Notre Dame Law Review

Volume 37 | Issue 3 Article 11

3-1-1962

Recent Decisions

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RECENT DECISIONS

ESTATE TAX — TENANTS BY THE ENTIRETY AND JOINT TENANTS — INTER VIVOS TRANSFER WITH RETAINED LIFE ESTATE. — Decedent and his wife owned five separate parcels of real estate as tenants by the entireties, and another parcel with a daughter as joint tenants. The entire consideration for these properties was furnished by the decedent. In 1943 and in 1946, the decedent and his wife conveyed the parcels held by them as tenants by the entireties, to their children, reserving in themselves life estates with remainders to the survivors of them. They received no consideration in return for these conveyances. In 1945, the parcel of real estate owned by them with their daughter as joint tenants, was similarly conveyed to another child; the daughter did not join in this conveyance. In determining how much of the value of these properties should be included in decedent's gross estate for estate tax purposes, the District Director of Internal Revenue included the full value of all the properties, less the value of the life estate of the widow in one-half thereof. In an action to recover estate taxes alleged to have been erroneously assessed against and collected from the estate of plaintiff's decedent, *held*, that only one-half of the value of the entirety properties, transferred by the decedent and his wife, should be included in decedent's gross estate; only one-third of the value of the joint property, transferred by the decedent and his wife, should be included in decedent's gross estate. *Glaser v. United States*, 196 F. Supp. 47 (N.D. Ind. 1961).

The Government contended that two provisions[1] of the Internal Revenue Code should be read together, one provision requiring inclusion in the gross estate, for tax purposes, of property jointly held by the decedent and others and the other provision requiring the inclusion of property transferred for no consideration and with the retention of a life estate. The court concluded that only the latter provision is applicable, and confined itself to property law. Since the conveyances by the decedent and his wife destroyed the tenancies, decedent was left with only an interest in one-half of the property. Since he retained a life estate in that one-half, that interest is includable in his estate for the purposes of estate taxation.

In this comment, consideration will be given first to the requirement that property held by the decedent as a joint tenant or tenant by the entirety be included in his estate for taxation purposes. Taxes of this sort, *i.e.*, death duties or excises imposed upon the occasion of change in legal relationships to property brought about by death are ancient in origin.[2] Such taxes were known to the Roman law and the ancient law of the continent of Europe.[3] Having survived the test of constitutionality,[4] they are now firmly imbedded in the United States Internal Revenue Code.[5] Disregarding for the present, the transfer of the properties by decedent and his wife, the application to decedent's estate of the reasoning which

1 INT. REV. CODE of 1954, § 2040; INT. REV. CODE of 1954, § 2036.

2 Knowlton v. Moore, 178 U.S. 41,47 (1899).

3 SMITH, WEALTH OF NATIONS 311 (London ed. 1811).

4 O'Shaughnessy v. Commissioner of Internal Revenue, 60 F.2d 235 (6th Cir. 1932); Robinson v. Commissioner of Internal Revenue, 63 F.2d 653 (6th Cir. 1933). Sections of the Internal Revenue Code requiring inclusion in gross estate for tax purposes, of value of property held by tenants by the entirety are not unconstitutional.

5 INT. REV. CODE of 1954, § 2040.

> The value of the gross estate shall include the value of all property (except real property situated outside of the United States) to the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth.

lies behind the justification for these taxes would result in the inclusion, for purposes of taxation, of the entire value of the properties in question.[6] An argument to the contrary was advanced by the court which decided the case of *Bowers v. Commissioner of Internal Revenue.*[7] That court held that the tax should be based upon, and limited to, the increase in the value of the estate of the surviving tenant through the death of the other. It stated:

> Under no theory can it be said that the husband's interest in the property at the time of his death was the full value of the real estate. Equally clear is the conclusion that the wife, who already owned part of the fee, could not have the value of her interest increased by the full value of the real estate by becoming the owner of the balance of the fee upon the death of her husband.[8]

Upon appeal to the United States Supreme Court, however, the decision was reversed.[9] The reasons behind the reversal are found in the earlier case of *Tyler v. United States*[10] wherein the court said:

> Before the death of the husband the wife had the right to possess and use the whole property, but so, also, had her husband; she could not dispose of the property except with her husband's concurrence; her rights were hedged about at all points by the equal rights of her husband. At his death, however, and because of it, she for the first time, became entitled to exclusive possession, use, and enjoyment. . . . These circumstances, together with the fact, the existence of which the statute requires, that no part of the property originally had belonged to the wife, are sufficient, in our opinion, to make valid the inclusion of the property in the gross estate which forms the primary base for the measurement of the tax.

It would seem that the principal factor permitting Congress to so tax an estate is that the death of one tenant by the entirety, since it frees the property from his rights in it, is the generating source of important and definite accessions to the property rights of the other.[11] It is the indispensable and intended event which brings the larger estate into being for the grantee and effects its transmission from the dead to the living.[12] There is, at death, a distinct shifting of economic interest, a decided change for the survivor's benefit; and this termination of a joint tenancy or tenancy by the entireties marked by a change in the nature of ownership of property was designated by Congress as an appropriate occasion for the imposition of a tax[13]; and, while state law creates legal interests and rights, it is the federal law which designates which of these interests and rights shall be taxed.[14]

It is important to note that in determining the value of an estate for purposes of taxation, no distinction is made between property held by joint tenants and that held by tenants by the entireties. As expressed by one court:

> There is sufficient substantial similarity between joint tenancies and tenancies by the entirety to have moved Congress to treat them alike for purposes of taxation. Practical necessities — and taxation is "eminently practical" — may well have led Congress to group different types of joint ownership together for taxation rather than to afford different treatment to each varying shade of such ownership.[15]

Attention is now directed to the second requirement that property transferred for no consideration and with the retention of a life estate be included in the estate of the deceased grantor for purposes of taxation.

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6 Lindsey v. United States, 167 F. Supp. 136 (D. Md. 1958).
7 90 F.2d 790 (7th Cir. 1937); reversed, 303 U.S. 618 (1939).
8 Bowers v. Commissioner of Internal Revenue, *supra* note 7 at 791.
9 Bowers v. Commissioner of Internal Revenue, 303 U.S. 618 (1939).
10 281 U.S. 497,503,504 (1930).
11 Third Nat. Bank and Trust Co. of Springfield v. White, 45 F.2d 911 (D. Mass. 1930).
12 Klein v. United States, 283 U.S. 231 (1931).
13 United States v. Jacobs, 306 U.S. 363 (1938); Fairclaw v. Forrest, 130 F.2d 829 (D.C. Cir. 1942).
14 Helvering v. Stuart, 317 U.S. 154,162 (1942); Morgan v. Commissioner, 309 U.S. 78,80-81 (1940).
15 United States v. Jacobs, 306 U.S. 363,370 (1938).

This provision appeared in the Revenue Act of 1926,[16] which required the inclusion in one's estate, for estate tax purposes, of property of which he had made a transfer intended to take effect in possession or enjoyment at or after his death. The taxing authorities interpreted this phrase to include a transfer wherein the transferor reserved to himself the benefits of the property; however, the Supreme Court of the United States reversed this interpretation in the case of *May v. Heiner*[17] and held that property which the decedent had conveyed irrevocably, but in which he had retained a life interest was not taxable to his estate. Subsequently, on March 2, 1931, three *per curiam* decisions to the same effect as *May v. Heiner* were issued by the same court.[18] On the next day Congress passed a joint resolution[19] which expressly stated that property transferred, but with a life estate reserved to the donor, was taxable to his estate.

The law, then, was based on the decision of *May v. Heiner* as to pre-1931 transactions, and on the 1931 joint resolution as to post-1931 transactions until the Supreme Court's decision in 1949 in *Commissioner of Internal Revenue v. Estate of Church*,[20] which overruled *May v. Heiner*. The *Church* decision has been interpreted to mean that even in the simple case of a life estate and an irrevocable remainder, the law was that the property was subject to the estate tax.[21]

Speaking of the Joint Resolution of March 3, 1931, and of the *Church* decision, the court in the case of *McNichol's Estate v. Commissioner of Internal Revenue*[22] stated:

> This resolution redefined the phrase "intended to take effect in possession and enjoyment at or after his death," so that it would include a transfer under which the transferor retained for his life . . . the possession or enjoyment of, or the income from, the transferred property. . . . By this resolution Congress rejected the view of *May v. Heiner* and its progeny that estate tax includability depended upon whether or not the title had technically passed. . . .
>
> The *Church* opinion emphasizes that the criterion for determining whether property transferred *inter vivos* is subject to a death tax is the effect of the transfer, and states that whenever in fact the ultimate possession or enjoyment of property is held in suspense until the death of the transferor, the property is swept into the decedent's gross estate by the statute. Substance and not form is made the touchstone of taxability.

The intent of Congress as shown by the Joint Resolution and interpreted in the *Church* case is reflected in the present wording of Section 2036 of the Internal Revenue Code of 1954.[23] And, while it is true that an ingenius mind may devise many means of avoiding an inheritance tax, still the one commonly used was a

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16 Revenue Act of 1926, § 302(c), 44 Stat. 70.

17 281 U.S. 238 (1930).

18 Burnet v. Northern Trust Co., 283 U.S. 782 (1931); Morsman v. Burnet, 283 U.S. 783 (1931); McCormick v. Burnet, 283 U.S. 784 (1931).

19 *Chap. 454, 71 Cong., 3rd Sess., 46 Stat. 1516 (1931);*

> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the first sentence of subdivision (c) of section 302 of the Revenue Act of 1926 is amended to read as follows:
>
> (c) to the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

20 33 U.S. 632, (1949).

21 Smith v. United States, 139 F. Supp. 305 (Ct. Cl. 1956).

22 265 F.2d 667 (3d Cir. 1959).

23 INT. REV. CODE of 1954, § 2036.

transfer with reservation of a life estate.[24] Thus, viewing the actions of Congress, it can safely be surmised that this is the avoidance meant to be eliminated. And it would seem that the amount of interest retained in the transferred property does not have to be large in order for it to be included in the estate of the transferor. It is enough if he retains some contingent interest in the property until his death, delaying until then the ripening of full dominion over the property by the beneficiaries.[25]

It seems clear that Congress intended that the estate tax, *i.e.*, an excise tax upon the privilege of transmitting property by reason of death,[26] should not be avoided by a transfer of property for no consideration (and, probably in the vast majority of cases, to the person who would have received the property upon the death of the transferor) with a retention of the enjoyment of the property. And Congress has also provided that the privilege of passing to the survivor of a joint estate, an unimpeded title to the property, should also be taxed to the estate of the decedent. However, in its attempt to tax the properties involved in such transactions, it appears that Congress has failed to forsee and provide for the situation existing in the present case, even though, as conceded by the court, the type of transaction involved here could easily be used by a taxpayer in an attempt to avoid estate taxes.

Be that as it may, it is not hard to find justification for the decision. If it be true that a conveyance by tenants by the entireties and joint tenants, with a reservation of a life estate, destroys the tenancies, then it seems logical to conclude that no joint interests exist to which Section 2040 of the Internal Revenue Code of 1954 can be applied. Although this seems to be a reasonable solution to the problem at hand, there are still problems which could arise in the future as a result of this decision.

Since, under this decision, the estate is taxed on one-half and one-third the value of the properties, it seems safe to assume that this interest is considered as descending upon either the wife or the grantees. If it is considered as descending upon the wife, then it would seem that this would merge with her existing interest. She would then hold the entire interest, *i.e.*, the *only* life estate in the properties. Her death would seem to be the proper occasion for the application of Section 2036 of the Internal Revenue Code and the entire value of the properties would presumably be taxable to her estate. Query; would this not result in double taxation of that interest in the property originally included in the estate of the deceased husband?

Further, since an estate tax is a tax upon the privilege of passing property at death, it would seem, under the present decision, that the decedent is deemed to have left one-half and one-third of the value of the properties in question. However, since the wife receives only that which she already had, *i.e.*, a life estate, and since the grantees still hold the property subject to her life estate, it is submitted that no one has in fact been materially benefited. The question then arises whether any part of the value of these properties should be taxable to the estate of the decedent.

Another problem which will most certainly arise is that of the proper allowance for the marital deduction which is the deduction allowed from the gross estate of a married person for property passing to his or her spouse.[27] Since the Internal Revenue Code of 1954 in Section 2056(b) has explicit provisions denying the marital deduction for property passed to the wife which will not be part of her

24 In the Matter of Keeney, 194 N.Y. 281, 87 N.E. 428 (1909); *aff'd*, 222 U.S. 525 (1912).
25 Fidelity-Philadelphia Trust Co. v. Rothensies, 324 U.S. 108 (1944).
26 BLACK, LAW DICTIONARY 647 (4th ed. 1951).
27 2 BEVERIDGE, FEDERAL ESTATE TAXATION § 14.01 (1956).

taxable estate at her death, the resolution of the questions posed above is very important.

Mindful of the goals of Congress in this area, it is submitted that it could be found, since the entire original consideration was furnished by the decedent, that the conveyance by him and his wife did not so divest him of the enjoyment, either present or future, of the entire property so as to relieve his estate of any part of the entire value of the properties, but left him with a life estate in the other half, which might be termed a "secondary" life estate. In spite of the conveyance, there still existed the possibility that the wife would precede the decedent in death. If this were to happen, the decedent would have had the only life estate in the property; would have received no consideration for the transfer of the property; and would presumably have his estate subjected to the provisions of Section 2036 of the Internal Revenue Code.[28] It seems that, since it is this retention of enjoyment or attachment of a "string" to the benefits of transferred property which Congress has intended should render that property subject to estate taxation, it would not be unreasonable to conclude that the entire value of the "transferred" property in the instant case should be included in the estate of the decedent.

It is submitted, further, that it might be found that the conveyance of property by tenants by the entireties or joint tenants, reserving in *themselves*[29] life estates, did not result in the destruction of the tenancy but merely a continuation of it in a different form, *i.e.*, life estate. It could therefore be concluded that, since their transfer began and ended in harmony, they have acted as one, and are subject to the provisions of Section 2036 of the Internal Revenue Code just as an individual is so subjected.

The decision is a reasonable one. However, courts have held, in cases involving individuals, that a transaction which might be a legally valid transfer or gift for most purposes, can, under certain circumstances, be treated, for the purposes of estate taxation, as though it had never been transferred at all. Since this has been done with the cases which have dealt with individuals, it would seem that the same construction could be placed upon a transfer by persons owning property as joint tenants or tenants by the entireties.

Robert E. Veverka

INSURANCE — TOTAL DISABILITY BENEFITS — TOTAL DISABILITY IS NECESSARILY RELATIVE, AND MUST BE DETERMINED ON THE FACTS OF EACH CASE — Plaintiff brought suit to recover benefits provided for in an insurance policy[1] issued to him by the defendant. He testified that he had been a carpenter or a construc-

28 It is important, in order to avoid this problem of double taxation, that Section 2036 be interpreted as not applicable to a situation wherein the consideration was furnished in its entirety by the survivor of the joint interest.

29 In the instant case, the decedent and his wife reserved the life estates in *themselves* and in the survivor of *them*. This would seem to add support to the theory that the transfer was considered by them to be done in unison; it would also seem to render more feasible the submission that the tenancy was not destroyed but merely continued in a different form.

1 Disability Before Age 60: Waiver of Premiums-Payment of Insurance in Monthly Installments — If the Insured shall become totally disabled, either physically or mentally, from any cause whatsoever, *to such an extent that he (or she) is rendered wholly, continuously permanently unable to engage in any occupation or perform any work for any kind of compensation or financial value during the remainder of his (or her) lifetime,* and if such disability shall occur at any time after the payment of the first premium on this Policy, while this Policy is in full force and effect and the insured is less than sixty years of age, and before any nonforfeiture provision shall become operative, the Company, upon receipt of due proof of such disability, will grant the following benefits.

Prudential Life Insurance Co. of America v. Tate, 344 S.W.2d 254 (Tex. Civ. App. 1961). (Emphasis added.)

tion superintendent all of his active working days and that he was no longer able to do either kind of work. He became sixty years of age on August 27, 1955, but was disabled prior to that time. He did not become aware of the total disability provision until May 1957, at which time he filed a claim for his loss.

He testified that he could perform the duties of a timekeeper but that he did not know how to type. He could neither walk nor stand for a very long period of time and he did not believe that his physical condition would permit him to hold a timekeeper's job. He also thought he might be able to perform the duties of a construction material salesman, but he had never had any experience as a salesman, and knew of no jobs in such occupation. The trial court overruled defendant's motion for an instructed verdict, and also refused to submit to the jury the question of whether the plaintiff was able to perform these occupations. The jury found for the plaintiff, and judgment was entered in the amount of $3276.64.

The defendant appealed to the Texas Court of Civil Appeals which affirmed. The defendant then appealed to the Supreme Court of Texas on the ground, *inter alia,* that it was error for the trial court to overrule petitioner's motion for an instructed verdict because respondent admitted on cross-examination that he was able to perform the duties of (1) a timekeeper and (2) an effective salesman of construction material. *Held:* affirmed.[2] "A total disability clause in an insurance policy should be reasonably construed. Total disability is necessarily a relative matter, and must depend chiefly on the peculiar circumstances of each case and on the nature of the occupation or employment and the capabilities of the person injured. We do not believe it was within the contemplation of the parties that the insured should educate himself, or go through apprenticeship for another occupation, and, perchance, be able to do some occupation, and thereby relieve the Insurance Company from the obligations of its contract." *Prudential Life Insurance Co. v. Tate,* 347 S.W.2d 556 (Tex. 1961)

A literal interpretation of the disability provision in this case[3] would seem to require that the plaintiff must be unable to transact any kind of business whatsoever, in order to recover under the terms of the policy. However, the Texas court stated that a total disability clause should be reasonably construed.[4] The court further cited *Cooley's Briefs on Insurance:*[5]

> Total disability is necessarily a relative matter, and must depend chiefly on the peculiar circumstances of each case and on the nature of the occupation or employment and the capabilities of the person injured. It does not mean absolute physical disability of the insured to transact any kind of business pertaining to his occupation, but exists if he is unable to do any substantial portion of the work connected therewith.

The decision in the *Tate* case[6] is in accord with the majority[7] of jurisdictions which follow a so-called liberal rule of construction, when interpreting disability

2 The Supreme Court of Texas reversed, however, on the ground that an improper standard was used to calculate damages.

3 Prudential Life Insurance Co. v. Tate, *supra* note 1.

4 It is true that, by applying the strict letter of the contract, the evidence does not disclose a total disability as would prevent him from performing any and all duties incident to the practice of his profession; but I think the clause should be reasonably construed, and, so construing the same, he has become totally disabled. Hefner v. Fidelity & Casualty Co. of New York, 110 Tex. 606, 160 S.W. 330, 334, 222 S.W. 966 (1913).

5 6 COOLEY'S BRIEFS ON INSURANCE 5539 (2nd ed. 1928).

6 Prudential Life Insurance Co. v. Tate, *supra* note 1.

7 Nearly all the decisions agree, either expressly or by necessary implication, that a clause in an accident policy or in a life policy providing for payment of indemnity in case the insured is totally or wholly disabled from engaging in any occupation or employment for wage or profit will not be construed, as a literal construction would require, as meaning a state of absolute inability to carry on any vocation whatever, but will be given a broader interpretation in favor of the insured in accordance with the so-called liberal rule of construction. This rule is so general and well settled that it is needless to cite authorities for it. *See* Annot., 149 A.L.R. 7-189 (1944).

provisions in similar situations. These courts broadly interpret such provisions in favor of the insured.[8]

> The stipulation that, before liability attaches, the insured shall be disabled "from pursuing any occupation whatsoever for remuneration or profit" is an undue restriction on the contract and evidently not within the contemplation of the parties.[9]

In *Equitable Life Assurance Society of the United States v. Neill,*[10] the plaintiff was a dentist. He had been disabled in 1932 and the defendant paid disability benefits from that time until 1951. In 1951, the defendant denied liability under the policy on the ground that the plaintiff was no longer disabled. The plaintiff had invested in a business which sold laundry equipment. He had no specific duties to perform and received no remuneration until he sold his stock in the company. The court affirmed a verdict for the plaintiff and stated:

> The oft-repeated Florida statement that under a policy definition that total and permanent disability exists when the insured is prevented from doing any work, does not mean that [the] insured must be bedridden or reduced to [a] condition of complete helplessness.[11]

In *Huffman v. Equitable Life Assurance Society,*[12] an employee of a copper mining company contracted silicosis. He was denied recovery under a total disability provision similar to that involved in the *Tate* case.[13] There was conflicting expert testimony as to whether the insured was able to perform manual labor, and whether he was totally disabled. There was also evidence that the insured had been working as an automobile salesman since his alleged total disability. The trial court entered judgment for the insured and the court of appeals affirmed. The Supreme Court of Tennessee, when it reversed and dismissed the case, set out two rules as conditions of recovery under a total disability provision:

> First, as a condition of recovery, it must appear that the insured is incapacitated to earn, not only in his chosen or previously formed occupation, but in any other to which he may be reasonaly fitted.
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> Second, to defeat recovery on the ground of earning capacity, it must appear that the remaining capacity to earn, despite disability, is a capacity to earn substantially. No scintilla rule applies. The earning capacity remaining must bear some reasonable relation to the natural or previous capacity to earn, against loss of which it is the purpose of the policy contract to insure.

The conditions of recovery as defined in the *Huffman* case, provide at least some reasonable criteria for determining when a person is totally disabled. But even these standards are not adequate, because they are not sufficiently comprehensive to be applied to the multitude of different disability provisions in existence today. Appleman states that:

> In general, total disability is not considered to exist if the insured can follow any remunerative occupation, whether his present vocation or another, especially where a general type of clause is used as that just indicated "so as to be prevented thereby from engaging in any occupation and performing any work for compensation or profit." This rule is not applied, however, without qualification. In construing what constitutes total disability, the courts have held that the insured can only be expected to follow occupations for which his age, health, training, and experience have fitted him and for which he is reasonably qualified.[14]

The decision in the instant case does not go far enough toward eliminating uncertainty in the interpretation of such provisions. The court did not indicate what a claimant must prove in order to show that he is totally disabled. The court

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8 *Ibid.*
9 Jefferson Standard Life Insurance Co. v. Cuffman, 127 S.W.2d 567, 571 (Tex. Civ. App. 1939).
10 243 F.2d 193 (5th Cir. 1957).
11 *Ibid.*
12 241 S.W.2d 536 (Tenn. 1951).
13 *Compare* Prudential Life Insurance Co. of America v. Tate, *supra* note 1, *with* Huffman v Equitable Life Assurance Society, 241 S.W.2d 536, 537 (Tenn. 1951).
14 1 APPLEMAN, INSURANCE LAW AND PRACTICE § 681 (1941).

did not do so because the provision which it considered, was drafted in such a manner as to preclude a literal interpretation, and was therefore "reasonably construed."[15]

If the contract had been clear and unambiguous it would not have been necessary to construe the provision so as to favor either party. The provision could have been literally construed, and the case would have been decided solely on the basis of its facts considered in reference to the explicit terms of the policy. It has been stated that:

> Where there is no ambiguity in the terms of the contract or the tests laid down by it, neither party will be favored in its construction. Thus, the courts will not construe two entirely dissimilar expressions to have the same meaning. If the contract refers to "engaging in any occupation or employment for wage or profit," it necessarily does not mean the same as "performing any and every kind of duty pertaining to the insured's employment." One is general, the other limited — the latter pertaining only to the occupation which the insured is following at the time of the injury. Thus it would be error for the court to permit the jury to consider only the question as to whether the insured, after injury, could follow his present vocation under the general type of clause.[16]

The disability benefit has been referred to as "the actuary's mistake."[17] It would be equally correct to say that the disability benefit provision in its present form is also the draftman's mistake, because it appears that it is the sort of clause the courts simply will not enforce.

> To define the insured event is often the most difficult and important task of the draftsman of insurance contracts. If it is defined too narrowly, the contract will fail to give the insured the protection that he desires. Arbitrary limitations are likely to arouse the hostility of courts, who may construe them to mean something quite different from what the insurer had in mind. On the other hand, if the insured event is broadly or loosely defined, the court, construing it most favorably to the insured, in accord with the well-established rule, will make it include cases that the insurer did not intend to include when it fixed the premium for the policy.[18]

The difficulties of drafting a total disability provision which would be capable of being literally interpreted, without prejudicing the insuror or the insured, does not appear to be an impossibility. The Tennessee Court[19] has established a criterion for determining when a person is totally disabled. The court in the *Tate* case[20] has established to some extent a criteria from which a determination can be made as to whether a person is totally disabled.

It is submitted that a just result was reached in the *Tate* case, and is probably reached in the great majority of cases involving a total disability clause. However, the failure to provide the criteria discussed above does leave open the possibility that these provisions will be variously construed. In view of this fact insurance companies would be well advised to attempt to draft provisions which would allow such cases to be determined solely on the basis of their facts, at the trial level, and with a minimum of uncertainty as to what is meant by the term *"totally disabled."*

John W. Dell

REAL PROPERTY — LITTORAL LAND OWNERS — LAND CREATED BY COMMONWEALTH BY PUMPING SAND FROM HARBOR AND DEPOSITING IT IN FRONT OF LITTORAL OWNER'S SEAWALL IS PROPERTY OF LITTORAL OWNER. — The three plaintiffs own contiguous lots facing and bounded by Wild Harbor on the West. A seawall separates land from sea so that at high tide the water merely rises in

15 Hefner v. Fidelity & Casualty of New York *supra* note 4.
16 1 APPLEMAN, INSURANCE LAW AND PRACTICE § 681 (1941).
17 LIFE INSURANCE TRENDS & PROBLEMS (1943).
18 PATTERSON, ESSENTIALS OF INSURANCE LAW 240 (1957).
19 241 S.W.2d 536. It may be that these criteria, if followed by the draftsman, will produce the strictest clause enforceable.
20 Prudential Life Insurance Co. v. Tate, *supra* note 1.

height against the wall. In the Spring of 1950 the Massachusetts Department of Public Works undertook a dredging operation and deposited sand against the seawall, creating a beach on the harbor side of the seawall. Jetties were constructed to protect the newly formed beach. Defendant association's members began using this area for usual beach purposes and installed a loud speaker system, primarily to assist the lifeguards on the shore. Plaintiffs sought injunctive relief against the use of the public address system, and an injunction against use of the beach, as well as a declaration of their unencumbered rights to the newly created beach area. The lower court dismissed the bill on grounds that the Commonwealth's actions dedicated the area to a public use. On appeal to the Supreme Judicial Court, *held:* reversed. *Michaelson v. Silver Beach Improvement Ass'n.*, 178 N.E.2d 273 (1961).

The court stated the principal question to be "whether a beach created as was this one belongs to the littoral owners or to the Commonwealth."[1] Finding for the littoral owners would necessitate holding that a direct and unnatural creation of land in front of their property vests title in the owners, while deciding for the public requires a decision that the beach was created appurtenant to the Commonwealth's reserved power to control navigation. After analyzing the cases relied upon in the lower court, the decision was reversed on a finding that the creation of the new beach was more like natural accretion than part of a navigation project.

The court admitted that the problem posed by this case is unique in Massachusetts, and attempted to couch its findings in terms of existing Massachusetts water law. The United States Supreme Court has held that state law governs its decision in water cases.[2] At common law the title to the bed of the sea below high water mark was in the Crown.[3] However, in Massachusetts, the Colonial Ordinance of 1641-47 settled the common law as extending private ownership along tide waters to "the low water mark where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further."[4] The public rights to navigation, fishing and fowling, however, are reserved in the state.[5] The result is that Massachusetts owns all the land below this line, and enjoys a reserved right above this line, limited to the mentioned public uses. Generally speaking, in the following discussion it makes little difference whether the Colonial Ordinance's low water mark is the property line, whether the high water mark is the line, or even whether any intermediate line has been statutized. The various states recognize one of these lines. The theory herein is equally applicable to all.

Taking first the public dedication theory, the crucial question posed is whether the formation was a natural, if not necessary, incident to the harbor dredging. This question was answered affirmatively in *Home for Aged Women v. Commonwealth*,[6] by a showing that the construction of the dam and the filling of a strip of land outside the seawall along the Charles River were treated by the legislature as parts of a single project for the public good. The Massachusetts court used the words "natural, if not necessary incident of the change of the water level"[7] when describing the relationship between navigation and the built up area. In the instant case the department of public works was not shown to have explicitly required the creation of beaches and the construction of jetties to be a necessary part of the harbor deepening project. If the beaches were declared necessary to navigation, the littoral owners would have no title in them under the then existing

1 Michaelson v. Silver Beach Improvement Association, Inc., 178 N.E.2d 273, 275 (Mass. 1961).
2 Shively v. Bowlby, 152 U.S. 1 (1893).
3 Barker v. Bates, 13 Pick. (Mass.) 255 (1832).
4 Butler v. Attorney General, 195 Mass. 79, 80 N.E. 688 (1907).
5 Home for Aged Women v. Commonwealth, 202 Mass. 422, 89 N.E. 124 (1909).
6 *Ibid.*
7 *Id.* at 436, 89 N.E. 124, 129.

Massachusetts law as expressed in *Home for Aged Women.*[8] Rather, there is silence on the matter. It thus remained necessary for the court to determine whether the beaches are so closely related to the public right of navigation as to be a part of it.

The lower court found as a matter of fact that the formation of the beaches was so related, and resulted in a dedication of the new land to the public use. When the state embarks on a dredging project it is natural and necessary to deposit the removed sand somewhere. Any dredging can also be said to improve navigation to some degree. Logically then, the deposit of sand incident to dredging is natural and necessary. The real problem is whether the depositing of sand along the plaintiffs' shoreline was a natural and necessary incident of the dredging. In *Home for Aged Women,* the fill outside the seawall was specifically intended as part of the comprehensive project. The fill was necessary to raise the water level for navigation, and landscaping the built up area for a park dedicated it to the public use. In the instant case this intent factor is completely absent. The disposal of the sand along adjacent shores seems to have been a matter of convenience rather than an intentional building up of the beach for some related navigational purpose. It is not apparent that the beach provided any needed access to the water for navigational purposes, nor is it indicated that the extended shoreline protects the navigability of the harbor. Thus, it was relatively easy to justify reversing the lower court's finding of fact. Implicit in this finding is the court's deduction that the jetty project was separate and distinct from the navigational project. The very fact of the construction might be some indication of legislative intent, but there is no showing that this improvement had a direct and continuing connection with navigation. The littoral owner's rights can only be defeated by the state for a public use under one of its reserved powers.[9] Legislative intent to make the beach a necessary part of the navigation project is missing, as are facts upon which to judicially construct intent. The instant court reaches this conclusion when it inquires whether the navigational dredging project would be substantially impaired without the creation of the beaches and construction of the jetties. *Home for Aged Women* would produce an affirmative reply. Speaking of Silver Beach though, the court concluded that under the undisputed facts it is clear that the creation of the beach was by no means necessary for the enjoyment of navigation in the deeper channel.[10]

One possible argument seems to have been overlooked. A New York case has held that submerged lands have the same general incidents, as property, as other real property.[11] There the question concerned a trespass. Here though, it could be recognized that the removal of soil from one part of land to another portion of the same owner's land is a lawful use of real property, so long as a nuisance is not created. The main element of a nuisance is to so use your land as to not hinder the free use of a neighbor's property.[12] The formation of the beach does not per se create a nuisance so long as the basic rights of the littoral owner are preserved. The right of access has been said to be the fundamental riparian right on which all others depend.[13] This right can be protected by an easement without granting title to the land. The right of access is one only for navigation or other lawful purposes, and is not necessarily an exclusive right of the littoral owner. The result of such an argument would be that defendants and the general public would be entitled to the reasonable use of the beach. Plaintiffs would be considered part of the general public. If the lands were considered

8 *Ibid.*
9 Adams v. Frothingham, 3 Mass. 352 (1807).
10 Michaelson v. Silver Beach Improvement Association, Inc., *supra* note 1 at 277.
11 White v. Knickerbocker Ice Co., 254 N.Y. 152, 172 N.E. 452 (1930).
12 PROSSER ON TORTS 405 (2nd ed. 1955).
13 State v. Knowles-Lombard Co., 122 Conn. 263, 188 A. 275 (1936).

to be a reclamation by the state, the case of *Richardson v. City of Boston*[14] would interject a pertinent point. There Boston's construction of a street on flats owned by the city caused debris to hamper the access of ships to plaintiff's wharves. The court held plaintiff's damage to be "damnun absque iniuria" because the use was lawful. In the *Silver Beach* case the transfer of sand from the channel to a spot nearer the shore could also be a lawful, or at least not an unlawful, use of the state land. If so, the littoral owner would have no legal complaint.

Proceeding to the accretion theory, the framework of existing Massachusetts water law indicates an insignificant difference between natural accretions and unnatural additions to the littoral owner's land. One exception is that the owner himself cannot cause an extension of his land without permission from the state.[15] In *Burke v. Commonwealth*[16] the court said that when the accretion is natural, the line of ownership follows the changing water line. The reason for such a rule is that an owner takes the property with notice that the forces of nature may work upon the land to his benefit or burden. Additionally, there is a legislative and judicial desire that all land should be owned by someone.[17] Thus, the general rule is that littoral owners have title to the appropriate sea mark, much like the owner of an orchard has title to the fruits.

Prior to the last few decades and the invention of highly efficient dredging equipment, most of the so-called artificial changes along water lines have occurred through a combination of artificial and natural causes. The common situation involves the construction of an obstruction, leading to a build-up of silt or alluvion in a position where it would not have formed absent the obstruction. Courts have labelled this an artificial accretion.

Massachusetts considers such a function an unnatural accretion, yet holds these accumulations legally vested in the littoral owner even though not due entirely to natural causes.[18] In *Burke v. Commonwealth*[19] a breakwater was constructed to protect a harbor entrance channel. Sand built up behind this structure in the course of time, exposing subsurface flats belonging to the state. The court there equated the build-up of beach land behind the breakwater to natural accretion, and declared the title to be in the littoral owner. In applying that case to the one at hand, the Massachusetts court here simply said that "we see no reason why the fact that the land created as here, by dredging should require a different result."[20]

True, there may be no difference necessitating a contrary result in this case, but for purposes of bringing the law into sharper focus it is submitted that a distinction should be made. Earlier it was mentioned that modern dredging equipment and techniques have made purely unnatural accretions more commonplace. It can reasonably be expected that the economical and convenient nature of water transportation will at least continue the present need for clearing old channels, if not require significant increases in dredging activity to create new waterways. Such activity is undertaken for the most part by the federal government and the states. Because of the rather blunt equating of natural and artificial accretions in older decisions, further problems will arise when a closer examination is accorded the professed identity between natural and purely unnatural accretions. The *Silver Beach* case deals with a purely artificial accretion. There is here really no working of natural forces to create the beach area; it is formed solely through

14 Richardson v. City of Boston, 19 S. Ct. (How.) 263, 15 L.Ed. 639 (1856).
15 Saunders v. New York Central & Hartford R.R. Co., 144 N.Y. 75, 38 N.E. 992 (1894).
16 Burke v. Commonwealth, 283 Mass. 63, 186 N.E. 277 (1933).
17 Adams v. Frothingham, *supra* note 9.
18 Burke v. Commonwealth, *supra* note 16.
19 *Ibid.*
20 Michaelson v. Silver Beach Improvement Association, Inc., *supra* note 1 at 278.

human efforts. The legal declaration that ownership is in the littoral proprietor should have been stated as being based on the principle that wholly artificial deposits of alluvion along the shoreline belong to the littoral owner, subject only to the paramount rights of the United States and the Commonwealth in aid of navigation, fishing and fowling. Furthermore, the test to be applied when determining whether a project is incident to this reserved power should be the "direct and continuing relation" query used by the court herein.[21]

The Alabama Supreme Court was faced with a problem similar to the present one and referred to the artificial build up as "streamlined accretion, or perhaps a reclamation."[22] The instant case should not be viewed as dealing with a reclamation since the same intent problem which arose in connecting the dredging and the beach projects again presents itself. There was no showing of any intent to reclaim submerged lands, merely an intent to effect a deeper harbor channel as a primary purpose. The use of the suggested classification would permit a more accurate understanding of the basic legal ideas existent in the area today.

Natural accretions would continue to vest title absolutely in the littoral owner. Even though the current law in Massachusetts and most other states treats artificial formations of the *Burke v. Commonwealth*[23] variety as natural accretions, the developing case law should recognize at least the possibility of a difference.

Even more so should a distinction be made between natural accretions and land formations resulting more or less indirectly from some lawful navigational project. Case law appears to be just developing in this area. It seems that both the *Silver Beach* and *State v. Gill*[24] cases reached a just result. However, in future cases the relationship between the lawful project and the secondary project may be more pronounced than here. In such cases the court could reach an opposite result without applying the aforementioned test and considerably cloud this newly defined area of the law, simply because the problem was not viewed in the proper perspective.

It is expected that with an increased awareness of the problem the state law-making body will be more careful to express its actions in accord with the reserved power to control navigation that it possesses. Similarly, the legislature could enact a comprehensive act pronouncing that all accretions, artificial or otherwise, not caused by the littoral or riparian owner, belong to said owner unless the state exercises its rights to use the land for lawful purposes of navigation, fishing or fowling.

James A. Wysocki

REAL PROPERTY — TENANCY BY THE ENTIRETY — JOINT TENANCY — DEED PURPORTING TO CONVEY PROPERTY BY THE ENTIRETIES TO MAN AND WOMAN NOT LEGALLY MARRIED CREATED A JOINT TENANCY. — Decedent and one Alice lived together in the District of Columbia, ostensibly as man and wife, for a period of more than thirty years. In fact, however, they had never been married, and decedent had a legal spouse, Susie, by virtue of a 1903 ceremonial marriage which had never been terminated. Decedent had visited Susie regularly and sent her support payments until the time of his death in 1957. In 1952 certain realty in the District of Columbia was deeded to decedent and Alice as *tenants by the entirety*. Decedent died intestate, and shortly thereafter a dispute arose as to the ownership of the property, Alice claiming to be the sole owner through the right of survivorship, and Susie claiming that there was no survivorship and hence that the property passed to her through intestate succession. *Held*: where a man

21 Both elements are required. Here the beaches were a direct result of the dredging, but had no continuing relation to navigation.

22 State v. Gill, 259 Ala. 177, 66 So. 2d 141 (1953).

23 *Supra* note 16.

24 State v. Gill, 259 Ala. 177, 66 So. 2d 141 (1953).

and woman are disabled from holding property as tenants by the entirety because they are not legally married, a deed conveying property to them and purporting to create a tenancy by the entirety created, instead, a joint tenancy, and not a tenancy in common. *Coleman v. Jackson,* 286 F.2d 98 (D.C. Cir. 1960).

At common law, a conveyance to two or more persons normally created one of the following types of tenancies: a tenancy in common, a joint tenancy, or a tenancy by the entirety.[1] Joint tenancy existed as early as the thirteenth century,[2] and Bracton commented that joint tenants were seized *"pur my et per tout."*[3] Littleton defined joint tenants as:

> Joyntenants are, as if a man be seized of certain lands or tenements, &c., and enfeoffeth two, three, or four, or more, to have and to hold to them for terme of their lives, or for terme of another's life, by force of which feoffment or lease they are seized, these are joyntenants.[4]

Tenancy by the entirety is, for all practical purposes, a specialized type of joint tenancy which is available to married persons.[5] It has the incident of survivorship, just as joint tenancy. The "doctrine" of survivorship means that each tenant is seized of the whole of the estate, and upon the death of one tenant the interests of the other tenants are freed from any participation by the interest of the decedent. In other words, if A and B are owners of Blackacre with the right of survivorship, and A dies, B immediately becomes the owner of Blackacre in severalty; A's heirs get nothing. This right is based upon the belief that the estate is held by a fictitious unity composed of all of the cotenants, and that this unity continues in existance as long as one or more of the tenants is still alive, provided they do nothing to sever the tenancy. The four unities — time, title, interest and possession — were a necessity in the creation of this entity.[6]

Another incident, this one peculiar to tenancy by the entirety, is the inability of either husband or wife, while both are living, to alienate any interest in the tenancy without the consent of the other party.[7] This incident is based upon the "amiable fiction" of the union of husband and wife, that the marriage constitutes but one person, and that this person or "unity" holds the property. Because of this fiction, this type of tenancy is available only to a husband and wife, and a prerequisite for a tenancy by the entirety is a valid existing marriage.[8] So important is this requirement that if property is conveyed to a married couple as tenants by the entirety, and their marriage is later terminated by a divorce, the tenancy by the entirety is dissolved and the parties hold as joint tenants.[9]

There were certain presumptions which arose at common law concerning the type of tenancy which would result from a particular conveyance. One of these presumptions was that, if no contrary intent were expressed in the instrument the intent of the parties was that the grantees hold as joint tenants.[10] If the grantees were husband and wife, the presumption was in favor of tenancy by the entirety, and this presumption was followed even in cases where there was a contrary intent expressed, the rationale being that a married couple could not take by moieties.[11]

In approximately forty-six[12] of the fifty states, including the District of

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1 DIGBY, HISTORY OF THE LAW OF REAL PROPERTY 274 (5th ed. 1897).
2 2 AMERICAN LAW OF PROPERTY § 6.1 (Casner ed. 1952).
3 BRACTON, f. 13.
4 LITTLETON'S TENURES, lib. iii. c. 3. s. 277.
5 MICH. STATE B.J. 196, 199 (1926).
6 2 AMERICAN LAW OF PROPERTY, *op. cit. supra* note 2, § 6.1.
7 FREEMAN, COTENANCY AND PARTITION § 64 (2nd ed. 1886).
8 *Id.* § 63.
9 Enyeart v. Keppler, 118 Ind. 34, 20 N.E. 539 (1888); Stelz v. Shreck, 128 N.Y. 263, 28 N.E. 510 (1891).
10 FREEMAN, *op. cit. supra* note 7, § 18.
11 *Id.* § 71.
12 The four states which have not enacted legislation on this point are Louisiana, Ohio, Nebraska and Wyoming. Louisiana, of course, never had the presumption favoring joint ten-

Columbia, the effect of the common law presumption in favor of joint tenancy has been lessened by statute.[13] This has been done either through an actual change in the presumption to one in favor of tenancy in common,[14] or by the abolition of survivorship as an incident of joint tenancy.[15] It is almost universally provided, however, that these statutes do not apply to trustees and executors of estates, presumably because of the desire for continuous management in the event of the death of one tenant.[16] Also, it is often provided in these acts that they shall not apply to a husband and wife holding as tenants by the entirety.[17] A novel statute recently enacted in this field is a Wisconsin act which provides that a surviving joint tenant or tenant by the entirety takes subject to any mortgages or liens incurred by the decedent, but the act expressly provides that these mortgages or liens shall not defeat the right of survivorship.[18]

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ancy, so no change was necessary. "Although no statute has been enacted in Ohio abolishing joint tenancy, it may be broadly stated that title to either real or personal property by technical joint tenancy is not recognized in Ohio. . . . However, if the operative words of a deed or will or other instrument clearly express the intention to create the right of survivorship, such words will not be disregarded." 14 Ohio Jur.2d 89 (1955). In Nebraska it has been held that, "Joint tenancies are created by contract, and if not so created do not exist . . . they are not favored, and if not expressly created by contract the law presumes the tenancy is in common." Sanderson v. Everson, 93 Neb. 606, 607, 141 N.W. 1025, 1026 (1913). Thus it appears that Wyoming is the only state that has not dealt with this problem either through legislation or judicial determination.

13 ALA. CODE tit. 57, § 19 (1958); ALASKA COMP. LAWS ANN. § 22-1-6 (1949); ARIZ. REV. STAT. § 14-204 (1956); ARK. STAT. ANN. § 50-411 (1947); CAL. CIV. CODE § 683 (West 1956); COLO. REV. STAT. ANN. § 118-2-1 (1953); CONN. GEN. STAT. ANN. § 47-14a (1958); DEL. CODE ANN. tit. 25 § 701 (1953); D.C. CODE ANN. § 45-816 (1951); FLA. STAT. ANN. § 689.15 (1954); GA. CODE ANN. § 85-1002 (1933); HAWAII REV. LAWS § 345-1 (1955); IDAHO CODE ANN. § 55-104, 508 (1953); ILL. ANN STAT. ch. 76 § 1 (Smith-Hurd 1934); IND. ANN STAT. § 56-111 (1951); IOWA CODE ANN. § 557.15 (1956); KAN. GEN STAT. ANN. § 58-501 (1949); KY. REV. STAT. ANN. § 381-120 (1955); ME. REV. STAT. ANN. ch. 168, § 13 (1954); MD. ANN. CODE art. 50, § 9 (1957); MASS. ANN. LAWS ch. 184, § 7 (1955); MICH. STAT. ANN. § 26.44 (1956); MINN. STAT. ANN. § 500.19(2) (1945); MISS. CODE ANN. § 834 (1942); MO. ANN STAT. § 442.450 (1949); MONT. REV. CODES ANN. § 67-308, 313 (1947); NEV. REV. STAT. § 111.065 (1957); N.H. REV. STAT. ANN. § 477:18 (1955); N.J. STAT. ANN. § 46:3-17 (1940); N.M. STAT. ANN. § 70-1-14 (1953); N.Y. REAL PROP. LAWS § 66; N.C. GEN. STAT. § 41-2 (1956); N.D. CENT. CODE § 47-02-06 (1960); OKLA. STAT. ANN. tit. 84, § 184 (1951); ORE. REV. STAT. § 93.180 (1953); PA. STAT. ANN. tit. 20, § 121 (1950); R.I. GEN. LAWS ANN. § 34-3-1 (1956); S.C. CODE § 19-55 (1952); S.D. CODE § 51.0214 (1939); TENN. CODE ANN. § 64-107 (1955); TEX. PROB. CODE § 46 (1956); UTAH CODE ANN. § 57-1-5 (1953); VT. STAT. ANN. tit. 27, § 2 (1959); VA. CODE ANN. § 55-20 (1950); WASH. REV. CODE § 11.04.070 (1951); W.VA. CODE ANN. § 3539 (1955); WIS. STAT. ANN. § 230.44 (1957).

14 See, *e.g.*, CONN. GEN STAT. ANN. § 47-14(*a*) (1958); GA. CODE ANN. § 85-1002 (1933).

15 See, *e.g.*, ARIZ. REV. STAT. § 14-204 (1956); KY. REV. STAT. ANN. § 381-120 (1955); N.C. GEN. STAT. § 41-2 (1956).

16 ARIZ. REV. STAT. § 14-204 (1956); COLO. REV. STAT. ANN. § 118-2-1 (1953); DEL. CODE ANN. tit. 25, § 701 (1953); D.C. CODE ANN. § 45-816 (1951); HAWAII REV. LAWS § 345-1 (1955); IDAHO CODE ANN. § 55-104,508 (1953); ILL. ANN. STAT. ch. 76, § 1 (Smith-Hurd 1934); IND. ANN. STAT. § 56-111 (1951); KANS. GEN. STAT. ANN. § 58-501 (1949); KY. REV. STAT. ANN. § 381-130 (1955); MICH. STAT. ANN. § 26.44 (1956); MINN. STAT. ANN § 500.19(2) (1945); MO. ANN. STAT. § 442.450 (1949); MONT. REV. CODES ANN. § 67-313 (1947); NEV. REV. STAT. § 111.065 (1957); N.M. STAT. ANN. § 70-1-14 (1953); N.Y. REAL PROP. LAWS § 66; N.C. GEN. STAT. § 41-2 (1956); N.D. CENT. CODE § 47-02-06 (1960); ORE. REV. STAT. § 93.180 (1953); PA. STAT. ANN. tit. 20, § 121 (1950); R.I. GEN. LAWS ANN. § 34-3-1 (1956); VT. STAT. ANN. tit. 27, § 2 (1959); VA. CODE ANN. § 55-20 (1950); WASH. REV. CODE § 11.04.070 (1951); W.VA. CODE ANN. § 3539 (1955); WIS. STAT. ANN. § 230.44 (1957).

17 FLA. STAT. ANN. § 689.15 (1954); IND. STAT. ANN. § 56-511 (1951); MICH. STAT. ANN. § 26.44 (1956); MO. ANN. STAT. § 442.450 (1949); NEV. REV. STAT. § 111.065 (1957); VT. STAT. ANN. tit. 27, § 2 (1959); WIS. STAT. ANN. § 230.45 (1957).

18 WIS. STAT. ANN. § 230.455 (Supp. 1961). The main impact of this statute stems from the fact that it helps prevent tenants from becoming "judgment-proof" because their property is subject to the right of survivorship in another.

Statutes favoring tenancy in common over joint tenancy and/or abolishing the right of survivorship have been thought to express legislative disfavor of joint tenancy and survivorship, but they have not usually been construed to render them illegal. Even under these statutes, a valid conveyance in joint tenancy with the right of survivorship is still possible.[19]

This construction does not appear to have frustrated the "intent" of the legislatures in passing these statutes; indeed, it seems clear that the "intent" was not to outlaw these aspects of tenancy, but rather to remove the common law presumption in favor of joint tenancy and to replace it with one in favor of tenancy in common. In fact, a majority of these statutes provide that they shall not apply where joint tenancy is "expressly declared,"[20] "expressly granted,"[21] "declared in its creation,"[22] or where "the language . . . makes it clear that a joint tenancy was intended. . . ."[23] From the words of these statutes themselves, therefore, it is evident that great weight is to be placed upon the intent expressed by the parties. There is great diversity of opinion, however, as to what words are necessary to satisfy the specificity requirements of these statutes. In states where the incident of survivorship has been abolished, the courts have arrived at a similar conclusion by saying that survivorship will be upheld if it is arrived at by a definite contract.[24]

Thus, it appears that the only import which the courts have been willing to give to these statutes is that a conveyance purporting to result in joint tenancy with the incident of survivorship must be quite definite in its statement of that purpose before it will be given the desired effect. This seems to be a quite logical result, because these carry-overs from the common law, although ancient, are still useful, and it is not necessary to destroy them in order to bring the law of cotenancy into conformity with present day social conditions.

In the District of Columbia, the jurisdiction in which the *Coleman* case was tried, there was in effect at the time of the conveyance in question a statutory presumption in favor of tenancy in common. It provides, in part, that:

> Every estate granted or devised to two or more persons in their own right, including estates granted or devised to husband and wife, shall be a tenancy in common, unless *expressly declared* to be a joint tenancy. . . .[25] (Emphasis added.)

There is no doubt that under present law the conveyance in the *Coleman* case could not result in a tenancy by the entirety, since decedent and Alice were not husband and wife even under common law principles, so the court was faced with two possible alternatives: joint tenancy or tenancy in common. A finding of the former would go against the literal impact of the statute; a finding of the latter would be a frustration of the intent of the decedent grantee.

Courts, and legislators also, have often felt compelled to foster ease of transfer, or "liquidity," as it is often called in the field of property law. They have placed great weight upon the intentions of the parties to the instrument, whether it be a conveyance,[26] a trust agreement,[27] or a contract,[28] *ut res magis valeat quam pereat* — "that the thing might have effect rather than be destroyed."[29] This

19 See, *e.g.*, Nash v. Martin, 90 Ga.App. 235, 82 S.E.2d 658 (1954); Palmer v. Flint, 121 A.2d 837 (Me. 1960). See generally 14 AM. JUR. *Joint Tenancy* §§ 84, 85 (1938); 48 C.J.S. *Joint Tenancy* § 3 (1955).

20 D.C. CODE ANN. § 45-816 (1951).

21 ARK. STAT. ANN. § 50-411 (1947).

22 IDAHO CODE ANN. § 55-106 (1953).

23 KAN. GEN. STAT. ANN. § 58-501 (1949).

24 See, *e.g.*, Peyton v. Wehrbane, 125 Conn. 420, 6 A.2d 313 (1939); Bowling v. Bowling, 243 N.C. 515, 91 S.E.2d 176 (1956).

25 D.C. CODE ANN. § 45-816 (1951).

26 Sharp v. Hall, 86 Ala. 110, 5 So. 497 (1889).

27 Farkas v. Williams, 5 Ill.2d 417, 125 N.E.2d 600 (1955).

28 In re Howe's Estate, 31 Cal.2d 395, 189 P.2d 5 (1948).

29 BLACK, LAW DICTIONARY (4th ed. 1951).

is, in effect, what the court in the *Coleman* case did. The court reasoned, quite logically, to the conclusion that the statute involved applies "only where there is no expression to the contrary in the conveyance,"[30] and since "what the parties *intended* in this case is clear . . . ,"[31] the court decided that "the *intention* of survivorship manifested in the deed can best be effected by declaring the cotenants in this case to have been joint tenants."[32] (Emphasis added.)

That the intent of the deceased with regard to the type of cotenancy he desired was clearly expressed is evident from the facts. There is no evidence in the case that the conveyance was the result of a gift or devise. Because of this, it must be assumed that the deceased paid valuable consideration for the property, and as a result of this payment he had the right to prescribe the type of tenancy by which the property would be held. The court noted that there was a clause to the following effect on the face of the deed:

> Sale of the above described property was ratified to said Thomas H. Jackson (decedent) who has directed that conveyance be made to the parties hereto of the second part as Tenants by the Entirety, as evidenced by his signature hereto.[33]

Immediately following this sentence was the signature of the decedent. This would surely seem to negate any contention that tenancy by the entirety was a mere whim of the draftsman, rather than a definite intention of the decedent grantee.

There is another aspect in this case which merits consideration. In the *Coleman* case the lower court had decided that Alice "did not live with him (decedent) in good faith as his wife"[34] because she knew of his prior marriage. It is submitted that few circumstances should have less effect upon the decision of the questions in a case such as this than the morality of one of the parties. The appellate court disposed of this issue in such a logical and concise manner that its words bear quotation:

> [T]his is not relevant to the question whether they were joint tenants. Whatever society and we may think of the illicit relationship, the law recognizes the rights of the participants to hold property jointly and to give or bequeath property to each other without limitation imposed because of the relationship.[35]

The significance of this case stems not so much from the factual situation, which admittedly would seldom occur, but from the difficult question of statutory interpretation which was thrust upon the court, and the laudable manner in which the court responded. The court in the *Coleman* case, by not confining itself to a mere repetition of the slogans of judicial passivism, reached a logical and just result.

Theodore A. Fitzgerald

TAXATION — ACCRUAL BASIS CORPORATE TAXPAYER MUST INCLUDE IN ITS TAXABLE INCOME AMOUNTS HELD TO ITS CREDIT IN A RESERVE ACCOUNT IN THE YEAR IN WHICH THE AMOUNTS WERE CREDITED. — A corporate taxpayer, who uses the accrual basis of accounting, in order to gain a more liquid position, arranged with financing agencies to sell them its customers' promissory notes, which were obtained through the sale of its products. These notes consisted of the unpaid portion of the selling price plus finance charges. In return, the finance agencies gave cash, the face value of the notes less finance charges in one instance, and less finance

30 Instant case at 100.
31 *Id.* at 102.
32 *Id.* at 103.
33 *Id.* at 102 n.8. The draftsman, through this sentence, seems to be making doubly sure that the intent of the grantee is clear. Query: Could it be that the draftsman had knowledge of decedent's marital entanglements?
34 Instant case at 103.
35 *Ibid.*

charges plus a 10% deduction in two other instances. The amounts retained by the finance agencies were credited to a "dealer's reserve account," in the name of the corporate taxpayer, for the purpose of securing payment on the notes obtained from it. The taxpayer, during the taxable year, included in its gross income, the cash received from its sales involving the promissory notes with the finance agencies, but failed to include the amounts set aside in the reserve account. *Held*: The accrual basis corporate taxpayer must include in its taxable income the amounts held to its credit in the "dealer's reserve account" by the finance companies during the year in which the amounts were credited to the dealer taxpayer. *General Gas Corp. v. Commissioner of Internal Revenue,* 293 F.2d 35 (5th Cir. 1961).

The basis of the holding in *General Gas* was that when the finance company credited the "dealer's reserve account," the taxpayer acquired the fixed right to receive the amounts and as such must include the amounts as taxable income for the year in which the credit was made.[1]

The principles governing taxpayer's use of the accrual basis method of accounting have been settled in the opinions of the Supreme Court of the United States.[2] Determining whether or not income is to be reported in one particular year or another depends upon its receipt by the taxpayer. Just what is meant by receipt is explained in *Spring City Foundry Co. v. Commissioner,*[3] where the court stated:

> Keeping accounts and making returns on the accrual basis, as distinguished from the cash basis, import that it is the right to receive and not the actual receipt that determines the inclusion of the amount in gross income. When the right to receive an amount becomes fixed, the right accrues.[4]

It is to be noted that the crucial factor in determining taxable income under the accrual basis is to ascertain the instant when the right to receive becomes fixed or certain; for if a contingency exists which creates a reasonable doubt as to the collectibility of particular income[5] or prevents a determination of the amount with reasonable certainty,[6] the income will not be considered accrued for tax purposes.[7] Where a question arises as to whether there is a contingency or not, *Continental Tie and Lumber Co.* v. *United States*[8] points out that the contingency, in order to prevent the accrual of income, must be real and substantial, and mere vague possibilities affecting determination of the amount or collection of the income will not defer its accrual.

It is suggested at this point, that since the taxpayer will have to treat that amount set aside in the "dealer's reserve account" as income during the year in which it was credited to that account, it would seem that the taxpayer could take advantage of the bad debt provisions of the Internal Revenue Code for those promissory notes which were uncollectible.[9]

In *General Gas,* the amounts held accrued were set aside by the finance agencies in the "dealer's reserve account" as security for the payment of the notes which it had received from taxpayer.[10] In the event a particular note was unpaid, the particular finance company affected could charge the "reserve account" for the face value of the note. As stated in the opinion, the "reserve account" was liable for all customer defaults.[11] Also out of the "reserve account" interest payments were

1 General Gas Corp. v. Commissioner of Internal Revenue, 293 F.2d 35 (5th Cir. 1961).
2 Security Flour Mills Co. v. Commissioner, 321 U.S. 281 (1944); Brown v. Helvering, 291 U.S. 193 (1934).
3 292 U.S. 182 (1934).
4 *Id.* at 184-85.
5 Brown v. Helvering, 291 U.S. 193 (1934).
6 Security Flour Mills Co. v. Commissioner, 321 U.S. 281 (1944).
7 Lucas v. American Code Co., 280 U.S. 445 (1930).
8 286 U.S. 290 (1932).
9 INT. REV. CODE OF 1954, § 166.
10 General Gas Corp. v. Commissioner of Internal Revenue, 293 F.2d 35, 38 (5th Cir. 1961).
11 *Ibid.* at 38.

paid to the finance companies under the financing contract between them and General Gas Corporation. "It receives in cash the cumulative reserve in excess of the 30% limit (under the financing agreement amounts in the "reserve account" were to never be higher than 30% of outstanding notes) and of course, will eventually receive the entire amount remaining to its credit.[12]

The taxpayer contended that the amounts can be taxed as income only when they are actually received; that there was no fixed right to receive prior to actual payment. This argument was presented in *Commissioner* v. *Hansen,*[13] a case involving substantially similar facts, where the taxpayer contended that the amounts that were retained by the finance companies and entered on their books as liabilities to the dealers under their "reserve accounts"

> were subject to such contingencies that it could not have been known in the year of such retention and credits, what amount of those reserves would actually be received by them and hence, they did not acquire, in the year of such retention and credits, a fixed right to receive — in a later year or at any time — the amounts so withheld and credited to them and therefore those amounts did not constitute accrued income to them.[14]

The court in *Hansen* stated that the amounts so credited were subject to liabilities which the dealer-taxpayer might have by way of customer default on notes sold by it to the financing agencies, but pointed out that only those obligations which arose under the financing agreements could be offset against the "reserve accounts" and not just any obligations which General Gas might have to the finance agencies. Only those amounts which were sold to the finance agencies in the form of notes and were subsequently unpaid could be applied to such accounts. These were the only authorized offsets. No amount could be charged by the finance company against the "dealer's reserve account" without the authorization of the company.

> It follows that only one or the other of two things can happen to the dealer's reserve account: (1) the finance company is bound to pay the full amount to the dealer in cash, or (2) if the dealer has incurred obligations to the finance company under his guaranty, endorsement or contract of sale, of the installment paper, the finance company may apply so much of the reserve as is necessary to discharge those obligations, and is bound to pay the remainder to the dealer in cash.[15]

In *Douglas* v. *Willcuts,*[16] it was determined that a taxpayer receives income when an obligation is discharged by another for his benefit. Since a taxpayer receives income when an obligation is discharged by another for his benefit, it would follow that a fixed right to have an obligation discharged constitutes accrued income to accrual basis taxpayers.[17] The amounts in the "reserve accounts" applied to the uncollectible notes, as unauthorized under the financing agreement were as much received as if General Gas Company had received cash. Since these amounts were received and since the "reserve accounts" were limited in use by the agreement between General Gas and the finance companies, it follows that the amounts could be taxed as income to the accrual basis taxpayer at the time the withheld amounts were entered on the books of the finance companies as liabilities to the dealers since, at that time, the dealers acquired a fixed right to receive the amounts so retained by the finance companies.

In *General Gas,* when by contract it had agreed to make good all notes which went bad, having the finance companies charge such uncollectible notes against the "dealer's reserve account" the court, following *Hansen,* stated that General Gas had received the entire amounts of those reserve credits.

The notes were indorsed by General Gas to the finance companies "without

12 *Ibid.* at 38.
13 300 U.S. 446 (1959).
14 *Id.* at 464, 465.
15 *Id.* at 465.
16 296 U.S. 1 (1935).
17 Old Colony Trust Co. v. Commissioner, 278 U.S. 716 (1929).

recourse," whereas in *Hansen,* they were indorsed "with recourse." The court in *General Gas* found this insignificant, since by agreement the finance agencies were to charge the uncollectible notes against the "reserve accounts."[18]

The Internal Revenue Service has consistently maintained that amounts withheld by finance companies to cover possible losses on notes purchased from dealers constituted income to dealers who employ the accrual method of accounting, from the time the amounts are recorded on the books of the finance companies as liabilities to the dealers.[19]

The decision in *Hansen* compelled the decision in *General Gas.* Prior to *Hansen* there was a conflict as to whether or not the creation of "dealer's reserve accounts" constituted income for the dealer in the year in which the credits were made to the account.[20] Some cases held that such amounts were contingent and unascertainable. These cases placed stress on the fact that the finance companies would charge notes uncollectible against the "reserve accounts," thus making the amount that dealers might receive uncertain.

General Gas, amplifying the decision in *Hansen* has met this argument. As long as the amounts held in the "reserve accounts" are ultimately to go to the taxpayer in the form of cash or as the extinguishment of taxpayer's obligations arising under the financing contract, the amounts in such "reserve accounts" must be included in taxpayer's income for the year in which the amounts were credited to such "accounts" for it was at that instant that taxpayer's right to receive became fixed.

The scope of *Hansen* and *General Gas* leaves little apparent leeway for taxpayers. However, it is suggested that making the "dealer's reserve accounts" liable for *any* obligations arising between the companies and the finance agencies might make the sum so uncertain as to avoid the impact of *Hansen* and *General Gas.* In those cases emphasis was placed on the fact that the extinguishment of liabilities was covered by the financing contract.

Robert W. Cox

TORTS — RELEASE — RELEASES GIVEN TO ORIGINAL TORTFEASORS CONSTRUED TO DISCHARGE MANUFACTURER OF INTRAMEDULLARY NAIL AND OWNER OF TRUCK INVOLVED IN ACCIDENT. — Plaintiff Clark suffered a compound fracture of his right thighbone in an automobile accident. Surgeons inserted a surgical pin, manufactured by defendant Zimmer Mfg. Co., to speed the mending process by holding the jagged edges of the bone firmly together. One year later the pin snapped, causing serious and permanent reinjury. Clark filed a complaint against the defendant on a theory of implied warranty of the surgical pin. Zimmer's reply asserted that plaintiff had given, *prior* to the institution of this action, a full release to one Couture, the other party to the automobile accident. The Court of Appeals, affirming summary judgment for the defendant Zimmer, *held:* under Massachusetts law, the release given to Couture was a bar to the action. It could not be said as a matter of law that the subsequent damage to plaintiff was a wholly new and distinct injury. *Clark v. Zimmer Mfg. Co.,* 290 F.2d 849 (1st Cir. 1961).

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18 General Gas Corp. v. Commissioner of Internal Revenue, 293 F.2d 35 (5th Cir. 1961).

19 G.C.M. 9571, X-2 CUM. BULL. 153 (1931), most recent, Rev. Bull. 57-2, 1957-1 CUM. BULL. 17:

> Amounts withheld by banks or finance companies to cover possible losses on notes purchased from dealers constitute income to dealers employing the accrual method of accounting, to the extent of their interest therein at the time the amounts are recorded on the books of the bank or finance company as a liability to the dealer.

20 Morgan v. Commissioner, 277 F.2d 152 (9th Cir. 1960); Texas Trailercoach v. Commissioner, 251 F.2d 395 (5th Cir. 1958).

In a similar case, a dairy truck owned and driven by the defendant Gnagey collided with an automobile driven by Carnegie. The plaintiff, a passenger in the automobile, later released Carnegie from any liability for $1,518.87. Gnagey's defense in this suit against him was based principally upon the release given to Carnegie. In affirming judgment for defendant on the pleadings, the Supreme Court of Pennsylvania *held:* that the language of the release[1] specifically relieved the defendant from any liability for damage inflicted by him. *Hasselrode v. Gnagey,* 404 Pa. 549, 172 A.2d 764 (1961).

There is an old common law maxim that "the release of one or more joint tortfeasors is a release of all the joint tortfeasors."[2] On its face innocuous, in practice the rule has led to surprising results, often called unjustifiable,[3] because courts have followed the theoretical logic of the rule without considering its practical effects. Legal writers, in law reviews and treatises, have long voiced strong disapproval of this rule.[4]

The two cases noted are characteristic of the result commonly expected years ago, but seem out of step with the more recent trend of judicial reasoning. In the *Clark* case,[5] a release given to a negligent motorist barred a suit against a negligent manufacturer of surgical pins. In the *Hasselrode* case,[6] an almost identical release barred a subsequent action against a negligent truck driver, in the face of what seems to present an insuperable obstacle, *i.e.,* Section 4 of the Uniform Contribution Among Tortfeasors Act.[7]

At common law[8] it was assumed that where two or more persons, acting in concert, committed a wrong, the cause of action accruing to the wronged party was single and indivisible. Hence, the release of one wrongdoer dissolved that cause of action completely. The arguments proposed in favor of this result were that (1) there was but one cause of action,[9] (2) it would be unjust to permit double recovery for one's injuries,[10] (3) an inseparable injury forces an impossible appor-

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1 Plaintiff does "release and forever discharge the said Frank R. Carnegie . . . and any and all other persons, associations and corporations, whether herein named or referred to or not. . . ." Hasselrode v. Gnagey, 404 Pa. 549, 172 A.2d 764 (1961).

2 Trieschman v. Eaton, 224 Md. 111, 166 A.2d 892, 895 (1961); Abb v. Northern Pacific Ry. Co., 28 Wash. 428, 68 Pac. 954 (1902).

3 *E.g.,* wrongdoers not contributing to the consideration for the release are discharged; the one attempting to make reparation bears the whole loss; compromises in settlement of tort liability are discouraged; and tortfeasors are given an advantage inconsistent with their liability. McKenna v. Austin, 134 F.2d 659, 662 (D.C. Cir. 1943).

4 COOLEY, TORTS § 80 (1930); 4 CORBIN, CONTRACTS §§ 933-35 (1951); HARPER AND JAMES, TORTS 711-12 (1956); PROSSER, TORTS 244-45 (2d ed. 1955); 2 WILLISTON, CONTRACTS § 338A (1959); Prosser, *Joint Torts and Several Liability,* 25 CALIF. L. REV. 413 (1937); Wigmore, *Release to One Joint Tortfeasor,* 17 ILL. L. REV. 563 (1923); 33 NOTRE DAME LAWYER 443 (1961); 13 CORNELL L.Q. 473 (1928).

5 Clark v. Zimmer Mfg. Co., 290 F.2d 849 (1st Cir. 1961).

6 Hasselrode v. Gnagey, 404 Pa. 549, 172 A.2d 764 (1961).

7 A release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors *unless the release so provides,* but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release or in any amount or proportion by which the release provides that the total claim shall be reduced if greater than the consideration paid. PA. STAT. ANN. tit. 12, § 2085 (Supp. 1960). (Emphasis supplied.)

8 Dwy v. Connecticut Co., 89 Conn. 74, 92 Atl. 883, 884 (1915). See generally McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943); Trieschman v. Eaton, 224 Md. 111, 166 A.2d 892 (1961).

9 Duck v. Mayeu, 2 Q.B. 511, 513 (1892).

10 Plaintiff is entitled to but one satisfaction. "When the plaintiff has accepted satisfaction in full for the injury done him, . . . he is so far affected in equity and good conscience, that the law will not permit him to recover again for the same damages." Lovejoy v. Murray, 3 Wall. 1, 17 (1865);

tionment of damages,[11] and (4) it is assumed that the one receiving the release committed the whole tort and caused all the harms.[12] As the holdings and dicta in this vein multiplied, releases for injuries sustained at the hands of concurrent and successive tortfeasors were included in the rule.[13] With this extension, the question of proximate cause became important,[14] *i.e.*, whether the prior wrong was the proximate cause of the following wrong, or whether the latter was a new and independent harm.

Where the release was given under seal, further problems arose, for it was said that one could not protest that compensation received from one tortfeasor was not intended to be full satisfaction, because the seal prevented inquiry into the amount of adequacy of the consideration given in exchange.[15] Although saying that the injured party was entitled to full satisfaction for harms done, courts often confused satisfaction in form (*e.g.*, a release)[16] with satisfaction in reality — the latter being full compensation, the former very often falling short of that.[17]

Of special interest is the development of what might be called the "negligent physician" type of case, since the *Clark* case bears the rationale of those cases. It was said above that the release rule extended to successive tortfeasors, as well as joint tortfeasors. If a person was injured and sought medical care, and the physician chosen aggravated the injury, the tortfeasor responsible for the primary injury was also liable for the aggravation.[18] This follows the proximate cause rules of liability for foreseeable results of an injury. Then if the injured party released the original tortfeasor from liability, the release prevented any suit against the negligent physician.[19] One can readily see that the Court of Appeals in the *Clark* case[20] has equated

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> This arbitrary approach to a consideration of the effect of a release goes beyond any reasonable necessity to honor the principle of law that a litigant should not recover twice for the same injury. Moreover, these holdings offend the basic principle of the law that an injured party should be wholly compensated for his injuries where liability exists. Couillard v. Charles T. Miller Hospital, 253 Minn. 418, 92 N.W.2d 96, 100 (1958).

11 Foster v. Bussey, 132 Iowa 640, 109 N.W. 1105 (1906). *But see* Chipman v. Palmer, 77 N.Y. 51 (1879).

12 Abb v. Northern Pacific Ry. Co., 28 Wash. 428, 68 Pac. 954, 955 (1902). See also Carey v. Bilby, 129 Fed. 203, 205 (8th Cir. 1904), to the effect that a release should be strictly construed against the maker.

13 *E.g.*, Southern Pacific Ry. Co. v. Raish, 205 F.2d 389 (9th Cir. 1953), where it was said that there need be no collusion, concert, or common duty to make tortfeasors jointly liable — merely an indivisible injury; *but see* Husky Refining Co. v. Barnes, 119 F.2d 715, 716 (9th Cir. 1941), "In the case of such independent concurring torts the release of one wrongdoer does not release the other." Foster v. Bussey, 132 Iowa 640, 109 N.W. 1105 (1906). See also McGannon v. Chicago & N.W. R. Co., 160 Minn. 143, 199 N.W. 894 (1924);

> If the plaintiff's health was impaired through the negligence of his former employer, and he subsequently sustained further injury through the negligent acts of the railway company, thus aggravating his former injury, the company would be liable to the extent that its acts aggravated the plaintiff's condition, but the former employer would not be liable for such aggravation.

14 Mainfort v. Giannestras, 49 Ohio Op. 440, 111 N.E.2d 692, 694 (C.P. 1951). See generally Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413 (1937).

15 Eastman v. Grant, 34 Vt. 387 (1861); Ellis v. Essau, 50 Wis. 138, 6 N.W. 518 (1880).

16 Gunther v. Lee, 45 Md. 60 (1876).

17 "The experts in this field agree that the distinction between satisfaction in form and satisfaction in fact should be determined *in every case*, and control the result." Trieschman v. Eaton, 224 Md. 111, 166 A.2d 892, 895 (1961). (Emphasis supplied.) See also PROSSER, TORTS 243-46 (2d ed. 1955).

18 Makarenko v. Scott, 132 W.Va. 430, 55 S.E.2d 88, 93 (1949), states the reasons: (1) the unskilled treatment is a result which should reasonably have been anticipated by the tortfeasor; (2) the tortfeasor is presumed to know the necessity of medical treatment, and is accountable for its risks; and (3) the aggravation of the injury would not have occurred had there been no original injury — the aggravation is a proximate result of the injury.

19 Harris v. Brian, 255 F.2d 176 (10th Cir. 1958); Tanner v. Espey, 128 Ohio St. 82, 190 N.E. 229 (1934).

20 290 F.2d 849 (1st Cir. 1961).

the breach of an implied warranty of fitness with the negligent actions of a physician.[21]

Not all courts adhere to the "negligent physician" rule at this time, and it is probable that most would allow an evasion in one of two ways. First, where the negligence of the physician occasions a distinct and separate injury, the release given to the first wrongdoer can be held of no relevance in the successful prosecution of a suit against the former.[22] Second, where the terms of the release indicate no intent to release anyone but the original wrongdoer, that intent may be given effect.[23] Where the plaintiff's original recovery is had under a Workmen's Compensation Act, some courts apply another limitation, narrower in scope than the preceding two. They say that relief under the particular Workmen's Compensation Act, and relief based upon negligent treatment, are distinct legal claims and a release of one will not bar the other.[24]

The developments seen in the cases dealing with negligent physicians are a micro-mirror of the over-all manner in which release problems are handled. Releases are being construed more liberally; successful collateral attack is becoming more common; and the legal effects of releases are coming more into line with what one's instinctive sense of fair dealing and justice would demand. Four categories by which circumvention of the release rule is accomplished delineate the routes by which liberal judicial thought is traveling, and will continue to do so.[25]

(1) *The Covenant Not To Sue*

Construing a would-be release as a covenant not to sue has been by far the most common device by which the harshness of the release rule has been avoided.[26]

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21 Bowles v. Zimmer Mfg. Co., 277 F.2d 868 (7th Cir. 1960), deals with a similar situation, arriving at a different result than in *Clark* even though Michigan law seemed to follow the release rule. The wording of the release here, however, differed in that it expressly reserved the right of the releasor to sue others for the injury. See also Von Blumenthal v. Cassola, 166 Misc. 744, 3 N.Y.S.2d 246 (1938), *aff'd* 254 App. Div. 857, 6 N.Y.S.2d 342 (1938), where it was held that a negligent actor cannot be a joint, concurrent, or successive tortfeasor with one charged with breach of warranty. There are no other cases on this point.

22 Mainfort v. Giannestras, 49 Ohio Op. 440, 111 N.E.2d 692, 694 (C.P. 1951):

> The sole question is whether the negligence of the defendant surgeon aggravated the original injury or created an independent injury, unassociated with the original wrong and not reasonably foreseeable by the original wrongdoer as a natural sequence of his wrong. . . . If said injuries are found to be the result of a distinct and independent wrong the release is no bar to this suit.

23 Couillard v. Charles T. Miller Hospital, 253 Minn. 418, 92 N.W.2d 96, 97 (1958). The court in its syllabus, after giving the general (release) rule, said:

> [T]he fact that an injured person has signed a release in general terms will not prevent him from showing by parol evidence that he was never compensated for and never intended to release claims based on injuries caused by the subsequent tortfeasor for which the releasee is also liable because of the rules of proximate cause. The intent of the parties on the question of actual compensation is a question of fact for the jury. The release is, however, prima facie evidence that full compensation was received from the original wrongdoer, including injuries caused by subsequent tortfeasors, and the burden is on the plaintiff to prove the contrary.

24 White v. Matthews, 221 App. Div. 551, 224 N.Y. Supp. 559, 562-63 (1927); *contra*, Makarenko v. Scott, 132 W.Va. 430, 55 S.E.2d 88 (1949). The *Clark* court relied on Vatalaro v. Thomas, 262 Mass. 383, 160 N.E. 269 (1928), and Purchase v. Seelye, 231 Mass. 434, 121 N.E. 413 (1918), both of which dealt with claims under a statute of this kind. (If the *Clark* case had come before the Supreme Judicial Court of Massachusetts, it is possible that the factors of the recent trend in judicial thinking as regards releases, and the element of breach of implied warranty would have influenced a different decision.)

25 These categories are merely intended as a frame of reference for ease in discussion. The lines of demarcation are not absolute.

26 McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943); Dwy v. Connecticut Co., 89 Conn. 74, 92 Atl. 883 (1915); Myers v. Kennedy, 306 Mo. 268, 267 S.W. 810 (1924); Holland v. Southern Public Utilities Co., 208 N.C. 289, 180 S.E. 592 (1935).

The theoretical justification[27] lies in the distinction between the *effects* of the two. Where a release extinguishes a cause of action, a covenant not to sue merely makes the remedy inaccessible, and so meets the objection of dissolution of an indivisible cause of action.[28] A few courts are more forthright, and reject any such distinction.[29]

(2) *Full Compensation*

What this means is that the court's primary inquiry is directed to the question of whether the plaintiff received full compensation, or "satisfaction in fact," for his injuries.[30] More specifically, as applied to the multiple tortfeasor situation, a court will not prevent a litigant from suing, even though he has executed one or more releases to possible defendants. The court will, however, credit pro tanto any amount received by plaintiff in satisfaction (by release, judgment, or other means) to the account of the particular defendant being sued.[31]

> We could not well do otherwise and retain our conception of the purpose sought to be accomplished by the rule, and of the ultimate test to be applied in effectuating that purpose — to wit, the satisfaction of the injured party. Plainly the rule was not formulated out of a tender regard for joint tortfeasors, and to furnish a shield for them against demands for satisfaction for their wrongs.[32]

(3) *The Intent of the Parties to the Release*

Two questions immediately arise under this heading (a) whether the contracting parties manifest a discernible intent as to what effect the release should have on liability of third persons; and if not, (b) whether parol evidence should be admitted to make clear to what extent rights of third parties were intended to be affected.

As to the first inquiry, an express reservation of the right to sue third parties, named or not, is more generally given effect by the courts,[33] even though there are old English decisions (followed by one or two American jurisdictions)[34] holding the contrary.[35] There is more disagreement as to what answer should be given to the second question, concerning the admissibility of parol evidence.[36] The conflict in opinion is intensified when it is contended that between a person not in privity with the releasor and the releasor himself, the parol evidence has no applica-

27 In practical effect, however, the distinction is artificial and meaningless. McKenna v. Austin, note 26, *supra.*

28 It is interesting to note, in connection with the comment in note 24, *supra,* that Massachusetts has precedent justifying such a result. See Matheson v. O'Kane, 211 Mass. 91, 97 N.E. 638 (1912), in which a release was held to be a covenant not to sue, where it was evident that less than full compensation was received by the plaintiff.

29 Gronquist v. Olson, 242 Minn. 119, 64 N.W.2d 159 (1954).

30 Myers v. Kennedy, 306 Mo. 268, 267 S.W. 810, 815 (1924).

31 Trieschman v. Eaton, 224 Md. 111, 166 A.2d 892, 896-97 (1961).

32 Dwy v. Connecticut Co., 89 Conn. 74, 92 Atl. 883, 888-89 (1915).

33 Black v. Martin, 88 Mont. 256, 292 Pac. 577 (1930). A large number of courts have given effect to a release with an express reservation of rights against others by interpreting it as a covenant not to sue, *e.g.,* Myers v. Kennedy, 306 Mo. 268, 267 S.W. 810 (1924). *Contra,* McBride v. Scott, 132 Mich. 176, 93 N.W. 243 (1903).

34 Flynn v. Manson, 19 Cal. App. 400, 126 Pac. 181 (1912). This case is no longer good law in California, and it is doubted that any other jurisdiction at the present time would follow it in principle or in name.

35 The early English cases . . . follow the logic of this rule to the conclusion that any kind of a settlement, release or satisfaction, even though expressly limited to certain parties, operates to discharge all who participated in the wrong. The idea underlying . . . is that the primary intention to release is . . . to be carried out, and all inconsistent reservations must be ignored as repugnant to the purpose of the release. . . . Walsh v. New York Central & H.R. R. Co., 204 N.Y. 58, 97 N.E. 408, 410 (1912).

See also Duck v. Mayeu, 2 Q.B. 511 (1892), which shows the reversal of English law on this point.

36 Parol evidence should be admitted: Safety Cab Co. v. Fair, 181 Okla. 264, 74 P.2d 607, 609 (1937). It should not: Muse v. De Vito, 243 Mass. 384, 137 N.E. 730 (1923).

tion.[37] The newer attitude is reflected in the cases no longer dealing with releases as sacrosanct, and giving greater freedom in setting them aside on the grounds of fraud, mutual mistake, undue influence, unconscionability, and so on.[38]

(4) *Effectuation of Remedial Legislation*

Perhaps the major development in this area has been the trend in those states which have adopted the Uniform Contribution Among Tortfeasors Act, including Section 4 of the Act as set out in note 7, *supra*.[39] The legislative intent, seen in the Act, to nullify the effect of the release rule, has been followed in most jurisdictions where the issue has been decided.[40] It is submitted that where construction of a release allows more than one meaning, as was possible in the *Hasselrode* case,[41] the policy of full compensation should be given considerable weight in determining the final outcome. Justice Musmanno's caustic dissent[42] amply indicated the desire for greater liberality in construing releases so as to effectuate the policy of the applicable Uniform Contribution Among Tortfeasors Act.

Notwithstanding the increase of judicial freedom in cases dealing with releases, the cases do indicate that the "spirit" of the release rule is deeply ingrained in the law, and great care must be exercised by counsel wishing to avoid its application.[43] An indispensable requirement of any release signed by a plaintiff desirous of further recovery is an express reservation of rights to sue third parties, which should be explicit to the point of naming names. It is probable that failure to insist upon such a provision would be inexcusable negligence by counsel for the plaintiff. The broadly inclusive wording of the releases[44] in both *Clark* and *Hasselrode* was *the* fatal defect, and could easily have been avoided.

Philip B. Byrne

VOLUNTARY ASSOCIATIONS — PHYSICIANS AND SURGEONS — VOLUNTARY ASSOCIATION SUBJECT TO JUDICIAL SCRUTINY WHEN MEMBERSHIP POLICIES OF EXCLUSION CONFLICT WITH PUBLIC POLICY OF THE STATE. — Italo John Falcone pursued an accelerated undergraduate course at Rutgers University and Villanova College. He next completed the course of the Philadelphia College of Osteopathy,

37 In Shea v. New York, C. & St.L. R. Co., 105 Fed. 559, 562-63 (7th Cir. 1901), the court cited GREENLEAF ON EVIDENCE § 279:

> [T]his rule is applied only . . . between the parties to the instrument, as they alone are to blame if the writing contains what was not intended, or omits that which it should have contained. It cannot affect third persons, who, if it were otherwise, might be prejudiced by things recited in the writings, contrary to the truth, through the ignorance, carelessness, or fraud of the parties, and who . . . ought not to be precluded from proving the truth, however, contradictory to the written statements of others. . .

and went further to say that mutuality requires that this right be open to both parties. *Accord,* Reams v. Janoski, 268 Ill. App. 8 (1932); *contra,* Martin v. Setter, 184 Minn. 457, 239 N.W. 219 (1931). See generally 4 CORBIN, CONTRACTS §§ 931-35 (1951), and in particular § 934.

38 Jordan v. Guerra, 23 Cal.2d 469, 144 P.2d 349 (1944); Ruggles v. Selby, 25 Ill. App. 2d 1, 165 N.E.2d 733 (1960); Denton v. Utley, 350 Mich. 332, 86 N.W.2d 537 (1957); *but see* Corbett v. Bonney, 121 S.E.2d 476 (Va. 1961).

39 See generally 33 NOTRE DAME LAWYER 291 (1958).

40 See, *e.g.,* Raughley v. Delaware Coach Co., 47 Del. 343, 91, A.2d 245 (1952).

41 Hasselrode v. Gnagey, 404 Pa. 549, 172 A.2d 764 (1961).

42 *Id.* at 765-69.

43 *Compare* Tanner v. Espey, 128 Ohio St. 82, 190 N.E. 229 (1934) *with* Adams Express Co. v. Beckwith, 100 Ohio St. 348, 126 N.E. 300 (1919); *and* Lisoski v. Anderson, 112 Mont. 112, 112 P.2d 1055 (1941) *with* Black v. Martin, 88 Mont. 256, 292 Pac. 577 (1930). See also Price v. Baker, 143 Colo. 264, 352 P.2d 90 (1959), and Farrar v. Wolfe, 357 P.2d 1005 (Okla. 1960).

44 *Clark,* at 850: "[R]elease . . . Roland F. Couture *and any and all other persons, firms and corporations. . . .*"; *Hasselrode,* at 764: "[R]elease . . . Frank R. Carnegie . . . *and any and all other persons, associations and corporations, whether herein referred to or not. . . .*" (Emphasis supplied.)

graduating with a degree D. O. Then, after he served a one-year internship and a three-year residency at the Detroit Osteopathic Hospital, he presented his credentials to the New Jersey State Board of Medical Examiners. Falcone passed the prescribed medical examination and was certified by the State Board as licensed "to practice Medicine and Surgery in the State of New Jersey."

Falcone then attended the medical school of the University of Milan for one academic year and, having received credit from Milan for his studies at the Philadelphia College of Osteopathy, he was awarded an M. D. Upon his return to the U.S., Doctor Falcone served a second, medical, internship at St. Peter's Hospital in New Brunswick, New Jersey, and a brief residency at the Jersey City Medical Center. Shortly thereafter, he was admitted to the Middlesex County Medical Society as an associate member, a temporary status of two years maximum duration. Following this admission, he practiced surgery and obstetrics in the city of New Brunswick. During this period he was a member of the staff of both St. Peter's Hospital and the Middlesex General Hospital. Just before the expiration of his two-year associate membership in the County Society, Falcone's early osteopathic education came to the knowledge of the Society.

Basing its action on an unwritten requirement of its Committee on Medical Ethics, the County Society refused to admit Falcone to active membership. Appeal to the State Medical Society availed him nothing. The Judicial Council of the American Medical Association ruled that it did not have jurisdiction to hear his further appeal. Immediately following his exclusion from active membership in the County Society, Doctor Falcone was removed from the staffs of both of the local hospitals in which he had practiced.

An action was brought in the Law Division of the courts of New Jersey seeking an order directing the County Society to admit Falcone into membership. After trial, the Superior Court so ordered. The defendant Society appealed to the Supreme Court of New Jersey, arguing that plaintiff had no judicially enforceable right of admission to membership. *Held:* affirmed. Exclusion of a qualified applicant from a professional association which results in the applicant's partial exclusion from the practice of his profession is contrary to natural justice and the public policy of the State of New Jersey. *Falcone v. Middlesex County Medical Society,* 34 N. J. 582, 170 A.2d 791 (1961).

The position of the courts with respect to the relationship between individuals and voluntary associations has so long been characterized by extreme reluctance to interfere that a case like *Falcone* is well worth careful study.[1] This policy against intervention has been reiterated so frequently as to make the citation of cases upholding it unnecessary. The various considerations influencing the courts to avoid interference were summarized by Professor Chaffee as the 'Hot Potato Policy' (involuntary associations can become very incensed at intervention), the 'Dismal Swamp Policy' (courts cannot be expected to inquire into the elaborate internal politics of such associations) and the 'Living Tree Policy' (judicial interference could stifle such organizations).[2] As a result of this policy of non-intervention, judicial relief in the areas of exclusion and expulsion from voluntary associations has been exceptional and limited in scope. The rising importance of voluntary organizations in contemporary life[3] has however led to considerable protest against this judicial attitude. Much of this protest has been directed against the characterization of some associations as voluntary at all. On this point Professor Robsen is worth quoting.

> The fact that a body is generally a voluntary society does not necessarily mean that every member has joined of his own spontaneous desire or

1 Stoljar, *The Internal Affairs of Associations,* in LEGAL PERSONALITY AND POLITICAL PLURALISM (1958).

2 Chafee, *The Internal Affairs of Associations Not for Profit,* 43 HARV. L. REV. 993, 1021 (1930).

3 See BERLE, THE TWENTIETH CENTURY CAPITALIST REVOLUTION (1954).

> even of his own free will. . . . All that is implied by the conception of a voluntary association is, in fact, the idea of a group that was originally created by the voluntary coming together of free persons for the furtherance of a common purpose and the embodiment of that coming together in some more or less permanent and tangible institution. This is the mark and sign of the true voluntary society, and often enough, indeed, the only "voluntary" element to be found remaining in the coercive, ruthless, arbitrary and autocratic bodies which sometimes pass by that name.[4]

The argument of the scholars has usually been either for the replacement of the narrow theories limiting relief in expulsion cases[5] or for a division of voluntary associations into those which are truly social and those which have economic impact.[6] *Falcone* doubtless represents a judicial response to the writings of the legal scholars. In order to understand the nature and extent of this response, it is necessary to survey the development of the earlier law in this area.

Most of the actions involving membership in voluntary associations have been suits by expelled members rather than excluded persons. Because legal theories developed in expulsion cases have helped to shape the law in the exclusion area, they must be briefly considered. The courts which have interfered in expulsion cases have generally required that some sort of property interest of the expellee be lost.[7] In granting relief, they have often relied on a theory that the articles of association form a contract between the members and the association and that only for violation of this contract is a remedy available.[8] Under the latter test, judicial relief was generally held to be available only where 1) the rules of the society were contrary to natural justice, 2) the society failed to abide by its own rules, 3) there was evidence of malicious unfairness in the enforcement of the rules.[9] This theory seems to demand no more than procedural due process for the expellee, though it seems that the English courts at least have employed it to protect substantive rights.[10]

The controversy over the proper attitude of the courts toward expulsions does not directly concern us here, but it is clear that jurisdictions which limit their relief in expulsion to cases where the member has lost a property right and had his contract with the other members breached, can logically give no relief to a person who has merely been *excluded* from an association.[11] Thus, most of the reported cases have refused relief of any sort to plaintiffs complaining of exclusion. One of the most forceful statements of this approach appeared in *Cline v. Insurance Exchange of Houston.*[12] The court in that case said, "A voluntary association has

4 ROBSON, JUSTICE AND ADMINISTRATIVE LAW 318, 319 (3rd. ed. 1951).

5 Pound, *Equitable Relief Against Defamation and Injuries to Personality,* 29 HARV. L. REV. 640 (1916); Chafee, *The Internal Affairs of Associations Not for Profit,* 43 HARV. L. REV. 993 (1930); Note, 22 U. OF CHI. L. REV. 694, 703 (1955).

6 Blumrosen, *Legal Protection Against Exclusion from Union Activities,* 22 OHIO ST. L. J. 21 (1961); Note, 65 YALE L. J. 369 (1956).

7 Lawson v. Hewell, 118 Cal. 613, 50 Pac. 763 (1897); White v. Brownell, 2 Daly 329 (N.Y. Ct. of App. 1868); Rigby v. Connol, 14 Ch. D. 482 (1880).

8 Krause v. Sander, 66 Misc. 601, 122 N.Y. Supp. 54 (Sup. A. 1910).

9 Dawkins v. Antrobus, 17 Ch. D. 615 (1881).

10 Lee v. Showman's Guild of Great Britain, [1952] 2 Q.B. 329; Abbot v. Sullivan, [1952], 1 K.B. 189; See, *The Use of the Injunction to Restrain Wrongful Expulsion from Voluntary Associations,* 1 SYDNEY L. REV. 186, 195 (1954).

11 Cox, *The Role of Law in Preserving Union Democracy,* 72 HARV. L. REV. 609, 619 (1959).

12 Sebastion v. Quarter Century Club of United Shoe Machinery Corp., 327 Mass. 178, 97 N.E.2d 412 (1951); Gold Knob Outdoor Advertising Co. v. Outdoor Advertising Association of Texas, 225 S.W.2d 645 (Tex. Civ. App. 1949); Chapman v. American Legion, 244 Ala. 553, 14 So. 2d 225 (1943); Cline v. Insurance Exchange of Houston, 140 Tex. 175, 166 S.W. 2d 677 (1943); Greenwood v. Building Trades Council, 71 Cal. App. 159, 233 Pac. 823 (Dist. Ct. App. 1925); Horan v. Blink, 17 Pa. Dist. 363 (1908). *Contra, In re* Guess, 16 Misc. 306, 38 N.Y. Supp. 91 (Sup. Ct. 1896). Weinber v. Inglis, (1919) 1 A.C. 606 (Eng.); Rex v. Lincoln's Inn, 4 Bunn & C. 825, 99 Eng. Rep. 1277 (1825); King v. Bishop of London, 15 East 117, 104 Eng. Rep. 789 (1812); Rex v. Gray's Inn, 1 Doug 353, 99 Eng. Rep. 227 (K.G. 1780).

the power to enact rules governing the admission of members and prescribing certain qualifications for membership: such rules will be enforced unless they are against good morals or violate the laws of the state."[13]

A significant exception to the general rule of non-interference with exclusion is developing in cases of exclusion from labor unions.[14] The early cases involving admission to unions generally reached the same result on much the same reasoning as other exclusion cases.[15] This earlier approach is illustrated by a union case in New York where the court said, "There is no rule of law anywhere which gives power to a court to compel a membership corporation or a voluntary association to accept an applicant as a member of such bodies. . . ."[16] The realization was growing, however, that the "basic difference between a social organization and a labor union lies in the control which the union has over the economic opportunities of the excluded worker."[17] The same idea has been more dramatically expressed as follows, "To exclude a man from a club may be to deny him a pleasant dinner companion, but to exclude a worker from a union may be to deny him the right to eat."[18] The fruits of this idea are a group of cases holding that no one may be barred from a job by a simultaneously closed shop and closed union.[19] It must be noted however that in all but one of these cases the relief given to the plaintiff has *not* been an order that they be admitted into the union, but rather an alternative remedy requiring that the union either admit them or not enforce the closed shop agreement against them. Only in *Thorman v. International Alliance*[20] was admission specifically ordered.

The cases dealing with admission to and retention of membership in medical societies have largely followed the patterns described above.[21] In the exclusion area, however, statutes in England and New York making membership in a medical society a prerequisite of practice led to extensive judicial review of refusal to admit.[22]

The position of medical societies as voluntary associations largely free from judicial scrutiny was seriously modified by a series of anti-trust suits arising out of controversies between local medical societies and cooperative health care groups.[23]

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13 140 Tex. 175, 166 S.W.2d 677 (1943).

14 Blumrosen, *Legal Protection Against Exclusion from Union Activities*, 22 OHIO STATE L. J. 21 (1961).

15 Frank v. National Alliance, 89 N.J.L. 380, 99 Atl. 134 (L. 1916); Meyer v. Journeymen Stonecutters Association, 47 N.J. Eq. 519, 20 Atl. 492 (Ch. 1890).

16 Simons v. Berry, 210 App. Div. 90, 205 N.Y. Supp. 442, 444 (1942).

17 Blumrosen, *Legal Protection Against Exclusion from Union Activities*, 22 OHIO ST. L. J. 21 (1961).

18 Summers, *The Right to Join a Union*, 47 COL. L. REV. 33 (1947).

19 Thorman v. International Alliance, 49 Cal. 2d 629, 320 P.2d 494 (1958); Wilson v. Hacker, 200 Misc. 124, 101 N.Y.S.2d 461 (Sup. Ct. 1950); Selgman v. Toledo Moving Picture Operators, 88 Ohio App. 137, 98 N.E.2d 54 (Ct. App. 1947); Williams v. International Brotherhood of Boilermakers, 27 Cal. 2d 586, 165 P.2d 903 (1946); Local 104 v. International Brotherhood of Boilermakers, 33 Wash. 2d 1, 203 P.2d 1019 (1945); James v. Marinship Corp., 25 Cal. 2d 751, 155 P.2d 329 (1944); Carrol v. Local 269, 133 N.J. Eq. 144, 31 A.2d 225 (Ch. 1943).

20 49 Cal. 2d 629, 320 P.2d 494 (1958).

21 *Expulsion:* Smith v. Kern Co. Med. Ass'n., 19 Cal. 2d 263, 120 P.2d 874 (1942); Weyrens v. Scotts Bluff Co. Med. Soc., 133 Neb. 815, 277 N.W. 378 (1938); State *ex rel.* Hyde v. Jackson Co. Med. Soc., 295 Mo. 144, 243 S.W. 341 (1922); Brown v. Harris Co. Med. Soc., 194 S.W. 1179 (Tex. Civ. App. 1917); Gregg v. Mass. Med. Soc., 111 Mass. 185, 15 Am. Rep. 24 (1872). *Exclusion:* Medical Society of Mobile County v. Walker, 245 Ala. 135, 16 So. 2d 321 (1944); State *ex rel.* Hartigan v. Momangalia Co. Med. Soc., 87 W.Va. 273, 124 S.E. 826 (1924). See generally, Note, *Expulsion and Exclusion from Hospital Practice & Organized Medical Societies*, 15 RUTGERS L. REV. 327 (1961).

22 People *ex rel.* Bartlett v. The Medical Society of the County of Erie, 32 N.Y. 187 (Ct. App. 1865); *Ex Parte* Paine, 1 Hill 665 (N.Y. Sup. Ct. 1841); Rex v. Askew, 4 Burr 2186, 98 Eng. Rep. 139(K.B. 1768); Dr. Bonham's Case, 8 Coke 107a, 77 Eng. Rep. 638 (C.P. 1610).

23 See American Medical Ass'n. v. United States, 317 U.S. 519 (1942); Group Health Cooperative of Puget Sound v. King County Medical Soc., 39 Wash. 2d 586, 237 P.2d 737 (1951).

The lower court in the *Falcone* case emphasized the fact that the A.M.A. and its component societies substantially control the entrance into and practice of medicine through control of the medical schools and the hospitals.[24] An extensive study of the A.M.A. appearing in the Yale Law Journal revealed that membership in a county society may be a prerequisite to 1) a reputation of competence 2) a license to practice 3) malpractice insurance 4) certification of specialization 5) emergency assistance 6) the privilege of practice in hospitals.[25] Such findings of power seem to make the imposition of some judicial safeguards inevitable.

The law of New Jersey on admission to voluntary associations before *Falcone* had developed in much the same way as the decisions traced in the preceding paragraphs. Two cases late in the 19th century held that there could be no judicial remedy for exclusion.[26] Both of these cases involved trade unions. More recent cases, however, held that there could not be simultaneously a closed shop and closed union.[27] Two cases in the last decade distinguished the labor union situation and held that there is no right of membership in a charitable corporation[28] or a fraternal order.[29] The second of these cases, *Trautwein v. Harbourt,* distinguished fraternal orders such as the defendant Order of the Eastern Star from organizations in which membership is an "economic necessity."[30]

Thus, the judicial policy against intervention in voluntary associations may be seen to have resulted in relief for a minority of persons expelled or excluded from them. Relief in expulsion cases was generally limited by theories which altogether precluded relief in exclusion cases, with the partially recognized exception of exclusion from a union. On the books in 1960 there were only two modern cases explicitly ordering that membership in a voluntary association be granted.[31]

It is in this legal context that we must examine *Falcone.*

The trial court in *Falcone* had expressly held that where a voluntary membership association so controls the practice of a trade or profession as to become in fact an involuntary association, such an association becomes subject to strict judicial scrutiny and that the exclusion of Doctor Falcone "contravenes the public policy of the State."[32] In approving this holding the Supreme Court first recited the facts summarized above, laying heavy emphasis on Doctor Falcone's qualifications to practice all branches of medicine and the fact that the State of New Jersey had so licensed him.[33] The court next described the adverse economic effects upon the plaintiff, arising from the action of the defendant.[34] It stated that it was clear from the record that Doctor Falcone, due to his having been dropped from the local hospital staffs, would no longer be able to successfully continue his practice of obstetrics and surgery because membership in the Society was a prerequisite to the use of hospital facilities.[35] The court then referred to a number of cases and law review articles establishing the monopoly held by the County Society (through

24 Falcone v. Middlesex County Medical Society, 62 N.J. Super. 184, 162 A.2d 324, 329-30 (L. 1960).
25 Note, 63 YALE L.J. 937, 949-50 (1954).
26 Frank v. Natural Alliance, 89 N.J.L. 380, 99 Atl. 134 (L. 1916); Mayer v. Journeymen Stonecutters Ass'n., 47 N.J. Eq. 519, 20 Atl. 492 (Ch. 1890).
27 Carrol v. Local 269, 133 N.J. Eq. 144, 31 A.2d 223 (Ch. 1943); Wilson v. Newspaper and Mail Deliverers' Union, 123 N.J. Eq. 343, 197 Atl. 720 (Ch. 1938).
28 Leeds v. Harrison, 7 N.J. Super. 558, 72 A.2d 271 (L. 1950).
29 Trautwein v. Harbourt, 40 N.J. Super. 247, 123 A.2d 30 (App. Div. 1956).
30 *Id.* at 264, 170 A.2d at 39.
31 Thorman v. International Alliance, 49 Cal. 2d 629, 320 P.2d 494 (1958); Group Health Cooperative of Puget Sound v. King County Medical Soc., 39 Wash. 2d. 586, 237 P.2d 737 (1951).
32 Falcone v. Middlesex County Medical Society, 62 N.J. Super. 184, 201, 162 A.2d 324, 333 (L. 1960).
33 Falcone v. Middlesex County Medical Society, 34 N.J. 582, 586-87, 170 A.2d 791, 794 (1961).
34 *Ibid.*
35 *Ibid.*

its affiliation with the American Medical Association) over the practice of medicine in Middlesex County.[36] It quoted with approval the statement appearing in the Yale Law Journal to the effect that non-membership amounts to a partial revocation of licensure to practice medicine.[37]

Referring to the trial court's holding that the defendant's action was contrary to "public policy;" the court sought first to establish the relevance of policy arguments in the courts of New Jersey,[38] citing its recent decisions: imposing a higher standard of care on landlords,[39] permitting corporate gifts to charity,[40] holding prenatal injuries compensable,[41] eliminating charitable immunity[42] and limiting the effect of express warranties by manufacturers.[43] Stressing the Holmesian doctrine that public policy is at the bottom of every important principle which is developed by litigation,[44] the court referred to the traditional common law reluctance to interfere in the affairs of voluntary associations.[45] Conceding that this reluctance is in most cases wise, the court nevertheless emphasized that "in particular situations, where the considerations of policy and justice were sufficiently compelling, judicial scrutiny and relief were not found wanting. . . ."[46] Citing New Jersey cases involving expulsion from social organizations and cases from other jurisdictions dealing specifically with expulsions from medical societies, the court noted that the property and contract theories have been sometimes used in giving relief while in other cases expulsions have been set aside on the bases of unreasonableness, injustice and violation of public policy.[47] The court relied on *Bernstein v. Alameda-Contra Costa Medical Association*[48] as support for the proposition that any medical association's by-law which is against public policy is unenforceable.

When confronted with the recent superior court case of *Trautwein v. Harbourt*,[49] discussed above, the court attempted to state the exact dimensions of its action:

> We are here concerned with and therefore deal solely with an organization, membership in which may be here, in the language of Trautwein, reviewed as "an economic necessity"; in dealing with such an organization, the Court must be particularly alert to the need for truly protecting the public welfare and advancing the interest of justice by reasonably safeguarding the individual's opportunity for earning a livelihood while not impairing the standards and objectives of the organization.[50]

Immediately following this statement, the court discussed six cases which it regarded as supporting its position. In the first,[51] a licensed physician, seeking to fulfill a statutory duty imposed upon him by the law of New York, sought admission into his county medical society. He was refused admission on the grounds of a previous violation of the AMA's ethical prohibition against advertising. The New York Court of Appeals found this an insufficient ground for exclusion and ordered the plaintiff

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36 *Ibid.*
37 *Id.* at 588, 170 A.2d at 795.
38 *Ibid.*
39 Faber v. Creswick, 31 N.J. 234, 156 A.2d 252 (1959).
40 A. P. Smith Mfg. Co. v. Barlow, 13 N.J. 145, 98 A.2d 581 (1953).
41 Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960).
42 Callopy v. Newark Eye & Ear Infirmary, 27 N.J. 29, 191 A.2d 276 (1958).
43 Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).
44 HOLMES, THE COMMON LAW 35 (1st ed. 1881).
45 Falcone v. Middlesex County Medical Society, 34 N.J. 582, 590, 170 A.2d 791, 796 (1961).
46 *Ibid.*
47 *Ibid.*
48 39 Cal. App. 2d 241, 293 P.2d 862 (Dist. Ct. App. 1956).
49 22 N.J. Super. 220, 125 A.2d 283 (1956).
50 Falcone v. Middlesex County Medical Society, 34 N.J. 582, 591, 170 A.2d 791, 796 (1961).
51 People *ex rel.* Bartlett v. Medical Society of the County of Erie, 32 N.Y. 187 (Ct. App. 1865).

admitted to full membership. The second,[52] one of the monopoly suits against the AMA, also resulted, after a finding that a County Society's action violated the State's anti-monopoly prohibitions, in an injunction forbidding the exclusion of the plaintiff from membership. The *Marinship* case,[53] was quoted by the court to the effect that when a union attains a monopoly of a supply of labor through use of the closed shop, its freedom to exclude persons from membership is severely curtailed because in such a situation the power to choose members affects not merely "social relations" but "the fundamental right to work for a living." The next three were New Jersey cases[54] similar to *Marinship* in their facts and containing similar language. *Thorman v. International Alliance,*[55] the last case reviewed by the court, appeared to be the only one in which, as was noted above, a union was specifically ordered to admit a person to membership.

The court seems to have employed these cases to illustrate its next proposition: that the public policy considerations in modern cases involving trade and professional associations are substantially different than those of the earlier cases dealing with social, religious and fraternal associations. The Court said of the former situations that "there have been persuasive indications, . . . that in a case presenting sufficiently compelling factual and policy considerations, judicial relief will be available to compel admission to membership."[56] This seems nothing more than a re-statement of the court's "economic necessity" test just presented. Yet in the next section the court seems to go farther. Noting that the public is greatly concerned with the affairs of this private voluntary membership association because of its virtual monopoly over the local hospitals and its power to exclude Falcone and thereby limit local patients' free choice of physician, the court said that "public policy strongly dictates that this power should not be unbridled, but should be viewed judicially as a *fiduciary power* to be exercised in reasonable and lawful manner for the advancement of the interests of the medical profession and the public generally; the evidence firmly displays that here it was not so exercised, and that Doctor Falcone was fairly and justly entitled to the relief awarded him in the Law Divisions."[57] Finally, and somewhat summarily, the court handled the problem of the validity of the use by the County Medical Society of its requirement of four years of study in an AMA-approved medical school. This requirement, it was said, need not be considered in its general application because of Doctor Falcone's eminent qualifications.[58] As applied to him, such a requirement was said to be "arbitrary and unreasonable and beyond the pale of the law."[59] Summing up its decision the court closed by saying:

> When the County Society engages in action which is designed to advance medical science or elevate professional standards, it should and will be sympathetically supported. When, however, as here, its action has no relation to the advancement of medical science of the elevation of professional standards but runs strongly counter to the public policy of our State and the true interests of justice, it should and will be stricken down.[60]

Viewed exclusively on its particular facts and with regard solely to the court's action, *Falcone* is eminently clear. A qualified and licensed physician who was deprived of ability to fully practice his profession by his exclusion from the defendant

52 Group Health Cooperative of Puget Sound v. King County Medical Soc., 39 Wash. 2d 586, 237 P.2d 737 (1951).
53 James v. Marinship Corp., 25 Cal. 2d 721 155 P.2d 329 (1944).
54 Carrol v. Local 269, 133 N.J. Eq. 144, 31 A.2d 233 (Ch. 1943); Wilson v. Newspaper & Mail Deliverers' Union, 123 N.J. Eq. 343, 197 Atl. 720 (Ch. 1938); Cameron v. International Union, 118 N.J. Eq. 11, 176 Atl. 692.
55 49 Cal. 2d 629, 320 P.2d 494 (1958).
56 Falcone v. Middlesex County Medical Society, 34 N.J. 582, 596, 170 A.2d 791, 799 (1961).
57 *Id.* at 596-97, 170 A.2d at 799.
58 *Id.* at 598, 170 A.2d at 800.
59 *Ibid.*
60 *Ibid.*

society was ordered admitted to it. The element of natural justice so frequently stressed by the court was plainly satisfied by its ruling. Yet any attempt to state in a single sentence this court's position as to voluntary associations and to thereby predict its future action would flounder for want of a clear statement by the Court of the limits of its decision.

In three succeeding statements of increasing generality, the court attempted to set forth the principle on which the decision was based. It is first emphasized that Doctor Falcone's exclusion resulted in a partial divestiture of his state-granted license.[61] Such an action was contrary to a *statutory* expression of the state's public policy. This test is clear enough, but narrow. It would only invalidate exclusion where there is a statutory license to practice a profession and where the applicant is barred because of his exclusion from fully exercising his rights under the license.

Next the court says that it will act in some situations where membership is an "economic necessity," the requirements of natural justice demand the action, and the public welfare is served. Acting in such situations, however, the court will be careful not to impair the legitimate objectives of the society.[62] This implies a broader range of judicial activity. Under such a formulation the courts are no longer limited by the requirement of a statutory license, but the limitation, however vague, of economic necessity is yet present.

The final paragraphs of the court's opinion seem to suggest a yet broader criterion for the application of judicial power to voluntary associations. There the court emphasizes the public interest in the affairs of this association and the power exercised by it. Such power, says the court, should be used in a fiduciary manner and if it is not so used it will be subject to judicial reversal.[63] These sentences, recast in general terms, could be used to justify extensive judicial intervention. There is no talk here of statutory license nor economic necessity nor even of exclusion. Rather it seems, wherever the public interest is tied up in a voluntary association its actions must comport with that public interest.

None of these statements by the court are inconsistent and none of them inapplicable to the case of Doctor Falcone, but each establishes a test of judicial intervention which calls forth different predictions as to its action in future cases.

Whether or not one concurs with the holding here and regardless of one's judgement upon each of the three grounds of intervention required by the case, there are certain objections which may be made to the opinion. The court gives the County Society and other county societies little guidance as to what they must do in further admission situations to avoid judicial disapproval. There was too little discussion in this case of just what a society may look into in determining admission.

A more fundamental objection must be made to the court's failure to consider any alternative to the relief granted.[64] Conceding that it is clear that plaintiff was entitled to relief from the economic hardship imposed upon him by the society's refusal to admit him, it is not so clear that an order compelling admission was the only or the best relief. All but one of the union cases, it will be remembered, gave defendant unions the alternative of admitting plaintiffs to membership *or* not enforcing their closed shop against them. It is possible that the adverse effect upon Falcone could be remedied in no other way than admission,[65] but to grant this extraordinary remedy compelling the members of the Society to associate with

61 *Id.* at 588, 170 A.2d at 795.
62 *Id.* at 592, 170 A.2d at 796-97.
63 *Id.* at 597, 170 A.2d at 799.
64 For a similar criticism of the lower court's decision, see Note, 15 RUTGERS L. REV. 327 (1961). The analogous distinction between admission to unions and job protection is discussed in Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System,* 67 YALE L.J. 1327, 1343 (1961).
65 See note 25 and the accompanying text. It is possible that full relief could not have been granted in this case by an order against the hospitals, but it is nevertheless submitted that the court should have discussed this point.

someone not of their choosing and over their objection that the hospitals and not they should be defendants was to decide the case without sufficient consideration of the alternatives.

The second ground of the court's intervention, its idea of economic necessity, is open to objection on grounds of vagueness. Clearly the Order of the Eastern Star is at one end of a spectrum of necessity and a county medical association near the other. Arguably, however, there are few organizations extant in our commerical society membership in which may not be of economic benefit to some applicants. It seems unlikely that the court's simple ranging of social, religious and fraternal organizations on one hand and economic associations on the other will stand the test of future litigation.[66]

Finally, one might take objection to the broad language of the court's last test. It is easy to say that a voluntary association whose interests conflict with those of the public should be limited. But the court's use of the phrase "Fiduciary power" seems unnecessary to the decision and an undesirable analogy subject to future application which might too severely limit an association's freedom of action.[67]

The decision in *Falcone,* despite its sometimes vague and perhaps overly broad language, is an important and beneficial alteration in both the general law of voluntary associations and the particular law of the medical profession. The decision is a response to an actual need of a society increasingly corporate in structure.[68] The recognition by this court that some intervention by the judiciary may be necessary apart from the anti-trust laws is a valuable contribution to this area of the law. Of necessity, such an early recognition leaves open many questions of extent and theory.

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WILLS — BANK DEPOSITS — DEPOSIT CERTIFICATES MARKED "P. O. D." (PAYABLE ON DEATH) TO A NAMED BENEFICIARY ARE AN INVALID ATTEMPT AT TESTAMENTARY DISPOSITION UNLESS THE FORMALITIES OF A WILL ARE COMPLIED WITH. Decedent had made three bank deposits totalling $8500 and received in return deposit certificates bearing his name followed by the letters "P. O. D." and the names of his two daughters by a previous marriage. Decedent made a will providing legacies for his daughters by the previous marriage. He specifically provided that his widow should not share in his estate. His widow elected to take under the law. She filed exception to the inventory and appraisement of the estate because the bank deposit certificates were not included. It was agreed by the parties (the widow and the daughters named as beneficiaries) that "P. O. D." meant "payable on death" and that it was decedent's intent that the certificates should on his death be payable to his two daughters who names followed the letters "P. O. D." on the certificates. *Held.* Widow's exceptions upheld. Adding words "payable on death" to a certificate of deposit was an invalid testamentary disposition contrary to the Statute of Wills[1] and the certificates of deposit were to be included in decedent's estate. *In re Estate of Atkinson,* 175 N.E.2d 548 (Ohio, P. Ct., 1961).

66 For a suggestion that economic interests are not the only ones demanding judicial protection see, HORN, GROUPS AND THE CONSTITUTION 173 (1956).

67 This approach is suggested by Professor Chafee's "Living Tree" argument. See note 2 and accompanying text.

68 BERLE, THE TWENTIETH CENTURY CAPITALIST REVOLUTION 82 (1954).

1 OHIO REV. CODE ANN. § 2107.03 (Page 1953):

> Except oral wills, every last will and testament shall be in writing, but may be handwritten or typewritten. Such will shall be signed at the end by the party making it or by some other person in such party's presence and at his express direction, and be attested and subscribed in the presence of such party, by two or more competent witnesses, who saw the testator subscribe, or heard him acknowledge his signature.

The disposition of bank deposits to recipients other than the depositor's estate on the death of the depositor has become a source of increased litigation. This is due to the increasing use of the bank deposit for purposes other than merely the safekeeping of funds;[2] to the various forms which bank deposits take and to the failure of the courts to adopt realistic, consistent legal theories in regard to bank deposits.[3] Bank deposits used to dispose of relatively small amounts of cash in a simple and effective manner are becoming more widespread. If correctly established, they provide a simple and inexpensive way of providing for heirs on the death of the depositor. They provide the layman a valuable device for making testamentary dispositions without the aid of lawyers. Such bank deposits, testamentary in character, have been called "the poor man's will."[4]

Generally, bank deposits by which the depositor seeks to give some interest in the fund to another take one of four forms:

1. Deposit by A for A, in trust for B.
2. A and B jointly.
3. In the name of B.
4. For A, payable on death to B.[5]

In dealing with these forms the courts have adopted different theories to explain the results reached. They treat the deposits as trusts[6] or a hybrid form of trust — the "tentative trust";[7] called in New York the "Totten trust."[8] Another theory adopted is a gift theory, either as a gift inter vivos or a gift causa mortis.[9] A present irrevocable interest to the beneficiary must be conveyed during the depositor's lifetime for the gift to be effective.[10] Taking from either property or contracts law, some courts, depending on the form of the deposit, use theories of joint tenancy and survivorship.[11] The form of the deposit is not always controlling. The same forms of deposit are sometimes treated under different theories with different results.[12]

In the present case, the Ohio court did not deal at length with the various theories by which the bank deposit in question could be characterized. It was not seriously contended that the bank deposit in this case was a deposit in trust for the beneficiaries. This is probably because, even if there were a trust, a revocable trust can be successfully challenged by a surviving widow who elects to take under the law, so that the res of the trust is included in decedent's estate.[13] It is not clear from the discussion of the cases cited by the Ohio court on what possible theory such a disposition of a bank deposit would be held to pass to the beneficiary on the death of the depositor. The Ohio cases which support such a disposition of a bank deposit as in the present case are based on a theory of joint ownership either by gift or by contract.[14] This is true despite the fact that

2 1 SCOTT, TRUSTS § 58.1, p. 477.
3 39 DICK. L. REV. 37 (1934).
4 53 COLUM. L. REV. 103 (1953).
5 *Ibid.*
6 SCOTT, *op. cit. supra* note 2, § 58, p. 477.
7 Matter of Totten, 179 N.Y. 112, 71 N.E. 748 (1904).

> A deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration such as delivery of the pass book or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation or some act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor.

8 Deriving its name from the famous case of Matter of Totten, *supra* note 7.
9 Nemcek v. Central City Nat'l Bank, 188 Pa. Super. 518, 149 A.2d 533 (1959).
10 Oleff v. Hodapp, 129 Ohio St. 432, 195 N.E. 838 (1935).
11 Dudley v. Uptown Nat'l Bank of Moline, 25 Ill. App. 2d 514, 167 N.E.2d. 257 (1960).
12 Butler State Bank v. Duncan, 319 S.W.2d 913 (Mo. App. 1959).
13 Harris v. Harris, 140 Ohio St. 437, 72 N.E.2d 378 (1947).

in Ohio there is no technical joint tenancy as to real or personal property.[15] There can be survivorship by contract, however.[16] To be effective such a deposit must vest a present interest in the party named as joint owner or beneficiary.[17] The basis of the decision in the present case is that there is no present interest conveyed; the letters "P. O. D." are, therefore, clearly testamentary and unless witnessed by two witnesses the bank deposit certificate is invalid to pass any interest to the named beneficiary.[18]

The authorities of other jurisdictions are generally in accord with the result reached by the Ohio court.[19] The Georgia Supreme Court in *Stone v. Guest*[20] discussed the possibility of treating the attempted disposition of a bank deposit as a trust, a gift, or a third-party beneficiary contract and rejected all three theories. Following the famous case of *Matter of Totten*,[21] a trust theory is probably the easiest to sustain once it is determined that the intention of the testator is testamentary.[22] It has been suggested that the court adopted the trust theory in these bank deposit cases to circumvent the Statute of Wills.[23] The trust device, however, is largely fictional and has not provided uniformity in this area of the law.[24] While there is a tendency in the law to wink at the Statute of Wills when a depositor attempts to make small cash legacies through a bank deposit, by the use of a trust theory, such a forthright attempt as in the present case (having the deposit slips marked P. O. D. to a beneficiary) is too baldly in violation of the Statute of Wills to receive judicial sanction,[25] unless there is statutory permission for such a testamentary bequest.[26]

The result reached in the present case was the correct one considering the law in Ohio and neighboring jurisdictions. Also, the result is sound in that it strengthens the socially desirable public policy that prevents a husband from disinheriting his wife. The result, however, is also unfortunate in that it held that a bank deposit "P. O. D." to a beneficiary must be executed with all the formality of a will in order to be effective. The reason other courts attempt to disregard the Statute of Wills in such cases is because of the useful nature of bank deposits to provide an uncomplicated method to make small devises of money. The P. O. D. form of deposit is not unusual considering the number of reported cases in which such deposits were brought into litigation. It is also an acceptable form for passing title to United States Savings Bonds upon death.[27] Those cases, however, are controlled by federal regulations. It has been suggested that the use of the P. O. D. designation on bank deposit certificates has increased because of the layman's familiarity with it in connection with government bonds.[28]

The result in the present case is unfortunate in that the deposit is attacked as to its form. Under the theory of the trust cases, the bank deposit is a device

14 In re Estate of Voegel, 161 N.E.2d 778, *appeal dismissed*, 169 Ohio St. 237, 158 N.E.2d 893 (1959); Sage v. Flueck 132 Ohio St. 377, 7 N.E.2d 802 (1937); Cleveland Trust Co. v. Scobie, 114 Ohio St. 241, 151 N.E. 373 (1926).

15 In re Hutchinson's Estate, 120 Ohio St. 542, 166 N.E. 689 (1929).

16 *Ibid.*

17 Schmitt v. Schmitt, 39 Ohio. App. 219, 177 N.E. 478 (1928).

18 OHIO REV. CODE ANN. § 2107.03 (Page 1953).

19 Guest v. Stone, 206 Ga. 239, 56 S.E.2d 247 (1949); Dudley v. Uptown Nat'l Bank of Moline, 25 Ill. App. 2d 514, 167 N.E.2d 257 (1960); In re Estate of Schultz, 152 N.Y.S.2d 959 (Surr. Ct. 1956); Hillie v. Slovenian Sav. & Loan Ass'n., 67 Pa. D & C 190 (C.P. 1948).

20 *Supra* note 19.

21 179 N.Y. 112, 71 N.E. 748 (1904).

22 Butler State Bank v. Duncan, 319 S.W.2d 913 (1959).

23 53 COLUM. L. REV. 103 (1953).

24 39 DICK. L. REV. 37 (1934). See In re Holpern, 303 N.Y. 33, 100 N.E. 120 (1931).

25 See cases cited note 19 *supra*.

26 Deist Estate, 75 Pa. D & C 145 (C.P. 1950). *But see* Hillie v. Slovenian Sav. & Loan Ass'n 67 D & C 190 (Pa. 1948).

27 Harvey v. Rackliffe, 141 Me. 169, 41 A.2d 455 (1945).

28 Dudley v. Uptown Nat'l Bank of Moline, 25 Ill. App. 2d 514, 167, N.E. 2d 257 (1960).

which a man can use as a will without the required formality of a will. In making a bank deposit the depositor in reality fulfills the purposes of the Statute of Wills. There is the ritualistic act which the Statute requires and there is the evidentiary requisite fulfilled by the deposit certificate.[29] A person making a deposit with the intent that it be payable on his death to another generally would give the act as much deliberation as any other testamentary act. By requiring the depositor to consult an attorney to determine which form of bank deposit will be valid to pass an interest to another at his death, the Ohio court fails to recognize the desirable effect such a device can have in a person's estate plan. Since the assistance of a lawyer must be sought to choose the correct form of deposit, the depositor is better advised to have the attorney draft a will.

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29 51 YALE L. J. 1, 38 (1941).