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Recent Decisions

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RECENT DECISIONS

ARMED SERVICES — GOVERNMENT INSURANCE — REINSTATEMENT OF LAPSED POLICY WHERE FAILURE TO APPLY FOR WAIVER OF PREMIUMS IS DUE TO CIRCUMSTANCES BEYOND CONTROL OF INSURED. —*United States v. Sinor,* 238 F.2d 271 (5th Cir. 1956). Plaintiff attempted to recover the benefits of a National Service Life Insurance Policy which had lapsed for non-payment of premiums. Insured was a victim of myelogenous leukemia and was discharged from service with 100 percent disability. The administrator of his estate contended that insured's physical and mental condition constituted "circumstances beyond his control," thus preventing him from applying for a waiver of premiums. On appeal from a judgment for plaintiff, the United States Court of Appeals for the Fifth Circuit reversed, holding that proof of mental incompetence was necessary to substantiate a claim of circumstances beyond the insured's control.

The Veterans' Administrator has the authority to reinstate a policy and waive premiums retroactively "in any case" if he finds that the veteran was prevented from making application for reinstatement and waiver due to "circumstances beyond his control." National Service Life Insurance Act, 54 STAT. 1011 (1940), as amended, 38 U.S.C. § 802 (n) (1952). As indicated by the instant case, the Fifth Circuit interprets "circumstances beyond his control" as meaning mental incapability when the health of the insured is in issue. *Accord, Linton v. United States,* 227 F.2d 254 (5th Cir. 1955); *Aylor v. United States,* 194 F.2d 968 (5th Cir. 1952); *Scott v. United States,* 189 F.2d 863 (5th Cir.), *cert. denied,* 342 U.S. 878 (1951). Emphasis on mental condition was stressed in *Jensen v. United States,* 94 F. Supp. 468 (D. Utah 1950), where insured was suffering from Banti's disease which had caused both physical and mental deterioration. The court allowed a waiver after pointing out that the greater emphasis was being placed on insured's mental condition. A greatly impaired physical condition by itself was not enough. *Gossage v. United States,* 229 F.2d 166 (6th Cir. 1956); *Guihan v. United States,* 110 F. Supp. 738 (E.D.N.Y. 1953); *McIntosh v. United States,* 114 F. Supp. 241 (E.D. Ky. 1953). In *White v. United States,* 123 F. Supp. 869 (W.D. Va. 1954), the court stated that "it is quite conceivable . . . that there might be many instances of complete physical disability, where the circumstances of the disability would not justify a finding that the failure to apply for a waiver was due to circumstances beyond the veteran's control." *Id.* at 872. However, the court was careful to point out it was not

necessary to go to the other extreme of requiring that the insured be found to have been "non compos mentis" for his condition to operate as an excuse. In the *White* case the court held that the mentality of the insured, who was suffering from nephritis — leaving him nervous and depressed — was sufficient to justify reinstatement.

Notwithstanding this narrow emphasis on the mental condition, there have been decisions in other circuits in which the phrase "circumstances beyond his control," has been liberally construed. In *Landsman v. United States,* 205 F.2d 18 (D. C. Cir. 1953), the insured suffered from Hodgkin's disease and was never aware of his true physical condition. His true condition was not diagnosed until he was on his death bed; unawareness of his serious condition constituted a circumstance beyond his control. In *Kershner v. United States,* 215 F.2d 737 (9th Cir. 1954), as in the instant case, the insured was suffering from myelogenous leukemia. Government doctors knew insured was dying but, for medical reasons, chose to encourage him to believe in eventual recovery. Lack of opportunity to make a free or intelligent choice concerning his insurance was a circumstance beyond insured's control. Similarly, in *United States v. Vandver,* 232 F.2d 398 (6th Cir. 1956), where insured did not learn the seriousness of his condition—cancer—until near death, the court held that ignorance of the existence of the disease or of its seriousness and effects was enough to reinstate the policy. See *Sly v. United States,* 220 F.2d 212 (7th Cir. 1955); *United States v. Myers,* 213 F.2d 223 (8th Cir. 1954).

A study of the provisions of the National Service Life Insurance Act reveals that the act was intended to be remedial and gratuitous in nature. It provided that those who died in the line of duty, including death resulting from disease, within the statutory period, would be deemed to have at least $5,000 insurance. National Service Life Insurance Act, 54 STAT. 1009 (1940), as amended, 38 U.S.C. § 802 (d) (2) (1952). The statutory period was obviously intended to cover those men in service at the time of the outbreak of World War II who might not have had opportunity to apply for insurance. Where any person was in the active service between October 8, 1940 and September 2, 1945, and was denied insurance solely because of health, the act automatically granted insurance if the applicant thereafter incurred total or permanent disability. 60 STAT. 782 (1946), 38 U.S.C. § 802 (c) (3) (1952). The scope of exceptions to forfeiture of a policy once acquired—the problem in the instant case — has also been extended since the original act, which stated that the Veterans' Administrator could make an application for waiver effective within a period of not more than six months prior to

the date of application, but not prior to the first day of the seventh month of continuous disability. National Service Life Insurance Act, 54 STAT. 1011 (1940). In 1942 it was liberalized to include any situation in which the Administrator finds that the insured's failure to make timely application for waiver of premiums was due to circumstances beyond his control. 56 STAT. 658 (1942), 38 U.S.C. § 802 (n) (1952). In 1944, further liberalization provided that in the event of insured's death without an application for waiver having been filed, the beneficiary could file within a year of insured's death, with evidence of the insured's right to waiver. 58 STAT. 763 (1944), 38 U.S.C. § 802 (n) (1952). It is evident these amendments were meant to be far-reaching in allowing reinstatement of insurance coverage, and interpretation of statutory provisions in this regard ought to be correspondingly liberal.

Language regarding mental competence is used in § 802 (d) (5) of the act. It provides that ". . . persons shown by evidence satisfactory to the Administrator to have been mentally or legally incompetent at the time the right to apply for continuation of insurance or for death benefits expires, may make such application at any time within one year after removal of such disability." 56 STAT. 658 (1942), 38 U.S.C. § 802 (d) (3) (1952). This provision and the one in § 802 (n), providing for reinstatement if the insured was prevented from making application due to "circumstances beyond his control," were enacted in the same bill in 1942. It thus seems logical to infer that Congress intended that a broader meaning be given the quoted phrase than mere mental incompetence, but there is no definitive indication as to the extent. Prior to passage, a letter from Frank T. Hines, then Veterans' Administrator, to the President of the Senate, May 14, 1942, stated:

> ". . . Those who are captured, besieged, or otherwise isolated by the forces of the enemy between December 7, 1941, and April 30, 1942, who are or may be without any insurance protection and who are unable, by reason of circumstances of which they have no control, to apply for the same, are in as great need of insurance protection as those who are known to be totally disabled. Further, it is believed there should be a definite limitation upon the time in which insurance protection, or benefit, under such provisions may be claimed, and that there should be relief for those who through *legal or mental* incompetence are unable to apply within the limited time." S. REP. No. 1430, 77th Cong., 2d Sess. 3 (1942). Emphasis added.)

That it was not intended by the Veterans' Administrator that the phrase "circumstances beyound his control" and mental incompetence should necessarily mean the same thing is clear, although

there is no indication that the Veterans' Administrator intended the interpretation of "circumstances beyound his control" to extend to persons other than those captured, besieged, or otherwise isolated by the forces of the enemy. The enacted bill did not include this latter restriction but provided that waiver should apply "in any case in which the Administrator finds that the insured's failure to make timely application for waiver of premiums or his failure to submit satisfactory evidence of the existence or continuance of total disability was due to circumstances beyond his control." National Service Life Insurance Act, 54 STAT. 1011 (1940), as amended, 38 U.S.C. § 802 (n) (1952).

Congress did not restrict the "circumstances" proviso to cases where the insured was mentally incompetent but spoke of "any case" in which the insured's failure to make timely application for waiver of premiums was due to "circumstances beyond his control." *Landsman v. United States, supra.* Since the court in the instant case restricted the "circumstances" proviso to those instances where the insured was mentally incompetent, the interpretation appears too narrow and not in accord with the liberal spirit of the act, observed in its amendments and legislative history.

Harry Contos, Jr.

CONSTITUTIONAL LAW — DUE PROCESS — INVOLUNTARY BLOOD TEST NOT A VIOLATION OF DUE PROCESS. — *Breithaupt v. Abram,* 352 U.S. 432 (1957). After being involved in a fatal automobile accident, petitioner was taken to a hospital and while unconscious, a sample of his blood was taken by the attending physician at the request of a state patrolman who suspected petitioner had been drinking. The results of the blood test, establishing intoxication, were admitted in evidence over petitioner's objection; on the basis of the blood test he was convicted of involuntary manslaughter. No appeal was taken but the supreme court of New Mexico denied habeas corpus. The United States Supreme Court granted certiorari since it was contended that involuntary blood tests administered at the instance of state police officers are a denial of due process within the meaning of the Fourteenth Amendment of the Federal Constitution. *Held,* the taking of a blood sample by a physician from an unconscious person was not so offensive to the whole community and its sense of justice as to violate due process.

On the state level three approaches have been utilized to determine the admissibility in evidence of involuntary blood tests against the accused in a criminal action: (1) is an involuntary blood test a deprivation of the right against compulsory self-incrimination; (2) is such a test an unreasonable search and seizure; and (3) is it a violation of due process?

The earlier state decisions made use of the first approach — compulsory self-incrimination. It was held that an accused was not denied his constitutional guarantee against compulsory self-incrimination by the taking of a blood sample while he was unconscious and thereafter using it as evidence against him. *State v. Cram,* 176 Ore. 577, 160 P.2d 283 (1945). This conclusion was grounded in the theory that the right against self-incrimination applies only to "testimonial" as distinguished from "real" evidence. *State v. Sturtevant,* 96 N.H. 99, 70 A.2d 909 (1950); *Commonwealth v. Statti,* 166 Pa. Super. 577, 73 A.2d 688 (1950). However, the opposite result has been reached without passing on any constitutional issue. The results of an involuntary blood test have been held inadmissible where the blood was taken without the express or implied consent of the accused. *State v. Weltha,* 228 Iowa 519, 292 N.W. 148 (1948). Obviously, under such a theory the use of blood samples taken from an unconscious person would be precluded.

There is some authority that the administration of an involuntary blood test constitutes an unreasonable search and seizure and as such is inadmissible as evidence against the accused. *State v. Kroening,* 274 Wis. 266, 79 N.W.2d 810 (1956). However, it is clear that the federal power cannot be invoked where the state has denied the accused the privilege against self-incrimination, *Twining v. New Jersey,* 211 U.S. 78 (1908), or where evidence obtained through an illegal search and seizure is admitted against him. *Wolf v. Colorado,* 338 U.S. 25 (1949).

The federal courts hesitate to interfere with state administration of criminal justice and will only intervene where there has been violation of the "concepts of ordered liberty" within the meaning of the due process clause of the fourteenth amendment. *cf. Palko v. Connecticut,* 302 U.S. 319 (1937). The forced extraction of evidence from the stomach of the accused is one instance where the federal judiciary has found a deprivation of due process. *Rochin v. California,* 342 U.S. 165 (1952). Similarly a state conviction has been reversed where the Supreme Court found that coercive methods were employed to elicit a confession from the accused. *Malinski v. New York,* 324 U.S. 401 (1945). It is to be noted that in both cases there were overtones of brutality which were sufficient to constitute a violation of fundamental

"concepts of ordered liberty."

The principle of the *Rochin* case has been confined, on the state level, to situations where "brutal" or "shocking" force was employed to obtain evidence for subsequent use at a trial or hearing. Consequently, it has been held that a blood test administered to an unconscious person did not fall within the confines of *Rochin*, *People v. Haeussler,* 41 Cal. 2d 252, 260 P.2d 8 (1953), *cert. denied,* 347 U.S. 931 (1954). In the instant case the majority held that the withdrawal of blood from an unconscious person was not "conduct that shocks the conscience" and did not come within the purview of the *Rochin* doctrine, thus limiting the rule to instances where police conduct is "brutal," "offensive" or "shocks" the conscience. The majority reasoned that the conduct complained of in the *Rochin* case was not so much the lack of consent, but the forceful struggle which occurred prior to the use of the stomach pump. Such a narrow interpretation of the principle seems to sap much of its vitality.

Examples of the application of the *Rochin* doctrine which occurs when it is strictly construed may be found in four recent decisions. Reasoning that the rule applied only to "shocking" force, a state court held that it was not applicable where the arresting officer placed a neckhold on the accused, forcing him to relinquish a packet of narcotics from his mouth. *People v. Dawson,* 127 Cal. App. 2d 375, 273 P.2d 938 (1954). But, where the police wrestled with the accused and forced him to spit out a package of narcotics, it was held to be a violation of due process. *People v. Martinez,* 130 Cal. App. 2d 54, 278 P.2d 26 (1955). Similarly, Arizona has held that the *Rochin* case does not apply where the accused is strapped in a chair and his head involuntarily held so that his breath could be obtained and used for a drunkometer test. *State v. Berg,* 76 Ariz. 96, 259 P.2d 261 (1953). More recently, where the arm of the accused had to be held in an attempt to secure a blood sample because he had previously withdrawn it, the force used was not so "shocking" as to fall within the purview of *Rochin. People v. Duroncelay,* . . . Cal. . . . , 303 P.2d 617 (1956), *hearing granted,* Dec. 12, 1956. Consequently, it seems that if the *Rochin* principle is to have a more progressive significance, it should not be limited merely to instances of flagrant police brutality, but also to situations in which there is lack of affirmative consent to bodily invasion.

The decision in the instant case is probably influenced by the amount of traffic fatalities caused by drunken driving. Admittedly, this is a grave problem but there seems to be a better solution; one in which both the rights of the individual are protected against state invasion and in which safety of the public is protected.

Both New York and Kansas have enacted statutes to cope with the problem. Under these statutes, any person who operates a motor vehicle in the state is deemed to have given his consent to submit to a chemical test in order to determine the alcoholic content of his blood. The driver may refuse to submit to the test, but in that event, his operator's license may be revoked subject to a hearing. N. Y. VEH. & TRAFFIC LAWS § 71-a (Supp. 1956); KANS. GEN. STAT. § 8-1001 (Supp. 1955). This type of legislation would seem to provide the protection necessary to safeguard the fundamental rights of the individual as well as the public safety in a fairer and more adequate manner than that reached by the Court in the instant case.

An analysis of the various approaches to the problem leads to the conclusion that the *Rochin* rule is unduly restricted if confined to such elusive concepts as "brutal," "offensive" or "shocking" police conduct, which can be expanded or contracted at judicial caprice. Compare the two California cases: *People v. Dawson, supra,* and *People v. Martinez, supra.* The community sense of justice should be found to be violated in all situations where bodily integrity is invaded for purposes other than medical rehabilitation. Statutes patterned after the New York and Kansas enactments, *supra,* can cope with the problem of drunken driving faster and easier than judicial determination and in a manner better adapted to "traditional notions of fair play and substantial justice."

A. Alteri

CONSTITUTIONAL LAW—DUE PROCESS—NOT VIOLATED BY ADMINISTRATIVE REGULATION IMPOSING ABSOLUTE LIABILITY ON RACE HORSE TRAINER FOR CONDITION OF HIS HORSE.—*Maryland Racing Comm'n v. McGee,* 212 Md. 69, 128 A.2d 419 (1957). A horse trained by plaintiff was discovered to have been drugged prior to a race. A hearing was held and plaintiff's license was revoked by the Maryland Racing Commission pursuant to Commission Rule 111 which provides that "no person shall administer, or cause or knowingly permit to be administered . . . any drug to any horse entered for a race," and imposes a duty upon trainers to guard their horses in such a manner as to prevent any such administration. Plaintiff sought a writ of mandamus to compel the Commission to restore his trainer's license. Plaintiff contended that there was insufficient evidence to support the finding and that the

rule was unconstitutional since its operation deprived him, without due process of law, of the right to practice his chosen profession. With respect to the latter contention, plaintiff alleged that the mere fact that his horse had been drugged was considered conclusive proof of its violation. The trial court, finding no evidence in the record to support the Commission's finding that plaintiff had failed to properly guard his horse, ordered the writ to be issued. On appeal, the order was reversed on the ground that sufficient evidence was presented. The court did indicate that even should the regulation be construed as imposing absolute liability, it would nevertheless be constitutional.

The right to follow a chosen profession was recognized as a "liberty" protected by the due process clause of the fourteenth amendment of the United States Constitution in *Allgeyer v. Louisiana,* 165 U.S. 578 (1897). But rights protected under the due process clause are not absolute. States, through the exercise of their police power, may prescribe regulations modifying such rights to promote the health, safety and welfare of its citizens. *Lawton v. Steele,* 152 U.S. 133 (1894); *Munn v. Illinois,* 94 U.S. 113 (1876). The United States Supreme Court described the interaction between the police power and the due process clause in *Nebbia v. New York,* 291 U.S. 502, 525 (1934):

> And the guaranty or due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. . . . [T]he reasonableness of each regulation depends upon the relevant facts.

There is no doubt that, under the proper circumstances, this power extends to the point of the imposition of liability without fault. *New York Central R.R. v. White,* 243 U.S. 188 (1917); *Prentiss v. National Airlines,* 112 F. Supp. 306 (D.N.J. 1953). Statutes imposing such liability are not uncommon; examples are those regulating liquor trade, theaters, dance halls, used car dealers and railroads. See Annot., 3 A.L.R.2d 107 (1949).

Since horse racing is so closely associated with gambling, it has long been stringently regulated for the protection of public morals, health, safety and welfare. *Grainger v. Douglas Park Jockey Club,* 148 Fed. 513 (6th Cir. 1906); *Clark v. Harford Agriculture & Breeders' Ass'n,* 118 Md. 608, 85 Atl. 503 (1912); *State ex rel. Duensing v. Roby,* 142 Ind. 168, 41 N.E. 145 (1895). The dicta of these cases state that regulation, even to the point of outright prohibition, is justifiable, as long as it is not arbitrary or capricious.

Prior to the instant case, the Court of Appeals of Maryland had held a similar regulation unconstitutional. *Mahoney v. Byers,*

187 Md. 81, 48 A.2d 600 (1946). The rule there invalidated provided: "No person shall administer or knowingly permit to be administered . . . any drug. . . . The fact that the analysis shows the presence of a drug shall be conclusive evidence either that there was knowledge of the fact on the part of the trainer or that he was guilty of carelessness. . . ." The court held that since there was no commission rule requiring a trainer to guard his horse, and that it was common practice not to do so, the conclusive presumption of knowledge or carelessness was arbitrary and therefore unconstitutional. This position was adopted by the Supreme Court of Florida in *State ex rel. Paoli v. Baldwin,* 159 Fla. 165, 31 So. 2d 627 (1947), in invalidating a Florida commission rule which provided that "the trainer shall be the absolute insurer of and responsible for the condition of the horse entered in a race, regardless of the acts of a third party." The court held that although knowledge or carelessness was not an essential factor under the rule, its substantial effect was to raise a conclusive presumption of knowledge or carelessness, and thus was invalid. There was no discussion of the state's police power in the decision. However, in the following two years, rules worded exactly like the Florida rule were held to be a valid exercise of the police power, and as such, constitutional. *State ex rel. Morris v. West Virginia Racing Comm'n,* 133 W. Va. 179, 55 S.E.2d 263 (1949); *Sandstrom v. California Horse Racing Bd.,* 31 Cal. 401, 189 P.2d 17, *cert. denied,* 335 U.S. 814 (1948).

In the instant case, the Maryland court gives every indication of crossing over to the rule expressed in the *Morris* and *Sandstrom* cases. Although Rule 111 still makes knowledge essential, the objection of *Mahoney v. Byers, supra,* that no duty was placed upon a trainer to guard his horse has been removed. In view of the statutory trend toward imposition of liability without fault, the well established precedent for such administrative regulations, and the possible mischief which can arise from "fixed races," it seems clear that even if Maryland Racing Commission Rule 111 were applied in a situation similar to the instant case, but where there was no evidence of actual failure to guard, it would not be held unconstitutional.

William A. Loy

EVIDENCE — DOMESTIC RELATIONS — ADMISSIBILITY OF BLOOD TESTS TO DISPROVE PATERNITY IN SUPPORT ACTIONS.— *Commonwealth ex rel. O'Brien v. O'Brien,* 182 Pa. Super. 584, 128 A.2d 164 (1956). Plaintiff in 1954 filed a petition in the municipal court of Philadelphia asking support for her son born in 1947, three years before plaintiff and defendant were divorced, but five years after they separated. Defendant objected on the ground of non-paternity and requested blood tests in accordance with PA. STAT. ANN. tit. 28, § 306 (Purdon Supp. 1956), which authorizes the courts to order blood tests on motion of the defendant in "any proceeding to establish paternity." The court denied the request and granted the support asked. Defendant appealed and the Superior Court, evenly divided, affirmed the decision. The court held that the defendant's request was properly denied since a support action is not one to establish paternity within the meaning of the statute.

The underlying consideration in the instant case is that where a child is born in wedlock he is presumed legitimate. 10 C.J.S., *Bastards* § 3b (1938). Although this presumption is stated to be one of the strongest known to the law, it may be rebutted by competent and relevant evidence showing that the husband could not possibly have been the father of the child. *Ash v. Modern Sand & Gravel Co.,* 234 Mo.App. 1195, 122 S.W.2d 45 (1938). Such evidence may constitute proof of impotence, *In re Walker's Estate,* 180 Cal. 478, 181 Pac. 792, 797 (1919) (dictum); impossibility of access, *Pilgrim v. Pilgrim,* 118 Ind. App. 6, 75 N.E.2d 159 (1947); non-access, *Commonwealth v. Gantz,* 128 Pa. Super. 97, 193 Atl. 72 (1937); non-access during the period of possible gestation, *Cairgle v. American Radiator and Standard Sanitary Corp.,* 366 Pa. 249, 77 A.2d 439 (1951); or racial characteristics which exclude the husband, *Bullock v. Knox,* 96 Ala. 195, 11 So. 339 (1892). All these factors have been held to be valid defenses not only in bastardy proceedings, but in support proceedings where the paternity of the child was put in question. *Peters v. District of Columbia,* 84 A.2d 115 (D.C. Mun. Ct. App. 1951); *Commonwealth v. Gantz, supra.*

But blood test evidence is now considered as strong as proof of non-access. This evidence, while it cannot prove that a man *is* the father of the child, can definitely *exclude* him as being the father, and this exclusion can be secured in about 55% of the cases. MCCORMICK, EVIDENCE, § 178 (1954). New scientific methods are increasing this percentage so that in the future close to 100% exclusion may be possible. Since these tests are as conclusive as proof of non-access, it seems illogical to admit the latter in support actions and yet exclude the former in similar actions.

By analogy, if proof of non-access is admitted, its equal should be also. Even in the absence of statute, the common law should permit the introduction of blood test evidence. Pennsylvania apparently recognized this when it twice admitted blood test evidence before the enactment of the statute in question. *Commonwealth v. Visocki,* 23 Pa. D. & C. 103 (1935) (support case); *Commonwealth v. Zammarelli,* 17 Pa. D. & C. 229 (1931) (bastardy proceeding).

Federal courts have ordered blood tests and received the results as evidence in support actions. A leading case is *Beach v. Beach,* 114 F.2d 479 (D. C. Cir. 1940), in which the court held that blood tests could be ordered even in the absence of a specific authorization by virtue of FED. R. CIV. P. 35(a), which gives the courts power to order a party to submit to physical examination "where his physical condition is in controversy." The *Beach* case held that both the mother and her child in a support action fall within this rule. The Pennsylvania courts possess similar power by virtue of PA. STAT. ANN. tit. 12, rule 4010 (Purdon Supp. 1956), which also authorizes the courts to order physical examinations for a party to a suit "where his physical condition is in controversy." Even if the statute in the instant case does not authorize blood tests in a support action, it is suggested that the court, pursuant to the logic of the *Beach* case, *supra,* should still order them under rule 4010.

Some states have accepted blood test evidence under their statutes to overcome the presumption of legitimacy not only in bastardy cases, but also in divorce and support proceedings. *Cortese v. Cortese,* 10 N.J.Super. 152, 76 A.2d 717 (1950) (support action); *C. v. C.,* 200 Misc. 631, 109 N.Y.S.2d 276 (Sup. St. 1951) (divorce action); *Houston v. Houston,* 199 Misc. 469, 99 N.Y.S.2d 199, 204 (Dom.Rel.Ct. 1950) (dictum) (support action). Both New York and New Jersey, and at least six other states, MCCORMICK, *supra,* n. 10, have blood test statutes which differ from Pennsylvania's only in that they authorize the court to order blood tests "whenever is shall be relevant," N.J. REV. STAT. § 2A:83-3 (1951); N.Y. CIV. PRAC. ACT § 306-a; or without limitation, N.Y. DOM. REL. LAW § 126-a.

The court in the instant case construed the statute narrowly and determined that a support action is not one to establish paternity, so that a request for blood tests ought to be denied where the child was born in wedlock. *Accord, Commonwealth v. Heydt,* 3 Pa. D. & C.2d 129 (1955). But the petition in the instant case was based on PA. STAT. ANN. tit. 18, § 4733 (Purdon Supp. 1956), which provides a legal remedy "If any . . . father . . . neglects to maintain *his* . . . children . . . ." (Emphasis added.) This wording

would seem to imply that the first question answered be whether the defendant is the father of the child. Such a construction presupposes that paternity may be put in issue, making the case one to establish paternity. Therefore a support action could logically fall within the rule set down by the statute in the instant case.

This statute apparently arose in conformity with the recent trend toward acceptance of blood test evidence. As previously indicated, Pennsylvania had admitted such evidence even before the enactment of the statute. *Commonwealth v. Visocki, supra* (support action); *Commonwealth v. Zammarelli, supra* (bastardy case). It is an accepted rule of statutory construction that statutes are not to be construed to modify or abrogate the common law any further than is clearly expressed or justly implied from the language used. McCAFFREY, STATUTORY CONSTRUCTION, § 46 (1953). Clearly this statute is not expressly restrictive and therefore it ought to be construed as merely clarifying, not abrogating, the common law rule which admits blood test evidence in support proceedings. This interpretation would recognize that the statute is not restrictive but declaratory of the admissibility of blood test evidence in all proceedings where paternity is put in issue.

Also, it should be noted that the statute under which this action for support was instituted, is quasi-criminal in nature. Its purpose is protection rather than punishment. *Commonwealth v. Widmeyer,* 149 Pa. Super. 91, 26 A.2d 125 (1942). To the extent the proceeding is civil in nature, the comparison to and the logic of the evidence statutes of the federal courts and other states is applicable. To the extent the proceeding is criminal, the court in the instant case reaches a seemingly illogical conclusion. Under the statute, in order for the defendant to be held guilty, it is necessary that the child he has failed to support be his own. By its holding, the court allows the presumption of legitimacy to obliterate the presumption in a criminal case that the defendant is innocent until proven guilty. Also, criminal statutes are to be strictly construed in favor of the defendant. McCAFFREY, *supra* at 73.

If the instant case is held to be a proceeding to establish paternity, a construction not illogical, the blood tests are specifically authorized and could have been ordered; if the case is not one to establish paternity, the blood tests could have been ordered under the still-existing common law. If the blood tests fail to disprove paternity, no harm has been done; if they succeed, a substantial injustice has been averted. Courts seeking the ascertainment of the truth ought not fear valid evidence which might

aid them in arriving at truth. By refusing to order the blood tests in the instant case, the court failed to bring Pennsylvania law in closer conformity with justice and scientific advancement.

Richard D. Schiller

TAXATION — FEDERAL INCOME TAX — TAXABILITY OF CORPORATE FUNDS SECRETLY DIVERTED BY OFFICER-STOCKHOLDERS. — *Drybrough v. Commissioner*, 238 F.2d 735 (6th Cir. 1956). Petitioners, Drybrough and Simpson, the principal stockholders, officers and directors of a collection and mercantile agency, which for tax purposes operated on a cash basis, secretly diverted from the mail basket for five consecutive years (1942-1946), incoming checks, cashed them and divided the proceeds. Since the diverted funds, amounting to more than $200,000, constituted net income, they were subject to a 95 percent excess-profit tax. These sums were neither recorded on the corporation's books nor were they reported in the corporation's or the petitioners' tax returns. For this willful evasion both the corporation and the petitioners were fined and the latter imprisoned. After their release, the petitioners returned to the corporation the full amount diverted to enable the corporation to satisfy its tax liabilities — deficiencies and penalties — amounting to more than $300,000.

The Commissioner also asserted deficiencies and penalties in a like amount against petitioners, determining that the funds constituted taxable dividends to them. The tax court in substance sustained these determinations. *United Mercantile Agencies, Inc. v. Commissioner*, 23 T. C. 1105 (1955). However, on appeal this decision was significantly modified. *Held*, only to the "extent of earnings and profits" determined by excluding the deficiencies and civil fraud penalties from the corporation's earnings and profits for the respective years, the misappropriated funds will be taxed to petitioners as ordinary (dividend) income in the years received. "Withdrawals in excess of earnings and profits will be taxed as capital gains after the adjusted basis of petitioners' stock has been exhausted." *Drybrough v. Commissioner*, *supra* at 745.

In cases of fraudulent, unrecorded deflections of corporate receipts by stockholder-officers the first issue is whether moneys misappropriated by such corporate officers have the character of taxable income under the *Wilcox* rationale, *Commissioner v. Wilcox*, 327 U.S. 404 (1946), or whether the sums thus wrongfully

taken constitute non-taxable embezzled funds within the compass of the *Rutkin* decision, *Rutkin v. United States,* 343 U.S. 130 (1952).

Profits of illegal businesses, *United States v. Sullivan,* 274 U.S. 259 (1927) (bootlegging), proceeds of unlawful transactions, *Caldwell v. Commissioner,* 135 F.2d 488 (5th Cir. 1943) (kickbacks), and funds wrongfully appropriated, *Kurrle v. Helvering,* 126 F.2d 723 (8th Cir. 1942) (fruits of embezzlement), had almost always been taxable. However, in the *Wilcox* case, the Supreme Court decided that moneys embezzled by a bookkeeper from his employer need not be reported as gross income under the INT. REV. CODE of 1939, § 22 (a), 53 STAT. 9 (now INT. REV. CODE of 1954, § 61 (a)) ("gains . . . from any source whatever"), for the "taxpayer cannot be said to have received any gain or profit within the reach of section 22 (a) "since" taxable gain is conditioned upon (1) the presence of a claim of right to the alleged gain and (2) the absence of a definite, unconditional obligation to repay or return that which would otherwise constitute a gain." *Commissioner v. Wilcox, supra* at 408. But the *Wilcox* decision was expressly confined to its facts in *Rutkin v. United States, supra,* where the Supreme Court held extorted money taxable, pronouncing that not only lawful gains but also unlawful ones constitute taxable income whenever "its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it." *Rutkin v. United States, supra* at 137.

Yet, the latter ruling left uncertain whether control or voidable title would henceforth be the touchstone of taxability in cases dealing with ill-gotten gains. See note, *Taxation of Misappropriated Property: The Decline and Incomplete Fall of "Wilcox",* 62 YALE L. J. 662 (1953). Consequently, the law respecting illegal income is still largely unsetted; court decisions reveal only a semblance of consistent rationale. Cases handed down after *Rutkin v. United States, supra,* have with few exceptions expressed the belief that it is difficult to reconcile the two cases, and that the *Rutkin* decision in effect overruled the *Wilcox* principles. "Certainly the whole approach of the [*Rutkin*] case, stressing actual possession or control, is diametrically opposed to the 'claim of right' criterion of the [*Wilcox*] case." *United States v. Bruswitz,* 219 F.2d 59, 61 (2d Cir. 1955). See also *Kann v. Commissioner,* 210 F.2d 247, 250 (3d Cir. 1954); *Marienfeld v. United States,* 214 F.2d 632, 639 (8th Cir. 1954); Gelfand, *"Wilcox" or "Rutkin" — Is the Fog Lifting?,* 34 TAXES 109 (1956). The instant case expresses a similar sentiment. 238 F.2d at 738.

In the cases dealing with secret corporate diversions the *Wilcox*

decision, applicable to clear-cut cases of embezzlement only, can easily be circumvented by a holding that it is "too narrow to encompass the facts of the present case," *Drybrough v. Commissioner, supra* at 738, or conversely, the opportunity for use and disposal of the funds is "more synonymous with that existing in the *Rutkin* case." *Marienfeld v. United States, supra* at 638. The *Marienfeld* case was followed in *Berra v. United States,* 221 F.2d 590 (8th Cir. 1955), where the court could not find facts constituting embezzlement because the funds had not initially come into the taxpayer's possession lawfully or in the course of his employment. This signifies a crucial distinction, express or implied, in which the courts' further belief that the wrongdoers would probably never have had to account for the fraudulent conversions but for the discovery accentuates the fact that theirs was a readily realizable economic gain. *Briggs v. United States,* 214 F.2d 699 (4th Cir. 1954); *Davis v. United States,* 226 F.2d 331 (6th Cir. 1955), *cert. denied,* 350 U.S. 965 (1956); *Drybrough v. Commissioner, supra.*

The courts have reasoned that taxpayers who purloin funds from their wholly-owned corporations do not embezzle, for in reality they pilfer only from a corporation which they completely dominate and control. *United States v. Augustine,* 188 F.2d 359 (3d Cir. 1954); *Davis v. United States, supra.* This is aptly expressed in *Kann v. Commissioner, supra* at 251: "In other words, he merely took the funds from himself under a different name."

A notable decision apparently to the contrary is *Estate of Dix v. Commissioner,* 223 F.2d 436 (2d Cir. 1955). The question before the court was whether the deceased taxpayer realized taxable income when he surreptitiously converted to his own use funds from a family-owned corporation, over which he, as president, exercised complete control. Finding that the deceased taxpayer had been a non-stockholding officer and that his position as such did not amount to corporate consent, the court characterized his defalcations "as a simple case of embezzlement," analogous to that of *Commissioner v. Wilcox, supra.* See also *Lashells' Estate v. Commissioner,* 208 F.2d 430 (6th Cir. 1953), the other pro-*Wilcox* ruling with a similar factual situation.

In these cases of unreported diversions of corporate receipts by officers of the corporation, who own or control a majority of the corporation's stock, the courts find these funds constitute "constructive dividends" and consequently, are taxable at ordinary income rates. *Currier v. United States,* 166 F.2d 346 (1st Cir. 1948); *Christopher v. Burnet,* 55 F.2d 527 (D.C. Cir. 1931). Such a determination is correct as these funds virtually belong to the officer-stockholders and could have reached their hands at

least to the extent of earnings and profits. Moreover, such a determination, in turn, warrants the finding that these converted sums are thus taxable since there is no obligation to repay them, which is one of the requisite conditions without which the *Wilcox* principle has no application. *Currier v. United States, supra.* That dividends need not be formally declared in order to be taxed as such has become a self-evident proposition with the Internal Revenue Service. *Wiese v. Commissioner,* 93 F.2d 921 (8th Cir. 1938), *cert. denied,* 304 U.S. 562 (1939); *Christopher v. Burnet, supra.*

However, the statutory definition of a dividend as "any distribution of property made by a corporation to its shareholders . . . out of its earnings and profits," INT. REV. CODE of 1939, § 115 (a), 53 STAT. 46 (now INT. REV. Code of 1954, § 316), justifies taxation of such diversions as dividends only to the extent the corporation has earnings and profits for distribution. *United States v. Lesoine,* 203 F.2d 123, 125 (9th Cir. 1953). This is in deference to well-settled and well-reasoned principles of corporation law. See 11 FLETCHER, CYCLOPEDIA CORPORATIONS § 5329 (perm. ed. 1932). The balance of the diverted funds, which represent corporate distributions other than dividends, are not taxable as income — they serve to reduce the basis of taxpayer's stock instead — except when they exceed the adjusted basis of the stock. Then they are taxed as capital gains, since they constitute a return of capital in excess of the adjusted basis. INT. REV. CODE of 1939, § 115 (d), 53 STAT. 47 (now INT. REV. CODE of 1954, § 301). See also *Dawkins v. Commissioner,* 238 F.2d 174 (8th Cir. 1956). Therein the court clearly held that the "diversions should be treated as constructive dividends to the extent of corporate earnings and as a return of capital for any excess above earnings." 238 F.2d at 180.

However, the *Davis* opinion contains no such consideration; on the contrary, the Sixth Circuit held that the taxpayer who deflected, for his own use, income of his wholly-owned corporation is taxable thereon regardless of whether the corporation had sufficient surplus to make the distribution as a dividend or whether the corporation's creditors might assail the transaction, stating:

> . . . it does not make any difference whether he received it as a legal distribution of cash as the result of a dividend, or whether he took it fraudulently, using his wholly-owned corporation with its false bookkeeping methods and concealment of sales and receipts to hide the fact that he was secretly acquiring from this source the cash, over which he exercised command, control, and dominion, and from which he realized economic gain and benefit. 226 F.2d at 334-335.

As to the computation of earnings and profits, or more specific-

ally, as to the question whether the penalty assessments may be deducted for the respective years in diminution of earnings and profits, the instant case clashes with the recent decision in *Bernstein v. United States,* 234 F.2d 475 (5th Cir. 1956), wherein the court was not disposed to follow *Estate of Stein,* 25 T.C. 940 (1956), which, in turn, was adhered to in the instant case. In the *Bernstein* case the court thought it would be a strange rule that would require accrual of penalties to determine the amount of earnings and profits, since no liability for such penalties would ever arise if the corporation was not resorting to fraudulent schemes. "[O]fficers and directors of a corporation [may not] conduct the affairs of their corporation in such a way as to defraud the government [of income taxes] and then assert the existence of a fraud penalty as corporate liability, and thus translate what would otherwise be a dividend distribution to themselves into distribution of capital." 234 F.2d at 482.

And as to the issue whether deficiency assessments may be used to reduce earnings and profits of the respective years, the instant case is apparently in conflict with *Helvering v. Alworth Trust,* 136 F.2d 812 (8th Cir. 1943), *cert, denied,* 320 U.S. 784 (1943), where it was held that the accrued but unpaid taxes and fraud penalties are not to be considered in the instance of a cash-basis corporation in computing the amount of its earnings and profits available for the payment of dividends.

As in many spheres of the law of taxation, this problem area is frought with conflicting propositions and decisions which often grow out of disregard for the truism that taxation is an intensely practical matter and is "not so much concerned with refinements of title as it is with actual command over the property taxed," *Corliss v. Bowers,* 281 U.S. 376,378 (1930). It is submitted that the rule evolved in the instant case, with its comprehensive sweep and its desirable regard for the equities of the situation, is a fair settlement of a tax dispute in a case where the civil liability for taxes and penalties is adjudicated and where punitive concepts should be avoided.

Karl Jorda

ZONING — VALIDITY OF ORDINANCE PERMITTING OUTDOOR ADVERTISING ONLY WHEN ACCESSORY TO THE USE OF PREMISES. — *Landau Advertising Co. v. Zoning Board of Adjustment,* 387 Pa. 552, 128 A.2d 559 (1957). Plaintiff, an outdoor advertising con-

cern, applied for a permit to place a billboard atop a drugstore in the city of Philadelphia. Upon hearing, the application was denied by the Zoning Board of Adjustment on the ground that the sign was not an "accessory use" within the meaning of the city zoning ordinance in that the products advertised were not sold on the premises. On appeal to the court of common pleas, the decision was reversed, whereupon a writ of certiorari was granted. The Supreme Court of Pennsylvania reversed, holding that the use was not accessory, and that an ordinance prohibiting outdoor advertising in certain districts, except where it related to the business conducted on the premises, was not unconstitutional.

The ordinance in question regulates the use of land in an " 'A' Commercial District," which area may include retail businesses. The regulation of outdoor advertising in such a district limits the types of signs which may be displayed, specifically allowing the display of small professional signs, bulletin boards for churches, and signs advertising the sale or rent of real estate. However, uses which are accessory to the use of the land or buildings are permitted generally. Philadelphia Zoning Ordinance §§ 16 (27), 5 (3). Although an advertising sign is not within one of the types expressly permitted, it may be maintained as an accessory use. *Silver v. Zoning Board of Adjustment,* 381 Pa. 41, 112 A.2d 84 (1955).

In refusing permission, the Board stated that the proposed sign would be a distraction to motorists, and would not be conducive to the "proper and orderly development of the neighborhood." The supreme court accepted these findings of fact as true in refusing to grant plaintiff permission to erect the sign.

The question thus became whether highway safety and neighborhood development were sufficient reasons for refusal to grant the requested permit in that a sign accessory to the premises would seem to be objectionable on the same basis as a non-accessory sign. The plaintiff's chief contention in the case was directed to the legitimacy of the Board's reasons; the ordinance was alleged to be unconstitutional as an arbitrary restraint of a legitimate business.

From the start, courts have upheld regulations governing the business of outdoor advertising. *Cusack Co. v. Chicago,* 242 U.S. 526 (1917). If an ordinance bears a substantial relation to the public health, safety, morals, or general welfare, then it is constitutional as a legitimate exercise of the police power of the municipality. *Cusack Co. v. Chicago, supra.* Exemplifying the application of these criteria are decisions holding that if a particular billboard is a distraction to motorists, or is so large as to be

hazardous to public safety, it may be prohibited through the legitimate exercise of the municipality's police power. *General Outdoor Adv. Co. v. Department of Public Works,* 289 Mass. 149, 193 N.E. 799 (1935), *cert. denied,* 297 U.S. 725 (1936); *People v. Norton,* 108 Cal. App. 767, 288 Pac. 33 (1930). It is beyond dispute that the business of outdoor advertising may be controlled for the sake of promoting and preserving the public health and welfare. *Criterion Service Inc. v. East Cleveland,* 88 N.E.2d 300 (Ohio App. 1949), *appeal dismissed,* 152 Ohio St. 416, 89 N.E.2d 475 (1949). Furthermore, courts have been exceedingly reluctant to strike down municipal zoning ordinances, presuming their validity and reasonableness. See *Murphy, Inc. v. Town of Westport,* 131 Conn. 292, 40 A.2d 177 (1944).

A problem arises in determining the extent to which a municipality is permitted control over outdoor advertising. An ordinance prohibiting all billboards within an entire village except those advertising real estate for sale or rent was declared void in *Mid-State Advertising Corp. v. Bond,* 274 N.Y. 82, 8 N.E.2d 286 (1937); in *O'Mealia Outdoor Adv. Co. v. Mayor & Council of Rutherford,* 128 N.J.L. 587, 27 A.2d 863 (1942), a municipal ordinance prohibiting anyone engaged in advertising as a business from erecting a sign within the village was struck down. Such restrictions were recognized as arbitrary and unreasonable which bore no substantial relation to the public health or welfare.

The problem of aesthetics has frequently arisen in connection with these ordinances. It was originally maintained that the aesthetic element alone was an insufficient reason for such ordinances. *Passaic v. Paterson Adv. & Sign Painting Co.,* 72 N.J.L. 285, 62 Atl. 267 (1905). See 2 DILLON, MUNICIPAL CORPORATIONS § 697 (5th ed. 1911). The prevailing view is still that this consideration can only be auxiliary since alone it would not be a sufficient justification for the exercise of the city's police power. *Criterion Service v. East Cleveland, supra.* Some courts have inferred, however, that they would uphold an ordinance on aesthetic grounds alone if they found it necessary for the preservation of the zoning area. *General Outdoor Adv. Co. v. Department of Public Works, supra* (dictum); see *People v. Sterling,* 267 App. Div. 9, 45 N.Y.S.2d 39 (3d Dep't 1943) (concurring opinion, dictum).

The constitutional question in the instant case arose partly because of the admission by the defendant municipality that if the *druggist* had made application for a sign to be placed above his store, it would have been granted. That is, the sign would then be a use accessory to the premises, and would thus be permitted. This indicates, as the dissenting opinion pointed out, that the wording of the sign is the only difference. But this is an in-

sufficient reason for refusing application. See *Borough of Prospect Park v. McClaskey,* 151 Pa. Super. 467, 30 A.2d 179 (1943).

Ordinances allowing only accessory uses were upheld in *Murphy, Inc. v. Town of Westport, supra,* and *United Adv. Corp. v. Borough of Raritan,* 11 N. J. 144, 93 A.2d 362 (1952). The *Raritan* case indicated that billboards are nuisances generally, and that their use may be limited by restricting them to on-the-premises advertising. *But see General Outdoor Adv. Co. v. Village of Evendale,* 54 Ohio Op. 354, 124 N.E.2d 189 (1954).

A fairly stable pattern of decisions on the problem of billboard advertising is evident. In most instances, the prohibition of billboards has been justifiable, since the reasons therefore are related to matters of public health, safety, and welfare. Other cases rest on less firm ground, the courts having failed to demonstrate clearly the relationship of the regulation to these criteria.

It is submitted that the present case falls within this latter category. Plaintiff's sign would have been no more of a distraction to motorists or an impediment to the orderly growth of the neighborhood than would have a sign which advertised a product sold in the drugstore below. More plausible reasons could have been invoked by the court in reaching its decision. Emphasis could have been placed upon the fact that the druggist must meet local competition, and is therefore entitled to advertise his products. His sign would then be an extension of his own local business, whereas plaintiff's sign would mean the introduction of an entirely new commercial enterprise into the district. If this exlusion was the result intended, the court should have said so with greater emphasis. Regulation of the extent of billboard advertising is admittedly sound and desirable. But in the interests of fairness and impartial government, more substantial reasons should be set forth than are found in the present case.

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