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NOTES

Constitutional Law

PRIVILEGE AGAINST SELF-INCRIMINATION IN FEDERAL COURTS: PROBLEM OF COMMUNIST AFFILIATION

Against a background of hate and hysteria in a world where individual freedom is daily becoming more constrained, the liberties protected by the Constitution of the United States stand out sharply defined. In the courts of this nation, even those who would destroy the fabric of freedom claim the protection which that document gives to all citizens. Among the safeguards which the individual can rightly aver, in the course of proceedings against him, are those assured by the Fifth Amendment.[1]

This article is limited to one of those safeguards—that of the privilege against self-incrimination. This privilege did not originate in the

[1] "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U. S. CONST. AMEND. V.

Constitution, but as a heritage of the common law was incorporated in it as the law of the land.[2] The privilege here under discussion is that guaranteed by the Fifth Amendment and restricted only to the Federal Government.

The common law origin of the privilege is shrouded in confusion. The exact time of its early recognition is not known although it is generally believed that it began to take root in the Thirteenth Century in the form of resistance to taking the oath ex officio of the ecclesiastical courts.[3] Some authorities trace the origins into the Roman Law;[4] according to other sources, it has its beginning in a higher law.[5]

The common law expressed the privilege in the maxim *nemo tenetur prodere seipsum*—nobody is bound to accuse himself. The first recorded use of the phrase was by Sir Edward Coke in *Cullier v. Cullier.*[6] Corwin comments that it may have originated with Coke.[7]

In the early English law there was uncertainty as to whether the privilege applied to the accused or to witnesses. In *Lilburn's Case,*[8] where a witness refused to testify because his testimony might incriminate, the witness admitted that if he himself had been accused, he would have had to testify. The privilege was not allowed and the witness, Lilburn, was whipped for his refusal. The House of Commons later voted the sentence illegal and on petition, the House of Lords ordered the sentence vacated as "illegal and most unjust . . . and against . . . the law of the land. . . ." This finally confirmed the law to be that no witness could be compelled to give testimony of an incriminating nature. It was from this interpretation that the privilege was adopted by the Fifth Amendment and by its language extended, not restricted, to the accused in a criminal case.[9]

I.

The constitutional privilege merely reiterates the common law against self-incrimination. If literally interpreted, it would apply only to the defendant in a criminal case; but having been construed in the light of the common law precedents, it is not limited to the criminally

2 8 WIGMORE, EVIDENCE § 2252 nn. 4,5 (3rd ed. 1940).

3 8 *Id.* § 2250; Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause,* 29 MICH. L. REV. 1 (1930).

4 ROBERTI, DE PROCESSIBUS, cited by Corwin, *supra* note 3, at 7 n.

5 Lilburn's Trial, 3 How. St. Tr. 1315, 1331 (1637). In refusing to take the oath ex officio, Lilburn said: ". . . it is absolutely against the law of God; for that law requires no man to accuse himself. . . . This oath is against the very law of nature." As cited by Corwin, *supra* note 3, at 7.

6 Cro. Eliz. 201, 78 Eng. Rep. 457 (1589).

7 Corwin, *op. cit. supra* note 3, at 7.

8 3 How. St. Tr. 1315 (1637), as cited by Corwin, *supra* note 3, at 7.

9 8 WIGMORE, *op. cit. supra* note 2, § 2252 nn. 6,7.

accused alone.[10] Consequently, it has been deemed applicable to civil cases where the question asked might have incriminated the witness or accused.[11] The crux of the entire matter is the interpretation of "incriminate" or "expose to criminal prosecution." This has been held to mean that in any instance where the answer would expose the witness to fine, imprisonment, forfeiture, or penalty, whether in a civil or criminal proceeding, the witness will be excused from answering the question.[12]

It is elemental that a person accused may not take the witness stand in a criminal trial and still claim the constitutional privilege. His right is to refuse to testify; by taking the stand, he waives this immunity. Otherwise the anamolous situation would arise where a defendant could take the stand to give favorable evidence for his case and then by claiming the privilege, bar the prosecution from attacking his credibility in cross-examination. Under such circumstances the privilege would be one against giving evidence which would tend to convict. It is true that as the law now stands, and as it stood at the time of the adoption of the amendment, the accused may refuse to testify in his own trial. The amendment unequivocally gives him this right. But the privilege is broader than this. It applies, not only to the defendant in a criminal case, but also to a witness.[13] And as stated above, it is not confined to criminal cases.

It is readily evident that questions may be put to a witness in other tribunals, the answers to which would expose him to prosecution for a crime. It is a reasonable rule that he should not be compelled to answer them, for then the privilege would have no significance. This is the position the Supreme Court has taken.[14] A witness is protected against self-incrimination wherever he is called upon to answer questions, and *where he can be compelled to testify.*

Nor is the privilege limited to cases before the courts. It extends to witnesses summoned before grand juries, legislative investigating committees, and administrative tribunals. It is, as the United States Supreme Court has pointed out, as broad as the mischief against which it protects.[15]

A grand jury, in order to determine whether there is sufficient evidence to warrant a true bill, has the authority to summon witnesses

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10 *Ibid.*

11 McCarthy v. Arndstein, 226 U. S. 34, 45 S. Ct. 16, 69 L. Ed. 158 (1924).

12 Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886); Coffey v. United States, 116 U. S. 436, 6 S. Ct. 437, 29 L. Ed. 684 (1886).

13 United States v. Burr (*In re* Willie), 25 Fed. Cas. 38, No. 14,692e (C. C. D. Va. 1807).

14 Counselman v. Hitchcock, 142 U. S. 547, 12 S. Ct. 195, 35 L. Ed. 1110 (1892).

15 *Id.* at 563.

before it, and to compel their testimony. A person ordered to appear and answer is not stripped of his constitutional rights merely because the constitutional amendment refers only to criminal cases. Here also, one has a right to refuse to testify if such testimony would expose him to prosecution for crime. In fact, many of the decisions concerning the privilege arise out of grand jury investigations where a contumacious witness is cited for contempt of court because he refused to answer a question put to him.[16]

It has long been established that the legislature may inquire into various activities in the course of preparing legislation.[17] Concomitant with this power of inquiry for legislative purposes is the power to summon witnesses and to compel their testimony before the legislature or its committees.[18] While it has definitely been established under state law and constitution that witnesses before state legislative committees have the option of claiming the privilege of self-incrimination,[19] there have not been any direct determinations whether it can be claimed before a Congressional committee.

The *Counselman v. Hitchcock* case,[20] through dicta, viewed favorably the extension of the privilege before legislative committees. The reasons given were based upon the privilege as enunciated in state proceedings. The crucial question involved seems to resolve itself around the scope of a criminal case as the phrase appears in the Fifth Amendment. If the restricted, literal view of the words "criminal case" is adhered to, the privilege would not be allowed. But if the broad interpretation of the common law is to be logically followed, the privilege which extends to civil cases and grand jury investigations, should also extend to testimony before a congressional committee. The United States Supreme Court has assumed this to be true,[21] but has not, as yet decided this precise issue. In many decisions, the Court has volunteered the opinion that the privilege would be broad enough to sustain a refusal to testify if incrimination would result, no matter where the

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16 See note 14 *supra;* Mason v. United States, 244 U. S. 362, 37 S. Ct. 621, 61 L. Ed. 1198 (1917); Brown v. Walker, 161 U. S. 591, 16 S. Ct. 644, 40 L. Ed. 819 (1896); United States v. Cusson, 132 F. (2d) 413 (2d Cir. 1942).

17 McGrain v. Daugherty, 273 U. S. 135, 47 S. Ct. 319, 71 L. Ed. 580 (1927).

18 *Ibid.*; Barsky v. United States, 167 F. (2d) 241 (D. C. Cir. 1948), *cert. denied,* 334 U. S. 843, 68 S. Ct. 1511, 92 L. Ed. 1767 (1948).

19 Henry Emery's Case, 107 Mass. 172 (1871); Doyle v. Hofstader et al., 257 N. Y. 244, 177 N. E. 489 (1931); *In re* Hearing Before Joint Legislative Committee, 187 S. C. 1, 196 S. E. 164 (1938).

20 142 U. S. 547, 563, 12 S. Ct. 195, 35 L. Ed. 1110 (1892), while stating the object of the amendment, the Court said: ". . . a person should not be compelled, when acting as a witness *in any investigation,* to give testimony which might tend to show that he himself had committed a crime." (Emphasis supplied.)

21 *Ibid.*

testimony is being elicited.[22] Naturally, before the privilege attaches, the testimony of the witness must be through compulsion. Thus in *May v. United States,*[23] where the witness voluntarily testified, the absence of compulsion made the evidence given admissable in his subsequent trial.

The privilege of refusing to answer is based upon the right of the witness not to accuse himself of crime. If the answer does not incriminate the witness, or if the consequences of the incrimination are removed, the privilege no longer exists, and he must answer. The method by which testimony can thus be compelled is by statutes granting immunity [24] to the witness.[25]

The first attempt by Congress to provide immunity was held unconstitutional by the United States Supreme Court because the immunity was not as broad as the privilege it attempted to replace.[26] In order that any immunity statute be held valid, it must meet this requirement: it must be coextensive with the privilege.[27] It is questioned whether the present immunity statute [28] gives the witness absolute immunity.[29] If the courts deem the statute as inadequate, then the privilege may still be claimed, and the statute making refusal to testify a misdemeanor would not apply.[30] The fact that immunity given by federal law is no bar to prosecution in state courts does not render the statute inadequate or allow the witness to claim the privilege.[31]

II.

A basic problem in the field of self-incrimination is: who determines the incriminatory character of the question. Both in England and the United States, there existed a hesitancy in attempting to formulate a test for this problem.[32] The early English view seemed to be based

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22 *Ibid.;* United States v. Goodner et al., 35 F. Supp. 286 (D. Colo. 1940).

23 175 F. (2d) 994 (D. C. Cir. 1949).

24 8 WIGMORE, *op. cit. supra* note 2, § 2281: ". . . 'Immunity' signifies the beneficial result to the offender . . . the non-liability for the offense itself. . . . By an immunity the offender's guilt ceases. . . ."

25 See note 14 *supra*; *Jack v. Kansas,* 199 U. S. 372, 26 S. Ct. 73, 50 L. Ed. 234 (1905); Brown v. Walker, *supra* note 16.

26 See note 14 *supra.*

27 *Id.,* 142 U. S. at 586.

28 18 U. S. C. § 3486 (1948): "No testimony given by a witness before either House . . . shall be used as evidence in any criminal proceeding against him in any court. . . ."

29 Hamilton, *The Inquisitorial Power of Congress,* 23 A. B. A. J. 511 (1937).

30 52 STAT. 942 (1938), 2 U. S. C. § 192 (1946): "Every person who having been summoned as a witness by . . . either House . . . who . . . refuses to answer . . . shall be deemed guilty of a misdemeanor."

31 United States v. Murdock, 284 U. S. 141, 52 S. Ct. 63, 76 L. Ed. 210 (1931).

32 8 WIGMORE, *op. cit. supra* note 2, § 2271 n. 3.

on the proposition that the witness alone knew all the circumstances and how the question, if answered, would be connected with other facts to establish his guilt. This therefore led to the once prevalent statement that the witness's claim of the privilege was conclusive.[33] From this position, the courts gradually retreated, the English much slower than the American. They finally adopted the rule that the statement of the witness, standing alone, was not enough; he must show the court his danger.[34] Because of the fact that the English courts were unsettled so long on this problem, many early American state cases held that the application of the privilege must be at the determination of the witness.[35]

The federal courts have, since *United States v. Burr* (*In re Willie*),[36] followed the view that the judge ultimately must determine whether or not the question propounded will incriminate. In that case, Burr's secretary was questioned concerning a certain letter written in cipher, and refused to answer on the grounds that he might provide clues that would show himself guilty of a crime (misprision of treason). The court ordered him to answer, determining that the question related only to a knowledge of the cipher and not to the contents, and was therefore not incriminating. In its determination of the propriety of the question, the court considered the two opposing principles which create the problem, one being the right of the United States to compel testimony; the other being the privilege of the witness not to accuse himself of crime. Courts must weigh both these principles, and the burden falls upon the witness to show the criminatory character of the testimony. Chief Justice Marshall, in the *Burr* case, said the court must determine whether the question might incriminate, and if it would, the witness must then decide whether the answer would incriminate. If he swears that it would, the court is bound by his oath, and cannot require an answer. In Marshall's own words:[37]

> When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be. The court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges

33 Adams v. Lloyd, 3 H. & N. 351, 157 Eng. Rep. 506 (1858); Fisher v. Ronalds, 12 C. B. 762, 138 Eng. Rep. 1104 (1852).

34 Mason v. United States, *supra* note 16; United States v. Burr (*In re* Willie), *supra*, note 13.

35 Word v. Sykes, 61 Miss. 649 (1884); Warner v. Lucas, 10 Ohio 337 (1840); Poole v. Perritt, 28 S. C. 128 (1842); State v. Edwards, 2 Nott. & M. 13 (S. Car. 1819).

36 See note 13 *supra*.

37 *Id.*, 25 Fed. Cas. at 40.

> would strip him of the privilege which the law allows, and which he claims. It follows . . . necessarily then, from this statement of things, that if the question be of such a description that an answer to it may or may may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath that his answer would criminate himself, the court can demand no other testimony of the fact.

III.

Another basic problem is: what is an incriminating question? The solution appears simple: one to which the answer would expose the witness to prosecution for crime. However, the effect of an answer varies from one which would brand the witness guilty of an offense to one which has no evidentiary value at all, such as where the danger apprehended by the witness is unreasonable or a product of a worried conscience. Out of many cases on this particular point, the writers on the subject have synthesized three different types of questions which might, if answered, incriminate.[38] The first is the question which would directly incriminate. No court, where the privilege has been recognized, ever required an answer to this kind of inquiry. The second type is the question to which an answer, while not directly admitting a crime, would reveal a material element of an offense. This, too, has come under the interdiction of the courts. The third category of incriminating questions can best be described as "clue-supplying." These are questions which are not incriminating in themselves, but if answered would supply a lead to material elements.

The courts are historically divided on whether the third type of question must be answered. The early cases follow Chief Justice Marshall, who decided that a witness can be compelled to answer only if the answer is not directly incriminating or does not constitute a necessary and material link in the chain of evidence.[39] In the *Burr* case, the witness *was* required to answer a question which could supply a clue.

The modern view was first laid down in *Counselman v. Hitchcock*.[40] In that case, the United States Supreme Court held that an immunity statute could not replace the privilege against self-incrimination if the

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38 8 WIGMORE, *op. cit. supra* note 2, § 2260 et seq.; Godlewski, *The Privilege Against Self-Incrimination Before the House Committee on Un-American Activities*, 1 INTRA. L. REV. (St. Louis U.) 15, 17 (1949); Rapacz, *Rules Governing the Allowance of the Privilege Against Self-Incrimination*, 19 MINN. L. REV. 426 (1935).

39 United States v. Quitman, 27 Fed. Cas. 680, No. 16,111 (C. C. E. D. La. 1854); United States v. Moses, 27 Fed. Cas. 5, No. 15,824 (C. C. D. C. 1804); United States v. Burr (*In re* Willie), *supra* note 13; MODEL CODE OF EVIDENCE, Rule 202 and comment (1942).

40 See note 14 *supra*.

statute did not prohibit the use of testimony or evidence obtained as a result of a lead supplied by the testimony. The logical corollary of this holding is that the witness may refuse to answer any question which seeks to elicit information, even if the answer itself does not incriminate, but which only leads to incriminating evidence.

Wigmore [41] has criticized the courts for extending the privilege to the third type of question. The purpose of the privilege is not to prevent the giving of facts which might, in the hands of a "skillful and ingenious prosecutor" lead to the uncovering of material elements; but rather, to enable the witness to avoid giving those material elements himself in his own testimony. As Marshall in *In re Willie,*[42] Frank in his dissent to *United States v. St. Pierre,*[43] and Wigmore [44] indicate, the dividing line between the two types of questions is obscure but existant. There is a definite point where the testimony desired would not reveal a link in the chain of evidence; and once that point is passed, the privilege no longer applies. Although careful and meticulous investigation of a lead supplied by the witness might uncover a material and necessary fact which would enable the prosecutor to secure a conviction, the witness is not incriminating himself by his testimony and it does not contravene the amendment to require him to answer. As pointed out in *May v. United States,*[45] the purpose of the privilege is not to enable the witness or accused to escape punishment for his misdeeds, but only to force the state to use evidence other than that supplied by the witness to secure conviction.

While this view is perhaps the most logical and probably represents the intentions of the framers of the amendment,[46] it is not followed by the federal courts today. The present position is best outlined by Judge Hand in the *St. Pierre* case when he says:[47]

> Whatever may have been the original limits of the privilege . . . since Counselman v. Hitchcock, it is settled in federal courts that a witness cannot be compelled to disclose anything that will "tend" to incriminate him, whether or not the answer would be an admission of one of the constitutive elements of the crime.

We see, then, that the test initiated by Marshall no longer applies, and the witness cannot be compelled to give either a material element or a lead to a material element. So all the three types of questions are proscribed in the federal courts.

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41 8 WIGMORE, *op. cit. supra* note 2, §§ 2261 et seq.

42 See note 13 *supra.*

43 132 F. (2d) 837 (2d Cir. 1942).

44 8 WIGMORE, *op. cit. supra* note 2, §§ 2261 et seq.

45 See note 23 *supra.*

46 Counselman v. Hitchcock, *supra* note 14; United States v. Burr (*In re* Willie), *supra* note 13.

47 132 F. (2d) 837, 838 (2d Cir. 1942).

In order to take advantage of the ban on "clue-seeking" questions, the witness must establish to the satisfaction of the court that there is a danger, even though the question appears harmless,[48] and that the facts and circumstances in which the witness is enmeshed make his answers incriminatory where otherwise they would not be. Obviously the witness cannot fully explain the circumstances in order to claim the right to keep silent, because to do so would reveal what he seeks to hide; but he must show the court that there is a real danger in answering the particular, and on its face harmless, question. Possibly the best statement of this proposition is in *Regina v. Boyes,* where the court said: [49]

> To entitle him [a party called as a witness] . . . to the privilege of silence, the Court must see, from the circumstances of the case and the nature of the evidence which he is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. Moreover, the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. . . . if the fact of witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question.

The courts readily agree that there is no general test which can be laid down in order to determine this proposition. As was said in *Mason v. United States,*[50] the determination of the incriminatory character of the question must be with the circumstances and the exigencies of the individual case. However, several tests have been propounded. One is the so-called "impossibility test." The first concrete statement of this is found in *Arndstein v. United States,* in which the court stated:[51]

> It is impossible to say from mere consideration of the questions propounded, in the light of the circumstances disclosed, that they could have been answered with entire impunity.

This is cited with approval in *Alexander v. United States.*[52] The problem is clear: How is a court going to know when a question might tend to incriminate if answered?

Another test the courts have adopted in attempting to solve this problem is the reasonable apprehension test.[53] If the witness can dem-

48 United States v. Rosen, 174 F. (2d) 187 (2d Cir. 1949), *cert. denied,* 338 U. S. 851, 70 S. Ct. 87, ... L. Ed. .... (1940); United States v. Weisman, 111 F. (2d) 260 (2d Cir. 1940); United States v. Zwillman, 108 F. (2d) 802 (2d Cir. 1940); United States v. Burr (*In re* Willie), *supra* note 13.

49 1 B. & S. 311, 121 Eng. Rep. 730 (1861).

50 244 U. S. 362, 37 S. Ct. 621, 61 L. Ed. 1198 (1917).

51 254 U. S. 71, 72, 41 S. Ct. 26, 65 L. Ed. 138 (1920).

52 181 F. (2d) 480 (9th Cir. 1950).

53 Mason v. United States, *supra* note 16; Camarota v. United States, 111 F. (2d) 243 (3rd Cir. 1940).

onstrate to the satisfaction of the court that he has reasonable grounds for believing that the question might incriminate or lead to incriminating evidence, he need not answer. In endeavoring to determine what a reasonable apprehension is, the court in the *Boyes* case laid down the general rule quoted above. The *Mason* case leaves the particular determination up to the trial judge's sound discretion. The United States Courts of Appeals for the Second [54] and Ninth [55] Circuits, have held that an apprehension formed by reading newspaper reports of investigations constitutes a reasonable apprehension, and reversed the lower courts. All these cases affirm the principle that the witness must show, to the satisfaction of the court, reasonable apprehension that the answer to the question will tend to incriminate even though the question is harmless on its face.

In an article in the *Minnesota Law Review,* Professor Rapacz discusses the difficulty in applying this test, observing:[56]

> It is necessary to distinguish between a showing that the question *may* incriminate and a showing of *how* it may do so. The court cannot require the witness to show *how* an answer might incriminate him, but it may require a showing to its satisfaction that the question, if answered, *may* tend to incriminate. The mere assertion of the witness that an answer may incriminate will not suffice.

Professor Rapacz recognizes the logical distinction between how an answer incriminates, and the fact that it may; but it is a logical distinction only. It is difficult to see the practical difference, because a witness, to show that it *may* incriminate, must show *how* it *may*. In the words of Judge Learned Hand,[57] the witness is "boxed in a paradox." He must "prove the criminatory character of what it is his privilege to suppress just because it is criminatory." Judge Hand feels that we must be "content with the door's being set a little ajar. . . ."

IV.

A witness need not answer a question if that answer would incriminate directly. He need not answer if his reply discloses a material element of a crime. He is even protected in federal courts from giving clues which would lead to the discovery of material elements. In increasing number in recent months, the question: "Are you or have you been a member of the Communist Party?" has been met by a refusal on the part of witnesses to answer on the grounds that the answer might incriminate. This position is sound only if the answer actually

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54 United States v. Weisman, *supra* note 48.

55 Kasinowitz v. United States, 181 F. (2d) 632 (9th Cir. 1950); Doran v. United States, 181 F. (2d) 489 (9th Cir. 1950); Alexander v. United States, *supra* note 52.

56 Rapacz, *supra* note 38 at 434.

57 United States v. Weisman, *supra* note 48.

would incriminate. A brief examination of the status of the Communist Party in the United States is in order.

The Communist Party per se has not been outlawed by the United States.[58] On the other hand, conspiracy to overthrow the government of the United States by force and violence contravenes the criminal statutes of the United States.[59] The Communist Party sometimes has been characterized as an organization seeking to overthrow the government of the United States by force and violence.[60]

The question now arises: If a person is asked whether or not he is a communist, is the answer a necessary and essential link which may convict him of a conspiracy under the Smith Act,[61] or is it merely a clue which may lead to material facts and show him guilty under the same act? Or is it an innocent question? Under the Smith Act, and in the light of the *Schneiderman*[62] and other cases,[63] the question, "Are you a Communist Party member?" would fall under the clue-seeking type of question. This can be asserted in the light of the language of the act and of the cases, because nowhere is the party expressly outlawed. What the cases do is outline the circumstances whereby the question of party membership, legally innocent in itself, becomes a clue, or even a link, in the chain of incriminating evidence so that a witness is justified in invoking the privilege.

In the case of *Rogers v. United States*,[64] a federal grand jury was investigating various government employees who allegedly had made false statements in connection with their loyalty oath. One witness, who was not shown to be or to have been a government employee, and who had not testified as to any association with the Communist Party could not be required to answer the question as to party organization because party membership was an element showing that an offense had been committed. There, the circumstances under which the question was asked and the facts of the particular case made the question incriminating, and justified the witness in declining to answer.

In recent loyalty investigations before a grand jury, the questions: "Do you know the name of the county officers of the Los Angeles County Communist Party?" and "Do you know the table of organiza-

58 Estes v. Potter, United States Attorney, et al., 183 F. (2d) 865 (5th Cir. 1950); Rogers v. United States, 180 F. (2d) 103 (10th Cir. 1950); Notes, 24 NOTRE DAME LAW. 542 (1949); 23 NOTRE DAME LAW. 577 (1948).

59 18 U. S. C. §§ 371, 2385 (1948).

60 United States v. Dennis et al., 183 F. (2d) 201 (2d Cir. 1950); Rogers v. United States, *supra* note 58.

61 18 U. S. C. § 2385 (1948), teaching and advocating the overthrow of the government of the United States by force and violence.

62 Schneiderman v. United States, 320 U. S. 118, 63 S. Ct. 1333, 87 L. Ed. 1796 (1943).

63 See note 55 *supra*.

64 179 F. (2d) 559 (10th Cir. 1950).

tion and the duties of the county officers of the Los Angeles County Communist Party?" were held to be incriminatory.[65] The Circuit Court of Appeals reasoned that in order to answer these questions, the witnesses would have to be intimately associated with the group under investigation, and in the light of the Smith Act and newspaper accounts of the party as an organization advocating forcible overthrow of the government, they were justified in refusing to answer and thus furnishing leads to their own prosecution.

The question of whether the witness knew that an alien in a deportation proceeding was a communist was disallowed in *Estes v. Potter.* The court there said:[66]

> If the answers to the questions might tend to show that the appellant was a member of or affiliated with the Communist Party, his fear of criminal prosecution was justified. There is no statute that makes it a crime to be a member of the Communist Party, but the very object of the investigation to which the appellant was subpoenaed was to ascertain whether the aliens in question were members of or affiliated with the Communist Party and, therefore, subject to deportation under 8 U. S. C. A. § 137, subdivision (e) and (g) of which provide for the deportation of any aliens who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches, the overthrow by force or violence of the government of the United States. . . .
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> Appellant was asked whether he personally knew the alien; if he knew whether said alien was a member of the Communist Party; . . . if he know whether the alien attended meetings of the Communist Party, etc. He could hardly know whether the alien attended meetings without being present there in person, and evidence of appellant attending such meetings would tend to show that he was a Communist. Appellant was not asked concerning things that he might have heard or been told. he was not asked if he knew the alien's reputation for communistic activities. The distinction is a significant one. He could not know the crucial things that he was asked about without furnishing a link in the chain of evidence that might be needed to convict him under the New Criminal Code, 18 U. S. C. A. § 2385 or 18 U. S. C. A. § 371. . . .
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> The questions propounded to the appellant do not disclose the incriminatory nature of the answers sought to be elicited, but appellant does not have to prove that his answer would incriminate him to be entitled to the privilege. If that were the nature of the burden, he would be forced to divulge the very facts that the immunity permits him to suppress. A witness need only show that his answers are likely to be dangerous to him. If in the circumstances it is reasonable to infer the possibility of incrimination from the answers that the witness may give, the privilege may be claimed.

There is some question as to whether the Communist Party is implicitly outlawed. As a result of the trial of the eleven communist leaders before Judge Medina in New York,[67] there are additional

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65 See note 55 *supra.*

66 183 F. (2d) 865, 867 (5th Cir. 1950).

67 Godlewski, *supra* note 38, at 20.

grounds for believing that the question may be of an incriminating nature. The reason is not that it is unlawful to be a party member, but because it is unlawful to engage in a conspiracy. The tendency, as a result of the trial, is to treat the Communist Party as a conspiracy. The position, then, becomes this: while the answer is not directly incriminating—that is, the answer "yes" to the question proposed would not of itself lead to criminal prosecution, it might in the hands of a skillful investigator, provide a clue which eventually would see the witness in a federal court for trial for conspiracy. In the light of recent developments, both in legal temper [68] and in legislation,[69] the answer is beginning to leave the clue-providing class and become more and more a necessary link—a material element—of a crime. As it makes the transition, the necessity for justification of the refusal to answer becomes less demanding, for any court will see that the question on its face will be incriminating. An excellent illustration of this point can be had by reference to the new anti-subversive law passed over the President's veto by the second session of the Eighty-first Congress.[70] By the terms of that act, communists may not be employed by certain government agencies or even by certain private concerns, without disclosing their affiliation. Concealment of party membership is made unlawful, and since party membership itself is the essential element in the crime, the answer to a question concerning it cannot be compelled.

Conclusion

The privilege is available to communists, traitors, and criminals. It may, at times, hamper the promotion of the general welfare and justice, but it exists as a constant reminder that the purpose of the courts and legal system is to protect the rights of the individual. It is best expressed in the words of Lilburn:[71]

> For what is done to anyone, may be done to everyone . . . I judge it . . . expedient for every man, continually to watch over the rights and liberties of his country, and to see that they are violated upon none, though the most vile and dissolute of men; or if they be, speedily to endeavor redresse; otherwise such violations, breaches, and incroachments will eat like a Gangrene upon the Common Liberty and become past remedy. . . .

One writer has criticized the privilege as a relic from the days when the citizen needed protection against arbitrary proceedings; the opinion

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68 Alexander v. United States, *supra* note 52.

69 Internal Security Act of 1950, Pub. L. No. 831, 81st Cong., 2nd Sess. (Sept. 23, 1950).

70 *Ibid.*

71 Lilburn, *The Just Defence of John Lilburn* (1653), reprinted in HALLER AND DAVIES, THE LEVELLER TRACTS 454 (1944), as cited in 22 So. CAL. L. REV. 307 (1949).

is well reasoned and has considerable merit.[72] However, it is difficult to see how the privilege can be weakened without again running the risk of arbitrariness. If the guilty are protected, it is an incidental effect—a by-product of a procedure which forces the prosecutor to obtain his evidence from other sources and thereby insure an innocent man, in the hands of a skillful and unscrupulous district attorney, safety from unwittingly convicting himself.

The overextension of the privilege by the *Counselman* case[73] is justly and adequately criticized by Judge Frank and Wigmore. It should be limited to the area outlined by Chief Justice Marshall in the *Burr* case. The answer should bear a close relationship to a material element of a crime to be privileged; it need not be carried to the extremes that the *Counselman* case and those following it have seen fit to extend it.

The sound logic of Marshall speaks for itself. The *Counselman* case, insofar as it insists upon adequate immunity, is sound; but the purpose of the privilege and the needs of the individual, which are the only reasons for the existence of the privilege, are adequately served if the ban on "clue-supplying" answers is lifted.

Wilmer L. McLaughlin

John F. Mendoza

Constitutional Law

Racial Segregation and the Separate but Equal Doctrine

Racial segregation is a problem which has perennially confronted the courts, the legislatures, and the people of this nation. With the enactment of the three Amendments[1] to the Constitution guaranteeing equal rights for all citizens regardless of their color, the question whether separation of the races can be enforced by state law was placed before the Supreme Court. After the early rulings, which placed the segregation problem outside the scope of federal legislative power and within the reasonable exercise of the states' police power,[2] the issue remained relatively dormant for many years, there being but few cases affecting separation of the races to reach the high Court. But, while the constitutional aspect of the problem was not prominent, the

72 Maguire, Evidence, Common Law and Common Sense 102 (1947).

73 See text at note 47 *supra*.

1 U. S. Const. Amends. XIII, XIV, and XV.

2 Plessy v. Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896); The Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835 (1883).

social aspect remained the subject of much controversy. In recent years the problem in its entirety has become more pressing. Increased sociological and psychological knowledge acquired throughout the years,[3] the emphasis on the fundamental rights of man resulting from the atrocities committed in World War II, and the present position of world leadership of this country [4] have all combined to raise the issue whether racial segregation is necessarily discriminatory, and thereby depriving members of the minority groups of fundamental rights guaranteed by the Constitution. Recent investigations [5] and proposed federal legislation,[6] as well as arguments of interested groups as *amicus curiae* in a rash of cases involving racial segregation,[7] have brought the constitutional issue into the limelight on the Supreme Court's calendar. The latest decisions of the high Court, while leaving the early established principles unchanged, have had a decided effect on racial segregation.

The Court early decided that separation of the races per se is not a violation of the equal protection clause of the Fourteenth Amendment. The famous case of *Plessy v. Ferguson,*[8] while it concerned only segregation in local transportation, created the "separate but equal" doctrine and established the two opposing sides of the controversy. In the majority opinion Justice Brown expressed the argument which has prevailed throughout the years when he said:[9]

> The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based on color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have

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3 See MYRDAL, AN AMERICAN DILEMMA (1944).

4 See TO SECURE THESE RIGHTS, REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS 148 (1947).

5 *Id.*, in the entirety.

6 See, *e.g.*, President's Message to Congress, 95 CONG. REC. 68 (1949).

7 See, *e.g.*, Brief for United States in support of appellant, Henderson v. United States, 339 U. S. 816 (1950); Brief for Committee of Law Teachers as *Amicus Curiae,* Sweatt v. Painter *et al.*, 338 U. S. 865 (1950), Editors, *Segregation and the Equal Protection Clause,* 34 MINN. L. REV. 289 (1950).

8 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896).

9 *Id.*, 163 U. S. at 544; see *Id.*, 163 U. S. at 557-62, where Justice Harlan, expressing the opposing viewpoint in his dissent, said: "The fundamental objection . . . is that it interferes with the personal freedom of citizens . . . in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. . . . The arbitrary separation of citizens, on the basis of race . . . is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the constitution. It cannot be justified upon any legal grounds."

> been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.

In following the "separate but equal" doctrine the Supreme Court has consistently said that if there be an equality of privilege which the laws give to segregated groups, the races may be separated, *i.e.*, that constitutional invalidity does not arise from the mere fact of separation but may arise from inequality of treatment.[10]

The field of transportation has been a fruitful source of litigation concerning racial segregation. The force of the *Plessy* decision in *intrastate* commerce is evidenced by the relatively few cases presented to the Court thereafter wherein the equal protection clause was involved. The doctrine of "separate but equal" has been and still is the law in this area, subject, however, to the restrictions of the commerce clause.

In interstate commerce the first cases involving state segregation laws were allowed or disallowed depending on whether they were a prohibited interference with interstate commerce.[11] The constitutional question from the equal protection point of view was not the issue in these decisions. It was assumed that the state had a limited right under the police power to segregate according to races. After the enactment of Section 3 (1) of the Interstate Commerce Act[12] the constitutional question in the interstate transportation cases was eliminated, subsequent cases being decided on a statutory ground. However, the attitude of the Supreme Court in deciding these cases is significant. In *Mitchell v. United States*,[13] Mitchell, a Negro traveling from Chicago to Hot Springs, was compelled to transfer from a first class to a second class coach upon the train's entry into Arkansas, there being no first class coaches available for colored persons. This transfer was enforced by the train's conductor in compliance with an Arkansas statute requiring separate but equal accommodations for the white and colored races. The Interstate Commerce Act made it unlawful for a carrier to subject any person to any "undue or unreasonable prejudice or disadvantage in any respect whatsoever."[14] The district court affirmed the Commission's dismissal of Mitchell's com-

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10 See, Sipuel v. Board of Regents, 332 U. S. 631, 68 S. Ct. 299, 92 L. Ed. 247 (1948); Mitchell v. United States, 313 U. S. 80, 61 S. Ct. 873, 85 L. Ed. 1201 (1941); Missouri *ex rel.* Gaines v. Canada, 305 U. S. 337, 59 S. Ct. 232, 83 L. Ed. 208 (1938); Gong Lum v. Rice, 275 U. S. 78, 48 S. Ct. 91, 72 L. Ed. 172 (1927); McCabe v. Atchison, T. & S. F. Ry., 235 U. S. 151, 35 S. Ct. 69, 59 L. Ed. 169 (1914).

11 C. & O. Ry. Co. v. Kentucky, 179 U. S. 388, 21 S. Ct. 101, 45 L. Ed. 244 (1900); Louisville, N. O. & T. Ry. v. Mississippi, 133 U. S. 587, 10 S. Ct. 348, 33 L. Ed. 784 (1890); Hall v. De Cuir, 95 U. S. 485, 24 L. Ed. 547 (1878).

12 24 STAT. 380 (1887), as amended, 49 U. S. C. § 3 (1) (1946).

13 313 U. S. 80, 61 S. Ct. 873, 85 L. Ed. 1201 (1941).

14 See note 12 *supra.*

plaint on the grounds that the state law required the railroad to separate the passengers. The Supreme Court reversed, holding the Act to have been violated. In its opinion, however, the Court said:[15]

> The question whether this was a discrimination forbidden by the Interstate Commerce Act is not a question of segregation but one of equality of treatment. The denial to appellant of equality of accommodations because of his race would be an invasion of a fundamental individual right which is guaranteed against state action by the Fourteenth Amendment . . . and in view of the nature of the right and of our constitutional policy it cannot be maintained that the discrimination as it was alleged was not essentially unjust.

It would appear from this language that the "separate but equal" theory was the standard of measurement used in deciding whether there had been discrimination. But would the Court's decision have been the same if there had been first class accommodations available for colored people?

The Court indicated the answer to this question nine years later in *Henderson v. United States.*[16] In this case the issue was whether the rules and practices of the Southern Railway Company which required the division of each dining car so as to allot ten tables exclusively to white passengers and one table exclusively to negro passengers, and which called for a curtain or partition between that table and the others, violate Section 3 (1) of the Interstate Commerce Act.[17] The Court, in holding the statute violated said: [18]

> The right to be free from unreasonable discriminations belongs, under § 3 (1) to each particular person. Where a dining car is available to passengers holding tickets entitling them to use it, each such passenger is equally entitled to its facilities in accordance with reasonable regulations. The denial of dining service to any such passenger by the rules before us subjects him to a prohibited disadvantage. . . . The rules impose a like deprivation upon white passengers whenever more than 40 of them seek to be served at the same time and the table reserved for Negroes is vacant. . . . Discriminations that operate to the disadvantage of two groups are not the less to be condemned because their impact is broader than if only one were affected.

Would not this reasoning apply equally to Pullmans, second class coaches, etc., as well as to dining cars? Has not the Court by this reasoning gone one step further than the *Mitchell* case and made segregation in interstate transportation all but impossible, even though the separate accommodations be substantially equal?

The field of education has also been the basis for many cases involving separation of the races. Since it has been consistently held that

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15 See note 12 *supra,* 313 U. S. at 94.

16 339 U. S. 816, 70 S. Ct. 843, 94 L. Ed. .... (1950).

17 See note 12 *supra.*

18 See note 16 *supra,* 70 S. Ct.-at 847.

the state has sole control over education within its borders,[19] the constitutional issue in these cases falls under the equal protection clause and, consequently, the "separate but equal" doctrine has been applied. The nature of education renders more difficult the problem of determining when the privileges under segregation laws are equal. The various decisions since the *Plessy* case indicate the construction given the word equal on the various levels of education. In *Cummings v. Richmond County Board of Education*[20] the Court refrained from enjoining the school board from appropriating money for a high school for white children even though there was no similar school provided by the board for colored children. The Court was of the opinion that the requirement of equality was met where there was in existence, outside the board's jurisdiction, a private school open to colored students which would cost them no more than the board would have charged Negroes to attend a school for colored children.

On the primary level of education the Court, in the case of *Gong Lum v. Rice*,[21] held that a state can be said to afford to a Chinese child the equal protection of the laws by giving her the opportunity of a free common school education in a school which receives only children of brown, yellow, or black races.

In recent years the Court has construed the word equal, as it applies to educational facilities on the higher levels, to mean something different than when it is applied to the lower levels of education. In *Missouri* ex rel. *Gaines v. Canada*[22] it was held that provisions for the legal education in other states of colored residents of Missouri is insufficient to satisfy the constitutional requirement of equal protection of the laws. The Court said that the petitioner's right was a personal one and that because of it the state was bound to furnish him, within its borders, facilities for legal education substantially equal to those which the state afforded persons of the white race. The Court did not say what "substantially equal" was, but at least, it had to be provided within the state to be equal.[23] Again in *Sipeul v. Board of Regents*[24] it was held that the state of Oklahoma, which maintained a law school for whites, would either have to furnish the colored people with equal facilities for a legal education or else allow the colored residents to enter the white law school. The Court did not say what these equal facilities would be but said that the state, so long

19 Gong Lum v. Rice, 275 U. S. 78, 48 S. Ct. 91, 72 L. Ed. 172 (1927); Cumming v. Richmond County Board of Education, 175 U. S. 528, 20 S. Ct. 197, 44 L. Ed. 262 (1899).

20 175 U. S. 528, 20 S. Ct. 197, 44 L. Ed. 262 (1899).

21 275 U. S. 78, 48 S. Ct. 91, 72 L. Ed. 172 (1927).

22 305 U. S. 337, 59 S. Ct. 232, 83 L. Ed. 208 (1938).

23 *Accord,* McCready v. Byrd *et al.,* .... Md. ...., 73 A. (2d) 8 (1950), *cert. denied,* Oct. 9, 1950, 19 U. S. L. WEEK 3093 (U. S. Oct. 10, 1950).

24 332 U. S. 631, 68 S. Ct. 299, 92 L. Ed. 247 (1948).

as it provided legal education for whites, would have to provide legal education for colored students which would be substantially equal to that given the white students at the state supported schools.

In June 1950 the Court decided two significant cases which further indicate some of the requirements for equal facilities in graduate and professional schools. In *McLaurin v. Oklahoma State Regents* [25] it was held a denial of equal protection to admit a colored resident to a heretofore all-white graduate school and then keep him segregated within the graduate school itself by requiring him to sit in an assigned row in the classrooms, and at special tables in the library and dining hall. In pointing out that under these conditions a student would be receiving unequal treatment in that he would be deprived of the necessary association with his fellow students the Court said: [26]

> These restrictions were obviously imposed in order to comply, as nearly as could be, with the statutory requirements of Oklahoma. But they signify that the State, in administering the facilities it affords for professional and graduate study, sets McLaurin apart from the other students. The result is that the appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions, and exchange views with other students, and, in general, to learn his profession.

In *Sweatt v. Painter*,[27] decided the same day, a Negro was refused admission to the all-white University of Texas state supported law school where his only other alternative was to attend a newly organized state supported law school for the exclusive use of colored people. In holding that the Negro petitioner had been denied equal protection the Court said:[28]

> . . . petitioner may claim his full constitutional right: legal education equivalent to that offered by the State to students of other races. Such education is not available to him in a separate law school as offered by the State.

While it was not said that law students within a state could not be separated, the Court, in stating that the law schools must be substantially equal, listed several requirements necessary to fulfill the equality test:[29]

> Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of student body, scope of the library, availability of law review and similar activities . . . the University of Texas Law School possesses to a far greater degree those

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25 339 U. S. ...., 70 S. Ct. 851, 94 L. Ed. .... (1950).
26 *Id.*, 70 S. Ct. at 853.
27 339 U. S. ...., 70 S. Ct. 848, 94 L. Ed. .... (1950).
28 *Id.*, 70 S. Ct. at 851.
29 *Id.*, 70 S. Ct. at 850.

> qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of administration, position and influence of alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.

It is evident from these two recent cases that because of the more rigid requirements for equality, compliance with the "separate but equal" doctrine has become so difficult that it has rendered segregation laws ineffective on the graduate and professional levels of education. But might not the same requirement of equality be applied to separate schools on the undergraduate level? Is not the presence or absence of an experienced faculty, influential alumni, and a free exchange of ideas as important on the undergraduate level as it is on the graduate level? These and other questions will have to await decision on a later day. Admittedly, if segregated schools can meet the requirements of equality of treatment they will be tolerated, otherwise not.

The legality of residential segregation has also been before the Court. In this field the Court, in taking a clear and definite stand, has invoked not only the equal protection clause but also the due process clause of the Fourteenth Amendment. Consequently, there is little room for segregation in places of abode, either by state zoning laws or by private covenants to be enforced by the state courts.

In 1916 the Court, in *Buchanan v. Warley*,[30] determined the validity of a city zoning ordinance which prohibited colored people from moving into areas wherein the greater number of houses were occupied by whites, and vice versa. The ordinance was challenged by a white petitioner in a suit to enforce the sale of his property to a Negro. In declaring the law violative of the due process clause of the Fourteenth Amendment the Court said:[31]

> The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person.
>
> It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution.

It is interesting to note that this ordinance was invalidated because it took the petitioner's property without due process, rather than a denial of equal protection to the Negro. A possible explanation of this

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30 245 U. S. 60, 38 S. Ct. 16, 62 L. Ed. 149 (1916).

31 *Id.*, 245 U. S. at 81. See also Harmon v. Tyler, 273 U. S. 668, 47 S. Ct. 471, 71 L. Ed. 831 (1926), wherein a similar enactment in New Orleans was invalidated in a per curiam opinion, "on the authority of Buchanan v. Warley."

is that the petitioner was a white man and he did not allege violation of the equal protection of laws.

In determining the constitutionality of private agreements involving separation of the races the Court takes the stand that as long as the purposes of the agreements are effectuated by voluntary adherence to their terms, no provisions of the Fourteenth Amendment are violated, since there has been no action by the state.[32] When, however, the effect or purposes of these covenants are secured only by judicial enforcement by state courts, such judicial enforcement becomes prohibited state action within the meaning of the equal protection clause of the Fourteenth Amendment.[33] When a person is not permitted to buy property from an owner who is willing to sell, the segrant is denied equal protection since he is denied rights of ownership or occupancy enjoyed as a matter of course by other persons of different race or color.

While segregation enforced by state statute and municipal ordinance is also prevalent within many states in street cars, hotels, restaurants, and theaters, no cases touching these matters have reached the Supreme Court. This may be a result of a realization of the force of the *Plessy* decision.

A recent case involving segregation in the field of publicly owned recreational facilities also illustrates the Court's adherence to the "separate but equal" doctrine. *Rice v. Arnold*[34] reached the high Court as a result of a petition for mandamus to compel the superintendent of the municipally owned and operated golf course in Miami to permit Negroes to use the course upon the same basis as white people. The petition challenged the superintendent's rule allocating facilities of the course exclusively to Negroes on Monday, and reserving the other six days of the week for white people exclusively. The defendant contended that the one day allotment of facilities of the golf course to Negroes was not discriminatory since the days of playing each week were apportioned to the number of white and colored golfers according to the record of the course kept by the superintendent. The Supreme Court granted certiorari but vacated the judgment of the Florida Supreme court, and, without hearing argument, instructed the Florida court to reconsider its decision denying mandamus in the light of the *Sweatt* and *McLaurin* cases.[35] Since in these two cases the "separate but equal" doctrine was the express basis of the Court's decision, this instruction would seem to be a manifestation of the Court's conviction that the time schedule as set up by the golf course

32 Corrigan v. Buckley, 271 U. S. 323, 46 S. Ct. 521, 70 L. Ed. 969 (1926).

33 Shelley v. Kraemer, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948).

34 19 U. S. L. WEEK 3103 (U. S. Oct. 17, 1950).

35 McLaurin v. Oklahoma State Regents, 339 U. S. ...., 70 S. Ct. 851, 94 L. Ed.... (1950); Sweatt v. Painter, 338 U. S. 865, 70 S. Ct. 848, 94 L. Ed. . . . (1950).

superintendent did not meet the requirements of the "separate but equal" doctrine. The Court apparently thought that the facilities offered Negroes under this time schedule were not equal to those offered the whites.

It is evident that the Supreme Court by its decisions has partially settled the legal aspects of the racial segregation problem. Segregation in public, graduate and legal education has been made practically impossible. In interstate transportation the *Henderson* case has eliminated segregation in dining cars, and left the legality of separation in other phases of interstate transportation in grave doubt.. Residential segregation has also been eliminated to the extent of declaring zoning laws unconstitutional, and disallowing state enforcement of private restrictive agreements. In state provided recreational facilities, separation of the races has been made more difficult by the tightening of the equality requirements. However, while alleviating the racial problem by a more rigid application of the equality test, the Court has not varied the constitutional principle underlying the "separate but equal" doctrine.

While the cases and the federal statutes on the subject illustrate the eagerness of the federal government to prohibit segregation whenever and wherever it is within its power to do so, yet, the fact remains that the Supreme Court has decided that under our constitutional system state governments still have the power to segregate according to races if they so deem it necessary for the common good of the state.[36] Regardless of what may be said in favor of the complete abolition of racial segregation by federal legislation, the police power of the state must still be respected. The Court has chosen to base its decisions on the ultimate ground that a citizen does not have, guaranteed by the Constitution, a fundamental right not to be segregated. The Supreme Court has manifested, throughout the years, a profound respect for the separation of powers principle where states have found it necessary in the exercise of their police power to segregate on the basis of race.

Patrick F. Coughlin
William J. O'Connor

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36 It is highly probable that in the future racial segregation will be challenged as being violative of the United Nations Charter. But to declare separation of the races violative of the United Nations Charter it would be necessary for the Court to hold: First, that the Charter has the force of a treaty and is therefore the supreme law of the land; second, that a citizen living in the United States under this Charter has, guaranteed by the Charter, a fundamental right not to be segregated according to race. For a recent decision of a state court holding that the Charter has the force of a treaty and is therefore the supreme law of the land, see Sei Fujii v. State, ... Cal. App. ...., 217 P. (2d) 481 (1950). For a further discussion of this case, see CONSTITUTIONAL LAW—TREATIES in the "Recent Decision" section of this issue.

Evidence

SPOUSE AS COMPLAINING WITNESS IN NON-VIOLENCE CRIMINAL ACTIONS

Practicing lawyers and prosecutors are frequently confronted with the very practical problem of procedure and evidence when a wife is desirous of instituting criminal proceedings against her husband, and subsequently acting as the prosecuting witness. Marital testimony in criminal actions is usually categorized [1] into three main problems, namely: privileged communications; ability to testify *for* [2] the spouse; and, ability to testify *against* the spouse. By far the greater amount of controversy centers on the last named category, and this article will be confined to this phase.

At early common law the wife was barred from testifying against her husband under any circumstances because of the theory that her identity was merged in her husband's. The theory included the idea that a woman was nothing more than a mere chattel,[3] and as such, was powerless to disturb the supposed domestic tranquility. It soon became apparent that both the family and the state required some safeguard for the wife's person.[4] An exception to the privilege was instituted which has become practically universal today.[5] The wife is permitted to institute actions against her spouse and to be a competent witness for the prosecution, when the charge is one of personal, *i.e.*, corporal violence to her. The violence, however, is not always in the physical sense.

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1 3 VERNIER, AMERICAN FAMILY LAWS § 226 (1935).

2 See 20 MINN. L. REV. 693 (1935), in which the writer states: "It is to be noted that while the disqualification of one spouse to appear as a witness for the other has been almost wholly removed in the states, the trend of the statutes, except in a minority of jurisdictions, has been not to alter essentially the common law conceptions as to admissibility of evidence by one spouse against the other, except to broaden the scope of personal offense by one against the other."

3 "The privilege evolved at a time in history when the wife was little better than the chattel of her husband, and when the law's grasp of the psychology of interpersonal relationships was naive." 29 NEB. L. REV. 108 (1950). For an interesting treatise on this subject, see Hutchins and Slesinger, *Some Observations on the Law of Evidence: Family Relations,* 13 MINN. L. REV. 675 (1929).

4 3 OKLA. L. REV. 225 (1950): "The early lawyers did not fail to realize that the privilege could be subject to abuse and an exception was engrafted upon the rule that permitted the wife or the husband, who was the victim of a wrong by the other, to appeal to the courts unrestricted by the privilege. The exception was a product of necessity and one which was apparently somewhat narrow in scope and limited to the actual protection of the spouse (Bentley v. Cooke, 3 Doug. 422, 99 Eng. Rep. 729 (1784)—'. . . that necessity is not a general necessity, as where no other witness can be had, but a particular necessity, as where, for instance, the wife would otherwise be exposed without remedy to personal injury.')"

5 2 WIGMORE, EVIDENCE § 612 (3rd ed. 1940).

The problem, then, is to determine what is "personal" violence as it appears in many state statutes. The great majority of states not using the word "personal" resort to the phrase "an offense committed by one against the other." [6] Naturally, the cases are replete with the problem of what is an offense by one against the other.

I.

Instituting Criminal Actions

The common prerequisites for a person instituting criminal actions are that the complainant have knowledge of the facts of the crime and be a person competent to testify to the facts in the complaint.[7]

The latter requirement has prompted the courts to consistently hold that a wife could not institute proceedings against her husband unless she was competent to testify against him in the trial of the crime.[8] This standard has been followed in determining her eligibility to present facts before a grand jury,[9] to swear out a complaint against her husband,[10] and to swear out an affidavit for having a warrant issued.[11] Thus, in order for a wife to be a competent complaining witness, it is first necessary to ascertain if she qualifies as a valid witness for the particular crime. This necessitates a thorough understanding of the statutes on competency of witnesses, plus the current interpretation given the statutes by the courts, as well as the courts' application of the common law privilege.

II.

Competency of Wife Under Statutes Permitting Her to Testify in a Trial for Crime Committed by "One Against the Other"

(a) Against the Property of the Other:

Unfortunately, states having similar statutes permitting one spouse to testify against the other for a crime committed by "one against the

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6 For a modern statute see VA. CODE ANN. § 8-288 (1950).

7 People v. Stickle, 156 Mich. 557, 121 N. W. 497 (1909).

8 Bell v. State, 14 Ga. App. 809, 82 S. E. 376 (1914); Smith v. State, 14 Ga. App. 614, 81 S. E. 912 (1914); People v. Bladek, 259 Ill. 69, 102 N. E. 243 (1913); Tulman v. State, 37 Ind. 353 (1871); *Ex parte* Dickinson, 132 S. W. (2d) 243 (Mo. App. 1939); State v. Berlin, 42 Mo. 572 (1868); State v. Snyder, 93 N. J. L. 18, 107 Atl. 167 (1919), *aff'd* 94 N. J. Eq. 377, 109 Atl. 925 (1920); People v. Budzinski, 159 Misc. 566, 289 N. Y. Supp. 656 (1936); State v. Coats, 130 N. C. 701, 41 S. E. 706 (1902); Stribling v. State, 88 Tex. Crim. Rep. 195, 215 S. W. 857 (1919); Thomas v. State, 14 Tex. App. 70 (1883).

9 People v. Bladek, *supra* note 8; People v. Budzinski, *supra* note 8; State v. Coats, *supra* note 8; State v. Snyder, *supra* note 8.

10 State v. Berlin, 42 Mo. 572 (1868); Stribling v. State, 88 Tex. Crim. Rep. 195, 215 S. W. 857 (1919).

11 Bell v. State, 14 Ga. App. 809, 82 S. E. 376 (1914); Smith v. State, 14 Ga. App. 614, 81 S. E. 912 (1914); Tulman v. State, 37 Ind. 353 (1871);

other" have failed to interpret their statutes in the same light. In fact, the different interpretations are as numerous as the exceptions to the parol evidence rule.[12] It might be said that there are three schools of thought on the subject.

One such school, led notably by Texas,[13] is that the statute is merely declaratory of the common law, *i.e.*, there must be a personal violence [14] committed against the wife before she is competent to testify against her spouse. In a Texas court it was held that a wife could not be a competent witness against her husband in the larceny of a mule, allegedly the separate property of the wife. The court stated: [15]

> This provision of the code cannot, in our opinion, be properly given so broad an interpretation as to permit husbands and wives to testify against their property. To give it such a construction would be to make a marked innovation upon a well established common-law rule of evidence not required or warranted by its language.

A further illustration of a construction virtually declaratory of the common law is in the case of *Meade v. Commonwealth*,[16] where the forgery by the husband of the wife's name on a deed was held not an "offense committed by one against another," within the terms of the statute. The court said:[17]

> The words "offense" and "criminal offense" are used interchangeably in our statute. As used, they mean a "prosecution for a criminal offense," and not a proceeding based merely on a private wrong.

Another jurisdiction which supports this concept is Washington. In *State v. Kephurt* [18] the wife was deemed incompetent to testify against her husband for the crime of arson on the ground that the statute [19] was merely declaratory of the common law privilege.

The better and more reasonable rule of the second school can be found in the decisions of Colorado,[20] Iowa [21] and Nebraska.[22] A Colo-

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Ex parte Dickinson, 132 S. E. (2d) 243 (Mo. App. 1939); Thomas v. State, 14 Tex. App. 70 (1883).

12 Note, 25 NOTRE DAME LAW. 330 (1950).

13 Compton v. State, 13 Tex. App. 271 (1882).

14 Baxter v. State, 34 Tex. Crim. Rep. 516, 31 S. W. 394 (1895); Compton v. State, *supra* note 13; Overton v. State, 43 Tex. 616 (1875); Meade v. Commonwealth, 186 Va. 775, 43 S. E. (2d) 858 (1947); State v. Kelphart, 56 Wash. 561, 106 Pac. 165 (1910).

15 Overton v. State, *supra* note 14, 43 Tex. at 618.

16 186 Va. 775, 43 S. E. (2d) 858 (1947).

17 *Id.*, 43 S. E. (2d) at 863.

18 56 Wash. 571, 106 Pac. 165 (1910).

19 WASH. ANN. CODE & STAT. § 5994 (Ballinger 1897).

20 Emerick v. People, 110 Colo. 572, 136 P. (2d) 668 (1943); O'Loughlin v. People, 90 Colo. 368, 10 P. (2d) 543 (1932); Wilkinson v. People, 86 Colo. 406, 282 Pac. 257 (1929); Dill v. People, 19 Colo. 469, 36 Pac. 229 (1894).

21 State v. Shultz, 177 Iowa 321, 158 N. W. 539 (1916); State v. Hurd, 101 Iowa 391, 70 N. W. 613 (1897); State v. Chambers, 87 Iowa 1, 53 N. W.

rado court, in a case of recent date, held that a wife was competent to testify against her husband for the crime of obtaining bonds from her by false pretenses and by using her as the victim of the confidence game.[23] Although this state has a statute within the general class under consideration, the court did not refer to the code but declared:[24]

> . . . she [the wife] was the individual particularly and directly injured and affected by the alleged crime for which the defendant was prosecuted, and consequently was a competent witness against him.

The same court had in 1894 permitted a wife to testify against her husband for the crime of perjury in divorce proceedings against her. That court considered the language of the statute was broad enough to include any crime, whether of violence or otherwise, which directly affected the wife, and stated that she could testify "wherever she is the individual particularly and directly injured or affected by the crime." [25] An Oklahoma court in a case on all fours with the Colorado case, and with a comparable statute, reached the same result.[26]

The third school might be said to be that as expressed by the legislature of some states.[27] Mindful of the narrow construction given by some courts to the type of statute under discussion the legislatures expressly broadened its scope by permitting a spouse to testify for any crime committed "against the person or property of the other." These statutes have been construed more broadly than the typical statute above has been interpreted by the jurisdictions of the first school (Texas), but not as liberally as constructions evolved by the second school (Colorado). This legislative compromise will be discussed forthwith in the section on miscellaneous statutes.

(b) Crimes Against the Morals and Dignity of the Wife:

Though there is much diversification in an interpretation of what crimes affect property, the scope of what constitutes a crime against "morals and dignity" is seemingly unlimited. *A fortiori,* in attempting to resolve the problem, the courts have been prompted to make constant distinctions between the different classifications of these crimes, *e.g.,* adultery,[28] incest,[29] rape,[30] and abandonment.[31]

1090 (1893); State v. Hughes, 58 Iowa 165, 11 N. W. 706 (1882); State v. Sloan, 55 Iowa 217, 7 N. W. 516 (1880); State v. Bennett, 31 Iowa 24 (1870).

22 Hills v. State, 61 Neb. 589, 85 N. W. 836 (1901); Lord v. State, 17 Neb. 526, 23 N. W. 507 (1885).

23 Emerick v. People, 110 Colo. 572, 136 P. (2d) 668, 669 (1943).

24 *Ibid.*

25 Dill v. People, 19 Colo. 469, 36 Pac. 229, 233 (1894).

26 West v. State, 13 Okla. Crim. Rep. 312, 164 Pac. 327 (1917).

27 ARK. STAT. ANN. § 43.2020 (1947); CAL. PEN. CODE § 1322 (1949).

28 State v. Bennett, 31 Iowa 24 (1870); State v. Lusher, 131 Minn. 97, 154 N. W. 735 (1915); State v. Armstrong, 4 Minn. 335, 4 Gil. 251 (1860); Heacock

In 1913, Justice Furman of the Criminal Court of Appeals of Oklahoma concisely expressed the modern tenets which would permit a wife to testify against her husband for the crimes mentioned above.[32] After stating that the pivotal question depends upon what constitutes "a crime against the other," Justice Furman went on to say:[33]

> In reason and in justice we believe that whenever a husband or wife is guilty of conduct, which constitutes a public offense, and which also constitutes a direct violation of the legal rights of the other, the crime is against such other, as well as against the public, and that such husband or wife should be permitted to testify in all such cases. . . . Considering the substance rather than the form of things, we are of the opinion that the idea that the wife can only testify against her husband for an assault committed upon her person is a relic of barbarism.

Still in search of the answer to the question Justice Furman proceeds:[34]

> What is the meaning of this phrase, "a crime committed one against the other?" Is it merely declaratory of the common law, meaning in fact, when personal violence is inflicted by one against the other, or has it a broader meaning, based upon the philosophy of the rule, and including all crimes interrupting and objectionable to the marriage relation?
>
> A respectable army of authorities, we concede, might be cited in support of the narrower construction. But the courts in those cases, we respectfully submit, have blindly followed precedents not based upon reason, and have yielded to that foolish sentimental impulse, which, as Mr. Wigmore so rightly remarks, is the real foundation of this rule. This court has declared more than once that it will follow no precedents not founded upon reason; that Oklahoma should be ruled by the living and not the dead.

Finally Justice Furman sums up his convictions in this manner:[35]

> We do not believe this court will say that we have so foolish a public policy in Oklahoma that closes the lips of an abandoned and deserted wife, in order that the family harmony and concord which has been utterly destroyed by the husband's acts shall not be further disturbed.

In passing, it might be well to note that the belief of the same court ten years later had somewhat contracted. The court in the case of

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v. State, 4 Okla. Crim. Rep. 606, 112 Pac. 949 (1911); Hall v. State, 148 Tex. Crim. Rep. 459, 188 S. W. (2d) 388 (1945); Thomas v. State, 14 Tex. App. 70 (1883).

29 State v. Shultz, 177 Iowa 321, 158 N. W. 539 (1916); State v. Chambers, 87 Iowa 1, 53 N. W. 1090 (1893); Toth v. State, 141 Neb. 448, 3 N. W. (2d) 899 (1922); State v. Burt, 17 S. D. 7, 94 N. W. 409 (1903).

30 Cargill v. State, 25 Okla. Crim. Rep. 314, 220 Pac. 64 (1923).

31 Wilkinson v. People, 86 Colo. 406, 282 Pac. 257 (1929); Harris v. State, 80 Neb. 195, 114 N. W. 168 (1907).

32 Hunter v. State, 10 Okla. Crim. Rep. 119, 134 Pac. 1134 (1913).

33 *Id.*, 134 Pac. at 1135.

34 *Id.*, 134 Pac. at 1136.

35 *Id.*, 134 Pac. at 1138.

Cargill v. State [36] held that the wife was not a competent witness against her husband in a prosecution against him for rape or assault to commit rape upon a third person. Justice Bessey, speaking for the court, stated it thusly:[37]

> The rule that the injury must amount to a physical wrong upon the person is too narrow; and the rule that any offense remotely or indirectly affecting domestic harmony comes within the exception is too broad. The better rule is that, when an offense directly attacks or directly and vitally impairs the conjugal relation, it comes within the exception to the statute that one shall not be a witness against the other except in a criminal prosecution for a crime committed one against the other. In this sense the commission of rape by a husband upon a third person is not a crime against the wife within the meaning of our statute.

Is adultery a crime "against the other" under these statutes? Perhaps the most notable case constituting one spouse a competent witness against the other is *State v. Bennett*.[38] Here the court reasoned that the statute requiring one spouse to be the complainant in an adultery action, conclusively indicated legislative intent that adultery was more a crime against the innocent spouse than a public wrong. Likewise, Arizona, in its penal code sections dealing with adultery specifically requires that one of the spouses institute the action.[39]

Perhaps with more uniformity than in the other "immoral" crimes, the courts have held that incest is not a crime against the wife under the statutes. Iowa alone, perhaps, has firmly adhered to the proposition that incest is a crime against the other spouse.[40]

In *State v. Burt*, Justice Haney conveniently classified the crimes a husband can commit: [41]

> With reference to this statute the husband's crimes might be classified thus: (1) Those which are against persons other than his wife; (2) those which are against no particular person; and (3) those which are against his wife. It is only in actions for crimes belonging to the last-mentioned class that the wife can testify for or against her husband without his consent.

This classification poses the question: is this not the same as the common law exception requiring physical injury? Are there no crimes against the marital *relationship* of husband and wife? This question continues to reappear in all cases involving crimes which insult the moral dignity of the spouse, although they are not directed at her physical person.

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36 25 Okla. Crim. Rep. 314, 220 Pac. 64 (1923).

37 *Id.*, 220 Pac. at 67.

38 31 Iowa 24 (1870).

39 ARIZ. CODE ANN. § 43-401 (1939).

40 State v. Chambers, 87 Iowa 1, 53 N. W. 1090 (1893).

41 State v. Burt, 17 S. D. 7, 94 N. W. 409, 411 (1903).

III.

Competency of Wife Under Miscellaneous Statutes

(a) Against the Property of the Other:

Further delineations of the statutes are impossible because of the wide range of miscellaneous codes pertaining to the spouse's competency. It should be noted, however, that the trend in this property subdivision is to broaden the spouse's competency. In the final analysis these anomalous statutes must be interpreted by discerning the legislative intent and the courts' desire to widen the restrictive common law privilege.

In California a husband was competent to testify against his wife for the crime of grand larceny because the statute [42] included the word "property" in an exception similar to the type of statute under discussion in the first section of this article, *i.e.*, "for a crime committed by one against the person or property of the other." The California court said:[43]

> Evidently the amendment to . . . the Penal Code was adopted . . . to expressly authorize a spouse to testify against the other one in a criminal action involving a crime against *either* the *person* or the *property* of the witness. (Emphasis supplied.)

Under a statute [44] making either spouse competent to testify in criminal proceedings for bodily injury or violence attempted, a Pennsylvania court held a wife competent to testify against her husband for libel.[45] Likewise the Pennsylvania court, under the same statute, held a wife competent to testify against her husband when he conspired to cause her to be committed to an insane asylum.[46]

(b) Crimes Against the Morals and Dignity of the Wife:

Arkansas has a statute [47] similar to that of California,[48] which makes the spouse competent to testify against the other for crimes against the person or the property of the other. However, the same court under the same statute held that a wife was competent in an action of abandonment although she was regarded as not competent for the crime of rape.[49] In this case the court interpreted the excep-

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42 CAL. PEN. CODE § 1322 (1949). ". . . or in case of criminal actions or proceedings for a crime committed by one against the person or property of the other . . ."

43 *In re* Kellogg, 41 Cal. App. (2d) 833, 107 P. (2d) 964, 966 (1940).

44 PA. STAT. ANN. tit. 19, § 683 (1930).

45 Commonwealth v. Nairn, 30 Pa. Dist. 883 (1920).

46 Commonwealth v. Spink, 137 Pa. 255, 20 Atl. 680 (1890).

47 ARK. STAT. ANN. § 43.2020 (1947).

48 See note 42 *supra.*

49 Wilson v. State, 125 Ark. 234, 188 S. W. 554 (1916).

tion allowing one spouse to testify against the other to mean an injury against the person or property of the husband or wife while they occupy that relation. Therefore, a wife could not testify against her husband for rape committed prior to their marriage. Just ten years later the court interpreted the statute to mean that either spouse could testify against the other in a criminal prosecution in any case where the offense involved an injury to the spouse personally, in addition to the effect upon society.[50]

Very recently a California court extended the existent liberal code provisions to make a wife competent to testify against her husband for the crime of selling her for immoral purposes.[51]

Bigamy does not make the wife competent to testify in Mississippi [52] though that state has a statute [53] which makes a wife competent in all controversies which occur between the spouses. The same result was reached in Michigan [54] in spite of statutes [55] which permit the spouse to testify in cases where the cause of action grows out of a personal wrong or injury done by one to the other. The crime of bigamy was held not to be a personal wrong or injury to the defendant's first wife under such a statute. Massachusetts has a statute [56] which precludes compulsory testimony by one spouse against the other. This statute has been construed by the court in *Commonwealth v. Barker,*[57] a case involving the crime of polygamy, that: "There is nothing which prevents a husband or wife from testifying against the other in criminal proceedings if the one testifying is willing to do so."

Conclusions

Fortunately, there has been a decidedly liberal extension of the common law exception in the federal courts. Since the common law is not applicable in federal criminal cases, an encouraging number of federal cases, decided under the realistic federal procedural rules, have noticeably diminished the strict application of the exception.[58]

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50 Murphy v. State, 171 Ark. 620, 286 S. W. 871 (1926).

51 People v. Tidwell, 61 Cal. App. (2d) 58, 141 P. (2d) 969 (1943).

52 McQueen v. State, 139 Miss. 457, 104 So. 168 (1925).

53 MISS. CODE ANN. § 1689 (1942): ". . . shall be competent witness in their own behalf, as against each other, in all controversies between them."

54 People v. Quanstrom, 93 Mich. 254, 53 N. W. 165 (1892).

55 MICH. STAT. § 7546 (1885). This statute as it now stands, MICH. STAT. ANN. § 27.916 (1938), expressly provides that a spouse shall be competent to testify in "suits for divorce and cases of prosecution for bigamy . . ."

56 MASS. ANN. LAWS § 233-20 (1933).

57 185 Mass. 324, 70 N. E. 203 (1904).

58 Shores v. United States, 174 F. (2d) 838 (8th Cir. 1949); Hayes v. United States, 168 F. (2d) 996 (10th Cir. 1948); Levine v. United States, 163 F. (2d) 992 (5th Cir. 1947); United States v. Mitchell, 137 F. (2d) 1006 (2nd Cir.), *aff'd,* 138 F. (2d) 831 (2nd Cir. 1943), *cert. denied,* 321 U. S. 794, 64 S. Ct.

Despite the many valid and logical arguments posed,[59] the "state courts seem reluctant in the absence of explicit legislative language to discard the archaic rule of privilege." [60] One of the main reasons for the continued adherence to the rule is public policy, *i.e.*, the "privilege is based upon a desire to preserve the marital relation and avoid family discord." [61] But is not all family harmony gone when one spouse desires to be a complaining witness against the other? On the other hand, valuable testimony is frequently barred, which would aid in a fair determination of a criminal case upon its merits. Many spouses are thereby not adequately protected from injustice perpetrated upon them in respect to the marriage relationship as well as to their property rights. The much disputed old bugbear against inducing perjury seems to be a rather inadequate reason for the rule of incompetency of the spouse. Nor is the oft-cited reason of protecting family unity of compelling force in view of the alarming, but legally sanctioned, divorce rate of the present day. Further, the passage of the Married Womens' Acts,[62] the adoption of the Nineteenth Amendment to the United States Constitution,[63] and the present social and economic status of women must be considered.[64]

Today marriage is not, unfortunately, as permanent a legal institution as it was when the common law lawyers inaugurated the exception, and now most "testimony by a witness against her husband represents not the cause but the effect of a split home." [65]

Even before the adoption of the Nineteenth Amendment existing state statutes which merely tended to codify the common law excep-

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785, 88 L. Ed. 1083 (1944); Yoder v. United States, 80 F. (2d) 665 (10th Cir. 1935); Denning v. United States, 247 Fed. 463 (5th Cir. 1918); Pappas v. United States, 241 Fed. 665 (9th Cir. 1917). *Contra*: United States v. Walker, 176 F. (2d) 564 (2nd Cir.), *cert. denied*, 338 U. S. 891, 70 S. Ct. 239, 94 L. Ed. 146 (1949).

59 For interesting discussions of the privilege in particular jurisdictions, see the following:

California: Hines, *Privileged Testimony of Husband and Wife in California*, 19 CALIF. L. REV. 390 (1931);

Canada: Comment, 28 CAN. B. REV. 585 (1950);

Kentucky: Note, 38 KY. L. J. 459 (1950);

Louisiana: O'Connor, *The Qualifications of Defendant's Spouse as a Witness in Criminal Cases*, 9 NOTRE DAME LAW. 272 (1934);

North Carolina: Note, 26 N. C. L. REV. 206 (1948);

Tennessee: Note, 3 VAND. L. REV. 298 (1950);

Wisconsin: Gollmar, *Marital Privilege*, [1945] WIS. L. REV. 232.

60 Comment, 29 NEB. L. REV. 108, 110 (1950).

61 [1945] WIS. L. REV. 232.

62 3 VERNIER, *op. cit. supra* note 1, § 167.

63 U. S. CONST. AMEND. XIX.

64 8 WIGMORE, *op. cit. supra* note 5, § 2228 at p. 232.

65 30 B. U. L. REV. 135 (1950).

tion, were criticized by active members of the bar. As early as 1917 a practicing attorney of Kentucky wrote of his state code: [66]

> Those words suggest the days of chivalry and must have been written when Kentucky gentlemen all read Sir Walter Scott, kept their wives secluded in the home, and took over their property on marriage as a matter of right under the beneficient provisions of the common law. They may have worked well in the days of *coverture*. But the wife is now an entity, a human being, a citizen. All the ways of the earth are open to her. She pursues all business avocations and fills all professions. . . . I submit that no law ought to protect those guilty of wrong by sealing the mouth of the spouse who knows the facts and is willing to testify. What sort of a public policy is that? Is justice and right between the parties litigant less sacred than the relation of husband and wife? Again, submit that no husband nor wife should distrust the spouse or feel less affection because that spouse has told the truth that justice might be done. We cannot build our sacred institutions, we cannot sanctify the home, we cannot inspire or perpetuate affection between husband and wife by a lie or by the suppression of the truth. And logic might suggest that permitting the husband or wife to testify against the other might be a great restraint against wrongdoing.

Certainly the Kentucky attorney succinctly and poignantly defined the problem and voiced the view of many modern writers, nearly unanimous in their condemnation of the privilege. It would appear that resolute progress is occurring, for "we are moving in the direction of allowing the trier of the facts to hear all the evidence," as the court said in *Funk v. United States*.[67] The interest or relationship of the witness should merely be a consideration in determining the weight to be given to the testimony, not a ground for complete disqualification. Progressive advocates of the elimination of the rule were heartened by the *Yoder v. United States* [68] decision, for the conclusion reached was "in accord with the views of a strong modern school of commentators, who contend there is no reason to sacrifice personal justice for the sake of a mythical family unity, or to apply the rules of cricket to the law of evidence for the sake of a dubious social benefit." [69]

In an attempt to serve better, in a very practical sense, the ends of justice, the trial judge [70] should be permitted to exercise his judgment and experienced discretion in order to fulfill the dual role of ascertaining the actual need for truth and protecting the marital harmony—singularly difficult problems to resolve. Of course, the need for a judge performing such a duty would be ended, should the state legislatures rid the statutes of the privilege.

Presumably it is not the theorists and academicians alone who espouse the termination of such an outdated privilege, for the American

66 6 KY. L. J. 45 (1917) as quoted in 38 KY. L. J. 459, 461 (1950).
67 290 U. S. 371, 54 S. Ct. 212, 78 L. Ed. 363 (1933).
68 80 F. (2d) 665 (10th Cir. 1935).
69 Comment, 10 So. CAL. L. REV. 94 (1936).
70 Comment, 38 GEO. L. J. 316 (1950).

Bar Association has recommended the abolition,[71] and the very practical and concise MODEL CODE OF EVIDENCE, Rules 215, 216 (1942), presented by the American Law Institute omitted the privilege *in toto*.

"The privilege has also been criticized as a 'curious piece of policy,' in that it consults the wrongdoer's own interests in determining whether justice shall have its course against him." [72] Bentham says that the privilege "not only makes every man's home his castle, but aids in converting it into a den of thieves." [73]

In practice the rule has been an undesirable one for many reasons. Legislatures have devised new exceptions as difficulties have arisen and the rule has been riddled with an endless variety of complexities. Some courts, "mayhap while praising the rule, have gone out of their way to escape its logical conclusions." [74] Other courts, in both code and common law states, have religiously followed the exception *ad litteram*.

It is apparent that the reason for the privilege has long since been vitiated and with the single exception of actual marital communications, the old common law rule should be interred thus terminating at last one of the vicissitudes with which the procedural law of evidence has been plagued for centuries.

Truth, and truth alone, should be the conclusive criterion henceforth. State courts and legislatures would serve the cause of justice more fully, should they follow the judicial path marked by recent federal decisions and some few state courts.

Arthur L. Beaudette
Henry M. Shine, Jr.

Wills

THE RIGHT OF AN ANNUITANT TO ELECT TO TAKE EITHER THE PRINCIPAL SUM OR THE ANNUITY PAYMENTS

Introduction

For centuries the broad policy of English law has favored and promoted the free alienation of absolute interests, whether of realty or personalty. Attempts to limit such interests by restrictions inconsistent with their absolute nature have been rejected by the English courts.

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71 63 A. B. A. REP. 594 (1938).

72 Comment, 24 CALIF. L. REV. 472 (1936).

73 7 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 481 n. (Bowring ed. 1827), as cited in 24 CALIF. L. REV. 472, 473 n. (1936).

74 19 CALIF. L. REV. 390, 409 (1930).

No better example of the workings of this policy may be cited than the right of a *cestui,* of full age, sound mind, and enjoying the whole equitable interest, to terminate a trust and obtain the conveyance of the legal title to the trust property from the trustee.[1] Another reflection of the policy is the doctrine that a legatee for whom a testator directs the purchase of an annuity may elect to take the principal sum in lieu of the prescribed payments. It is with this latter English rule and its relation to the American cases that this article is primarily concerned.

The right of a legatee to take the principal sum instead of the annuity payments as directed by a will has long been established in England.[2] Thus where the interest over such a legacy is vested absolutely, without a gift over, the legatee may elect to take the capital amount even against the express intention of the testator that he shall not have such option.[3] The problem is, of course, restricted to those cases in which the will directed the *purchase* of an annuity, rather than the *payment* of an annual sum out of the estate, it having been held that no right of election existed in the latter case.[4]

However, as will be shown, the doctrine has had a mixed reception in the United States. The purpose of this treatise is to indicate the origin and development of the rule in England, its introduction into this country by the New York courts, and through a survey of the American cases, its present status, limitations and effect in American law.

I.

The English Background

The earliest case discussing the right of the beneficiary to elect to take the capital sum was decided in 1725. In this case, *Yates v. Compton,*[5] the point was not actually in issue as the legatee had died before the purchase of the annuity had been made, but her administrator filed a bill praying an order to pay the principal sum into her estate. In granting the request, the court indicated by way of dictum that the annuitant would have had the same right had she lived. In its opinion the court purported to discover the intent of the testator that his heir-at-law should be deprived of all his inheritance, and was perhaps so impressed by this desire of the testator that it refused to permit the legacy to fail.

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1 4 BOGERT, TRUSTS AND TRUSTEES § 1002 (1948).

2 Yates v. Compton, 2 P. Wms. 309, 24 Eng. Rep. 743 (1725).

3 Stokes v. Cheek, 28 Beav. 620, 54 Eng. Rep. 504 (1860); *Re* Browne's Will, 27 Beav. 324, 54 Eng. Rep. 127 (1859); Woodmeston v. Walker, 2 Russ. & M. 197, 39 Eng. Rep. 370 (1831).

4 Carmichael v. Gee et al., 5 App. Cas. 588 (1880); Wright v. Callender, 2 De G. M. & G. 652, 42 Eng. Rep. 1027 (1852).

5 2 P. Wms. 308, 24 Eng. Rep. 743 (1725).

Virtually the same situation prevailed in a later case,[6] in which the person for whom the annuity was to be purchased committed suicide two days after the testator's death. The court held that the annuitant's personal representatives were entitled to the principal sum, and stated in the course of the opinion that: [7]

> The interference of the Court against the will of the legatee to compel the laying out the money in an annuity for a person . . . would have been perfectly nugatory and vain.

Again in *Bayley v. Bishop* [8] in 1803, the court permitted the representative of a legatee to take the principal sum although the legatee had predeceased the life-tenant, the proceeds of whose estate were to be used in the purchase of the annuity according to the direction in the will. The court declared that an absolute interest vested in the legatee at the time of the testator's death though it did not take effect until the death of the life-tenant. The court said: [9]

> . . . it is clear, he [the testator] meant an annuity to be purchased with the £500; which is the same in effect as giving a legacy of £500 to his son; for upon a bill filed he might have received the money; and the Court would not have compelled the trustees to lay it out in an annuity.

Here again is indicated the consideration underlying all the English cases, *i. e.*, that such an order to purchase an annuity is the same as an outright bequest of a sum of money.

The extent of the doctrine is indicated by *Palmer v. Craufurd* [10] where the legatee expressed an intention to accept the legacy but failed to fulfill one of the requirements for the issuance (i.e., personal appearance at the government annuity office) and died before its purchase. As in the preceeding cases, his personal representative secured a decree directing payment of the capital amount.

The English courts, in permitting the election between the annuity and the principal sum, have denied any distinction between legacies specifying the expenditure of a certain amount for the purchase of an annuity, and one which merely specifies that an annuity producing a stated income be purchased.[11] They have held that in the latter situation no great difficulty is encountered in determining at any given time how much of an investment will be necessary to produce the income specified in the will.[12]

A more detailed enunciation of the doctrine of free alienability of chattels as applied to bequests of annuities was made in *Woodmeston v.*

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6 Barnes v. Rowley, 3 Ves. Jun. 305, 30 Eng. Rep. 1024 (1797).
7 *Id.*, 30 Eng. Rep. at 1025.
8 9 Ves. Jun. 6, 32 Eng. Rep. 501 (1803).
9 *Id.*, 32 Eng. Rep. at 503.
10 3 Swans. 482, 36 Eng. Rep. 945 (1819).
11 Dawson v. Hearn, 1 Russ. & M. 606, 39 Eng. Rep. 232 (1831).
12 *In re* Robbins, [1907] 2 Ch. 8.

Walker,[13] where the will in question expressly stated that the legatee was "without power . . . to assign or sell the same by way of anticipation or otherwise." The court declared the legatee entitled to the principal sum, applying by analogy the rule prohibiting the placing of restrictions on real property inconsistent with the nature of the interest given. However, the court indicated that if the forbidden act of alienation was accompanied by a penalty by way of a gift over, which would determine the legatee's interest, the court would honor the restriction.

The English courts have carried this theory of the right to demand the capital sum to the extent of permitting an election even where the testator expressly forbade an election or alienation. Here the argument cannot be made that the testator must be deemed familiar with the law and hence intended to give the beneficiary the right of election. One early decision [14] justified this course of action on policy grounds and denied the right of a testator to encumber an absolute gift so as to prevent alienation. A later case,[15] involving a will which declared the legatee to be without power of anticipation as to the annuity directed to be purchased, merely granted the legatee's petition for an order declaring her to be entitled to the principal sum without opinion. And where a will stated that the beneficiary should not be allowed to accept the value of the annuity in lieu of the income, the court merely announced that, "It would be an idle form to direct an annuity to be purchased, which the annuitants might sell immediately afterwards." [16]

The result obtaining when the restriction on the power of alienation is accompanied by a limitation over, hinted at in *Woodmeston v. Walker*,[17] was given effect in *Hatton v. May* [18] in 1876. There the testator directed his trustees to purchase a government annuity with funds from his residuary estate for a legatee who was not to be entitled to receive the price of the annuity in lieu of the payment. The will further directed that if the legatee should attempt any act of alienation the annuity should cease and be void and sink into the residue. The court refused the legatee's petition for an order requiring the trustees to pay her the principal sum, and directed that the annuity should be purchased and held by the trustees for her benefit until she should attempt to alienate her interest. The court distinguished *Barnes v. Rowley* [19] and *Bayley v. Bishop* [20] on the grounds that in those cases the interest had vested absolutely at the time of the testator's death in that there was no limitation over specified in the event of an attempt

13 2 Russ. & M. 197, 39 Eng. Rep. 370 (1831).
14 Woodmeston v. Walker, *supra* note 3.
15 *Re* Browne's Will, *supra* note 3.
16 Stokes v. Cheek, *supra* note 3, 54 Eng. Rep. at 505.
17 2 Russ. & M. 197, 39 Eng. Rep. 370 (1831).
18 3 Ch. D. 148 (1876).
19 See note 6 *supra*.
20 See note 8 *supra*.

to secure the principal sum or to alienate the interest given. However, the court also stated that without the express provision in the will that the annuity should cease and fall into the residue, the rule of *Woodmeston v. Walker* would be applicable. Thus the testator's intent, when expressed only by a direction that no right of election was to be had, would still be disregarded.

In the *Hatton* case, the court founded its decision on an earlier case [21] where a will contained a provision squarely in point. In this early authority, the limitation over, a direction that the annuity was to fall into the residue upon an attempted alienation, was given effect when the annuitant listed the annuity among his assets in invoking the insolvency act. But one year after the decision in *Hatton v. May* the same type of will provision was held to be ineffective to avoid a transfer by the annuitant who was, the court said, entitled to the principal sum if he so wished and was capable of giving his purchaser a good title. Although counsel for the executors cited the decision of *Hatton v. May*, the court disregarded it entirely in its opinion, merely reciting that none of the cases cited had any bearing on the question presented.[22] Thus the decisions on this point are in apparent conflict. However, it is interesting to note that the English courts remained adamant on the principal rule of permitting an election wherever conceivably possible.

The further problem of whether or not the personal representative of an annuitant may elect to take the principal amount, when the fund from which the purchase was to be made has not yet come into existence, was raised in In re *Mabbett*.[23] The case was the more interesting because, of the several annuitants named in the will, one died before and one after the sale of realty out of which the fund arose. The personal representatives of each sued for the principal sums and the court granted the petition of the latter, but denied that of the former. The reason advanced was that the fund out of which the annuities were to be purchased had not yet come into existence at the time of the first annuitant's death. The court held there could be no vested interest in the annuity to be purchased which would permit a payment of the principal sum into the estate. But the estate of the annuitant who died after the inception of the fund was benefited by the specified capital sum under the general rule. Although in earlier and heretofore controlling cases [24] the same factor was treated as inconsequential, the court proceeded to make the distinction between the existence and non existence of the fund and predicate its decision upon it.

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21 Shee v. Hale, 13 Ves. Jun. 404, 33 Eng. Rep. 346 (1807).

22 Hunt-Foulston v. Furber, 3 Ch. D. 285 (1876).

23 [1891] 1 Ch. 707.

24 Bayley v. Bishop, *supra* note 8; Barnes v. Rowley, *supra* note 6; Yates v. Compton, *supra* note 2.

That the general rule that a bequest directing the purchase of an annuity may be treated as an absolute bequest of the principal amount at the option of the legatee continues in force and without question is well illustrated in several cases decided in the first decade of this century.[25] The English doctrine, unlike the trend in the American cases to be discussed hereafter, has remained unchanged. The reason advanced for the application of this rule—that the legatee could immediately sell the annuity and obtain the principal amount anyway—likewise remained unchanged.

II.

The American Decisions

It was not until early in the 19th century that, the American courts were first faced with the problem of allowing a legatee to take the principal sum set aside to purchase an annuity by direction of a will. In 1907, a New York Supreme court held that an absolute gift of $15,000 for the purchase of an annuity by the executor was merely a transferable legacy and the beneficiary could elect to take the principal sum in lieu of the annuity payments.[26] The court's argument followed the familiar pattern of the English courts that to deny the right of election was a nugatory act since the beneficiary could sell or assign the annuity immediately in any event. Of material influence in the court's decision was the absence of any remainderman whose rights might have been affected by such election.

Four years later the first state court of last resort ruled on the matter. In this case, *Parker et al. v. Cobe*,[27] the Supreme Judicial Court of Massachusetts granted the beneficiary of an annuity the right of election where the annuity was to be purchased by the executor. The court said: [28]

> It is the settled law of England that a bequest of money to be used in the purchase of an annuity gives the legatee a right to the money and he can insist that the annuity shall not be bought.

As in the English cases, emphasis was laid on the fact that the annuity was not to be paid out of the estate but rather was to be purchased by the executor.

Following this trend the New York Court of Appeals in 1916 gave support to these earlier cases by declaring that the English rule governed when there was a direction to purchase and no gift over of any

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25 *In re* Cottrell, [1910] 1 Ch. 402; *In re* Brunning, [1909] 1 Ch. 276 (1908); *In re* Robbins, *supra* note 12.

26 Reid v. Brown, 54 Misc. 481, 106 N. Y. Supp. 27 (1907).

27 208 Mass. 260, 94 N. E. 476 (1911).

28 *Id.*, 94 N. E. at 476.

right under the annuity.[29] The court was presented with a strong argument that to give such a right of election was contrary to the intent of the testator. But in disposing of this argument the court stated: [30]

> The counsel for the appellant strenuously insists that the right of election claimed by the petitioner thwarts the clearly expressed intention of the testator. I think not. It must be assumed that the will of the testator providing for the annuity was drawn with regard to the law existing on the subject. The testator knew, it must be assumed, that the gift of the annuity might be regarded as a legacy of the definite sum set aside to purchase the annuity. If he had desired to defeat this power of election, he should have followed the suggestion contained in Reid v. Brown . . . and placed the $10,000 in trust for the benefit of the annuitant.

Thus the *Cole* case exemplified the holdings in these first American cases. Following what the courts deemed to be the settled English rule they steadfastly refused to deny legatees the right of election where there was no gift over after the lifetime of the annuitant and the annuity was to be purchased by an executor or trustee.

In 1931, a New York Surrogate's Court [31] refused to grant an election to decedent's husband where the will provided for an annuity to be paid out of her estate during the lifetime of the husband and after his death the principal to go to named nieces and nephews. The court distinguished the case from In re *Cole* in that here the income was to be paid out of the estate (rather than to purchase an annuity) and because there was a gift over to the nieces and nephews. And in In re *Mitchell's Estate,*[32] the court held that while the ruling of the *Oakley* case was correct, nevertheless it applied to that particular factual situation only, and that the basic rule regarding proposed elections had been laid down in *Reid v. Brown.*[33]

This pattern of cases in New York was followed to the extreme limit in In re *Bertuch's Estate* where the Appellate Division [34] reversed a Surrogate Court decision [35] which had given effect to the testator's mandatory order prohibiting an election to take the principal sum of the annuity given his wife under the will. Here the court directly and specifically overrode the testator's express intention to give effect to the doctrine of election. Perhaps as a result of this extreme position the New York legislature met the problem by passing a statute in 1936 [36] denying the right of the annuitant to elect to take the principal

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29 *In re* Cole's Estate, 219 N. Y. 435, 114 N. E. 785 (1916).

30 *Id.,* 114 N. E. at 786.

31 *In re* Oakley's Will, 142 Misc. 1, 254 N. Y. Supp. 306 (1931).

32 152 Misc. 228, 273 N. Y. Supp. 289 (1934).

33 See note 26 *supra.*

34 225 App. Div. 773, 232 N. Y. Supp. 36 (1928).

35 *In re* Bertuch's Will, 132 Misc. 731, 230 N. Y. Supp. 789 (1928).

36 N. Y. DECEDENT ESTATE LAW § 47(b) which provides in part: "If a person hereafter dying shall direct in his will the purchase of an annuity from

sum except to the extent that the will provided for such a right or to the extent it provided an assignable annuity be purchased. However, five years later the court in In re *Fischer's Estate* [37] construed this statute to be applicable only where the testator directed the annuity to be purchased from a *particular* insurance company. In that case the will simply provided for the purchase of an annuity "from some reputable life insurance company, bank or other organization authorized to issue same," and the court held that this indefiniteness carried the case out of the statute. However, in the same year the language of the statute was amended in such a way as to forestall such a construction.[38] Therefore the common law rule as laid down by the courts of New York was effectively changed by statute to give effect to the testator's intention.

Highlighting the litigation of this problem have been the so-called "charitable annuity company cases." The problem posed by these cases is this: the testator wishes to provide for a certain person during his or her lifetime, giving them an income from an annuity, and through the purchase of this annuity from a charitable organization to make a donation to that organization. The rates of these charitable annuities are set higher than the corresponding rates in commercial companies with the avowed purpose of having the unexpended portion of the policy remain with the charity as a gift. In the case of In re *Geis' Estate* [39] the testator had been engaged for many years in the service of a missionary society. He wished to provide for the future security of his wife and three children and still make a charitable gift over to the society in whose service he had spent many years. He therefore made a will directing that the estate, after the payment of his debts and certain small legacies, be divided into four parts and used for the purchase of annuities from this society. In denying the annuitants the right to elect to take the capital sum instead of the annuity payments the court said: [40]

> This annuitant is not now in position to demand the whole initial sum, because the testator did not intend this legatee should receive the whole; but did intend that the probable residue should be given over to the charitable or benevolent purpose to which he had devoted all his life's work.

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an insurance company, the person or persons to whom the income thereof shall be directed to be paid shall not have the right to elect to take the capital sum directed to be used for such purchase in lieu of such annuity except to the extent the will expressly provides for such right, or except to the extent that the will expressly provides that an assignable annuity be purchased. . . ."

37 261 App. Div. 252, 25 N. Y. S. (2d) 140 (1941).

38 See note 11 *supra*. In 1941, the statute was amended to delete the words: ". . . from an insurance company . . ."

39 167 Misc. 357, 3 N. Y. S. (2d) 770 (1938).

40 *Id.*, 3 N. Y. S. (2d) at 772.

When the problem arose in Iowa in 1947, the court in In re *Johnson's Estate* [41] held that the legatee had no right to take the principal sum when it was the testator's intention to ultimately benefit the charitable society issuing the annuity—the remainderman implicit in such a policy. In reviewing the cases upholding the English rule the court was unimpressed with the arguments advanced in its support and impliedly indicated that it would refuse to follow the English rule whether or not a charitable remainderman was involved.

Again that year an Illinois appellate court [42] denied the right of a legatee of a charitable annuity the right to elect the amount to be used to purchase the annuity. The Illinois court indicated that the testator, by her familiarity with the purposes and rate schedule of the quasi-religious society, knew and intended that the organization should be benefited by the unexpended portion of the annuity not enjoyed by the annuitant, and that since there was impliedly—if not expressly—a gift over to this society, it would be contrary to the testator's intention to permit an election.

Thus in all of these cases where the annuity was purchased from a charitable, as opposed to a commercial insurance company, the courts have been willing and anxious to protect and implement the intention of the testator. It would be anomalous to speak piously of the testator's intention in these cases and yet in other cases, where by the very use of the annuity the testator's intention to deny the beneficiary the principal sum is apparent, to completely ignore that intention. That this has been done, however, is evident.

Illustrative of the decisions hedging on the basic issue is the California case of In re *Benziger's Estate.*[43] Here, too, there was a charitable society as remainderman expressly so designated. The court refused to give one of the testator's two children the right to elect, basing its opinion on the fact that under the English rule the right of election did not arise whenever there was a gift over. The court specifically stated that it did not decide whether it would give effect to the testator's intention if there was not such a gift over. The manifest intent of the testator should be equally apparent in either case and to impliedly recognize such a distinction is judicial sophistry at its worst.

Other courts have, however, not been so reluctant to meet the problem squarely. In 1943 a New Jersey court [44] refused to adopt the rule so strenuously contended for in the New York and Massachusetts cases and denied the testator's wife an election. In this case there was a specific provision in the will denying the wife any right to elect,

41 *In re* Johnson's Estate, 238 Iowa 1221, 30 N. W. (2d) 164 (1947).

42 *In re* Herrick's Estate, 340 Ill. App. 548, 92 N. E. (2d) 332 (1950).

43 61 Cal. App. (2d) 628, 143 P. (2d) 717 (1943).

44 Berry v. President and Directors of Bank of Manhattan Co., 133 N. J. Eq. 164, 31 A. (2d) 203 (1943).

and the court gave effect to this intention of the testator to devise his property subject to certain conditions. The opinion emphasized the importance of following the testator's intention no matter how harsh or unfair it may seem, unless that intention provides for the doing of an illegal act or one which contravenes public policy.

The Colorado court in 1948 [45] reviewed the authorities on this particular problem in a case in which the testator's estate was put in trust until the beneficiary reached the age of fifty, at which time the trustees were to purchase an annuity for the benefit of the *cestui* with a right in the *cestui* to appoint any remaining payments at his death. While there was a gift over here to remaindermen—at least contingently—the Colorado court did not decide the case on that basis, but in a cogent and perceptive review of the authorities held that no right of election resided in the legatee—that to permit such a right would be contrary to the testator's express intention.

Two recent cases, however, involved the exact problem with which we are concerned, *i.* e., where there is no gift over to any remainderman, either express or implied, and the annuities are to be purchased by the executor. The New Hampshire court in *Bedell v. Colby et al.*[46] refused to permit the legatee under a will to take the principal sum that the testator had directed to be used to purchase an annuity. The court held that it was the testator's obvious purpose to protect his daughter from her own improvidence in money matters and for that very reason had provided in his will for the purchase of the annuity. To permit her now to disavow this protection and take the capital amount would be to ignore the testator's wishes in the disposition of his estate and the plans for his daughter's security.

In *Feiler et al. v. Klein et al.*,[47] the testatrix left land in trust for the benefit of her children. The income from the trust was to be distributed to the children, but the trustee was empowered to sell the property if he thought best and to apply the proceeds in purchasing annuities from named insurance companies. The children claimed that the provision was capricious and demanded a right to elect to take the parcels of land. Judge Morgan dismissed this contention saying: "No good reason is shown by the petition or evidence for failing or refusing to carry out the wishes of the testatrix in the manner provided for in her will." [48] The court indicated that the testatrix apparently did not wish the devisees to have the property all at once, but rather intended for them to be provided for over a period of years, and that for the

[45] Ketcham v. International Trust Co., 117 Colo. 559, 192 P. (2d) 426 (1948).

[46] 94 N. H. 384, 54 A. (2d) 161 (1947).

[47] 74 N. E. (2d) 384 (Ohio App. 1947), *aff'd sub nom.* Feiler et al. v. Feiler et al., 149 Ohio St. 17, 77 N. E. (2d) 237 (1948).

[48] *Id.*, 74 N. E. (2d) at 389.

court to disregard this intention would be to ignore the settled law of Ohio: that the testator's intention will be given effect unless the wishes are illegal or contrary to public policy.[49]

As may be seen from this examination of the cases, a definite swing away from the arbitrary English rule has been noticeable in recent years. The modern cases continue to place more and more importance on following out the testator's intention in this matter. It has been pointed out [50] that the English courts in giving this right of election were influenced by the rule that where a will directs the sale of land and payment of the proceeds to a legatee, the latter may elect to take the land instead. The basis for this rule is that it would be vain to insist on such a sale when the legatee could purchase the land and then receive the price back as a bequest. As was pointed out by the Court of Appeals in *Feiler et al. v. Klein et al.*: [51]

> It is not true that the legatee by the sale will be able to receive substantially the amount of the purchase price of the annuity.
>
> It is our information that the vast majority of annuities have no cash value whatever and no value can be realized from them other than the guaranteed monthly income once they are made effective. If the provisions of an annuity permit its sale, such a sale is extremely rare and it can be made, if at all, only at a heavy discount.

Hence the reasons for the English rule do not exist with regard to modern American annuities. As this has become apparent more and more states adopt what may be called the "modern American rule."

Conclusion

From the summary of the English cases it would seem that the doctrine was originally premised on a different type of annuity—one which was more or less freely assignable—a difference which the earlier American cases failed to detect. Thus the American courts in predicating their earlier decisions on a false view of the purpose and nature of annuities have permitted the express intention of the testator to be thwarted. The modern cases have noticed that these arguments are baseless and as a result there has been a gradual but definite trend away from permitting the beneficiary to dispense with the conditions the testator has imposed upon the acceptance of his legacy. As the New Jersey court in a recent case remarked: [52]

> It is equally difficult to perceive the considerations of policy which are said to prevent a testator from exercising his judgment and discre-

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[49] See Union Savings Bank & Trust Co. et al. v. Alter et al., 103 Ohio St. 188, 132 N. E. 834 (1921).

[50] See Note, 41 MICH. L. REV. 276 (1942), for an interesting analysis of the problem.

[51] *Supra* note 47, 74 N. E. (2d) at 388.

[52] Speth v. Speth et al., 8 N. J. Super. 587, 74 A. (2d) 344 (1950).