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Recent Decisions

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Statutes affecting both theories, though effective and expedient for the moment, often destroy the last traces of logical analysis. Not that this "destruction" strikes at the heart of any crucial jurisprudence, but it does make prediction by counsel advising clients considerably more difficult. Legislation should, whenever possible, promote the logical, scientific growth of the law, as Cardozo put it, since this responsibility is not that of the courts alone, but rests upon members of the bar generally and, moreover, upon legislators.

James J. Haranzo

Bernard James McGraw

James F. O'Rieley

RECENT DECISION

CONSTITUTIONAL LAW — SEARCHES AND SEIZURES — USE OF CONCEALED RADIO TO GATHER INCRIMINATING EVIDENCE. — *On Lee v. United States*, ...U.S....., 72 S. Ct. 967, 96 L. Ed. *770 (1952). Chin Poy, a paid Government informer, entered petitioner's laundry and engaged him in an incriminating conversation concerning illegal sales of opium. At the time of this conversation, the petitioner was at large on bail following his arrest for the illegal sale of narcotics. Unknown to petitioner, Chin Poy had concealed on his person a radio transmitter which carried the conversation outside the laundry to a receiving set manned by a federal agent. At the trial, against objection, the agent was allowed to relate the conversation overheard in this unusual "comic strip" method. The petitioner, On Lee, was convicted of selling one pound of opium in violation of 35 STAT. 614 (1909), as amended, 21 U.S.C. §§ 173, 174 (1946), and of conspiracy to sell opium in violation of 18 U.S.C. § 371 (Supp. 1951).

The court of appeals affirmed the judgment of conviction. But a dissent warned that the Fourth Amendment must protect privacy from the unbridled wonders of scientific progress. *See United States v. On Lee*, 193 F. (2d) 306, 311 (2d Cir. 1951) (dissenting opinion). On review a bare majority of the Supreme Court affirmed the judgment and refused to abandon the basic position adopted in *Olmstead v. United States*, 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (protection against wire tapping not provided by the Fourth and Fifth Amendments). In dissent, Justices Black, Frankfurter, Douglas and Burton would have rejected the *Olmstead* thesis entirely, or considered that case not controlling in the circumstances presented.

When there is no clear taking of tangible property, the Court has avoided extending the protection of the Fourth Amendment. This stand has never received unanimous approval and a conflict has arisen over the proper analysis of the historic precedents underlying both majority and minority views. The instant case, with its unusual electronic eavesdropping, presented the situation which was anticipated by Justice Brandeis' dissenting opinion in the *Olmstead* case, *supra,* 277 U.S. at 473: "Subtler and more far-reaching means of invading privacy have become available to the Government."

In *Olmstead v. United States, supra,* two divergent interpretations of the Fourth Amendment conflicted. Over dissents by Justices Holmes, Brandeis, Butler and Stone, evidence obtained by wire tapping was held admissible. Chief Justice Taft reasoned, for the majority, that the Fourth Amendment was intended to be strictly construed according to its express language, and that intangible, immaterial things were not within the Amendment's protection. *Olmstead v. United States, supra,* 277 U.S. at 463-6. The dissent of Justice Brandeis is an impressive challenge of the majority position, striking as it does at the core of the analysis — the precedents involved. He regarded the Fourth and the Fifth Amendment as a protection of the private citizen's right to be let alone whatever the means used by Government to effect the invasion of privacy. *Olmstead v. United States, supra,* 277 U.S. at 471-9. In his dissent in the case under examination, Justice Douglas refers to this plea for the cause of privacy and hails it as "an historic statement of that point of view." *On Lee v. United States, supra,* 72 S. Ct. at 676.

At common law, evidence which meets the tests of relevancy and verity is admissible, and the fact that it was obtained illegally or through some stratagem is immaterial. *Olmstead v. United States, supra,* 277 U.S. at 467; *Adams v. New York,* 192 U.S. 585, 24 S. Ct. 372, 48 L. Ed. 575 (1904); 8 WIGMORE, EVIDENCE § 2183 (3d ed. 1940); Morgan, *The Law of Evidence, 1941—1945,* 59 HARV. L. REV. 481, 535-41 (1946). The strict majority view of *Olmstead* is therefore in accord with basic evidence rules isolated from constitutional considerations. Generally, the Fourth Amendment can only be invoked when there has been a search or seizure of a person, house, papers or material effects. *Hester v. United States,* 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 898 (1924). No search was shown when the Coast Guard used a searchlight to sweep the decks of a motor boat running liquor illegally, the Court holding the practice similar to the use of a spy glass and not within the Fourth Amendment. United States v. Lee, 274 U.S. 559, 563, 47 S. Ct. 746, 71 L. Ed. 1202 (1927). Evidence gathered by federal officers after gaining entry into a lodge by false cards was held admissible in *United States v. Wainer,* 49 F. (2d) 789 (W.D. Pa. 1931). Similarly,

evidence obtained by eavesdropping officers hidden by an informer has a valid corroborating effect. *Wiggins v. United States,* 64 F. (2d) 950, 952 (9th Cir. 1933) *semble, cert. denied,* 290 U.S. 657, 54 S. Ct. 72, 78 L. Ed. 569 (1933). In *United States v. Feldman,* 104 F. (2d) 255 (3d Cir. 1939), *cert. denied,* 308 U.S. 579, 60 S. Ct. 97, 84 L. Ed. 485 (1939), federal officers detected the odor of whisky being made and charged in for an arrest without obtaining a warrant. No unlawful search was involved. In *Goldman v. United States,* 316 U.S. 129, 62 S. Ct. 993, 86 L. Ed. 1322 (1942), the Court upheld the use of a detectaphone. This is a device which is attached to the outer walls of a room to pick up conversation within. Chief Justice Stone and Justices Frankfurter and Murphy thought that the time was ripe to overrule the "stultifying" construction adopted in the *Olmstead* case.

The view of the dissenters in the *Olmstead* case has been partially vindicated by congressional action which resulted in the enactment of § 605 of the Federal Communications Act of 1934. 48 STAT. 1103 (1934), 47 U.S.C. § 605 (1946). Section 605 prohibits the disclosure of intercepted interstate messages sent by wire or radio. The Court has interpreted this section as placing a ban on the use in federal courts of evidence obtained through wire tapping. *Nardone v. United States,* 302 U.S. 379, 58 S. Ct. 275, 82 L. Ed. 314 (1937); *Nardone v. United States,* 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307 (1939). However, it is the rationale of the *Olmstead* decision which those advocating a more liberal interpretation would upset. Justice Murphy, dissenting in *Goldman v. United States, supra,* 316 U.S. at 141, points out:

> It is strange doctrine that keeps inviolate the most mundane observations entrusted to the permanence of paper but allows the revelation of thoughts uttered within the sanctity of private quarters. . . .

Although dissents in *Olmstead, Goldman* and the instant case call for an extended and what can be called a new construction of the Fourth Amendment, some justification for this concept appears early in the famous civil rights case of *Boyd v. United States,* 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886). There, a statute compelled the production of pertinent papers and records in forfeiture proceedings. No search or seizure in the technical sense took place, but the Court noted the relation of the Fourth and Fifth Amendments and held the statute violative of both. As to interpreting the Amendments, the Court stated, 6 S. Ct. at 535:

> A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

After the *Olmstead* ruling, but prior to the decision in *Nardone v. United States, supra,* it was permissible to cross-examine federal officers on the wire tapping issue for purposes of discrediting them as witnesses. *Morton v. United States,* 60 F. (2d) 696, 699 (7th Cir. 1932). When officers entered the home of a person implicated in an auto accident without a warrant, and heard the person admit an incriminating fact, subsequent testimony concerning this statement was held inadmissible. *Neuslein v. District of Columbia,* 115 F. (2d) 690 (D.C. Cir. 1940). Although the thing found in this search was a statement, a violation of the Fourth Amendment occurred since security of the privacy of the home was regarded as within constitutional protection. *Nueslein v. District of Columbia, supra,* 115 F. (2d) at 692-6. The absence of express or implied consent to the entry in the *Nueslein* case provides the basis for distinguishing it from the instant case. The false credentials strategy approved in *United States v. Wainer, supra,* was subsequently disapproved in *Fraternal Order of Eagles, No. 778 v. United States,* 57 F. (2d) 93 (3d Cir. 1932) (Fourth Amendment violated). Prior to the allowance of wire tapping, the Court ruled that evidence acquired by federal officers through stealth amounted to an unreasonable search and seizure. *Gouled v. United States,* 255 U.S. 298, 41 S. Ct. 261, 65 L. Ed. 647 (1921). However, in *Olmstead v. United States, supra,* 277 U.S. at 463, *Gouled* was confined to its precise facts.

In addition to finding no violation of the Fourth Amendment in the instant case, the Court refused to apply the rule which excludes evidence obtained in violation of fair law enforcement policy. *McNabb v. United States,* 318 U.S. 332, 63 S. Ct. 608, 87 L. Ed. 819 (1943). While the Court again recorded its reluctance to overthrow the tests for construing the Fourth Amendment laid down in *Olmstead,* it made clear that the present controversy was at best only a tenuous analogy to wire tapping. Since federal law now forbids the use of evidence obtained through wire tapping, it is unlikely that a clear opportunity to overrule *Olmstead* will ever be squarely presented. Although it is unwise to handcuff law enforcement unnecessarily in the continuing effort to protect the community, the liberal view shows that effective and secure civil liberty must also evolve. Scientific devices, like the radio set in the instant case, emphasize the tension between public and private rights. While considering the constant "war" against crime, the dissenting argument centers on the concept of personal freedom, preferring to heed the warning of Justice Brandeis, dissenting in *Olmstead v. United States,* 277 U.S. at 479, "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

Thomas D. Logan

CRIMINAL LAW — USE OF THE PHRASE "SO FAR AS PRACTICABLE" IN AN ADMINISTRATIVE DEFINITION OF A CRIME. — *Boyce Motor Lines, Inc. v. United States,* ....U.S....., 72 S. Ct. 329, 96 L. Ed. *249 (1952). The petitioner trucking company was charged with violating a regulation of the Interstate Commerce Commission; 49 CODE. FED. REGS. § 197.1 (b) (1949), which provides that:

> Drivers of motor vehicles transporting any explosive, inflammable liquid, inflammable compressed gas, or poisonous gas shall avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings.

The statute which authorized the regulation established the penalty and also made culpable intent a prerequisite of the offense. 18 U.S.C. § 835 (Supp. 1951).

The petitioner was charged with transporting a dangerous inflammable liquid through the Holland Tunnel on three occasions. On the third trip, sixty persons were injured when the liquid exploded. The indictment stated that there were other and more practicable routes available, and that the petitioner knew that use of the route through the Holland Tunnel was a violation of the regulation. The district court dismissed the indictment, reasoning that the regulation lacked certainty and made the standard of guilt mere conjecture. *United States v. Boyce Motor Lines, Inc.,* 90 F. Supp. 996, 998 (D. N.J. 1950). The court of appeals reversed, pointing out that the statute required actual wrongful intent. 188 F. (2d) 889, 891 (3d Cir. 1951). This judgment was affirmed by the Supreme Court and the regulation regarded as sufficiently clear — when considered in the light of practical necessity. Justice Jackson, joined by Justices Black and Frankfurter, dissented, insisting on a more intelligible standard of definiteness.

The question presented is whether the use of the phrase "so far as practicable," is so vague and indefinite as to make conjectural the standard of guilt which is sought to be set up by the regulation.

When the elements of actual knowledge of the wrong and specific intent are coupled within the regulation, as required by the statute, an important safeguard against unfairness is added. This requirement, however, does not necessarily render certain or provide a definite standard of what is or what is not a crime under the regulation. But as stated in *Screws v. United States,* 325 U.S. 91, 102, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945), ". . . it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware."

Generally, a statute defining a crime should be clear enough to inform those who come within its reach. When men of common intelligence must guess as to the meaning of a penal statute and there is a diver-

gence of interpretation, the Court has declared this vagueness violative of due process. *Connally, Commissioner, v. General Construction Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926). This attempt to formulate some test for determining fatal vagueness in criminal statutes was favorably noted in *Winters v. New York*, 333 U.S. 507, 518, 68 S. Ct. 665, 92 L. Ed. 840 (1948), where the Court struck down for lack of definiteness a New York statute banning the distribution of lurid crime magazines. *Accord: Lanzetta v. New Jersey*, 306 U.S. 451, 59 S. Ct. 618, 83 L. Ed. 888 (1939); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 41 S. Ct. 298, 65 L. Ed. 516 (1920). Traditional notions of fair play impose upon government the duty to promulgate definite and certain criminal laws. In the effort to preserve communal peace, the citizen should be protected by reasonable and fair notice. *See Pierce v. United States*, 314 U.S. 306, 311, 62 S. Ct. 237, 86 L. Ed. 226 (1941); *Cantwell v. Connecticut*, 310 U.S. 296, 307, 60 S. Ct. 900, 84 L. Ed. 1213 (1940). What particular course of conduct is "practicable" may often depend on individual judgment. There is authority to the effect that where the criminal law is concerned, due process will not be allowed to rest on some equivocal word. *Connally, Commissioner, v. General Construction Co., supra*, 269 U.S. at 395.

However, in *Nash v. United States*, 229 U.S. 373, 33 S. Ct. 780, 781, 57 L. Ed. 1232 (1913), the Court pointed out that:

> . . . the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death.

In the *Nash* case, the validity of the Sherman Act, 26 STAT. 209 (1890), as amended, 50 STAT. 693 (1937), 15 U.S.C. § 1 *et seq.* (1946), was challenged, and on the question of definiteness the Court held that words having a well settled common law meaning meet the test of certainty. *Nash v. United States, supra*, 33 S. Ct. at 781; *cf. International Harvester Co. v. Kentucky*, 234 U.S. 216, 34 S. Ct. 853, 855-6, 58 L. Ed. 1284 (1914). Similarly, when statutes contain words with special or technical meanings which are well known to those governed by the law, they have been held valid. *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 502, 45 S. Ct. 141, 69 L. Ed. 402 (1925); *Omaechevarria v. Idaho*, 246 U.S. 343, 38 S. Ct. 323, 325, 62 L. Ed. 763 (1918). Both the *Hygrade* and *Omaechevarria* cases involved statutes which, like the principal case, required a specific intent. More apposite to the instant case are *United States v. Thornburg*, 6 Fed. 41 (S.D. Ohio), *aff'd sub nom. United States v. Wise*, 7 Fed. 190 (C.C.S.D. Ohio 1881), and *The Benton*, 51 Fed. 302 (E.D. Mo. 1892). These cases involved a statute forbidding the carrying of inflammables on passenger vehicles. Exception was made as to petroleum of a certain fire test where there was no other "practicable" mode of transportation. "Practi-

cable" was construed as being used in the commercial sense as distinguished from a physical or mechanical sense.

Judicial definitions of the word "practicable" vary widely according to the particular circumstances. Generally, the courts define it as possible, feasible, that which is capable of performance, or that which may be accomplished. *E.g., Streeter v. Streeter*, 43 Ill. 155, 165 (1867); *Walbridge v. Brooklyn Trust Co.*, 143 App. Div. 502, 128 N.Y. Supp. 686, 690 (2d Dep't 1911). And see 33 WORDS AND PHRASES 170 (1940). Isolated definitions add little to understanding the use of the word in a given statute, and in the final analysis the meaning depends largely on context. *Holyfield v. State*, 124 Tex. Crim. App. 422, 63 S.W. (2d) 386, 388 (1933).

In the instant case, both the court of appeals and the Supreme Court relied heavily on *Sproles v. Binford, Sheriff*, 286 U.S. 374, 52 S. Ct. 581, 76 L. Ed. 1167 (1932), in upholding the regulation as sufficiently definite. There, Chief Justice Hughes, speaking for a unanimous Court, said, 286 U.S. at 393:

> "Shortest practicable route" is not an expression too vague to be understood. The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding. . . . The use of common experience as a glossary is necessary to meet the practical demands of legislation.

However, as Justice Jackson points out in his dissent in the instant case, 72 S. Ct. at 333, there was a clear standard in *Sproles* — "distance." Therefore, in the *Sproles* case there was injected a tangible element which sufficiently clarified the words "practicable route."

The end of regulating the transportation of dangerous explosives on public highways should be safety, but in achieving this end, clarity in the regulation itself cannot be sacrificed. In the interest of both safety and clarity, more comprehensive regulations should perhaps be issued, since practical and workable administrative action should not be forced to rely on the generic language of omnibus legislation.

Charles L. Daschle

FEDERAL TRADE-MARK ACT — CONFLICT OF LAWS — ACTS COMMITTED OUTSIDE UNITED STATES. — *Bulova Watch Co. v. Steele*, 194 F. (2d) 567 (5th Cir. 1952). The Bulova Watch Company, a New York corporation, brought this action against Sidney Steele, a citizen of the United States actually domiciled and residing in Texas. The plaintiff sought to enjoin Steele from using the name "Bulova" on watches in Mexico and to recover damages resulting from such use. Steele operates a watch business in Mexico. He buys some parts from

companies in the United States, assembles watches, stamps them with the name "Bulova" and sells them *in Mexico*. Evidence showed that in 1933 a Mexican trade-mark was granted to S. Steele, Y Cia., S. A., the predecessor in title to Sidney Steele. This grant gave Steele the right to use the name "Bulova" in the Republic of Mexico as a trade name for watches. The Bulova Watch Company had brought an action against Steele in the Mexican courts to prevent him from using the name "Bulova" on the watches he sold. The result of the litigation was in favor of Steele. The District Court for the Western District of Texas dismissed this action below stating that the subject matter of this suit and the acts of Steele were beyond the jurisdiction and control of both the state and federal governments. The court of appeals reversed, holding the district court did have jurisdiction.

The question of jurisdiction here is not concerned with the personal jurisdiction over the parties. It is not a question of jurisdiction based upon citizenship. *Milliken v. Meyer,* 311 U.S. 457, 463, 61 S. Ct. 339, 85 L. Ed. 278 (1940). Steele was personally served within Texas, so jurisdiction *in personam* is not disputed. The question of jurisdiction here has to do with whether or not the Lanham Trade-Mark Act, 60 STAT. 427, 15 U.S.C. §§ 1051-1127 (1946), gave the court jurisdiction over the subject matter complained of since the acts were committed in Mexico.

The holding of this case presents two legal problems worthy of comment: the interpretation of the Lanham Trade-Mark Act as to what acts it may regulate; the conflict of laws question whether an American court can pass upon acts done wholly outside the United States and which have been adjudicated lawful there.

Congress has the power to legislate on trade-marks and trade names only by reason of the Commerce Clause. A trade-mark is neither an invention, a discovery, nor a writing within the constitutional provision protecting patents and copyrights. *Trade-Mark Cases,* 100 U.S. 82, 25 L. Ed. 550, 551, 552 (1879).

The Lanham Trade-Mark Act aims to regulate trade-marks used in commerce. The Act, 60 STAT. 443, 15 U.S.C. § 1127 (1946), defines "commerce" as "all commerce which may lawfully be regulated by Congress." This definition is broad but is not all inclusive. In the absence of some relationship to interstate or foreign commerce, business activity will not come within the term. *Samson Crane Co. v. Union Nat. Sales, Inc.,* 87 F. Supp. 218, 221 (D. Mass. 1949), *aff'd,* 180 F. (2d) 896 (1st Cir. 1950).

What constitutes interstate or foreign commerce has been the subject of litigation since the adoption of our Constitution. The slightest variation in the facts of the case often produces a change in the decision. *Wagner v. City of Covington,* 251 U.S. 95, 40 S. Ct. 93, 64 L. Ed. 157

(1919); *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23 (U.S. 1824). In ROTTSCHAEFER, CONSTITUTIONAL LAW §§ 136-8 (1939), it was stated very concisely for our purpose:

> The factor that appears to be requisite in order that activities or transactions constitute interstate commerce is that there be an actual interstate movement of goods or persons, or that the transaction contemplates or necessarily involves such movement. The same principles, mutatis mutandis, would apply in determining whether a given activity or transaction constituted foreign commerce.

The stated facts in the case under discussion include only incidentally this actual or contemplated interstate or inter-country movement of goods. Cases and dials purchased in the United States, together with watch mechanisms from Switzerland, are assembled, stamped with the name "Bulova," and sold, *in Mexico*. There was neither allegation nor proof that Steele sold watches in the United States. It is true that some of the watches found their way into the United States, but not as the proximate result of the acts of Steele. To support its finding of jurisdiction, the majority advanced the following grounds: Steele was both a citizen and a domiciliary of the United States, he had been personally served in this country, and he had done acts in this country which had a substantial effect on foreign commerce and which also resulted in injury to the Bulova Watch Company within the United States. 194 F. (2d) at 571.

The arguments in the dissent, 194 F. (2d) at 572, by Judge Russell were very straightforward and logical. His view was that the Lanham Trade-Mark Act, as interpreted by the majority, was an attempt to prescribe a standard of fair competition for the nations of the world. He also stated that the majority was declaring illegal the acts of Steele, done in Mexico in accordance with a legal grant and upheld in the Mexican courts, merely because the perpetrator of the acts was an American citizen subject to the jurisdiction of American courts. An American citizen must obey the law of a foreign sovereign when he goes to that country to engage in business. He has his rights and duties under that law. When he follows the law of that country his acts should not be subject to the standards of his domicile too, merely because of his citizenship.

In *Vacuum Oil Co. v. Eagle Oil Co.*, 122 Fed. 105, 106 (C.C.D.N.J. 1903), an action was brought to enjoin infringement of complainant's trade-mark in the German Empire with regard to the word "Vacuum." The parties agreed that trade-marks registered in the United States did not afford any protection against acts committed wholly in foreign countries. The court decided that such an action was one sounding in tort and should be governed by the law of the place where the alleged wrong was committed. Since the acts complained of were not contrary to the law of Germany, the court in America recognized the sovereignty of Germany by giving effect to its laws.

The authorities are uniform in holding that the law of the place where the wrong was committed governs in tort actions. *Cuba R.R. v. Crosby,* 222 U.S. 473, 32 S. Ct. 132, 56 L. Ed. 274 (1912); *Slater v. Mexican National R.R.,* 194 U.S. 120, 24 S. Ct. 581, 583, 48 L. Ed. 900 (1904); RESTATEMENT, CONFLICT OF LAWS § 379 (1934).

The leading case on this subject is *American Banana Co. v. United Fruit Co.,* 213 U.S. 347, 29 S. Ct. 511, 53 L. Ed. 826 (1909). It involved an action under the Sherman Anti-Trust Act to recover triple damages and to protect trade from monopolies. There was an alleged conspiracy by persons in the United States to do certain acts in Central and South America aimed at driving competitors out of business. The case held that since all the acts complained of were committed outside the United States and were not regarded as illegal where committed, they were not actionable in the United States. The Court stated, 29 S. Ct. at 512: "But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."

In *Ingenohl v. Olsen & Co.,* 273 U.S. 541, 544, 47 S. Ct. 451, 71 L. Ed. 762 (1927), the Supreme Court held that a trade-mark registered in one jurisdiction has only such validity and protection in a foreign country as the foreign law accords it. Bulova Watch Company has litigated with Steele as to the ownership of the trade-mark in Mexico. The Mexican court decided that Steele acted in accordance with Mexican law in regard to his use of the trade-mark. Can the American courts now redecide the existence or non-existence of Steele's right to use that trade-mark *in Mexico*?

The majority's reasoning on this point was that Steele was under no legal duty to use the name "Bulova." He was merely granted the privilege to use it. Therefore, if the United States exercises its jurisdiction over its nationals here, argued the majority, it would not involve a conflict with the sovereignty of the Republic of Mexico.

Once the Bulova Watch Company brought an action against Steele in Mexico it should have been bound by that determination. *Spann v. Compania Mexicana Radiodifusora Fronteriza, S.A.,* 131 F. (2d) 609, 611 (5th Cir. 1942). The plaintiff made the election and should be bound by it.

Should this case go to the United States Supreme Court, it is the opinion of this writer that the Court will find it difficult to affirm in the light of the law and logic of the dissent.

R. Emmett Fitzgerald

FORFEITURES — ILLEGAL SEIZURE OF CHATTEL BY FEDERAL OFFICERS AS BAR TO FORFEITURE. — *United States v. One 1949 Model Ford Coach Automobile,* 101 F. Supp. 492 (W.D. S.C. 1951). The United States brought this proceeding under 53 STAT. 362 (1939), 26 U.S.C. § 3116 (1946), to forfeit an automobile on the grounds that its owner, Thelma Roach, had not paid a special tax levied upon retail liquor dealers and had used the car to effect the illegal sale of liquor. Two investigators of the Alcohol Tax Unit went to Roach's place of business and, without a warrant or other legal process, demanded and seized the automobile. This action was then instituted. Roach intervened as claimant and moved to dismiss the Government's libel on the grounds that the original seizure of the automobile was unlawful and in violation of the Fourth Amendment to the United States Constitution. The court granted the motion to dismiss, thus adhering to the principle that an unlawful seizure prevents the court from acquiring jurisdiction upon the filing of a libel for forfeiture of the seized chattel.

The principal issue in the instant case was whether the illegality of a seizure by federal officers of an automobile used in violation of the Internal Revenue Code was a bar to the suit instituted by the United States for the forfeiture of the automobile.

The great majority of cases arising on this point have held that the illegality of the seizure has no effect on the forfeiture action. This rule was explained by Justice Brandeis in *Cook v. United States,* 288 U.S. 102, 121, 53 S. Ct. 305, 77 L. Ed. 641 (1933):

> . . . the fact that the possession was acquired by a wrongful act is immaterial. . . . The doctrine rests primarily upon the common-law rules that any person may, at his peril, seize property which has become forfeited to, or forfeitable by, the Government; and that proceedings by the Government to enforce a forfeiture ratify a seizure made by one without authority, since ratification is equivalent to antecedent delegation of authority to seize.

In the *Cook* case, the United States Coast Guard, in violation of a treaty, seized a British rum-runner; the court therefore reasoned that since the United States itself lacked authority to make the seizure because of the limitations imposed by the treaty, there could be no ratification of the seizure. The application of the rule was denied since both the United States and the actual seizors were totally bereft of all authority.

A number of federal cases voiced this rule at an early date. *Taylor v. United States,* 3 How. 197, 11 L. Ed. 559, 563 (U.S. 1845); *The Merino,* 9 Wheat. 391, 6 L. Ed. 118, 121 (U.S. 1824); *The Caledonian,* 4 Wheat. 100, 4 L. Ed. 523, 525 (U.S. 1819); *Gelston v. Hoyt,* 3 Wheat. 246, 4 L. Ed. 381, 397 (U.S. 1818); *The Richmond,* 9 Cranch 102, 3 L. Ed. 670, 671 (U.S. 1815). The reasoning underlying the

rule appeared again in *United States v. Pacific Finance Corp.*, 110 F. (2d) 732, 733 (2d Cir. 1940):

> . . . forfeiture takes effect immediately upon the commission of the illegal act and the later proceedings culminating in the judicial condemnation of the property are only for the purpose of perfecting the title in the United States.

Pacific Finance, supra, and In re *Ford Sedan,* 26 F. Supp. 146 (D. Minn. 1938), presented instances where certain phraseology in legislation was extremely influential. Both cases involved violations of REV. STAT. § 3062 (1875), as amended, 49 STAT. 526 (1935), 19 U.S.C. § 483 (1946), which provides that property used in violation of its terms shall be seized and forfeited, with no provision made for the issuance of a warrant.

This rule thus requires only that the Federal Government be in possession of the res at the time of the filing of the forfeiture libel; the manner in which the possession was acquired is immaterial. *Strong v. United States,* 46 F. (2d) 257, 260 (1st Cir. 1931); *Bourke v. United States,* 44 F. (2d) 371 (6th Cir. 1930); *United States v. 673 Cases of Distilled Spirits and Wines,* 74 F. Supp. 622 (D. Minn. 1947). Justice Story, speaking for the Court in *Wood v. United States,* 16 Pet. 342, 10 L. Ed. 987, 994 (U.S. 1842), crystallized this rule when he stated:

> . . . the United States are not bound down by the acts of the seizors to the causes which influenced them in making the seizure, nor by any irregularity on their part in conducting it, if in point of fact the seizure can now be maintained as founded upon an actual forfeiture thereof at the time of the seizure. . . .

The underlying foundation of all these cases is that the action for forfeiture of property which was illegally seized is not governed by the same rules, nor is it surrounded by the constitutional safeguards, which are applicable to the criminal case where the fruits of the illegal seizure are attempted to be introduced into evidence and used against the accused. *United States v. Eight Boxes,* 105 F. (2d) 896, 898, 900 (2d Cir. 1939).

The minority rule, as exemplified by the instant case, does not recognize this distinction. Under this rule, the power and authority of the federal court in forfeiture proceedings is predicated on lawful possession of the res by the court, which lawful possession cannot be based upon an unlawful seizure of the res by federal officers. *Daeufer-Lieberman Brewing Co. v. United States,* 8 F. (2d) 1 (3d Cir. 1925). If, however, the original seizure was effected by state officers, the United States can adopt it, and a subsequent forfeiture action will not be affected by the illegality of the seizure. *Dodge v. United States,* 272 U.S. 530, 532, 47 S. Ct. 191, 71 L. Ed. 392 (1926).

The instant case relied heavily upon *United States v. Plymouth Coupe,* 182 F. (2d) 180 (3d Cir. 1950), where the court held that the

Government's unlawful possession of a chattel could not sustain the court's jurisdiction in a proceeding instituted for its forfeiture. But *Plymouth* admitted the authority to the contrary and reached its decision only by an expressed unwillingness to overrule its prior decision in *Daeufer-Lieberman, supra. United States v. Plymouth Coupe, supra,* 182 F. (2d) at 182. The instant case, 101 F. Supp. at 495, quotes a passage from the *Plymouth* case, *supra,* wherein *Cook v. United States, supra,* is cited as substantiating the rule of *Daeufer-Lieberman, supra.* It is submitted that the *Cook* case is not authority for *Daeufer-Lieberman,* since *Cook* presented an instance where a treaty took away the power of the United States itself to make the seizure, and thus no ratification could be made. Absent the treaty, the United States would have had authority to seize for the prohibited offense, and Justice Brandeis' quoted rule would have applied.

Thus *Daeufer-Lieberman Brewing Co. v. United States, supra,* stands as the bed-rock of the third circuit minority. But a critical analysis of the *Daeufer-Lieberman* rule was made in *United States v. 673 Cases of Distilled Spirits and Wines,* 65 F. Supp. 896, 899 (D. Minn. 1946), where the conclusion was that the authority which *Daeufer-Lieberman* relied on actually substantiated the opposite view — the view in force in the first, second and sixth circuits.

The distinction between the use of illegally seized evidence in a criminal suit and an "illegal" seizure followed by an action for the forfeiture of the seized property was pointed out in *Boyd v. United States,* 116 U.S. 616, 6 S. Ct. 524, 528, 29 L. Ed. 746 (1886):

> The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo.* In the one case, the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government.

It is submitted that this distinction is valid, and that the failure to observe it has resulted in the minority reaching from *Daeufer-Lieberman, supra,* to the instant case. Had the court in the *Plymouth Coupe* case, *supra,* analyzed and evaluated this distinction, it is very possible that the circuits would now be in agreement in holding that the illegal seizure by federal officers has no effect on the subsequent action by the United States for the forfeiture of the seized chattel.

Richard M. Di Valerio

MUNICIPAL CORPORATIONS — IMMUNITY FROM LIABILITY IN OPERATION OF MUNICIPAL AIRPORT. — *Van Gilder v. City of Morgantown*, ...W. Va....., 68 S.E. (2d) 746 (1949). When the plaintiff's airplane was destroyed by fire while stored at the Morgantown municipal airport, he sued the city for breach of bailment. The Supreme Court of Appeals of West Virginia held that the city, both in operating the airport and in renting hangar space, was performing a governmental function, and that therefore the immunity of the state from suit was applicable as a bar to the action. W. VA. CODE ANN. § 2786 (10) (1949), under which the case was decided, provides:

> The acquisition of any lands or interests therein pursuant to this article, the planning, acquisition, establishment, construction, improvement, maintenance and operation of airports and air navigation facilities, whether by the State separately or jointly with any municipalities, and the exercise of any other powers herein granted to the commission are hereby declared to be public and governmental functions, exercised for a public purpose, and matters of public necessity. . . .

The significance of the case lies in the fact that the immunity from liability was created, not by the express terms of the statute declaring the operation of an airport a governmental function, but by judicial construction as necessarily implied in "governmental function." The general rule, in the absence of statute, is that the act of a municipality in acquiring and operating an airport is strictly a proprietary function for which ordinary liability attaches. *City of Mobile v. Lartigue*, 23 Ala. App. 479, 127 So. 257, 260 (1930); *Coleman v. City of Oakland*, 110 Cal. App. 715, 295 Pac. 59, 61 (1930); *Peavey v. City of Miami*, 146 Fla. 629, 1 So. (2d) 614, 617 (1941); *Brummett v. City of Jackson*, 51 So. (2d) 52, 53 (Miss. 1951); *City of Blackwell v. Lee*, 178 Okla. 338, 62 P. (2d) 1219, 1220 (1936); *Mollencop v. City of Salem*, 139 Ore. 137, 8 P. (2d) 783, 785 (1932). Thus the question presented is whether a statute which merely declares that this ordinarily proprietary function shall henceforth be governmental necessarily extends the state's immunity from suit to such function.

Statutes which deal with the municipal acquisition and operation of airports are of two general types. The first empowers the municipality to own and operate the airport as a governmental function, GA. CODE tit. 11, c. 2, §§ 01, 02 (1933); N. C. GEN. STAT. c. 63, §§ 49, 50 (1950); W. VA. CODE ANN. §§ 580, 2786 (10) (1949). The second includes the provisions of the first, and further provides that no liability shall attach to the city by reason of such ownership or operation. IOWA CODE ANN. c. 330, §§ 2, 15 (1949) (airport immunity indirectly provided); MINN. STAT. c. 360, §§ 032, 033 (1949); TENN. CODE ANN. §§ 2726.13, 2726.22 (Williams 1942).

The legislative mandate transforming the proprietary act of owning and operating an airport into a governmental function of a city has generally been upheld. FLA. STAT. c. 332, § 03 (1951), *Seaboard Air*

Line R.R. v. Peters, 43 So. (2d) 448, 453 (Fla. 1949); MINN. STAT. c. 360, § 113 (1949), *Erickson v. King,* 218 Minn. 98, 15 N.W. (2d) 201 (1944). Even where the legislatures have not expressly spelled out "governmental function," courts, sustaining the statutes, have interpreted them as implying the term. KAN. GEN. STAT. ANN. c. 3, § 113 (Corrick 1949), *Concordia-Arrow Flying Service Corp. v. City of Concordia,* 131 Kan. 247, 289 Pac. 955, 957 (1930); ORE. COMP. LAWS ANN. tit. 12, c. 3, § 04 (1940) (eminent domain), *McClintock v. City of Roseburg,* 127 Ore. 698, 273 Pac. 331 (1929); PA. STAT. ANN. tit. 53, § 3800 — 1 (1931), *Wentz v. City of Philadelphia,* 301 Pa. 261, 151 Atl. 883 (1930).

The statutes which in addition provide that no liability shall attach to the municipality have likewise been upheld as constitutional. IOWA CODE ANN. c. 330, §§ 2, 15 (1949), *Abbott v. City of Des Moines,* 230 Iowa 494, 298 N.W. 649 (1941); TENN. CODE ANN. § 2726.22 (Williams 1942), *Stocker v. City of Nashville,* 174 Tenn. 483, 126 S.W. (2d) 339 (1939). TEX. STAT., REV. CIV. art. 1269h (1948) was declared unconstitutional, insofar as it purported to exempt cities from all liability for injuries resulting from the ownership and operation of municipal airports, in *Christopher v. City of El Paso,* 98 S.W. (2d) 394 (Tex. Civ. App. 1936). But this determination was unnecessary for the decision since the city had not been linked to any negligence.

In considering statutes which declare the city airport to be a governmental function but do not expressly provide immunity, courts have disagreed on whether immunity from liability was necessarily included. In *Mayor, etc., of Savannah v. Lyons,* 54 Ga. App. 661, 189 S.E. 63 (1936), the airport was classified as a park and the city held not liable for injuries resulting from a defective airport road. In *Rhodes v. City of Asheville,* 230 N.C. 134, 52 S.E. (2d) 371, *rehearing denied,* 230 N.C. 759, 53 S.E. (2d) 313 (1949), the court refused to exempt the city from liability in the absence of an express provision in the statute. The court in *Rhodes,* in holding that the municipal airport is a proprietary function for which tort liability attaches, cited for the "overwhelming weight of authority," 52 S.E. (2d) at 374, only cases which either did not involve a statutory declaration of "governmental function" or were decided on other grounds. In denying a rehearing, the court held, 53 S.E. (2d) at 313, that the governmental-proprietary distinction is to be made, not by the legislature but by the courts. To this extent at least, *Rhodes* must be considered not an expression of, but rather a deviation from, the majority rule.

It would seem to follow logically that once the validity of statutes changing the ownership and operation of an airport on the part of a municipality from a proprietary to a governmental function have been established, *Seaboard Air Line R.R. v. Peters, supra; Erickson v.*

King, supra, that is, once it is established that the city, in its ownership and operation of an airport, is engaged in the performance of a governmental as distinguished from a proprietary function, the immunity from liability necessarily arises. See McQUILLIN, MUNICIPAL CORPORATIONS § 53.01 (3d ed. 1950). The effect of reclassifying the municipal airport as a governmental function should not be restricted to the allowance of bond issues and taxes by the city to finance the project. When considered in the light of modern economics, the municipal airport as a governmental function should include the immunity from liability as an incentive if nothing more. It is an established fact that airports are not a financially sound investment, hence the scarcity of private capital. *See Rhodes v. City of Asheville, supra,* 52 S.E. (2d) at 376. But the necessity of the airport is likewise established, and if private enterprise cannot furnish it, government must. With the growing importance of the city-owned airport should come a uniform policy — either through judicial interpretation as in the instant case or through express statutory enactments — of exempting cities from liability arising from ownership and operation of airports.

Stan. R. Herrlinger

PERSONAL PROPERTY — BAILMENTS — LIMITATION OF BAILEE'S LIABILITY BY CONTRACT. — *Fisk v. Bullard,* ....Okla....., 239 P. (2d) 424 (1951). The plaintiff, Bullard, after traveling on a bus operated by the Oklahoma Transportation Company, checked his bag by delivering it to defendant Fisk. Fisk gave him a check which recited that the storage charge was ten cents per day and that the liability of the check was not to exceed $25.00. The next day, on demand, the defendant failed to return the plaintiff's traveling bag. At the suggestion of Fisk, who made out a claim for him against the Oklahoma Transportation Company, he got in touch with the claim agent in an effort to recover his bag. All these efforts were unsuccessful, and the plaintiff sued Fisk and the Oklahoma Transportation Company to recover damages for loss of luggage and for expenses incurred by the plaintiff in attempting to locate and recover the luggage. The trial court rendered judgment against both defendants who then appealed. The Supreme Court of Oklahoma held that evidence sustained a finding that defendant Fisk, in operating the check room in the bus terminal, was an agent of the defendant transportation company, that liability of the defendant transportation company was that of a warehouseman or bailee for hire and that it could not limit its liability for loss of property held by it.

The issue, which will be the subject of this writing, was whether a bailee for hire or an owner of a parcel check room can limit his liability by contract.

The practice is frequent for certain classes of bailees, particularly operators of parcel check rooms in railroad stations, bus stations and the like, to attempt to limit their liability by posting public notices and by embodying in the receipts or checks given to customers terms limiting their liability. Such terms, if advanced as a defense in a suit against the bailee for negligence, are generally held to violate public policy. *Denver Union Terminal Ry. v. Cullinan,* 72 Colo. 248, 210 Pac. 602, 603 (1922); *Oklahoma City Hotel Co. v. Levine,* 189 Okla. 331, 116 P. (2d) 997 (1941); *Allen v. Southern Pac. Co.,* 213 P. (2d) 667 (Utah 1950). The court stated, 213 P. (2d) at 668:

> The great weight of authority is that a bailee cannot entirely exempt himself by contract from liability due to his negligence and contracts limiting his liability for negligence during the course of a general business with the public are usually regarded as being against public policy.

The almost unanimous opinion in the United States holds that where the bailor's property is taken by the bailee into its custody and control, a failure, refusal, or inability to return same on demand, establishes a prima facie case against the bailee. *See e.g., Hotels Statler Co. v. Safier,* 103 Ohio St. 638, 134 N.E. 460, 462 (1921). Thus there can be no presumption in favor of a limitation of liability. The burden of proof is cast on the bailee to go forward with the evidence to show that there was a meeting of the minds as to the limitation of the bailee's liability. If the bailee merely alleges that he posted a sign containing the limitation of liability in his place of business, the courts will find his proof insufficient. *Parris v. Jaquith,* 70 Colo. 63, 197 Pac. 750 (1920).

Courts may decline to determine whether or not the limitation clause is invalid. Instead, they simply declare that the bailor, having received and retained the ticket, without knowledge that it contained any special terms, and without his attention being called to this fact, is not bound by the provisions for limited liability. For example, in *Brown v. Hines,* 213 Mo. App. 298, 249 S.W. 683, 684 (1923), the court stated:

> But it makes no difference whether the stipulation is held as intending to cover any loss caused from any cause whatsoever or merely a loss that might occur by reason of any cause except negligence or fraud of the defendant, for in either case defendant must be held liable, as it is not shown that plaintiff agreed to the limitation.

Other decisions indicate directly that the limitation is valid, but go on to say that the limitation is ineffectual where the bailor does not consent to it. The court in *Jones v. Great Northern Ry.,* 68 Mont. 231, 217 Pac. 673 (1923), held that where the bailee negligently causes the bailor's property to be lost, the bailee should be held liable for the reasonable value of the property; but there is nothing to prevent the parties from openly and fairly contracting to diminish

the bailee's liability. Similarly, it was held in *Union Bus Station, Inc., v. Etosh,* 48 Ohio App. 161, 192 N.E. 743 (1933), that the owner of luggage left at a bus station which provided for the safe keeping of luggage was not bound by a stipulation printed on the back of a claim check limiting liability of the bailee for loss. The court pointed out that the attention of the plaintiff, who could not read English, was not called to the printing on the check limiting the liability of the bus station to a specfied amount. These courts base their decisions on the theory that the minds of the parties never met and that, hence, the special contract was never entered into.

There are also cases to substantiate the view that there is no duty imposed upon the plaintiff to read the check given him by the bailee, and that a plaintiff in the absence of knowledge from the railroad company of the special terms upon which the bailment was accepted, could recover the value of the suitcase and contents. *Jones v. Great Northern Ry., supra; Lebkeucher v. Pennsylvania R.R.,* 97 N.J.L. 112, 116 Atl. 323 (Sup. Ct.), *aff'd,* 98 N.J.L. 271, 118 Atl. 926 (1922).

The fact that the bailor pays only a small sum for the bailment does not constitute consent on his part to the limitation of the bailee's liability. In short, the smallness of the sum paid has no effect on the extent of the bailee's liability. *Union News Co. v. Vinson,* 227 S.W. 236 (Tex. Civ. App. 1921).

In *Healy v. New York Cent. & H. R.R.,* 153 App. Div. 516, 138 N.Y. Supp. 287 (3d Dep't 1912), *aff'd,* 210 N.Y. 646, 105 N.E. 1086 (1914), the court held that before the plaintiff could be deemed to have assented to the limitation of the bailee's liability printed on the back of the check, he must have had knowledge of the special contract limiting the bailee's liability. Thus, without this knowledge, there was no meeting of the minds, and the plaintiff could not be bound by the special terms. The court also stated, 138 N.Y. Supp. at 289:

> . . . I think that the clause of the coupon which attempted to limit the liability of the defendant impaired its obligation to exercise that degree of care in the safe-keeping of the goods intrusted to it which a reasonably careful man would exercise in regard to similar goods of his own, and hence was a condition which the defendant had not the legal right to insert in the coupon and was void. It is a matter of common knowledge that the value of a handbag and its contents carried by a person traveling is often many times $10, and manifestly a condition in a receipt which limits the liability of the bailee to so small a sum weakens his sense of obligation to exercise that degree of care which he would be likely to exercise if he knew that he would be held liable for the full value of the parcel stored in the event of its loss.

This case has been generally followed in this country and the additional circumstance that the bailee has posted a notice of the limitation does not change the result, in absence of proof that the customer saw the notice and knew its character and purpose. *Denver Union Terminal Ry.*

v. Cullinan, supra; Van Noy Interstate Co. v. Tucker, 125 Miss. 260, 87 So. 643 (1921); *Jones v. Great Northern Ry., supra; Lebkeucher v. Pennsylvania R.R., supra.*

Concluding, it is firmly settled that receipt, from the bailee at the time of the bailment, of a ticket, ostensibly a token for later identification of the bailed property, does not bind the bailor as to provisions purportedly limiting the bailee's liability, which are printed thereon, where his attention is not called to them and where he has no actual knowledge that they are part of the contract.

Richard G. Dytrych

TAXATION — FEDERAL INCOME TAXES — HOLDING PERIOD OF OIL AND GAS INTEREST DATES FROM TIME OF DISCOVERY OF OIL. — *Petroleum Exploration v. Commissioner,* 193 F. (2d) 59 (4th Cir. 1951). The taxpayer on March 2, 1937 acquired an instrument designated as "Oil and Gas Lease" to seventy acres of property in Marion County, Illinois. The lease provided that in consideration of $35 paid, the lessor granted, demised, leased and let the seventy acres to the taxpayer, as lessee, for the sole and only purpose of mining and operating for oil and gas for the optional term of ten years from date, and for so long thereafter as oil or gas was produced from the premises. It also provided that it would terminate as to both parties unless a well was commenced on the property, or a nominal sum paid by the lessee to the lessor, on or before the first and each succeeding anniversary of the lease execution. The rights of the parties to any oil or gas produced and saved were set forth. No well was commenced during the first year of the lease; to avoid termination the taxpayer paid the required sum according to the terms of the lease. During September and October, 1938, six producing wells were drilled on the seventy acres, necessary equipment was installed and a quantity of oil was recovered. In January, 1939, the taxpayer sold its interest in the property to the Texas Company for a large gain. Operating equipment was included in this sale, but oil recovered prior thereto was excluded.

For the purpose of determining excess profits income credit, the taxpayer included the gain from this sale as short-term capital gain. The Commissioner considered the gain to be from a sale of assets held for more than six months, and hence excluded from taxpayer's excess profits net income as provided by Section 711 (b) (1) (B) of the Internal Revenue Code, *repealed* 59 STAT. 568 (1945), for the purpose of computing excess profits credit. The Tax Court upheld the Commissioner's findings. On appeal, the court of appeals reversed

this part of the Tax Court's holding and found that the gain was short-term, that is, from the sale of assets held for six months or less.

The rule of property law followed in Illinois, situs of the property in question, was stated in *Triger v. Carter Oil Co.*, 372 Ill. 182, 23 N.E. (2d) 55, 56 (1939):

> It is the settled law in this State that oil and gas in place are minerals but by reason of their fugacious qualities they are incapable of an ownership distinct from the soil. They belong to the owner of the land only so long as they remain under the land, and if the owner makes a grant of them to another, it is a grant only of the oil and gas that the grantee may take from the land. No title to it vests in the grantee until it is actually removed from the land.

On this theory, that oil and gas in place are not recognized as subject to ownership, it would appear that no new rights come into existence under an oil and gas lease until oil or gas is "actually reduced . . . to possession" on the surface of the land. *Ohio Oil Co. v. Indiana*, 177 U.S. 190, 20 S. Ct. 576, 583, 44 L. Ed. 729 (1900). The rule followed in Illinois is followed generally throughout the United States, although the lessee's right to *produce* oil is deemed vested from the date of the lease. *Ohio Oil Co. v. Indiana, supra*, 20 S. Ct. at 584; and *see, e.g., Halbert v. Hendrix*, 121 Ind. App. 43, 95 N.E. (2d) 221 (1950). Of the oil producing states, Texas alone recognizes ownership of oil in place and holds that a determinable fee vests in the lessee. *Corzelius v. Harrell*, 143 Tex. 509, 186 S.W. (2d) 961, 964 (1945).

While following, in substance, the above general rule, various courts have decided legal interests created by an oil and gas lease under a multitude of theories. As pointed out in 1 SUMMERS, OIL AND GAS § 152 (2d ed. 1938), the following terms have been used in labeling a lessee's rights: profit a prendre, *Connell v. Kanwa Oil, Inc.*, 161 Kan. 649, 170 P. (2d) 631, 634 (1946); an estate in land, *Carroll v. McCarthy*, 129 S.W. (2d) 1201 (Tex. Civ. App. 1939); not an estate in land, *Duff v. Keaton*, 33 Okla. 92, 124 Pac. 291, 294-5 (1912); a freehold, *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9, 84 N.E. 53, 54 (1908); a chattel real, *Richardson v. Callahan*, 213 Cal. 683, 3 P. (2d) 927, 928 (1931); an interest in land, *Roberts v. Tice*, 198 Ark. 397, 129 S.W. (2d) 258, 260 (1939); not an interest in land, *Kokomo Natural Gas & Oil Co. v. Matlock*; 177 Ind. 225, 97 N.E. 787, 789 (1912); personal property, *Burden v. Gypsy Oil Co.*, 141 Kan. 147, 40 P. (2d) 463, 466 (1935); incorporeal hereditament, *Funk v. Haldeman*, 53 Pa. 229, 244 (1867); and a tenancy at will, *Knight v. Indiana Coal and Iron Co.*, 47 Ind. 105 (1874). Under all of these theories it is recognized that a lessee's rights, whatever they may be, come into being at the time the lease is made. West Virginia is the only jurisdiction which has clung to the view that a lessee's

interest is executory or inchoate until discovery of oil or gas, and vested thereafter. *E.g., Crawford v. Ritchey*, 43 W. Va. 252, 27 S.E. 220, 223 (1897). See 1 SUMMERS, *supra*, § 157.

The court, in the case under review, relied on an old Pennsylvania case, *Venture Oil Co. v. Fretts*, 152 Pa. 451, 25 Atl. 732 (1893), which applied the option theory presently followed by West Virginia. The *Venture* case has never been specifically overruled in Pennsylvania, but the option theory is no longer followed by her courts. *See, e.g., Colgan v. Forest Oil Co.*, 194 Pa. 234, 45 Atl. 119, 121 (1899). Disregarding, then, the general rule followed by all jurisdictions except West Virginia, the court, 193 F. (2d) at 63, ". . . to give uniformity to Federal tax jurisprudence looking to the practical and economic consequences of the . . . transaction . . .," concluded that what was actually sold by the taxpayer was its interest in the oil in place, an interest which was acquired when the wells were completed.

The Supreme Court has adhered to the doctrine that ". . . Congress, in the exercise of its plenary power under the Constitution, to tax income . . . is not subject to state control." *Burnet, Commissioner, v. Harmel*, 287 U.S. 103, 110, 53 S. Ct. 74, 77 L. Ed. 199 (1932). *See Weiss, Collector, v. Wiener*, 279 U.S. 333, 337, 49 S. Ct. 337, 73 L. Ed. 720 (1929); *Burk-Waggoner Oil Ass'n v. Hopkins, Collector*, 269 U.S. 110, 114, 46 S. Ct. 48, 70 L. Ed. 183 (1925); *United States v. Childs, Trustee*, 266 U.S. 304, 309, 45 S. Ct. 110, 69 L. Ed. 299 (1924). It is recognized that legal interests are created by state law, but the federal statute determines when and how those rights are taxed. State law is controlling only in those cases where the federal taxing act, ". . . by express language or necessary implication, makes its own operation dependent upon state law." *Burnet, Commissioner, v. Harmel, supra*, 287 U.S. at 110. Exceptions to this doctrine may be noted in *United States v. Cambridge Loan and Building Co.*, 278 U.S. 55, 59, 49 S. Ct. 39, 73 L. Ed. 180 (1928), deciding that whether a "domestic" association referred to in the tax statute was really such for tax purposes depended upon whether or not the state recognized it as such, and in *Poe, Collector, v. Seaborn*, 282 U.S. 101, 51 S. Ct. 58, 75 L. Ed. 239 (1930), where the Court held that the state law of community property determined the ownership of income for purposes of filing income tax returns. The trend, however, has been to enlarge the scope of the *Harmel* case, and limit the application of the latter two. *See, e.g., Estate of Rogers v. Commissioner*, 320 U.S. 410, 414, 64 S. Ct. 172, 88 L. Ed. 134 (1943).

The instant case involves the application of Section 711 (b) (1) (B) of the World War II Excess Profits Tax Law which was repealed for the taxable years beginning after December 31, 1945. 59 STAT. 568 (1945). The counterpart of that law is the current Section 433 (b)

(2) of the Internal Revenue Code, which provides that "There shall be excluded [from base period years] gains and losses from sales or exchanges of capital assets and gains and losses to which section 117 (j) is applicable." Hence, the problem could not arise under present law. It is clear, however, that the principle applied here is also applicable in determining the holding period of an oil and gas lease for income tax purposes, i.e., where an agreement is construed as involving the conveyance of an interest in "oil in place" such interest is deemed to have been held from the time oil was discovered on the premises, and not from the time the agreement was executed.

There will undoubtedly be further litigation of the issue by oil producers, with the aim of aligning federal income tax treatment to the rule of property law followed by an overwhelming majority of the states.

Paul R. Pressler, C.P.A.

TORTS — JOINT TORT-FEASORS — RIGHT TO CONTRIBUTION AS AFFECTED BY SEPARATE SETTLEMENTS. — *Employers Mut. Casualty Co. v. Chicago, St. P., M. & O. Ry.*, ...Minn....., 50 N.W. (2d) 689 (1951). Lange's automobile collided with a tank car which had been spotted on a spur track. Marcella Lange, a passenger in the automobile, was injured and sued the driver and the railway company as joint defendants for $12,000 in damages. Marcella contended that the driver negligently operated the automobile and that the railway company was negligent in spotting the tank car near the highway at the crossing. During the pendency of the action, the railway company paid Marcella $6000 and received a covenant not to sue. Subsequently, Lange's insurer paid Marcella $5000 in full settlement and release of all her claims for the injuries referred to. The insurer then brought an action for contribution of $2500 against the railway company. The trial court's judgment for the plaintiff insurer was reversed on appeal and judgment was entered for the defendant railway company. The court affirmed the principle of contribution between joint tort-feasors, but denied its application under the facts of the instant case. These facts clearly indicated that the plaintiff did not pay more than his equitable share of the burden and therefore was not entitled to contribution from the defendant who had previously paid the claimant a substantial sum, which amounted to more than one-half of the total recovered by the claimant.

The question in the case was whether a joint tort-feasor who effected a settlement and secured a release of the injured party's claim was entitled to contribution from the other joint tort-feasor who had previously purchased from the claimant a separate covenant not to

sue. Should the amount paid for the covenant not to sue have been considered in determining the tort-feasor's right to contribution?

The question of contribution between joint tort-feasors had its origin in 1799 in England when the strict rule was formulated that no contribution shall lie between wrongdoers. *Merryweather v. Nixan,* 8 T.R. 186, 101 Eng. Rep. 1337 (1799). The rule was later held to apply only in cases where the plaintiff was a willful and conscious wrongdoer. *Adamson v. Jarvis,* 4 Bing. 66, 130 Eng. Rep. 693, 696 (1827). In 1894 the English courts adhered to this modification allowing contribution between concurrent, negligent wrongdoers. *Palmer v. Wick and Pulteneytown Steam Shipping Co.,* [1894] A.C. 318. In the United States, the overwhelming majority of our courts refuse to allow contribution even where independent, concurrent negligent acts caused a single loss. *Union Stock Yards Co. v. Chicago, B. & Q. R.R.,* 196 U.S. 217, 25 S. Ct. 226, 49 L. Ed. 453 (1905); *Adams v. White Bus Line,* 184 Cal. 710, 195 Pac. 389 (1921); *Jackson v. Record,* 211 Ind. 141, 145, 5 N.E. (2d) 897 (1937); PROSSER, TORTS § 109 (1941). The courts holding to this view continue to apply the principle, set forth in *Merryweather v. Nixan, supra,* that one of several wrongdoers cannot recover against another wrongdoer, although he was compelled to pay all the damage for the wrong done. A Texas court, in *Wheeler v. Glaer,* 137 Tex. 341, 153 S.W. (2d) 449, 451 (1941), stated in dictum:

> At common law, as a general rule, joint tort-feasors have no right of contribution among themselves. The rule is not based on equity, but rests on consideration of public policy; it being the policy of the law to leave wrongdoers where it finds them, and not to allow one to found a right of recovery on his own wrong.

Oregon denies contribution for still another reason. The court said in *Fidelity & Casualty Co. of New York v. Chapman,* 167 Ore. 661, 120 P. (2d) 223, 225 (1941):

> Contribution, however, in our opinion, practically means adoption of the doctrine of comparative negligence. Certainly the allowance of contribution between active tort-feasors on any basis of comparative negligence is contrary to the well-settled rule in this state.

Minnesota, the jurisdiction of the instant case, and Wisconsin are the only remaining states which allow contribution between negligent tort-feasors in the absence of statute. *Underwriters at Lloyds of Minneapolis v. Smith,* 166 Minn. 388, 208 N.W. 13 (1926); *Ellis v. Chicago & N.W. Ry.,* 167 Wis. 392, 167 N.W. 1048 (1918). A number of states that have shown dissatisfaction with the common law rule have adopted statutes which allow contribution between joint tort-feasors. PROSSER, TORTS § 109 (1941).

The basis of the doctrine of contribution rests on payment by one joint tort-feasor of the entire common liability, thus relieving the

other. According to principles of equity and of natural justice, the benefited tort-feasor is bound to make restitution to the extent of his fault. *Canosia Tp. v. Grand Lake Tp.*, 80 Minn. 357, 83 N.W. 346, 347 (1900); *Brown v. Haertel,* 210 Wis. 354, 246 N.W. 691, 692 (1933). Another underlying principle advanced by the courts is the "inchoate right" theory, as best stated in *De Brue v. Frank,* 213 Wis. 280, 251 N.W. 494, 496 (1933):

> When the concurring negligent acts give to the injured a cause of action against the joint tort-feasors, the incidental right of a joint tort-feasor to compel contribution is created. Once in being, although contingent, subordinate, or inchoate, it has an existence in contemplation of law until it is no longer needed as a resource to which the joint tort-feasor may look for relief from an inequitable burden placed upon him by reason of the refusal of another to perform such other's duty by paying his honest share of the common obligation, unless sooner waived or given up by its owner.

Thus the general rule, in those jurisdictions allowing contribution between joint tort-feasors, is that upon the payment and settlement of the entire claim by one, the other tort-feasor is bound to contribute his share. *Western Casualty & Surety Co. v. Milwaukee General Const. Co.*, 213 Wis. 302, 251 N.W. 491, 492 (1933); *Duluth, M. & N. Ry. v. McCarthy,* 183 Minn. 414, 236 N.W. 766, 768 (1931). Statutes, in some jurisdictions, have modified this rule by requiring, as a condition precedent to contribution, that a judgment shall have been recovered jointly against the tort-feasors. *Moudy v. St. Louis Dressed Beef & Provision Co.*, 149 Mo. App. 413, 130 S.W. 476, 481 (1910), *aff'd,* 160 Mo. App. 608, 140 S.W. 934 (1911); *La Lone v. Carlin,* 139 Misc. 553, 247 N.Y. Supp. 665, 666 (Sup. Ct. 1931).

The issue in the instant case involved, not only the general question of contribution, but, more specifically, the effect of the amount paid for the covenant not to sue upon the other tort-feasor's right to contribution where he has secured a release from the injured party for a full settlement. The general rule is that the amount paid for the covenant not to sue does not affect the right to contribution, but, except where it is only a nominal sum, it will be a *pro tanto* reduction of the covenantee's liability for contribution. *Blauvelt v. Village of Nyack,* 141 Misc. 730, 252 N.Y. Supp. 746 (Sup. Ct. 1931); *Holland v. Southern Public Utilities Co.*, 208 N.C. 289, 180 S.E. 592, 593 (1935). This principle of *pro tanto* reduction of the eventual liability is in conformity with natural justice. Both tort-feasors incurred an obligation to pay their equitable share of the burden at the occurrence of the injury, which obligation continues until such payment is made. By purchasing a covenant not to sue from the injured party, the tort-feasor does not extinguish his obligation entirely, but only *pro tanto;* to hold otherwise would offend both justice and reason.

The modern trend is to allow contribution where the tort-feasors are not guilty of intentional wrong, but are jointly at fault for an injury caused by mere negligence while undertaking a lawful act. The instant case upholds in principle the right to contribution in these circumstances. Although definitely the minority view, the doctrine is in accord with the basic principle of equity and justice that no one should carry more than his share of the burden when others are equally at fault. Nor does such a doctrine offend our moral view of right and fairness for it is applicable only where the tort-feasors are guilty of no moral turpitude.

James Kalo

TRIAL — INTERFERENCE WITH JURY'S DELIBERATIONS — COMMUNICATIONS BETWEEN JUDGE AND JURY AS REVERSIBLE ERROR. — *People v. Tilley*, ...Ill....., 104 N.E. (2d) 499 (1952). Tilley was convicted of manslaughter and sentenced to ten years in prison. An appeal was taken, Tilley assigning as error, *inter alia,* the conduct of the trial judge in communicating with members of the jury after they had retired. The trial ended on a Saturday afternoon and the jury deliberated all night without reaching a verdict. The next morning the trial judge, accompanied only by the bailiff, went to the jury room and asked if there was any hope of arriving at a verdict. A juror asked the judge for additional information. The trial judge told him to read the instructions and that additional information could be given only in open court in the presence of the defendant and his attorneys. Another juror asked if the defendant had admitted performing the abortion which led to the manslaughter charge and the judge informed him it had been specifically denied. In a short time the jury found the defendant guilty. On appeal a divided court held that the actions of the trial judge were highly imprudent and improper, but did not amount to reversible error since it did not appear that defendant's case had been prejudiced.

The decision is significant in that it points up the question whether such communications between judge and jury, without more, amount to reversible error or whether it must affirmatively appear from the record that a party's case was prejudiced by such communication before the verdict of the trial court can be reversed. A review of the cases demonstrates a conflict, with each jurisdiction purporting to follow what it considers the majority rule.

In those jurisdictions holding that an improper communication between judge and jury constitutes reversible error even though the record does not disclose that it was prejudicial, a case generally cited with approval is *Sargent v. Roberts,* 1 Pick. 337 (Mass. 1823). There

the action was in assumpsit and the jurors had deliberated six hours before notifying the trial judge they could not agree. The trial judge wrote directions for a systematic review of the evidence and sent it to the jury room. Even though it was admitted that such practice had prevailed in Massachusetts trial courts for many years, the appellate court decided it should be curtailed and held prejudicial as a matter of law. The rule controlled a later Massachusetts case. *Read v. City of Cambridge,* 124 Mass. 567 (1878).

In *State v. Murphy,* 17 N.D. 48, 115 N.W. 84 (1908), the jury deliberated for forty-eight hours and then requested the trial judge to meet with them. After learning that no verdict had been reached, the trial judge asked them to consider it further and bade them good night. The jury found defendant guilty of forgery a short time later. The mere fact that the trial judge had gone to the jury room was held reversible error without an inquiry as to the effect it had on the case, the court stating, 115 N.W. at 89:

> To determine in each case whether prejudice resulted would be difficult, if not impossible, and justice will be better subserved by avoiding such communications entirely. The authorities are practically unanimous in condemning such communications, and in *holding them prejudicial as a matter of law.* [Emphasis supplied.]

Equally conclusive language was used by the court in *Havenor v. State,* 125 Wis. 444, 104 N.W. 116 (1905), where the trial judge went to the jury room, refused to answer any questions propounded by the jury, but did offer to read the instructions to them. The court recited, 104 N.W. at 117:

> Whenever such communications were had, though they were not prompted by improper motives, and though they may not have influenced the jury in arriving at their verdict, still they are generally treated as in themselves sufficient ground for setting aside the verdict rendered, for the reason that no party should be subjected to the burden of an inquiry before the court, regardless of whether or not its conduct in this respect, or that of its officers or that of the opposing party, has tended to his injury.

Other courts have applied the rule without any extended discussion of the policy behind it. *E.g., State v. Wroth,* 15 Wash. 621, 47 Pac. 106 (1896). Still other courts have called the communication reversible error without any mention of a requirement that it appear to have been prejudicial. *O'Connor v. Guthrie & Jordan,* 11 Iowa 80 (1860); *State v. McGlade,* 165 Kan. 425, 196 P. (2d) 173 (1948).

In a few states the rule has been formulated that a verdict will not be reversed because of communications between judge and jury unless it appears from the record that appellant's case was actually prejudiced by the conduct of the trial judge. *See, e.g., Day v. State,* 185 Ark. 710, 49 S.W. (2d) 380 (1932). In *State v. Verde,* 66 R.I. 33, 17 A. (2d) 39 (1940), the trial judge permitted mail to be

delivered to a sequestered jury and on one occasion sent a physician to attend an ailing juror. The defendant contended this was reversible error per se. The court condemned the laxity of the trial judge and the bailiff in regard to the mail, but refused to reverse since it could find no harm that had been done, stating, 17 A. (2d) at 43:

> . . . it appears to us that the great weight of authority is to the effect that such irregular communications with the jury do not in and of themselves vitiate the jury's verdict but do so only if the unsuccessful party has been prejudiced thereby.

The same rule was approved, by way of dicta, in *Commonwealth v. Knable,* 369 Pa. 171, 85 A. (2d) 114, 118 (1952).

The United States Supreme Court has held that irregular communications are not reversible error unless it appears that appellant's case was adversely affected. *Mattox v. United States,* 146 U.S. 140, 13 S. Ct. 50, 53, 36 L. Ed. 917 (1892). Two modifications of this rule have appeared. In criminal cases, the giving of an instruction to the jury in the absence of the accused, *Shields v. United States,* 273 U.S. 583, 47 S. Ct. 478, 71 L. Ed. 787 (1927), and the judge's inquiry as to the numerical division of the jury, *Brasfield v. United States,* 272 U.S. 448, 47 S. Ct. 135, 71 L. Ed. 345 (1926), constitute reversible error per se.

The circuit courts follow the rule laid down by the Supreme Court, holding that the mere fact of improper communication will not, of itself, necessitate a reversal. *Little v. United States,* 73 F. (2d) 861 (10th Cir. 1934); *Ray v. United States,* 114 F. (2d) 508 (8th Cir 1940), *cert. denied,* 311 U.S. 709, 61 S. Ct. 318, 85 L. Ed. 461 (1940) In the *Ray* case the court stated, 114 F. (2d) at 513:

> Private communications, even though harmless in themselves, may open the way to abuses and may destroy confidence in legal procedure and the judiciary. . . .
>
> However, if the record shows affirmatively that appellant was not prejudiced, then the error does not require reversal.

In the instant case, the Illinois court relied on *People v. Brothers,* 347 Ill. 530, 180 N.E. 442 (1932), where it was held that a verdict would not be reversed if it was apparent that no harm had been done by a communication to the jury, either by the trial judge or by third persons. However, it appears that the *Brothers* case was itself a departure from a rule of many years' standing in Illinois. Previously *any* irregular communication to the jury had been reversible error per se. *People v. McGrane,* 336 Ill. 404, 168 N.E. 321 (1929); *People v. Beck,* 305 Ill. 593, 137 N.E. 454 (1922); *Crabtree v. Hagenbaugh,* 23 Ill. 349 (1860). In the *Brothers* case a distinction was sought to be made on the ground that in all the previous Illinois cases, the impropriety on the part of the trial judge had been calculated to prejudice the jury while in that one case there was no showing of prejudice.

But the court was apparently oblivious to the arguments advanced in those previous Illinois decisions for the rule that any message between judge and jury outside of open court was *per se* reversible error. In *Crabtree v. Hagenbaugh, supra,* the court stated, 23 Ill. at 349:

> We choose to assume, that what was said and done by the judge, while in the jury room, did not influence the jury in their deliberations, for we think that, independent of its effect upon the jury, the judgment should be reversed, for the simple reason that such an interview did take place. If, in this case, no harm was actually done, and for that reason the verdict is allowed to stand, we open the door to the inquiry in all such cases, as to whether the party has been injured by the interview. Such an inquiry should not be tolerated.

And in *Mound City v. Mason,* 262 Ill. 392, 104 N.E. 685 (1914), the trial judge went to the jury room and orally answered a question. The court, on appeal, reiterated the Illinois rule, stating, 104 N.E. at 688:

> It is error, for which a judgment will be reversed, for a trial judge to hold any communication with a jury in regard to the instructions in the case except in open court. It is immaterial whether the instructions given were right or wrong.

To accord the parties in a civil suit, or the defendant in a criminal action, the full protection they deserve, the rule should be that *any* communication between judge and jury, outside of open court, is of itself reversible error. As noted by a dissenting justice in the case under discussion, 104 N.E. (2d) at 506, remarks by a trial judge may appear perfectly harmless and yet be accompanied by a smile, a frown, or a grimace which might profoundly influence the jury. To require an unsuccessful litigant to prove that the impropriety affected the jury's determination is to present him with an insurmountable difficulty.

Joseph C. Spalding

WILLS — RIGHT OF JUDGEMENT LIEN CREDITOR OF DISINHERITED HEIR TO CONTEST WILL. — In re *Harootenian's Estate,* ....Cal. (2d)...., 238 P. (2d) 992 (1951). The plaintiff, separated wife of the proponent George Harootenian, had obtained a judgment against him for unpaid support. Subsequent to this, his father died expressly disinheriting George. Plaintiff filed a complaint as intervenor to contest the will and to revoke probate. The lower court dismissed the complaint and an appeal was taken. In reversing the judgment of dismissal, the Supreme Court of California held that a judgment creditor of a disinherited heir was a proper person to contest the will. Two concurring justices believed this to be a narrow restriction and argued that all creditors who had actually brought an action and

effected a valid attachment should have this right. 238 P. (2d) at 997, 998. The dissenters thought that a person with an uncertain prospect of actually achieving a property interest should not be allowed to harass the administration of an estate. An interested person to them would be one who received directly, and not through a third person, property of the estate. 238 P. (2d) at 998, 1000. Thus, the instant case presents the three prevailing views on this topic.

The controversy in this situation stems from the interpretation of the statutes, CAL. PROB. CODE §§ 370, 380; CAL. CODE CIV. PROC. § 387 (Deering 1949), giving the right to contest a will to "any person interested." Interest, as the dissenting opinion points out, has a multitude of meanings. No argument arises when a person has a direct pecuniary interest in the devolution of the estate which could be impaired or defeated by the will or benefited by setting it aside. *Chilcote v. Hoffman*, 97 Ohio St. 98, 119 N.E. 364, 366 (1918); *cf.* In re *Plaut's Estate,* 27 Cal. (2d) 424, 164 P. (2d) 765 (1945).

Since a general creditor has only an expectancy interest with no present vested right, he has no right to contest, according to the early case of *Smith v. Bradstreet,* 33 Mass. (16 Pick.) 264, 265 (1834). To permit him to contest would invite limitless litigation by every disappointed creditor. It would not be just for many small claims to hold up the distribution of large estates to the rightful heirs. In re *Shepard's Estate,* 170 Pa. 323, 32 Atl. 1040, 1041 (1895). This policy has been objected to when the creditor would be entitled to set aside a fraudulent conveyance, in which instance the right to contest has been granted. In re *Kalt's Estate,* 16 Cal. (2d) 807, 108 P. (2d) 401, 404 (1940). The strongest reasons for this position are given in *Brooks v. Paine's Ex'rs,* 123 Ky. 271, 90 S.W. 600 (1906), where the point is emphasized that probate is a conclusive proceeding and therefore provides the only opportunity for creditors to show cause against those trying to defraud them. Further, the debtor's right to his property is not unqualified, but must be limited by the rights of the creditors. The facts in this particular case revealed a strong inference of fraud and tended to support the holding — giving general creditors the right to contest.

A number of courts claiming to be in the majority hold that a judgment creditor of an heir has a sufficient interest to contest the will. In re *Duffy's Estate,* 228 Iowa 426, 292 N.W. 165 (1940); In re *Langevin's Will,* 45 Minn. 429, 47 N.W. 1133 (1891); In re *Coryell's Will,* 4 App. Div. 429, 39 N.Y. Supp. 508 (3d Dep't 1896); *Bloor v. Platt,* 78 Ohio St. 46, 84 N.E. 604 (1908). *Smith v. Bradstreet, supra,* recognized, to a limited extent, this right to contest by holding, 33 Mass. at 265-6, that although a general creditor had no vested claim to be established or defeated in the probate of the will, an attachment

creditor did have a present lien which gave a direct interest in the land that could be followed to perfect title. The lienholder was thus not denied his day in court.

The majority view holds that the lien is given by law and that as title vests in the heir immediately on death, so does the lien of the judgment creditor, but on probate title might be taken from the heir, thereby defeating the lien. Since probate is necessary to divest the vested interest, when this appears likely, the judgment creditor is certainly a party interested under the statutes and has a right to contest the will. In re *Van Doren's Estate,* 119 N.J. Eq. 80, 180 Atl. 841 (Prerog. Ct. 1935). This position is well set out in *Watson v. Alderson,* 146 Mo. 333, 48 S.W. 478, 482 (1898):

> A lien creditor, whose lien attaches the moment that title is vested in his debtor by descent cast, although by virtue of his lien judgment he had no interest in the estate of the deceased, has the same direct and immediate interest in the probate of a will by which that title would be devested that an heir at law has. It is not interest in the estate of the deceased that authorized any person to contest a will under the statute, but interest in its devolution, — in the probate of will that determines that devolution.

The court held that lien creditors were interested persons under the statute. This reasoning is the basis of the majority view.

The minority rule does not permit either the general or the judgment creditor to contest the will. The reasons for this conclusion are varied, however, as opposed to those permitting such action. One analysis was presented in *Lee v. Keech,* 151 Md. 34, 133 Atl. 835 (1926), where it was held that a lien was a remedy which gave only a right to levy on land to pay the judgment debt. This gave neither right nor property in the land itself, which the court regarded as essential to present a sufficient interest to contest the will. However, in *Lockard v. Stephenson,* 120 Ala. 641, 24 So. 996 (1899), it was reasoned that an heir has an expectancy interest which might or might not develop into a vested interest. Since there was no legal estate, the mere contingent interest would not permit a contest by judgment creditors. A third argument appeared in *Bank of Tennessee v. Nelson,* 40 Tenn. 634, 637, 3 Head 436, 438 (1859), where the court logically argued that since the creditor would sue on the right of the heir, how could the creditor do so where the heir is content with the will? The stand of *Brooks v. Paine's Ex'rs, supra,* against fraud can be used in rebutting this contention, but the general rule is that an heir can always renounce his legacy. *See Strom v. Wood,* 100 Kan. 556, 164 Pac. 1100, 1101 (1917), and see ROLLISON, WILLS § 308 (1939). If a judgment creditor did contest the will and was successful, could the heir renounce any inheritance and thus again defeat his creditor? Perhaps this can be remedied by applying the rule of In re *Kalt's Estate, supra,* that a legatee could not renounce his bequests if the