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Recent Decisions

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> tion by reasonably deferring the unqualified enjoyment of the principal of his devise or bequest without explaining to the beneficiary and to the public his reasons for doing so.

As has been shown, until recently the testator's intention has either been ignored as insignificant and unimportant, or explained away by facile statement that the testator must be presumed to have known the law and intended to give the beneficiaries the right of election. This idea of conclusive presumption of intent was carried so far in New York that, as was noted, the legislature was forced to change the rule adopted by the courts of that state.[53] It is significant that other states have not required such action. As the New Hampshire court said: [54]

> . . . there seems no need to invoke a legislative act here to accomplish the desired result.
>
> Our courts are not disposed to follow arbitrary rules, English or otherwise, at what appears to be the expense of justice.

Doubtless there may be cases where it will prove a hardship to insist that the beneficiary take the annuity instead of the principal sum, but it is not the province of the courts to say whether or not the testator's wishes were wise. That the courts will continue to enforce these annuity provisions according to the intent of the testator seems assured.

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RECENT DECISIONS

ADMINISTRATIVE LAW—RAILWAY LABOR ACT—JURISDICTION OF STATE COURTS TO ADJUDICATE DISPUTES ARISING UNDER ACT.—*Slocum v. Delaware, L. & W. R. R.*, ...U. S....., 70 S. Ct. 577, ...L. Ed..... (1950). The railroad had separate bargaining contracts with the Telegraphers union and the Clerks union. There arose between the two unions a jurisdictional dispute as to which contract controlled certain yard jobs of the railroad. Upon being confronted with these claims at the bargaining table, the railroad agreed with the contention that the jobs were embraced in the Clerks contract. The Telegraphers' chairman, Slocum, protested. He claimed back pay for certain workers, and urged re-assignment of the jobs to members of his union. At this juncture the procedure normally would have been to petition the Adjustment Board under Section 3 of the Railroad Labor Act, 44 STAT. 578 (1926), as amended, 48 STAT. 1189 (1934), 45 U. S. C. § 153 (1946), which provides:

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53 See notes 36 and 38 *supra*.
54 Bedell v. Colby et al., *supra* note 46, 54 A. (2d) at 163.

> The disputes . . . shall be handled in the usual manner [at the bargaining table] up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes *may* be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board . . . (Emphasis supplied.)

Instead of following this statutory procedure, the railroad filed a suit for a declaratory judgment in a New York state court. Both unions were named as defendants. The relief prayed for was an interpretation of both agreements, a declaration that the Clerks' agreement covered the jobs in question, and that the Telegraphers must refrain from making similar claims under its contract. The Telegraphers motion to dismiss on grounds that the Railway Labor Act left the state court without jurisdiction was denied. A trial was had. The court interpreted the contracts as the railroad had urged, and granted decrees in accordance with the railroad's request. The Appellate Division affirmed, 274 App. Div. 950, 83 N. Y. S. (2d) 513, (1948), which in turn was affirmed by the Court of Appeals of New York. 299 N. Y. 496, 87 N. E. (2d) 532 (1949). The Supreme Court of the United States in the instant case reversed the New York courts, holding that the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive.

In its decision the Court followed *Order of Ry. Conductors of America et al. v. Pitney* et al., 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318 (1946), and distinguished *Moore v. Illinois Central R. R.*, 312 U. S. 630, 61 S. Ct. 754, 85 L. Ed. 1089 (1941). It must be noted that these two cases are the basis of the opposite decisions of the New York courts with that of the instant case. To clearly understand the principal case, the necessity of interpreting the *Moore* and *Pitney* decisions is apparent.

The facts of the *Pitney* case, are remarkably similar to the case at hand. While proceedings for reorganization of a railroad under Section 77 of the Bankruptcy Act, 47 STAT. 1474 (1933), as amended, 11 U. S. C. § 205 (1946), were pending in the district court, the trustees agreed with the bargaining representative of yard conductors that five trains should be manned by yard rather than road conductors. Relying on earlier agreements, the bargaining representative of the road conductors petitioned the court to instruct the trustees not to displace the road conductors, and to enjoin such action as long as the earlier agreements were not altered in accordance with the Railway Labor Act. The court took jurisdiction, determined that the yard conductors were entitled to operate the trains in question, and dismissed the petition. The circuit court of appeals affirmed. 145 F. (2d) 351 (3d Cir. 1944). The Supreme Court of the United States modified, holding that insofar as the order constituted instructions to the trustees, it was within the supervisory power of the district court as a bankruptcy court, and that

part of the order was affirmed. But it was further stated that the district court should not have interpreted the agreements for the purposes of finally adjudicating the dispute between the unions and the railroad, but should stay dismissal of the cause so as to afford opportunity for application to the Adjustment Board for an interpretation of agreements pursuant to the Railway Labor Act. The court said, 326 U. S. at 567:

> The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. . . . the court should exercise equitable *discretion* to give that agency the first opportunity to pass on the issue. . . . The court of equity should, therefore, in the exercise of its discretion stay its hand (Emphasis supplied.)

The Court in the instant case in speaking of the *Pitney* case says, 70 S. Ct. at 579:

> . . . in Order of Conductors v. Pitney . . . we held . . . that the federal District Court in its equitable discretion should have refused "to adjudicate a jurisdictional dispute involving the railroad and two . . . bargaining agents . . ." Our ground for this holding was that the court "should not have interpreted the contracts . . ." but should have left this question for determination by the Adjustment Board, a congressionally designated agency peculiarly competent in this field. . . . This reasoning equally supports a denial of power in any court—state as well as federal—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act.

But the Court of Appeals of New York interpreted the *Pitney* case quite differently, 299 N. Y. 496, 87 N. E. (2d) 532 (1949), understanding that decision to give the courts discretionary jurisdiction. The New York court said, 87 N. E. (2d) at 536:

> . . . the Pitney case . . . recognized the concurrent jurisdiction of the board and the courts to interpret the contracts, but held that the equity court *in the exercise of its discretion* should have stayed its hand under the circumstances of that case . . .

In *Moore v. Illinois Central R. R., supra,* an employee sued the railroad alleging wrongful discharge. It was held by the Supreme Court that an administrative finding was not prerequisite to filing a suit in court for wrongful discharge. The Court stated in its opinion, 312 U. S. at 634:

> . . . we find nothing in the Act which purports to take away from the courts the jurisdiction to determine a controversy . . . or to make an administrative finding a prerequisite to filing a suit in court. . . . It is to be noted that . . . § 153 (i), as amended in 1934, provides no more than that disputes "may be referred . . . to the . . . Board. . . ." It is significant that . . . the 1926 Railway Labor Act . . . had, before the 1934 amendment, provided that upon failure . . . to reach an adjustment a "dispute shall be referred to the . . . Board . . . ." This difference in language, substituting "may" for "shall", . . . was . . . a clarification of the law's original purpose. . . . neither . . . Act . . . indicates that the machinery provided for settling disputes was

> based on a philosophy of legal compulsion. On the contrary, the legislative history of the . . . Act shows a consistent purpose . . . to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature.

The *Moore* case was distinguished in the instant case. The Court proceeded on the premise, 70 S. Ct. at 580, that Moore:

> . . . chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee. . . . A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees.

However, the New York Court of Appeals construed the *Moore* case to hold that the jurisdiction of the Board is *not* exclusive.

Another case, *Elgin, J. & E. Ry. v. Burley et al.*, 325 U. S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886 (1945), held that courts were not deprived of their jurisdiction in suits where employees sue the carrier, although the employment relationship still existed.

Still other courts have interpreted the *Moore* case. The United States court of appeals in *Washington Terminal Co. v. Boswell*, 124 F. (2d) 235 (D. C. Cir. 1941), *aff'd per curiam*, 319 U. S. 732, 63 S. Ct. 1430, 87 L. Ed. 1694 (1943), said:

> . . . the carrier, under the decision in Moore v. Illinois Central R. R., supra, can bring its suit on the contract, independently of the statute, prior to the time when the dispute is submitted to the Board.

The decision in the instant case introduces three problems: (1) the taking away of what has always been the prerogative of the courts, namely the interpreting of contracts as to matters of law; (2) the question of whether a ruling of the board is subject to judicial review; (3) a disregard of the rules of statutory interpretations. These three points are the basis for the vigorous dissenting opinion by Mr. Justice Reed.

It is not given to argument that the power to interpret contractual relationships has always rested with the courts. The interpretation of a writing is for a court. *Hamilton v. Insurance Company*, 136 U. S. 242, 10 S. Ct. 945, 34 L. Ed. 419. RESTATEMENT, CONTRACTS § 8 (1932).

As to the court's power to review administrative findings, Mr. Justice Reed presses hard to point out that, although the majority expressly states that its decision does not withhold the right to judicial review, nevertheless its practical effect is to withhold it. He states that it is highly questionable under the provisions of the act whether any appeal can be had from Board action or inaction.

The question of statutory interpretation is brought to bear on the case by the dissent. This question is not even broached by the ma-

jority in the instant case. It is carefully avoided. Ignored by the Court is the legislative history of the Act—changing the 1926 *obligatory* "shall be referred" to the 1934 *permissive* "may be referred." In by-passing the historical aspect of the act, the Court seems to have enabled itself to disregard a basic rule of statutory interpretation—namely, that words be given their common meaning unless defined as having a different meaning. In the *Moore* case the Court used this change of words as its most forceful argument. That opinion would have been substantially weak if not illogical without it. On reason, nothing in the act stating the contrary, the construction of the *Moore* case, and the dissent in the instant case is the correct one.

It appears that the principal case is a reversal of the *Pitney* and *Moore* cases, and a misinterpretation of the letter and spirit of Section 3 of the Railway Labor Act.

Jack Fena

CHARITIES—IMMUNITY OF CHARITABLE CORPORATIONS FROM LIABILITY FOR TORTS OF THEIR AGENTS.—*Moore v. Moyle et al.*, ...Ill. ...., 92 N. E. (2d) 81 (1950). Action by Agnes Moore against J. Moyle, B. Bramlage, and Bradley Polytechnic Institute, a charitable corporation, to recover damages for personal injuries. The lower court dismissed the action against Bradley University and the plaintiff appeals.

In 1940, the plaintiff was a student at Bradley and the individual defendants were instructors in its physical education department. Bradley had purchased a trapeze to be used in the approaching college circus. The plaintiff was practicing on the trapeze, preparing for the circus, when it collapsed, allowing her to fall some twenty feet to a hardwood floor where she was injured.

Her complaint rested upon *res ipsa loquitur*, negligence, and contract. She alleged that Bradley was fully insured against the risk involved here and that the judgment, if obtained, would not impair or diminish any funds held by Bradley in trust for charitable purposes. A motion to dismiss was filed by Bradley, averring it was a charitable corporation, and therefore not liable for the torts of its agents. The trial court entered an order striking all counts as to Bradley, and all except negligence as to the individual defendants.

The Supreme Court of Illinois held that the actual trust funds of charitable corporations are immune from liability for the torts of the corporation's employees and agents. Beyond this, they said, the rule of *respondeat superior* is in effect. In effect, this means that a charitable corporation is liable in an action if the judgment

can be collected from non-trust funds. If the corporation has nothing but trust funds the action will not lie, but if the corporation has non-trust funds or is protected by insurance then the action will lie.

The main issues in the case are: whether the charitable corporation's immunity from liability for the torts of its agents is absolute; and if not, does an action lie against the charitable corporation if it has non-trust funds or is protected by insurance.

The authorities on the subject of liability of charitable corporations for the torts of their agents are extremely divergent. *Tucker v. Mobile Infirmary Ass'n.,* 191 Ala. 572, 68 So. 4 (1915); *Fordyce and McKee v. Woman's Christian Nat. Library Ass'n.,* 79 Ark. 550, 96 S. W. 155 (1906); *Hordern v. Salvation Army,* 199 N. Y. 233, 92 N. E. 626 (1910). However, as a general rule, it can be stated that these corporations are exempt from liability for tort where the injured person is a recipient of the bounty of the charity, and in some instances where the injured is not the recipient of the charity. *Parks v. Northwestern Univ.,* 218 Ill. 381, 75 N. E. 991 (1905); *Eighmy v. Union Pac. Ry.,* 93 Iowa 538, 61 N. W. 1056 (1895); *Gable et al. v. Sisters of St. Francis,* 227 Pa. 254, 75 Atl. 1087 (1910).

There are many theories for the basis of the immunity. Among them are: implied waiver or assent to immunity by the acceptance of benefits; protection of trust-funds; public policy; performance of public function; and prevention of the frustration of the donor's intention of the charity. The Illinois Court has always followed the theory of protecting the trust funds from being diverted for a purpose not contemplated by the donor. *Hogan v. Chicago Lying-In-Hospital,* 335 Ill. 42, 166 N. E. 461 (1929); *Lenahen v. Ancilla Domini Sisters,* 331 Ill. App. 27, 72 N. E. (2d) 445 (1947).

Some jurisdictions hold absolutely that no liability attaches in any event against a charitable corporation for the torts of its agents. They base their holding on public policy. *Adams v. University Hospital,* 122 Mo. App. 675, 99 S. W. 453 (1907). Other jurisdictions recognize no immunity from liability in any case. *Geiger v. Simpson M. E. Church,* 174 Minn. 389, 219 N. W. 463 (1928); *Hewett v. Woman's Hospital Aid Ass'n.,* 73 N. H. 556, 64 Atl. 190 (1906); *Sheehan v. North Country Comm. Hospital et al.,* 273 N. Y. 163, 7 N. E. (2d) 28 (1937). The majority of jurisdictions, however, while reasoning along the lines of public policy, limit the immunity from liability to cases where there has been no negligence on the part of the corporation in the selecting and keeping of the agents or employees who caused the damage. *Thornton v. Franklin Square House,* 200 Mass. 465, 86 N. E. 909 (1909); *De Groot v. Edison*

Institute, 306 Mich. 339, 10 N. W. (2d) 907 (1943); *Gitzhoffen v. Sisters of Holy Cross Hospital Ass'n.,* 32 Utah 46, 88 Pac. 691 (1907).

Where the court in the instant case seems to condition the liability of the corporation on the presence of insurance to cover the particular injury its reasoning appears questionable. The majority tried to distinguish the point by reasoning that the presence of insurance had no bearing on the liability, that it merely affects the collectibility of the judgment. It cites *Parks v. Northwestern University, supra,* as holding that charitable corporations are not absolutely immune from liability for the torts of its agents. Immunity is allowed there only to protect trust funds. Since the immunity is allowed only to protect the trust funds and the trust funds are protected by insurance, then there is no need for the immunity. The argument appears to be specious since it goes right back to saying that the presence or absence of insurance is the determining factor of whether the action will lie.

Had the plaintiff failed to allege the presence of the insurance to protect the charitable trust funds, the appeal would probably have been affirmed—for a dismissal. The only conclusion that can be drawn is that insurance is the determining factor of the case.

An insurance company is nothing more than a surety for the insured. The insurer should be held liable only for what the insured is protected against and for which it can be held legally responsible. Illinois has always held that when the principal is discharged the surety is discharged. *Bank of America et al. v. Jorjorian,* 303 Ill. App. 184, 24 N. E. (2d) 896 (1940). In the case under discussion, the insured or the principal is not liable but the surety or the insurer is liable. The holding seems contrary to the Illinois law of suretyship.

If insurance had nothing to do with liability and is related to collectibility only, then insurance should not have been discussed in the case. The appeal was only to determine if there was a cause of action against the charitable corporation. Insurance being concerned only with collectibility of a judgment, it could be relevant only if judgment was attained. Collectibility of a judgment has never had any bearing on the legal rights of the parties.

The majority opinion, in the case under discussion, claimed to be following the *Parks* case as far as it went, and to have extended it to fit this case. The dissent believed the majority opinion to be contrary to that decision. The vast majority of text writers maintain that the *Parks* case grants absolute immunity. That case states: "The doctrine of *respondeat superior* does not extend to charitable institutions . . ." If *respondeat superior* does not extend to char-

itable corporations it would be impossible for them to be held liable for the acts of their employees or agents. Therefore, the *Parks* case holds much more than that the immunity exists only to protect the trust funds, as the majority opinion contended it held.

It seems impossible to arrive at the conclusion of the majority without over-ruling the *Parks* case. It also seems impossible to state there is a cause of action without predicating it upon the presence of liability insurance. But this court, backed by a case which held absolute immunity and the court's own statement that insurance has no bearing on legal liability, held this cause of action good against a charitable corporation if its funds were protected by liability insurance. It is submitted that logic was neglected in the reasoning of this decision.

R. Emmett Fitzgerald

CONSTITUTIONAL LAW—ADEQUATE REPRESENTATION BY COUNSEL IN A CRIMINAL PROSECUTION.—*Schmittler v. State,* ....Ind....., 93 N. E. (2d) 184 (1950). An affidavit was filed in the Posey Circuit Court on March 30, 1949 charging the appellant with second degree burglary and grand larceny, committed on or about March 28, 1949. The accused, a boy of twenty-one, had never before been in court, and until the time of entering his plea had no opportunity to discuss with any person, his predicament and position, with reference to the criminal charges against him. His mother had visited him on March 31, 1949, but did not employ counsel at the time, thinking that the case was to be dropped, as she had reimbursed the owner of the property for his alleged loss. On April 1, 1949, appellant entered a plea of guilty, after talking to an attorney in the courtroom for *fifteen minutes.* This attorney was paid the sum of five dollars for his services, for which he made a brief statement of *216 words,* asking the judge for clemency. When the plea of guilty was entered, the grand larceny count was dismissed, and the appellant was sentenced on the burglary charge to the Indiana Reformatory.

This is an appeal from a judgment of the circuit court, denying appellant a petition for a writ of error coram nobis against the State of Indiana, appellee. The appellant has assigned as error that at the time of entering his plea of guilty he was inadequately represented by counsel and was not informed of his constitutional rights by his attorney.

The Supreme Court affirmed the judgment of the lower court, holding that the evidence sustained the finding that petitioner was

represented by competent counsel of his own choosing, and made his guilty plea voluntarily and by such plea waived any deprivation of rights.

It is to be presumed, stated the majority, that this lawyer did his duty and properly represented his client, unless there be clear and convincing proof to the contrary. *Fambles v. State,* 97 Ga. 625, 25 S. E. 365 (1895). Where a defendant is represented by competent counsel, a failure to assert or claim constitutional rights is treated as a waiver. *Irvin v. State,* 220 Ind. 228, 41 N. E. (2d) 809 (1942).

The dissenting opinion vigorously attacked the conclusion reached by the majority, premising its arguments on two basic points: (1) that counsel was inadequate, and did not have sufficient time to prepare a defense; (2) that appellant's constitutional rights have been denied.

Concerning appellant's constitutional right to counsel, IND. CONST. ART. 1, § 13 provides: "In all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel . . ." This same right is guaranteed by the 6th Amendment of the Constitution of the United States. The spirit of these constitutional provisions, requires that an accused must have something more than a perfunctory representation. That this spirit is followed by the courts is illustrated by the pertinent statement made by the court in *Castro v. State,* 196 Ind. 385, 147 N. E. 321, 323 (1925):

> And mere perfunctory action by an attorney assuming to represent one accused of crime which falls short of presenting the evidence favorable to him and invoking the rules of law intended to prevent conviction for an offense of which the accused is innocent, or the imposition of a penalty more severe than is deserved, should not be tolerated.

The accused must be advised by competent counsel as to his legal and constitutional rights before he is in a position to freely and understandingly enter his plea. *Rhodes v. State,* 199 Ind. 183, 156 N. E. 389 (1927).

It must be remembered that the attorney's obligation to his client is the same, whether he is paid by the county or the accused, whether he is paid much or little, or nothing at all. The accused has the right to expect that his counsel would make a sufficient investigation of the facts to understandingly advise the appellant on entering a plea of guilty. Canon 5, CANONS OF ETHICS OF THE AMERICAN BAR ASSOCIATION, states:

> Having undertaken such defense, the lawyer is bound by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

In the instant case, the appellant's attorney merely made a cursory plea for clemency. He asked for no continuance for an inves-

tigation of the facts. His representation was "perfunctory, passive, and casual." *Abraham et al. v. State,* ....Ind....., 91 N. E. (2d) 358 (1950); *Bradley v. State,* 227 Ind. ....., 84 N. E. (2d) 580 (1949); *Wilson v. State,* 222 Ind. 63, 51 N. E. (2d) 848 (1943); *Rhodes v. State, supra; Sanchez v. State,* 199 Ind. 235, 157 N. E. 1 (1927); *Castro v. State, supra.*

In the case of *Bradley v. State, supra,* 84 N. E. (2d) at 582, this court with its present personnel unanimously held:

> The fundamental right of a defendant in a criminal case to have competent counsel assist him in his defense carries with it as a necessary corollary, the right that such counsel shall have *adequate time* in which to prepare the defense. (Emphasis supplied.)

This principle of law was declared by the court when the attorney was given sixty-five and one-half hours to prepare the defense, and was deemed a denial of the constitutional right to counsel, and a denial of due process of law.

Again this proposition was reiterated by the court in *Hoy v. State,* 225 Ind. 428, 75 N. E. (2d) 915 (1947), where the trial court forced appellant to trial on the same day counsel was appointed. It was there said that adequate time and preparation was "as essential as appointment of counsel." Likewise it was held to be a reversible error to deny a motion for a continuance and force the defendant to trial on a charge of rape, when counsel would only have approximately one-half day to prepare for trial. *Rice v. State,* 220 Ind. 523, 44 N. E. (2d) 829 (1942). In *Sanchez v. State, supra,* the court emphasized that this right is not defeated merely because an accused himself employs counsel.

The right to counsel in most states is applied broadly to all criminal prosecutions, in others it is limited to the more serious crimes, and in a very limited number, to capital cases. This principle of adequate representation finds support in the reasoning of an overwhelming array of state decisions whether counsel had been retained by the accused or appointed by the court. In *Shaffer v. Territory,* 14 Ariz. 329, 127 Pac. 746 (1912), the court said that the right to have counsel prepare his case for trial is a substantial one, which cannot be properly infringed by setting the case for trial three days after accused's arraignment and the employment of counsel. A denial of postponement for twenty hours to subpoena witnesses was held to be an abuse of discretion, though no witnesses were absent. *Sheppard v. State,* 165 Ga. 460, 141 S. E. 196 (1928). An accused placed on trial with only a few minutes to confer with counsel, did not receive a fair and impartial trial. *People v. Hambleton,* 399 Ill. 388, 78 N. E. (2d) 293 (1948). The right of a prisoner to be heard by himself and counsel includes "a co-ordinate right to sufficient opportunity and time to prepare defense." *Carter v. Com-*

monwealth, 258 Ky. 807, 81 S. W. (2d) 883 (1935). Every man is presumed innocent, and when accused, entitled to reasonable opportunity to prepare defense. *Commonwealth v. O'Keefe,* 298 Ga. 169, 148 Atl. 73 (1929). An accused is entitled to consultation with his attorney, and reasonable time for due preparation of case for trial, including reasonable opportunity to interview witnesses. *Tucker v. Commonwealth,* 159 Va. 1038, 167 S. E. 253 (1933).

Thus the cases are in accord that the counsel of the accused must be given a *reasonable time* in which to prepare the defense. *Mitchell et al. v. Commonwealth,* 225 Ky. 83, 7 S. W. (2d) 823 (1928); *State v. Collins,* 104 La. 629, 29 So. 180 (1900); *Dolan v. State,* 148 Neb. 317, 27 N. W. (2d) 264 (1947); *State v. Whitfield,* 206 N. C. 696, 175 S. E. 93 (1934); *Waters v. State,* ....*Okla. Cr.* App....., 197 P. (2d) 299 (1948).

The decisions of the Supreme Court are not entirely consonant with this principle. In *Canizio v. People of the State of New York,* 327 U. S. 82, 66 S. Ct. 452, 90 L. Ed. 545 (1946), the petitioner did not have counsel during the trial, but he was represented by an attorney who appeared on his behalf in an effort to secure a low sentence. The court thought that he "had counsel in ample time to take advantage of every defense which would have been available to him originally." See also: *Gibbs v. Burke,* 337 U. S. 773, 69 S. Ct. 1247, 93 L. Ed. 1686 (1949); *Avery v. Alabama,* 308 U. S. 444, 60 S. Ct. 321, 85 L. Ed. 377 (1940). The appointment of counsel is not a fundamental right, essential to a fair trial in non-capital cases. *Betts v. Brady,* 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942). This Court has in non-capital cases recognized the constitutional rights of the accused to the assistance of counsel for his defense where there are *special circumstances* showing that, otherwise, the defendant would not enjoy that fair notice and adequate hearing which constitute the foundation of due process of law in the criminal trial. *Bute v. Illinois,* 333 U. S. 640, 677, 68 S. Ct. 763, 92 L. Ed. 986 (1948). Although the decisions of the Supreme Court do not establish the inherent right to have counsel appointed in all criminal prosecutions, the cases lend convincing support as to the fundamental nature of that right. In the capital punishment case of *Powell v. Alabama,* 287 U. S. 45, 58, 53 S. Ct. 55, 77 L. Ed. 158 (1932), it was held that placing a defendant on trial with no counsel until the morning of the trial date was a denial of effective aid by counsel, and the violation of due process under the Fourteenth Amendment. Mr. Justice Sutherland, speaking for the majority, said:

> It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court

> could say what a prompt and thorough going investigation might disclose as to the facts.

If adequate time for consultation and preparation is essential before trial, it necessarily follows that adequate time must be afforded and used if counsel is to be in any position to advise whether to stand trial or enter a plea of guilty. The record of cases indicate that the appearance of counsel in the present case was rather pro forma than zealous and active. The defendant was not accorded the right of counsel in any substantial sense. As the court so logically said in *Commonwealth v. O'Keefe, supra,* 148 Atl. at 74:

> It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case.

Certainly the prompt disposition of criminal cases is to be commended and encouraged. However, in achieving that end the courts must not strip the defendant of his right to have sufficient time to converse with his attorney and to prepare for his defense. To do that is not to proceed promptly in the calm spirit of regulated justice, but rather to advance with the haste of a mob.

James J. Haranzo

CONSTITUTIONAL LAW—EXERCISE OF EQUITABLE POWERS OF FEDERAL COURTS IN POLITICAL QUESTIONS—DISPROPORTIONATE VOTING SYSTEM OF STATE.—*South et al. v. Peters,* 339 U. S. 276, 70 S. Ct. 641 (1950). The complainant sought to enjoin the forthcoming Congressional election on the grounds that he and fellow citizens of Fulton County, Georgia, did not have an equal voice in the election of their representatives for federal offices under the county unit voting system employed in Georgia. This system gave each county a fixed number of electoral votes varying between two and six according to the relative population of the county. The candidate who received a plurality of votes in a particular county received the entire block of electoral votes. The inconsistency of the system was that the electoral votes allotted to each county were grossly disproportionate with the relative populations; particularly the heavily populated counties had far less than their share. A vote in Fulton County on the average had only one eleventh of the weight of a vote elsewhere in the state; it had only 1/120th of the weight of a vote in the most sparsely populated county. The Supreme Court refused to exercise its equitable powers on the grounds that it was a political question cognizable only by the political branches of the government.

The Court in rendering this decision supported its position with two important cases on the question of whether or not every voter is entitled to have his vote weigh equally with that of every other voter. *Colegrove et al. v. Green et al.,* 328 U. S. 549, 66 S. Ct. 1198, 90 L. Ed. 1432 (1946), and *Wood v. Broom,* 287 U. S. 1, 53 S. Ct. 1, 77 L. Ed. 131 (1932). The latter case involved facts similar to the instant case, *i.e.,* the distribution of the electoral vote was so allocated that persons in highly populated districts did not have an equal voice in the election of their representatives. The Court dubbed the issue a political question and dismissed the case for lack of jurisdiction. The Court there was divided, the dissenting justices being the same as those in the instant case. In the *Colegrove* case, *supra,* the Court was presented with an identical question which it resolved in a like manner, by an equally divided Court, only six justices taking part. The district court had reluctantly followed *Wood v. Broom, supra,* by which it felt itself bound, and dismissed the case. However, it asked for reversal, 64 F. Supp. 632, 634, in stating:

> Our study of the opinion of the Supreme Court in the case of Wood v. Broom . . . has resulted in our reaching a conclusion contrary to that which we would have reached but for that decision. We are an inferior court. We are bound by the decision of the Supreme Court, even though we do not agree with the decision or the reasons which support it. We have been unable to distinguish this case and as members of an inferior court, we must follow it. Only the Supreme Court can overrule that decision.

The general rule on the lack of jurisdiction in political matters was aptly expressed by the court in *Fletcher v. Tuttle,* 151 Ill. 41, 37 N. E. 683, 688 (1894), where the court said:

> The extraordinary jurisdiction of courts of chancery cannot therefore be invoked to protect the right of a citizen to vote or be voted for at an election, . . . nor can it be invoked for the purpose of restraining the holding of an election, or of direction or controlling the mode in which, or of determining the rules of law in pursuance of which, an election shall be held. These matters involve in themselves no property rights, but pertain solely to the political administration of government.

In accord with this theory several courts have handed down like decisions: *Blackman et al v. Stone,* 300 U. S. 641, 57 S. Ct. 514, 81 L. Ed. 856 (1936); *Sevilla v. Elizalde,* 112 F. (2d) 29 (D. C. Cir. 1940); *Ex parte State ex rel. Tucker,* 236 Ala. 284, 181 So. 761 (1938); *Patterson et al. v. People ex rel. Parr et al.,* 23 Colo. App. 479, 130 Pac. 618 (1913); *Printup et al. v. Adkins,* 150 Ga. 347, 103 S. E. 843 (1920); *State ex rel. Gongwer v. Graves,* 90 Ohio St. 311, 107 N. E. 1018 (1914); *Wasson v. Woods,* 265 Pa. 442, 109 Atl. 214 (1919); *State ex rel. Barber v. Circuit Court of Marathon County et al.,* 178 Wis. 468, 190 N. W. 563 (1922). All of these hold that the right to vote and to have one's vote carry

weight equal to all other votes is not a right that the judiciary may protect, but is one that must be protected by the political branches of the government.

Although no federal courts have been able to find sufficient basis under the equal protection clause of the Constitution to order that each man should have an equal voice in the election of government officials, nevertheless the dissenting opinions and the narrow majority that has decided the cases indicates a definite inclination toward a liberalization of the justiciability of this type of political question. The issue upon which this trend turns is the difference of opinion of the quality of the right to vote.

In *Lansdon v. State Board of Canvassers,* 18 Idaho 596, 111 Pac. 133, 135 (1910), the court said:

> Since the right to vote and hold office is not among the inalienable rights of which the American people are so jealous, the regulation of this branch of the rights and privileges of the citizen has been delegated to the political department of the state in every state of the Union.

The Court seemed to be of the opinion that only the so-called inalienable rights should be protected by the courts; yet the courts will protect many rights given by the Constitution which are not inalienable and have never been claimed to be such. A Kentucky court found itself faced with this question and voiced its opinion in *Ragland v. Anderson,* 125 Ky. 141, 100 S. W. 865, 869 (1907), that:

> Equality of representation is a vital principle of democracy. In proportion as this is denied or withheld, the government becomes oligarchical or monarchical. Without equality Republican institutions are impossible. Inequality of representation is a tyranny to which no people worthy of freedom will tamely submit. . . . It was this kind of oppression which inspired that great struggle for freedom which began on Lexington Green in 1775, and ended at Yorktown in 1781. Equality of representation is the basis of patriotism. No citizen will, or ought to, love the state which oppresses him; and that citizen is arbitrarily oppressed who is denied equality of representation with every other citizen of the commonwealth.

Our political system of government is founded on the principle of limitation effected by the separation of the three branches of the government, the legislative, the executive and the judicial. To safeguard these powers the courts have taken great caution not to invade the domain of one or the other of the two branches of government. At times they have found themselves hard put to draw the dividing line between judicial rights and political privileges.

Mr. Justice Holmes gave a forcible expression of his opinion of the problem in *Nixon v. Herndon et al.,* 273 U. S. 536, 540, 47 S. Ct. 446, 71 L. Ed. 759 (1927), where he said:

> The objection that the subject-matter of the suit is political is little more than a play upon words. Of course the petition concerns political action but it alleges and seeks to recover for private damage.

The trend of the decisions shows a struggle to overcome the barricade between the departments of government in order to protect the citizens' right to vote and to have their votes *counted* without discount or dilution. Mr. Justice Douglas in his dissent in the instant case aptly describes the county unit system of voting as the "last loophole" in the Court's decisions that there must be no discrimination because of race in primary or general elections.

The right to vote is not an absolute right, for it is not accorded to every individual. Nevertheless when that right is given it must be given equally to all to insure to each citizen an equal protection of the law, that law which gives him the right to vote. Who would contend that the petitioners in the instant case have equal representation in their government when it is conceded that citizens of one county carry one hundred and twenty times the voting power per person as those in the petitioners' county, and that on the average the petitioners' votes are worth only one eleventh as much as those of the majority of citizens outside of their county. If this is equality what would be disproportion?

Bernard James McGraw

CONSTITUTIONAL LAW—HABEAS CORPUS IN EXTRADITION PROCEEDINGS—SCOPE OF INQUIRY.—*Johnson v. Matthews,* 182 F. (2d) 677 (D. C. Cir. 1950). Lewis Johnson, a fugitive from justice of the State of Georgia, was apprehended in the District of Columbia and ordered delivered to an agent of the executive authority of Georgia. He petitioned for a writ of habeas corpus in the District Court for the District of Columbia and appealed from a judgment dismissing the writ. Petitioner alleged that he had been the victim of cruel and inhuman treatment while incarcerated in Georgia, that he would be unable to secure a fair trial and that his life would be placed in danger if returned. In affirming the judgment of the lower court, the circuit court held that it would not, on habeas corpus hearings to invalidate extradition warrants, hear and pass on evidence concerning the constitutional validity of phases of the penal action in a demanding state.

The court ruled that habeas corpus was the proper process for testing the validity of arrest and detention for extradition purposes, but a petition for a writ tested only the detention in the asylum state and did not test the constitutional validity of original or prospective incarceration in the demanding state.

The question presented to the court concerned the exact scope of the inquiry in habeas corpus proceedings to invalidate extradition warrants: should the hearing be limited to the procedural provisions of the extradition clause of the Federal Constitution, U. S. CONST. ART. IV, § 2, and the Congressional act which gave it effect, 18 U. S. C. § 3182 (1946), or should the writ be referred more directly to the preservation of human rights?

In dismissing the writ the court chose to stay within normal confines established by the decided cases. Traditionally, habeas corpus to invalidate an extradition warrant tests: (1) correctness of the requisition papers, (2) identity of the petitioner, (3) whether petitioner is a fugitive from justice of the demanding state, and (4) whether petitioner was in the demanding state at the time the alleged crime occurred. See *State ex rel. Kollman v. Johnson,* 184 Minn. 309, 238 N. W. 490 (1931); *Ex parte Birch,* .... Okl. ...., 209 P. (2d) 510 (1949); *State ex rel. Lea et al. v. Brown et al.,* 166 Tenn. 669, 64 S. W. (2d) 841 (1933); *People ex rel. Hollander v. Britt,* 195 Misc. 722, 92 N. Y. S. (2d) 662 (1949); NOTES, 47 COL. L. R. 470 (1947), 17 TEMP. L. Q. 469 (1943).

In the interests of interstate harmony, the Supreme Court has been reluctant to pass on evidence of deprivation of constitutional rights in demanding states when presented with a petition for habeas corpus. There has been a tendency to regard extradition as almost automatic when the basic procedural requirements have been met by the demanding state. In *Drew v. Thaw,* 235 U. S. 432, 440, 35 S. Ct. 137, 59 L. Ed. 302 (1914), Mr. Justice Holmes stated:

> When, as here, the identity of the person, the fact that he is a fugitive from justice, the demand in due form, the indictment by a grand jury for what it and the governor of New York allege to be a crime in that state, and the reasonable possibility that it may be such, all appear, the constitutionally required surrender is not to be interfered with by the summary process of habeas corpus upon speculations as to what ought to be the result of a trial in the place where the Constitution provides for its taking place.

Evidence tending to show that a petitioner suffered deprivation of constitutional rights in the demanding state has been held inadmissible in *Pettibone v. Nichols,* 203 U. S. 192, 27 S. Ct. 111, 51 L. Ed. 148 (1906); *Person v. Morrow,* 108 F. (2d) 838 (10th Cir. 1940); *Cappola v. Platt,* 123 Conn. 38, 192 Atl. 156 (1937); *Huff v. Ayers,* 6 N. J. Super. 380, 71 A. (2d) 392 (1950); *Ex parte Colier,* 140 N. J. Eq. 469, 55 A. (2d) 29 (1947).

In *Pelley v. Colpoys,* 122 F. (2d) 12 (D. C. Cir. 1941), the court refused to hear evidence of personal animosity existing between the petitioner and the prosecuting attorney. Petitioner offered to prove that the animosity was the basis of his conviction and that the prosecuting attorney was now the judge of the court having jurisdiction

over him if the extradition were successful. In *Hale v. Crawford,* 65 F. (2d) 739 (1st Cir. 1933), the petitioner sought to invalidate the extradition warrant by habeas corpus and alleged that Negroes had been systematically excluded from the grand jury returning the indictment. The court held that testimony concerning such exclusion was inadmissible and stated that it should properly be heard in a trial court of first instance.

The petitioner in the instant case specifically alleged cruel and inhuman treatment at the hands of penal authorities in the demanding state as grounds for release from custody. Michigan and New Jersey have passed on this phase of the question and have held that such allegations, plus an expressed fear of mob violence, did not constitute grounds for issuance of the writ since petitioner failed to sustain his admittedly heavy burden of proof. In *Ex parte Ray,* 215 Mich. 156, 183 N. W. 774 (1921) the court said it was not sufficient for petitioner to show statistics concerning lynchings in Georgia and refused to issue the writ because petitioner could not prove bad faith on the part of Georgia officials as to his particular case. In passing on the evidence, the court demonstrated that it might leave the traditional limits of inquiry in such cases and release the prisoner if he substantiated his charges. In *Ex parte Paramore et al.,* 95 N. J. Eq. 386, 123 Atl. 246, 247 (1924), the court refused the writ where petitioner based his application on fear of mob violence, and said:

> . . . he fears that if he is returned to Georgia he will be lynched; this fear being based upon alleged threats and demonstrations made against him by some evil disposed people of the community in which he formerly lived, and upon mob violence suffered in the past by persons of the colored race in the state of Georgia. That this plea does not constitute a legal ground for nullifying the Governor's writ of extradition is too plain for discussion. To heed the appeal would be to give the prisoner his absolute freedom—an impossible alternative to a dismissal of the writ.

Counsel for the petitioner in the instant case cited *Johnson v. Dye,* 175 F. (2d) 250 (3rd Cir. 1949) where it was held that petitioner for writ of habeas corpus to defeat extradition should be released from custody on the grounds that he had proved cruel and barbaric treatment at the hands of jailers in the demanding state. This decision was later reversed by the Supreme Court, 338 U. S. 864, 70 S. Ct. 146, ...L. Ed..... (1949), and the court rightly refused to follow it. However, the dissenting judge pointed out that the case was reversed without opinion, upon a single reference to *Ex parte Hawk,* 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572 (1944). Since *Ex parte Hawk* did not refer to the question of remedies in a foreign jurisdiction but stated merely that a petitioner should exhaust his remedies in a state court before applying to a federal court, the dissenting judge interpreted the reversal of *Johnson v. Dye, supra,* as being no reversal of that portion of the opinion which would make it possible to

test the constitutional validity of the acts of a demanding state in its former or contemplated handling of the petitioner. A review of the cases cited in *Johnson v. Dye, supra,* is helpful in tracing the historical origin of the little-used rule that habeas corpus in extradition proceedings may test the legality of actions of penal officers in demanding states.

Ironically, authority for the rule seems to have been largely manufactured from the wording of cases adhering strictly to the older rule that the scope of habeas corpus in extradition proceedings should be limited to the determination of whether a crime had been committed, whether petitioner was the person so charged, and whether petitioner was a fugitive from justice of the demanding state. In *Commonwealth ex rel. Flower v. Superintendent,* 220 Pa. 401, 69 Atl. 916, 919 (1908), the general tenor is that evidence concerning denial of constitutional rights is inadmissable on habeas corpus hearing to invalidate an extradition warrant, the court stating:

> He does not claim that there is any prejudice existing against him in that state, or that he cannot have a fair and impartial trial in that jurisdiction for the crime charged there against him.

This language has been construed to mean that if petitioner could allege and prove that prejudice against him existed in the demanding state, he should be released from custody.

Further, in *Marbles v. Creecy et al.,* 215 U. S. 63, 69, 30 S. Ct. 32, 54 L. Ed. 92 (1909), the petitioner, a Negro, alleged that there was danger of lynching if extradition should be ordered, but failed to prove his allegations. In emphatically denying the writ the court stated:

> It is clear that the executive authority of a state in which an alleged fugitive may be found, and for whose arrest a demand is made in conformity with the Constitution and laws of the United States, need not be controlled in the discharge of his duty by considerations of race or color, nor by a mere suggestion—certainly not one unsupported by proof, as was the case here—that the alleged fugitive will not be fairly and justly dealt with in the state to which it is sought to remove him, nor be adequately protected, while in the custody of such state, against the actions of lawless and bad men.

A Pennsylvania court interpreted the foregoing excerpt to imply that if a petitioner could offer substantial proof that his fears of mob violence were well grounded, the writ of habeas corpus should be employed to release him from custody. Both *Marbles v. Creecy et al., supra,* and *Commonwealth ex rel. Flower v. Superintendent, supra,* were cited as authority for releasing a petitioner in a habeas corpus proceeding to defeat extradition in *Commonwealth ex rel. Mattox v. Superintendent,* 152 Pa. Super. 167, 31 A. (2d) 576 (1943).

The last mentioned case leans heavily on the excerpt from *Marbles v. Creecy et al., supra,* and cites *Appleyard v. Massachusetts,* 203 U.

S. 222, 27 S. Ct. 122, 51 L. Ed. 161 (1906), as further authority for its position. Mattox, a Negro youth, alleged and offered substantial proof that he would be in grave danger of lynching if sent to the demanding state. The court ruled the evidence sufficient and stated, *Mattox v. Superintendent, supra,* 31 A. (2d) at 580:

> An ounce of prevention, in this respect, is worth a pound of cure; and we are of opinion that where the judge granting the writ of habeas corpus is satisfied by substantial and competent evidence that the feeling against the relator and the attitude of the prosecuting and peace officers of the demanding state is such as to furnish reasonable grounds for the belief that he will not receive a fair and impartial trial and is in grave danger of being lynched or abused by mob action, he may discharge him from custody and refuse to deliver him over to the representatives of the demanding state.

Bearing in mind that habeas corpus is the only legal weapon a fugitive has for personal protection, there is some merit in the argument offered by counsel for petitioner in the instant case that release from custody should follow a substantial showing that extradition will result in barbaric treatment of the accused. Whether there should be a sacrifice of interstate harmony in favor of direct protection of human rights is a question calling for the expression of differing philosophical and sociological views of the courts.

The majority based its opinion on the fact that adequate remedies were available in the state and federal courts of Georgia. Granting that Georgia courts are completely competent and zealous in the protection of human rights, still the majority holding is based on the assumption that unusual punishment will positively be held in abeyance until recourse is had to those courts. But, as the dissenting judge points out, the regularity of official action might well be made "a rebuttable presumption to be tested in the lights of facts, rather than by speculation."

There would seem to be no danger of interstate discord when courts pass on evidence concerning the possibility of lynching and cruel treatment so long as the burden of proof is made to lie heavily on the petitioner. States having humane penal practices should not be averse to having that system tested by constitutional standards by a sister state.

Probably the court in the case at hand would have been justified in deeming petitioner's evidence inadequate but the same court should not effectively close off a fugitive's only means of escaping unusual punishment by declaring that such evidence was inadmissible.

Joseph C. Spalding

CONSTITUTIONAL LAW—RIGHT OF WITNESS TO REFUSE TO ANSWER QUESTIONS CONCERNING HIS MEMBERSHIP IN THE COMMUNIST PARTY. —*Fawick Airflex Co. v. United Electrical, Radio & Machine Workers of America, Local 735 et al.*, ...Ohio App..... 91 N. E. (2d) 431 (1950). Joseph Kres and another were charged with violation of a restraining order of the Court of Common Pleas of Cuyahoga County, Ohio, which, inter alia, restricted picketing of the Fawick Airflex Co., during a strike at that plant. Kres, a union official, was accused of inciting a riot among the picketers. Testifying in his own behalf, he refused on cross-examination to answer the following questions:

"Are you a member of the Communist Party?"

"Have you ever been a delegate as the representative at a Communist Party meeting in the State of Ohio?"

"Did you attend a State convention of the Ohio Communist Party on April 30, 1944, held at Public Hall?"

The court ruled that the refusals constituted contempt of court. Kres appealed to the Ohio Court of Appeals, which held in the instant case that the refusal of a witness to answer questions concerning his alleged affiliation with the Communist Party is punishable as contempt of court. In his appeal, Kres urged that the court committed prejudical error in permitting "irrelevant and immaterial" questions to be propounded as to his political affiliations and activities. Judge Doyle, speaking for the court, stated that questions tending to disclose the witness's character or *affiliations* are permissible if they have a "legitimate bearing upon his credit as a witness." He added that the limits of such cross examination is strictly a matter for the trial court's discretion.

The court continued that, under the circumstances, which indicated an "active, preconceived and planned revolt against law and order," the inquiry as to appellant's alleged Communist affiliations was most relevant and material. Taking judicial notice of Communistic methodology, the court said, 92 N. E. (2d) at 434:

> Certainly, in this year of 1950, judges of the courts of America cannot shut their eyes to things well known to every intelligent layman. . . . the [Communist] party in its struggle for power would make "merchandise of . . . American principles" and, in the process of forging ahead, it is well known that the sanctity of the truth and an oath may be, and is, pushed aside with impunity if warranted by the occasion.

An earlier reflection of this same view is to be found in the case of In re *MacKay*, 71 F. Supp. 397 (N. D. Ind. 1947), in which the court took notice of the fact that Communism advocates force and violence and conforms to peaceable democratic processes "for tactical purposes only."

In the oft-quoted case of *Schneiderman v. United States,* 320 U. S. 118, 63 S. Ct. 1333, 87 L. Ed. 1796 (1943), the court reiterated the judicial cognizance of the villainous aim of Communism, which is the destruction of existing social conditions through various means, including denial of political rights to all non-Communists or non-proletarians.

From the general tenor of these utterances from the bench, climaxed by the forceful words of Judge Doyle in the instant case, the trend toward making membership in the Communist Party a ground for impeachment of a witness becomes discernible. Certainly the value and reliability of a Communist's testimony seems to be steadily diminishing. The House Committee on Un-American Affairs recently expressed the current opinion of many Americans toward Communism. In H. R. 4581, 80th Cong. 1st Sess. (1947), it said that Communism is:

> . . . not a political party, but is an international conspiracy and an anti-religious ideology which advocates and practices deceit, confusion, subversion, revolution, and the subordination of man to the state, and which has for its purposes and intentions the overthrow of any democratic or other form of government by force and violence, if necessary. . . .

Another timely and significant point is the appellant's second assignment of error in which he protested that the demand that he answer the communist questions violated his constitutional guarantees of freedom of speech, press, assembly, thought and association, and his privilege against self-incrimination. Referring to this privilege against self-incrimination, the Ohio Court, in *McGorray v. Sutter,* 80 Ohio St. 400, 89 N. E. 10 (1909), held it a perversion of the rule to allow a witness to use this immunity to prevent the discovery of truth or to protect himself from embarrassment or humiliation.

A very concrete statement of the rule of immunity of witnesses is laid down by the court in *Reg. v. Boyes,* 1 B. & S. 311, 121 Eng. Rep. 730, 738 (1861). In that case, Justice Cockburn said:

> . . . 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. We think that a merely remote and naked possibility, out of the ordinary course of the law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. . . . it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice.

Justice Marshall, sitting in Aaron Burr's trial, stated that if a reasonable possibility of danger to the witness is apparent to the court,

then the witness, by virtue of his unique knowledge of the incriminating nature of the answer, must be the sole judge of what his answer will be. *United States v. Burr,* 25 Fed. Cas. 38, No. 14,629e (C. C. Va. 1807).

Evidence of recent adherence to the same principle as to the court's power is to be found in such cases as In re *Stewart,* 121 Wash. 427, 209 Pac. 849 (1922), and In re *Berman,* 105 Cal. App. 37, 287 Pac. 125 (1930). As recently as 1949, in the case of *Apodaca v. Viramontes,* 53 N. M. 513, 212 P. (2d) 425 (1949), the rule was reemphasized when the court held that it is for the trial judge to determine whether a question has a reasonable tendency to incriminate the witness. Further, the court held that if no such tendency existed, it was the right of the state to compel the witness to answer.

In the instant case, then, the court had the responsibility and the power to decide whether any direct answer to the questions presented could implicate the appellant.

A much less strenuous approach to the question was taken by Judge Doyle. He simply pointed out that it is no crime to be a Communist. Moreover, he said, the witness could not legitimately complain of any degradation by virtue of his membership in that "intransigent group" because it was of his own choosing.

Concerning the confusion extant between the commonly recognized privilege against self-incrimination and a vaguely recognized and presently outmoded privilege against self-degradation, Wigmore, in 3 WIGMORE, EVIDENCE § 2255 (3rd ed. 1940), points out that:

> In English practice the two privileges—concerning infamy and concerning criminality—were never confused . . . In this country, constitutional sanction was given to the latter with practical unanimity; but there never was any suggestion, in express proposal or in apparent phrasing, thus to recognize the former; and here, as in England, it has in most jurisdictions come to be ignored, and is replaced by judicial restrictions of cross examination to character.

Bearing out this contention concerning the non-recognition of the privilege against self-degradation in the United States is the case of *Brown v. Walker,* 161 U. S. 591, 16 S. Ct. 644, 40 L. Ed. 819 (1896). There the court held that a mere tendency of his testimony to degrade the witness in the public eye did not exempt him from the duty to answer the questions.

Therefore, since the privilege against self-degradation is not recognized in the United States, appellant's contention with respect to the self-incrimination privilege should be given short shrift, for three reasons. In the first place the court disposed of it by application of the rule propounded in the English case of *Reg. v. Boyes, supra.* Sec-

ond, because membership in the Communist Party is not illegal, there can be no possibility of self-incrimination. Third, if appellant has confused the privilege against self-incrimination with the alleged privilege against self-degradation, he suffers no wrong if the court refuses to honor that archaic and currently meaningless privilege.

The appellant's objection concerning his rights of freedom of speech, assembly, press, etc., are also worthy of consideration here. The court acknowledges that "liberty of speech and of the press, and liberty of silence, are within the liberties safeguarded by the clauses of the First and Fourteenth Amendments." But the court further points out that the guarantee of personal liberty is not absolute; that it must give way to the public welfare when something dangerous thereto seeks to abuse such privilege in order to avoid public scrutiny.

Appropriate to this consideration are the findings of the courts concerning the recent Congressional investigations of Communism. In *Barsky v. United States,* 167 F. (2d) 241 (D. C. Cir. 1948), the court held that Congress had the power to examine individuals in a manner which could elicit an admission of Communist beliefs or membership. The court pointed out that the privilege against self-incrimination is not involved, since membership in the Communist Party is not illegal. In 1949, in the case of *Lawson v. United States,* 176 F. (2d) 49, 52, (D. C. Cir. 1949), the court said:

> . . . the House Committee on Un-American Activities, or a properly appointed subcommittee thereof, has the power to inquire whether a witness subpoenaed by it is or is not a member of the Communist Party or a believer in Communism and that this power carries with it necessarily the power to effect criminal punishment for failure or refusal to answer that question under 2 U. S. C. A. § 192.

No doubt the communist control bill just passed by Congress over presidential veto will have considerable bearing on this question. The measure, entitled the Internal Security Act of 1950, Pub. L. No. 831, 81st Cong., 2d Sess. (Sept. 23, 1950), requires that all individuals who are, or who become, members of a "Communist-action organization" shall register with the Attorney General as being a member of such organization. The penalty for failure to so register is a fine of not more than $10,000, or imprisonment for not more than five years, or both. Admittedly, being a member of a communist organization is not, as such, a criminal act, and therefore the privilege against self-incrimination cannot be invoked against a question put to a witness concerning such membership. But under this new law, a communist may find himself being cross-examined on the witness stand as to his communist membership when he has failed to register as a communist, as now required. Consequently his answer would, under this measure, be incriminating, if truthful. Therefore, could he not now invoke the privilege?

Undoubtedly the Commuunist Party will waste no time in seizing upon any possible constitutional lever to counteract the effect of the instant case, and to carry on their campaign which is aimed at the ultimate destruction of the Constitution, that very instrument under which they now seek refuge.

James Francis O'Rieley

CONSTITUTIONAL LAW—SEGREGATION IN EDUCATION AND EQUAL PROTECTION OF THE LAWS.—*McLaurin v. Oklahoma State Regents for Higher Education et al.*, ...U. S....., 70 S. Ct. 851, 94 L. Ed. . . . (1950). Plaintiff brought suit to enjoin defendants from refusing to admit him, a Negro, to the University of Oklahoma for the purpose of pursuing a postgraduate course in education leading toward a doctor's degree. The district court was of the opinion that if any statute or law of the State of Oklahoma denies or deprives this plaintiff admission to the University of Oklahoma for the purpose of pursuing the course of study he seeks, it is unconstitutional and unenforceable. But the court strongly emphasized the fact that they did not mean the segregation laws of Oklahoma are incapable of constitutional enforcement. Said the court, in 87 F. Supp. at 528: "We simply hold that insofar as they are sought to be enforced in this particular case, they are inoperative." Whereupon McLaurin was admitted to the University and afforded the same educational facilities as other students at a state university except that he was, in accordance with the state's segregation laws, assigned to a seat in the classroom in a row specified for colored students, a special table in the library, and a particular table in the cafeteria. From a judgment of the District Court for the Western District of Oklahoma holding that such conditions did not deny McLaurin "equal protection of the laws" as guaranteed by the Fourteenth Amendment to the Constitution of the United States, the plaintiff appealed to the Supreme Court.

Mr. Chief Justice Vinson, in delivering the opinion of the Court, stated that Oklahoma, in providing graduate education in a state university, may not segregate Negro students from white students even though state imposed separation consists only of assignment to a seat in a row specified for colored students, and to special tables in the library and school cafeteria.

The specific problem pointed up by the present case is the extent to which the "equal protection" clause of the Fourteenth Amendment limits the power of a state to distinguish between students of different races in professional and graduate education in a state university.

The Fourteenth Amendment to the Constitution of the United States states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The primary object of this amendment was to relieve the Negro race from disabilities which have been said "to be inherent in and inseparable from the African blood." *Marshall v. Donavan,* 73 Ky. 681, 687 (1874). Also see *United States v. Wong Kim Ark,* 169 U. S. 649, 18 S. Ct. 456, 42 L. Ed. 890 (1898).

Nevertheless, there is very definitely one disability they have not been relieved from—that of segregation in education. This is evidenced by the fact that there are now sixteen states and the District of Columbia which require the separation of the white and Negro in education. D. C. CODE § 31-1110 (1940). ALA. CODE ANN. tit. 52, § 93 (1940); ARIZ. CODE ANN. § 54-416 (1939); ARK. STAT. ANN. § 80-509 (1937); DEL. REV. CODE § 2631 (1935); FLA. STAT. § 228.09 (1941); GA. CODE ANN. § 2-6601 (1933) (As amended Ga. Laws 1945, p. 397); KY. REV. STAT. § 158.020 (1944); MD. ANN. CODE GEN. LAWS art. 77, § 111 (1939); MISS. CODE ANN. § 6276 (1942); MO. REV. STAT. ANN. § 10349 (1939); N. C. GEN. STAT. ANN. § 115-2 (1943); OKLA. STAT. tit. 70, § 451 (1941) (now repealed, Laws 1949, p. 607, art. 20, § 9); S. C. CODE ANN. § 5377 (1942); TENN. CODE ANN. § 2377 (1934); VA. CODE ANN. § 22-221 (1950); W. VA. CODE ANN. § 1775 (1949). The same is provided for by the Constitutions of Texas and Louisiana: TEX. CONST. ART. VII, § 7 and LA. CONST. ART. XII, § 1.

The state supreme courts have generally held these statutes to be constitutional. *State ex rel. Farmer v. Board of School Commissioners,* 226 Ala. 62, 145 So. 575 (1933); *Dameron et al. v. Bayless,* 14 Ariz. 180, 126 Pac. 273 (1912); *County Court of Union County v. Robinson,* 27 Ark. 116 (1871); *Ward v. Flood,* 48 Cal. 36 (1874); *Grady v. Board of Education,* 149 Ky. 49, 147 S. W. 928 (1912); *Williams et al. v. Zimmerman et al.,* 172 Md. 563, 192 Atl. 353 (1937); *State ex rel. Gaines v. Canada et al.,* 342 Mo. 121, 113 S. W. (2d) 783 (1938), *rev'd. on other grounds,* 305 U. S. 337, 59 S. Ct. 232, 83 L. Ed. 208; *Chrisman et al. v. Mayor, etc.,* 70 Miss. 477, 12 So. 458 (1893); *Johnson v. Board of Education,* 166 N. C. 468, 82 S. E. 832 (1914); *Tucker v. Blease et al., State Board of Education,* 97 S. C. 303, 81 S. E. 668 (1914); *Martin v. Board of Education et al.,* 42 W. Va. 514, 26 S. E. 348 (1896).

So have the lower federal courts. *Bluford v. Canada,* 32 F. Supp. 707 (D. C. Mo. 1940); *Wong Him v. Callahan,* 119 Fed. 381 (C. C. N. D. Cal. 1902); *United States v. Buntin,* 10 Fed. 730 (C. C. S. D.

Ohio 1882); *Bertonneau v. Board of Directors of City Schools et al.,* 3 Fed. Cas. 294, No. 1, 361 (C. C. La. 1878).

With respect to the Supreme Court, the direct issue of a state's right to require separation of the Caucasian and Negro races in the public schools had never been before the Court. There are several cases very often cited for that very point but they are not authority for the proposition. *Sweatt v. Painter et al.,* ....U. S....., 70 S. Ct. 848, 94 L. Ed. . . . (1950) (decided the educational opportunities offered white and Negro law students by state of Texas were not substantially equal); *Missouri ex rel. Gaines v. Canada et al., supra,* (decided on the constitutionality of requiring a Negro to attend a school in an adjacent state); *Gong Lum et al. v. Rice et al.,* 275 U. S. 78, 48 S. Ct. 91, 72 L. Ed. 172 (1927) (decided on the decision rendered in the *Cumming* case, *supra,* but that case is no authority for a state's right to practice segregation in education); *Berea College v. Kentucky,* 211 U. S. 45, 29 S. Ct. 33, 53 L. Ed. 81 (1908) (decided merely on the issue of whether the state statute with respect to segregation in corporations was constitutional); *Cumming v. Board of Education,* 175 U. S. 528, 20 S. Ct. 197, 44 L. Ed. 262 (1899) (Mr. Justice Harlan in delivering the opinion of the Court specifically stated that it was not necessary to consider the question of separate schools for the white and colored); *Plessy v. Ferguson,* 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896); (decided on the issue of the constitutionality of a statute which required the railway to provide separate accommodations and the conductor to assign passengers according to their race); *Hall v. DeCuir,* 95 U. S. 485, 24 L. Ed. 547 (1878) (decided on the issue of segregation on a steamboat being a regulation of interstate commerce). Yet these very cases are generally held to be authority for the proposition that a state may separate the races in education providing the facilities are substantially equal.

But when are the separate facilities "substantially equal"? The earliest recognition of this theory as applied to schools is to be found in *Roberts v. The City of Boston,* 59 Mass. (5 Cush.) 198 (1849). Later in one of the earliest decisions in federal courts, *Bertonneau v. Board of Directors, supra,* at 296, the fundamental rule was stated as follows:

> Any classification which preserves substantially equal school advantages does not impair any rights, and is not prohibited by the constitution of the United States. Equality of rights does not necessarily imply identity of rights.

The requirement of "substantial equality" is met even though there arises inconvenience to an individual from the location of the Negro school. *Dameron et al v. Bayless, supra; Roberts v. The City of Boston, supra; Lehew v. Brummel,* 103 Mo. 546, 15 S. W. 765 (1891). But if the location is such as to make the school dangerous,

constitutional requirements of equal facilities are not satisfied, *Reynolds v. Board of Education,* 66 Kan. 672, 72 Pac. 274 (1903); *Lowery v. Board of Graded School Trustees,* 140 N. C. 33, 52 S. E. 267 (1905); or in the amount of the appropriations, *Chrisman et al. v. Mayor, etc., supra,* ($12,000 for white schools and $3,000 for negro schools valid), are no ground for complaint if the number of pupils are in proportion. Also see *State of Missouri ex rel. Gaines v. Canada et al., supra,* in which it was held that the requiring of a Negro to go to school in adjacent state is denial of equal protection of the laws. In *Pearson et al v. Murray,* 169 Md. 478, 182 Atl. 590 (1936), a provision providing for scholarships to Negroes to attend colleges outside the state, mainly for the purpose of professional studies, does not meet the test of substantial equality. Where white children spent six years in grade school, three years in junior high and three years in senior high, but colored children had to spend eight years in grade school, one year in junior high and three years in senior high, such treatment did not conform to the test of "substantial equality." *Graham v. Board of Education,* 153 Kan. 840, 114 P. (2d) 313 (1941). Establishment of a separate law school for negro students which did not have an independent faculty or library and lacked accreditation did not meet the test of "substantial equality." *Sweatt v. Painter et al., supra.*

However, it is submitted that in the present case, the Supreme Court has made it more difficult for states maintaining separate school systems for white and Negro to meet the time honored test of "substantially equal" facilities. True, the present case dealt specifically with separation in graduate schools, but it is felt this decision will serve as a forerunner to the elimination of segregation in public schools. This will result from stricter insistence by the courts to the adherence of the "substantially equal" theory which the states will eventually be compelled to meet. This would be proper because racial segregation in education is contrary to our fundamental positive principles, the Declaration of Independence and the Constitution of the United States, and the Natural Law which is part of the law of God.

E. Milton Farley, III

CONSTITUTIONAL LAW—TREATIES—UNITED NATIONS CHARTER AS A TREATY AFFECTING STATE LAWS.—*Sei Fujii v. State,* ....Cal. App....., 217 P. (2d) 481 (1950). This case concerns itself with an action by a Japanese immigrant, Sei Fujii, who is ineligible for citizenship under the naturalization laws, Nationality Act of 1940, 54 STAT. 1140 (1940), as amended, 8 U. S. C. § 703 (1946), against the State of California. It was brought to determine whether an escheat had occurred under

the provisions of the Alien Land Law, CAL. GEN. LAWS act 261, § 7 (1944), as to real property acquired by the plaintiff. From a judgment of the Superior Court of Los Angeles County adjudging that the property conveyed to plaintiff had escheated to the state on the date of the deed, the plaintiff appealed. The court in the instant case held that the Charter of the United Nations was a treaty of the United States, and as such all state laws were subject to it. The court ruled that since the discriminatory nature of the law was in open conflict with the provisions of the treaty, particularly Article 17 of the General Assembly's Universal Declaration of Human Rights, which proclaims the right of everyone to own property, the statute was void.

The fundamental question to be resolved in this case is the determination of whether the United Nations Charter comes within the meaning of a treaty. "A treaty is primarily an agreement or contract between two or more nations or sovereigns entered into by agents appointed for that purpose, and duly sanctioned by the supreme powers of the respective parties." 52 AM. JUR., Treaties § 3.

The power to make treaties in respect to international problems is an admitted attribute of sovereignty, *i.e.,* the President and the Senate. *United States v. Curtiss-Wright Export Corp., et al.,* 299 U. S. 304, 57 S. Ct. 216, 81 L. Ed. 255 (1936). Its sanction is found in U. S. CONST. ART. VI, § 2, which explicitly states:

> All Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitutions or Laws of any State to the Contrary notwithstanding.

In accordance with this constitutional provision a treaty is accorded the same dignity and force as that of the Constitution. *Ware v. Hylton et al.,* 3 Dall. 199, 1 L. Ed. 568 (U. S. 1796). The courts have never declared a treaty unconstitutional. Recent decisions seem to indicate that the judiciary regards the executive as speaking "ex cathedra" when it decides to speak on the subject of treaties. *United States v. Belmont,* 301 U. S. 324, 57 S. Ct. 758, 81 L. Ed. 1134 (1937); *United States v. Curtiss-Wright Export Corp. et al., supra.* The primitive conditions and circumstances of the eighteenth century dictated the framers' decision to grant the broad treaty-making powers of the executive. The distinction between national and international affairs of the time was not a shadowy line calling for metaphysical niceties. Wright, *The Constitutionality of Treaties,* 13 AM. J. INT'L L. 242 (1919). Geography and commerce made them distinct realities. Today, however, the impact of laws and the force of social problems know no boundaries. They cut through national borders and mix with those of other nations. A serious difficulty is encountered in attempting to identify this "hybrid social creature" because of its

strange resemblance to both a national and an international affair. The extreme importance of the treaty-making powers is made manifest when one suddenly realizes that perhaps a "trojan horse" has been within the Constitution throughout these many years.

If the executive possesses the power to make treaties embracing every subject that is termed "international," he will, in effect, be making laws for the individuals and the states. Many assert that the President, under the treaty power, can effectuate his civil rights program and thus avoid any constitutional objection to such legislation. Holman, *Treaty Law Making: A Blank Check for Writing a New Constitution,* 36 A. B. A. J. 707, 788 (1950). The question becomes one of inquiring whether the executive possesses the power to amend the Constitution through the treaty device.

All true powers of government reside in the people. See the DECLARATION OF INDEPENDENCE; PREAMBLE TO THE CONSTITUTION. These powers are transferred to its agents, the three departments of the government in order to secure the fundamental rights of the people. It is elementary that an agent cannot possess more power than its principal. Even more elementary is the inherent disability of the agent (Federal Government) to give its sub-agent (United Nations) more power than the agent itself possesses. Manion, *Some Legal Aspects of American Sovereignty,* 20 NOTRE DAME LAW. 1, 5 (1944).

The treaty-making power extends to all subjects within the international domain. *United States v. Pink et al.,* 315 U. S. 203, 62 S. Ct. 552, 86 L. Ed. 796 (1942); *Asakura v. Seattle,* 265 U. S. 332, 44 S. Ct. 515, 68 L. Ed. 1041 (1924); *Ross v. McIntyre,* 140 U. S. 453, 11 S. Ct. 897, 35 L. Ed. 581 (1891); *De Geofroy et al. v. Riggs,* 133 U. S. 258, 10 S. Ct. 295, 33 L. Ed. 642 (1890). It is limited to subjects and treaties not inconsistent with our form of government, with the relation of the states and the United States, or with the Constitution. *Holden v. Joy,* 17 Wall. 211, 21 L. Ed. 523 (U. S. 1872); *Boudinot v. United States,* 11 Wall. 616, 20 L. Ed. 227 (U. S. 1871); *Pegano v. Cerri,* 93 Ohio St. 345, 112 N. E. 1037 (1916). It is submitted that the powers of the executive under the treaty clause is one of extension and not one of comprehension. He possesses the legal capacity in the interests of the nation to name the international subjects to which the provisions of the Constitution shall apply; he possesses no power to change the constitutional provisions to be applied to these subjects. It is admitted that grave difficulties ensue when a national subject-matter blends with an international subject-matter. However, much of the confusion which surrounds this problem would soon be dispelled if the fundamental principle of our limited government were applied to this problem. If any alleged treaty violates any individual constitutional right, the subject-matter is distinctly national in nature, though it may have international consequences.

In passing upon the constitutionality of any treaty, it is suggested that the court ask three questions: (1) Does this proposed treaty affect an individual right guaranteed by the Constitution? (2) Can the national or state government protect this interest without recourse to foreign governments? (3) Is it unnecessary that this right be protected for the national welfare, as indicated in *Missouri v. Holland,* 252 U. S. 416, 40 S. Ct. 382, 64 L. Ed. 641 (1920)? If these questions are all answered in the negative, it is quite clear that an international subject-matter exists and in this field the government is sovereign. If, on the other hand, an affirmative answer ensues, it is evident that a national or domestic subject-matter exists. In this area the power of judicial review reigns.

When the President and the Senate formally made the United Nations Charter the law of the land, they did not extend the provisions of the United States Constitution; rather they defined and reformulated the basic constitutional rights in the light of their own social policy. See Holman, *supra.* This is not to criticize the rights conferred by the charter; rather the contention is that this domain is national in character, exclusively subject to national jurisdiction.

The dominant theme of the charter is its vague language which leans toward a socialistic conception of the individual to the state, and its inclusion of aspirations under the guise of fundamental rights. This charter is not a treaty, a contract between independent nations concerning international events, but rather a social compact—an international bill of rights—attempting to import a new philosophy of government into America. See Holman, *supra;* Simmons, *Man's One Fundamental Right: To Be Let Alone,* 36 A. B. A. J. 711 (1950).

Much controversy has been waged over Justice Holmes' decision in *Missouri v. Holland, supra.* Previously, a federal migratory bird act had been declared unconstitutional as an invasion of the reserved powers of the states, *United States v. Shauver,* 214 Fed. 154 (E. D. Ark. 1914). A treaty governing the protection of migratory bird life was ratified by the senate. A second migratory bird act was passed, practically identical with the first. It was declared valid as a necessary implementation of a valid treaty. Many authorities have expressed deep concern over the possible ensuing consequences of this decision. Holman, *supra,* at 709. But in the light of the test proposed above, this decision should give no cause for alarm. No constitutional right of the individual was violated. It was an international matter which could only be adequately handled by the federal government in the interests of the nation.

In the face of world affairs, the danger of the Constitution being amended by the executive is becoming more imminent. It may be pointed out, however, that the presence of Congress acts as a restraint

upon the powers of the president. This body can abrogate any treaty, and by failing to appropriate the necessary funds it can frustrate the purpose of any treaty. See *Fong Yue Ting v. United States et al.*, 149 U. S. 698, 13 S. Ct. 1016, 37 L. Ed. 905 (1893).

Although no case has actually been presented to the courts for determination, it is to be hoped that the courts will recognize their power to declare any treaty unconstitutional which deals with national problems. Since most treaties require speed of approval to become effective instruments, it is suggested that resort be made to the use of the declaratory judgment.

The *Fujii* decision is the first instance of a case decided under a "presidentially amended constitution." It represents more than a trend; it is illustrative of the fact that the courts have given judicial notice to an entirely new body of fundamental principles.

The court held that by reason of U. S. CONST. ART. VI, § 2, the United Nations Charter became the supreme law of the land. It quoted Chapter nine, Article 55 of the Charter that "The United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." The court then made reference to the "Universal Declaration of Human Rights" which was passed by the General Assembly of the United Nations in 1948, stating that the declaration emphasized the purpose of the United Nations and its charter. Article I of the declaration states that "all human beings are born free and equal in dignity and rights. They . . . should act toward one another in a spirit of brotherhood." Article II states that "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article XVII states that "Everyone has the right to own property alone as well as in association with others."

In reference to the alleged discrimination practiced upon Mr. Fujii, the court concludes, 217 P. (2d) at 488:

> Clearly such a discrimination against a people of one race is contrary both to the letter and to the spirit of the charter which, as a treaty, is paramount to every law of every state in conflict with it. The Alien Land Law must therefore yield to the treaty as the superior authority. The restrictions of the statute based on eligibility to citizenship, but which ultimately and actually are referable to race or color, must be and are therefore declared untenable and unenforceable.

This decision means that the government can make laws in respect to intrinsically national problems which directly affect the fundamental rights of the individual. It means that the sovereignty of the people under our constitutional form of government now resides in the executive and the Senate.

In the interests of the general welfare the Constitution grants the control of immigration to Congress, U. S. CONST. ART. I, § 8. The United Nations Charter, in its Chapter 1, subtracts this power from Congress under the pretense of halting discrimination, vaguely implying that the act is authorized under the nebulous concept of brotherhood.

The president and the Senate are acting within the domain of their constitutional power when, as treaty-makers, they bargain away the governmental property rights in order to protect the constitutional rights of the people. But any attempt by these officers to effectuate an international agreement involving constitutional rights must fail as a treaty because it is a transgression upon the exclusive domain of the people.

Robert J. Affeldt

CONSTITUTIONAL LAW—WHETHER THE REMOVAL OF A CONDITIONALLY REINSTATED MEMBER OF CIVIL SERVICE INVOLVES CONSTITUTIONAL RIGHTS.—*Bailey v. Richardson,* 182 F. (2d) 46 (D. C. Cir. 1950). Appellant, Dorothy Bailey, had been an employee in the federal classified civil service. After having been separated therefrom in 1947, she was conditionally reinstated in 1948. The condition was that she might be removed by the Civil Service Commission if investigation disclosed certain basis for disqualification. Among such disqualifications was one which arose if reasonable grounds existed for belief that the person is disloyal to the Federal Government.

This disqualification soon materialized in regard to the appellant in the form of an interrogatory from and a hearing before a loyalty board designed to determine the loyalty of Miss Bailey. Specifically, the questions in the interrogatory and at the hearing probed for further information concerning the affiliations of the appellant with the Communist Party or its front organizations. She denied any affiliation with any phase or undertaking of the Communist Party and supported her position with affidavits and witnesses. No other witnesses testified. None of the informants, presumably members of the Federal Bureau of Investigation, were revealed. This was ostensibly for security reasons. When this procedure resulted in a separation and a three-year ban from civil service, the appellant sought legal relief. In the district court, she filed an action for a declaratory judgment and for an order directing her reinstatement in Government service. The district court upheld the administrative ruling and upon appeal this court, the circuit court of appeals, affirmed that part of the ruling referring to separation from Government employ and reversed the section providing for a three-year ban from federal service. This re-

versal was based upon the interpretation of the ban as a proscription and therefore a punishment without a judicial trial under the ruling in *United States v. Lovett,* 328 U. S. 303, 66 S. Ct. 1073, 90 L. Ed. 1252 (1946).

Because the actual ruling in the principal case may be subject to several interpretations, it is important that the holding of the court be carefully scrutinized. There is no doubt that the court unequivocally denounced the three-year ban. Confusion may arise however in regard to the first phase of the ruling when an answer is sought to the question whether the appellant was considered to be an applicant for employment or an employee improperly dismissed. One writer states that the case held that dismissal plus proscription was punishment but that "*dismissal* alone in accordance with the provision of the loyalty program does not violate the constitutional rights of a federal employe." (Emphasis supplied.) 38 GEO. L. J. 672. In another review of the case, 36 VA. L. REV. 675, it was stated that the holding was that:

> An administrative board is empowered to bring about the *dismissal* of civil service employees for disloyalty without reference to the rights guaranteed by the Sixth Amendment, inasmuch as discharge is not a punishment. (Emphasis supplied.)

On the other hand it is the view of this writer that the case held that an applicant for employment (rather than an employee) or one deemed to have the status of such applicant has no constitutional right to a hearing or a specification of the reasons why he is not appointed. To substantiate this view that the court found the appellant to have the status of an applicant for appointment, resort must be had to the language of the court. The court found that her placement whether it be called appointment, reappointment, or reinstatement was as much a function of the employment authority as is an original appointment. Desiring to progress deeper into the constitutional question arising out of contention that the appellant was dismissed, the court said, 182 F. (2d) at 55:

> . . . we must assume that Miss Bailey was in the classified service without condition at the time of her removal from the rolls and that she was, therefore, dismissed from employment and not merely denied appointment; although, as we have indicated, we do not agree with that view of her status. If her status was merely that of an applicant for appointment, as we think it was, her non-appointment involved no procedural constitutional rights.

As stated above the court thoroughly discussed the constitutionality of the alleged dismissal. Perhaps this was because the court saw the constitutional issue underlying the applicant-employee status problem and chose not to base the entire decision upon its interpretation of the status question. Because of this possibility, a recital of the major constitutional contentions of the appellant and of the answers of the court thereto would not be bootless here.

The three basic contentions of the appellant center upon the First, Fifth, and Sixth Amendments respectively. To the argument of the appellant that her dismissal since premised upon political activity violated her rights of free speech and assembly under the First Amendment, the court replied, 182 F. (2d) at 59:

> . . . so far as the Constitution is concerned there is no prohibition against the dismissal of Government employees because of their political beliefs, activities or affiliations.

The point made under the Fifth Amendment that she was deprived of property without due process of law was dealt with summarily by the court when it said that the cases and history emphasize the fact that Government employ is not property.

The final contention of the appellant was partially based upon the Sixth Amendment which requires not only confrontation by witnesses but also trial by jury in all criminal prosecutions. She also bases it upon the presumption that while the Government had the power to dismiss her, it did not have the power to hurt her. She contends that though this hearing was not a criminal prosecution per se, she was charged with disloyalty which she maintains is akin to treason while dismissal is akin to conviction. This final and perhaps climactic argument was met with the reply of the court that while the appellant may have been injured, nothing similar to a criminal prosecution in the legal sense in fact visited her. In order to weaken the contention of the appellant of the injury to reputation which she suffered, the court applied the rule that an individual injured by the Government while it is exercising its governmental power has no redress.

While it was not discussed as a controlling issue by the court, the question concerning the alleged injury to reputation is a collateral matter which might be studied herein with profit. Essentially the problem centers around the possible abuse to which the social and professional reputation of an employee or applicant is threatened under the loyalty program as administered herein. That the Government as an employer has rights and powers analogous to those of a private employer is not to be denied. And quite apropos to the ruling in the principal case are the words of the court in *Friedman v. Schwellenbach et al.*, 159 F. (2d) 22, 24 (D. C. Cir. 1946) when it said:

> The United States has the right to employ such persons as it deems necessary to aid in carrying on the public business. It has the right to prescribe the qualifications of its employees and to attach conditions to their employment.

But to portray with vividness the true danger to the reputation of an employee or applicant who is perhaps actually loyal, it is well to refer directly to the text of the principal case. The court passed

over the fact that the loyalty hearing had received much notoriety with the statement, 182 F. (2d) at 64:

> It should be remarked parenthetically that . . . any publicity which it received was not pursuant to but in flat contradiction of the Executive Order, the Attorney General's instructions, and the Loyalty Board's rules, all of which forbid publicity.

To cast off the contention of unwarranted injury of the appellant with the above few words and with no investigation of the reasons why the orders and instructions prohibiting publicity were not followed reveals a trend not truly in accord with certain policies emphasized in recent cases. Noteworthy is *Spanel v. Pegler et al.*, 160 F. (2d) 619 (7th Cir. 1947), where it was held that the statement that one is a Communist is libelous per se. Even the charge that one is an agent and not a member of the Communist party has been held libelous under New York law. *Grant v. Reader's Digest Ass'n*, 151 F. (2d) 733 (2d Cir. 1945). These cases clearly pronounce the policy of protecting the reputation of the individual from charges of affiliation with the Communist party. The instant case therefore in its disregard for the fact that the proceedings in which appellant was charged with communistic affiliation were publicized seems to run counter, in spirit at least, to the libel cases above cited.

In seeking redress for the injury suffered the appellant might have attempted an action sounding in defamation against the United States under the Federal Tort Claims Act, 62 STAT. 933 (1948), 28 U. S. C. § 1346 (b) (Supp. 1948), or against the board members in their individual capacities for the negligent publication of matter libelous per se. Either attempt might succumb to the defense of truth, *Sullivan v. Meyer*, 141 F. (2d) 21 (D. C. Cir. 1944); the immunity afforded quasi judicial proceedings, *Smith v. O'Brien*, 88 F. (2d) 769 (D. C. Cir. 1937); or to the immunity given executive officers of importance dealing with matters pertinent to their positions, *Mellon v. Brewer*, 18 F. (2d) 168 (D. C. Cir. 1927). These patently reveal the inefficacy of such remedy.

In conclusion it should be emphasized that the ultimate significance of the holding in the principal case lies of course in its determination of the applicant-employe status problem and also in its comprehensive presentation of the answers to the constitutional questions involved. It should also be noted that the particular phase of the decision dealing with the alleged injury to reputation was but a collateral issue. It is submitted that while the decision is based upon a sound analysis of the status of the appellant and in addition resolved any constitutional doubts, the undercurrent of disregard for the rules designed to properly protect the right to reputation of the examined employee or applicant is not to be condoned.

Robert A. Stewart

TAXATION—BENEFICIAL INTERESTS IN TRUSTS TAXABLE UNDER INTANGIBLE PERSONAL PROPERTY TAXES.—*Goodenough v. State et al.*, ... Mich. ...., 43 N. W. (2d) 235 (1950). Lawrence Holt established two inter vivos, irrevocable trusts of intangible assets for the benefit of his children and grandchildren. Under both trusts the trustees were given full legal title and full management and control of the principal. The net income was to be distributed annually among the settlor's children and grandchildren living at the time the trust was created. Twenty years after the decease of the last of these beneficiaries, the corpus was to be distributed to grandchildren born after the establishment of the trust. The trustee was not given any power to pay out any part of the principal to any beneficiary except upon the termination of the trust. The intangibles constituting the corpus of each of the trust estates are of two types: profit-producing, and nonprofit-producing. Plaintiff, a granddaughter of the settlor living at the time he established the trusts, is a resident of Michigan. The trusts have their situs in Pennsylvania. Defendants, the State of Michigan and the Department of Revenue of Michigan, imposed an intangible property tax against plaintiff as "owner" of both trusts under the provisions of a statute, MICH. STAT. ANN. § 7.556(2) (1937), providing for "an annual specific tax on the privilege of ownership." Plaintiff contested the assessment on the nonprofit producing assets. Plaintiff, though a beneficiary—and thereby an "owner" by express statutory provision, MICH. STAT. ANN. § 7556(1)i (1937), did not have, and never can have, any right of ownership in the assets of the two trusts; nor can she have any control over the management of them. Her only power is to bring suit in event of misfeasance or malfeasance on the part of the trustees. In such action her only recourse would be to the Pennsylvania courts. The court in a guarded decision declined to pass upon the constitutionality of the statute, and held only that insofar as the tax was computed on the basis of plaintiff having a beneficial interest in the nonprofit producing items of the trusts, such tax was unlawfully imposed.

The propriety of the decision—forbidding the assessment of a privilege tax where there is no real privilege—can be little doubted. As stated by the court, 43 N. W. (2d) at 239: "Instead of possessing a 'privilege' or having a 'beneficial interest' pertinent to the nonprofit producing intangibles, the only result in the instant case is that plaintiff is assessed an additional tax." However, the question arises—and remains after the decision: what beneficial interest of a cestui que trust, or what right or power, is properly assessed under an intangible property tax law?

Intangible property is subject to taxation, *Schwab v. Richardson*, 263 U. S. 88, 44 S. Ct. 60, 68 L. Ed. 183 (1923), usually at the

domicile of the owner, *Lawrence et al. v. State Tax Commission of Mississippi,* 286 U. S. 276, 52 S. Ct. 556, 76 L. Ed. 1102 (1932). It is generally recognized that the legislature has power to fix the situs of intangible personal property, provided that it does not act arbitrarily, 2 COOLEY ON TAXATION § 444 (4th ed. Nichols 1924).

The property of trust estates generally is assessed against the trustee as holder of legal title, *Johns Hopkins University v. Board of Com'rs of Montgomery County et al.,* 185 Md. 614, 45 A. (2d) 747 (1946). The tax is in substance upon the interest of the beneficiary, the trustee being a mere conduit through the medium of which the property of the beneficiary passes into the treasury. The tax is assessed in the name of the trustee but is against the beneficiary. *Wise v. Commonwealth,* 122 Va. 693, 95 S. E. 632 (1918); *Selden v. Brooke,* 104 Va. 832, 52 S. E. 632 (1906). The trust, sometimes dealt with as if it had a separate existence, *Anderson v. Wilson et al.,* 289 U. S. 20, 27, 53 S. Ct. 417, 77 L. Ed. 1004 (1933), consists of separate interests: the equitable interest of the beneficiary in the res and the legal interest of the trustee, *Brown v. Fletcher,* 235 U. S. 589, 35 S. Ct. 154, 59 L. Ed. 374 (1915). In *Greenough et al. v. Tax Assessors et al.,* 331 U. S. 486, 496, 67 S. Ct. 1400, 91 L. Ed. 1621 (1947), the Court said:

> No precedent from this court called to our attention indicates that the federal Constitution contains provisions that forbid taxation by a state of intangibles in the hands of a resident testamentary trustee.

Each separate and distinct right or interest in a trust fund may be appropriately taxed, *Wood v. Ford,* 148 Fla. 66, 3 So. (2d) 490 (1941); *Commonwealth ex rel. Martin v. Sutcliffe,* 283 Ky. 274, 140 S. W. (2d) 1028 (1940). The reasoning of the courts was well-stated in *Mayor of Baltimore v. Safe Deposit & Trust Co.,* 97 Md. 659, 55 Atl. 316, 317 (1903):

> The trustee, who holds the title, is the owner in a legal and technical sense, but the cestui que trust is the beneficial and substantial owner. We do not think the legislature has exceeded its powers over the subject of taxation, . . . in providing that personal property of the kind involved in this case [stocks and bonds] shall . . . be treated as belonging to its substantial owner, and not to its technical holder.

A beneficial interest is said to be something of value, worth, advantage or use to a person, *In re Duffy's Estate,* 228 Iowa 426, 292 N. W. 165, 168 (1940); it is the entire interest of a beneficiary in a trust, *Papeneau v. Security-First Nat. Bank of Los Angeles,* 45 Cal. App. 690, 114 P. (2d) 629 (1941). In Florida, for intangible tax purposes it must be a present vested beneficial interest, *Mahan v. Lummus,* 160 Fla. 505, 35 So. (2d) 725 (1948); but in New York "any person who . . . has a right, whether present or future, whether vested or contingent, to income or principal of the trust fund, has a beneficial interest in the trust." *Schoellkopf et al. v. Marine Trust*

Co. of Buffalo, 267 N. Y. 358, 196 N. E. 288, 290 (1935). *Brown v. Fletcher, supra,* has been cited as authority for the proposition that the beneficiary's equitable interest in the trust is a property right, although that case dealt with assignment of a beneficiary's interest, rather than taxation. In *Maguire v. Frebrey,* 253 U. S. 12, 40 S. Ct. 417, 64 L. Ed. 739 (1920), the leading case on the taxation of the interests of beneficiaries in trust property, the Court upheld a tax on income received by a Massachusetts beneficiary from property held in trust in Pennsylvania. The Court remarked, 253 U. S. at 16:

> Such beneficiary has an equitable right, title and interest distinct from its legal ownership. . . . It is this property right belonging to the beneficiary, realized in the shape of income, which is the subject-matter of the tax under the statute of Massachusetts.

In a vigorous stroke against double-taxation the Supreme Court held in *Safe Deposit & Trust Co. v. Virginia,* 280 U. S. 83, 50 S. Ct. 59, 74 L. Ed. 180 (1929), that Virginia could not levy an ad valorem property tax against the value of a Maryland trust where the beneficiaries were residents of Virginia. The beneficiaries had no right to remove the property and no present right to enjoyment; they were to become entitled to the principal and accumulated income upon attaining the age of twenty-five. It seems clear that this type of tax is valid, although *Safe Deposit & Trust Co. v. Virginia* has not been reversed. *State Tax Commissioner v. Aldrich et al.,* 316 U. S. 174, 62 S. Ct. 1008, 86 L. Ed. 1358 (1942); *Pearson v. McGraw,* 308 U. S. 313, 60 S. Ct. 211, 84 L. Ed. 293 (1939); *Curry v. McCanless,* 307 U. S. 357, 59 S. Ct. 900, 83 L. Ed. 1339 (1939).

The right to tax a resident beneficiary upon his equitable interest in a foreign trust has been recognized by state courts. *Westinghouse Electric & Mfg. Co. v. Los Angeles County,* 188 Cal. 491, 205 Pac. 1076 (1922); *Sumerall's Committee v. Commonwealth,* 162 Ky. 658, 172 S. W. 1057 (1915); *Hunt v. Perry,* 165 Mass. 287, 43 N. E. 103 (1896); *Davis v. Macy,* 124 Mass. 193 (1878); *Grand Lodge of Maryland, K. P. v. Mayor of Baltimore et al.,* 157 Md. 542, 146 Atl. 744 (1929); *Commonwealth v. Stewart,* 338 Pa. 9, 12 A. (2d) 444 (1940) *aff'd,* 312 U. S. 649, 61 S. Ct. 445, 83 L. Ed. 1101 (1941); *Ellett v. Commonwealth,* 132 Va. 136, 110 S. E. 358 (1922). The tax may be assessed to the beneficiary where the person having control of the property is not vested with the rights and duties of a trustee in the true sense of the word. In re *Boyd,* 138 Iowa 583, 116 N. W. 700 (1908), held that the Iowa statute, IOWA CODE § 428.1 (1946), providing that property held in trust be listed by the trustee, does not authorize the listing of beneficial interests. In re *Cooper's Estate,* 229 Iowa 921, 295 N. W. 448 (1940); In re *Assessment of Taxes against Van Dyke,* 229 Iowa 295, 294 N. W. 319 (1940); *Hathaway v. Fish,* 13 Allen 267 (Mass. 1866); *Swett v. Boston,* 18 Pick. 123 (Mass. 1836); *Trustees of*

the General Assembly of the Presbyterian Church v. Gratz, 139 Pa. 497, 20 Atl. 1041 (1891); property is made assessable directly to the beneficiary in case of a naked or dry trust, *Commonwealth v. Southeastern Iron Corp.,* 142 Va. 107, 128 S. E. 528 (1925).

It is well-settled that the power of appointment is the equivalent of ownership. "A general power of appointment . . . has hitherto been regarded by this court as equivalent to ownership of the property subject to the power." *Curry v. McCanless, supra* 307 U. S. at 371. In *Graves v. Elliott,* 307 U. S. 383, 59 S. Ct. 913, 83 L. Ed. 1356 (1939), the decedent created a trust, the income to be paid to his daughter during her life, then to her children until they reached the age of twenty-five years when they were to have the corpus. If the daughter died without issue, the trust estate was to revert to the settlor. The settlor reserved the right to change the beneficiaries, revoke the trust or remove the trustees. Such power of disposition, the court said, 307 U. S. at 386:

> . . . is a potential source of wealth and its exercise in the case of intangibles is the appropriate subject of taxation at the place of the domicile of the owner of the power. The relinquishment at death, in consequence of the non-exercise in life, of a power to revoke a trust created by a decedent, is likewise an appropriate subject of taxation.

Graves v. Elliott, supra, was reaffirmed in *Graves v. Schmidlapp,* 315 U. S. 657, 660, 63 S. Ct. 870, 86 L. Ed. 1097 (1942). It must be noted however that these cases dealt generally with estate and inheritance taxes.

The right to receive income is a most valuable and distinctive attribute of ownership. Under Pennsylvania law, PA. STAT. ANN. tit. 72, § 3244 (1949), taxation of equitable interests is expressly limited to cases where the owner is entitled to receive income from the trust. ". . . if the right to receive income exists, the property is taxable whether income is received or not." *Commonwealth v. Stewart, supra,* 12 A. (2d) at 451. But in Ohio if the trustee is authorized, but not required, to make a distribution of income from the trust, when such distribution is made the beneficiary has a taxable interest and an intangible property tax may be levied, OHIO GEN. CODE ANN. §§ 5328-1, 5370 (1938); *Harker v. Evatt,* 140 Ohio St. 354, 44 N. E. (2d) 355 (1942). In *Mahan v. Lummus, supra,* the trustee had absolute management and control of an irrevocable trust. Income of the trust was to be paid to the beneficiary during her life for her maintenance and support but for no other purpose; she had no power of appointment. The court held that this naked right to receive income was not a taxable beneficial interest. In *Commonwealth ex rel. Martin v. Sutcliffe, supra,* 140 S. W. (2d) at 1032, the court stated that ". . . the right to receive income from intangibles is more than potential wealth, it is real wealth and is likewise taxable." *County Board of Tax Sup'r v. Helm,* 297 Ky. 803, 181 S. W. (2d) 452 (1944).

A beneficiary having the right to income for life and the power to devise the trust was held to be the real beneficial owner and assessable for intangible property tax in Florida, *Wood v. Ford,* 148 Fla. 66, 3 So. (2d) 490 (1941). Where the beneficiary would receive a share of the income from a trust only if living at the time of distribution, he had not a sufficient beneficial interest to be assessed for the tax, since he had not a present, vested beneficial interest, *Owens v. Fosdick,* 153 Fla. 17, 13 So. (2d) 700 (1943). In the *Mahan* case, *supra,* where the beneficiary had a right to a certain income but no power of appointment, a provision in the trust agreement whereby the beneficiary was to receive emergency payments from the trust in case of incapacitation, the beneficial interest was not considered to have been enlarged and no tax was levied. In *City of St. Albans v. Avery,* 95 Vt. 249, 114 Atl. 31 (1921) the beneficiaries had the power to absolutely control the character of the securities comprising the fund and the power to terminate the trust at will. Their interest was held to be property and therefore subject to taxation. *Fidelity & Columbus Trust Co. v. Louisville,* 245 U. S. 54, 38 S. Ct. 40, 62 L. Ed. 145 (1917); *Hunt v. Perry, supra; Brooklyn Trust et al. v. Booker,* 122 Va. 680, 95 S. E. 664 (1918).

The principal case points up the confusion existing in the taxation of beneficial interests under intangible property tax statutes. Undoubtedly a beneficial interest is a type of property, and the owner thereof is a type of owner against whom a tax may be levied. However, the question remains: what is a beneficial interest that should, in justice to the owner, be subject to a tax? To levy an income tax against those who have no income is absurd; likewise illogical is the levying of a property or privilege tax against one who has no property or privilege. In the instant case the plaintiff received neither income from the nonprofit producing items in the corpus, nor owned any real beneficial interest in the trust corpus which could never benefit her, or over which she could exercise any control. Thus it is submitted that the intangibles tax could not be assessed against her as attempted. So it was held.

Robert A. Layden

TAXATION — FEDERAL INCOME TAXES — DEDUCTIBLE BUSINESS EXPENSES—COMMISSIONS OF MANUFACTURER'S AGENT ("FIVE PER CENTER") TO SECURE GOVERNMENT CONTRACTS.—*The Aetna-Standard Engineering Co.,* 15 T. C. No. 42 (Sept. 25, 1950), P-H 1950 TC SERV. ¶ 15.42 (1950). Petitioner, a manufacturer, employed Milburn & Brady, Inc., to act as petitioner's agent to aid in securing war contracts, for which Milburn & Brady, Inc. was to receive a five

per cent commission for any business it might obtain. The agent secured two contracts for the petitioner to produce 37mm. gun carriages, the contracts totaling $5,005,189.91, for which the petitioner paid commissions of $59,496.24. Petitioner seeks to deduct this amount as an ordinary and necessary business expense under Section 23(a) of the Internal Revenue Code.

In obtaining the contracts Milburn & Brady, Inc. performed many valuable services for petitioner. Possibly the most important of these was the action taken when it was found that two other manufacturers had underbid the petitioner on a competitive bid. The agent submitted information to the government officials that the lowest bidder was incapable of performing the contract; it also contended that the other lower bidder was an Atlantic Seaboard producer who was much more vulnerable to enemy action than the petitioner's plant which was located at Youngstown, Ohio, so that petitioner should be given at least part of the contract. Similarly after the contracts had been let, the agent continued to perform many services for the petitioner.

The court found that in all the services performed by Milburn & Brady, Inc. there was no evidence that it had used improper methods or had exerted any personal influence upon government officials. Further, that the services rendered for the petitioner corresponded to those performed by other manufacturers' agents for similar remuneration, which had been reduced in the instant case from five per cent to somewhat less than one and a half per cent of the gross contract price.

The court held that the commissions paid by the petitioner to its agent were deductible as ordinary and necessary business expenses under Section 23(a) of the Internal Revenue Code.

This decision falls cleanly within a class of controversies involving the deductibility of commissions paid to manufacturer's agents for procuring governmental contracts. The deductibility of these commissions is assailed on two grounds: (1) that they are extraordinary expenses incurred in activities contrary to public policy, and thus should not be deductible as ordinary and necessary business expenses within the meaning of the statute; and, (2) that they are "sums of money expended for lobbying purposes, . . . including advertising other than trade advertising . . ." and are expressly non-deductible as per U. S. TREAS. REG. 111, §§ 29.23(o)-1 and 29.23(q)-1 (1950). *Harden Mortgage & Loan Co.*, 11 P-H BTA MEM. DEC. ¶ 42,431 (1942), *aff'd*, 137 F. (2d) 282 (10th Cir. 1943). The first ground is the one of primary importance.

The test promulgated under the decisions is that commissions paid to manufacturer's agents will not be allowed to be deducted

when the agent has been employed to, or has in fact exerted personal influence, *Easton Tractor & Equipment Co. et al.*, 35 B. T. A. 189 (1936); *New Orleans Tractor Co.*, 35 B. T. A. 218 (1936), or political influence, *T. G. Nicholson*, 38 B. T. A. 190 (1938); *Messenger Publishing Co.*, 16 P-H TC MEM. DEC. ¶ 47,241 (1947), *aff'd mem.*, 168 F. (2d) 903 (3rd Cir. 1948). That there is no essential difference between personal and political influence is clearly recognized by the courts. See *Harden Mortgage & Loan Co., supra.* The reason given for denying deductibility, *New Orleans Tractor Co., supra* at 220, is that the

> . . . agreement . . . was void and unenforceable as contrary to public policy and, further, that commissions paid pursuant to such an agreement did not constitute such an ordinary and necessary business expense as was contemplated by the applicable revenue act.

Deductibility is generally denied when the payments are made to officeholders directly, *T. G. Nicholson, supra; Harden Mortgage & Loan Co., supra.* But *cf. Alexandria Gravel Co. v. Commissioner*, 95 F. (2d) 615 (5th Cir. 1938), *reversing*, 35 B. T. A. 323 (1937), or indirectly, *Harden Mortgage & Loan Co, supra.* Likewise deductibility is denied when payments are made to political figures who are not officeholders where the hiring appears to be under circumstances that indicate that the use of personal or political influence is anticipated, *Easton Tractor & Equipment Co., supra,* and *New Orleans Tractor Co., supra* (agent was "close to the administration"); *Messenger Publishing Co., supra* ("political leader"); *Harden Mortgage & Loan Co., supra* ("powerful influence"; also members of the agent-partnership were state officials); *Blake B. Rugel*, 10 P-H BTA MEM. DEC. ¶ 41,040 (1941) (close friend and donator to T. J. Pendergast, machine politician). This rule applies even though there is no evidence of "improper acts" by the agent, as long as the payor of the commission could presume that some of the money would go to persons prominent in politics. *Harden Mortgage & Loan Co., supra.*

There are a few cases which allow commissions paid to a manufacturer's representative to be deducted. In *Estate of Joseph H. Scobell et al.*, 47 B. T. A. 971 (1942), fees paid to a lawyer to represent the taxpayer before the Ohio Board of Liquor Control were allowed to be deducted. Although the counsel engaged had been formerly an Assistant Attorney General of Ohio, he had left state employment and was in private practice. The Board of Tax Appeals found no political influence exercised.

Similarly a deduction for a ten per cent commission was allowed in *Spillman Engineering Corp.*, 15 P-H TC MEM. DEC. ¶ 46,258 (1946). Here the court found that there was no evidence that the agent had been hired upon a representation of personal influence nor that any such influence had in fact been exerted. It rejected, as not

founded on authority, the Commissioner's contention that as the bids were competitive there was no need to pay a commission to an agent to secure the contracts, and thus the commission was an extraordinary expense.

The *Alexandria Gravel Co.* case, *supra,* is cited in the instant decision as involving the same situation. The *Alexandria* case was a two-to-one decision, open to some doubt on the facts. The Board of Tax Appeals denied the ten per cent commission paid to one Dore, a Louisiana State Senator. It found that the taxpayer knew at the time he engaged Dore that Dore "was 'friendly with the administration,' had 'good personal contacts,' and was a 'good mixer.'" 35 B. T. A. at 324. Evidence also showed that Dore was able to obtain prompt issuance of warrants by the state auditor's office as a "special favor," and that the competitive bids were awarded only "to a great extent" to the lowest bidder. Upon these findings the Board concluded that the commissions paid to Dore were for his "personal influence" and were non-deductible.

The circuit court of appeals reversed, 95 F. (2d) 615 (5th Cir. 1938), interpreting the facts to indicate that Dore was not hired to exert any personal influence, and that he had not in fact been shown to have exerted any. It dismissed the securing of prompt issuance of warrants as a "special favor" as non-prejudicial to the public, and characterized the bids as "competitive" where little effective influence could be exerted, rather than competitive "to a great extent" as found by the Board. The dissenting judge questioned the majority's opinion, stating that the fact that the bids were deemed to be competitive "would seem to support, rather than refute, the inference of the Board that payment of the commission in question was unnecessary and extraordinary." *Supra* at 616-7. This decision can be interpreted to mean that there is a presumption of a lack of political or personal influence, at least when the contracts are secured upon competitive or semi-competitive bids, and that it is upon the government to rebut this presumption.

Analyzing the cases several rules appear: (1) that commissions paid to manufacturer's agents will not be deductible if the agent is hired to exert personal and/or political influence on government officials; (2) that the courts are prone (with the exception of the *Alexandria* case) to find influence if the agent is an officeholder or has substantial political influence; (3) that if the contract is secured on a competitive or semi-competitive bid, the inference is that effective influence could not have been exerted; and, (4) that some sort of valuable services must be performed by the agent. This last rule is indicated by the decisions in *Estate of Joseph H. Scobell et al., supra,* and *Spillman Engineering Corp., supra,* as well as in the instant case.

The principal case appears to be a sound decision on its particular facts in that the manufacturer's agent was not shown to have exercised any personal or political influence, especially in view of the fact that the contracts were obtained primarily on the basis of competitive bids. It also emphasized the rule that valuable services must be performed by the agent.

However, it leaves at least one question unanswered. The contracts here were not secured according to absolute competitive bids as the petitioner did not submit the lowest bid. The obtaining of the contract under this circumstance by the agent indicates the exercise of some influence. Whether this exercise was impersonal and non-political the evidence does not disclose, and the court does not explicitly consider the point. It must be conceded that the argument expounded by the agent to the government officials—that part of the contract should be let to an inland manufacturer—seems to be valid as impersonal and non-political.

The decision also creates a dangerous implication. First it does not attempt to draw any line between political and non-political influence. It follows the *Alexandria* case expressly stating it to involve the same situation without any explanation or distinguishment, when the facts of the *Alexandria* case show a definite tainting of political influence not explicitly present in the instant case; this is coupled with disregard of an express examination of the finding of fact that both Milburn and Brady had personal connections with various government officials including the former chief of the Naval Bureau of Supplies and Accounts. All of this strengthens the implied rule of the *Alexandria* case—i.e., that there is a presumption of a lack of political influence which must be rebutted by the government. This is against the weight of authority of the other cases, and places the Commissioner in the unfavorable position indeed of having to produce evidence that is extremely difficult to obtain, especially in these days when Washington and the state capitals are infested with the so-called five per centers.

Mark Harry Berens

TORTS—APPLICATION OF ATTRACTIVE NUISANCE DOCTRINE TO PONDS AND POOLS.—*Plotzki v. Standard Oil Company of Indiana*, ... Ind. App. ...., 92 N. E. (2d) 632 (1950). The Standard Oil Co. of Indiana, in the spring of 1944, had a large excavation made on its premises in a residential area of the city of Hammond, Indiana. The excavation was located about fifty yards from the street, and was clearly visible from the sidewalk. The bottom of the excavation was very uneven, ranging from a foot or so to eight feet in depth.

The excavation became filled with water and was frequented by large numbers of children who used it as a swimming hole. The water was not clear and the drop-offs were obscured by the murkiness of the water. No fence was maintained about the premises and no warning signs were posted.

Donald Plotzki, plaintiff's eleven year old son, went to the pool and while wading therein stepped into one of the drop-offs and was drowned. The complainant alleged that the boy had no knowledge of the deep water caused by the drop-offs. The plaintiff, who is the mother of the deceased infant, seeks to recover for his death on the theory that defendant maintained an attractive nuisance which was the cause of the boy's death. The lower court sustained defendant's demurrer on the ground that the complaint failed to state a cause of action under the doctrine. The Supreme Court of Indiana, with strong dissent, affirmed the judgment.

The weight of authority in the United States is to the effect that the attractive nuisance doctrine does not apply to ponds, pools, lakes, streams or other bodies of water—at least where there is no unusual danger. *Blough v. Chicago G. W. R. R. Co. et al.,* 189 Iowa 1256, 179 N. W. 840 (1920). Also see Note, 36 A. L. R. 224 (1925) and cases cited therein.

Various reasons have been set forth for the refusals of the courts to extend the doctrine to such conditions. The perils embodied in ponds, pools, lakes, streams and other waters are deemed to be obvious to children. *Troglia v. Butte Superior Mining Company,* 270 F. 75 (9th Cir. 1921). The element of hidden or concealed danger such as will probably result in injury to children is lacking. Considering the large number of children who swim in ponds every day of the year, the number of fatal or serious accidents is comparatively small. *Sullivan v. Huidekoper,* 27 App. D. C. 154, 5 L. R. A. N. S. 263 (1906). In light of the usefulness of ponds and pools of water it would result in the imposition of an oppressive burden upon landowners to hold them responsible for children who use their ponds for swimming. Common sense tells us that it is a relative impossibility to keep boys out of swimming holes and ponds. *Sullivan v. Huidekoper, supra.* There is nothing more attractive or dangerous about an artificially created pond than there is in natural ponds or streams of water. *Blough v. Chicago G. W. R. R. Co. et al., supra.* It would represent an impossible task to invent and erect around every pond and pool in the United States at a reasonable cost a fence which could be guaranteed to keep boys out. *Emond et al. v. Kimberly-Clark Co.,* 159 Wis. 83, 149 N. W. 760 (1914). Boys are adventuresome and athletic by nature, continually occupied in relatively dangerous activities. If a landowner on whose property there is a pond can be held liable for a child who drowns in it so might

every riparian owner who leaves the river banks exposed. *Robbins v. Omaha,* 100 Neb. 439, 160 N. W. 749 (1916). The danger of being drowned in a pond or pool is not concealed or disguised even to an infant. Such dangers are in the open, easily seen and do not constitute a trap or pitfall. *Eades v. American Cast-Iron Pipe Co.,* 208 Ala. 556, 94 So. 593 (1922). There is always the danger of drowning in the waters of streams and pools, and children are presumed to have been instructed early against such dangers and should be sufficiently acquainted with them. *Anderson v. Reith Riley Construction Co.,* 112 Ind. App. 170, 44 N. E. (2d) 184 (1942).

The problem facing the court was the formulation of the policy of the Indiana courts on the subject, with a view to the relative policy considerations involved.

The position of the Indiana Supreme Court in regard to the extension of the attractive nuisance doctrine to cases involving ponds and pools was first indicated in 1886 in dictum only. In a case involving a negligence action for maintaining an unguarded foundation pit in the bed of a stream adjacent to a public street, it was stated that anything done immediately adjacent to a public street such as would probably attract children into danger must be suitably guarded. *Indianapolis v. Emmelman,* 108 Ind. 530, 9 N. E. 155 (1886). This dictum was followed and applied as the law of the state in *Indianapolis v. Williams,* 58 Ind. App. 447, 108 N. E. 387 (1914).

By 1937, however, the Indiana Supreme Court in dictum, without any reference to *Indianapolis v. Williams, supra,* modified the rule to the extent of declaring the "turntable" or attractive nuisance doctrine to be inapplicable to swimming pools in parks, whether they were artificially constructed, or merely natural bodies of water improved in their bathing facilities. Such waters were deemed obvious to children to be sources of danger. *Evansville v. Blue,* 212 Ind. 130, 8 N. E. (2d) 224 (1937).

A further modification of the rule was made in 1942, by dictum, in a case involving a sand pit, where an analogy was drawn between an open sand pit and an unguarded pool of water to the effect that both were common to nature and contained nothing of danger that was not obvious. Children were presumed to have been warned at an early age concerning the dangerous nature of ponds and pools whose depths might be uncertain. *Anderson v. Reith Riley Construction Co., supra.*

Although severely criticized by Justice Emmert in his dissenting opinion, this trend toward a limitation of the application of the attractive nuisance doctrine is as much in keeping with the policy of Indiana courts as those of the majority of the states. The law is reluctant to impose restraint upon a landowner's use of his property,

even where such a use is injurious to those outside his boundaries. The reluctance is even more pronounced where the owner is to be hampered merely for the protection of those who trespass upon his land, even though they be children of tender years. *Holstine v. Director General of Railroads,* 77 Ind. App. 582, 134 N. E. 303 (1922).

That such a trend represents an intelligent and realistic approach to the problems involved in applying the attractive nuisance doctrine is indicated by a careful analysis of the alternative measures suggested by Justice Gilkinson in his dissenting opinion, 92 N. E. (2d) at 645:

> Under the conditions shown by the complaint appellee was charged with the duty of (a) fencing the pool, posting notices forbidding trespassing or suggesting danger, (b) removing the attraction, (c) keeping children out of the pool or (d) taking reasonable precautions for their safety.

To a suggestion similar to (a) above, Justice Vinzi, in writing the majority opinion in *Emond v. Kimberly-Clark Co., supra,* 149 N. W. at 761, said:

> The world cannot be made danger-proof—especially to children. To require all natural or artificial streams or ponds so located as to endanger the safety of children to be fenced or guarded would in the ordinary settled community practically include all streams and ponds, be they in public parks or upon private soil, for children are self-constituted licensees, if not trespassers, everywhere. And to construct a boy-proof fence at a reasonable cost would tax the inventive genius of an Edison.

The majority opinion expressed in *Peters v. Bowman,* 115 Cal. 345, 47 Pac. 113, 114 (1896), suggests that the alternative suggested in (a), of posting danger signs, would be merely tautological.

> Such a body of water may be found in or close to nearly every city or town in the land; the danger of drowning in it is apparent open danger, the knowledge of which is common to all; . . .

The alternative recommended in (b), involving draining of the excavation, seems especially well met in *Stendal v. Boyd,* 73 Minn. 53, 75 N. W. 735 (1898).

> If he [property owner] must fence in his stone quarry after it fills with water, so that children cannot reach it,—a well-nigh impossible task,—why should he not be required to do it before, [or after the water has been removed] for a stone quarry, with its steep and irregular sides, might well be an attractive and dangerous place to children? It would seem that there was no middle ground, and that the doctrine . . . ought to be limited to cases of attractive and dangerous machinery.

Such an absolute prohibition upon a property owner as suggested in (c) is unknown in Kentucky, whose Court of Appeals in *McMillin's Adm'r v. Bourbon Stock-Yards Co.,* 179 Ky. 140, 200 S. W. 328, 329 (1918), said of itself:

> We . . . have extended what is known as the attractive nuisance doctrine possibly farther than, and certainly as far as, any other court whose opinions have come under our observation; . . .
>
> But this duty [to safeguard premises] does not go to the extent of making the owner an insurer of the safety of trespassing children.

The precise nature of the "reasonable precautions" suggested in (d) is not obvious from the opinion as stated. Such measures as refilling the excavation and again reopening it as the construction work progressed, maintaining a life-guard, keeping servants on the look-out, etc., seem to fall within the area excluded as unreasonable in *Chicago B. & Q. R. R. v. Krayenbuhl,* 65 Neb. 889, 91 N. W. 880, 882 (1902).

> But it must be kept in mind that it [the duty to safeguard infants] requires nothing of the owner that a man of ordinary care and prudence would not do of his own volition, under like circumstances. Such a man would not willingly take up unreasonable burdens, nor vex himself with intolerable restrictions.

Whether, as suggested by dissenting Justice Emmert in his dissenting opinion, Indiana will revert to the rule of *Indianapolis v. Williams, supra,* remains to be seen. The present tendency toward a limitation of the attractive nuisance doctrine, however, would seem to suggest that his prediction was not well founded.

Joseph T. Helling

TRUSTS—POWER OF CESTUI TO COMPEL TERMINATION WHEN ENTIRE BENEFICIAL INTEREST IS VESTED.—*Speth v. Speth et al.,* .... N. J. ...., 74 A. (2d) 344 (1950). Testatrix devised and bequeathed her residuary estate to the Plainfield Trust Company and her brother James Speth, in trust. The trustees were to invest and reinvest, to collect and receive the income, and to pay over the entire income to her brother James Speth for a period of ten years, and at the end of the ten-year period to pay over the corpus and principal to James Speth. Testatrix further directed the trustees that should some unusual circumstances arise they were to apply, in addition to the income, some portion of the principal for the benefit of James Speth. The beneficiary sought to compel premature termination contending that since he was the sole beneficiary in whom the entire beneficial interest was vested, he was entitled to immediate termination despite the provisions of the trust to the contrary. The court held that the intention of the testatrix, since it violated no rule of law or public policy, was to be given effect, and accordingly refused to decree termination.

When, as in the instant case, a trust provides that the income is to be paid to the beneficiary or accumulated for him for a certain number of years or until the beneficiary reaches a certain age and at that time the principal is to be paid to him, or if he dies before reaching such age or such period has elapsed, to his estate, or to whomever he designates in his will, the entire beneficial interest of the trust is vested in him. The problem arises whether he can compel termination before the time fixed by the terms of the vested trust, contrary to the intention of the settlor.

In England when the entire beneficial interest is vested in a single beneficiary, such beneficiary, if sui juris, is entitled to termination at any time notwithstanding contrary provisions of the trust. The leading case of *Saunders v. Vautier,* 4 Beav. 115, 49 Eng. Rep. 282 (1841), involved a trust under which the principal and accumulated income were to be paid to the sole beneficiary at the age of twenty-five. At the age of twenty-one he demanded payment, and his request was granted by the court over the opposition of the trustee. The Master of the Rolls (Lord Langdale) stated, 49 Eng. Rep. at 282:

> . . . where a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has absolute indefeasible interest [in the legacy], is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge.

This view seems to have been adopted without much consideration, as pointed out by Lord Herschell in *Warton v. Masterson,* L. R. [1895] A. C. 186, 193, his Lordship stated:

> The point seems, in the first instance, to have been rather assumed than decided. . . . It is needless to inquire whether the courts might have given effect to the intention of the testator. . . . The doctrine has been so long settled and so often recognised that it would not be proper now to question it.

The rule has been explained upon the ground that the postponement of enjoyment is inconsistent with or repugnant to the absolute interest granted. *Gosling v. Gosling,* Johns. V. C. 265, 70 Eng. Rep. 423 (1859); *Curtis v. Lukin,* 5 Beav. 147, 49 Eng. Rep. 533 (1842).

In the United States the courts have generally reached the opposite result. According to the view prevailing in the majority of states, the expressed intent of the settlor will be respected by the court against an attempt of the beneficiary to secure premature termination. *Shelton et al. v. King et al.,* 229 U. S. 90, 33 S. Ct. 686, 57 L. Ed. 1086 (1913); *DeLadson v. Crawford,* 93 Conn. 402, 106 Atl. 326 (1919); *Claflin v. Claflin et al.,* 149 Mass. 19, 20 N. E. 454 (1889); *First Wisconsin Trust Co. v. Hamburger et al.,* 185 Wis. 270, 201 N. W. 267 (1924); RESTATEMENT, TRUSTS § 337 (Supp. 1948). The leading American case on the question is *Claflin v.*

Claflin, supra. In that case a testator left property in trust for his son, directing the trustee to pay the son ten thousand dollars at the age of twenty-one, ten thousand dollars at the age of twenty-five, and the balance at the age of thirty. After the beneficiary reached the age of twenty-one and received the first payment, but before he reached the age of twenty-five, he brought suit to compel the trustee to pay him the remainder of the trust fund. The beneficiary contended that since he was the sole beneficiary of the trust his interest in the trust fund was vested and absolute, and the provision in the will postponing the payment of the money beyond the time he was twenty-one was void. The court held that he was not entitled to termination of the trust. In the opinion, 20 N. E. at 456, Field, J., said:

> In the case at bar nothing has happened which the testator did not anticipate, and for which he has not made provision. It is plainly his will that neither the income nor any part of the principal should now be paid to the plaintiff. It is true the plaintiff's interest is alienable by him, and can be taken by his creditors to pay his debts, but it does not follow because the testator has not imposed all possible restrictions [*i.e.*, a spendthrift trust] that the restrictions which he has imposed shall not be carried into effect. . . . We are unable to see that the directions of the testator to the trustees to pay the money to the plaintiff when he reached the age of 25 and 30 years and not before are against public policy, or are so far inconsistent with the rights of property given to the plaintiff, that they should not be carried into effect. It cannot be said that these restrictions upon the plaintiff's possession and control of the property are altogether useless, for there is not the same danger that he will spend the property while it is in the hands of the trustees as there would be if it were in his own.

Under the *Claflin* doctrine, the mere fact that enjoyment of the principal is postponed does not prevent the beneficiary from transferring his interest in the principal or income. *Stier v. Nashville Trust Co.*, 158 Fed. 601 (6th Cir. 1908); *DeLadson v. Crawford, supra; Claflin v. Claflin, supra.* However, if the beneficiary does transfer his whole interest under the trust his transferee cannot compel premature termination, otherwise the provision for postponement would be practically nugatory, since the beneficiary could force premature termination by mere transfer. *Stier v. Nashville Trust Co., supra; DeLadson v. Crawford, supra; First Wisconsin Trust Co., v. Hamburger, supra;* RESTATEMENT, TRUSTS § 337, comments (j) and (k) (Supp. 1948).

It would seem clear that even under the American view the duration of postponement must be limited. A provision making a trust indestructible or postponing enjoyment of the principal for an unreasonable length of time does not violate the Rule against Perpetuities; that rule being concerned only with the time within which interests must vest; but when once vested, as in the *Claflin* situation, the Rule against Perpetuities is not concerned. See GRAY, THE

RULE AGAINST PERPETUITIES § 121.5 (4th ed. 1942) for a detailed analysis. The question does not seem to have been directly considered by the courts, but it has been suggested that trusts which are by their terms to continue for a period longer than allowed by the Rule against Perpetuities are void, or at least terminable at the option of the beneficiary, not by virtue of the Rule against Perpetuities, but by analogy, under a suggested rule which would adopt the same period. KALES, ESTATES FUTURE INTERESTS 737 (2d ed. 1920); Cleary, *Indestructible Testamentary Trusts,* 43 YALE L. J. 393, 397 (1934). In the instant case the court said by way of dictum that a similar rule might well be applied, but since a period of ten years "does not materially offend public welfare" they did not pursue the matter further.

The American cases following *Claflin v. Claflin, supra,* stress the notion that the owner of property can do as he likes with it, *cujus est dare est disponere;* that it is the privilege of the donor to qualify his gift in any manner he pleases so long as the qualifications do not violate any positive rule of law or are not contrary to public policy. On the other hand, the same maxim can be used to support the English rule. When the entire beneficial interest is vested in the cestui, he is in substance the real owner, and, if under no disability, should not be restrained in the use and disposition of property in which no one but himself has any interest. If the question is to be decided simply on authority, the English courts have long since settled the law and American courts have usually paid great deference to the rule of the English equity judges on questions of this sort. See KALES, ESTATES FUTURE INTERESTS § 733 (2d ed. 1920). But the English judges, themselves, have been unable to advance logical reasons for the rule. In *Gosling v. Gosling, supra,* the vice-chancellor in supporting the rule of *Saunders v. Vautier, supra,* 49 Eng. Rep. at 282, said:

> If the property is once theirs, [the cestui's] it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full so soon as they attain twenty-one.

But such a statement is a reiteration of the rule, rather than a reason for the rule.

The truth is, that the problem is not one of legal logic, but one of public policy; that is to say, to what extent a testator or donor inter vivos should be allowed to control not only the disposition, but also the enjoyment of his property. 3 SCOTT, THE LAW OF TRUSTS § 337.3 (1939). The question is: Is there any reason of public policy against such a trust so insistent that it warrants a rule which defeats the settlor's intentions?

The court stated in the instant case, 74 A. (2d) at 348:

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

> cretion by reasonably deferring the unqualified enjoyment of the principal of his devise or bequest without explaining to the beneficiary and the public his reasons for doing so. . . . certainly a period of ten years does not materially offend public welfare.

Gray argues, GRAY, RESTRAINTS ON ALIENATION § 124 (2d. ed. 1920), that if a creditor or grantee can take possession only at the time when the trust ends, any sale by the cestui will be highly disadvantageous to him. If the cestui is a spendthrift his position will be worse than if he had received the property outright as he will be forced to sell at a ruinous discount. If the cestui is not a spendthrift there is no reason for such a trust. However, it would seem that such an argument should not be accorded the dignity of a "compelling public policy" which must override the testator's or settlor's intentions. Certainly the validity of the trust should not depend upon the testator's or settlor's wisdom or lack of it, but upon the inherent reasonableness of the conditions imposed from a legal standpoint. And as the court said in *DeLadson v. Crawford, supra,* 106 Atl. at 328:

> . . . the postponement of the enjoyment of the principal of a trust fund for ten years is not an unreasonable exercise of the undoubted right of the testator to impose conditions on the enjoyment of his bounty.

Nor can it be said that such restrictions on the cestui's enjoyment of the property are always unwise for there is not the danger that the cestui will spend the property when it is in the hands of the trustee as there would if it were his own. *Claflin v. Claflin, supra.* In many cases it may be desirable to place the management of the property in the hands of one experienced in business matters for a period beyond the time when the cestui attains the age of twenty-one without resorting to a spendthrift trust.

It would seem that the severest charge that can be made against holding postponement of enjoyment clauses valid is that they are either harmless, or in the extreme case where the cestui is a spendthrift, unwise. A defeat of the right of the owner of property to dispose of it in any way he sees fit, so long as such disposition does not contravene a positive rule of law or violate public policy, for so trivial a reason ought not to be allowed. It is submitted that the result in the instant case, giving effect to the testatrix's intention is correct.

Clifford A. Goodrich, Jr.

WILLS—CHARITIES—CHARITABLE BEQUEST FOR MASSES.—*Lanza v. Di Fronzo et al.,* .... Ohio St. ...., 92 N. E. (2d) 299 (1949). Antonio Di Fronzo, deceased, provided in Item 15 of his last will and testament as follows: "The balance of my estate to go for Masses for the repose of the souls of myself and my beloved wife,

Maria Di Fronzo." Robert F. Lanza, as executor of the last will and testament of Antonio Di Fronzo, deceased, brought proceedings against Michele Di Fronzo and others for construction of the will of the deceased. Certain defendants contended that Item 15 was ambiguous, uncertain, and without a beneficiary who might enforce same, and hence, they, as next of kin and heirs at law, should be entitled to the residue of the estate.

The evidence and testimony in the case which are undisputed, plainly brought out that the deceased and his wife were devout Catholics, members of St. Therese's Church, their names being carried on the records of the parish as such, and that they were regular attendants, and further that the last rites were administered to both of them by the pastor of St. Therese's Church. Funeral services were also held for them at this church. St. Therese's Church, as one of the defendants, claimed to be entitled to the benefits of Item 15.

The court laid the foundation for its decision by stating initially two basic tenets of law applicable to the construction of wills. The first rule is that which requires a court to ascertain and give effect to the intent of the testator determined from the whole will. This, the court does by placing itself in the position of the testator at the time of the execution of the will. The second rule is that which admits parol evidence to show the relationship of the testator, and his affection for those persons who are the natural objects of his bounty. This is necessary in order to discover the true intention of the testator. Applying the above rules the court found that it was the testator's intent to leave a major portion of his estate to be used for the saying of Masses for the repose of the souls of his wife and himself.

The crucial question then became whether or not a gift for the saying of Masses is valid in the State of Ohio. In order to decide this question several sub-questions demanded the court's attention. (1) Is a gift for Masses a charitable bequest? This question involves a consideration of whether such a bequest benefits one individual, the person for whom the Mass is said, or whether it benefits an indefinite number of persons, sufficiently numerous to place the bequest on the level of a public benefit. (2) If it is a charitable bequest, does it fail for lack of a beneficiary, seeing that the testator in his will neglected to mention anyone who might receive the money? In the present case the court gave its answer to these questions by holding that: (1) the gift was a charitable bequest; (2) the Mass benefits a large number of people in addition to the testator and his wife for whom the Masses would be offered; and, (3) the bequest would not fail for lack of a trustee since the court could correct the

omission by ordering the executor of the decedent's will to pay the funds to St. Therese's Church.

These same questions have been answered in a number of conflicting decisions during the past fifty years in Ohio and in other jurisdictions. However, it seems that the difficulty has not been so much that the bequests have failed, as that the courts have neglected to comprehend fully the necessary incidents of such essentials as the nature of the Mass, the function of Mass stipends, and the historical development of charitable bequests. The result has been inconsistent opinions expressed by courts on matters which should be uniform wherever decided.

Prior to examining the cases in the United States, we shall examine briefly, the early English law, which, at the time of the Reformation, militated against bequests for Masses for the dead. Although during the reign of Queen Elizabeth statutes outlawed the celebration of the Mass, yet these did not affect the disposition of property for this purpose. *Bourne v. Keane,* [1919] A. C. 815, 845. By 1835 the Roman Catholic Relief Acts of 1791, 31 Geo. 3, c. 32, and of 1829, 10 Geo. 4, c. 7, (repealed by the Roman Catholic Relief Act, 1926, 16 & 17 Geo. 5, c. 55), and the Roman Catholic Charities Act of 1832, 2 & 3 Will. 4, c. 115, had set the stage for the decision of Sir Charles Pepys, in *West v. Shuttleworth,* 2 My. & K. 684, 39 Eng. Rep. 1106 (1835). At the time this case was brought the celebration of the Mass was no longer illegal, and freedom of worship had been granted to Catholics. They could acquire and hold property for schools, religious worship, education and charitable purposes, subject to the mortmain statutes. In the *West* case, it was held that bequests in trust for the saying of Masses were void as a superstitious use. It was also decided that such bequests were not charitable since the testatrix herself intended to secure all the benefit, and did not intend to benefit the priests individually or the church generally.

West v. Shuttleworth, supra, authority for almost seventy-five years, was overruled in 1919 by the House of Lords in *Bourne v. Keane, supra.* It was held in this case that a bequest of a personal estate to have Masses said for the dead was not void as a gift to superstitious uses. This was only a partial closing of the door on the old rule, however, since the question of whether or not such gifts were charitable was left as previously decided in the *West* case.

The door was left partially open until 1934 when the English courts closed it by ruling that such bequests were for a charitable use. In *Lindeboom v. Camille,* [1934] 1 Ch. 162, Luxmore, J., in an excellent opinion, left no doubt that the mistakes and misconceptions concerning the nature of the Mass would not be duplicated in English courts again.

The courts of the United States have not been bothered by the problem which confronted their English brethren prior to 1919. Since this country was founded on safeguards which guaranteed religious liberty, the doctrine of superstitious uses which arose under the Chantries Act, 1547, 1 Edw. 6, c. 14, has never been the basis of barring bequests for Masses in the United States. *Hoeffer v. Clogan,* 171 Ill. 462, 49 N. E. 527 (1898).

In the case under discussion Judge Brewer has based his finding that the testator's bequest is for a charitable use on the solid foundation of authoritative Church treatises in addition to a number of outstanding decisions wherein the nature of the Mass was painstakingly examined in order to determine whether or not the benefit of the Mass was general and public or confined to the soul for whom it was offered. In re *Kavanaugh's Estate,* 143 Wis. 90, 126 N. W. 672 (1910), and cases cited therein; *Delaware Trust Co. v. Fitzmaurice,* 27 Del. Ch. 101, 31 A. (2d) 383 (Ch. 1943); 10 CATHOLIC ENCYCLOPEDIA 19 (1913); GIHR, THE HOLY SACRIFICE OF THE MASS (11th ed. 1935). The doctrine of the Catholic Church is expressed in the *Kavanaugh* case, *supra,* 126 N. W. at 675, as follows:

> According to the doctrine of the Catholic Church as established by the proof in this case, the whole church profits by every mass, since the prayers of the mass include all of the faithful, living and dead. The sacrifice of the mass contemplates that all mankind shall participate in its benefits and fruit. The mass is the unbloody sacrifice of the cross and the object for which it is offered up is in the first place, to honor and glorify God; secondly, to thank Him for His favors; third, to ask His blessing; fourth, to propitiate Him for the sins of all mankind. The individuals who participate in the fruits of this mass are the person or persons for whom the mass is offered, all of those who assist at the mass, the celebrant himself, and for all mankind, within or without the fold of the church.

This method of reasoning to substantiate charitable bequests has received the sanction of the majority of courts in the United States today. 2 BOGERT, TRUSTS § 376 (1935). Nevertheless, the court, in the case of *Sherman v. Baker,* 20 R. I. 446, 40 Atl. 11 (1898), stated that there is a diversity of opinion as to the execution of bequests for Masses. According to the *Sherman* case: "One class holds that they are good as charitable trusts, being for religious services." This seems to be the more prevalent view and is illustrated by the following cases: *Sedgwick v. National Savings and Trust Co. et al.,* 130 F. (2d) 440 (D. C. Cir. 1942); In re *Hamilton's Estate,* 181 Cal. 758, 186 Pac. 587 (1919), distinguishing In re *Lennon's Estate,* 152 Cal. 327, 92 Pac. 870 (1907), on the ground that that decision was based on the proposition that the bequest was for the benefit of the testator alone, which was a question of fact not controlling in the *Hamilton* case; *Hoeffer v. Clogan,* 171 Ill. 462, 49 N. W. 527 (1898); *Ackerman v. Fichter,* 179 Ind. 392, 101 N. E.

493 (1913); *Obrecht v. Pujos,* 206 Ky. 751, 268 S. W. 564 (1925); In re *Schouler,* 134 Mass. 426 (1883); *Webster v. Sughrow,* 69 N. H. 380, 45 Atl. 139 (1898); *Moran v. Kelly,* 95 N. J. Eq. 380, 124 Atl. 67, *aff'd,* 96 N. J. Eq. 699, 126 Atl. 924 (1924); *Kerrigan v. Tabb et al.,* 39 Atl. 701 (N. J. Ch. 1898); In re *Morris,* 227 N. Y. 141, 124 N. E. 724 (1919); In re *Kavanaugh's Estate, supra,* overruling *McHugh v. McCole,* 97 Wis. 166, 72 N. W. 631 (1897).

The court continued in the *Sherman* case, *supra*: "Another class holds that they are private trusts, which are void because there is no living beneficiary to enforce the trust." This statement is illustrated by the case of *Festorazzi v. St. Joseph's Roman Catholic Church,* 104 Ala. 327, 18 So. 394 (1893).

The court further said: "A third class holds that they are good as outright gifts for a specified legal object." In re *Ward's Estate,* 125 Cal. App. 717, 14 P. (2d) 91 (1932); In re *Lennon's Estate, supra;* Matter of *Zimmerman,* 22 Misc. 411, 50 N. Y. S. 395 (1898); *Sherman v. Baker, supra.*

To these three classes a fourth can be added, illustrated by the Iowa case of *Moran v. Moran,* 104 Iowa 216, 73 N. W. 617 (1897). This case held that a private trust was created which would be valid although not charitable.

The principal case has been placed in the class which upholds the majority view. As was stated in the opinion, only two reported decisions were found from Ohio. Neither of these were of aid to the court. In re *Estate of Riley,* 138 Ohio St. 145, 33 N. E. (2d) 987 (1941), did not raise the question of whether a gift for Masses was valid as a charitable use or not. *Fugman v. Theobald,* 12 Ohio Cir. Dec. 720, was reversed in 64 Ohio St. 473, 60 N. E. 606 (1901), the upper court sustaining a gift for the saying of Masses as a direct gift to a priest.

It seems unquestionable that the *Lanza* case will be followed in Ohio in the future and that it is bound to be cited by courts in other jurisdictions as similar cases arise, not only as authority in cases where a testator has failed to designate either a priest or church to accept his bequest for Masses, but also for its sound exposition of the nature of the Mass.

Edward J. Van Tassel

WORKMEN'S COMPENSATION—EFFECT OF EXTRATERRITORIAL PROVISIONS IN STATE COMPENSATION STATUTES.—*Daniels v. Trailer Transport Co.,* .... Mich. ...., 42 N. W. (2d) 828 (1950). The plaintiff, LeRoy Daniels, an Illinois resident, went to Texas and secured employment with defendant, Trailer Transport Co. The transport company had its home office in Michigan, but carried on its operations

in several states. The plaintiff, in entering his employment with the defendant, signed forms whereby he agreed to comply with all the requirements and regulations of the Interstate Commerce Commission, the insurance companies, and the Trailer Transport Company. He also elected to be bound and subject to the provisions of the Workmen's Compensation Law of the State of Michigan. The plaintiff, during the course of his employment, worked in six states for the defendant. While in such employment, he was severely injured in Tennessee and voluntarily was awarded compensation under the Tennessee act. He then sought compensation in Michigan, where the Workmen's Compensation Commission awarded him weekly compensation for total disability, less credit for the amounts paid under the Tennessee act. The defendants, the Trailer Transport Company, and the Pacific Employers Insurance Company, appealed the Michigan Commission's decision granting the award. The court held that when a Michigan corporation employs a non-resident by a contract made outside of the state, the Workmen's Compensation Act does not apply and the Commission has no jurisdiction to award or deny compensation for injuries to such an employee. The jurisdiction of the commission can neither be extended nor limited by agreement.

The problem presented was one of first impression in Michigan in which the court had to decide whether a non-resident, not employed in the state, whose contract was entered into and whose injury occurred outside of the state, was entitled to recovery under the Michigan Workmen's Compensation Act.

At common law it was usually held that the law of the state wherein the accident occurred was the law to be applied to the litigation of negligence cases. When workmen's compensation statutes were first enacted, it was only natural to apply the same principle: that is, the action is confined to the limits of the state in which the injury occurred. This is often referred to as the "tort" or "territorial" theory in which it is held, that unless the legislature had indicated expressly or impliedly a contrary intent, a compensation act is presumed to have no extraterritorial effect. *Tomalin v. S. Pearson & Son, Limited,* [1909] 2 K. B. 61. This theory seems to have influenced the Massachusetts court in deciding In re *Gould,* 215 Mass. 480, 102 N. E. 693 (1913), the first case in the United States construing a workmen's compensation statute, and which held that the Massachusetts Act had no extraterritorial effect. The position has found very little support in this country with the exception of *Sheehan Pipe Line Construction Co. v. State Industrial Commission,* 151 Okla. 272, 3 P. (2d) 199 (1931). In fact the Massachusetts position has since been changed by statute. MASS. ANN. LAWS c. 152, § 26 (1950), construed in *McLaughlin's Case,* 274 Mass. 217, 174 N. E. 338 (1931). With regard to the change of the common law

rule by statutory enactment, Mr. Justice Sutherland speaking for the Supreme Court in *Cudahy Packing Co. of Nebraska v. Parramore,* 263 U. S. 418, 423, 48 S. Ct. 153, 68 L. Ed. 366 (1923), stated:

> The modern development and growth of industry, with the consequent changes in the relations of employer and employee, have been so profound in character and degree as to take away, in large measure, the applicability of the doctrines upon which rest the common law liability . . . leaving of necessity a field of debatable ground where a good deal must be conceded in favor of forms of legislation, calculated to establish new bases of liability more in harmony with these changed conditions.

Numerous states have statutory provisions of similar import to that of the Michigan statute, precluding extraterritorial effect of the statute except in cases both where the injured employee is a resident of the state and the contract of employment was made within the state. Cases construing such statutes are: *Severing et al. v. Industrial Commission et al.,* 363 Ill. 217, 2 N. E. (2d) 65 (1936); *Elkhart Sawmill Co. v. Skinner,* 111 Ind. App. 695, 42 N. E. (2d) 412 (1942); *Liggett and Myers Tobacco Co. v. Goslin,* 163 Md. 74, 160 Atl. 804 (1932); *Ritenour v. Creamery Service Inc.,* 19 N. J. Misc. 82, 17 A. (2d) 283 (1941); *Raiola v. Union Stevedoring Corp.,* 268 App. Div. 837, 50 N. Y. S. (2d) 242 (1944); *Buhler v. Maddison,* 105 Utah 39, 140 P. (2d) 933 (1943).

The court, in the instant case, was governed by MICH. STAT. ANN. § 17.193 which provides that:

> The industrial action board shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state, in those cases where the injured employe is a resident of this state at the time of the injury, and the contract of hire was made in this state, and any such employe or his dependents shall be entitled to the compensation or death benefits provided by this act.

The court decided that the factual situation did not bring it within the provisions of the statute, and therefore the compensation commission exceeded its jurisdiction in the granting of the award. Neither statutory condition was met as plaintiff was not a resident of the state of Michigan at the time of the injury, nor was the contract of hire made in the state. There is no support for the plaintiff's argument that the section is only a portion of the procedural part of the act. The Supreme Court of Michigan, in construing the above statute in an earlier case, *Cline v. Byrne Doors, Inc.,* 324 Mich. 540, 37 N. W. (2d) 630, 633 (1949), held that under the provisions in the Michigan statute the claimant's right to compensation depends on whether he was employed by virtue of a contract of hire made in the state.

Some jurisdictions have extraterritorial provisions in their statutes, enacted to protect those employed in the state who are incidentally