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Recent Decisions

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impracticability of taxing small transfers. It surely is not overlooked that a gift of a future interest can be as small as any other gift. And there is no hint of a legislative desire to penalize gifts simply because enjoyment is postponed. Possibly it is forgotten that there are legitimate, intelligent and practical reasons for restricting a donee's immediate use and possession of property. This is especially true if the donee is a minor.

It is not here proposed that the statutory provision should be eliminated entirely. The exclusion should be denied to gifts where the number of donees, or eventual donees, and the value of their gifts actually are uncertain. But the provision as it now stands is irrationally discriminatory. A possible solution would be to allow the exclusion even though the gift is of a future interest as long as the number of donees and the value of their gifts are definite and certain. It is doubted that this would provoke excessive litigation.

Robert A. Layden

RECENT DECISIONS

ADOPTION — INHERITANCE FROM FIRST ADOPTIVE PARENTS BY CHILD SUBSEQUENTLY ADOPTED BY OTHERS. — *In re Zaepel's Estate*, . . .Cal. . . ., 228 P. (2d) 600 (1951). The petitioner attempted to contest the disposition of property under the will of the testatrix who, at one time, had adopted the petitioner. The decedent and the father of the petitioner were married after he divorced her natural mother. This adoption was accomplished under the laws of Connecticut. Several years after this proceeding she was adopted by her natural grandmother in New York. After the death of the petitioner's father, the second wife moved to California and remarried. By her will, duly probated, she left her estate to the Roman Catholic Church of St. Helen in Los Angeles. In the will she recited that she had no children. The appellate court sustained the findings of the trial court which had decided that the petitioner was neither a descendant nor an ancestor who, under the will or the laws of succession, was entitled to take the property bequeathed or devised in the will.

Of the many problems arising with respect to adoption, one involves the capacity and right of inheritance from and by the adopted child. Occasionally there has arisen, as here, the question of inheritance from the first adoptive parents by a child subsequently adopted by others.

The majority of decisions favor inheritance by the adoptee from the first adopters. Among this majority, however, there is a well-marked separation between cases in which the first adopters die prior to the second adoption proceedings, and cases where the first adopting parents are still living at the time of the subsequent proceedings. In the first instance, the inheritance is considered to have vested in the adoptee at the death of the original adopters. In *Patterson v. Browning*, 146 Ind. 160, 44 N. E. 993, (1896), the court found no reason why an adopted child should not inherit from its natural parents, and also from its adoptive parents. Consequently, it saw no reason why an adoptee might not inherit from both first and second adoptive parents.

In a decision considered to be under the minority rule, *In re Talley's Estate*, 188 Okla. 338, 109 P. (2d) 495 (1941), the court agreed in part with the first group of majority cases by declaring that the adopted person inherits from the first adoptive parents, who died before the second adoption, because the inheritance occurs at the instant of death and the estate vests at that time. *Patterson v. Browning, supra; Russell's Adm'r v. Russell's Guardian*, 14 Ky. L. Rep. 236 (1892); *In re Sutton's Estate*, 161 Minn. 426, 201 N.W. 925 (1925).

In the second group of majority cases the inheritance is upheld even though the death of the first adopters does not antecede the second adoption. The rationale is that most adoption statutes do not cut off the right to inherit from natural parents, and, analagously, therefore, the right to inherit from adopting parents is not cut off. The argument is succinctly stated in *Dreyer v. Schrick*, 105 Kan. 495, 185 Pac. 30 (1919), where the court observed that in the absence of a statute preventing dual inheritance it could not be said that the adoption statute cut off capacity to inherit already enjoyed, and that there was no reason why a second adoption should annihilate the right of inheritance when the first adoption had no such result. Accord: *Holmes v. Curl*, 189 Iowa 246, 178 N.W. 406 (1920); *Villier v. Watson*, 168 Ky. 631, 182 S.W. 869 (1916); *In re Egley's Estate*, 16 Wash. (2d) 681, 134 P. (2d) 943 (1943). In *Coonradt v. Sailors*, 186 Tenn. 294, 209 S.W. (2d) 859 (1948), the Tennessee court supported both majority views, but the case should probably be distinguished because the issue was whether an attempted annulment of the original adoption proceedings was effective or whether the attempted annulment had the effect of a re-adoption by a natural parent.

The minority decisions oppose inheritance from first adoptive parents by an adoptee who has been adopted by others. This view distinguishes between a birth right and a right acquired by grace of statute, and on this basis, it is argued, the right of inheritance is severed. As it was explained by a Michigan court, *In re Klapp's Estate*, 197 Mich. 615, 164 N.W. 381 (1917), after the second adoption,

> . . . the first adoptive father was no longer entitled to the custody of the child; neither was he entitled to its services. He was no longer obligated to care for, educate, and support the child. If the new adoption

> destroyed these rights and obligations, why did it not destroy the child's right to inherit, since that right was dependent for its existence upon the same assent, the same agreement, which created the other relations?

The question can be, and has been, raised as to how, in the case of a child, a minor may assent to the terms of an agreement of which he has no knowledge. To skirt this difficulty one court, *In re Talley's Estate, supra,* emphasized the element of blood relationship by stating, at 109 P. (2d) 498:

> Neither in theory, practice nor common sense was petitioner the adopted son of his first adoptive parents after his second adoption. Having lost that relationship (a thing which by parallel he could not entirely do, at least as to blood, as to his natural parent) there was no longer any predicate upon which to base the conclusion that he would thereafter inherit from his first adoptive parents the same as if he had been their natural son.

If the better law lies with the minority, as has been suggested, Kuhlmann, *Intestate Succession by and from the Adopted Child,* 28 WASH. U. L. Q. 221 (1943), 16 NOTRE DAME LAW. 240 (1941), 18 WASH. L. REV. 215 (1943), perhaps it should be left to legislatures to formulate desired public policy as it was in the principal case. In that case, both trial and appellate courts invoked CAL. PROB. CODE ANN. § 257 (1944) which bars an adopted person from succession to the estate of a natural parent since the relationship between them has been severed by the adoption.

According to Kuhlmann, *supra,* only five states have enacted specific provisions cutting off inheritance from natural parents by a child who is subsequently adopted by others. Of these five, two, California and Connecticut, are represented in the cited case. Michigan which pioneered the minority rule still adheres to its decision, but raises the inference that it might now rule otherwise had not the earlier decision hardened into a rule of property law of more than thirty year's standing. *In re Carpenter's Estate,* 327 Mich. 195, 41 N.W. (2d) 349 (1950). Judging by these few developments over three score years, it does not appear that any marked change will take place in the present status of the question until the problem becomes more extensive or more acute.

John M. Sullivan

ATTORNEY AND CLIENT — CONTINGENT FEES — QUANTUM MERUIT. — *McCarthy v. Santangelo,* 137 Conn. 410, 78 A. (2d) 240 (1951). The plaintiff, an attorney, entered into a contingent fee contract with defendant, his client. The contract provided that the plaintiff would take one-third of the alimony decreed by the court contingent upon securing a divorce for the defendant. The plaintiff made a reasonable effort to secure a reconciliation and performed other legal services for the defendant. Defendant discontinued the plaintiff's services six months after the divorce action was brought, and plaintiff brought this action to recover the reasonable value of his services. The Connecticut court held that a contract to accept a contingent fee in divorce actions is void as against public policy, and that every reason for denying recovery upon the express agreement applies equally to the denial of recovery on *quantum meruit.*

When an attorney and client enter into an illegal fee arrangement to obtain a divorce, should the court allow a recovery on *quantum meruit?* This was the issue involved in the instant case.

In England and Massachusetts contingent fee contracts are illegal in all cases. *Sherwin Williams Co. v. J. Mannos & Sons, Inc.*, 287 Mass. 304, 191 N. E. 438 (1934); *Wild v. Simpson,* [1919] 2 K. B. 544 (C.A.); *Swinfen v. Chelmsford,* 5 H. & N. 890, 157 Eng. Rep. 1436 (1860). This rule evolved from the theory that reconciliation and a minimum of litigation were essential to a well-ordered society. The courts foresaw the danger of bringing suit where little or no cause existed. It was felt that contingent fee contracts were an incentive to the attorney to pursue the case without making a reasonable effort either to effect a reconciliation or to avoid litigation. Radin, *Contingent Fees in California,* 28 CALIF. L. REV. 587, 588 (1940).

Most jurisdictions permit contingent fee contracts save where divorce is involved on the ground that poor and indigent clients would have no other way of securing adequate legal assistance. *Dorr v. Camden,* 55 W. Va. 226, 46 S. E. 1014 (1904). But since the husband is held accountable for the reasonable value of the services performed by an attorney in behalf of his spouse, there is no validity for extending this argument to divorce actions. IND. ANN. STAT. § 3-1216 (Burns 1933); *People* ex rel. *Mehan v. Mehan,* 198 Ill. App. 300 (1916); Radin, *supra* at 589.

In this country the general rule is that a contract for the payment of a fee to an attorney, conditioned upon his procuring a divorce for his client or contingent upon the amount of alimony obtained, is void as against public policy. *Brindley v. Brindley,* 121 Ala. 429, 25 So. 751 (1899); *McConnell v. McConnell,* 98 Ark. 193, 136 S. W. 931 (1911); *Newman v. Freitas,* 129 Cal. 283, 61 Pac. 907 (1900); *Barngrover v. Pettigrew,* 128 Iowa 533, 104 N. W. 904 (1905); *Jordan v. Westerman,* 62 Mich. 170, 28 N. W. 826 (1886); *Klampe v. Klampe,* 137 Minn. 227, 163 N. W. 295 (1917); *Lynde v. Lynde,* 64 N. J. Eq. 736, 52 Atl. 694 (1902).

It is also a general rule in the United States that where the services to be performed are not illegal, but the contingent fee contract entered into is illegal, the attorney is allowed recovery on *quantum meruit*. *McCurdy v. Dillon*, 135 Mich. 678, 98 N. W. 746 (1904); *Overstreet v. Barr*, 255 Ky. 82, 72 S. W. (2d) 1014 (1934); *Ferkin v. Board of Education*, 278 N. Y. 263, 15 N. E. (2d) 799 (1938). Although many states have adopted this rule, they still hold that it is the attorney's duty to attempt a reconciliation. Recognizing that the state has an interest in maintaining the family relation, *Johnson v. Johnson*, 245 Ala. 145, 16 So. (2d) 401 (1944); *Seacord v. Seacord*, 33 Del. (3 Harr.) 485, 139 Atl. 80 (1927); *Heflinger v. Heflinger*, 136 Va. 289, 118 S. E. 316 (1923); *Hahn v. Hahn*, 104 Wash. 227, 176 Pac. 3 (1918); *Miles v. Chilton*, 1 Rob. Eccl. 684, 163 Eng. Rep. 1178 (1849), the state's interest is not served by permitting recovery on *quantum meruit* where a contingent fee contract has first been made for the purpose of securing a divorce. *Brindley v. Brindley, supra.*

Although an Iowa court, In re *Sylvester's Estate*, 195 Iowa 1329, 192 N. W. 442, 443-4 (1923), stated the above principles, it failed to follow them to the logical conclusion, that recovery should not be allowed on *quantum meruit*:

> A contract between an attorney and client, providing for the payment of a fee to the attorney contingent upon the procurement of a divorce for the client, is against public policy and illegal and void. Such a situation involves the personal interest of the attorney in preventing a reconciliation between the parties, a thing which the law favors and public policy encourages. . . . The sanctity of the marriage relation, the welfare of children, the good order of society, the regard for virtue, all of which the law seeks to foster and protect are ample reasons why such contract should be held to be contrary to public policy.

The minority rule, which the Connecticut court followed in deciding the instant case, holds that where the court discovers during the progress of the divorce action that it is being prosecuted on a contingent fee, no attorney fee will be allowed. *Brindley v. Brindley, supra; White v. White*, 86 Cal. 212, 24 Pac. 1030 (1890); *Sharon v. Sharon*, 75 Cal. 1, 16 Pac. 345 (1888). When consideration is given to the ill effects incident to the majority rule and the resultant temptation to forego reconciliation, the virtue of the minority rule is apparent. There is a direct conflict between the interests of the state in the family relation and the majority rule.

It is the opinion of the writer that the same reason for disallowing recovery upon the illegal contingent fee contract, should apply with equal force to a recovery on *quantum meruit*. The stability of the state depends on the unity of the family. The attorney has a duty to press for a reconciliation. It would seem that the courts have a greater duty to set down rules which would require the attorney to exercise his duty.

William G. Greif

CONFLICT OF LAWS — CONSTITUTIONALITY OF STATE STATUTE ASSERTING IN PERSONAM JURISDICTION OVER NON-RESIDENT CORPORATION DOING SINGLE ACT IN STATE OF FORUM. — *Smyth v. Twin State Improvement Corp.*,....Vt....., 80 A. (2d) 664 (1951). This was a tort action brought by Lucy Smyth, a resident of Vermont, against the Twin State Improvement Corporation, a Massachusetts corporation. The facts alleged in plaintiff's complaint show that the defendant, in repairing the plaintiff's house, located in Vermont, negligently placed holes in the roof and in the sides of the building, causing water to leak through with resultant damage. Service was had on the foreign corporation under VT. REV. STAT. § 1562 (1947), by serving the Vermont Secretary of State and by sending a copy to the defendant's principal place of business in Massachusetts by registered mail. The defendant appeared specially and moved to dismiss on the grounds that the complaint did not show the commission of a tort as required by VT. REV. STAT. § 1562 (1947) and that the statute is unconstitutional. The trial court granted the motion to dismiss for failure to allege the necessary jurisdictional facts.

On plaintiff's appeal the Supreme Court of Vermont reversed the lower court on the issue of the adequacy of the pleadings, and went on to hold that the provisions of VT. REV. STAT. § 1562 (1947) were not in conflict with the Due Process Clause of the Fourteenth Amendment. By this decision, the State of Vermont asserted *in personam* jurisdiction over a foreign corporation on a cause of action arising out of a single, isolated activity performed by the corporation within the state and where the activity represented the only business transacted there.

The Vermont statute leaves no room for doubt that the present case is included within its terms. VT. REV. STAT. § 1562 (1947) reads:

> If a foreign corporation makes a contract with a resident of Vermont to be performed in whole or in part by either party in Vermont, or if such foreign corporation commits a tort in whole or in part in Vermont against a resident of Vermont, such acts shall be deemed to be doing business in Vermont by such foreign corporation . . . in any actions or proceedings against such foreign corporation arising from or growing out of such contract or tort.

The precise question involved — whether a single, isolated activity of a foreign corporation renders it amenable to personal jurisdiction for liability arising from that activity in the courts of the state where the act was done — has not as yet been decided by the United States Supreme Court. But from an analysis of the case law on the subject, the principle is drawn that in order for a foreign corporation to be subjected to an *in personam* judgment, the foreign corporation must be "doing business" in the state of the forum. *St. Louis Southwestern Ry. v. Alexander*, 227 U.S. 218, 33 S. Ct. 245, 57 L. Ed. 486 (1913); *Old Wayne Mutual Life Association of Indianapolis v. McDonough*, 204 U.S. 8, 27 S. Ct. 236, 51 L. Ed. 345 (1907). But this merely leads to the question whether a single, isolated activity can constitute "doing business."

The federal courts in particular have refused to establish any definite test to determine what constitutes "doing business," basing their reluctance on the proposition that each case is to be determined on its own facts. *Bergold v. Commercial Nat. Underwriters Inc.*, 61 F. Supp. 639 (D. Kan. 1945). In general, ". . . the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction. . . ." *People's Tobacco Company v. American Tobacco Co.*, 246 U.S. 79, 38 S. Ct. 233, 235, 62 L. Ed. 587 (1918). Applying this standard, the courts have concluded that a single, isolated activity by a foreign corporation does not constitute "doing business" as will render it subject to *in personam* jurisdiction. *Bank of America v. Whitney Central National Bank*, 261 U.S. 171, 43 S. Ct. 311, 67 L. Ed. 594 (1923); *Rosenberg Bros. & Company v. Curtis Brown Company*, 260 U.S. 516, 43 S. Ct. 170, 67 L. Ed. 372 (1923). In order to establish this jurisdiction, there must be continuous dealings of some type. *International Harvester Company of America v. Kentucky*, 234 U.S. 579, 34 S. Ct. 944, 58 L. Ed. 1479 (1914); *Connecticut Mutual Life Insurance Company v. Spratley*, 172 U.S. 602, 19 S. Ct. 308, 43 L. Ed. 569 (1899). The continuous dealings which have justified *in personam* judgments against foreign corporations have been varied: the continuous solicitation of orders by agents with authority to take payment, *International Harvester Company of America v. Kentucky, supra;* the ownership of the stock of a domestic corporation with the added factor of control of the domestic corporation, *Bergold v. Commercial Nat. Underwriters Inc., supra;* the issuance of insurance policies together with the sending of agents to adjust claims, *Commercial Mutual Accident Company v. Davis*, 213 U.S. 245, 29 S. Ct. 445, 53 L. Ed. 782 (1909); *Pennsylvania Lumbermen's Mutual Fire Insurance Company v. Meyer*, 197 U.S. 407, 25 S. Ct. 483, 49 L. Ed. 810 (1905); the maintenance by a railway company of an office with a freight agent there to settle claims in a state where the railway has no trackage, *St. Louis Southwestern Ry. v. Alexander, supra*; or the maintenance of an office with an agent therein selling securities, *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623, 55 S. Ct. 553, 79 L. Ed. 1097 (1935).

The recent case of *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), though authority only for the proposition that continuous solicitation by salesmen of a foreign corporation constitutes "doing business" in the state of the forum, is better known for its broad tests to determine what activities of a foreign corporation will establish personal jurisdiction. Required are sufficient contacts with the state of the forum so ". . . that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" 326 U.S. at 316. This dictum, together with others of the same import from the same case, is the foundation upon which the Vermont court rendered its decision in the present case. The authoritative weight of this dicta remains to be determined.

It is interesting to note the judicial construction given a state statute similar to VT. REV. STAT. § 1562 (1947). Arkansas in 1947 enacted a statute, ARK. STAT. ANN. tit. 27, § 340 (1947), which provided for *in personam* jurisdiction over ". . . any corporation not qualified under the Constitution, and Laws of this State as to doing business herein, who shall do *any business* or perform *any character of work or service* in this State. . . ." [Emphasis supplied.] Provision was made, as in the Vermont statute, *supra*, for service upon the Secretary of State and for sending a copy by registered mail to the defendant at his last known address. A case arising in the federal courts under this act held that it must have been the legislative intent ". . . that it apply only when the foreign corporation is 'doing business' (as that expression has been defined by court decisions) in the State of Arkansas." *McWhorter v. Anchor Serum Co.*, 72 F. Supp. 437, 439 (W. D. Ark. 1947). The opinion implies, 72 F. Supp. at 439, that if "any business," or "any character of work or service," as used in the act, is intended to apply to a single, isolated activity, the statute would be declared unconstitutional as violative of due process. The following year, the Arkansas Supreme Court declared, though in a statement not necessary to the disposition of the case before it, that this part of the act was "a valid exercise of the legislative authority," *Gillioz v. Kincannon*, 213 Ark. 1010, 214 S. W. (2d) 212, 214 (1948), without placing upon it the construction adopted by the federal court.

Perhaps the only true examples of a foreign corporation being subjected to *in personam* jurisdiction on liability arising from single, isolated activity are to be found in the inclusion of the foreign corporation within the scope of the non-resident motorist statutes, as a valid exercise of the police power of the state. *Highway Steel & Mfg. Co. v. Kincannon*, 198 Ark. 134, 127 S. W. (2d) 816, *appeal dismissed*, 308 U.S. 504, 60 S. Ct. 88, 84 L. Ed. 431, *rehearing denied*, 308 U.S. 635, 60 S. Ct. 134, 84 L. Ed. 528 (1939); *Jones v. Pebler*, 371 Ill. 309, 20 N. E. (2d) 592 (1939). Another example, although it stands alone, sanctions *in personam* jurisdiction in an action for the unpaid part of the purchase price on a contract of sale of machinery entered into in the state of the forum. *Colorado Iron-Works v. Sierra Grande Min. Co.*, 15 Colo. 499, 25 Pac. 325 (1890).

The merit in holding a foreign corporation personally liable for the consequences of its activities within the state, even though the activity is single or isolated, is obvious. Leflar, *Acts Of 1947 General Assembly, Acts 65 and 347; Service On Non-Resident Defendants*, 1

ARK. LAW REV. 201 (1946-47). But this is not the law as established by the decided cases. The cases referred to by the Vermont Supreme Court to ". . . illustrate the proposition that continuous activity within the state is not necessary as a prerequisite to jurisdiction," 80 A. (2d) at 666, are concerned, not with foreign corporations, but with individuals, and have arisen under non-resident motorist statutes. There is, then, no real authority to sustain the position taken by the principal case; there is only the dicta of the *International Shoe* case, *supra.* Though modern mobility may favor the progress and the development in the law which this Vermont decision represents, nevertheless, the constitutional requirements of due process of law, as established by an almost unbroken line of judicial decisions, cannot be disregarded. Until the dicta of the *International Shoe* case, *supra,* is given authoritative standing as *law,* and until this prospective "law" is established as applicable to single, isolated activity similar to that in the instant case — a determination which was expressly avoided even in the dicta of the *International Shoe* case, *supra* — the instant decision must be held to represent a departure from the traditional requirements of due process.

Joseph F. MacKrell

CONSTITUTIONAL LAW — SEPARATION OF CHURCH AND STATE — RELEASED TIME PROGRAMS IN PUBLIC SCHOOLS. — *Zorach v. Clauson,* 303 N. Y. 161, 100 N.E. (2d) 463 (1951). The petitioners, both mothers of public school children, instituted a mandamus proceeding to compel the Board of Education of the City of New York and the Commissioner of Education of the State of New York to abolish the "released time" program in the public schools of New York City. Under this program parents were allowed to withdraw their children from school for one hour each week in order to send them to religion classes. It was contended by the petitioners that the "released time" program was a direct violation of the First Amendment which was made applicable to the states by the Fourteenth. In support of their contention the petitioners relied primarily on the principles set forth in *Illinois* ex rel. *McCollum v. Board of Education,* 333 U. S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948).

The court ruled that the "released time" program as operated in New York City was not violative of the Constitution within the principles set forth in the *McCollum* decision, differentiating the two cases on their facts.

The *McCollum* decision was based to a large extent on a statement made in *Everson v. Board of Education,* 330 U.S. 1, 15, 67 S. Ct. 504, 91 L. Ed. 711 (1947), by Justice Black:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

State courts have differed widely in their decisions regarding separation of Church and State. Some of the courts have held that the transportation of children in public school busses to parochial schools was not permissible. *Judd v. Board of Education,* 278 N. Y. 200, 15 N.E. (2d) 576 (1938); *Visser et ux. v. Nooksack Valley School Dist. No. 506,* 33 Wash. (2d) 699, 207 P. (2d) 198 (1949). The following permitted this transportation: *Bowker v. Baker,* 73 Cal. App. (2d) 653, 167 P. (2d) 256 (1946); *Adams v. County Commissioners,* 180 Md. 550, 26 A. (2d) 377 (1942); *Board of Education v. Wheat,* 174 Md. 314, 199 Atl. 628 (1938). *Zellers v. Huff,* ....N.M....., 236 P. (2d) 949 (1951), and *O'Conner v. Hendrick, School Trustee,* 184 N. Y. 421, 77 N.E. 612 (1906), held the wearing of religious garb by teachers in public schools to be objectionable. But in *Gerhardt v. Heid,* 66 N.D. 444, 267 N.W. 127 (1936), and in *Hysong v. School Dist. of Gallitzin Borough,* 164 Pa. 629, 30 Atl. 482 (1894), it was held unobjectionable. The reading of the Bible in public schools has been allowed. *Kaplan v. Independent School Dist. of Virginia,* 171 Minn. 142, 214 N.W. 18 (1927); *Doremus v. Board of Education,* 5 N. J. 435, 75 A. (2d) 880 (1950). In *People* ex rel. *Ring v. Board of Education of Dist. 24,* 245 Ill. 334, 92 N.E. 251 (1910), and in *State* ex rel. *Weiss v. District Board of School-Dist. No. 8,* 76 Wis. 177, 44 N.W. 967 (1890), the reading of the Bible was not allowed.

The New York courts were first faced with the problem of the constitutionality of a "released time" program in *Stein v. Brown, Board of Education,* 125 Misc. 692, 211 N. Y. Supp. 822 (Sup. Ct. 1925). There it was held that the board's practice permitting pupils to leave early to attend religious classes was unlawful and unauthorized because it substituted religious instruction for the required public school curriculum. In addition, the court held that the printing of registration and attendance cards for the religious program on school presses was an unauthorized use of public funds in aid of religious institutions. A few years later the New York Court of Appeals in *People* ex rel. *Lewis v. Graves, State Commissioner of Education,* 245 N. Y. 195, 156 N.E. 663 (1927), ruled that the "released time" program as administered in the city of White Plains was not an unconstitutional use of public property or money in aid of denominational schools. The program was the same as that which was declared unconstitutional in the *Stein* case except that the cards were not printed by the schools. The court stated that the requirements of regular attendance were elastic and absences were excusable for any legitimate reason within the discretion of the authorities.

In *Gordon v. Board of Education,* 78 Cal. App. (2d) 464, 178 P. (2d) 488 (1947), the California court followed the liberal trend by declaring "released time" programs constitutional since they do no violence to the doctrine of separation of Church and State. The Supreme Court of Illinois likewise held a "released time" program constitutional in *People* ex rel. *McCollum v. Board of Education,* 396 Ill. 14, 71 N.E. (2d) 161 (1947), but on appeal the Supreme Court of the United States held that the "released time" program was unconstitutional. *Illinois* ex rel. *McCollum v. Board of Education, supra.* This first and only case on "released time" decided by the Supreme Court has caused a furor.

After the *McCollum* decision, the courts of New York continued to declare the "released time" programs constitutional, contending that the cases could be distinguished on their facts from the *McCollum* case. The constitutionality of the programs was upheld in *Lewis v. Spaulding,* 193 Misc. 66, 85 N. Y. S. (2d) 682 (Sup. Ct. 1948), and in the present case.

Whether all "released time" programs are unconstitutional per se is a question not answered satisfactorily in the *McCollum* decision. There was no definite statement that a certain feature, if found in a "released time" program, would render it unconstitutional. Justice Frankfurter, concurring specially in the *McCollum* case, suggested that a plan other than the one there involved might not be subject to objections. He stated, 333 U. S. at 231:

> We do not consider, as indeed we could not, school programs not before us which, though colloquially characterized as "released time," present situations differing in aspects that may well be constitutionally crucial. . . . [P]rograms . . . like that before us, could not withstand the test of the Constitution; others may be found unexceptionable.

On the other hand, Justice Reed, who alone dissented in the *McCollum* case, stated that although various expressions in the majority opinions apparently allowed for further litigation variations from the plan actually involved, nevertheless any future cases would have to run the gauntlet not only of the judgment which was entered but of the accompanying words of the opinions. 333 U. S. at 239-40. He could not determine from the majority opinions whether the purpose of the plan for religious instruction during public school hours was unconstitutional or whether some ingredient used in or omitted from the formula made the plan unconstitutional. However, he stated, 333 U. S. at 240:

> From the tenor of the opinions I conclude. . . that any use of a pupil's school time, whether that use is on or off the school grounds, with the necessary school regulations to facilitate attendance, falls under the ban.

In predicting whether or not the principal case will be reversed by the Supreme Court, it is well to note that in the *McCollum* case the "released time" program involved (1) the use of tax-supported property in the propagation of religion and (2) the use of compulsory public school machinery to provide pupils for the religious classes. If the use of tax-supported property was the crucial factor in the *McCollum* case, then the Supreme Court might possibly declare the New York "released time" program constitutional because no religious instruction was given on public school property. If it does so rule, the Court might be compelled to retract some of the statements made in the *McCollum* case, e.g., that "the First Amendment has erected a wall between Church and State which must be kept high and impregnable." 333 U. S. at 212. If the use of the compulsory public school machinery was also a crucial factor in determining the constitutionality of the "released time" program, then the cited decision would almost certainly be reversed since there was, to some extent, use of this machinery. This was the position taken by the dissenting judge in the instant case where he stated, 100 N.E. (2d) at 478:

> What is vital and operative is, not where the religious teaching is given, but that it secures its pupils through the instrumentality of the state and through the machinery and momentum of the public school system.

The fact remains that the basis for the Supreme Court decision in the *McCollum* case was undoubtedly the "wall of separation" phrase used by Jefferson. The Court's magnification of Jefferson's "wall" appears fantastic. As pointed out by Judge Desmond in his concurring opinion in the instant case, no true "wall" has ever existed. 100 N.E. (2d) at 472. Justice Reed was of the same opinion in his dissent to the *McCollum* decision, for he maintained that even Jefferson did not exclude religious education from the state-controlled University of Virginia, an institution he himself founded. *Illinois* ex rel. *McCollum v. Board of Education, supra,* 333 U. S. at 245-7. And the Federal Government still has compulsory religious services in both the United States Military Academy and the United States Naval Academy and maintains chaplains in the armed forces and in Congress. O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION 200 (1949).

Judge Desmond brought the real problem into focus when he stated in the concurring opinion, 100 N.E. (2d) at 471:

> The basic fundamental here at hazard is not . . . any so-called (but nonexistent . . .) "principle" of complete separation of religion from government. . . . The true and real principle that calls for assertion here is that of the right of parents to control the education of their children, so long as they provide them with the State-mandated minimum of secular learning, and the right of parents to raise and instruct their children in any religion chosen by the parents. . . . Those are true and absolute rights under natural law, antedating, and superior to, any human constitution or statute.

It is the view of the writer that the New York "released time" program is nothing more than a method which allows for the exercise of the religious liberties of the parents of public school pupils, and infringes on the rights of no one. As Judge Desmond, quoting Kent, pointed out in his concluding sentence, 100 N.E. (2d) at 474, "the Constitution 'never meant to withdraw religion in general, and with it the best sanctions of moral and social obligation, from all consideration and notice of the law.' "

William N. Antonis

CONSTITUTIONAL LAW — SMITH ACT — COMMUNIST PARTY AS A CLEAR AND PRESENT DANGER. — *Dennis v. United States,* 341 U. S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951). The defendant and ten others were indicted and convicted for conspiring to organize a society of persons known as the Communist Party of America which allegedly advocated the violent overthrow of the United States Government. This conspiracy was clearly a violation of the Smith Act, 18 U.S.C. §§ 10, 11 (1946). The Supreme Court granted certiorari limited to the question whether the designated sections of the Act clashed with either the First or Fifth Amendment. Chief Justice Vinson spoke for the majority and resolved the question in the negative. Stating that these sections of the Act came within the "clear and present danger" test, the Chief Justice affirmed the conviction.

Whether the "clear and present danger" test is the proper measure to determine the constitutionality of legislation has provoked considerable discussion during the last decade. In *Schenck v. United States,* 249 U. S. 47, 52, 39 S. Ct. 247, 63 L. Ed. 470 (1919), Justice Holmes brought forth the "clear and present" dictum when he wrote:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

This oft-quoted phrase has given rise to several constitutional questions concerning the right and extent of free speech for underlying it is the fundamental problem of the relationship between liberty and authority. In constitutional law these concepts are often seen encroaching upon the territory of each other. Some people are resigned to think of them as perpetually conflicting; others believe them to be antithetical concepts, depending upon which side of the political pendulum they cling to. In reality they are correlative terms, a political projection of the reciprocal relationship between right and duty. This truism was clearly indicated by SIMON, THE ACQUINAS LECTURE 2 (1940), writing on the "Nature and Functions of Authority":

> As to their complementary character, it is quite clear that authority, when it is not fairly balanced by liberty, is but tyranny, and that liberty, when it is not fairly balanced by authority, is but abusive license.

From the standpoint of the judiciary, the practical application of this relationship as to the freedom of speech (liberty) and the limitation of this freedom (authority) received a helping hand when Holmes announced his "clear and present danger" maxim in the *Schenck* case, *supra*. Schenck had been indicted under the Criminal Espionage Act, 40 STAT. 217 (1917), for obstructing recruiting for the armed services. Holmes, without any question as to the validity of the statute, affirmed the conviction on the ground that Schenck's *actions* were a clear and present danger to the welfare of the United States. Subsequently, Holmes, with reference to the *Schenck* case, affirmed two other cases which involved the Espionage Act. *Frohwerk v. United States,* 249 U. S. 204, 39 S. Ct. 249, 63 L. Ed. 561 (1919) (news publications attacking the war); *Debs v. United States,* 249 U. S. 211, 39 S. Ct. 252, 63 L. Ed. 566 (1919) (a speech denouncing the war).

Essentially then, Holmes maintained that only those *actions,* against which Congress had a right to legislate and which presented an imminent threat could be punished. However, in *Gitlow v. United States,* 268 U. S. 652, 669, 45 S. Ct. 625, 69 L. Ed. 1138 (1925), which involved a New York statute enjoining criminal anarchy, the Court refused the clear and present danger approach citing with approval from *People v. Lloyd,* 304 Ill. 23, 136 N.E. 505, 512 (1922):

> . . . the legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government, without waiting until there is a present and imminent danger of the success of the plan advocated.

And at 268 U. S. at 670, the Court further stated:

> In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration.

Thus the Court considered that if in the discretion of the legislature certain utterances involved a substantive evil, the utterances were punishable, not because they were dangerous, but because they were forbidden. Cushman, *"Clear and Present Danger" in Free Speech Cases: A Study in Judicial Semantics* in ESSAYS IN POLITICAL THEORY 311 (Konvitz & Murphy 1948). Holmes naturally registered a dissent to this decision.

Although Holmes' test was set aside in this case, and in others which came later, this was only temporary. Over a decade ago the Supreme Court again began employing the "clear and present" phraseology in cases other than those involving espionage and criminal anarchy. The utilization of the doctrine in different types of cases naturally meant that it was undergoing an expansion program; but moreover the Court had now turned the "clear and present danger" test into a yardstick to measure the validity of statutes affecting the freedom of speech, press and religion. *Terminiello v. Chicago,* 337 U. S. 1, 69 S. Ct. 894, 93 L. Ed. 1131 (1949); *Thomas v. Collins,* 323 U. S. 516, 65 S. Ct. 315, 89 L. Ed. 430 (1945); *Taylor v. Mississippi,* 319 U. S. 583, 63 S. Ct. 1200, 87 L. Ed. 1600 (1943); *West Virginia State Board of Education v. Barnette,* 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943); *Carlson v. California,* 310 U. S. 106, 60 S. Ct. 746, 84 L. Ed. 1104 (1940); *Thornhill v. Alabama,* 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940).

In *Thornhill v. Alabama, supra,* the Court struck down an Alabama statute as violative of freedom of speech and press. The statute was directed at picketing and made it unlawful for any person without a just or legal excuse to loiter about a place of business with the intention of influencing others to refrain from any business intercourse with the establishment. The late Justice Murphy in delivering the Court's opinion stated, 310 U. S. at 104-5:

> Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion.

Carlson v. California, supra, substantially supports this proposition. Extending its reasoning in the same manner in *Taylor v. Mississippi, supra,* the Court reversed a conviction and declared a Mississippi statute contrary to the liberties established by the Fourteenth Amendment. There, Taylor, a member of Jehovah's Witnesses, contravened the statute by distributing pamphlets which were allegedly calculated to encourage disloyalty to the United States and Mississippi as well as create an attitude of stubborn refusal to salute the national and state flags. The Court declared that no clear danger resulted from Taylor's action and voided the statute which prohibited the distribution. A recent case illustrating the new broad application of the "clear and present danger" test is *Terminiello v. Chicago, supra.* Terminiello, a Catholic priest then under suspension by his bishop, spoke to approximately 800 people in a Chicago auditorium. His speech was a vile, harangue-like denunciation of several religious and political groups, and resulted in a cross between breach of the peace and riot. Justice Douglas reasoned for the majority that the ordinance prohibiting such conduct was unconstitutional as applied. He declared, 337 U. S. at 4, that although speech is sometimes provocative and challenging, it is

> . . . nevertheless protected . . . unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience. . . .

These decisions definitely indicate that the present Court has utilized Holmes' maxim as a test for the constitutionality of statutes affecting the exercise of free speech and press. In the principal case, the Court held that as a matter of law, a clear and present danger does exist as a result of the activities of the Communist Party and that therefore the Smith Act is constitutional. More significant than this further extension of the Holmes' test is that the Court now has not only this test but also the *Gitlow* rule to determine the constitutionality of statutes similar to the Smith Act in the future.

Recapitulating for a moment, the *Gitlow* case, which concerned itself with a statute substantially the same as in the present case, rejected, or at least ignored, Holmes' test and upheld the statute merely because it was the product of "constitutional" legislative discretion. The case has never been overruled and instead has been cited as authority on several occasions. Consequently, in the future the Court has a choice either to continue to rely on the "clear and present danger" doctrine as precedent, or, if they reject this test, to revive the *Gitlow* holding as authority in the other approach to the problem.

Thomas Meaney, Jr.

INSURANCE — LIFE INSURANCE — CHANGE OF BENEFICIARY BY WILL. — *Stone v. Stephens*, ...Ohio...., 99 N.E. (2d) 766 (1951). This action was instituted to resolve conflicting claims to the proceeds of two life insurance policies. The insured had designated the plaintiff, then his wife, as the beneficiary in both policies. Although the plaintiff later obtained a divorce from the insured, no attempt was made to exercise the reserved right to change the beneficiary according to the formal method prescribed in the policy. After the divorce had been granted, the insured executed his will and in a pertinent clause provided that if he should die unmarried all his property should go to his grandmother, the defendant in this action. While serving as a pilot in the Royal Air Force, the insured disappeared at sea and was later declared dead. The insurance companies, acknowledging their liability, were interpleaded. A bare majority of the Supreme Court of Ohio ruled that the attempt to change the beneficiary by will was ineffective since the policy did not expressly or impliedly permit it. When the will took effect at death, the right of the designated beneficiary was already fixed by law and could not be altered by the interpleader of the companies. The dissenting judges were of the opinion that the provisions regarding the change of beneficiary protected only the companies, and that since these provisions were waived by the interpleader, the intent of the insured manifested in the will should prevail.

While the number of cases involving the question of a change of beneficiary in a life insurance policy has afforded the courts abundant opportunity to examine this problem, the yield in precise formulations is relatively sparse. See Grismore, *Changing the Beneficiary of a Life Insurance Contract,* 48 MICH. L. REV. 591 (1950). When the insured reserves the right to change the beneficiary and the policy recites formalities necessary to effect the change, may the insured pass over these provisions and change the beneficiary by will? The answer to this question has resulted in a division of the authorities and a development of the customary majority and minority decisions.

Common to both the majority and minority views are several underlying principles. Although these principles are lacking in perfected, definitive development, they are undisputed as isolated theorems. Since these principles are fundamental to a dissection of the problem of changing a beneficiary in a life insurance policy, they deserve mention at the outset. When ruling on the interest which the named beneficiary takes in a policy, where the right to change beneficiaries is reserved, the courts are in agreement that the interest is not vested until the death of the insured. During the life of the insured, the interest may be defeated and is an expectancy or contingent interest only. *Supreme Council of Royal Arcanum v. Behrend,* 247 U. S. 394, 38 S. Ct. 522, 62 L. Ed. 1182 (1918); *Katz v. Ohio National Bank,* 127 Ohio St. 531, 191 N.E. 782 (1934); *Oetting v. Sparks,* 109 Ohio St. 94, 143 N.E. 184 (1923). Although this concept of the expectancy interest is generally accepted, its application in a great number of conflicting cases demonstrates the need for a more comprehensive analysis. In *Parks' Ex'rs v. Parks,* 288 Ky. 435, 156 S.W. (2d) 480 (1941), the court suggested that in the accurate, technical sense an expectancy interest gives the named beneficiary a present, relatively secure right subject only to possible divestiture within the bounds of the contractual procedure. Under this interpretation the right of the beneficiary is subject to defeat only by exercise of the reserve power. See Grismore, *supra.* Most jurisdictions, including Ohio, do not require actual compliance with the policy provisions relating to change of beneficiary. A change will be permitted where substantial performance of the conditions is shown. *Atkinson v. Metropolitan Life Ins. Co.,* 114 Ohio St. 109, 150 N.E. 748 (1926); *Arnold v. Newcomb,* 104 Ohio St. 578, 136 N.E. 206 (1922). Some courts invoke the equitable principle and regard as done that which ought to be done where the insured has done all that he could under the circumstances to effect the change. *Barrett v. Barrett,* 173 Ga. 375, 160 S.E. 399 (1931).

The instant case typifies the majority rule that a change of beneficiary must be accomplished in rather strict accordance with the provisions of the policy. Under this view, it was held in *Fink v. Fink,* 171 N. Y. 616, 64 N.E. 506 (1902), that letters written by the insured shortly before his death requesting a change of beneficiary, did not follow the prescribed method and could not effect a change. The court pointed out that the contract provisions protected the *named* beneficiary and distinguished unexecuted power from intention to execute a change. This principle was reaffirmed, where wills were used to make the change, in *Pruchnowski v. Prudential Ins. Co. of America,* 242 App. Div. 899, 276 N. Y. Supp. 84 (4th Dep't 1934); *Martinelli v. Cometti,* 133 Misc. 810, 234 N. Y. Supp. 389 (Sup. Ct. 1929). When provisions set forth in the policy are not complied with, the less flexible majority view denies recovery to claimants under a will. *Cook v. Cook,* 17 Cal. (2d) 639, 111 P. (2d) 322 (1941); *Metropolitan Life Ins. Co. v. Jones,* 307 Ill. App. 652, 30 N.E. (2d) 937 (1940); *Parks' Ex'rs v. Parks, supra; Dogariu v. Dogariu,* 306 Mich. 392, 11 N.W. (2d) 1 (1943); *Martinelli v. Cometti, supra; Wannamaker v. Stroman,* 167 S.C. 484, 166 S.E. 621 (1932).

When considering whether interpleader of the insurance company waives the change provisions, some courts, supporting the strict majority view, have stated that the contingent interest of the beneficiary vests upon the death of the insured and that subsequent acts will not affect the vested right. *Metropolitan Life Ins. Co. v. Jones, supra,* 30 N.E. (2d) at 939; *Dogariu v. Dogariu, supra,* 11 N.W. (2d) at 7. Perhaps a better reason for this contention is that the provisions protect the beneficiary as well as the company and the company cannot waive the right of the beneficiary. *Wannamaker v. Stroman, supra,* 166 S.E. at 623. In support of the majority view, it has been said that the public interest would suffer from the uncertainties if testamentary changes were allowed. *Dogariu v. Dogariu, supra,* 11 N. W. (2d) at 7; *Wannamaker v. Stroman, supra,* 166 S.E. at 623.

According to the minority view, when the policy allows a change of beneficiary but is silent as to the mode required, a will may properly execute the change. *Townsend v. Fidelity & Casualty Co. of New York,* 163 Iowa 713, 144 N.W. 574 (1913). If the contract provisions do not extend protection to the nominated beneficiary, the interest which the beneficiary takes under the policy is said to be limited so as to be defeated by any clear expression of intent to do so. See Grismore, *supra.* In line with this reasoning, this minority of the courts has dispensed with the stringent requirement of following the policy provisions, regards the provisions as safeguards for the insurer alone and holds that the unequivocal intention expressed in the will controls. *Arrington v. Grand Lodge of Brotherhood of Railroad Trainmen,* 21 F. (2d) 914 (5th Cir. 1927), *cert. denied,* 276 U. S. 617, 48 S. Ct. 213, 72 L. Ed. 733 (1928); *Phoenix Mut. Life Ins. Co. v. Cummings,* 67 F. Supp. 159 (W. D. Mo. 1946); *Pedron v. Olds,* 193 Ark. 1026, 105 S.W. (2d) 70 (1937); *Eickelkamp v. Carl,* 193 Ark. 1155, 104 S.W. (2d) 814 (1937) (follows *Pedron* case); *Finnerty v. Cook,* 118 Colo. 310, 195 P. (2d) 973 (1948); *Hunter v. Hunter,* 100 S. C. 517, 84 S.E. 180 (1915) (declaration *in extremis*).

An Ohio court in a decision prior to the instant case had stated that the requirements in the policy benefited the insurer alone. *Atkinson v. Metropolitan Life Ins. Co., supra,* 150 N.E. at 752. Although this case did not involve a will, an essential element of the liberal rule was favorably recognized. In *Pedron v. Olds, supra,* 105 S.W. (2d) at 71-2, the court examined the policy provisions relating to change of beneficiary and concluded that the provisions were obviously for the benefit of the insurer. Variations of the formalities providing for a change of beneficiary in a life insurance policy undoubtedly exist, but these are differences in form only. The essence of the provisions which create the interest is basically the same. When the policy is not contained in the record and the court is unable to scrutinize the contract conferring the interest in question, a testamentary change of beneficiary is valid. *Benson v. Benson,* 125 Okla. 151, 256 Pac. 912 (1927). When the policy does not extend a secure interest to the beneficiary, the interest the beneficiary takes is similar and equal to that of a legatee under a will. Since both claimants have similar interests according to the minority contention, the last declared intent prevails. *Pedron v. Olds, supra.*

Although the decision in the instant case strengthens the position supported by the majority of the courts, whether it adds to the rationale of the basic problem is uncertain. If an exact exposition of the contractual conditions had been conducted, perhaps it would have obviated the necessity for oblique references to expectancy interests and somewhat fanciful conceptions of public policy. When considered in the light of the practicalities surrounding these cases, the solution of the minority, in addition to its equitable features, seems to be more penetrating.

William J. Hurley

TAXATION — EMPLOYER-EMPLOYEE RELATIONSHIP UNDER FEDERAL SOCIAL SECURITY ACT. — *Ringling Bros. - Barnum & Bailey Combined Shows, Inc. v. Higgins,* 189 F. (2d) 865 (2d Cir. 1951). This case deals with the common law concepts of master and servant and their application in determining who are employees under the Social Security Act. The court affirmed the trial judge's holding that where the ultimate power of direction and control resides in the employer there is an employee relationship, not that of independent contractor.

The taxpayer, a circus corporation, brought action for refund of moneys paid as unemployment taxes. The parties joined issue on whether certain persons in the plaintiff's employ during the year 1936 were employees, as held by the trial court, or independent contractors, in which case the tax is not applicable. Involved are the so-called "producing" clowns, who developed the original ideas for their acts and the "feature" acts, which included aerial trapeze, balancing, high-wire, seal, horse, dog, comic acrobatic and "human cannonball" acts. The plaintiff entered into contracts with these "producing" clowns and "feature" acts for an entire season, at the same time retaining an option to renew the contract for the next succeeding season upon the same terms. Each act was contracted for as a "package"; the contract was ordinarily made with the head of the act, and he alone was paid for it. Costumes and all properties were supplied by the several acts and remained under their sole control.

There are at least two lines of cases, each backed by substantial and reputable authority, and which have reached opposite results in resolving the problem presented in this case. It is essentially a conflict between adherents of strict common law tests of master and servant and those stressing the spirit of the legislation and the broad coverage under the Act. The instant case appears to fall into the latter grouping, as pointed out in the dissenting opinion, despite a recent amendment to the Social Security Act calling for application of the "usual" common law tests.

Since the inception of federal social security legislation in 1935, 49 STAT. 620 (1935), 42 U.S.C. § 301 *et seq.* (1946), the varying opinions of the courts have consistently assumed that there is some simple, uniform test easily applied to determine whether persons doing work for others fall into the class of employee or independent contractor. Unfortunately, this is not true. In *NLRB v. Hearst Publications, Inc.*, 322 U. S. 111, 64 S. Ct. 851, 88 L. Ed. 1170 (1944), the Court said that the relatively simple formula, developed after a "long and tortuous" history for deciding responsibility in tort, has by no means been controlling in the field of social legislation. See *Murray's Case,* 130 Me. 181, 154 Atl. 352 (1931); *In re Rheinwald,* 168 App. Div. 425, 153 N. Y. Supp. 598 (3d Dep't 1915).

In comparatively recent years a wide variety of state jurisdictions have pioneered in effecting a departure from the common law tests. They have repeatedly held that the social benefit statutes should be given a broad application as remedial legislation. *McKinley, Com'r of Labor v. R. L. Payne & Son Lumber Co.,* 200 Ark. 1114, 143 S. W. (2d) 38 (1940). Interpretation of the definitions given in these statutes differs from similar common law concepts, and the relationship defined in the statutes has been held to go beyond the common law test for determining responsibility for tortious conduct. *Globe Grain & Milling Co. v. Industrial Commission,* 98 Utah 36, 91 P. (2d) 512 (1939); see *In re Zeits,* 108 Ind. App. 617, 31 N.E. (2d) 209 (1941); *Unemployment Compensation Commission of North Carolina v. Jefferson Standard Life Ins. Co.,* 215 N. C. 479, 2 S.E. (2d) 584 (1939).

Despite this trend established by a minority of state court opinions, federal social legislation continued to be interpreted in the light of conventional common law tests. *Vaughan v. Warner,* 157 F. (2d) 26 (3d Cir. 1946); *Radio City Music Hall Corp. v. United States,* 135 F. (2d) 715 (2d Cir. 1943). Legislative intent was presumed to be in harmony with the term "employee" as the common law knew it. *American Oil Co. v. Fly,* 135 F. (2d) 491 (5th Cir. 1943); *Jones v. Goodson,* 121 F. (2d) 176 (10th Cir. 1941); *Texas Co. v. Higgins,* 118 F. (2d) 636 (2d Cir. 1941).

Judge Learned Hand laid down the rule subscribed to by the common law bank of jurists in *Radio City Music Hall Corp. v. United States, supra,* 135 F. (2d) at 717. He believed the real test to lie ". . . in the degree to which the principal may intervene to control the details of the agent's performance," and that there could be nothing more to say even though "the regulation redundantly elaborated it."

At least one court, *Williams v. United States,* 126 F. (2d) 129 (7th Cir. 1942), saw the purposes of the Social Security Act being defeated in the application of the strict control doctrine or common law rules of agency. In holding the plaintiff, an orchestra leader, instead of the establishment for which the orchestra performed, liable for social security taxes as the employer, the court took cognizance of the unfortunate situation resulting from its holding, but said, 126 F. (2d) at 133-4, that the plaintiff's appeal must be addressed to Congress rather than to the courts which are without power to legislate.

The first promise of a change to come in interpreting federal social legislation was noted in the field of workmens' compensation. *NLRB v. Hearst Publications, supra,* 322 U. S. at 129, rejected the test of the "technical concepts pertinent to an employer's legal responsibility to third persons for the acts of his servants." This test is often referred to as power of control, whether exercised or not, over the manner of performing services. "Employee" as used in the National Labor Relations Act, 49 STAT. 450 (1935), 29 U.S.C. § 152(3) (1946), as amended, 61 STAT. 137 (1947), 29 U.S.C. § 152(3) (Supp. 1951), had been earlier construed by the Supreme Court as having no definite meaning in the sense of being a word of art, but rather a word taking its color and meaning from the statute in the "light of the mischief to be corrected." *South Chicago Coal & Dock Co. v. Bassett,* 309 U. S 251, 259, 60 S. Ct. 544, 84 L. Ed. 732 (1940). See *United States v. American Trucking Associations, Inc.,* 310 U. S. 534, 60 S. Ct. 1059, 84 L. Ed. 1345 (1940).

The decision in *United States v. Silk,* 331 U. S. 704, 67 S. Ct. 1463, 91 L. Ed. 1757 (1947), first made it evident that the Supreme Court gave sanction to judicial thinking which was not concerned solely with the immediate technical relation of employer and employee in applying social security legislation. The Court expressed approval of its earlier ruling in the *Hearst* case, *supra,* and further clarified itself by saying, 331 U. S. at 712:

> As the federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose. Such an interpretation would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation.

See *Social Security Board v. Nierotko,* 327 U. S. 358, 66 S. Ct. 637, 90 L. Ed. 718 (1946); *Buckstaff Bath House Co. v. McKinley, Commissioner of the Department of Labor of Arkansas,* 308 U. S. 358, 60 S. Ct. 279, 84 L. Ed. 322 (1939).

In the same year, the Supreme Court in *Bartels v. Birmingham,* 332 U.S. 126, 67 S. Ct. 1547, 91 L. Ed. 1947 (1947), further disavowed the control doctrine in the application of social legislation. The Court held that all are employees who as a matter of "economic reality" are dependent upon the business to which they render service.

Almost immediately after this decision, Congress passed an amendment to the original Social Security Act. 49 STAT. 647 (1935), 42 U.S.C. § 301 (1946), as amended, 53 STAT. 1398 (1939), 62 STAT. 438 (1948), 26 U.S.C. § 1607 (i) (Supp. 1951). This amendment provides that the term "employee" shall not include:

> (1) any individual who, under *the usual common-law rules* applicable in determining the employer-employee relationship, has the status of an independent contractor, or (2) any individual (except an officer of a corporation) *who is not an employee under such common-law rules.* [Emphasis supplied.]

This amendment is apparently a direct rejection of the "economic reality" test advanced in *United States v. Silk, supra,* and *Bartels v. Birmingham, supra,* and manifests congressional approval of Judge Learned Hand's "control" test advanced in *Radio City Music Hall Corp. v. United States, supra.* See *Party Cab Co. v. United States,* 172 F. (2d) 87 (7th Cir. 1949); *Shreveport Laundries, Inc. v. United States,* 84 F. Supp. 435 (W. D. La. 1949).

Since there is no certainty as to what is *the usual common law* test, it was hardly to be expected that the spirit behind the "economic reality" doctrine of the *Bartels* case would be shelved for long. Despite extensive lip-service to the amendment and the *Radio City Music Hall* case, the instant opinion gives the impression of casting about for a rewording of the "economic reality" doctrine in an attempt to conform to both.

Joseph H. Harrison

TAXATION — FEDERAL INCOME TAXES — TAXABILITY OF GAINS FROM ILLEGAL TRANSACTIONS. — *United States v. Rutkin,* 189 F. (2d) 431 (3d Cir. 1951). The appellant, James Rutkin, was convicted of willfully attempting to evade income and victory taxes under INT. REV. CODE § 145(b). Rutkin had received $250,000 from one Reinfeld, who charged that the payment was made as the result of threats to kill and show of force by Rutkin. Rutkin contended that the payment was made in final settlement of his asserted interest in a certain partnership which was partly owned by Reinfeld. This contention was supported by the fact that Rutkin gave Reinfeld and others a general release of all his rights in the partnership at the time of payment. He claimed that the payment was not reportable income by him on the ground that the partnership had previously paid the capital gains tax on the money. On the basis of *Commissioner v. Wilcox,* 327 U. S. 404, 66 S. Ct. 546, 90 L. Ed. 752 (1946), the court, holding that the money received by Rutkin was obtained under a semblance of a claim of right and that a definite unconditional obligation to repay or return the money was absent, affirmed the conviction. The dissenting opinion also applied the rule of the *Wilcox* case, but held that on the basis of the extortion, Rutkin did not receive the money under a bona fide claim of right and consequently had no title to it, so that the money was not taxable to him.

The issue here rests upon the interpretation of Section 22(a) of the Internal Revenue Code as to what constitutes a taxable gain.

The general rule, well established by the decisions even before the *Wilcox* case, was that gains from illegal transactions are income and taxable to the wrongdoer. In *Humphreys v. Commissioner,* 125 F. (2d) 340 (7th Cir. 1942), ransom money and protection payments were taxable. Overcharges of passenger fares in excess of tariff provisions, *Chicago, R. I. & P. Ry. v. Commissioner,* 47 F. (2d) 990 (7th Cir. 1931), and misapplied funds due to a breach of trust between attorney and client, *United States v. Wampler,* 5 F. Supp. 796 (D. Md. 1934), were also taxed. Gains from usury, *Barker v. Magruder,* 95 F. (2d) 122 (D. C. Cir. 1938); graft money, *Chadick v. United States,* 77 F. (2d) 961 (5th Cir. 1935); unlawful bonuses, *Board v. Commissioner,* 51 F. (2d) 73 (6th Cir. 1931); and "kickbacks" on contracts and gambling gains, *Caldwell v. Commissioner,* 135 F. (2d) 488 (5th Cir. 1943), were all held taxable income.

Several decisions deviated from this general rule and held that embezzled funds were not taxable. *McKnight v. Commissioner,* 127 F. (2d) 572 (5th Cir. 1942); *Rau v. United States,* 260 Fed. 131 (2d Cir. 1919). However, the *Rau* case was overruled by *National City Bank of New York v. Helvering,* 98 F. (2d) 93 (2d Cir. 1938), and another case, *Kurrle v. Helvering,* 126 F. (2d) 723 (8th Cir. 1942), held that embezzled funds were taxable. These cases exemplify the divergence of opinion in the circuit courts on the question whether embezzled funds are taxable.

Underlying the general rule that gains from illegal transactions are taxable income to the wrongdoer are several basic principles. Primarily, it is well settled that Congress has the power to tax what it prohibits. *United States v. Sullivan,* 274 U. S. 259, 47 S. Ct. 607, 71 L. Ed. 1037 (1927). Secondly, a wrongdoer cannot set up his own wrongdoing as a lawful reason for escaping the tax on the gains derived from the wrong. *Board v. Commissioner, supra*; *United States v. Wampler, supra.* Finally, the system of federal income taxation is based upon an annual accounting period requiring the determination of income at the close of the taxable year without regard to the effect of later events. The practical difficulties which would result from the use of any other system of assessment clearly emphasize the importance of this factor. *Haberkorn v. United States,* 173 F. (2d) 587 (6th Cir. 1949); *Barker v. Magruder, supra.*

In the leading case embodying these principles to support the general rule, *North American Oil Consolidated v. Burnet,* 286 U. S. 417, 424, 52 S. Ct. 613, 76 L. Ed. 1197 (1932), the Court stated:

> If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent.

Two important concepts are manifested by this rule; namely, the claim of right doctrine and the objective probability of retention test. It is upon these considerations that the cases dealing with this subject have usually been founded. Nevertheless, a few decisions have been distinguished from the *North American* case by utilizing various other theories, notably, *Knight Newspapers, Inc. v. Commissioner,* 143 F. (2d) 1007 (6th Cir. 1944), and *Greenwald v. United States,* 57 F. Supp. 569 (Ct. Cl. 1944). In the former the stockholders of a corporation were deemed constructive trustees of a dividend subsequently rescinded. The latter held that the claim of right doctrine of the *North American* decision did not apply because the money in question was paid under a mistake of fact.

The *Wilcox* case itself held that embezzled funds were not taxable income to the embezzler and laid down the rule applied in the principal case. Undoubtedly, the *Wilcox* decision is a departure from the general rule that gains from illegal transactions are to be taxed even though the Court seemingly justified its opinion by stating that the embezzler received the funds under no claim of right and simultaneously with the act of embezzling incurred an unconditional obligation to repay or return the money. In *Gilken Corporation v. Commissioner,* 176 F. (2d)

141 (6th Cir. 1949), the court made no mention of the *Wilcox* case, but quoted from *Brown v. Helvering,* 291 U. S. 193, 54 S. Ct. 356, 78 L. Ed. 725 (1934), to the effect that the determinative factor is the unrestricted use, enjoyment and disposition of the income in question during the taxable year. Considering this factor alone, as a practical matter the embezzler does have unrestricted use, enjoyment and disposition of the funds.

The recent cases have generally not followed the *Wilcox* case which was purported to be the test under Section 22(a) of the Internal Revenue Code as to what constituted a taxable gain. *Capital Warehouse Co. v. Commissioner,* 171 F. (2d) 395 (8th Cir. 1948); *United States v. Chapman,* 168 F. (2d) 997 (7th Cir. 1948). An exception to this statement was *Gargaro v. United States,* 73 F. Supp. 973 (Ct. Cl. 1947), which applied the *Wilcox* rule.

The courts have taken great pains to distinguish the cases from the *Wilcox* decision in order to apply the rule adopted in *North American Oil Consolidated v. Burnet, supra.* Some have made the distinction that the "no restriction as to disposition" clause in the *North American* rule applies even though the "definite unconditional obligation to repay or return" requirement of the *Wilcox* rule has not been satisfied. *Fleischer v. Commissioner,* 158 F. (2d) 42 (8th Cir. 1946). *Akers v. Scofield,* 167 F. (2d) 718 (5th Cir. 1948), involving swindled funds, applied the rule of the *North American* decision and emphasized that there was no debtor-creditor relation as there was in the *Wilcox* case. *Haberkorn v. United States, supra,* was held to be controlled by the *North American* case and different from the *Wilcox* case in that the receipt of the money and the obligation to repay or return in the *Wilcox* case took place simultaneously, whereas in *Haberkorn* the holder treated the money received as his own, without restriction for over a year before an unconditional obligation to repay it arose.

It is well to note, also, that most of the dissension caused by the interpretations of Section 22(a) of the Internal Revenue Code as to what constitutes a taxable gain has its origin in the remedy provided where gains, previously reported, are repaid later. At present, the remedy is not to sue the Collector to recover the excess tax paid, but to claim the repayment as a deduction from income in the year in which it is repaid or returned. *Anderson v. Bowers,* 170 F. (2d) 676 (4th Cir. 1948). Undoubtedly, the most equitable remedy is to amend the Internal Revenue Code so that a taxpayer who restores income, previously reported, to its rightful owner may amend his return and obtain a refund of the excess tax paid.

The decision of the principal case while in accord with the general rule requiring taxation of gains from illegal transactions would be more convincing had it been based upon the rule manifested by *North American Oil Consolidated v. Burnet, supra.* It is evident that the latter rule has been given much support by the courts and is in complete harmony with the present system of taxation.

Robert L. Berry

TAXATION — TAXPAYER'S APPLICATION OF EQUITABLE ESTOPPEL AGAINST THE GOVERNMENT IN THE EXERCISE OF ITS GOVERNMENTAL POWERS. — *Stockstrom v. Commissioner,* 190 F. (2d) 283 (D. C. Cir. 1951). Louis Stockstrom filed no gift tax return for 1938, though he had made several gifts in trust of less than $5000 each. He paid no tax for that year because the Commissioner of Internal Revenue was, at the time, collecting gift taxes according to a court ruling that gifts in trust were gifts of present interests. By statute, gifts of present interests of less than $5000 were tax exempt. A revenue agent called Stockstrom's attention to his failure to file. The agent and a representative of Stockstrom immediately brought the matter before the Bureau of Internal Revenue at St. Louis. There, an official told them that since no tax was due, no return need be filed. In 1948 the Commissioner, to comply with a new court holding, changed his regulations with regard to the nature of the interest transferred by a gift in trust. He then sent the estate of the since deceased Stockstrom a notice of a tax deficiency due on the gifts made in 1938 and of penalties as a result of the nonpayment. When the executor of the estate petitioned for a redetermination, the Tax Court upheld the Commissioner's findings. On review the Court of Appeals for the District of Columbia considered the issue to be, not whether a present or future interest had been granted, but whether the Government was estopped from contending that the decedent's failure to file a tax return had prevented the three year statute of limitations from running. The court held that the doctrine of estoppel, available to the Government, was also available against it. Because the taxpayer's omission, after he had become aware of his neglect, was caused by his reliance upon the declarations of a Government agent, the Commissioner was estopped from pleading, in suspension of the statute of limitations, that no return had been filed.

The dissenting judge expressed regret that the law was not as the majority of the court had stated, but maintained the rule was well established that the Government is not subject to estoppel in tax matters.

Courts have sometimes divided the functions of the Federal Government into two classes: governmental or sovereign and corporate or proprietary. *Elrod Slug Casting Mach. Co. v. O'Malley,* 57 F. Supp. 915 (D. Neb. 1944). It is the opinion of this writer that, since the powers of the Federal Government are specifically enunciated and limited by the Constitution, this division is not technically correct. Strictly speaking, the Government possesses only governmental powers and the non-governmental, commercial activities in which it engages are allowed only because they are concomitant with and result from the exercise of the governmental powers.

When the Federal Government has entered the commercial world it has been held subject to the same laws as individuals. *Jay Cooke & Co. v. United States,* 91 U. S. 389, 23 L. Ed. 237 (1875). It possesses the same rights and is subject to the same liabilities as any other business: "The United States does business on business terms." *United States v. National Exchange Bank of Baltimore,* 270 U. S. 527, 534, 46 S. Ct. 388, 70 L. Ed. 717, 719 (1926).

When the United States acts in its governmental capacity, the general rule is that it is not subject to the doctrine of estoppel. *Gibbons v. United States,* 8 Wall. 269, 19 L. Ed. 453 (U. S. 1869); *United States v. City of Greenville,* 118 F. (2d) 963 (4th Cir. 1941); *United States v. Leccony Smokeless Fuel Co.,* 64 F. Supp. 269 (S. D. W. Va. 1946). Under this rule, neither an erroneous interpretation of a law, *Stewart v. United States,* 24 F. Supp. 145 (N. D. Cal. 1938), which is considered a nullity, *Ben Stocker,* 12 B.T.A. 1348 (1928), nor laches, *United States v. Kirkpatrick,* 9 Wheat. 720, 6 L. Ed. 199 (U. S. 1824), is sufficient to support the application of equitable estoppel.

This general rule was invoked in deciding a tax question in *Elrod Slug Casting Mach. Co. v. O'Malley, supra,* at 920, where the court said, "The assessment and collection of revenues is a governmental function, and the doctrine of estoppel has no place here."

The strongest argument in favor of the existence of this immunity is its effectiveness in guaranteeing to the nation the benefit and protection of its laws, free from the errors of human agents. The good resulting from the protection of the public interest is said to outweigh the evil of denying to individuals the defense of estoppel. As it was stated in *Gibbons v. United States, supra,* 19 L. Ed. at 454,

> No government has ever held itself liable to individuals for the misfeasance, laches or unauthorized exercise of power by its officers and agents.
>
> In the language of Judge Story, . . . "It does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests."

An indication that the Government might be subjected to the doctrine of equitable estoppel, even in the exercise of its governmental powers, can be found in dicta in several cases. *Barnett Inv. Co. v. Nee,* 72 F. Supp. 81 (W. D. Mo. 1947). "The doctrine of . . . estoppel must be applied with great caution to the Government and its officials. But in proper circumstances it does apply." *Vestal v. Commissioner,* 152 F. (2d) 132, 136 (D. C. Cir. 1945). The court further stated that estoppel could only be maintained when the agents have acted within their authority. One decision, *James Couzens,* 11 B.T.A. 1040, 1151 (1928), implied that the Government might be subjected to an estoppel even in the exercise of its power to tax. It said, however, that the ". . . necessity inherent in its sovereign power of taxation. . ." would allow the Government to be estopped only in the most extraordinary situation.

The instant case is disturbing for the reason that the cases most heavily relied upon by the court to substantiate its opinion fail to accomplish that purpose. *Swain v. Seamens,* 9 Wall. 254, 19 L. Ed. 554 (U.S. 1870); *Thomson v. Poor,* 147 N.Y. 402, 42 N.E. 13 (1895); *Dolan v. Rodgers,* 149 N. Y. 489, 44 N. E. 167 (1896), and *Imperator Realty Co. v. Tull,* 228 N. Y. 447, 127 N. E. 263 (1920), relied upon by the court involved controversies between individuals, and though they enunciate maxims regarding the use of equitable estoppel, they tell us nothing of the position of the Government under the doctrine. The keystone, as it were, of the court's opinion is *R. H. Stearns Co. v. United States,* 291 U. S. 54, 54 S. Ct. 325, 78 L. Ed. 647 (1934), but it can be distinguished from the principal case — there the Government succeeded in estopping a taxpayer. Of the cases cited, *United States v. Peck,* 102 U. S. 64, 26 L. Ed. 46 (1880) most nearly approaches the instant case in its holding, but there the Government was estopped from alleging non-performance of a contract obligation because its agents had rendered performance by the defendant impossible.

The court's decision, though weakly supported and contrary to the general rule, is, because of the facts of the case, more in accord with a layman's view of justice than would have been a holding based on the rule. Though the public interest argues strongly for the existence of the rule, it should be tempered in order to give more consideration to the rights of individuals, even against their government. It is submitted that the public interest might be better served by a modification of the rule making it more difficult for the Government to repudiate the acts and representations of its agents, and forcing it to place a greater premium upon the ability of applicants for responsible Government posts.

Robert F. McCoy

TITLE REGISTRATION STATUTES — INTERPRETATION OF CERTIFICATE OF TITLE ACT. — *Kelley Kar Co. v. Finkler,* 155 Ohio St. 541, 99 N.E. (2d) 665 (1951). The plaintiff, Kelley Kar Company, sold an automobile to one Anderson under a conditional sales contract signed in California. Anderson then took the car to Vermont where he fraudulently procured a certificate from the Vermont Motor Vehicle Department which indicated that he was the owner of the automobile and that his title was unencumbered. Appearing in Cleveland with the car, Anderson secured an Ohio certificate of title from the Clerk of Courts of Cuyahoga County to replace the Vermont certificate. Anderson did not inform the clerk of the interest of the Kelley Kar Company. The defendant, Finkler, relying upon the Ohio certificate held by Anderson, purchased the car from him and an Ohio certificate of title was issued to Finkler upon surrender of the one held by Anderson. The Kelley Kar Company learned that the automobile was in Finkler's possession and brought this action of replevin, also claiming $3000 as damages. The issue in the case was whether a certificate of title, though born in fraud, will prevail in the hands of an innocent purchaser over the claim of the conditional vendor. The Supreme Court of Ohio held that since the right, title and claim of interest of the Kelley Kar Company to the motor vehicle was not evidenced by a certificate of title, its claim could not be recognized.

The reasoning relied upon by the court appears to be contrary to the majority rule exemplified in another recent Ohio case, *Associates Discount Corp. v. Colonial Finance Co.,* 88 Ohio App. 205, 98 N.E. (2d) 848 (1950). There the conditional sales contract was duly recorded pursuant to the laws of New York. The court, in upholding the claim of the conditional vendor as against the claim of the mortgagee of an innocent purchaser in Ohio, applied the majority rule that where a conditional vendor has complied with the recording statutes of his own jurisdiction, his lien has priority over the claim of a bona fide purchaser from the conditional vendee in a foreign jurisdiction. *Pruitt Truck & Implement Co. v. Ferguson,* 216 Ark. 848, 227 S.W. (2d) 944 (1950); *Farnham v. Eichin,* 230 App. Div. 639, 246 N. Y. Supp. 133 (3d Dep't 1930).

An exception to the majority rule is allowed where the conditional vendor and vendee contemplate that the property will be removed to and used in a state other than that in which it was located at the time of the execution of the contract. It is held that the seller impliedly consents to the removal and the recording laws of the state of destination will determine his rights as against bona fide purchasers of the property. *Denkins Motor Co. v. Humphreys,* 310 Ky. 344, 220 S.W. (2d) 847 (1949).

There is a minority doctrine to the effect that the filing or recording of the conditional sales contract in the state where the property is located and where the transaction took place does not protect the conditional vendor against third persons after the removal of the property to another state unless it is filed or recorded in the second state. This minority rule is obviously applied where the state, by positive enactment in specific terms, declares that the conditional vendor's lien executed in a foreign jurisdiction will not be recognized unless it is re-recorded within the state to which the vehicle has been removed. MISS. CODE ANN. § 870 (1942). But it is also applied where the court has merely *interpreted* the local certificate of title act to mean that the conditional vendor's lien must be re-recorded within the state in order to be upheld against the claim of a bona fide purchaser. The minority doctrine was adhered to in *Lee v. Bank of Georgia*, 159 Fla. 481, 32 So. (2d) 7 (1947). The applicable section of Florida's certificate of title act, FLA. STAT. § 319.15 (1949), does not *specifically* state that a conditional sales contract executed in another state and properly recorded there must be re-recorded, but the court in the *Lee* case, *supra*, interpreted its title act to mean just that.

Formerly, Texas and Louisiana supported the minority view, but both presently construe their title acts in harmony with the majority rule. *General Motors Acceptance Corporation v. Nuss*, 195 La. 209, 196 So. 323 (1940); *Bank of Atlanta v. Fretz*, 148 Tex. 551, 226 S.W. (2d) 843 (1950). The Supreme Court of Texas in *Bank of Atlanta v. Fretz*, *supra*, 226 S.W. (2d) at 849, discussed its certificate of title law saying:

> The spirit and purpose of this law is to prevent fraud; not to encourage it. It was not the intention of the Legislature by this Act to invalidate liens validly acquired in States which do not have a similar law. . . . If the Legislature had intended this, it could have stated that all liens acquired in other States not having certificate of title laws would be forfeited when the vehicle reaches the hands of an innocent purchaser for value in this State.

In view of the foregoing, in the State of Ohio, the question is simply whether the court, in the cited case, interpreted its title act so as to invalidate all foreign liens not re-recorded in Ohio, and thus join Florida as a proponent of the minority view. Or can a conditional vendor in a foreign jurisdiction as the plaintiff in *Associates Discount Corp. v. Colonial Finance Co.*, *supra*, who has fully complied with the recording statutes of his own jurisdiction, still prevail as against an innocent purchaser in good faith in Ohio?

The court in the principal decision, 99 N.E. (2d) at 666, remarked that:

> The record does not disclose whether the conditional sale contract was filed or recorded in any public office in California.

If the prevailing view had been applied, the Kelley Kar Company would have had the burden of showing that the contract was registered pursuant to the California statute. Since the statement quoted above indicates that this burden was not sustained, it might appear at first blush that the court actually did adopt and apply the majority rule. In other words, it might be argued that the instant decision is based on the prevailing principle that where the conditional vendor does not comply with the recording statutes of his own jurisdiction, through negligence or otherwise, he cannot successfully assert his claim as against a subsequent bona fide purchaser in another jurisdiction. But the court in effect said that, for the purpose of this decision, whether or not the conditional vendor complied with the recording statutes of his own jurisdiction was of no consequence and had no bearing on the case. This contention is strengthened by the observation that the court, 99 N.E. (2d) at 670, favorably quoted from the *Lee* case, *supra,* a decision supporting the minority view. Also the court said, 99 N.E. (2d) at 670:

> The General Assembly of the sovereign state of Ohio has declared the policy of this state by enactment of the Certificate of Title Act. . . . The appellee [Kelley Kar Co.] has not complied with *that* law. The appellant has complied with it. Therefore, the appellee cannot prevail and procure possession of the automobile in question. [Emphasis supplied.]

Consequently, even if the Kelley Kar Company had duly recorded its lien pursuant to the recording statutes of California, unless it had re-recorded its lien in Ohio it could not prevail there as against a bona fide purchaser.

Without commenting on the soundness of this rule, it is the view of this writer that a preferable solution would be for the *legislature* to enact it by expressly providing that unless foreign liens are re-recorded in Ohio they shall not prevail against innocent purchasers.

Edward Canary

TORTS — RES IPSA LOQUITUR — ELECTRICAL SHOCK RECEIVED FROM TELEPHONE. — *Manley v. New York Tel. Co.,* ....N. Y....., 100 N.E. (2d) 113 (1951). In an action to recover damages for a paralysis of his right side, the plaintiff alleged that while removing a telephone receiver, and as a result of the defendant's negligence, he received a violent charge of electricity which knocked him down. The bill of particulars charged specific acts of negligence which were not proved at the trial. Ostensibly, the plaintiff primarily relied on his direct proof rather than on res ipsa loquitur. The trial court non-suited him at the close of his evidence, which consisted of his own inartistic testimony, the statement of one lay witness that she found him on the floor with the receiver hanging from the wall, and the opinion of a medical witness that part of the plaintiff's present condition was due to trauma and shock. The Court of Appeals, in a four to three decision, held that the plaintiff failed to adduce sufficient evidence to support an inference of negligence under the res ipsa loquitur theory and thus affirmed the judgment of the trial court.

Did the plaintiff satisfy the legal requirements necessary to support an inference of negligence under the res ipsa loquitur doctrine? More specifically, should the uncertainty of the plaintiff's testimony, plus the questionable medical proof, demolish the plaintiff's cause? This was the issue on which the New York Court of Appeals was divided.

The origin of the doctrine is traced to *Byrne v. Boadle,* 2 H. & C. 722, 159 Eng. Rep. 299 (1863), where a barrel of flour fell from a warehouse window and injured a passer-by. The court held there was sufficient prima facie evidence of negligence to cast on the defendant the burden of going forward with the evidence to show that the accident was not caused by his negligence. The use of the phrase and the application of the doctrine has grown rapidly in the United States. All jurisdictions have recognized and applied the principle except Michigan and South Carolina. See Shain, *Res Ipsa Loquitur,* 17 So. CALIF. L. REV. 187 (1944).

The generally accepted requirements or conditions which must be present before the doctrine may be invoked are: the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; it must be caused by an instrumentality within the exclusive control of the defendant; and it must not have been due to any voluntary action or contributory negligence on the part of the plaintiff. *Mabee v. Sutliff & Case Co.,* 335 Ill. App. 353, 82 N.E. (2d) 63 (1948); *Palmer v. Clarksdale Hospital,* 206 Miss. 680, 40 So. (2d) 582 (1949); PROSSER, TORTS § 43 (1941).

The procedural effect, according to the majority rule, is that the doctrine is nothing more than one form of circumstantial evidence, creating an inference of negligence which the jury in an ordinary case will be permitted but not compelled to accept. New York cases exemplifying this rule are *George Foltis, Inc. v. City of New York,* 287 N. Y. 108, 38 N.E. (2d) 455 (1941); *Galbraith v. Busch,* 267 N.Y. 230, 196 N.E. 36 (1935); *Slater v. Barnes,* 241 N.Y. 284, 149 N.E. 859 (1925).

As in the instant case, a plaintiff frequently has alleged specific acts of negligence in his pleadings, and then seeks to take advantage of the res ipsa loquitur theory. There are two views in this regard. The strict view does not allow the plaintiff to take advantage of the doctrine after he has pleaded specific acts of negligence. *Orr v. Des Moines Electric Light Co.,* 213 Iowa 127, 238 N.W. 604 (1931); *Bogrees v. Wabash Ry.,* 266 S.W. 333 (Kan. City, Mo. Ct. of App. 1924). The liberal and seemingly better view permits the plaintiff to take advantage of the doctrine without regard to the form of the pleading. *Gish v. Los Angeles Ry.,* 13 Cal. (2d) 570, 90 P. (2d) 792 (1939); *Firszt v. Capitol Park Realty Co.,* 98 Conn. 627, 120 Atl. 300 (1923).

The res ipsa loquitur doctrine has been applied in cases dealing with all kinds of human activity and therefore, the discussion here must be limited to those where it has been applied to factual situations similar to that in the instant case.

In *Shoemaker v. Mountain States Telephone & Telegraph Co.*, 17 F. Supp. 591 (D. Idaho 1937), res ipsa loquitur was held to be applicable where the plaintiff was injured by an electrical shock from a telephone receiver. The court said, 17 F. Supp. at 593:

> It appears that the telephone system was under the charge of the defendant, who installed it; that it was its duty to keep it up; and that an injury occurred while plaintiff . . . was using the telephone in the ordinary way. These facts bring the case under the rule advanced by the plaintiffs, and under that rule it is not incumbent upon plaintiffs to set out specifically the negligent acts or omissions complained of.

Two Missouri cases, *Joyce v. Missouri & Kansas Telephone Co.*, 211 S.W. 900 (Kan. City, Mo. Ct. of App. 1918) and *Warren v. Missouri & Kansas Telephone Co.*, 196 Mo. App. 549, 196 S.W. 1030 (Springfield Ct. of App. 1917), held that the res ipsa loquitur theory was properly applied where the plaintiffs received electrical shocks while using telephones in the ordinary and usual manner. A very recent New York Supreme Court case, *Hanaman v. New York Tel. Co.*, 278 App. Div. 875, 104 N.Y.S. (2d) 315 (3d Dep't 1951), held that a res ipsa loquitur case arose where injury resulted from an electrical shock sustained when using defendant's telephone.

The case most similar to the instant case on the facts is *Cain v. Southern Massachusetts Telephone Co.*, 219 Mass. 504, 107 N.E. 380 (1914). A crank type telephone and equivocal medical testimony appeared in both. The plaintiff also alleged specific acts of negligence and then relied on res ipsa loquitur. The highest tribunal of Massachusetts held this to be proper and ruled that it was error for the trial court to grant a non-suit. In *Fox v. Keystone Telephone Co.*, 326 Pa. 420, 192 Atl. 116 (1937), impairment to the plaintiff was again caused by an electrical charge delivered through the receiver. Specific acts of negligence were pleaded and recovery allowed. Perhaps the leading case in this series is *Delahunt v. United Telephone & Telegraph Co.*, 215 Pa. 241, 64 Atl. 515 (1906), where the doctrine was applied against the telephone company requiring it to show that the death of the plaintiff's decedent was not caused by an electrical shock from the telephone. The court, conceding that the current in a telephone may not ordinarily be a dangerous one, nevertheless held that since a telephone company should know that its lines might conduct a deadly charge, it must provide against this possibility by constant supervision of its installations and wires.

In the light of the consideration of the res ipsa loquitur doctrine in the above telephone cases, did the plaintiff in the instant case state a case which should have escaped a non-suit? Certainly the instrumentality was in the control of the defendant, that is, the maintenance of the telephone was the responsibility of the telephone company. It cannot be said that such an accident ordinarily occurs without negligence. *Delahunt v. United Telephone & Telegraph Co., supra.* There being no proof that the plaintiff's clothes were wet, or that the floor was wet where he stood, it must be concluded that the plaintiff was free from contributory negligence. It is the conclusion of the writer that the dissenting opinion in the instant case properly stated the law; that is, that the prima facie case should not be destroyed by inartistic pleadings and testimony.

Maynard R. Bissonnette

TRADE REGULATION — FAIR TRADE ACTS — EFFECT OF NON-SIGNER CLAUSE ON FAIR TRADE CONTRACTS. — *Schwegmann Bros. v. Calvert Distillers Corp.,* 341 U.S. 384, 71 S. Ct. 745, 95 L. Ed. 1035 (1951). The respondents, distributors of gin and whiskey, had a price-fixing policy whereby they endeavored to make retailers contract to sell their product at no less than the minimum price established by the company schedules. At the time of this suit, there were over 100 similar contracts in effect in Louisiana. The petitioner, a retail dealer of the respondents' products, refused to sign the contract and, with full knowledge of its terms and in violation of it, sold the products for less than the established minimum price. The respondents obtained a preliminary injunction in the district court which was upheld by the circuit court. *Schwegmann Brothers v. Calvert Distillers Corp.,* 184 F. (2d) 11 (5th Cir. 1950). The present action came before the Supreme Court on a writ of certiorari.

The principal issue presented to the Court was whether, under the Miller-Tydings amendment and the Louisiana Fair Trade Act, a non-signer of a price-fixing contract in an interstate price-fixing scheme could be enjoined from selling at less than the minimum price stipulated by the company and effective under the contract.

The Court, with three justices dissenting and two affirming specially, reversed the decree, holding that the Miller-Tydings amendment permitted vertical price-fixing only where sanctioned by state law and agreed to by the parties. But to enforce the contract terms against one not in privity, it was held, would be to condone price-fixing by compulsion, a consequence not within the intent of Congress at the time of passage of the amendment.

Under the Sherman Act, 26 STAT. 209 *et seq.* (1890), 15 U.S.C. § 1 *et seq.* (1946), the fixing of minimum prices is illegal per se. *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940). Similarly, a resale price maintenance contract is invalid without congressional approval. *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911). However, the Miller-Tydings amendment to the Sherman Act, 50 STAT. 693 (1937), 15 U.S.C. § 1 (1946), provided that "nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale" of commodities which bear the trade mark, brand, or name of the producer or distributor when the "contracts or agreements of that description are lawful" according to the law of the state.

In addition to permitting contracts establishing minimum prices, the law of Louisiana (where the instant case arose) also provides that once a contract of this kind is made with any retailer in the state, it is unfair competition for any other retailer, acting with knowledge of the facts, to sell for less than the minimum price. 51 LA. STAT. ANN. — REV. STAT. § 391 (1950). In other words, the Louisiana statute also enforces price fixing against non-signers of the contracts.

In Grether, *Experience in California with Fair Trade Legislation Restricting Price Cutting,* 24 CALIF. L. REV. 640, 648 (1936), the author pointed out that fair trade legislation had its first general impetus following the depression and was aimed principally at economic control. The first of these acts was enacted in California but it received little use. One reason was, as Grether, *supra* at 660, pointed out, the lack of control over dealers who refused to sign the contract. Later, the act was amended to include non-signers who acted with knowledge of the pricing contracts. CAL. BUS. & PROF. CODE § 16904 (1937). The purpose was "to introduce the coercive element essential to any large scale attempt to employ the Act." Grether, *supra,* at 644. At the present time this clause, in one form or another, is in most of the state fair trade acts. Even where it did not appear that the statute expressly so provided, it has been held that an action would lie against one who was not a party to the fair trade agreement. *Goldsmith v. Mead Johnson & Co.,* 176 Md. 682, 7 A. (2d) 176 (1939). This clause forms the principal basis around which the present controversy revolves.

The coercive effect injected into the fair trade acts by the non-signer clause and said to be so essential to their effectiveness was held to be reason for reversal in the principal case, the reasoning being that if the Miller-Tydings amendment legalized "contracts or agreements," then an essential element would be consensual agreement. This is not always found to be the case. In *Sears v. Western Thrift Stores of Olympia,* 10 Wash. (2d) 372, 116 P. (2d) 756 (1941), the court said that voluntary acquisition of the commodity with knowledge of the restrictions indicated assent to the retail price. *Lentheric, Inc. v. Weissbard,* 122 N.J. Eq. 573, 195 Atl. 818 (1937). *Weco Products Co. v. Reed Drug Co.,* 225 Wis. 474, 274 N.W. 426 (1937). In *Miles Laboratories, Inc. v. Seignious,* 30 F. Supp. 549, 556 (E.D.S.C. 1939), the court even went so far as to say that contract law was not applicable to enforcement against non-signers for a statutory right, not a contract right, was asserted.

The non-signer clause has also undergone attack in the courts on the question of constitutionality. In *Old Dearborn Distributing Co. v. Seagram Distillery Co.*, 299 U.S. 183, 57 S. Ct. 139, 81 L. Ed. 109 (1936), decided before the passage of the Miller-Tydings amendment, the facts were remarkably similar to the facts of the principal case. The defendant, a liquor retailer, sold products of the complainant at a cut price yet at a profit to himself. From an injunction restraining him from selling below the price set by contract with other retailers, the defendant appealed to the Supreme Court, contending, *inter alia,* that the non-signer clause of the act constituted a denial of due process and equal protection of the laws. However, the court upheld the validity of the Fair Trade Act of Illinois, and answered these objections by drawing a distinction between the goodwill symbolized by the trademark and the property right in the article itself.

A second objection to the acts themselves is that they constitute legislative price fixing of goods not affected with a public interest. Under this objection, a court stated, *Doubleday, Doran & Co. v. Macy,* 269 N.Y. 272, 199 N.E. 409, 411 (1936), "What the legislature cannot do directly it cannot do indirectly," and held the act to be unconstitutional. In the following year, however, this court, the New York Court of Appeals overruled itself in *Bourjois Sales Corp. v. Dorfman,* 273 N.Y. 167, 7 N.E. (2d) 30 (1937), in deference to the Supreme Court decision in the *Old Dearborn* case, *supra.* In *Burt v. Woolsulate, Inc.,* 106 Utah 156, 146 P. (2d) 203 (1944), the court similarly dispensed with this objection by stating that the fair trade acts were never designed to permit the regulation and control of prices for which the manufacturer or producer could sell his product nor do they attempt to establish prices. They merely permit the manufacturer to enter into resale price agreements with dealers to protect the goodwill of the product. *Kunsman v. Max Factor & Co.,* 299 U.S. 198, 57 S. Ct. 147, 81 L. Ed. 122 (1936); *Joseph Triner Corp. v. McNeil,* 363 Ill. 559, 2 N.E. (2d) 929, *aff'd,* 299 U.S. 183, 57 S. Ct. 139, 81 L. Ed. 109 (1936); *California Oil Co. v. Reingold,* 5 N.J. Super. 525, 68 A. (2d) 572, 573 (1949), holding: "That the enactment of the Fair Trade Act . . . was within the authority of the legislature is no longer open to question."

Conspicuous by its absence is any direct authority sustaining the opinion of the Court in the principal case. The determination was based principally upon an interpretation of legislative intent; the conclusion was that Congress, by omitting a non-signer provision, intended to make only "contracts or agreements" lawful and not to force contractual terms upon retailers who did not agree to them regardless of the non-signer provisions of state statutes. 71 S. Ct. at 750-1. This interpretation is not unreasonable in the light of *Rayess v. Lane Drug Co.,* 138 Ohio St. 401, 35 N.E. (2d) 447 (1941), which held that the fair trade laws are authorized exceptions to the general rule forbidding restraints of trade and must be strictly construed. *Mennen Co. v. Krauss Co.,* 37 F. Supp. 161 (E.D. La. 1941). But it should not be given such a narrow and strict judicial construction as virtually to destroy its purpose. *Calvert Distillers Corp. v. Nussbaum Liquor Store, Inc.,* 166 Misc. 342, 2 N.Y.S. (2d) 320 (Sup. Ct. 1938).

In *Pepsodent Co. v. Krauss Co.,* 56 F. Supp. 922, (E.D. La. 1944), the court interpreted the legislative intent quite differently than did the Court in the instant case and arrived at a directly opposite conclusion. In granting the injunction the court stated, 56 F. Supp. at 927:

> The history of the legislation leaves no doubt that Congress enacted the Miller-Tydings amendment with full knowledge of the provisions in state fair trade acts making resale price maintenance effective against non-contracting retailers, and that it was the design and intention of Congress to remove every obstacle which would hinder the free enforcement by the states of the provisions of their local fair trade acts in such fashion as their respective legislatures saw fit.

It is interesting to note that in arriving at these opposite interpretations of intent, the court in the *Pepsodent* case relied upon substantially the same sources as those used in the principal case.

While the basic principle is not specifically covered in the Miller-Tydings Act, numerous cases have been successfully pressed on the ground that Congress intended the statute to support the non-signer clause. *Sunbeam Corporation v. Wentling,* 91 F. Supp. 81 (M.D. Pa.), decree modified to apply to intrastate sales only, 185 F. (2d) 905 (3d Cir. 1950); *Schill v. Remington Putnam Book Co.,* 179 Md. 83, 17 A. (2d) 175 (1941); *Goldsmith v. Mead Johnson & Co., supra; Calvert Distillers Corp. v. Nussbaum Liquor Store, Inc., supra; Weco Products Co. v. Reed Drug Co., supra.*

The effect of the instant decision is to render inadequate the power of the state to accomplish the purpose of fair trade legislation. If the property interest of trademark owners is to remain a proper subject for legislative protection, the Miller-Tydings amendment must be broadened to include the relevant provisions of the state acts. Until that is done, the Sherman Act will render nugatory the non-signer clauses which make these state fair trade acts truly effective.

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