for a public use, it is not doubted that the judiciary may make the final determination as to whether the use for which the property is taken is really a public use. Cincinnati v. Vester, 281 U.S. 439, 446 (1930); Rindge Co. v. Los Angeles, 262 U.S. 700, 705 (1923); Hairston v. Danville & Western Ry., 208 U.S. 598, 606 (1908). However, there is no explicit constitutional requirement that the taking be for a necessity. Therefore, in the absence of a statute requiring that the taking be necessary for the public use, there is little upon which the courts may base their opposition to the taking, providing of course it is for a public use. See, 1 NICHOLS,

been consistently held that the determination of the necessity and the proper extent of the taking is a legislative rather than a judicial question.[10] Therefore, a court usually may not set aside an administrative agency's decision because it believes that the taking was not indispensable to the accomplishment of the public improvement. The courts have recognized that in exercising his wide discretion, the condemnor need not find an absolute necessity for the taking and have used such terms as "expediency,"[11] "advisability,"[12] and "desirability"[13] in describing the required justification for the taking. Nevertheless, some federal courts, including the court in the instant case, have indicated by way of dicta that some basis of need for the condemnation must exist and an arbitrary determination which results from bad faith or an abuse of discretion may be set aside, presumably on the basis that such a determination is in excess of the conferred authority.[14]

Even if the courts may set aside a clearly arbitrary decision, the condemning authority still retains a large amount of discretionary power and no federal case has been found where an abuse of discretion was declared. The demonstrable trend, which has not been impeded by the courts, has been toward expanding the condemnor's powers.[15] This reluctance of the federal courts to find an abuse of the condemnor's discretion is understandable. In most eminent domain cases, the decision as to the necessity of the taking involves problems which are unfamiliar to the lawyer or judge and are peculiar to the province of the engineer or specialist. This writer submits, however, that the judiciary need not acquiesce so readily to the administrative agency's decision when the sole justification for the taking is a slight monetary saving to the government. No special expertise is required to determine whether a taking is necessary when the material required is available, although at a higher price, on the local market. In such a case, the interests of the owner of the land, on the one hand, and the interest of the State in securing the land, on the other, may be more easily measured than in most condemnation cases. The court, after considering such factors as the amount to be saved, the proximity of the commercial market, and the consequent additional inconvenience or delay,[16] could easily determine whether the benefit to the State that would

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EMINENT DOMAIN § 4.11 1 at 552. Some courts, however, have indicated that a capricious taking may be set aside, evidently on the basis that the condemnor would be acting in excess of his delegated authority. See cases cited note 14 *infra.*

10 *E.g.,* Rindge Co. v. Los Angeles, *infra* note 14 at 709; Sears v. City of Akron, 246 U.S. 242, 251 (1918); Shoemaker v. United States, 147 U.S. 282, 298 (1893). Thus, in the instant case, the condemnor could decide whether to condemn the land in fee simple or take merely a *profit a prendre.* Other cases in which the government condemned in fee simple land which was to be used as a source of construction materials are: Harwell v. United States, 316 F.2d 791 (10th Cir. 1963); Cameron Dev. Co. v. United States, 145 F.2d 209 (5th Cir. 1944); United States v. Rayno, 136 F.2d 376 (1st Cir. 1943), *cert. denied,* 320 U.S. 776 (1943).

11 Joslin Mfg. Co. v. City of Providence, 262 U.S. 668, 678 (1923); Boom Co. v. Patterson, 98 U.S. 403, 406 (1878); United States v. Threlkeld, 72 F.2d 464, 465 (10th Cir. 1934), *cert. denied,* 293 U.S. 620 (1934).

12 Simmonds v. United States, 199 F.2d 305, 307 (9th Cir. 1952).

13 United States v. Carmack, 329 U.S. 230, 247 (1946).

14 *E.g.,* United States v. Certain Real Estate, 217 F.2d 920, 927 (6th Cir. 1954); Simmonds v. United States, 199 F.2d 305, 307 (9th Cir. 1952); United States v. Meyer, 113 F.2d 387 (7th Cir. 1940), *cert. denied,* 311 U.S. 706 (1940); Colorado Cent. Power Co. v. City of Englewood, 89 F.2d 233, 234 (10th Cir. 1937). A few federal courts have indicated that they doubt that even this exception to the condemnor's conclusive authority exists: *e.g.,* United States v. Mischke, 285 F.2d 628 (8th Cir. 1961); United States v. New York, 160 F.2d 479 (2d Cir. 1947), *cert. denied,* 331 U.S. 832 (1947). The Supreme Court avoided answering the question whether a court may set aside a capricious or bad faith decision of the condemnor in United States v. Carmack, *supra* note 13.

15 See Helstad, *Recent Trends in Highway Condemnation Law,* 1964 WASH. U.L.Q. 58, 59.

16 In the instant case, these factors were not discussed by the court or by the parties in their briefs. Therefore, it is difficult to determine whether the decision of the condemning authority was at all arbitrary or so capricious as to allow the court to set it aside.

be achieved by the taking justifies the harm that the landowner would endure by being deprived of his property.

This is not to say that a condemnation should be set aside in every case where a main motivation for the taking is economic. Indeed, it appears that economic considerations underlie many condemnation actions. The instances where the Government could have relied on private enterprise to meet its requirements and instead have resorted to condemnation are legion. The Supreme Court touched upon the question of the validity of a taking for the purpose of minimizing the government's expenses in *United States ex rel. T.V.A. v. Welch.*[17] The government's T.V.A. project had flooded a portion of the highway which provided the only reasonable means of access to the respondent's home. Rather than construct a new road at an expense which would have exceeded its value to the public, the government elected to condemn the respondent's property. In holding that the government's motive of desiring to prevent a waste of its funds did not invalidate the taking, the opinion stated: "The cost of public projects is a relevant element in all of them, and the Government, just as anyone else, is not required to proceed oblivious to elements of cost."[18]

But even though the government need not proceed oblivious to the cost factors, a decision to appropriate a citizen's land solely for the economic savings that would thereby be realized might be the result of the condemnor's failure to balance the competing public interests. Undoubtedly, the State may take private property for the benefit of the public, but the condemnor must realize that the general welfare may be promoted by the retention of private ownership as well as by the minimization of government expenses. The institution of private property constitutes an important part of the freedom we enjoy in our society and the security and independence it provides have been main factors in its development and progress.[19] While the government may restrain private property in the public interest, there is also a public interest in retaining private property which will in many instances outweigh the public interest served by an economic saving. Therefore, the government should not capriciously resort to its power of eminent domain when other equally suitable, though slightly more expensive, alternatives are available. To say otherwise is to repudiate our traditional concepts of private property and the high value we profess to place upon it.

While, in the past, the role of the judiciary in reviewing the condemnor's decision has been an extremely narrow one,[20] the courts should assume the responsibility of setting aside a decision made by one who failed to consider the available alternatives and the interest of the landowner. Otherwise, the injustice will go unrectified. It is not enough to say that the owner will receive a fair compensation for his loss; money damages are frequently not an adequate remedy to the owner for the loss of his land. The question whether a court should set aside a taking which was for the purpose of realizing an economic savings is not an easy one, nor does it lend itself to a categorical answer. In each case the desirability of the construction of the project at minimum cost must be weighed against the interests of the private landowner and the interest of the State in preserving a private ownership. One may predict, however, that when the sole interest to be promoted by the condemnation is a slight monetary saving to the State, the balance will often shift in favor of preserving the individual's interest in his property.

Michael J. Schimberg

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17 United States *ex rel* T.V.A. v. Welch, 327 U.S. 546 (1946); *C.f.* Old Dominion Land Co. v. United States, 269 U.S. 55 (1925).

18 United States *ex rel.* T.V.A. v. Welch, *supra* note 17 at 554.

19 See DIETZE, IN DEFENSE OF PROPERTY 1963.

20 Berman v. Parker, 348 U.S. 26 (1954); United States *ex rel.* T.V.A. v. Welch, 327 U.S. 546 (1946).