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NOTES

*Constitutional Law*SEARCH AND SEIZURE AS INCIDENT TO A VALID ARREST UNDER
THE FOURTH AMENDMENT

The American Colonies, after experiencing a period replete with abuses by the English sovereign, were reluctant to accept a federal government without having enumerated in the fundamental law of the land certain limitations upon its powers.¹ During the period immediately preceding the Revolution general warrants known as Writs of Assistance allowed unlimited searches and seizures of whole areas without regard to specific articles or crimes. This caused great concern for the protection of the right to be free from such unfettered governmental searches.² To allay this fear the Fourth Amendment specifically enumerated the right to be free from unreasonable searches and seizures.³

This article will first treat briefly of the method used by the federal courts in deterring violations of this right, and will then concern itself with the question: When is a search valid as incident to an arrest?

The period from the adoption of the Constitution until 1914 was significant for the scarcity of cases dealing with violations of this right.⁴ Then in *Weeks v. United States*⁵ the Supreme Court formulated an effective method for preventing unlawful searches. In that case the Court refused to admit in evidence the products of the unlawful search. As further developed by the courts this doctrine not only precludes the admission of such products in evidence, but also precludes the use of an illegally obtained article before a grand jury, or to obtain a subpoena duces tecum.⁶ However, inadmissibility of evidence on the federal level

¹ 1 COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 533-6 (8th ed. Carrington 1927); 1 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 322 (Elliot ed. 1836).

² In *Boyd v. United States*, 116 U. S. 616, 625, 6 S. Ct. 524, 29 L. Ed. 746 (1886), the Court quoted James Otis as saying in reference to the use of writs of assistance that they were: ". . . the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book." See CORNELIUS, THE LAW OF SEARCH AND SEIZURE 15 n. 14 (1926).

³ "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U. S. CONST. AMEND. IV.

⁴ *Adams v. New York*, 192 U. S. 585, 24 S. Ct. 372, 48 L. Ed. 575 (1904); *Boyd et al. v. United States*, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886).

⁵ 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914).

⁶ Rudd, *Present Significance of Constitutional Guarantees Against Unreasonable Searches and Seizures*, 18 U. OF CIN. L. REV. 387 (1949).

applies only when it is illegally obtained by a federal officer, or a state officer acting in concert with the federal officer.⁷ Evidence coming to the federal officer from outside sources will be admitted no matter how it was obtained.⁸

This method, consistently used in the federal courts, differs from that followed in a majority of the state courts, which are not governed by the Fourth Amendment.⁹ Although, all states have constitutional provisions protecting the right to be free from unreasonable searches, nevertheless, in most states evidence obtained by an unreasonable search may be admitted in evidence against the accused party.¹⁰ The aggrieved party's only recourse for such an illegal act is to bring a civil suit for damages, or, to have the state prosecute the offender.¹¹ Neither of these devices is particularly effective in deterring illegal searches by the police, or in compensating for the infringement upon the accused's right of privacy. Prosecutors are notoriously reluctant to prosecute police officers. Juries likewise hesitate to decide against executive officers who exceed legal limits in attempting to perform their duties.¹² The federal courts, however, in refusing to admit the fruits of the unlawful search are more effective in protecting this right. Instead of delegating the aggrieved party to the futile task of proceeding against an officer of the law, they remove the very incentive for the search.

While the means afforded for the protection of the right on the federal level is effective in preventing an illegal search, it is often difficult to determine whether the court will consider the particular search illegal. According to the Fourth Amendment the right is to be free from *unreasonable* searches and seizures. A search is generally reasonable when made either pursuant to a sufficient search warrant, or as an incident to a valid arrest.¹³

A search warrant is sufficient in the words of the Amendment when it issues upon probable cause, supported by oath or affirmation, and particularly describes the place to be searched, and the person or thing to be seized. These words strictly limit the scope as well as the existence of a search warrant. Limiting the product of the search to specific items prevents general or exploratory searches. The particularity of the place to be searched is a protection against the abuses of area warrants, exemplified by the pre-Revolutionary Writs of Assistance. Probable cause

⁷ *Byars v. United States*, 273 U. S. 28, 47 S. Ct. 248, 71 L. Ed. 520 (1927).

⁸ ROTTSCHAEFER, *HANDBOOK OF AMERICAN CONSTITUTIONAL LAW* §§ 309 *et seq.* (1939).

⁹ *Wolf v. Colorado*, 338 U. S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949).

¹⁰ *Rudd*, *supra* note 6.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ 1 COOLEY, *op. cit.* *supra* note 1, at 618 n. 2, 629. For a general coverage of this subject see also, Ramsey, *Acquisition of Evidence by Search and Seizure*, 47 MICH. L. REV. 1137 (1949).

supported by oath and affirmation prevents searches upon a mere suspicion, and is a further insurance of the general right of privacy and security.

It is a comparatively easy matter to determine whether a search is authorized by a search warrant. Congress has supplemented the requirements of the Fourth Amendment by stating the conditions for the issuance of a search warrant and the manner of its proper execution.¹⁴ The courts have had real difficulty, however, in deciding whether a search is justified as incident to a valid arrest.

In deciding this issue two questions become pertinent: (1) If the search is justified, how far may the officer search? Is he limited to a search of the person? Or the room in which the arrest is made? Or the whole of the premises in which the room is located? This is the problem of the scope of the search. (2) May a search be made as incident to an arrest even though there was sufficient time to get a search warrant? This involves the time element.

Scope of Search

A search generally is reasonable as incident to a valid arrest if the articles seized are within the control of the arrested party.¹⁵ This is illustrated, in dictum, in *Weeks v. United States*,¹⁶ one of the first cases to state this proposition. Federal officers arrested the defendant while he was at his place of employment, and while certain of them detained the defendant, others searched his house without a warrant. The Court refused to admit the lottery tickets seized during the search stating: "Nor is it the case of burglar's tools or other proofs of guilt found upon his arrest within the control of the accused."¹⁷ The same proposition was directly dealt with in *Carroll v. United States*,¹⁸ where the Court stated that whatever is found upon the person or in his control is subject to seizure. There the Court sustained a search of an automobile believed to be illegally transporting liquor. Unfortunately, in neither of these cases did the Court explain what was meant by control. How broad this term should be has caused dissension within the courts and confusion without.¹⁹

¹⁴ 18 U. S. C. §§ 617 *et seq.* (1946); FED. R. CRIM. P. 41. Also see, statutes concerning searches and seizures of intoxicating liquors, 49 STAT. 872-4 (1935), 26 U. S. C. §§ 3116, 3117 (1946).

¹⁵ See note 13 *supra*.

¹⁶ 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914).

¹⁷ *Id.*, 232 U. S. at 392.

¹⁸ 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925).

¹⁹ See *e. g.*, *United States v. Rabinowitz*, 339 U. S. 56, 70 S. Ct. 430, 94 L. Ed. (1950); *Harris v. United States*, 331 U. S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399 (1947); *Marron v. United States*, 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231 (1927); *Agnello v. United States*, 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145 (1925); *Weeks v. United States*, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914).

While these two cases indicate a right to search for that which is under the control of the arrested party, later cases speak of the right to search the premises within which the arrest occurs. In *Agnello v. United States*²⁰ officers made a search of the defendant's house although he was arrested several blocks away. The Court held that the cocaine discovered thereby was inadmissible because the arrest did not occur in the defendant's home. The Court added, by way of dictum, that there is a right to search the place of arrest, but, of course, in the case the search was not of the premises where an arrest was made.

This dictum became a full fledged holding in *Marron v. United States*.²¹ In that case a search warrant was issued to seize liquor unlawfully sold by the defendant. Upon entering the premises the officers observed the unlawful activities and arrested the defendant. During the search, ledgers found in a closet containing some of the liquor were seized along with the liquor. While the search warrant was not broad enough to sustain the seizure of the ledgers, their admission in evidence was nevertheless sustained by the Court on the theory that the officers had the right to search the place in order to uncover and seize things used to carry out the criminal activities.

This decision was limited to its special facts by *Go-Bart v. United States*.²² In commenting on the *Marron* case the Court pointed out that there the papers taken were actually in the offender's *immediate* custody and, therefore, their seizure could be sustained without declaring a right, concurrent with the arrest, to search the whole premises.

Reversing its position again the Court allowed the search of the whole premises in *Harris v. United States*.²³ This case is probably the most extreme extension of the scope of permissive searches incident to an arrest. Here a warrant was issued for the arrest of the defendant who was believed to be in possession of forged checks. After making the arrest in his living room, five officers searched defendant's four-room apartment for five hours, completely ransacking his belongings. Finally, in a bureau drawer, the officers discovered forged draft cards inside an envelope marked "George Harris, personal papers." The Court stated that a search as incident to arrest may ". . . extend beyond the person of the one arrested to include the premises under his immediate control."²⁴ It then decided as a matter of fact that petitioner's control did extend to the whole of the apartment, and, therefore, that the search was reasonable and valid. The Court added that the nature of the article sought is an important factor in determining reasonableness.

²⁰ 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145 (1925).

²¹ 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231 (1927).

²² 282 U. S. 344, 51 S. Ct. 153, 75 L. Ed. 374 (1931). See also *United States v. Lefkowitz*, 285 U. S. 452, 52 S. Ct. 420, 76 L. Ed. 877 (1932).

²³ 331 U. S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399 (1947).

²⁴ *Id.*, 331 U. S. at 151.

The three dissenting opinions in the *Harris* case indicate the disagreement and the uncertainty, of the Supreme Court Justices, in regard to the extent of the search. In his dissent,²⁵ Justice Frankfurter decried the extension of "control," as well as the *ab initio* validation of a search by the finding of illicit documents. Justice Frankfurter would limit control to that which is ". . . on the person, or in such open and immediate physical relation to him as to be, in a fair sense, a projection of his person."²⁶ He maintained that his test is justified both historically, and also authoritatively by *Go-Bart v. United States*²⁷ and *Lefkowitz v. United States*.²⁸

In his dissent,²⁹ Justice Murphy contended that the extension by the majority of the right to search as an incident to arrest does away entirely with the need for a search warrant. He also objected to the holding because, by the admission of the officers making the search, they were merely attempting to find anything that might convict the accused.

The most extreme position was taken by Justice Jackson who would limit the search to the body of the person arrested.³⁰

In February, 1950, the Court in *United States v. Rabinowitz*³¹ again sustained the right to search the place where the arrest occurred. The defendant in this case was a stamp dealer occupying a small office. The Government learned that he had received many United States postage stamps bearing forged overprints from a printer. Under the guidance of the Government a postal employee purchased four of these stamps, and after investigation it was determined that the overprints were actually forgeries. An arrest warrant was obtained ten days after the information was received, but no search warrant was procured.³² The defendant was arrested, and his office, including his desk, safe, and file cabinet, were thoroughly searched. A large number of stamps with forged overprints were found and seized. In arriving at their conclusion that the search was reasonable the Court said that the *Harris* case ". . . is ample authority for the more limited search here considered."³³

Justice Frankfurter dissented,³⁴ reaffirming the opinions he expressed in the *Harris* case that the extension of the concept of *control* is too broad, and that the decision is an unwarranted reliance upon the *Weeks* and *Carroll* cases.

²⁵ *Id.*, 331 U. S. at 155.

²⁶ *Id.*, 331 U. S. at 168.

²⁷ 282 U. S. 344, 51 S. Ct. 153, 75 L. Ed. 374 (1931).

²⁸ 285 U. S. 452, 52 S. Ct. 420, 76 L. Ed. 877 (1932).

²⁹ 331 U. S. 145, 183, 67 S. Ct. 1098, 91 L. Ed. 1399 (1947).

³⁰ *Id.*, 331 U. S. at 195.

³¹ 339 U. S. 56, 70 S. Ct. 430, 94 L. Ed. (1950).

³² The portent of the unexcused failure to obtain a search warrant will be discussed in the section following.

³³ 339 U. S. at 63.

³⁴ *Id.*, 339 U. S. at 68.

As shown by this most recent authority, officers now have a right to search the whole premises. The courts have justified this liberality by stating that the premises in question are within the control of the arrested party. However, there is much logic in the opposing view of Justice Frankfurter who says that the reason for allowing a search as incident to an arrest was to prevent: (1) injury to the arresting officer; (2) the possibility that the arrested party may escape; (3) a destruction of the evidence.³⁵ While he cites little authority for his contention it seems to be sustained by reason. This is especially evident in view of the emphasis in the Fourth Amendment upon the necessity of obtaining a search warrant. Obviously no broad right to search without a search warrant was contemplated by the framers of the Amendment because such a right would be a loophole for avoiding the limitations placed upon the issuance of the warrant.³⁶ Nor should immediate control be construed to mean the control a man ordinarily has over his premises. A search of the whole premises should not be allowed unless it is necessary to prevent the three dangers alluded to by Frankfurter. How far the officers can search therefore should depend upon the circumstances of each case,^{z. e.}, the size and nature of the premises, the number and location of the parties arrested, etc.

Opportunity to Obtain a Search Warrant

The second problem presented by incidental searches is the effect of the arresting officer's failure to obtain a search warrant when he has an opportunity to do so. If his failure is unexcused, does it render the search unreasonable under the Fourth Amendment?

In *Carroll v. United States*,³⁷ the Court made a distinction between the search of a store, dwelling house or other structure, and an automobile. The Court held that in the case of vehicles which can be readily moved from the jurisdiction, it is not practicable to obtain a search warrant and one will not be required. Hence, even without a warrant, the liquor seized in search of a car was admissible. This Court stated by way of dictum that in cases where the securing of a warrant is reasonably practicable, it must be done.

This case was followed by *Go-Bart v. United States*³⁸ where the Court after condemning the search involved as exploratory, also indicated its disapproval of the arresting officer's failure to obtain a warrant when there was sufficient time to do so.³⁹

³⁵ *Id.*, 339 U. S. at 72.

³⁶ See *Harris v. United States*, 331 U. S. 145, 183, 67 S. Ct. 1098, 91 L. Ed. 1399 (1947) (dissenting opinion of Justice Murphy).

³⁷ 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925).

³⁸ 282 U. S. 344, 51 S. Ct. 153, 75 L. Ed. 374 (1931).

³⁹ *Id.*, 282 U. S. at 358.

In *Taylor v. United States*⁴⁰ the holding apparently turned upon the fact that the arrest was not made until after the search had revealed the contraband liquor. Nevertheless, the Court upbraided the arresting officers for not obtaining a warrant although they had the opportunity to so proceed in an orderly way.⁴¹

Although not patently considered by the majority in *Harris v. United States*,⁴² the time factor was deemed to be of primary importance by the dissenting judges. Justice Murphy stated that the Constitution is not dependent on the whim or convenience of law enforcement officers, and that a search should not be made without a warrant where, as here, there is an opportunity to obtain one.⁴³

In *Johnson v. United States*,⁴⁴ federal narcotic agents arrested the defendant and searched her hotel room upon suspicion that they smelled opium smoke in the hall outside her room. The Court held there was not a valid arrest, and on this basis refused to admit the pipe used to smoke the opium, and other evidence seized. The Court said that inconvenience to the arresting officers, and the slight delay necessary to prepare papers and present the evidence to a magistrate, were not enough to bypass the Constitutional requirement. This criticism of the narcotic agents' failure to obtain a search warrant is mere dicta, however, since the court held that there was no valid arrest to which the search could be an incident.

After appearing in the foregoing maze of dicta, and in dissenting opinions, the failure to obtain a search warrant when there is opportunity to do so finally became the determining factor in *Trupiano v. United States*.⁴⁵ By that decision the Court inserted "time to procure" as an indispensable element in determining whether a search meets the Fourth Amendment requirement of reasonableness. Only if there is an insufficient time to obtain a search warrant will a search, as incident to arrest, be allowed. In this case operators of an unlawful still had been under surveillance for almost a month. In fact, one Government agent was in the employ of the defendants, and had full knowledge of all material facts. In spite of this the revenue agents did not obtain a search warrant. After this period of waiting, the agents, with the permission of the owner, entered the property, and seeing the still in operation arrested the defendants and seized the still. In a five to four decision, the Court held that the seizure of a still as incident to the arrest of the defendant was not reasonable because of the failure to obtain a search warrant, and disallowed the introduction of the evidentiary matter.

⁴⁰ 286 U. S. 1, 52 S. Ct. 466, 76 L. Ed. 951 (1932).

⁴¹ *Id.*, 286 U. S. at 6.

⁴² 331 U. S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399 (1947).

⁴³ *Id.*, 331 U. S. 190.

⁴⁴ 333 U. S. 10, 68 S. Ct. 367, 92 L. Ed. 436 (1948).

⁴⁵ 334 U. S. 699, 68 S. Ct. 1229, 92 L. Ed. 1663 (1948).

In voicing the majority opinion, Justice Murphy admitted that the arrest was legal, but stated that the proximity of the contraband liquor to one of the arrested lawbreakers was a mere fortuitous circumstance which was insufficient to authorize the seizure. The strictness of this holding is emphasized by the fact that no search was necessary to discover the still which was open to view. Justice Murphy further argued that a search without a warrant as incident to a lawful arrest is a strictly limited right, and must be justified by some necessity for dispensing with a search warrant. He concluded that in this case nothing was shown upon which the necessity of dispensing with a search warrant could be predicated.

In the dissenting opinion,⁴⁶ Justice Vinson emphasized that the seizure of articles in plain view of the arresting officer, without any search on his part, is reasonable, and should be allowed. He also stressed the fact that the goods seized were contraband. “. . . a reasonable accommodation of the interests of society and the individual . . .”⁴⁷ should permit the seizure of instrumentalities of crime, and contraband materials in open view of the arresting officer.

The same year, in *McDonald v. United States*⁴⁸ the Supreme Court reiterated the rule of the *Trupiano* case. Here policemen had been observing the defendant's movements about the rooming house where he lived. From sounds of an adding machine the officers concluded that a numbers racket was being operated from there. They then unlawfully entered the rooming house and peered through a transom into the defendant's room, where they observed the defendant at work at an adding machine surrounded by money and policy slips. The officers forthwith arrested the defendant and seized the evidence for admission at the trial. A majority of the Court refused admission because of the illegal entry and the lack of a search warrant. The Court argued that, after the officers peered through the transom they had sufficient time to obtain a search warrant, and that their failure was not excused by any emergency. The Court said:⁴⁹

Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. . . . Power is a heady thing; and history shows that the police acting on their own cannot be trusted.

Justice Jackson, concurring in the result,⁵⁰ pointed out that here as in many cases disallowing searches claimed to be based on necessity,

⁴⁶ *Id.*, 334 U. S. at 710.

⁴⁷ *Id.*, 334 U. S. at 716.

⁴⁸ 335 U. S. 451, 69 S. Ct. 191, 93 L. Ed. 153 (1948).

⁴⁹ *Id.*, 335 U. S. at 455.

⁵⁰ *Id.*, 335 U. S. at 457.

the crimes involved were merely *malum prohibitum*. It was his opinion that the suppression of crimes of this type is of less importance to society than the protection of privacy provided by the Fourth Amendment.

The doctrine of the *Trupiano* case was short-lived. Two years later, the Supreme Court in *United States v. Rabinowitz*⁵¹ expressly overruled the doctrine that a search without a search warrant cannot be reasonable if there was an opportunity to obtain such a warrant. In the *Rabinowitz* case ten days had elapsed since the officers had become aware of the defendant's activities. Nevertheless, they made the search without attempting to get a warrant. The Court said that the relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable considering all the circumstances. Upon this basis it was decided that the search was reasonable and the evidence admissible. Justice Minton, speaking for the Court, stressed the fact that law enforcement officers should have flexibility in the enforcement of the criminal laws.

In a vehement dissent,⁵² Justice Frankfurter argued that the test of reasonableness was thereby taken out of its context, *i. e.*, the history and purpose of the Fourth Amendment. He contended that the holding of the majority defeated the very purpose of the Amendment. He further maintained that some criterion of reasonableness is necessary for the proper guidance of district judges, juries, and police. He demanded retention of the *Trupiano* doctrine that the test must be the presence or absence of ample opportunity for obtaining a search warrant.

The *Rabinowitz* case has been cited in two recent courts of appeal cases. In *Martin v. United States*,⁵³ a Government officer had watched the activities of a man on probation for several months. One night he apprehended the probationee and another unloading an illegal liquor shipment from a car in a garage. The officer did not attempt to procure a warrant, but immediately arrested the men and seized the contraband. The court allowed the seized liquor to be admitted in evidence, expressly following the *Rabinowitz* decision. The court added that the circumstances in the instant case were stronger to sustain the seizure as there was a danger that the liquor would be removed.

In *McKnight v. United States*⁵⁴ the court indicated a limitation on the right to search the premises. In that case, officers having a warrant for defendant's arrest deliberately allowed him to pass them on the street and enter a house. Then they broke into the building, made the arrest, and searched the premises. It was shown that the sole purpose in employing such procedure was the validation of a search without a

⁵¹ 339 U. S. 56, 70 S. Ct. 430, 94 L. Ed. (1950).

⁵² *Id.*, 339 U. S. at 68.

⁵³ 183 F. (2d) 436 (4th Cir. 1950).

⁵⁴ 183 F. (2d) 977 (D. C. Cir. 1950).

proper warrant. Stating that the arrest was incident to the search, rather than the search to the arrest, the court held both the arrest and the search illegal. This case adds the requirement that police officers act in good faith in making the arrest. A mere subterfuge will not suffice.

Conclusion

Although the Supreme Court justices are still in disagreement on the law of incidental searches the present status of this law is evident from the majority's opinion in *Rabinowitz v. United States*. Presently this case is authority for the two main issues of this note, *i. e.*, when a search may be made as incident to a valid arrest and how far such a search may extend.

In deciding *when* a search may be made as incident to an arrest the question of whether the arresting officer had sufficient time to obtain a search warrant is no longer controlling. The court will look to all the circumstances of the case to determine whether the search was reasonable. In determining the *extent* of the search the court will not limit the search to that part of the premises so proximate to the arrested party that he is able to destroy the evidence. The court sanctions a search of the whole premises if it decides that such a search was reasonable under all the circumstances—"the total atmosphere of the case."⁵⁵

While this test is unobjectionable as far as it goes it appears to fall short of being an adequate guide for executive officers. Instead of requiring the officer to get a search warrant whenever they have an opportunity it lets him substitute his own judgment in determining the extent of the search. This was the very evil that the Fourth Amendment was intended to prevent.

While it appears that the application of the present interpretation of the Fourth Amendment does violence to Constitutional liberty there appears some ground for optimism. In the past, the Supreme Court has had a tendency to change its view in construing this Amendment. This has caused the law of search and seizure to comprise an oscillating pattern of authority. It is hoped that the *Rabinowitz* case is not the final determination of citizens' rights under the Fourth Amendment.

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⁵⁵ See *Martin v. United States*, 183 F. (2d) 436, 440 (4th Cir. 1950).

Sales

THE EFFECT OF CERTAIN FEDERAL REGULATIONS ON THE LAW OF SALES

Government regulation of various phases of the law of sales has become increasingly widespread and complex with the growth of the business economy. There are myriad reasons prompting the enactment of these regulations. The singular problems of shippers of agricultural products arising out of bad faith and untimely rejections of their goods with ensuing deterioration and loss led to the passage of The Perishable Agricultural Commodities Act. The inter-related problems of price discrimination and monopoly control of buying have been dealt with in the Robinson-Patman amendment to the Clayton Anti-Trust Act. More recently, World War II and the present international crisis have imposed heavy strains on the domestic economy and caused a corresponding decrease in the available supply of consumer goods. Price control legislation was enacted as a direct measure against an otherwise inevitable inflation. These particular regulations have been selected for analysis because each of them has had a vital contemporary effect upon the law of sales.

I.

Perishable Agricultural Commodities Act

By enacting the Perishable Agricultural Commodities Act¹ Congress came to the aid of the shippers of perishable goods who were incurring huge losses because of bad faith rejections of their shipments. The Act's purpose is patent by its forthright language: ²

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce . . . For any dealer to reject or fail to deliver in accordance with the terms of the contract *without reasonable cause* any perishable agricultural commodity. . . . (Emphasis supplied.)

Manifestly, the reason for the special protection given dealers in perishable goods is the vulnerability of their produce to loss through delay in delivery. While with other goods the loss incurred subsequent to a rejection would be limited to some additional shipping and storage costs and a possible declining market, perishable goods, in addition to these perils, might well be entirely deteriorated before a far-distant shipper can find a new purchaser.

While several cases ³ have stated that the Act was not intended to repeal the law of sales or to destroy the rights and liabilities of the con-

¹ 46 STAT. 531 *et seq.* (1930), as amended, 7 U. S. C. §§ 499a *et seq.* (1946). Subsection (a)(4)(A) defines perishable agricultural commodities as ". . . any of the following, whether or not frozen or packed in ice: Fresh fruits and fresh vegetables of every kind and character. . . ."

² 46 STAT. 532 (1930), 7 U. S. C. § 499(b) (1946).

³ Ernest E. Fadler Co. v. Hesser, 166 F. (2d) 904 (10th Cir. 1948); LeRoy Dyal Co. v. Allen, 161 F. (2d) 152 (4th Cir. 1947).

tracting parties thereunder, it certainly was intended to mitigate the rigors of the law of sales in regard to the rejection of perishable goods in certain types of contracts.

Some of the questions naturally arising under this act are: Does the buyer have the right to reject perishable goods that conformed to the contract when they were shipped under an f. o. b. shipping point contract? Does the buyer have any recourse against the seller other than rejection when the seller ships goods that do not conform to the contract? Will purely technical breaches of the contract by the seller excuse the buyer from further performance of the contract? Under f. o. b. acceptance final contracts is there any right to reject non-conforming goods? What is the measure of damages when the seller ships non-conforming goods under this type of contract and the buyer wrongfully rejects?

In f. o. b. shipping point contracts the decisions under the Act have not altered the law substantially. The buyer under a contract for the sale of perishable goods has ⁴

. . . the right of inspection at destination before the goods are paid for, but only for the purpose of determining that the produce shipped complied with the terms of the contract or order *at the time of shipment*. . . . Such right of inspection shall not convey or imply any right of rejection by the buyer because of any loss, damage, deterioration, or change which has occurred in transit. (Emphasis supplied.)

It has been held that where goods were conforming goods at the time of shipment the buyer has no right of rejection upon arrival, regardless of the condition of the goods.⁵ In this case the plaintiff shipper met the f. o. b. contract by shipping tomatoes which were conforming goods according to government inspection at the time of shipment. Upon arrival, however, the goods were excessively deteriorated, and the buyer refused to accept. The seller's recovery was the difference between the original contract price and the net sum on resale, plus interest and attorney's fees.

This case is in complete agreement with the existing law on f. o. b. sales which permits the buyer to inspect the goods upon arrival, but only for the purpose of seeing whether they conformed to the contract at the time of shipment. This means that if the seller appropriates the goods to an f. o. b. shipping point contract by shipping in suitable condition and quantity, the buyer must accept the goods upon delivery regardless of their condition.

Another problem of f. o. b. shipping point contracts was raised in the case of *A. J. Conroy, Inc. v. Weyl-Zuckerman & Co.*⁶ Here the seller shipped goods with a latent defect not appearing at the time of shipment

⁴ 7 CODE FED. REGS. § 46.24(i) (Cum. Supp. 1943).

⁵ *Alexander Marketing Co. v. Harrisburg Daily Market*, 87 F. Supp. 124 (M. D. Pa. 1949).

⁶ 39 F. Supp. 784 (N. D. Cal. 1941).

as was evidenced by government inspection. Upon arrival the defect was obvious, but the buyer nonetheless accepted the goods and recovered under the PACA for the difference between their sale value and the amount which they would have brought had they conformed to the contract. This result illustrates an alternative remedy provided by the PACA, whereby the buyer can sue the seller for failure to deliver without reasonable cause. The determinative factor is not that the goods did not conform upon delivery, but that conforming goods were not originally appropriated to the contract by the seller.

Although there have been administrative decisions, as yet there are no decisions on the effect of the PACA upon f. o. b. shipping point sales where there was only a technical breach of the contract so as to call into play the "without reasonable cause" phrase of the statute.

While the PACA has had little effect on f. o. b. shipping point sales, its full weight has been thrown upon the contracts known as f. o. b. acceptance and f. o. b. acceptance final. Under Title 7 of the Code of Federal Regulations these terms are defined as follows: ⁷

"F. o. b. acceptance" means the same as "f. o. b.," except that the buyer assumes full responsibility for the goods at shipping point and has no right of rejection on arrival. . . . The buyer's remedy under this method of purchase is by recovery of damages from the shipper and not by rejection of the shipment.

"F. o. b. acceptance final" means that the buyer accepts the produce f. o. b. cars at shipping point without recourse.

In a leading case ⁸ on the f. o. b. acceptance final provision the court held that mere technical breaches of the contract by the seller are not a basis for rejection. In this case, the buyer, in a falling market, sought to set up the seller's shipment of the produce one day earlier than was called for, as a substantial breach excusing the buyer from performance. Even if this case had involved only an f. o. b. shipping point contract, the court would undoubtedly have held that there was no reasonable cause for the rejection. *A fortiori*, where in addition to the "without reasonable cause" phrase there is also the definition of the f. o. b. acceptance final permitting no rejection whatever, the same result was doubly assured.

An even more graphic illustration of the effect of the f. o. b. acceptance final provision of the PACA is given in *L. Gillarde Co. v. Joseph Martinelli & Co.*⁹ It was there held that there was no right to reject a shipment of cantaloupes even though the goods did not conform at any time after the contract was concluded, and where there was an 85% loss by spoilage upon arrival. Obviously, under this rule all that the buyer

⁷ 7 CODE FED. REGS. §§ 46.24(l) and 46.24(m) (Cum. Supp. 1943).

⁸ *LeRoy Dyal Co. v. Allen*, 161 F. (2d) 152 (4th Cir. 1947).

⁹ 168 F. (2d) 276, *rehearing granted and judgment amended*, 169 F. (2d) 60 (1st Cir. 1948).

can do under an f. o. b. acceptance final contract would be to accept whatever is sent. He may then recoup his losses by an action against the seller either under the failure "to deliver in accordance with the terms of the contract without reasonable cause" clause of the PACA, or under the breach of the warranty of fitness remedies of the common law and under the Uniform Sales Act.

The court of appeals later reversed itself in this case on the matter of damages.¹⁰ In the first decision it was held that the fact that the cantaloupes were not number one grade when shipped might be considered by way of recoupment in assessing the damages against the defendant. On rehearing, this allowance of recoupment of the difference between what was delivered and what was contracted for was denied. The court thought that the practical effect of permitting the recoupment would be to emasculate the PACA since the rejecting buyer would never have to pay substantial damage. The final adjudication is necessarily harsh in this instance because the buyer is held for full damages, *i. e.*, the difference between the contract price and the resale price, although the value of the goods when he should have received them was only a fraction of the contract price. But if the policy behind the statute—*i. e.*, minimizing of losses in shipments of perishable goods—is to be furthered, the measures of damages must be that adopted in this case, in order to coerce the buyers into acceptance.

Not only quality failure but also quantity failure under f. o. b. shipping point acceptance final sales contracts has been litigated under the provisions of the PACA. In *Mancuso v. L. Gillarde Co.*,¹¹ the market on mellons was falling and the buyer seized upon the seller's shipment of a smaller quantity of the desired brand, and the inclusion of a substitute brand for the remainder, as a cause for his rejection of the entire shipment. The court held that by rejecting the shipment under the f. o. b. acceptance final contract, the buyer waived his right to claim damages for the seller's breach of the contract in shipping the wrong quantity. Therefore, the buyer was liable for refusing to accept even though the goods did not conform, and furthermore, under the *Gillarde v. Joseph Martinelli* ruling, the right to counterclaim for the seller's breach was forfeited by the rejection.

A further aspect of f. o. b. acceptance final contracts is brought out in the case of *Joseph Martinelli & Co. v. Simon Siegel Co.*¹² The issue presented for the court's decision was the effect of the seller's fraud in procuring the contract under the terms of the PACA which prohibit a refusal of the delivery of the goods. The court held that the statute presupposed a valid contract. Unless the contract was valid at all times,

¹⁰ 169 F. (2d) 60 (1st Cir. 1948).

¹¹ 61 A. (2d) 677 (Mun. Ct. App. D. C. 1948).

¹² 176 F. (2d) 98 (1st Cir. 1949).

the statute would not come into play; consequently there was a right to refuse the delivery. The fraud consisted of the shipper's sale of grapes after they had been rejected once because of decay. The shipper must have had knowledge of their decayed condition by this refusal, so the second sale was fraudulent as to the buyer and, f. o. b. acceptance final notwithstanding, the buyer was not obliged to accept them.

Thus under PACA the most significant phrase concerning the f. o. b. shipping point sale is the rejection without reasonable cause. In a case where the seller departs only *technically* from the terms of the agreement the buyer will not be permitted to reject the perishable goods. Otherwise the Act does not affect this type of sale. Under the f. o. b. acceptance and acceptance final sales, however, the right to reject has been shelved where there is an enforceable contract. Obviously, in such an instance the buyer can pursue his remedies under the PACA for failure to comply with the agreement, or sue under whatever common law and statutory remedies previously existed. But when the buyer wrongfully rejects he is liable for the entire difference between the contract price and the eventual sales price regardless of the condition of the perishable goods when shipped.

II.

The Robinson-Patman Act

The Robinson-Patman Act,¹³ in general, makes price discrimination unlawful when its effect is to substantially lessen competition. The Act amended Section 2 of the Clayton Anti-Trust Act which provided: ¹⁴

. . . that nothing herein contained shall prevent discrimination in price . . . on account of . . . quantity of the commodity sold . . . or discrimination in price . . . made in good faith to meet competition. . . .

This Section was construed as permitting quantity discounts without regard to the cost saving which accrued to the seller as a result of the quantity discounts,¹⁵ and consequently discrimination to meet competition so weakened the act "as to render it inadequate, if not almost a nullity."¹⁶ The purpose of the Robinson-Patman amendment was to limit quantity price differentials to a sphere of actual cost savings, for otherwise such differentials would become an instrument of favor and privilege, and thus injure competition and promote monopoly. The pertinent part of Section 2 of the Clayton Act was amended as follows: ¹⁷

¹³ 49 STAT. 1526 (1936), 15 U. S. C. § 13 (1946).

¹⁴ 38 STAT. 730 (1914), as amended, 49 STAT. 1526 *et. seq.* (1936), 15 U. S. C. § 13 *et. seq.* (1946).

¹⁵ *Goodyear Tire & Rubber Co. v. Federal Trade Commission*, 101 F. (2d) 620 (6th Cir.), *cert. denied*, 308 U. S. 557, 60 S. Ct. 74, 84 L. Ed. 468 (1939).

¹⁶ H. R. REP. NO. 2287, 74th Cong., 2d Sess. 7 (1936).

¹⁷ 49 STAT. 1526 (1936), 15 U. S. C. § 13a (1946).

. . . it shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality. . . . *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery. . . .

The amendment poses difficult problems to the seller whose price system grants discounts based upon quantity, or who sells to one party at a price less than to another because of competition from another seller. Some of the questions arising are: May a seller grant quantity discounts when such discounts are not fully reflected in cost savings? To what extent must the seller prove actual cost savings? May a seller grant discounts in order to meet the competition of another seller? Does unlawful price discrimination render the sales contract and the obligations arising out of it void and unenforceable?

Under the present act it is not necessary that the Federal Trade Commission prove that quantity discounts or other price discriminations have in fact injured competition. The Commission need only prove that there is a "reasonable possibility" that such discounts or similar discriminations may have a harmful effect upon competition.¹⁸ Quantity discounts can be justified only when they result from a cost saving to the seller. The burden of proving that the discount is justified by an actual cost saving is upon the seller, under the familiar rule that one who claims the benefit of an exception in a statute has the burden of proving that he comes within the exception.

In *Federal Trade Commission v. Morton Salt Co.*,¹⁹ the FTC had issued a cease and desist order against the salt company for discounts it allowed on carload shipments. Although it was proved by the company that less than one-tenth of one percent of its sales were not in carload lots, and that salt was a relatively small item of a grocery stock in trade, the Court said that it was only necessary that the Commission show that there was a "reasonable possibility" that such discounts could have a harmful effect upon competition.

Justice Jackson, in a dissenting opinion, vigorously attacked the majority's test of "reasonable possibility" saying:²⁰

The law of this case, in a nutshell, is that no quantity discount is valid if the Commission chooses to say it is not. . . . The evidence is that less than 1/10 of 1% of respondents' total salt business fails to get the benefit of this carload-lot discount. . . . It does not seem to me that one can fairly draw the inference that competition *probably* is affected. . . .

¹⁸ *Federal Trade Commission v. Morton Salt Co.*, 334 U. S. 37, 68 S. Ct. 822, 92 L. Ed. 1196 (1948); *Corn Products Refining Co. et al. v. Federal Trade Commission*, 324 U. S. 726, 65 S. Ct. 961, 89 L. Ed. 1320 (1945); *Standard Oil Co. v. Federal Trade Commission*, 173 F. (2d) 210 (7th Cir. 1949), *reversed*, 340 U. S. 100, 71 S. Ct. 240, 94 L. Ed. 100 (1951).

¹⁹ *Supra* note 18

²⁰ *Id.*, 334 U. S. at 58, 60.

Since the Act itself makes unlawful only discriminations the effect of which "may be substantially to lessen competition" the choice of words in the test posed by the majority does not seem to be supported by the statute.

The legislative history of the Act shows that it was the intent of Congress to broaden the Commission's power to prevent price discrimination. In explaining the proposed amendment, the Senate Judiciary Committee stated that it was intended to accomplish a substantial broadening of a similar clause in Section 2 of the Clayton Act; that the latter had in practice been too restrictive in requiring a showing of general injury to competition in the line of commerce concerned; and that it was the purpose of the amendment to enable the Commission to take preventive action before actual harm resulted.²¹

Under the original provision of the Clayton Act, a price discrimination made in good faith to meet competition was an absolute defense. Section 2 of that Act provided: ²²

. . . nothing herein contained shall prevent . . . discrimination in price in the same or different communities made in good faith to meet competition. . . .

As amended by the Robinson-Patman Act, Section 2 now provides: ²³

Upon proof being made . . . that there has been discrimination in price . . . the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section. . . . *Provided, however,* that nothing herein contained . . . shall prevent a seller rebutting the prima-facie case . . . by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor. . . .

The legislative history of the Robinson-Patman Act would seem to indicate that it was the intent of Congress to restrict a price differential made to meet competition to something less than the absolute defense that it was under the Clayton Act. The principal reason for the amendment was the prevention of price discrimination in favor of large quantity buyers, whose position enabled them to make effective demands for lower prices from sellers. In presenting the conference report, the Chairman of the House Conference Committee stated on the floor of the House: ²⁴

. . . this does not set up meeting of competition as an absolute bar to a charge of discrimination. . . . It merely permits it to be shown in evidence. This provision is entirely procedural. . . . If this proviso were construed to permit showing of a competing offer as an absolute bar to liability for discrimination then it would nullify the Act entirely at the very inception of its enforcement, for in nearly every case mass buyers receive similar discriminations from competition sellers of the same produce.

²¹ SEN. REP. NO. 1502, 74th Cong., 2d Sess. 4 (1936).

²² 38 STAT. 730 (1914), as amended, 49 STAT. 1526 (1936), 15 U. S. C. § 13 (1946).

²³ 49 STAT. 1526 (1936), 15 U. S. C. § 13(b) (1946).

²⁴ 80 CONG. REC. 9418 (1936).

However, very recently in *Standard Oil Co. v. Federal Trade Commission*,²⁵ the Supreme Court has held that a price discrimination made in good faith to meet the equal and lawful price of a competitor is an absolute defense, even though such discrimination is injurious to competitors at a lower level (i.e., the retail level) than that of the seller and the favored buyers.

The oil company sold gasoline to 358 of its own retailers and to four independent wholesalers in the Detroit area. The selling price to the wholesalers was one and one-half cents per gallon less than the price to the retailers. Because of this discount given the wholesalers, one of them was able to sell gasoline through its own retailers for as much as two cents per gallon lower than could Standard's retailers. Standard's defense to the alleged violation of the Act was that the discount was made in good faith to meet competition. The Federal Trade Commission concluded as a matter of law that it was immaterial whether the price discrimination was made in good faith in face of the affirmative proof that the price differential was injurious to retail stations.²⁶ The Court of Appeals for the Seventh Circuit ascribed to the Commission's view, and found a violation of the Act, holding that good faith to meet actual competition was not an absolute defense, but merely a procedural defense.²⁷

In overruling the court of appeals and finding that the Standard had not violated the Act, the Supreme Court rejected the Commission's proposed test that: ^{27a}

. . . in each case it [the commission] must weigh the potentially injurious effect of a seller's price reduction upon competition at all lower levels against its beneficial effect in permitting the seller to meet competition at its own level.

The Court saw no foundation for such a test. On the other hand, so long as the seller meets his burden of proof that the discrimination was made in good faith to meet competition, the defense is sufficient. The Court concluded that the legislative history of the Act was at best inconclusive, but that it nevertheless indicated that the purpose of Congress was to procedurally limit the defense as it existed under the Clayton Act, rather than to abolish it. Subject to the procedural limitations it remained an "equally absolute" defense.

When the seller brings an action for the unpaid purchase price the buyer cannot defeat the action by showing that the seller has sold to others at a price which unlawfully discriminates against the buyer. This is true even though the amount sought by the seller is equal to the un-

²⁵ 340 U. S., 71 S. Ct. 240, 94 L. Ed. (1951).

²⁶ 41 F. T. C. 263, 281-2 (1945).

²⁷ 173 F. (2d) 210 (7th Cir. 1949).

^{27a} 71 S. Ct. at 250.

lawful discrimination. In *Bruce's Juices, Inc. v. American Can Co.*,²⁸ the seller had sold cans to the buyer, receiving in payment the buyer's promissory notes. In defense to an action upon the notes the buyer contended that since the seller's quantity discount schedule was in violation of the Robinson-Patman Act, the consideration of the notes was illegal, and consequently no action could be maintained upon them. The Court gave judgment to the seller, holding that a violation of the Act did not render the contract illegal and void.

The Court pointed out that the only sanctions provided by Congress were a provision for the injured buyer to recover triple damages to redress private injury, and for the FTC to issue cease and desist orders and bring criminal proceedings to vindicate and protect the public interest. Furthermore, under familiar principles of quasi-contracts, if a violation of the Act were held to render the contract illegal, the seller could not maintain an action in *quantum valebant* for the reasonable value of the goods used by the purchaser. Therefore, such a contention, if upheld, would allow the purchaser to get the goods for nothing. And at no time does it appear in the legislative history of the Act that either House of Congress wanted to go so far as to permit that result. If the buyer's views were accepted the proposed remedy would soon end all illegal discounts by ending the business. This would seem to be the correct result under the rule that where a statute creates a new offense and provides the penalty, or gives a new right and declares the remedy, the penalty or remedy can be only that which the statute expressly provides.²⁹

Moreover, as the Court pointed out in the *Bruce's Juices* case, no single sale can be a violation of the Act. It takes at least two sales in order to constitute a discrimination. Consequently, the alleged illegality is not inherent in the sale in question, but can only be found in a series of transactions which a party to the litigation has had with third persons who are strangers to the allegedly discriminatory transaction. It is only when one goes outside the dealings between the seller and the buyer and considers the seller's sales to the third parties, that a violation can arise, and since such facts are unnecessary to sustain the seller's action on the notes (or any similar suit to collect the sale price) the defense must fail.

Summarizing, it is evident that under the Robinson-Patman Act the Federal Trade Commission establishes a prima facie case of unlawful discrimination by the mere showing of a price differential and a "reasonable possibility" that it may be harmful to competition. The burden of rebutting this prima facie case is then upon the seller. Proof that the discrimination is fully reflected by actual cost savings is an absolute defense. Likewise, proof that the discrimination was made in good faith

²⁸ 330 U. S. 743, 67 S. Ct. 1015, 91 L. Ed. 1219 (1947).

²⁹ D. R. Wilder Mfg. Co. v. Corn Products Refining Co., 236 U. S. 165, 35 S. Ct. 398, 59 L. Ed. 520 (1915).

to meet the equally low price of a competitor is an absolute defense even though such discrimination may be injurious to competitors at a level below that of the seller. Violation of the Act does not make the transaction void and the sales contract unenforceable; the seller can recover the purchase price in spite of the violation. Therefore, it would seem that price discriminations are permissible only when they reflect actual cost savings; otherwise, if there is a reasonable possibility that they will stifle competition they may be the subject of a cease and desist order of the Federal Trade Commission, and/or the basis of an action for triple damages by the injured seller.

III.

Price Control

Maximum price regulations adopted as an emergency defense or war measure are bound to have a profound effect upon the law governing the sale of virtually all types of goods, but in particular, consumer goods. These regulations pose many difficult problems between seller and buyer: What are the rights and duties of the parties to a pre-existing contract of sale, in which the price exceeds a ceiling price effective before the time of delivery? In the case of an executed transaction where both the goods have been delivered and the price paid, what is the buyer's right to recover back that portion of the price paid which is in excess of the maximum ceiling price? May the buyer recover damages for the seller's failure to deliver goods pursuant to a contract of sale when the price is in excess of the maximum ceiling price? Does a subsequent amendment to the price regulations revitalize a contract made illegal by a prior regulation? And may the seller enjoin a purchaser from reselling at a price which is less than the fair trade price, when the maximum resale price under the federal regulations is less than the fair trade price? The courts have had to deal with these and many other problems when, under federal law, it is illegal to sell or buy at a price in excess of that determined by an administrative agency.

During World War II prices of many commodities were regulated by the Office of Price Administration under the Emergency Price Control Act of 1942.³⁰ The Defense Production Act of 1950³¹ gives the Presi-

³⁰ 56 STAT. 23 (1942).

³¹ Pub. L. No. 774, 81st Cong. 2d Sess. § 401 (Sept. 8, 1950). During much of the last decade, due to the exigencies of war and national defense, the demand for goods had exceeded the supply, resulting in a seller's market and rapidly rising prices. Along with price controls, regulation of consumer credit was used in an attempt to correct this situation. Pursuant to Exec. Order No. 8843, 6 FED. REG. 4035 (1941), the Board of Governors of the Federal Reserve System first issued Regulation W on September 1, 1941, 12 CODE FED. REGS. § 222 (Cum. Supp. 1949), which regulated the minimum down payments and the time in which the balance must be paid. These controls were removed by Congress August 8, 1947, 61 STAT.

dent stand-by power to regulate and revise prices through a similar agency. The provisions of the two Acts are quite similar and, basically, the standards which are to guide the President in fixing and adjusting prices under the Defense Production Act of 1950 are the same as under the Emergency Price Control Act of 1942.³² Consequently, it would seem that decisions under, and interpretations of, the prior act will be a valuable guide under the present act.

The first problem arising in connection with the effect of price ceilings upon pre-existing contracts of sale is whether the statute or administrative regulation was intended to operate retroactively. Ordinarily, unless there is a clear manifestation of intent that the statute or regulation is intended to apply retroactively, the courts will not apply it to prior contracts or transactions. During the first World War Congress passed the Lever Act³³ which authorized the President, or the Federal Trade Commission acting for him, to fix the price of coke and coal. The Supreme Court held that the Act was not retroactive.³⁴ Under the Emergency Price Control Act of 1942 and the Defense Production Act of 1950 there is little doubt that Congress intended the price fixing provisions to have retroactive effect. Section 4(a) of the Emergency Price Control Act provided:³⁵

It shall be unlawful, regardless of any contract, agreement, lease, or other obligation *heretofore* or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity . . . in violation of any regulation or order. . . . (Emphasis supplied.)

Similarly, Section 402(d)(1) of the Defense Production Act of 1950 provides:³⁶

Regulations and orders issued under this title shall apply regardless of any obligation *heretofore* or hereafter incurred. . . . (Emphasis supplied.)

And Section 405(a) of the same Act provides:³⁷

It shall be unlawful, regardless of any obligation *heretofore* or hereafter entered into, for any person to sell or deliver, or in the regular course of

921 (1947). In September, 1950, Congress again authorized the Board of Governors to regulate consumer credit, Pub. L. No. 774, 81st Cong. 2d Sess. § 601 (Sept. 8, 1950), and pursuant to that authority the Board of Governors reissued Regulation W, 15 FED. REG. 6118 (1950). At present, automobiles, mechanical household appliances, and furniture are subject to credit regulations.

As distinguished from the price control regulations, to date the "for administrative purposes only" orders of Regulation W do not make contracts in violation thereof illegal and void.

³² CCH, *PLANNING FOR CONTROLS*, ¶ 106 (Sept. 2, 1950).

³³ 40 STAT. 276 (1917).

³⁴ *Matthew Addy Co. v. United States*, 264 U. S. 239, 44 S. Ct. 300, 68 L. Ed. 658 (1924).

³⁵ 56 STAT. 28 (1942).

³⁶ Pub. L. No. 774, 81st Cong. 2d Sess. § 402(d)(1).

³⁷ Pub. L. No. 774, 81st Cong. 2d Sess. § 405(a).

business or trade to buy or receive, any material or service . . . in violation of this title. . . . (Emphasis supplied.)

Under the Emergency Price Control Act it was uniformly held that the Act was retroactive. Consequently, the effect of a ceiling price was to render illegal and void pre-existing contracts of sale where the contract price exceeded the ceiling price. Or, at least the effect was to excuse performance of the contracts,³⁸ under the well established principle that, where after the negotiation of a contract, a statute is adopted or an administrative order promulgated which has the effect of rendering the performance illegal, both parties are discharged. This is true even though there is a provision in the contract to arbitrate any controversy arising under it, since the provision for arbitration is directed to the remedy and not to the validity of the contract. The price at which the goods are to be sold is as much of the essence of the contract as any of its other provisions, and when controlling public policy, by act of government, bars delivery at that price there is a complete frustration of the performance, excusing both seller and buyer from performance as a matter of law.³⁹

When the price is in excess of a subsequent price ceiling and the terms of the sales contract call for delivery before the effective date of the price ceiling, if because of default of one of the parties, delivery is not made before the effective date, delivery becomes illegal and unlawful. Thus, when delivery was delayed until after the effective date of a price ceiling because of the buyer's default, the buyer was entitled to recover back a deposit he had made on the price.⁴⁰ However, as a matter of general law, it would seem that under such a state of facts, the buyer would be liable to the seller for loss suffered as a result of the default, since the loss would be the direct result of the buyer's failure to take delivery at the time called for by the terms of the contract.⁴¹

If the sale or contract of sale is in "the regular course of business or trade" it is as unlawful for the buyer to receive or contract to receive as it is for the seller to deliver or contract to deliver at a price in excess of the ceiling price.⁴² In such a transaction both the buyer and seller are *pari delicto*. The provision applies not only to sales for the purpose

³⁸ *In re Kramer & Uchitelle, Inc.*, 288 N. Y. 467, 43 N. E. (2d) 493 (1942); *Sanders v. M. Lowenstein & Sons, Inc.*, 264 App. Div. 367, 35 N. Y. S. (2d) 591, *aff'd*, 289 N. Y. 702, 45 N. E. (2d) 457 (1942).

³⁹ *In re Kramer & Uchitelle, Inc.*, *supra* note 38.

⁴⁰ *Export Syndicate of Steel Producers, Inc. v. Dilsizian, Inc.*, 36 N. Y. S. (2d) 868 (S. Ct., Spec. Term, N. Y. County), *aff'd without opinion*, 265 App. Div. 923, 39 N. Y. S. (2d) 984 (1942).

⁴¹ *Brown & Rubin, The Effect of Wartime Price Control on Contracts For The Sale of Goods*, 52 *YALE L. J.* 74, 81 (1942).

⁴² Section 4(a) of the Emergency Price Control Act of 1942, 56 *STAT.* 28 (1942), provided: "It shall be unlawful . . . in the course of trade or business to buy or receive any commodity . . . in violation of any regulation. . . ." Section 405(a) of

of resale, but also to all sales for commercial or industrial use. In general it applies to all buyers engaged in any type of commercial activity for profit.

The statutory action for triple damages given to the buyer who purchases goods at a price in excess of the ceiling price applies only to purchases not made in the course of a business or trade.⁴³ Moreover, when a buyer in the course of business or trade has received and paid for an article, the purchase price of which was in excess of the ceiling price, he cannot maintain an action based upon an implied contract to recover the excess. Since the price ceiling makes the contract illegal and void, the court will not entertain an action based upon it, and insofar as the agreement has been performed the court will not order restitution, but will leave the parties in the position in which it finds them. Consequently, the action must fail.⁴⁴ The sale of a milling machine by a machine tool manufacturer to a machine shop operator,⁴⁵ and of a used tractor by a farmer to a lumber man,⁴⁶ and of ice by a producer to a commercial user,⁴⁷ have been held to be sales in the course of business or trade.

In one instance it was held that the seller's misrepresentation that the price charged was the ceiling price fixed by the price administrator was a misrepresentation of fact and not of law, and the complaint alleging such misrepresentation stated a good cause of action in tort as against a demurrer.⁴⁸ But since the directives of the Price Administrator had the force and effect of law⁴⁹ and both parties were charged with knowledge

the Defense Production Act of 1950 provides: "It shall be unlawful . . . in the regular course of business or trade to buy or receive, any material . . . in violation of this title. . . ."

⁴³ Section 205(e) of The Emergency Price Control Act of 1942, 56 STAT. 34 (1942), provided: "If any person selling a commodity violates a . . . maximum price . . . the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for \$50 or for treble the amount by which the consideration exceeded the applicable price, whichever is the greater, plus reasonable attorney's fees. . . ." § 409(c) of the Defense Production Act of 1950 provides: "If any person selling any material or service violates . . . a ceiling . . . the person who buys . . . for use or consumption other than in the course of trade or business may . . . bring an action against the seller . . . The seller shall be liable for reasonable attorney's fees and costs. . . . plus whichever of the following sums is greater: (1) . . . not more than three times the amount of the overcharge . . . but in no event shall such amount exceed the amount of the overcharge . . . plus \$10,000, or (2) an amount not less than \$25 nor more than \$50 as the court in its discretion may determine. . . ."

⁴⁴ Sommer et al. v. E. B. Kelly Co., 182 Misc. 119, 50 N. Y. S. (2d) 66 (1944); Bayne v. Kingery et al., 30 Wash. (2d) 922, 195 P. (2d) 98 (1948).

⁴⁵ Sommer et al. v. E. B. Kelly Co., *supra* note 44.

⁴⁶ Bayne v. Kingery et al., 30 Wash. (2d) 922, 195 P. (2d) 98 (1948).

⁴⁷ Morgan Ice Co. v. Barfield et al., 190 S. W. (2d) 847 (Tex. Civ. App. 1945).

⁴⁸ Sommer et al. v. E. B. Kelly Co., 182 Misc. 119, 50 N. Y. S. (2d) 66 (1944).

⁴⁹ Export Syndicate of Steel Producers, Inc. v. Dilsizian, Inc., 36 N. Y. S. (2d) 868 (S. Ct. Spec. Term, N. Y. County 1942).

of the law ⁵⁰—the result seems questionable. It has not been reached in other cases.

Upon the same principle the buyer cannot maintain an action for damages which result from the seller's failure to deliver goods pursuant to a contract of sale, the price being in excess of the ceiling price. Thus, when under such a contract the seller failed to deliver ice to the buyer as agreed, the buyer could not recover damages for the loss occasioned by the breach.⁵¹ In this Texas case the court stated: ⁵²

The rule is . . . that where parties who are charged with the knowledge of the law . . . undertake to enter into a contract in violation thereof they will be left in the position in which they put themselves. The courts will not permit a recovery to either side. . . . Before appellees would be permitted to recover damages for the breach of a contract the duty rested upon them to establish a legal contract. . . .

A subsequent amendment of the price regulations may revitalize a contract of sale. When at the time the contract was entered into the price was illegal, but before time for delivery an amendment of the price regulations cured the defect, the buyer could not refuse to take delivery on the grounds that the amendment made delivery merely permissive. Since delivery was then lawful the parties must either perform as per the contract or pay damages for their failure to do so.⁵³

When the sale price is in excess of the ceiling price, the seller cannot maintain an action for the balance of the purchase price which is in excess of the ceiling price. In the sale of an automobile, the buyer paid part of the purchase price in cash and gave a note secured by a chattel mortgage upon the automobile for the amount in excess of the ceiling price. Upon default the seller brought an action to collect the note and foreclose the mortgage. In reply to the buyer's answer that the excessive price made the contract illegal, the seller contended that the buyer's right to triple damages given by statute was his sole remedy and that the mortgage should be enforced. The court denied recovery saying: ⁵⁴

The fact that the purchaser is granted . . . a right . . . to collect damages . . . can in no way operate to validate a contract specifically declared unlawful. . . .

Under the Emergency Price Control Act of 1942 the maximum price for many articles was the highest price at which the dealer sold the article during the month of March, 1942. The retailer, who during that month sold an article for a price which was less than that called for by

⁵⁰ Morgan Ice Co. v. Barfield et al., 190 S. W. (2d) 847 (Tex. Civ. App. 1945).

⁵¹ *Ibid.*

⁵² *Id.*, 190 S. W. (2d) at 848.

⁵³ Neuberg v. Avery F. Payne Co., 37 N. Y. S. (2d) 366 (S. Ct. Spec. Term, N. Y. County 1942), *rev'd on other grounds*, 265 App. Div. 1052, 41 N. Y. S. (2d) 195 (1943).

⁵⁴ Walker et al. v. Bailey, 33 Ala. 284, 33 So. (2d) 891, 896 (1947).

a contract with his supplier pursuant to a state fair trade law, found himself in an anomalous position. If he sold at a price in excess of the March price he was violating the federal law, and if he sold at or below the March price he was violating the state law. In several cases, a dealer in this predicament was enjoined from selling at a price lower than the minimum fair trade price⁵⁵ despite the fact that a sale at the minimum fair trade price would subject him to civil and criminal penalties under the federal statute. In *Schreier v. Seigel*,⁵⁶ a New York court said that in their opinion it was not the intent of Congress to put its stamp of approval upon unfair trade practices by permitting violators of a state fair trade law to profit at the expense of those who in good faith had complied with its provisions, and that the dealer's only remedy was to petition the Price Administrator for a higher ceiling price. The court added that pending the granting of such petition, he should be restrained from selling the articles at any price. Under an identical set of facts the New Jersey court likewise enjoined the dealer.⁵⁷ The court pointed out that the dealer's difficulty was his own making; that first principles of equity and justice forbade that he should continue to profit from his willful disregard of a state statute; that he was in no position to invoke the federal statute to justify his original wrong. In answer to the dealer's contention that the federal statute, being the supreme law of the land, superseded the state fair trade law the court said:⁵⁸

The Federal regulation was not designed directly to modify or supercede the minimum prices in effect in March, 1942, under the State Fair Trade Act. It operated upon the prices then charged by the individual retailer.

By way of summary it can be said that maximum price regulations are retroactive in effect by express statutory provision, and render existing contracts for the sale of goods at a price in excess of the ceiling price void and excuse performance by the parties. Insofar as the transaction is executed the courts will not order restitution but will leave the parties in the position it finds them. The buyer cannot recover damages for the seller's failure to perform, nor can he recover back the excess of the purchase price over the ceiling price. However, if the purchase is for personal use in contradistinction to use in the course of business or trade the buyer has a statutory action for triple damages. A subsequent amendment to the price regulations making the sale price legal revitalizes a contract which was illegal under a prior regulation. And finally, when the maximum price under federal regulations is less than the minimum price under state fair trade laws the seller may enjoin the buyer from reselling in violation of the state law.

⁵⁵ *Helena Rubinstein, Inc. v. Charline's Cut Rate, Inc. et al.*, 135 N. J. Eq. 145, 36 A. (2d) 910 (1944); *Schreier et al. v. Seigel*, 265 App. Div. 36, 37 N. Y. S. (2d) 624 (1942).

⁵⁶ *Supra* note 55.

⁵⁷ *Helena Rubinstein, Inc. v. Charline's Cut Rate, Inc. et al.*, 135 N. J. Eq. 145, 36 A. (2d) 910 (1944).

⁵⁸ *Id.*, 36 A. (2d) at 912.

Concluding Remarks

It is indeed difficult, if not impossible, to draw any overall conclusion as to the effect of government regulations upon the law of sales. Each statute and each regulation must be investigated separately in order to discover what effect its unique provisions has upon the law of sales. The reason for the lack of a general effect by these statutes and regulations is that they are remedial in nature. Each one is designed to perform a specific function, *i. e.*, the PACA lessens the possibility of spoilage losses in shipments of agricultural commodities, the Robinson-Patman Act is aimed at monopolistic price discrimination, and price controls are imposed as an anti-inflation measure. Because the regulations are designed to effect their own purposes and are not viewed from the standpoint of sales, their impact upon the law of sales may be pronounced, but it is none the less varied.

Clifford A. Goodrich, Jr.

William T. Huston

Taxation

EXEMPTION OF CIVIC LEAGUES AND LOCAL ASSOCIATIONS OF
EMPLOYEES UNDER THE INTERNAL REVENUE CODE

The problem of exempting organizations under the provisions of the Code of Internal Revenue¹ is one which contains little certainty inasmuch as it can be applied to a multitude of situations. An indication of the uncertainty which exists in Section 101 is apparent from the words of James Henderson when he said:²

It is not only as fouled up as ever, but steadily growing more so as Congress becomes more sold, in the light of results, on minority pressure group voting powers.

But, since the revenue act of 1913,³ there has been a consistent legislative policy to permit exemption of organizations which serve the general welfare.⁴ The income of these organizations has been exempted from federal taxation in order to encourage the altruistic and benevolent motives ostensibly behind such organizations.⁵

¹ INT. REV. CODE §§101 *et seq.*

² HENDERSON, INTRODUCTION TO INCOME TAXATION 352 (1949).

³ 38 STAT. 114 (1913).

⁴ 6 MERTENS, LAW OF FEDERAL INCOME TAXATION §§34.01 *et seq.* (1942).

⁵ Finkelstein, *Freedom from Uncertainty in Income Tax Exemption*, 48 MICH. L. REV. 449 (1950).

In our present day society with its ever increasing centralization of benevolent activities, *e. g.*, social security, workmen's compensation, unemployment compensation, etc., the need for localized endeavors for the promotion of the general and civic betterment is readily apparent. The basic importance of civic organizations in our daily life makes it desirable to examine the nature of their activities, and the liberal interpretation by the courts of Section 101 in general, and Section 101(8) in particular.

I.

Section 101 has had a rather sporadic development. Some of its subsections boast an 1894 vintage,⁶ while others have been in existence only since 1936.⁷ The remaining subsections arose from time to time between the above dates: one in 1909,⁸ three in 1913,⁹ five in 1916,¹⁰ three in 1928,¹¹ and one in 1934.¹² Under the provisions of this section in the present Internal Revenue Code, more than thirty types of organizations have been granted an exempt status in nineteen distinct subsections.¹³

⁶ INT. REV. CODE §§ 101 (2), (3), (4) and (6), first appeared in rudimentary form in An Act to Reduce Taxation and Provide Revenue for the Government, § 32, 28 STAT. 556 (1894).

⁷ INT. REV. CODE § 101(18), was first seen in the Revenue Act of 1936, § 101(18), 49 STAT. 1675 (1936).

⁸ INT. REV. CODE § 101(1), first appeared in Revenue Act of 1909, § 38(1st), 36 STAT. 113 (1909).

⁹ INT. REV. CODE §§ 101 (5), (7), and (8), first appeared in An Act to Reduce Tariff Duties and Provide Revenue for the Government, II(G)(a), 38 STAT. 172 (1913).

¹⁰ INT. REV. CODE §§ 101(9), (10), (11), (12), and (14), first appeared in the Revenue Act of 1916, § 11(a), 39 STAT. 766 (1916).

¹¹ INT. REV. CODE § 101(13), (16), and (17), first appeared in the Revenue Act of 1928, § 45 STAT. 812 (1928).

¹² INT. REV. CODE § 101(5), first appeared in the Revenue Act of 1934, § 101(5), 48 STAT. 700 (1934).

¹³ The major organization exemptions are as follows:

- (1) Labor, agricultural or horticultural organizations;
- (2) Mutual savings banks, not having capital represented by shares;
- (3) Fraternal beneficiary societies;
- (4) Building and loan associations;
- (5) Non-profit cemetery companies;
- (6) Community chest corporations and those exclusively for religious, charitable, scientific, literary, or educational purposes, or for prevention of cruelty to children, or animals, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation;
- (7) Business leagues, chambers of commerce, real-estate boards, or boards of trade, not organized for profit, and no part of the net earnings of which inures to the benefit of any private shareholder or individual;
- (8) Civic social welfare leagues and associations of employees in a particular municipality;
- (9) Non-profit clubs for pleasure or recreation;

While the overall characteristics of these exempt organizations vary considerably, a few similarities are discernible. Generally they must not be organized primarily for profit, and they must also direct their activities towards a specified socially desirable end.

Of course, it is not to be inferred that the satisfaction of the above two requirements by an organization, ostensibly within one of the subsections of Section 101, will, in and of itself, cause the exempt status to follow forthwith. In addition the following requirements must be considered.

Generally, in order to qualify for the exemption, the organization must bring itself substantially within the express terms of the clause granting exemption.¹⁴ Also, the exemption provisions in cases of doubt are construed strictly in favor of the taxing power¹⁵ in all cases except those involving religious, charitable, educational, or like organizations under Section 101(6). Only under this subsection are the exemption provisions to be liberally construed.¹⁶

The strict rule of construction requires that each of the qualifying conditions be fulfilled. Therefore, an organization will not be exempt merely because it was not *organized* for profit unless it can establish the fact that it actually has no income subject to taxation.¹⁷ Furthermore, it is not sufficient for the taxpayer to show that the organization is of a

(10) Local benevolent life insurance associations, irrigation companies, telephone companies, and "like organizations," 85% of the income being collected from members to meet losses and expenses;

(11) Farmers' mutual insurance companies;

(12) Farmers' cooperative associations;

(13) Farmers' crop financing associations;

(14) Holding companies to collect exempt income;

(15) Federal agencies;

(16) Employees' beneficiary associations;

(17) Teachers' retirement fund associations;

(18) Religious or apostolic associations;

(19) Certain voluntary employees' beneficiary associations.

¹⁴ Retailers Credit Ass'n of Alameda County v. Commissioner, 90 F. (2d) 47 (9th Cir. 1937); Producers' Creamery Co. v. United States, 55 F. (2d) 104 (5th Cir. 1932).

¹⁵ Riverdale Co-operative Creamery Ass'n v. Commissioner, 48 F. (2d) 711 (9th Cir. 1931).

¹⁶ See *Helvering v. Bliss*, 293 U. S. 144, 150, 55 S. Ct. 17, 79 L. Ed. 246 (1934), where the Supreme Court of the United States expressed the basis for this rule as follows: "The exemption of income devoted to charity and the reduction of the rate of tax on capital gains were liberalizations of the law in the taxpayer's favor . . . and are not to be narrowly construed." When an organization enters into a competitive field, it must demonstrate that it falls strictly within one of the classifications in order to enjoy the advantage of exemption. *Industrial Addition Association v. Commissioner*, 1 T. C. 378 (1942).

¹⁷ See U. S. Treas. Reg. 111, § 29.101-1 (1944).

type similar to those exempted.¹⁸ Even if an exemption is won by a given organization, it will, of course, be lost if the organization subsequently operates for profit.¹⁹ This is not meant to convey the impression that even a short lived and slight profit will always erase the exemption. The borderline cases involving only meager profits may go either way.²⁰ It is interesting to note also that an organization, although fully qualified for exemption under a subsection of Section 101, will nevertheless be deprived of that exemption if it is found to be subversive.²¹ And where for some reason the exemption is partially lost, it is forfeited completely, since it is impossible for a given organization to be exempted as to certain funds and taxable as to others at the same time.²²

Generally, organizations exempt under Section 101 are also exempt from state and local taxation, including property taxes. However, local provisions vary considerably from state to state. The underlying reason for this exemption, their "inherent" social worth, has withstood the policy of increased and diversified taxation.

To establish its exemption the organization must file an affidavit or a questionnaire with the collector for the district in which its principal place of business or principal office is located. Organizations under certain subsections use prepared forms while the others file an affidavit. Copies of the different types of forms required under the various exemption subsections may be obtained from any collector. For example, civic leagues and associations of employees (with which this note deals) seeking an exemption must use Form 1024. In addition to the affidavit or questionnaire, the organization must also submit a copy of its articles of incorporation, declaration of trust, or other instrument of similar import setting forth its activities, as well as its by-laws, and its latest financial report. The collector, after receiving the affidavit or questionnaire and the other papers, examines them for completeness and forwards the completed documents to the Commissioner for his decision as to whether the given organization is exempt or not. In the Commis-

¹⁸ *Employes' Benefit Association of American Steel Foundries v. Commissioner*, 14 B. T. A. 1166, 1183 (1929). The Court of Tax Appeals said: "The petitioner [taxpayer] states in its brief: 'While the taxpayer cannot point to any particular paragraph of this section which enumerates organizations of the precise character of the taxpayer, it does not follow that the taxpayer is nevertheless taxable . . .' We cannot agree. Where Congress specifies exemption to certain organizations . . . there is no reason for another group of exemptions not expressed."

¹⁹ *Stanford University Book Store v. Helvering*, 83 F. (2d) 710 (D. C. Cir. 1936).

²⁰ *Compare Scofield v. Corpus Christi Golf & Country Club*, 127 F. (2d) 452 (5th Cir. 1942), and *Santee Club v. White*, 87 F. (2d) 5 (1st Cir. 1936), with *Aviation Club of Utah v. Commissioner*, 162 F. (2d) 984 (10th Cir.), *cert denied*, 332 U. S. 837, 68 S. Ct. 220, 92 L. Ed. 409 (1947).

²¹ See 1 P-H 1950 FED. TAX SERV. ¶ 4203-A (1948).

²² *The Economy Savings and Loan Company v. Commissioner*, 5 T. C. 543 (1945); *The Royal Highlanders v. Commissioner*, 1 T. C. 184 (1942).

sioner is reserved not only the power to determine the exempt or taxable status of a given organization, but also the authority to require additional information or additional questionnaires which he deems necessary for a proper determination. The collectors keep a list of all organizations in their respective districts held to be exempt. This is for the express purpose of investigating the organizations from time to time in order to determine whether they are observing the conditions upon which the exemption is predicated.

Most of the organizations, although found to be exempt, must nevertheless file annual returns stating specifically the items of gross income, receipts, disbursements, and other information which the Commissioner may have prescribed.²³

Despite the aura of extreme necessity which the terse regulations seem to give the requirements listed therein, it should be noted that a failure to file the affidavit or questionnaire with the collector does not preclude the exemption. The filing of an affidavit or questionnaire is not a condition precedent to the right of exemption.²⁴

II.

Section 101, subsection 8, the particular concern of this note, exempts from federal income taxation certain civic leagues and associations of employees.²⁵ This subsection was enacted in order to grant exemptions to welfare organizations which are not clearly charitable, educational, scientific or the like,²⁶ and yet promote patriotic and community purposes and the general good.²⁷

The "civic leagues" clause first appeared in the revenue act of 1913.²⁸ At that time no provision was made for the exemption of local associations of employees. It was not until 1924 that the provision was made for granting exemptions to associations of employees whose members "are all employees of one person, or persons, in a particular municipality. . . ." The association, to qualify for this exemption, must devote its net earnings exclusively to charitable, educational, or recrea-

²³ For the complete requirements, see U. S. Treas. Reg. 111, § 29.101-2 (1944).

²⁴ *The Savings Feature of the Relief Department of the Baltimore and Ohio R. R. v. Commissioner*, 32 B. T. A. 295 (1935).

²⁵ INT. REV. CODE § 101(8). "Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational or recreational purposes . . ." shall be exempt from taxation.

²⁶ INT. REV. CODE § 101(6).

²⁷ 6 MERTENS, *op. cit. supra* note 4, § 34.29.

²⁸ § II(G)(a), 38 STAT. 172 (1913).

tional purposes.²⁹ The subsection, formed in 1924 by the addition of the "local associations" clause to the "civic leagues" clause, has survived the rigors of subsequent legislation and appears as law today in the Code, unmodified and unchanged.³⁰

The Code provision does not define the term "civic league" nor does it indicate the legislative import of the clause "for the promotion of the social welfare."

In *United States v. Pickwick Electric Membership Corporation*,³¹ Judge Miller, speaking for the United States court of appeals, defines a "civic league" by saying that it:

. . . embodies the idea of citizens of a community cooperating to promote the common good and general welfare of people of the community.

Since the above definition, or any definition of such a vague term, of necessity, embodies the utilization of additional abstract terms, it seems necessary to indicate, by means of illustration, the scope of the term as applied in the courts.

A corporation which conducted a free public radio forum for the dissemination of liberal and progressive social views, and which was even incorporated in order to limit the personal liability of the individuals concerned, was found to be a civic organization.³² A housing corporation which leased dwellings to tenant stockholders for monthly payments, and which paid a fixed return to the stockholders, was found to be a civic organization chiefly because its purpose was to furnish at cost much needed homes for workingmen.³³ A village improvement association which operated a motion picture theater and used profits therefrom to improve the village was found to be a civic organization.³⁴

Perhaps even more elusive is the meaning of the clause "for the promotion of social welfare." So elusive in fact is the concept embodied in this term, that as yet the courts have not defined it. While it is clear that a social welfare organization need not be strictly charitable,³⁵ it is far from clear what other requirements must be met by it. To illustrate the lack of certainty existent, the Debs Memorial Radio Fund, which operated a radio station, was held to be a social welfare organization because its purpose was to broadcast educational, civic and cultural programs without charge.³⁶ Also in *Consumer-Farmer Milk Cooperative*,

²⁹ Revenue Act of 1924, § 231(8), 43 STAT. 282 (1924).

³⁰ See note 25 *supra*.

³¹ 158 F. (2d) 272, 276 (6th Cir. 1946).

³² *Debs Memorial Radio Fund, Inc. v. Commissioner*, 148 F. (2d) 948 (2d Cir. 1945).

³³ *Garden Homes Co. v. Commissioner*, 64 F. (2d) 593 (7th Cir. 1933).

³⁴ *Hanover Imp. Soc., Inc. v. Gagne*, 92 F. (2d) 888 (1st Cir. 1937).

³⁵ I. T. 1800, II-2 CUM. BULL. 152 (1923).

³⁶ *Debs Memorial Radio Fund, Inc. v. Commissioner*, 148 F. (2d) 948 (2d Cir. 1945).

Inc. v. Commissioner,³⁷ the Tax Court ruled that a dairy cooperative which distributed milk and other dairy products was not a social welfare organization, even though one of its purposes was to promote reforms and economies in the distribution of milk to low-income families. The Bureau of Internal Revenue has found the following associations to be social welfare organizations: The American Legion,³⁸ the Military Training Camps Association,³⁹ the Navy and Marine Memorial Association,⁴⁰ and an association which performs auxiliary work in conjunction with the activities of a police department.⁴¹ An analysis of the foregoing should indicate the fluctuating concept of the term "social welfare."

Perhaps the least ambiguous of the three clauses which contain the requisites of a tax exemption under this subsection is that which requires the organization to be non-profit in character. However, it was not until 1924 that the question of whether this non-profit clause should be applied to the source or the utilization of the funds was resolved. Before this date, the Bureau contended that an organization which carried on a profitable business but used these returns exclusively for the required civic purposes nevertheless forfeited its exempt status. In *Trinidad v. Sagada Ordin de Predicadores, etc.*,⁴² the Supreme Court of the United States, speaking through Mr. Justice Van Devanter, said:

Evidently the exemption is made in recognition of the benefit which the public derives from corporate activities . . . and is intended to aid them when not conducted for private gain. Such activities cannot be carried on without money; and it is common knowledge that they are largely carried on with income received from properties dedicated to their pursuit. . . . Making such properties productive to the end that the income may thus be used does not alter or enlarge the purposes for which the corporation is created and conducted.

Even though the test laid down by this decision is the ultimate application of the income rather than the source,⁴³ it is not contended that its scope is unlimited. A serious challenge to its applicability was established by the Tax Court in 1950 even though the court there maintained that it did not wish to disturb the test laid down in the *Trinidad* case.⁴⁴

³⁷ 13 T. C. 150 (1949). This determination was based primarily upon the failure of the cooperative to show that it operated *exclusively* for the promotion of the social welfare.

³⁸ O. D. 439, 2 CUM. BULL. 210 (1929).

³⁹ I. T. 2267, V-1 CUM. BULL. 84 (1926).

⁴⁰ I. T. 2460, VIII-1 CUM. BULL. 98 (1929).

⁴¹ G. C. M. 10,232, XI-2 CUM. BUL. 104 (1932).

⁴² 263 U. S. 578, 581, 44 S. Ct. 204, 68 L. Ed. 458 (1924).

⁴³ See *Hanover Imp. Soc., Inc. v. Gagne*, 92 F. (2d) 888 (1st Cir. 1937); *Garden Homes Co. v. Commissioner*, 64 F. (2d) 593 (7th Cir. 1933).

⁴⁴ *C. F. Mueller Co. v. Commissioner*, 14 T. C. 111 (1950). The Tax Court stated: "The liberal test of the ultimate destination rather than the source of the income, developed in those cases [referring to the *Trinidad* case and those following] should not be stretched and distorted to cover a different type of corporation from the one with which the Courts in those cases were dealing. Here, as already pointed

The doctrine of the *Trinidad* case is applied without difficulty to cases involving social welfare organizations which, as a mere incident to their social welfare work, also carry on a profitable business, using the gain derived therefrom entirely to further their social work. But where the total gain need not be applied to the furtherance of the organization's social welfare endeavors, an additional problem arises. Does the fact that an organization has the option to either direct all of its proceeds toward the desired social end or to utilize a part thereof in payment of a "return" to stockholders, cause it to be organized for profit and therefore not exempt? Two opposing theories are readily discernible from the cases. One views the organization which pays such a return ". . . as acting as a mere conduit, without remuneration except its expenses, in performing the promise it had made to the tenant stockholders . . .," the persons who were to benefit from the social welfare organization, and allows the organization to be exempt.⁴⁵ The other view sees no distinction between such an organization and any business corporation which exists only to earn profits and to distribute those profits to its stockholders. This point was vividly illustrated in *Amalgamated Housing Corporation v. Commissioner*⁴⁶ which involved an association created to reduce rentals for low-income tenants. The Board of Tax Appeals said:

Suppose that a corporation existed which was like this one except that its tenant stockholders were in higher income groups. . . . Would anyone contend that the corporation was not organized for profit or that it did not have any income merely because that income had to be used to pay off a mortgage, to retire the preferred stock, . . . to pay expenses of the corporation, or to make a refund to the tenants?

The first view treats the payment of returns as mere interest payments while the latter finds no difference between the payment of these returns, and the payment of dividends by any corporation.

With the addition of the "local associations" clause in 1924,⁴⁷ a problem of statutory construction arose. The Bureau of Internal Rev-

out, the petitioner [taxpayer] is not the corporation engaged in operating the educational institution, but is a wholly separate corporation which has as its sole day-to-day activity the operation of a macaroni business for profit. . . . Formerly, it was not the custom for educational and other similar institutions to risk their funds in carrying on a competitive business for the profit in it. It is not fair to assume that the Judges, in deciding those earlier cases, had in mind corporations like the present petitioner or that they were careful to say what they said with the intention that it should apply also to corporations like the petitioner which might later come into extensive use."

⁴⁵ *Garden Homes Co. v. Commissioner*, 64 F. (2d) 593, 597 (7th Cir. 1933).

⁴⁶ 37 B. T. A. 817, 827 (1938), *aff'd* 108 F. (2d) 1010 (2d Cir. 1940).

⁴⁷ Prior to 1924, "Civic leagues or organizations, not organized for profit but operated exclusively for the promotion of social welfare" were exempt. Revenue Act of 1921, § 231 (8), 42 STAT. 227 (1921). The 1924 Revenue Act added to this clause the following: "or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educa-

enue contends that the final clause, "the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes," when introduced by the amendment of 1924, applied to the whole subsection. But this attempted construction would preclude exemption for any civic league organization organized for social welfare whose net earnings are not applied exclusively to the above-mentioned purposes. An examination of the legislative history of this subsection clearly indicates that the above construction in effect frustrates the Congressional intent. In 1921 an amendment was suggested which would have added: ". . . and no part of the net earnings of which inures to the benefit of any private stockholder or individual . . ." to the "civic leagues" clause. However, this proposed amendment was withdrawn by its proponent.⁴⁸ While the exact reason for the withdrawal is not clearly shown by the record, it is submitted that the fact that the amendment *was* withdrawn prevents the net earnings requirement from being appended to the "civic leagues" clause by implication, especially since Congress subsequently has remained silent.

An additional fact which tends to defeat the construction of the Bureau is indicated by the circumstances surrounding the introduction and phraseology of the 1924 "local associations" amendment. This proposal was introduced at the insistence of an automotive workers' association in Flint, Michigan, and throughout the deliberations on the floor concerning the proposal, the intent to specifically benefit this association was clearly indicated.⁴⁹ There was no connection between the "local associations" clause and the "civic leagues" clause which had been in effect for eleven years. This is further shown by the legislative use of the disjunctive "or" instead of the conjunctive "and" connecting the civic league and local association clauses. It therefore appears that these clauses exempting entirely different organizations, enacted eleven years apart, and establishing entirely different prerequisites for exemption, cannot be reasonably construed together.⁵⁰

Because Section 101(8) with its broad and inclusive terms is capable of being applied to a multitude of diverse organizations whose members come from every walk of life, its importance and effect upon tax-paying

tional, or recreational purposes." Revenue Act of 1924, § 231(8), 43 STAT. 282 (1924).

⁴⁸ 61 CONG. REC. 5824-5 (1921). The proposal in question was submitted by Senator Wadsworth of New York in order to remove the ambiguity which he thought resulted from the use of the term "social welfare." Senator Walsh of Massachusetts, however, pointed out that the Bureau of Internal Revenue had had no difficulty in administering the Section. Consequently, Senator Wadsworth hesitantly withdrew his proposed amendment.

⁴⁹ 65 CONG. REC. 2905-6 (1924). "Mr. Young. ' . . . when this matter was before the committee the understanding was it was applied for by only one organization in one city of the United States. . . .'"

⁵⁰ For confirmation of this view see the construction applied by Judge Morton in *Hanover Imp. Soc., Inc. v. Gagne*, 92 F. (2d) 888 (1st Cir. 1937).

Americans is quite obvious. Since the situations which might arise hereunder are so numerous, an analysis will be made of only the more common activities of typical civic organizations in an effort to determine their taxable or exempt status.

The doctrine of the *Trinidad* case makes the final destination, rather than the source of the organization's funds, the determining factor. Therefore, it is not the business activities in which the organization is engaged, but rather the allotment of certain surplus funds derived from profitable activities, from which the Bureau of Internal Revenue ascertains the exempt or taxable status.

This problem may be efficaciously divided into two distinct phases: the payment of a return on evidences of participation such as mortgages, bonds, and common and preferred stock; and the distribution to members of the organization of various gifts not charitable in nature.

In the first phase, payments on bonds, mortgages, and like instruments which create a debtor-creditor relationship, do not present too great a problem because these evidences ordinarily arise from the necessity of obtaining initial capital outlays by an organization. An example is bonds issued by a radio station, organized exclusively for the promotion of social welfare, since a considerable capital investment is necessary to commence operations.⁵¹ Courts have not attempted to discourage the loaning of private capital to civic leagues, and have held that a fair return on the loan is permissible.⁵² This is true even though the ability to loan to the organization is restricted to its members.

More difficulty is incurred when the evidence of participation resembles an ownership certificate, such as "preferred" or "common" stock, of an ordinary profit-enterprise. For example, suppose a local housing association, created to supply low-cost housing to its tenants, issued "preferred stock" to anyone desiring to invest. Would the payment of a return thereon constitute a distribution of the profits of the organization, and thereby cause it to lose its exempt status? By the better view, the distribution is deemed a payment of "interest" for the use of capital which was essential to the establishment and sustained operation of the business.⁵³ This payment, so long as it is reasonable, is considered a proper compensation for the use of money. So long as the return appears to the courts to be interest on loan-investment, so called preferred stock will be treated like bonds, mortgages, and similar obligations. Even though the courts have not established a rule of law with respect to the payment of dividends on so-called common stock, it is submitted that the rule applied to preferred stock should also be used here. While the ab-

⁵¹ *Debs Memorial Radio Fund, Inc. v. Commissioner*, 148 F. (2d) 948 (2d Cir. 1945).

⁵² *Garden Homes Co. v. Commissioner*, 64 F. (2d) 593 (7th Cir. 1933).

⁵³ *Ibid.*

sence of a ceiling upon the amount of the "common stock" dividend causes it to appear to be completely devoid of the "debtor-creditor" aspect, which fiction the courts apply to justify a return on preferred stock, this seems to be a difference in degree rather than in kind for the purposes of exemption.

The second phase presents a most interesting and controversial question—whether the distribution to the members of the organization of certain gifts, not charitable in nature, constitutes an apportionment of the profits and thereby causes the organization to lose its exempt status. For purposes of illustration, let us suppose that a local American Legion Post, previously held exempt, distributes to each of its members a case of liquor for Christmas. Does this constitute an apportionment of the profits? Undoubtedly, the courts in the determination of this question would attempt to decide whether the gift was truly effecting a promotion of social welfare. If it is determined that the gift did not accomplish this, a further consideration would undoubtedly be whether the distribution of the gratuity was a mere incident to the social welfare activities of the organization, or was in the furtherance of the real primary purpose of the organization—the payment of a return of profits to its members? If it is found to be a mere incident, the organization will probably remain in the exempt category; but if the giving of the gratuity was the reason for which the organization was created, then there would be no question of its taxable status.

Conclusion

The broad and general terms of Section 101 in general and subsection 8 in particular, have and continue to cause much confusion when they are applied to the factual situation surrounding a given organization. It is also seen that juridical definitions of the Code terms are in most cases equally broad and general. Therefore, the questions of social desirability, long range betterment, and the actual motives of a given organization will play an important role in the litigation concerning its exempt or taxable status.

Even though this subsection has remained unchanged for some twenty-five years, the dispute still exists as to whether the final clause of the subsection—"the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes"—applies only to the "associations of employees," or to the "civic leagues" as well.

Up to this time, there has been little litigation under this subsection, but in this era of increased taxation, it seems evident that questions will arise concerning the continued exemption of organizations of questionable status.

Louis Albert Hajner

Robert A. Stewart

Torts

HOSPITAL LIABILITY FOR NONATTENDANCE OF PATIENT

The attitude of the courts on the subject of hospital liability for negligence has varied considerably in the past half-century. This may be attributed to the fact that hospitals have developed from the charitable institutions of fifty years ago into modern organizations receiving an increasing proportion of income from payments by patients, and intended to be more or less self-supporting.¹ Along with the ever-expanding physical plant and the greatly increasing number of patients, there has developed a correspondingly greater mass of case law which promises to impose a broader liability on hospital operation in general. The scope of this note is limited to an analysis of a particular phase of the hospital-patient relationship, namely the liability of a hospital for leaving a patient unattended where such nonattendance results in harm or injury to the patient.

The extent of legal liability of a hospital generally depends upon its legal classification. For this purpose, hospitals may be classified as private-profit, public, charitable, and industrial. A private-profit hospital is usually defined as one maintained by a private person or corporation and is a business enterprise designed for the profit of its owners.² A public hospital is one owned by the government, or one of its subdivisions, devoted chiefly to public purposes; however, a publicly owned hospital operated for public purposes, may, by statute be declared non-public.³ A charitable hospital, as the term indicates, is eleemosynary in aim; it is not organized for the purpose of making profit but with the motive of aid and benefit to others.⁴ The test as to whether a hospital is a charitable institution is whether those charged with its operation conduct it for their own private profit or advantage, and not whether patients pay for services rendered to them.⁵ An industrial hospital may be generally defined as one maintained by an employer for the benefit of employees at a profit or as a charity, and which is supported either by the employer or by contributions from the employees, or both.⁶

I.

Private-Profit Hospitals

Ordinarily, a private hospital, maintained as a business enterprise for profit, may not interpose a claim for immunity against liability for its

¹ Hartman, *Hospital Malpractice Insurance*, 16 JOURNAL OF BUSINESS 1 (1943).

² 4 SHEARMAN AND REDFIELD, NEGLIGENCE § 659 (Zipp's ed. 1941).

³ *Ibid.*

⁴ *Ibid.*

⁵ Southern Methodist Hospital and Sanatorium of Tucson v. Wilson, 51 Ariz. 424, 77 P. (2d) 458 (1938).

⁶ Kain v. Arizona Copper Co., 14 Ariz. 566, 133 Pac. 412 (1913); Phillips v. St. Louis & S. F. Ry., 211 Mo. 419, 111 S. W. 109 (1908).

negligence.⁷ The general rules of negligence are applicable to this type of institution. Its liability in negligence generally is predicated on the doctrine of *respondeat superior*—that a master is responsible for the torts of his servants committed within the scope of their employment.⁸ Thus, a hospital is liable in damages for injuries to patients proximately resulting from the negligence of its agents.⁹

When a hospital for private gain offers patient-care it has the duty to exercise a reasonable care and attention consonant with the circumstances surrounding the hospital-patient relationship. Aside from any contractual duty assumed in that relationship, the hospital, by the act of admitting the patient assumes a duty, engendered by an implied obligation from the admittance, to use the reasonable care and attention required by the patient's condition.¹⁰ This care is generally held to be the ordinary care that a prudent person would exercise under like conditions.¹¹ It may be measured by that degree of care used by other hospitals in the same community.¹² Of course, in applying the standard of due care, the patient's condition and capacity to care for himself is of controlling significance.¹³

The test for determining the proper care to be used is foreseeability. If the injury results from some harmful condition or act of the patient, the liability of the hospital for the injury depends on whether the condition or act of the patient was one that could have been reasonably anticipated and the injury prevented.¹⁴ Since those administering hospital care are obliged to have such training and skill as will enable them to exert ordinary and reasonable care in the treatment and care of the

⁷ 4 SHEARMAN AND REDFIELD, *op cit. supra* note 2, § 661; Note, 2 VAND. L. REV. 660 (1949).

⁸ Gitzhoffen v. Sisters of Holy Cross Hospital Ass'n, 32 Utah 46, 88 Pac. 691 (1907).

⁹ Pangle v. Appalachian Hall, 190 N. C. 833, 131 S. E. 42 (1925).

¹⁰ Maxie v. Laurel General Hospital, 130 Miss. 246, 93 So. 817 (1922); Broz v. Omaha Maternity and General Hospital Ass'n, 96 Neb. 648, 148 N. W. 575 (1914); Wetzel v. Omaha Maternity and General Hospital Ass'n, 96 Neb. 636, 148 N. W. 582 (1914); James v. Turner et al., 184 Tenn. 563, 201 S. W. (2d) 691 (1941); Hogan v. Clarksburg Hospital Co., 63 W. Va. 84, 59 S. E. 943 (1907).

¹¹ South Highlands Infirmary Inc. v. Galloway, 233 Ala. 276, 171 So. 250 (1936).

¹² South Highlands Infirmary Inc. v. Galloway, *supra* note 11; Thomas v. Seaside Memorial Hospital of Long Beach, 80 Cal. (2d) 841, 183 P. (2d) 288 (1947); Rice v. California Lutheran Hospital et al., 27 Cal. (2d) 296, 163 P. (2d) 860 (1945); Wood v. Samaritan Institutions, Inc., 26 Cal. (2d) 847, 161 P. (2d) 556 (1945).

¹³ Maki v. Murray Hospital, 91 Mont. 251, 7 P. (2d) 228 (1932); Robertson v. Charles B. Towns Hospital et al., 178 App. Div. 285, 165 N. Y. Supp. 17 (1917); Hogan v. Clarksburg Hospital Co., 63 W. Va. 84, 59 S. E. 943 (1907); Dahlberg et al. v. Jones, 233 Wis. 6, 285 N. W. 841 (1939).

¹⁴ Stansfield v. Gardner, 56 Ga. App. 634, 193 S. E. 375 (1937); James v. Turner et al., 184 Tenn. 563, 201 S. W. (2d) 691 (1941).

patient,¹⁵ the hospital will be held responsible for the knowledge it should have ascertained from the patient's condition by the proper exercise of such requisite skill and training.¹⁶ Therefore, this implied knowledge, coupled with the actual knowledge which the hospital is proven to possess, is the basis for applying foreseeability. Ordinary factors to be considered within the scope of foreseeability are the mental and physical condition of the patient,¹⁷ "the dangers afforded by his surroundings,"¹⁸ and the conduct of the patient,¹⁹ both before and after admittance to the hospital.²⁰ The last named factor, however, does not necessarily burden the hospital with the duty to investigate the patient's past history, but refers to the facts given to the hospital at the time of admittance.²¹

If injury would necessarily follow an act, and the act is alleged as being foreseeable, it may have to be proven to have been within the realm of reasonable probability.²² It is said that an act must be one that is *likely to happen* rather than one that is *more likely to happen than not*.²³ This implies that the chances that an act will occur must be greater than a mere mathematical possibility. Yet a hospital may be held liable for not foreseeing its first case of "intrapartum psychosis," a rare mental derangement occurring at childbirth.²⁴ In *Flanagan v. Unity Hospital*²⁵ the patient was in the labor room near a second story window. The nurse was out of the room answering a

¹⁵ *South Highlands Infirmary, Inc. v. Galloway*, 233 Ala. 276, 171 So. 250 (1936); *Pangle v. Appalachian Hall*, 190 N. C. 833, 131 S. E. 42 (1925).

¹⁶ *Durfee v. Dorr*, 123 Ark. 542, 186 S. W. 62 (1916); *Dahlberg et al. v. Jones*, 233 Wis. 6, 285 N. W. 841 (1939).

¹⁷ *Smith v. Simpson et al.*, 221 Mo. App. 550, 288 S. W. 69, 72 (1926): "... all the authorities hold that private hospitals owe to their patients such ordinary care and attention as the mental and physical condition of such patient reasonably requires."

¹⁸ *Smith v. Simpson et al.*, *supra* note 17.

¹⁹ *Davis v. Springfield Hospital*, 196 S. W. 104 (Mo. App. 1917), *aff'd*, 204 Mo. 626, 218 S. W. 696 (1920); *Breeze v. St. Louis & S. F. Ry.*, 264 Mo. 258, 174 S. W. 409 (1915).

²⁰ *Hignite's Adm'x v. Louisville Neuropathic Sanitorium*, 223 Ky. 497, 4 S. W. (2d) 407 (1928).

²¹ *Mesedahl v. St. Luke's Hospital Ass'n of Duluth*, 194 Minn. 198, 259 N. W. 819, 823 (1935): "... plaintiff's relatives must be charged with knowing the nature of the services rendered by defendant; that no one would be in constant attendance; that defendant did not specialize in mental cases generally and knew nothing of plaintiff's case, particularly. It would be a harsh rule indeed that would charge the authorities of a general hospital to go in search of the relatives of every patient entering it under the care of a physician of his own or his relatives' selection, and ascertain, independently of the attending physician, the nature of the patient's ailment and then to exercise their own judgment as to treatment required."

²² *See Palmer v. Clarksdale Hospital*, 206 Miss. 680, 40 So. (2d) 582, 587 (1949) (dissenting opinion).

²³ *See Spivey v. St. Thomas Hospital*, 211 S. W. (2d) 450 (Tenn. Ct. App. 1948).

²⁴ *Flanagan v. Unity Hospital*, 194 Misc. 26, 87 N. Y. S. (2d) 649 (1949).

²⁵ *Ibid.*

telephone call and did not have direct vision of the patient, who was suddenly seized by this rare malady and jumped or fell out of the window. The jury found that the hospital failed to exercise reasonable care in not rendering constant and uninterrupted attendance upon an expectant mother in labor, and in failing to provide the windows with safeguards. The court said that it was "common knowledge that childbirth itself is a hazard" and stated that:²⁶

It is not expecting too much, where the expectant mother goes to the hospital, that she should have constant and uninterrupted hospital observation and attendance during her labor period.

On defendant's appeal the case was reversed, and a new trial was granted, on grounds that no custom had been shown to furnish windows of labor rooms with bars.²⁷ The concurring judge went further and intimated that since there was no evidence that intrapartum psychosis was "ordinarily accompanied by suicidal tendencies" that the act of the patient was not reasonably foreseeable. On appeal by the plaintiff the Court of Appeals of New York reversed the order of the Appellate Division and affirmed the judgment of the trial court on the basis that the absence of bars on the window was not the only evidence indicating negligence in the case.²⁸ But the only other evidence of negligence was the failure of the attendant to keep the patient constantly attended or in sight. This raises the question: was the nonattendance of the patient negligence itself or only when it was linked with foreseeability? The dissenting opinion did not think that the patient's act was foreseeable in the light of the condition and history of the patient.

It is not necessary that the particular injury resulting from the act be foreseen, but only that it be foreseeable that some injury would result from the act.²⁹ Thus, where a mentally deranged patient is kept in an unlocked room which is not guarded and consequently the patient escapes and is later killed in a railroad yard the injury is foreseeable.³⁰ The court said: "The fatal injury to the patient was one that might be reasonably anticipated from permitting a crazy man to roam about a city for 12 hours."³¹

Irrespective of whether it is reasonably anticipated that an injury will occur, the standard of care of attendance is not thereby lessened. To illustrate, in a recent case a nurse placed a teapot of hot water on

²⁶ *Id.* at 651.

²⁷ *Santos v. Unity Hospital*, 276 App. Div. 867, 93 N. Y. S. (2d) 359 (1949).

²⁸ *Santos v. Unity Hospital*, ...N. Y...., 93 N. E. (2d) 574 (1950).

²⁹ *See Santos v. Unity Hospital*, 276 App. Div. 867, 93 N. Y. S. (2d) 359, 361 (1949) (dissenting opinion). ". . . the defendant cannot escape liability for neglect of duty because it could not foresee the exact nature of the injury that might result from its conduct."

³⁰ *Arlington Heights Sanitarium v. Deaderick et al.*, 272 S. W. 497 (Tex. Civ. App. 1925).

³¹ *Id.*, 272 S. W. at 499.

a tray on a bedside table of a patient who had previously undergone a surgical operation and was under the influence of narcotics. The nurse immediately left the room and shortly afterwards the teapot was found spilled on the patient's bed. The hospital was held liable for the burns sustained by the patient because the nurse knew or ought to have known the patient's condition, and either should have served the hot water or placed it out of the patient's reach.³² In another case, a patient suffered a heart attack during a two minute absence of the attendant, and fell from a cart. It was held that a reasonably prudent person could not have foreseen that the patient would suffer a heart attack at that particular time, but that possibly the hospital would be liable if due care had not been used in placing the patient on the cart.³³

Whether the length of time that a nurse is absent is in itself indicative of negligence usually depends on the circumstances of each case. One court intimated that an absence of five minutes may be negligence where the patient is left on a bed-pan.³⁴ Where a nurse is absent for twenty minutes it is foreseeable that during such time a patient may wish to answer a call of nature and would wait on himself if an attendant could not be summoned; nor would the act of the patient in waiting on himself be an intervening cause insulating the hospital from liability.³⁵ If a nurse leaves a patient, suffering from typhoid fever, exposed for approximately two hours without proper wraps, and the patient contracts pneumonia, the rules of ordinary negligence are easily applied.³⁶

Generally, a hospital is not considered to be an insurer of the patient's safety,³⁷ but where the patient may require constant attendance the consideration of such a standard is immaterial.³⁸ This is true with regard to cases involving self-inflicted injuries. The hospital owes a duty to safe-guard and protect the patient from any known possibility of self-harm or reasonably apprehended danger.³⁹ A prima facie case

³² Rice v. California Lutheran Hospital et al., 27 Cal. (2d) 296, 163 P. (2d) 860 (1945).

³³ Simmons v. South Shore Hospital, 340 Ill. App. 153, 91 N. E. (2d) 135 (1950).

³⁴ Croupp v. Garfield Park Sanitarium, 147 Ill. App. 7 (1909).

³⁵ Jefferson Hospital Inc. v. Van Lear, 186 Va. 74, 41 S. E. (2d) 441 (1947).

³⁶ Hayhurst v. Boyd Hospital, 43 Idaho 661, 254 Pac. 528 (1927).

³⁷ South Highlands Infirmary Inc. v. Galloway, 233 Ala. 276, 171 So. 250 (1936); Wood v. Samaritan Institution, Inc., 26 Cal. (2d) 847, 161 P. (2d) 556 (1945); Hogan v. Clarksburg Hospital Co., 63 W. Va. 84, 59 S. E. 943 (1907).

³⁸ South Highlands Infirmary Inc. v. Galloway, *supra* note 37, (absent five minutes to make entry on chart); Emory University v. Shadburn, 47 Ga. App. 643, 171 S. E. 192 (1933), *aff'd*, 180 Ga. 595, 180 S. E. 137 (1935) (failure to have nurse in constant attendance on delirious patient raises an inference of negligence when patient injures himself).

³⁹ Brawner et al. v. Bussell, 50 Ga. App. 840, 179 S. E. 228 (1935); also see Hawthorne v. Blythewood, Inc., 118 Conn. 617, 174 Atl. 81 (1934) (may have to maintain a twenty-four hour unbroken attendance).

of negligence is established when it is shown that a hospital, having knowledge of a patient's suicidal tendency, leaves the patient unattended, and the patient during the absence of the attendant commits suicide.⁴⁰ A hospital knowing of a self-destructive tendency in a patient ought to foresee that a steampipe may be a danger.⁴¹ Even when attending a patient known to have suicidal tendencies, the guard may be negligent in not securing the windows so as to prevent a patient from suddenly leaping out.⁴² A hospital may be liable for the failure of an attendant to discover a patient's scheme to distract attention from herself, to enable her to commit suicide. While attended in a sewing room on the third floor of the dormitory, a patient, who had made previous attempts to end her life, complained to the attendant of a fever. The attendant accommodatingly opened the window. The patient then dropped her thimble under a radiator and requested the attendant to retrieve it. When the attendant briefly turned her back to perform the request the patient jumped out the window.⁴³

For delirious patients reasonable care may require constant attendance, especially if the condition of the patient makes an injury foreseeable.⁴⁴ It would be difficult for a hospital to escape liability when a patient, suffering from an epileptic fit, is left alone in a room with an open grate fire.⁴⁵ Liability was also imposed where a patient jumped from a third-floor window when left unattended for five minutes while in a delirious condition from typhoid fever, the severity of which had previously obligated the hospital to strap the patient in bed to avoid self-injury.⁴⁶ A hospital's duty of attendance is not abrogated by its acceptance of the volunteer services of the patient's wife to watch the patient. The hospital will still be liable if the wife fails to properly attend her husband.⁴⁷

In some cases it is not foreseeable that a patient left unattended will come to self-harm, and the hospital may not be held liable since no one is required to take measures to avert that which a reasonable person under similar circumstances would not anticipate as likely to happen.⁴⁸

⁴⁰ *Gries v. Long Island Home*, 274 App. Div. 938, 83 N. Y. S. (2d) 728 (1948).

⁴¹ *Smith v. Simpson et al.*, 221 Mo. App. 550, 288 S. W. 69 (1926).

⁴² *Fowler v. Norways Sanitorium*, 112 Ind. App. 347, 42 N. E. (2d) 415 (1942).

⁴³ *Paulen v. Shinnick*, 291 Mich. 288, 289 N. W. 162 (1939).

⁴⁴ *Emory University v. Shadburn*, 47 Ga. App. 643, 171 S. E. 192 (1933); *Maki v. Murray Hospital*, 91 Mont. 251, 7 P. (2d) 228 (1932).

⁴⁵ *Hogan v. Clarksburg Hospital Co.*, 63 W. Va. 84, 59 S. E. 943 (1907).

⁴⁶ *Wetzel v. Omaha Maternity and General Hospital Ass'n*, 96 Neb. 636, 148 N. W. 582 (1914).

⁴⁷ *Tate v. McCall Hospital*, 57 Ga. App. 824, 196 S. E. 906 (1938) (wife fell asleep while watching).

⁴⁸ *Fetzer v. Aberdeen Clinic et al.*, 48 S. D. 308, 204 N. W. 364 (1925) (hospital permitted to plead contributory negligence on part of patient, but dissenting opinion seemed more logical in that a known condition of patient would rule out such defense).

Thus a hospital has been held not liable where an occasionally delirious patient, who had not previously displayed a suicidal tendency, jumped out of a second-floor window during a five minute absence of the nurse.⁴⁹ Even though a chronic alcoholic has threatened suicide, the hospital is not liable if, after the patient's condition has improved, he suddenly dashed from a guard and plunged into a tank to drown.⁵⁰ But where a patient, not having shown any self-destructive tendency, was known to have wandered out of bed, the liability of the hospital for an injury sustained by the patient in a fall from the third floor depended on whether the patient jumped out of the window or fell from the fire escape—the latter contingency being within the scope of foreseeability in the particular case.⁵¹

In many cases the plaintiff is unable to discover the particular negligent act of the hospital, and consequently may have recourse to the doctrine of *res ipsa loquitur*.⁵² To obtain its benefit the accident must be of a kind that "ordinarily does not occur in the absence of someone's negligence"; it must be caused "by an instrumentality within the exclusive control of the defendant"; it must not have been due to any voluntary or contributive action of the one injured.⁵³ *Res ipsa loquitur* raises a presumption to create a prima facie case,⁵⁴ but it does not create a prima facie case if at the same time there is evidence of specific negligence.⁵⁵ It has been contended that where a patient receives an injury while unconscious the very nature of such an occurrence would indicate a failure to exercise due care, and therefore a prima facie case under the *res ipsa loquitur* doctrine.⁵⁶ Yet to apply the doctrine in every such case may make the hospital, in effect, an insurer of the patient's safety.⁵⁷

A hospital entering into an agreement or special arrangement for treatment or care of a patient ordinarily implies that the physicians

⁴⁹ *Breeze v. St. Louis & S. F. Ry.*, 264 Mo. 258, 174 S. W. 409 (1915).

⁵⁰ *James v. Turner*, 184 Tenn. 563, 201 S. W. (2d) 691 (1941); see *Dahlberg et al. v. Jones*, 233 Wis. 6, 285 N. W. 841 (1939) (patient with a mild nervous disorder and mental depression suffers exposure during escape in nightgown).

⁵¹ *Davis v. Springfield Hospital*, 196 S. W. 104 (Mo. App. 1917), *aff'd*, 204 Mo. 626, 218 S. W. 696 (1920).

⁵² *Maki v. Murray Hospital*, 91 Mont. 251, 7 P. (2d) 228 (1932).

⁵³ PROSSER, TORTS § 43 (1941).

⁵⁴ *Palmer v. Clarksdale Hospital*, 206 Miss. 680, 40 So. (2d) 582 (1949). *But see* dissenting opinion to the effect that *res ipsa loquitur* is not a substitute for the cause of the injury but that it permits a deduction of negligence from such cause if the cause is established.

⁵⁵ *Simmons v. South Shore Hospital*, 340 Ill. App. 153, 91 N. E. (2d) 135 (1950) (*res ipsa loquitur* fails because a heart attack is not an accident that ordinarily would not occur except for defendant's negligence).

⁵⁶ *Richardson v. Dumas*, 106 Miss. 664, 64 So. 459 (1914).

⁵⁷ See *Maki v. Murray Hospital*, 91 Mont. 251, 7 P. (2d) 228, 237 (1932) (dissenting opinion).

and nurses furnished to the patient will meet the standard of their profession in the requisite qualities of ability, skill, and degree of learning, and that these qualities will be diligently exercised and applied in the care and treatment of the patient to the best of their judgment.⁵⁸ In the case of a contract, where it does not expressly or specifically provide for a certain minimum degree of care, such as constant attendance on the patient, the hospital, nevertheless, may be liable for not providing such degree of care.⁵⁹ On the other hand, if a hospital is left with the discretion to use a lesser degree of care than that suggested by the one entering the patient into the hospital, the hospital is not liable for using the lesser degree of care if it is the ordinary and reasonable care required by the circumstances.⁶⁰ A negligent breach of contract is a breach of duty *ex delicto* and not *ex contractu*. If only a breach of contract is alleged the contract will probably be construed rather strictly. For instance, a contract to keep constant watch and guard over a patient is not a contract to prevent the patient from committing suicide, nor is it one to pay the value of the lost life or services to another.⁶¹

In several jurisdictions liability of the hospital, either for breach of contract or for negligence, may depend on whether the negligent act is classified as administrative or medical.⁶² The hospital probably will not be liable if the act is medical on either the theory that a medical act by a corporation is *ultra vires*, or that the physician is an independent contractor.⁶³ An act is medical if it is within the scope of the practice of medicine, which is said to consist of three things: ⁶⁴

First, in judging the nature, character, and symptoms of the disease; *second*, in determining the proper remedy for the disease; *third*, in giving or prescribing the application of the remedy to the disease.

The limits of administrative or ministerial acts are much broader, and are usually designated as the "routine duties" toward "the care, protection, and customary hospitalization" of the patient.⁶⁵

In summary, it may be said, that the factors which make the non-attendance of a patient a negligent act for which the hospital is liable,

⁵⁸ Pangle v. Appalachian Hall, 190 N. C. 833, 131 S. E. 42 (1925).

⁵⁹ Wetzel v. Omaha Maternity and General Hospital Ass'n, 96 Neb. 636, 148 N. W. 582 (1914).

⁶⁰ Stansfield v. Gardner, 56 Ga. App. 634, 193 S. E. 375 (1937).

⁶¹ Duncan v. St. Luke's Hospital, 113 App. Div. 68, 98 N. Y. Supp. 867 (1906), *aff'd*, 192 N. Y. 580, 85 N. E. 1109 (1908).

⁶² Santos v. Unity Hospital, 276 App. Div. 867, 93 N. Y. S. (2d) 359 (1949) *rev'd*,N. Y., 93 N. E. (2d) 574 (1950); *see* Santos v. Unity Hospital, N. Y., 93 N. E. (2d) 574, 576 (1950) (dissenting opinion).

⁶³ Fowler v. Norway's Sanatorium, 112 Ind. App. 347, 42 N. E. (2d) 415 (1942).

⁶⁴ Underwood v. Scott, 43 Kan. 714, 23 Pac. 942, 943 (1890).

⁶⁵ Fowler v. Norways Sanatorium, 112 Ind. App. 347, 42 N. E. (2d) 415, 419 (1942).

are the condition of the patient or the circumstances in which the patient is left alone, when either the condition or the circumstances are known or ought to be known, and the injury that occurs is one that would be likely to happen when viewed in the light of experience or the realm of foreseeability.

II.

Public Hospitals

It may be stated generally that strictly public hospitals, like many other governmental agencies, are not liable for the negligent acts of their servants, subject however, to statutory provision to the contrary.⁶⁶ The doctrine of *respondeat superior* is, as a general rule, not applicable.⁶⁷ These hospitals are considered mere instrumentalities of the state, created to aid society in the performance of a public duty to care for the physically and mentally ill. Questions regarding the degree of care to be exercised, and foreseeability often are not given much consideration in these cases, since the dominant factor is the sovereignty of the state and whether or not in the particular instance it is to enjoy immunity from liability. The doctrine of sovereignty, together with public policy, appears to stand as the basis of this governmental immunity; and in the absence of express consent or assumption of liability, the state and its strictly governmental subdivisions retain this exemption.⁶⁸ Thus, with regard to liability for leaving a patient unattended, it has been held, in an action by a patient to recover damages resulting from a fall from her bed while delirious and unattended, that the operation of a county hospital is a governmental function, and the hospital is not liable for the negligence of its servants when they are acting in a governmental capacity.⁶⁹ Furthermore, the fact that it admits certain paying patients does not convert it into a proprietary or private hospital.⁷⁰ By the same token, it has been held that municipal hospitals are not liable for the negligence of their servants because the maintenance of such hospitals is an exercise of a governmental function or power.⁷¹

⁶⁶ *University of Louisville v. Metcalfe*, 216 Ky. 339, 287 S. W. 945 (1926); *Maia v. Eastern State Hospital*, 97 Va. 507, 34 S. E. 617 (1899); see, Note, 43 *YALE L. J.* 81, 89 (1938); Note, 49 *A. L. R.* 375 (1926). See also a series by: Borchard, *Government Liability in Tort*, 34 *YALE L. J.* 1, 129, 229 (1924-25); Borchard, *Government Responsibility in Tort*, 36 *YALE L. J.* 1, 757, 1039 (1926-28); Borchard, *Government Responsibility in Tort*, 28 *COL. L. REV.* 577 (1928); *Theories of Governmental Responsibility in Tort*, *id.*, at 734. And see PROSSER, *TORTS* § 108 (1941).

⁶⁷ *Leavell v. Western Kentucky Asylum*, 122 Ky. 213, 91 S. W. 671 (1906).

⁶⁸ See note 66 *supra*.

⁶⁹ *Griffin v. Colusa County et al.*, 44 Cal. App. (2d) 915, 113 P. (2d) 270 (1941).

⁷⁰ *Ibid.*

⁷¹ See *City of McAllen et al. v. Gartman et ux.*, 81 S. W. (2d) 147 (Tex Civ. App. 1935), *aff'd*, 130 Tex. Sup. Ct. 237, 107 S. W. (2d) 879 (1937), for citations

In most instances liability is dependent upon whether the function exercised is governmental or proprietary in nature.⁷² Thus, municipal hospitals not maintained for the indigent alone, but which charge fees for both medical care and hospitalization, have been held liable for the negligence of their servants.⁷³ *Beard v. City and County of San Francisco*⁷⁴ presents an interesting illustration of this rule. The plaintiff alleged lack of proper attendance and supervision over his infant son who was killed in a fall from his crib. The question arose as to whether the operation of the defendant hospital under a charter of the consolidated city and county was a governmental or proprietary function. The court, in reversing the judgment of the lower court for the defendant hospital, held this to be a mixed question of law and fact. It stated:⁷⁵

. . . because of the unusual status of the two governmental agencies, the manner of operation of the hospital becomes a mixed question of law and fact. . . . When a chartered city accepts the grant of power and establishes a hospital for the health and public welfare of the community it has two courses to follow—it may maintain a hospital for the indigent alone, or it may maintain one in competition with private hospitals in the same community, charging fees for both medical care and hospitalization. If the latter course is followed . . . a city would be operating the hospital in a proprietary capacity as to paying patients just as it operates its street railways, water, gas and electric facilities, and other utilities for the benefit of the community. . . .

The established rule in New York is to the effect that in the treatment and supervision of patients and inmates of its various state hospitals, the state is held to a standard of reasonable care.⁷⁶ The degree of care, of course, varies with the circumstances. For example, in the

to numerous cases and jurisdictions. See also *City of Richmond v. Long's Adm'rs.*, 17 Gratt. 375 (Va. 1867) for an interesting case involving loss of slave through lack of proper attendance whereby delirious slave escaped and was later found dead. See 2 McQUILLIN, MUNICIPAL CORPORATIONS § 10.05 (3rd ed. 1949); 6 McQUILLIN, MUNICIPAL CORPORATIONS §§ 2795 *et seq.* (2nd ed. 1928).

⁷² 2 SHEARMAN AND REDFIELD, *op. cit. supra* note 2, § 298; 4 *id.*, § 659.

⁷³ *Beard v. City and County of San Francisco et al.*, 79 Cal. App. (2d) 753, 180 P. (2d) 744 (1947); *City of Okmulgee v. Carlton*, 180 Okla. 605, 71 P. (2d) 722 (1937). See also *City of Shawnee v. Roush*, 101 Okla. 60, 223 Pac. 354, 355 (1924), in which the court clearly distinguishes between the governmental powers of a municipality and the proprietary functions exercised by it, holding that where a municipal corporation operates and maintains a hospital for compensation, it is acting in a quasi-private manner, and can not avoid liability by reason of its municipal character.

⁷⁴ *Supra* note 73.

⁷⁵ *Id.*, 180 P. (2d) at 746.

⁷⁶ *Callahan et al. v. State*, 179 Misc. 781, 40 N. Y. S. (2d) 109, *aff'd*, 266 App. Div. 1054, 46 N. Y. S. (2d) 104 (1943); *Shattuck v. State*, 166 Misc. 271, 2 N. Y. S. (2d) 353, *aff'd*, 254 App. Div. 926, 5 N. Y. S. (2d) 812 (1938); *Martindale v. State*, 244 App. Div. 877, 281 N. Y. Supp. 686, *aff'd*, 269 N. Y. 554, 199 N. E. 667 (1935); *Curley v. State*, 148 Misc. 336, 265 N. Y. Supp. 762 (1933). Similarly the state is held liable for damages to others outside of the physical limits of the institution: *Jones v. State*, 267 App. Div. 254, 45 N. Y. S. (2d) 404 (1943); *Weihls v. State*, 267 App. Div. 233, 45 N. Y. S. (2d) 542 (1943).

operation of its hospitals for the insane, the state is held liable for injuries committed by a patient, whether upon himself or others, when the state knows that his propensities are such that the act committed is likely to result from failure to properly attend or supervise.⁷⁷ In the recent case of *Daley v. State*,⁷⁸ the plaintiff's son, an inmate of a state hospital, was fatally injured when he fell or jumped into a vat of boiling soap in the hospital laundry. No attendant was present at the time to supervise the patients. The court held that the negligence of the hospital was conclusively established from the fact that the patient required constant supervision because the hospital had previous notice of his suicidal tendencies. Obviously the court applied the test of foreseeability. In another case a rule similar to that applied to private-profit hospital cases was relied on to establish liability on the part of the state for an assault by one inmate upon another.⁷⁹ The court held: ⁸⁰

The State is duty bound to furnish inmates of its hospitals for mental defectives with every reasonable precaution to protect them from injury either self-inflicted or otherwise. It was the duty of the State to use reasonable care and diligence not only in treating, but in safeguarding the deceased, measured by his capacity to provide for his own safety.

However, as in private-profit hospital cases, the state is not considered an insurer of the safety of the inmates of its institutions.⁸¹

In summary, it can be said that as a general rule no private action will lie against a public hospital for injuries sustained in the performance of a strictly public or governmental function. On the other hand it will be held liable either by statutory declaration, or when it has assumed a role similar to private hospitals by requiring payments from patients, or at least receiving payment from the patient injured.

III.

Charitable Hospitals

The liability of charitable hospitals for negligence is difficult to define or measure because of the many conflicting theories supporting some

⁷⁷ *Shattuck v. State*, *supra* note 76; *Paige v. State*, 245 App. Div. 126, 281 N. Y. Supp. 98 (1935); *Curley v. State*, *supra* note 76; *Wilcove v. State*, 146 Misc. 87, 261 N. Y. Supp. 685 (1933); *Van Patter Adm'r v. Charles B. Towns Hospital et al.*, 213 App. Div. 863, 209 N. Y. Supp. 935 (1926), *aff'd*, 246 N. Y. 646, 159 N. E. 686 (1927).

⁷⁸ 273 App. Div. 552, 78 N. Y. S. (2d) 584 (1948). *But cf.* *Root v. State*, 180 Misc. 205, 40 N. Y. S. (2d) 576 (1943), where the court stated that there was no duty on the State to maintain individual supervision for each potential suicide case because such a rule would place an unreasonable burden upon the State. (Patient hanged himself while attendant was absent for five minutes. The State had knowledge of his suicidal tendencies.) See also *McPartland v. State*, 277 App. Div. 103, 98 N. Y. S. (2d) 665 (1950), where the court held that it was not foreseeable that an epileptic patient might fall into water tub and drown.

⁷⁹ *Dowly v. State*, 190 Misc. 16, 68 N. Y. S. (2d) 573 (1947).

⁸⁰ *Id.*, 68 N. Y. S. (2d) at 578.

⁸¹ *Betts v. State*, 54 N. Y. S. (2d) 475 (N. Y. Ct. Cl. 1945).

or no degree of immunity.⁸² The motive for granting immunity is the desire to preserve charitable institutions;⁸³ but, because of an opposing desire to compensate the injured party, some courts have lowered charities to the position occupied by hospitals for private gain by refusing any immunity against liability.⁸⁴

Aside from the question of whether immunity from negligent liability is granted, all courts, in general, permit liability for an injury due to negligence where the charity has been negligent in the selection or retention of the agent or servant responsible for the injury.⁸⁵ Also, there may be an exception to the defense of immunity by a charity where the injured party is a paying patient.⁸⁶ In such case the rules of negligence are applied as if the hospital were one for private gain.⁸⁷ In illustration, a paying patient was admitted in a delirious condition, and allowed to be left alone in an unguarded room on the second floor near a window from which the patient fell or jumped. Deciding that the act was foreseeable from the condition of the patient, the court held the hospital liable for negligence despite its plea of being a charitable institution and a proper subject for immunity. The court stated:⁸⁸ "Such doctrine is repugnant and shocking to a sense of fairness and justice to the victim of what may aptly be termed protected negligence."

Where a payment by a patient is held not to affect the status of the charity in regard to immunity, the charity may still be liable on a theory of contract, and the negligence may be pleaded as evidence of a breach.⁸⁹ But if the negligence causes an injury resulting in death,

⁸² See *President and Directors of Georgetown College v. Hughes*, 130 F. (2d) 810 (D. C. Cir. 1942), and cases cited therein for full discussion of the various theories on charitable liability or immunity; see also Note, 19 *MSS. L. J.* 220 (1948).

⁸³ *Cook v. John N. Norton Memorial Infirmary*, 180 Ky. 331, 202 S. W. 874, 877 (1918): "We, like the great majority of courts, are unwilling to apply that Shylock view of the matter and to thereby take from the charity the 'pound of flesh'."

⁸⁴ *Mulliner v. Evangelischer Diakonissenverein, etc.*, 144 Minn. 392, 175 N. W. 699 (1920).

⁸⁵ *Canney et ux. v. Sisters of Charity of House of Providence*, 15 Wash. (2d) 325, 130 P. (2d) 899 (1942).

⁸⁶ *Mikota v. Sisters of Mercy et al.*, 183 Iowa 1378, 168 N. W. 219 (1918); *Duncan v. Nebraska Sanitarium Benevolent Ass'n*, 92 Neb. 162, 137 N. W. 1120 (1912). See *Maki v. St. Luke's Hospital Ass'n*, 122 Minn. 444, 142 N. W. 705 (1913) (weight of authority holds charities liable for injuries to servants); *McLeod v. St. Thomas Hospital*, 170 Tenn. 423, 95 S. W. (2d) 917 (1936) (weight of authority holds charities liable for injuries to strangers).

⁸⁷ *Sisters of the Sorrowful Mother v. Zeidler*, 183 Okla. 454, 82 P. (2d) 996 (1938).

⁸⁸ *Id.*, 82 P. (2d) at 997.

⁸⁹ *Klein v. New York Eye and Ear Infirmary, Inc.*, 201 N. Y. Supp. 218 (N. Y. Sup. Ct. 1923) (Hospital was allowed to set up charity as a defense because the complaint did not stipulate the action to be in contract or negligence. But if it had been in contract the immunity granted charitable institutions probably would not have been allowed).

and an action for a wrongful breach causing death is brought on the contract, the hospital may escape liability in those jurisdictions where such an action is created only by statute, for such an action sounds in tort, not in contract.⁹⁰ Also, if the paying patient obtains a special nurse upon request, selected by the hospital, and is injured through the negligence of that nurse, the charitable hospital will be held not liable on the theory that the special nurse is the agent of the patient, especially if the nurse is not subject to the control of the hospital.⁹¹

In summary, it may be stated that liability for negligence or the degree of immunity therefrom, which a charitable hospital enjoys, is made to depend to a great extent upon whichever one of several public policy theories is followed in the particular jurisdiction. However, as a general rule, it may be said that liability does attach for a negligent injury where the charitable hospital is shown to have been negligent in the selection or retention of the servant committing the tort.

IV.

Industrial Hospitals

The liability of industrial hospitals depends in each instance upon whether its general structure, nature, and purpose characterizes it as a charitable institution, with the employer contributing predominantly toward its maintenance, or as a hospital for profit, with contribution in whole or in part by the employees. If its legal classification is that of a non-profit organization, the rules regarding the degree of care to be exercised are the same as those applied to charitable hospitals, including that rule of ordinary care which must be exercised in the selection of the staff.⁹² The test generally used to determine whether such an undertaking is charitable or otherwise is its purpose. If the motivating purpose "is to make profit, it is not a charitable enterprise. If it is to heal the sick and relieve the suffering, without hope or purpose of getting gain from its operations, it is charitable."⁹³ However, if the court should find that its purpose and nature is that of a profit-making organization, deriving the greater part of its support from contributions or assessed payments from employees' paychecks, then the rules regarding

⁹⁰ *Duncan v. Nebraska Sanitarium Benevolent Ass'n*, 92 Neb. 162, 137 N. W. 1120 (1912).

⁹¹ *Canney et ux v. Sisters of Charity of House of Providence*, 15 Wash. (2d) 325, 130 P. (2d) 899 (1942).

⁹² *Illinois Cent. R. R. v. Moodie*, 23 F. (2d) 902 (5th Cir. 1928); *Congdon v. Louisiana Sawmill Co.*, 143 La. 209, 78 So. 470 (1918). See Notes 17 L.R.A. (N. S.) 1167 (1907); 30 L. R. A. (N. S.) 1207 (1910); 48 L. R. A. (N. S.) 531 (1914), for cases illustrating liability for negligence of attendants furnished by relief department toward which employees contribute.

⁹³ *Union Pacific Ry. v. Artist*, 60 Fed. 365 (8th Cir. 1894).

the degree of care to be exercised and the foreseeability relative to private-profit hospitals are applicable.⁹⁴ An illustration of this latter situation, involving the liability of an industrial hospital for leaving a patient unattended, is the case of *Phillips v. St. Louis & S. F. Ry.*⁹⁵ A mental patient had been treated in a hospital maintained by the defendant for the use of its employees. The mentally deranged employee had been permitted to leave the hospital unattended as a consequence of which he was killed by a street car. The deceased had made monthly contributions to the defendant employer as a member of the hospital association. The court, in giving judgment for the widow, held that the hospital, a corporation under the direct control of the defendant, was not a charitable institution within the rule which exempts such institutions from liability for negligence, and was therefore liable for failure to competently attend the patient. In applying the test of foreseeability the court quoted from Thompson, *Commentaries on the Law of Negligence*, as follows:⁹⁶

It is not necessary . . . that the injury, in the precise form in which it in fact resulted, should have been foreseen. It is enough that it now appears to have been a natural and probable consequence.

In other words it is sufficient that the injury is the natural, though not necessary and inevitable, result of the negligent act or omission to act. In another case applying the test of foreseeability, the court held that it could not be foreseen, in the absence of previous evidence of suicidal mania, that an employee undergoing an appendectomy would leap from a window during the short absence of the attending nurse.⁹⁷ Also, the mere fact that a hospital knows that a pneumonia patient is in a delirious condition does not establish that it was negligent in not preventing him from jumping out of a window.⁹⁸

In summary, it can be said that if the industrial hospital is characterized as a non-profit organization, the general rules applicable to charitable hospitals are applied; however, if it is found to be a business proposition and profit venture, the rules relative to private-profit hospitals are applied.

⁹⁴ *Phillips v. St. Louis & S. F. Ry.*, 211 Mo. 419, 111 S. W. 109 (1908); *Richardson v. Carbon Hill Coal Co.*, 6 Wash. 52, 32 Pac. 1012 (1893). See Note, 17 L. R. A. (N. S.) 1167 (1909), and cases cited therein.

⁹⁵ 211 Mo. 419, 111 S. W. 109 (1908).

⁹⁶ *Id.*, 111 S. W. at 115 quoting 1 THOMPSON, COMMENTARIES ON THE LAW OF NEGLIGENCE 62 (1901).

⁹⁷ *Breeze v. St. Louis & S. F. Ry.*, 264 Mo. 258, 174 S. W. 409 (1915). The court attempts to distinguish this case from *Phillips v. St. Louis and S. F. Ry.*, 211 Mo. 419, 111 S. W. 109 (1908).

⁹⁸ *Illinois Cent. R. R. v. Cash's Adm'x*, 221 Ky. 655, 299 S. W. 590 (1927). The court refused to discuss whether the hospital was operated for profit or charity because the hospital, under the particular facts, would not have been liable in either case.

V.

Conclusion

No court has held that the absence of an attendant or nurse is negligence per se. Absence is negligence only when it is of an unreasonable length of time in relation to the condition in which the patient was left; or when it is foreseeable or ought to have been foreseen that an absence, however brief, reasonably might result in some harm to the particular patient; or, when it is contrary to custom or practice to leave a patient unattended under the particular conditions. Constant attendance by custom or practice is distinguished from such attendance as required by the test of foreseeability in that, in the former, experience has taught that it is not the expected harm which is to be anticipated but the unexpected to be prevented. Even where constant attendance would ordinarily be required the courts may not stress this fact if the patient knowingly enters an understaffed hospital, since the patient could not reasonably expect to be constantly attended.⁹⁹

To summarize, it may be said that there is a great degree of similarity of the rules and decisions imposing liability, for nonattendance, upon private-profit hospitals, public hospitals when acting in a private character for profit, charitable hospitals in jurisdictions where they enjoy little or no immunity from liability, and industrial hospitals operating for profit. The tests of due care and foreseeability play the decisive role in the ultimate determination in litigations in which these particular institutions are involved.¹⁰⁰ In contradistinction to these classes of institutions are public hospitals when operating in the performance of a strictly public or governmental duty, charitable hospitals which enjoy immunity from liability and industrial hospitals characterized as non-profit organizations. In the ultimate determination of litigations in which these latter institutions are involved, the tests regarding due care and foreseeability do not play the dominant role, but the important consideration is whether these institutions in the first instance are, or are not, to be subject to liability for negligence.

Consistent with the idea of hospital liability for negligence must be developed an attitude which does not impede the work of these humane and highly necessary institutions for alleviating and overcoming physical and mental misfortunes in a civilized society. This attitude, motivated by a realization of the complexity of the society in which we exist today and the consequent increasing demand for medical care and hospitalization to help promote the mental and bodily welfare of that so-

⁹⁹ *Mulliner v. Evangelischer Diakonissenverein, etc.*, 144 Minn. 392, 175 N. W. 699 (1920).

¹⁰⁰ Where insurance companies carry the defensive claim of a hospital in an action for negligence the effect of such insurance in a jury trial is an important consideration. See Hartman, *supra* note 1, at 51.