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Recent Decisions

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can there be "unwilling" intent to evade? An individual who intends to evade the tax cannot help but act wilfully. The most plausible reason for the distinction between civil and criminal fraud lies in the burden of proof which the Commissioner must sustain in proving one or the other. If he can prove his case beyond a reasonable doubt, criminal prosecution will be brought. If he has less evidence, he will bring an action for civil fraud for the very same act.

Under the Code, the distinction between civil fraud and negligence is that in negligence there is *no* intent "to evade" the tax. Presumably, the distinction will lie in what motivated the taxpayer's actions which give rise to the delinquency.

In summary, where there has been an evasion of the tax, which of the various penalties will be imposed will depend upon one or both of these factors: the intent of the taxpayer as gleaned from the circumstances of the case, and the amount of evidence available to the Commissioner.

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RECENT DECISIONS

BAILMENTS—CONTRACTUAL EXTENSION OF THE COMMON LAW LIABILITY OF A BAILEE.—*Perreault v. Circle Club, Inc. et al.*, ...Mass....., 95 N. E. (2d) 204 (1950). The plaintiff leased a television set to corporate defendant for one month with an option to buy. The lease contained the following provision:

> The lessee shall pay for any damage to the equipment during the term hereof or while the same is in his actual possession or constructive possession, which may be due otherwise than the ordinary wear and tear incident to the normal use thereof, and at the termination of this agreement, by the expiration of the terms hereof or otherwise, the lessee shall surrender to the lessor the said equipment in good order, repair and condition in all respects, reasonable wear and tear expected [excepted].

Subsequently, the set was stolen while in the possession of defendant, but without negligence or fault on his part. The lower court decreed that defendant pay plaintiff the value of the set, less rentals paid, with interest, and upon appeal the decree was affirmed.

The issue raised in this case is whether the provision of the lease increases the liability of a bailee for hire beyond the duty of ordinary care to that of an insurer. The Supreme Judicial Court of Massachusetts held that the defendant was liable absolutely, regardless of fault, by the terms of his agreement.

The court recognized that "in the absence of a contract increasing the liability of a bailee, he is not liable for loss or damage occurring without his fault." *Amiro v. Crowley,* 256 Mass. 53, 152 N. E. 78 (1926); *Willet v. Rich,* 142 Mass. 356, 7 N. E. 776 (1886). It also pointed out that, according to the weight of authority, an agreement by a bailee to "return the goods in the same condition as received, ordinary wear and tear excepted" in the absence of a stipulation to pay in case of non-delivery adds nothing to his common law liability. See, *e.g., Sanchez v. Blumberg,* 176 S. W. 904 (Tex. Civ. App. 1915), and cases cited by the court in the instant case. The reason is succinctly explained in *Young v. Leary,* 135 N. Y. 569, 32 N. E. 607, 609 (1892):

> When language is used which does no more than express in terms the same obligation which the law raises from the facts of the transaction itself, the party using the language is no further bound than he would have been without it.

It is generally recognized that parties can make special bailment contracts changing the liability imposed by law, provided that such contracts do not contravene a positive rule of public policy. *Grady v. Schweinler,* 16 N. D. 452, 113 N. W. 1031 (1907). But the bailee will never be presumed to become an insurer; the contract must clearly show such an intent before he will be held to answer absolutely for the loss of goods. *McEvers v. The Sangamon,* 22 Mo. 187 (1855); *Ames v. Belden,* 17 Barb. 513 (N. Y. 1854). Courts have been reluctant to enlarge or restrict the ordinary obligations of a bailee unless by specific and clear expression he has shown an intention to change the common law incidents of the bailment relation. *Reconstruction Finance Corp. v. Peterson Bros.,* 160 F. (2d) 124 (5th Cir. 1947); *Marks v. New Orleans Cold Storage Co.,* 107 La. 172, 31 So. 671 (1901); *Morgan v. Citizens Bank,* 190 N. C. 209, 129 S. E. 585 (1925); *Dodge v. Nashville, C. & St. L. Ry.,* 142 Tenn. 20, 215 S. W. 274 (1919); *Fuchs, et al. v. Goe,* 62 Wyo. 134, 163 P. (2d) 783 (1945). But where a bailee expressly promises to return the goods in some stipulated condition or else to pay for them, courts have generally held him liable regardless of fault. *Rainbow Petroleum Co. v. Union Drilling & Petroleum Co.,* 115 Cal. App. 275, 1 P. (2d) 489 (1931); *Drake v. White, et al.,* 117 Mass. 10 (1875); *Axelrod v. Purian,* 222 Mo. App. 201, 297 S. W. 151 (1927); *Grady v. Schweinler, supra; Rapid Safety Fire Extinguisher Co. v. Hay-Budden Mfg. Co.,* 37 Misc. 556, 75 N. Y. Supp. 1008 (Sup. Ct. 1902); *Triangle Film Corp. v. Saks,* 7 Ohio App. 458 (1917).

However, some authority does exist for the proposition that bailees with or without special contract are excused when loss or injury is occasioned by an act of God or the public enemy, *Browning v. Hanford,* 5 Hill 588 (N. Y. 1843). But thieves, tramps and robbers are

not classified as public enemies in the legal sense of these words. *State v. Moore,* 74 Mo. 413 (1881).

In its decision, nevertheless, the court relied heavily on two Massachusetts cases in which bailees were held liable without fault for loss of the bailed article resulting from fire and wind; in each instance, they had expressly agreed to return the goods or pay for them. *Harvey v. Murray,* 136 Mass. 377 (1884), and *Drake v. White, supra.* In the *Drake* case, where a safe was destroyed by fire while in the bailee's possession during the great Boston fire of 1872, the court said, 117 Mass. at 13:

> . . . their express promise is to do one or the other of two things: either to return the property specifically, or to pay for it in money. There can be no doubt that if a creditor sees fit to accept a deposit of security upon such terms, and to place himself in the position of an insurer of its safety, he can legally do so. . . .

There are relatively few cases of total destruction of bailed property in the bailee's possession without fault on his part in which it was held that the bailee was not liable where there existed a special contract to return or pay for the property. In those few cases there was either an express exception, or the courts read into the contract an implied exception to the bailee's contractual obligations which relieved him from paying for the property in case of destruction. In *Whitehead v. Vanderbilt,* 10 Daly 214 (N. Y. 1881), the plaintiff loaned the defendant a horse on condition that he would return it at a certain time in good condition, unless he desired to purchase it, in which case, or in event of failure to return it in good condition, the defendant should pay plaintiff a stated sum. Before the time for return the horse died without neglect of the defendant. The court discharged the bailee from liability, reasoning that the continued existence of the subject of the bailment was essential to performance of the contract, since the parties clearly contemplated its being alive at the time fixed for return, and since they abstained from making any provision in the event of death. Of course where the bailor is a substantial factor in causing the destruction of the bailed goods, the bailee is released from his special contractual liability. *Famous Players Film Co. of New England v. Salomon,* 79 N. H. 120, 106 Atl. 282 (1918).

A decision which releases the bailee from his specific agreement on the basis that the parties contemplate the existence of the bailed goods at the time fixed for return, the rationale of *Whitehead v. Vanderbilt, supra,* contradicts the overwhelming number of cases which have held that a promise to return goods "in as good condition as received, reasonable wear and tear excepted" is a mere recognition of the common law duty of due care—since such provisions manifestly presuppose the existence of the bailed goods at the time for return. The reasoning of the *Whitehead* case hardly seems logical. In any event, in the in-

stant case the bailed good was still actually in existence, even if it was not in the bailee's possession, so that even if the argument were granted, it was inapplicable here.

It could be contended that the bailor was in some wise responsible for the non-performance of the bailee by not recovering his property when notified, and that the argument of release outlined in *Famous Players Film Co. of New England v. Salomon, supra,* would apply, but again the bailee here hamstrung himself by expressly agreeing to be responsible for the television set while in his "actual possession or constructive possession."

The conclusion of the court, based upon the agreement of the parties and previous judicial construction of similar lease provisions, is reasonable, and is a clear demonstration of an instance where a bailee may by express agreement increase his common law liability to that of an insurer. In *Gouled v. Holwitz,* 95 N. J. L. 277, 113 Atl. 323, 324 (1921), the situation is aptly phrased:

> As a general rule, where a party contracts expressly to do a thing not unlawful, the contractor must perform his agreement, and if, by some unforeseen accident, the performance is prevented, he must pay damages for not doing it. . . . Where from the result of such an accident one of two innocent persons must sustain a loss, the law casts it upon him who has agreed to sustain it, or, rather, leaves it where the agreement of the parties has put it, and will not insert for the benefit of one of the parties by construction an exception which the parties have, either by design or neglect, omitted to insert in their agreement.

William J. Daner

CONFLICTS OF LAW—FEDERAL COURTS—CHOICE OF LAW GOVERNING FEDERAL GOVERNMENT CONTRACTS.—*Rhode Island Discount Co. et al. v. United States,* 94 F. Supp. 669 (Ct. Cl. 1951). The United States Transportation Corps contracted with Somerset Shipyards, Inc., for the construction of barges. When the shipyards encountered financial difficulties, a supplemental contract was entered into whereby the Government agreed, *inter alia,* to pay the shipyards' existing obligations. At the completion of the construction contract, the shipyards was insolvent. Creditors and other claimants of the shipyards filed this suit against the United States for moneys held for their benefit under the supplemental contract. The court denied this claim, holding that the law of Massachusetts, which does not recognize the rights of third party beneficiaries, governed the transaction.

In making the choice of Massachusetts law, the Court of Claims was faced with the question of whether federal courts must look to state decisions in determining the rights of parties to federal government contracts. That the problem of choice of law in federal courts

was anticipated by the First Congress is attested to by Section 34 of the Federal Judiciary Act of 1789, 1 STAT. 92 (1789), which provided:

> That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.

Justice Story rendered the landmark interpretation of this statute in *Swift v. Tyson,* 16 Pet. 1, 10 L. Ed. 865 (U. S. 1842), where he concluded that "the laws of the several states" did not include the decisions of state courts, and that the federal courts, therefore, were not bound by the state courts' determinations of the general common law. Under this interpretation there naturally arose a considerable body of federal common law and, as a result, a dual system of justice within each state. A plaintiff who was eligible to have his cause of action determined in the federal courts had a choice of law; he could enter the federal or state court depending upon whether the law in the particular court favored his cause of action. See *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.,* 276 U. S. 518, 48 S. Ct. 404, 72 L. Ed. 681 (1928).

To remedy this situation the Supreme Court was moved in 1938 in *Erie R. R. v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), to overrule nearly a century of precedent. Justice Brandeis uttered his oft-quoted, and often misunderstood statement: "There is no federal general common law." For cases that were in the federal courts by virtue of diversity of citizenship, as in the *Erie* case, the statement was correct, but that this rule is strictly limited to diversity cases was clearly pointed out in *Hinderlider et al. v. La Plata River & Cherry Creek Ditch Co.,* 304 U. S. 92, 110, 58 S. Ct. 803, 82 L. Ed. 1202 (1938), which was decided the same day as the *Erie* case. It is clear that a federal common law does exist in non-diversity cases, and that the decision in the *Erie* case was intended only to remedy the paradoxical situation of having two distinct bodies of law applicable to the same matter, with possible contrary results depending upon which one was selected to govern. The Court in the *Erie* case said, 304 U. S. at 74:

> Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. *Swift v. Tyson* introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten "general law" vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen.

The lower federal courts generally interpreted the rule of the *Erie* case as not applicable to controversies arising out of government contracts, so that federal common law still governed. *Girard Trust Co. v. United States,* 161 F. (2d) 159 (3rd Cir. 1947); *Kolker v. United*

States, 40 F. Supp. 972 (D. Md. 1941); *United States v. Grogan et al.,* 39 F. Supp. 819 (D. Mont. 1941); *Byron Jackson Co. v. United States,* 35 F. Supp. 665 (S. D. Cal. 1940). *Contra*: *Alameda County v. United States,* 124 F. (2d) 611 (9th Cir. 1941); *United States v. Brookridge Farms, Inc.,* 111 F. (2d) 461 (10th Cir. 1940).

In the cases concerned with the law applicable to government contracts reaching the Supreme Court after the *Erie* decision, there has been unanimity in the determination that state law did not control. Where a check, drawn on the Treasurer of the United States for services rendered in Pennsylvania, was stolen from the mail and negotiated in the same state, federal law controlled the rights of the parties. *Clearfield Trust Co. et al. v. United States,* 318 U. S. 363, 63 S. Ct. 573, 87 L. Ed. 838 (1943). By issuing the check the Government was held to be exercising a constitutional function in that the authority to issue the check had its origin in the Constitution and the statutes of the United States. This line of reasoning circumvents the provision of the Federal Judiciary Act, now 28 U. S. C. § 1652 (Supp. 1950), in slightly altered form, and the interpretation of it in the *Erie* case, because that authority does not apply where "the Constitution or treaties of the United States or Acts of Congress otherwise require or provide. . . ."

Likewise, in *United States v. County of Allegheny,* 322 U. S. 174, 182, 64 S. Ct. 908, 88 L. Ed. 1209 (1944), the Court stated:

> Every acquisition, holding, or disposition of property by the Federal Government depends upon proper exercise of a constitutional grant of power. . . . It must be accepted as an act of the Federal Government warranted by the Constitution and regular under statute.
>
> Procurement policies so settled under federal authority may not be defeated or limited by state law. . . . The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State.

It was determined by the Court that the provisions of a Government contract were to be adjudicated by federal law, even though the provisions stated that the Government was to retain ownership of certain machinery annexed to an individual's realty. This holding frustrated a county's attempt to collect real estate taxes on the fixtures, and clearly indicated that Government contracts were paramount to local real property law.

In a third decision by the Supreme Court, *Priebe and Sons, Inc. v. United States,* 332 U. S. 407, 411, 68 S. Ct. 123, 92 L. Ed. 32 (1947), the Court declared that where Congress has not adopted a different standard, it is customary to construe Government contracts according to general common contract law. The Government contracted through the Surplus Commodity Corporation to purchase eggs from Priebe.

Priebe's claim for an amount unpaid on the contract was denied in the Court of Claims on the basis of state law, but the Supreme Court reversed since the general common law, not the state decisions controlled. In dissent Justice Black agreed that state law should not control the decision but thought that federal common law, as distinguished from general common law, should govern. He stated, 332 U. S. at 414: "I regard the decisions of this Court since *Erie R. Co. v. Tompkins* . . . as having established that the construction and validity of *all* government contracts are governed by federal law. . . ."

As the rule of the cases indicate, state decisions cannot control the federal courts' determinations of cases arising out of Government contracts. It is true that in the absence of any federal decisions on a particular point the rule of the state involved *may* be applied to the case. *Royal Indemnity Co. v. United States,* 313 U. S. 289, 61 S. Ct. 995, 85 L. Ed. 1361 (1941). But as a practical matter, with the federal government engaging in many diversified fields and, through its instrumentalities entering in many contracts, it would indeed place a cumbersome duty on the Government to require it to abide by the contract rules of forty-eight states.

The instant case insofar as the court considered itself bound by the Massachusetts rule on third party beneficiaries would seem to be decided incorrectly. As the cases amply indicate, the Government, when it does contract, is acting in pursuance of the "Constitution and the Acts of Congress"; hence there is no reason to apply state rules to these agreements.

William T. Huston

CONSTITUTIONAL LAW—FREEDOM OF SPEECH—PREVENTION AND PUNISHMENT.—*Feiner v. New York,* 340 U. S. ...., 71 S. Ct. 303, 95 L. Ed. .... (1951); *Kunz v. New York,* 340 U. S. ...., 71 S. Ct. 312, 95 L. Ed. .... (1951). Speaking for the Supreme Court in these companion cases, Chief Justice Vinson re-emphasized the policy of the United States of safeguarding constitutional freedoms from oppression while tolerating punishment by the states for their abuse.

The former case arose from the following facts: One evening petitioner Feiner stood on a public street corner and spoke through a loud speaker in an attempt to persuade a racially-mixed crowd of about seventy-five persons to attend an unpopular political meeting and listen to an address on civil liberties. In a "loud, high-pitched voice," he cast disparaging remarks upon certain public officials and, according to one version, urged the Negro people to "rise up in arms and fight for equal rights." One of the crowd threatened to remove the

petitioner from his box if the police did not. The restless crowd was "pushing, shoving and milling around" thereby forcing passing pedestrians to walk in the street. A police officer present, posted there to prevent disorder and possible injury to pedestrians, requested the petitioner "to get down off the box" and then vainly ordered him to stop talking. For refusal to obey, Feiner was arrested and convicted of disorderly conduct. The petitioner claimed the conviction violated his right of free speech under the Fourteenth Amendment.

The Court held that the conviction, since it was for breach of peace and violation of public order and authority and not for the making of a speech or for the contents of the speech, was a proper exercise of state police power; that here the Court could not say that the preservation of the community's interest in the maintenance of order and peace upon its streets was an encroachment upon the petitioner's right of free speech. As stated in *Gitlow v. New York,* 268 U. S. 652, 666, 45 S. Ct. 625, 69 L. Ed. 1138 (1925):

> . . . a state in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question.

The majority opinion in accepting the finding of the New York Court of Appeals in *New York v. Feiner,* 300 N. Y. 391, 91 N. E. (2d) 316 (1950), that clear and imminent danger of disorder was threatened, cited *Cantwell et al. v. Connecticut,* 310 U. S. 296, 308, 60 S. Ct. 900, 84 L. Ed. 1213 (1940):

> When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious.

A "clear and present" danger is one in which there are reasonable grounds for fearing that "serious evil will result" and for believing that the "danger apprehended is imminent." *Whitney v. California,* 274 U. S. 357, 376, 47 S. Ct. 641, 71 L. Ed. 1095 (1927). "The evil itself must be substantial and serious, and the degree of imminence extremely high." *Bridges v. California,* 314 U. S. 252, 263, 62 S. Ct. 190, 86 L. Ed. 192 (1941). A "substantive evil" is a grievous impairment of an interest which to society is of equal or greater importance than the societal interest in the constitutional freedom. Antieau, *"Clear and Present Danger" — Its Meaning and Significance,* 25 NOTRE DAME LAW. 603, 613 (1950).

In a dissenting opinion Justice Black did not think the facts showed an "imminent threat of riot or uncontrollable disorder" and agreed with the dissenting opinion of Justice Douglas that if police interference was necessary it was to protect the petitioner's right to speak. This view is supported by the decision in *Terminiello v. Chicago,* 337

U. S. 1, 69 S. Ct. 894, 93 L. Ed. 1131 (1949), where a speech not only aroused animosity but incited an actual riot; yet it was held not to be such a clear and present danger of a substantive evil sufficient to justify a restraint on free speech. But there the audience was voluntary rather than happenstance, and the speech was delivered in a private hall and not on a public street.

The viewpoint of the dissenting opinions in the *Feiner* case is better seen in light of the *Kunz* decision. The appellant Kunz had been convicted of violating a city ordinance which required all persons holding religious meetings upon the street to obtain a permit from the city police commissioner. The appellant had held a permit but it was revoked in 1946 because of complaints about his denunciation and ridicule of other religious beliefs. His subsequent applications for a permit were disapproved, and he was eventually arrested for speaking at a religious meeting without a permit.

The Court held the ordinance invalid as a prior restraint on the freedom of speech in that it vested a discretionary power in an administrative official "to control in advance the right of citizens to speak on religious matters on the streets of New York." 71 S. Ct. at 314. See *Saia v. New York,* 334 U. S. 558, 68 S. Ct. 1148, 92 L. Ed. 1574 (1948) (ordinance prohibiting use of amplifying devices on public streets except where permitted in discretion of the chief of police held invalid as suppression of free speech); *Cantwell et al. v. Connecticut, supra* (statute prohibiting solicitation of funds except for religious causes as determined by an authorized official held invalid as censorship of religion); *Schneider v. Irvington,* 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155 (1939) (ordinance requiring permit from police officer in order to distribute literature from door to door held invalid because of arbitrary power of censorship); *Hague v. C. I. O. et al.,* 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423 (1939) (ordinance giving local officer discretionary power to permit or refuse an assembly if in his opinion it would prevent disorder and riot held invalid as suppression of assembly); *Lovell v. City of Griffin,* 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (1938) (ordinance prohibiting distribution of literature without a permit from city manager held invalid as censorship of the press). But see *Cox et al. v. New Hampshire,* 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049 (1941) (ordinance requiring a permit to use the public streets for parades held valid as within proper control of municipal authority). *But cf. Myerson et al. v. Samuel et al.,* 74 F. Supp. 315 (E. D. Pa. 1947) (where there was an ordinance prohibiting public meetings for other than patriotic purposes in city parks, an injunction was granted restraining an official from interfering with the meeting, the reason being that there was no evidence of a clear and present danger to our form of government); *State v. Klapprott et al.,* 127 N. J. L. 395, 22 A. (2d) 877 (1941) (an ordinance making it a misdemeanor for the utterance

of any speech in the presence of two or more persons which proposes hostility against any group because of race or religion was held invalid as it was too subjective in application and the "clear and present danger" would not apply unless the utterance constituted a danger to the state).

In his dissent to the *Feiner* case Justice Black stated that this decision in light of the *Kunz* decision meant, 71 S. Ct. at 311:

> . . . that while previous restraints probably cannot be imposed on an unpopular speaker, the police have discretion to silence him as soon as the customary hostility to his views develops.

Therefore to him it seems that what is given by the *Kunz* decision is taken away by the *Feiner* decision. On the other hand Justice Jackson in a sharp dissent in the *Kunz* case thought that what was "order" in the *Feiner* case became "chaos" in the *Kunz* case. He contended that the majority opinion had based its decision in the *Kunz* case on the assumption that Kunz had been exercising a constitutional right at the time of his arrest. He quoted from *Chaplinsky v. New Hampshire,* 315 U. S. 568, 571-2, 62 S. Ct. 766, 86 L. Ed. 1031 (1942), where Justice Murphy had said:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting or "fighting" words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Justice Jackson points out that if in the *Chaplinsky* case such words as "God damned racketeer" and "damned Fascist" were held to be "insulting or fighting" words then here, certainly, such inflammatory statements as "the Pope is the anti-Christ" and "the Jews are Christ-killers" are clearly more so when cast at Catholics and Jews. He further notices the failure of the majority opinion to apply the "clear and present danger" test as originally enunciated by Justice Holmes in *Schenck v. United States,* 249 U. S. 47, 52, 39 S. Ct. 247, 63 L. Ed. 470 (1919); that where "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about . . . substantive evils" the words will not enjoy constitutional immunity. The words used by Kunz were certainly insulting and of a nature that when spoken in the environment of a public street would tend to incite and provoke disorder. Considering the societal interest in peace and order to be greater than its interest in allowing free speech of that type, it follows that street fighting and riots are substantive evils. Do away with the ordinance and Justice Jackson anticipates an emergency arising wherever there is no police force present, or one too small to cope with what may be a castastrophe, because of lack of notice of the speech to take place. But as stated in Antieau, *supra* at 606: "Freedom cannot be abridged if it is only the

fear of *future* evils that haunts the official." However, state decisions have long upheld the authority of the municipality to control its streets. Ex Parte *Bodkin,* 86 Cal. App. (2d) 208, 194 P. (2d) 588 (1948) (an ordinance directing police officers to keep streets and sidewalks unobstructed was held valid); *Hamilton v. Montrose,* 109 Colo. 228, 124 P. (2d) 757 (1942) (an ordinance prohibiting the use of loud sounding devices on city streets as a means for attracting crowds was held valid); *Harwood v. Trembley,* 97 N. J. L. 173, 116 Atl. 430, 431 (1922) ("liberty of speech no more authorizes a citizen to appropriate to his own use the public property of a community for the purpose of exercising that guaranty than it permits him to occupy in invitum the private property of a fellow citizen for the same purpose"); *Barker et al. v. Commonwealth,* 19 Pa. 412, 413 (1852) ("liberty of speech does not require that the clear legal rights of the whole community shall be violated"). *But cf. Commonwealth v. Surridge,* 265 Mass. 425, 164 N. E. 480 (1929) (where if the right to assemble obstructs a public way it cannot be exercised to the detriment of the public even though municipal authorities issued a permit for the assembly).

An analogy can more clearly, perhaps, show the effect of the majority opinions in the *Feiner* and *Kunz* cases and their respective dissenting opinions. Herein, the right to sow seed equates the right to free speech, weeds symbolize words of evil import or portent, and hay fever represents the crowd's disorderly reaction. If A desires to sow seed in a field belonging to both A and B, the *Kunz* case holds that B cannot prevent A from doing so. Nor can B interfere with A because in the past the seed produced a field of weeds. However, if B catches hay fever from A's production of weeds the *Feiner* case holds that A may be punished. Justice Black would assert that since A has the right to plant seed he has a right to be protected in cultivating the plants produced, nor can he be punished for causing B's hay fever as that would make his original right to plant seed a precarious one. Justice Jackson would disagree on the basis that the right to sow seeds means only the right to produce plants which do not cause hay fever, and further that A's past misconduct in producing weeds justify B in preventing A from sowing more weeds. However, it is doubtful that past misconduct will justify a prior restraint against a constitutional freedom. *Near v. Minnesota,* 283 U. S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931) (an injunction restraining the publication of a newspaper because of past misconduct in its publication was invalid as an infringement of freedom of the press). In *Milk Wagon Drivers Union et al. v. Meadowmoor Dairies, Inc.,* 312 U. S. 287, 61 S. Ct. 552, 85 L. Ed. 836 (1941), an injunction against peaceful picketing was sustained only because the past misconduct had a *continuing* coercive effect of violence to justify an infringement on freedom of speech.

The majority opinion of the *Kunz* case pointed out that if the fear of public disorder or violence should materialize public remedies were

available, and indicated by its decision in the *Feiner* case that actual violence need not occur to justify state police action. But an utterance may be prevented or punished only when violence is so very likely to follow upon it that there is no chance to interpose an effective counter-argument, and where such violence is a substantive evil which the state may constitutionally seek to prevent. *American Communication Ass'n, C. I. O., et al. v. Douds,* 339 U. S. 382, 70 S. Ct. 674, 94 L. Ed. 597 (1950). The attitude of the Court seems to be expressed in *De Jonge v. Oregon,* 299 U. S. 353, 364, 57 S. Ct. 255, 81 L. Ed. 278 (1937):

> Rights of free speech . . . may be abused by using speech . . . in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.

The permit system which the *Kunz* case held invalid is justified by Justice Jackson as a means for maintaining "good order." And "order" as he sees it is a means for protecting the civil liberties of the greater number. *See* his dissenting opinion in *Terminiello v. Chicago, supra* 337 U. S. at 14 (". . . must [we] forego order to achieve liberty"?). But the majority opinions seem to present the best solution by a checking-balance of social values so that order does not suppress liberty or liberty abuse order. However, the *Feiner* and *Kunz* cases still do not appear to answer the question asked by Mr. Justice Jackson: By what clear standards may "legitimate speaking" be distinguished "from that acknowledged to be outside of constitutional protection."

James D. Matthews

CONSTITUTIONAL LAW—PRIVILEGE AGAINST SELF-INCRIMINATION —REFUSAL TO TESTIFY CONCERNING MEMBERSHIP IN OR AFFILIATION WITH THE COMMUNIST PARTY.—*Patricia Blau v. United States,* 340 U. S. ...., 71 S. Ct. 223, 95 L. Ed. .... (1950); *Irving Blau v. United States,* 340 U. S. ...., 71 S. Ct. 301, 95 L. Ed. .... (1951). The petitioners, Patricia and Irving Blau, husband and wife, were found guilty of contempt for refusal to answer questions concerning the Communist Party of Colorado before a grand jury and the federal district court. As ground for their refusal, both witnesses invoked the privilege against self-incrimination of U. S. CONST. AMEND. V. The provisions of the Smith Act, 18 U. S. C. § 2385 (Supp. 1950), making it a crime, *inter alia,* to advocate the desirability of overthrowing the Government by force; to organize or assist in the organization of any society or group which advocated forceful overthrow of the Government; or to join or belong to a revolutionary group of the type described, was in force at the time of the Blaus' appearance before the grand jury. The court of appeals affirmed the convictions, 179 F. (2d) 559 (10th Cir. 1950);

180 F. (2d) 103 (10th Cir. 1950). The Supreme Court, in the instant cases, reversed both convictions, holding in the *Patricia Blau* decision that the accused could reasonably fear that criminal charges might be brought against her if she admitted employment by or intimate knowledge of the Communist Party. The Court declared, 71 S. Ct. at 224:

> Whether such admissions by themselves would support a conviction under a criminal statute is immaterial. Answers to the questions asked by the grand jury would have furnished a link in the chain of evidence needed in a prosecution of petitioner for violation of (or conspiracy to violate) the Smith Act.

Irving Blau's conviction was reversed expressly on the authority of the reasoning of the first *Blau* case. An additional element in Irving Blau's conviction, a claim of privilege against disclosure of a marital communication, was upheld against a dissent; however, this aspect will not be discussed here.

In these cases the Supreme Court has simply reaffirmed the classic interpretation of the Fifth Amendment's privilege against self-incrimination. See, e.g., *United States v. Burr* (In re *Willie*), 25 Fed. Cas. 38, No. 14,692e (C. C. D. Va. 1807); *Mason v. United States,* 244 U. S. 362, 37 S. Ct. 621, 61 L. Ed. 1198 (1917). See also Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause,* 29 MICH. L. REV. 1 (1930); Morgan, *The Privilege Against Self-Incrimination,* 34 MINN. L. REV. 1 (1949); Rapacz, *Rules Governing the Allowance of the Privilege Against Self-Incrimination,* 19 MINN. L. REV. 426 (1935); Note, *Privilege Against Self-Incrimination in Federal Court: Problem of Communist Affiliation,* 26 NOTRE DAME LAW. 68 (1950).

That an investigation by a grand jury is a "criminal case" within the meaning of the Fifth Amendment is no longer open to question. *United States v. Monia et al.,* 317 U. S. 424, 63 S. Ct. 409, 87 L. Ed. 376 (1943); *Camarato v. United States,* 111 F. (2d) 243 (3d Cir.), *cert. denied,* 311 U. S. 651, 61 S. Ct. 16, 85 L. Ed. 416 (1940). It is generally agreed that the privilege against self-incrimination, both at common law and as embodied in the constitutions of the several states and of the United States, is applicable to *all* judicial investigations and proceedings. Congressional investigations and hearings are likewise susceptible to invocation of the privilege. *See Counselman v. Hitchcock,* 142 U. S. 547, 563, 12 S. Ct. 195, 35 L. Ed. 1110 (1892); *United States v. Goodner et al.,* 35 F. Supp. 286, 290 (D. Colo. 1940). See also, 8 WIGMORE, EVIDENCE § 2252 (3rd ed. 1940); *Godlewski, The Privilege Against Self-Incrimination Before the House Committee on Un-American Activities,* 1 INTRAMURAL L. REV. (St. Louis U.) 15 (1949); Morgan, *supra* at 30; Notes, *Privilege Against Self-Incrimination in Federal Courts: Problem of Communist Affiliation,* 26 NOTRE

DAME LAW. 68, 71 (1950); *Applicability of Privilege Against Self-Incrimination to Legislative Investigations,* 49 COL. L. REV. 87 (1949).

The principal cases are the first definite pronouncements by the Supreme Court on the refusal to answer questions regarding Communist membership or affiliation on the ground of privilege against self-incrimination. These two decisions reversing the Court of Appeals for the Tenth Circuit clearly fall in line with pronouncements on this same matter by the other circuit courts. *See, e. g., Estes v. Potter,* 183 F. (2d) 865 (5th Cir. 1950); *Kasinowitz v. United States,* 181 F. (2d) 632 (9th Cir. 1950); *Doran v. United States,* 181 F. (2d) 489 (9th Cir. 1950); *Alexander v. United States,* 181 F. (2d) 480 (9th Cir. 1950); *United States v. Rosen,* 174 F. (2d) 187 (2d Cir. 1949). A decision of the Court of Appeals for the District of Columbia, *Lawson v. United States,* 176 F. (2d) 49 (D. C. Cir. 1949), appears at first blush to conflict with the decisions in the other circuits. During the questioning of two Hollywood screen-writers before a Committee of the House of Representatives on Un-American Activities, the witnesses were asked whether they were members of the Communist Party or believers in Communism, and one was asked whether he was a member of a certain writer's guild. They refused to answer and were convicted under the statute, 52 STAT. 942 (1938), 2 U. S. C. § 192 (1946), giving Congress power to impose criminal punishment for failure or refusal to answer pertinent and proper questions of legislative inquiry. Their argument was that the Bill of Rights protected all persons against compulsory disclosure of their private beliefs and associations regardless of what they may be, and that a person may not be punished for remaining silent as to those beliefs and associations. The court stated that defendants' contention was not a novel one and, in affirming the conviction, disposed of the argument, relying on *Barsky et al. v. United States,* 167 F. (2d) 241 (D. C. Cir. 1948). The court's omission of any reference to the Fifth Amendment is explainable by the fact that the defendants had not specifically appealed to the constitutional privilege against self-incrimination when they refused to answer. The privilege must be affirmatively invoked; it cannot arise automatically. It is in this respect that the *Lawson* decision can be distinguished from the holdings in other circuits.

Several state court decisions are worthy of mention. Two of these, *Fawick Airflex Co. v. United Electrical, Radio and Machine Workers of America,* .... Ohio App. ...., 92 N. E. (2d) 431, *appeal dismissed,* .... Ohio ...., 93 N. E. (2d) 480 (1950), 26 NOTRE DAME LAW. 130 (1950); *State v. James,* .... Wash. ...., 221 P. (2d) 482 (1950), held that the answers to questions concerning Communist Party membership or affiliation were not sufficiently incriminating to enable the party to invoke the privilege. These well-reasoned opinions are only analagous to the situation in the instant cases if: (1) the state had a statute similar to the Smith Act, *supra,* and (2) a privilege against

self-incrimination as broad as that granted by the Federal Constitution, as interpreted by the federal courts, existed in the state. It must also be realized that a witness cannot invoke the privilege in a state proceeding in response to questioning that might incriminate him under a federal statute, for instance the Smith Act.

In *State* ex rel. *Benemovsky v. Sullivan,* .... Fla. ...., 37 So. (2d) 907 (1948), the court drew a distinction between the Communist Party and a criminal communistic party, *i.e.,* one engaged in criminal communistic activities, and concluded that invocation of the constitutional privilege would be upheld in the latter case only. Obviously, the court did not believe the Communist Party to be intrinsically one of criminal activity.

Before the Supreme Court's reversal of the decisions in the *Blau* cases, the Tenth Circuit court handed down *Rogers v. United States,* 179 F. (2d) 559 (10th Cir.), *cert. granted,* 339 U. S. 956, 70 S. Ct. 978, 94 L. Ed. 1368 (1950), which has recently been affirmed by the Supreme Court, 340 U. S. ...., 71 S. Ct. 438, 95 L. Ed. .... (1951). Here, the witness testified that she held an official position in the Communist Party of Colorado, but refused to answer questions which would have elaborated upon her position and activities. The Supreme Court affirmed the conviction for contempt upon a finding that the witness had not invoked the privilege against self-incrimination until after she had voluntarily testified to her status in the Communist Party. It was held that a "real danger" of *further* incrimination and an *expanding* possibility of prosecution must exist before a witness may refuse to answer questions which would merely elaborate on the answer to a previously unprotested question. The Court further stated, 71 S. Ct. at 442:

> Disclosure of a fact waives the privilege as to details. As this Court stated in Brown v. Walker . . . : "Thus, if the witness himself elects to waive his privilege, as he may doubtless do, since the privilege is for his protection, and not for that of other parties, and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure."

The dissent, 71 S. Ct. at 443, 446, criticized the majority by declaring that adoption of the rule of waiver relegated the privilege to a second-rate position, and that "today's expansion of the 'waiver' doctrine improperly limits one of the Fifth Amendment's great safeguards." Although this language would lead to the belief that the majority had improperly extended the "waiver" doctrine, there is ample authority for the propriety of the decision. See the decisions of state courts collected in *United States v. St. Pierre,* 132 F. (2d) 837, 839 (2d Cir. 1942), and Note, 147 A. L. R. 255 (1943).

American courts today are faced with more than the mere determination of whether in a given instance the privilege against self-incrimination has been properly invoked. The problem has grown more seri-

ous and complex. More specifically, judicial wisdom and insight is faced with the problem of protecting our constitutional liberties and freedom from those who would use these constitutional liberties and freedom to destroy them, without infringing upon those traditional American institutions. The difficult position of the American judge in this situation was accurately defined by Mr. Justice Jackson in *Williamson et al. v. United States,* 184 F. (2d) 280, 283 (2d Cir. 1950), where he stated:

> My task would be simple if a judge were free to order persons imprisoned because he thinks their opinions are obnoxious, their motives evil and that free society would be bettered by their absence. The plea of admitted Communist leaders for liberties and rights here, which they deny to all persons wherever they have seized power, is so hypocritical that it can fairly and dispassionately be judged only with effort.

Today as in the past a serious threat to the continuance of free government exists in the nature of certain persons and certain organizations. Federal legislation directed against the godless political ideology described as Communism and its activities has been profuse. See Sutherland, *Freedom and Internal Security,* 64 HARV. L. REV. 383 (1951). Congress has passed the Internal Security Act of 1950, Pub. L. No. 831, 82d Cong., 2d Sess. (Sept. 23, 1950), specifically providing under section 4(f), that "neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation [of the Act] or of any other criminal statute." Exactly what effect, if any, this Act will have on further litigation involving the refusal of persons to testify as to their communistic beliefs, affiliations, and activities is at present purely problematical and speculative.

Benedict R. Danko

CORPORATIONS—REIMBURSEMENT BY CORPORATION FOR EXPENSES INCURRED BY DIRECTOR IN SUCCESSFULLY DEFENDING A STOCKHOLDER'S DERIVATIVE SUIT—NECESSITY FOR SHOWING A CORPORATE BENEFIT.—In re *E. C. Warner Co.,* ....Minn....., 45 N. W. (2d) 388 (1950). In a well-documented decision the Supreme Court of Minnesota held that a director who successfully defended himself in a stockholder's derivative suit was entitled to reimbursement for reasonable attorney's fees. The court further stated that it was not necessary for recovery to show that the action resulted in a benefit to the corporation.

A. E. Wilson, president and treasurer of the E. C. Warner Co., was sued, in the original action by minority stockholders, for waste and depletion of assets allegedly caused by his dereliction of duty. The suit was terminated on the merits in favor of Wilson. The present action was instituted by the attorneys, who had defended Wilson in the de-

rivative suit, to recover their fees from the corporation. The court, after discussing at some length the nature of a derivative suit, the position of the corporation therein, and the relationship of a director to the corporation and to the stockholders, held for the attorneys. In allowing this recovery, the court had the greatest difficulty in overcoming the benefit theory involved in cases of this nature. See *Solimine v. Hollander et al.*, 129 N. J. Eq. 264, 19 A. (2d) 344 (1941); *New York Dock Co. v. McCollom et al.*, 173 Misc. 106, 16 N. Y. S. (2d) 844 (S. Ct. 1939); *Griesse et al. v. Lang et al.*, 37 Ohio App. 553, 175 N. E. 222 (1931).

The benefit theory specifies that the corporation will not be liable for attorney fees where the director prevails unless some specific benefit can be shown to have accrued to the corporation itself. As a general rule stockholders who bring a derivative suit have recourse to the corporation for expenses only when the suit results in a tangible recovery for the corporation. *Sagalyn et al. v. Meekins, Packard & Wheat, Inc. et al.*, 290 Mass. 434, 195 N. E. 769 (1935); *Goodwin v Milwaukee Lithographing Co. et al.*, 171 Wis. 351, 177 N. W. 618 (1920). The courts seem to apply this rule by analogy to directors without considering the different relationships of the respective parties to the corporation. The theory and its incidents have been the subject of much discussion. See, *e.g.* Washington, *Litigation Expenses of Corporate Directors in Stockholders' Suits*, 40 COL. L. REV. 431 (1940); Comment, 30 CALIF. L. REV. 667 (1942). For the converse problem of the stockholder-prosecutor's expenses, see Hornstein, *The Counsel Fee in Stockholder's Derivative Suits*, 39 COL. L. REV. 784 (1939). After stating that there were conflicting views as to the necessity of a benefit, the Minnesota Court reasoned that policy, both business and public, dictated that reimbursement be allowed. A refusal of payment, it concluded, would place "a premium upon faithless and irresponsible corporate leadership and action," and would result in a refusal by "men of substance" to assume the responsibilities of directorships. An additional, and possibly a sounder reason, was that the right to recovery of expenses by a successfully defending director would tend to discourage strike suits—suits brought merely to harass the corporate official.

With the exception of New York, very few courts have dealt with the general subject and fewer still have considered the benefit problem. It appears that the first case concerned with the general subject is *Figge v. Bergenthal et al.*, 130 Wis. 594, 109 N. W. 581, 592 (1906), in which the officer involved was allowed his attorney's fees on the somewhat nebulous grounds that "if no case is made against defendants it is not improper or unjust that the corporation should pay for the defense of the action." This case limited recovery to officers under its particular facts, but it has been widely cited in support of the

right to reimbursement of directors. A second Wisconsin case, *Jesse et al. v. Four-Wheel Drive Auto Co. et al.*, 177 Wis. 627, 189 N. W. 276 (1922), derives its importance from the fact that it was referred to in a later Ohio case, *Griesse et al. v. Lang et al., supra,* as overruling *Figge et al. v. Bergenthal et al., supra.* Actually the *Jesse* case did not mention the *Figge* case nor was it in point since it was concerned with personal dealings between the defendant-director and a stockholder and no corporate interest was directly involved. Nevertheless, the Ohio court in the *Griesse* case refused to recognize the general right of recovery, and for the first time the benefit doctrine appeared. The court stated that before the corporation would be liable for attorney's fees, the director seeking such recovery must affirmatively show a benefit to the corporation arising from the litigation. The similar decision of *New York Dock Co. v. McCollom et al., supra,* was partially a result of the *Griesse* case. In the *McCollom* case the court stated that the possibility of suit was one of the risks of the office, and that neither authority nor equitable considerations gave a right of reimbursement.

It is interesting to note, as a possible solution to the problem, that the New York legislature passed a statute shortly after the decision in this case applicable to the situation. NEW YORK GENERAL CORPORATION LAW § 63. This statute provided for recovery of expenses incurred by officers or directors in successfully prosecuting or defending a suit. The New York Courts have declared it constitutional. *Hayman et al. v. Morris et al.*, 179 Misc. 265, 38 N. Y. S. (2d) 782 (S. Ct. 1942). It is not applicable unless there is a final exoneration on the merits. *Neuberger et al. v. Barrett et al.*, 180 Misc. 222, 39 N. Y. S. (2d) 575 (S. Ct. 1942). It is also held that no common law right existed as to such indemnity, *Bailey et al. v. Bush Terminal Co.*, 267 App. Div. 899, 46 N. Y. S. (2d) 877 (S. Ct. 1943), *aff'd.* 293 N. Y. 734, 56 N. E. (2d) 739 (1944). But the Supreme Court for Kings County rendered the statute completely useless as a cure for the benefit doctrine by reverting to the *McCollom* doctrine. In *Dievas v. Lekas et al.*, 182 Misc. 567, 48 N. Y. S. (2d) 785 (S. Ct. 1944), that court held that the statute was intended to reward only those who had brought money into the treasury or prevented others from taking it out — the benefit theory. It appears that New York still follows this rule.

Whether or not there was a benefit to the corporation, the director was allowed reimbursement by merely winning the case on the merits in *Solimine v. Hollander, supra.* One of the objections to the general right of recovery was overcome by the court in stating that the stockholder would not be overwhelmed by the financial power of the corporation since the payment was to be made only in the event that the director prevailed. The court commented at length on the *McCollom*

case, particularly and unfavorably on the expression in that case that liability to suit was one of the hazards assumed by a director in accepting the position. Although the showing of a benefit was held to be unnecessary, the court stated that in this case the director had actually conferred a benefit on the corporation—that by winning the suit the director demonstrated to the investment public the honesty of the corporate management. This dictum appears to be a liberalization of the benefit idea, which originally specified that the benefit must be something brought into the treasury or prevented from being removed, to include intangible advantages to the corporation.

That the rule regarding the necessity of a corporate benefit in expense cases is unsettled is apparent. As pointed out by the Minnesota court in the instant case, the decision in controversies of this nature are of importance because of their potential effect on the economy as a whole. An additional factor to be taken into account in finally determining the question is the practical viewpoint with regard to the director. That is, the relative impossibility on the part of the director of showing a pecuniary benefit to the corporation, since in most instances the derivative suit would result in a pecuniary benefit to the corporation only when it is won by the stockholder bringing the suit. As a result, the fact that the director prevails in the suit may mean that the corporation, as the real party in interest, has suffered a detriment. A consideration of the fact that most directors get a very small salary or none at all, and the potentiality of the strike suits mentioned by the Minnesota court should also be realized as bearing on the problem. On the other hand the derivative suit, the efficiency of which may be questioned, seems to be the only protection, other than the dubious value of the right to vote, afforded to the minority. The burden of proving a director negligent or fraudulent is very difficult and particularly so in larger corporate units. A director knowing that if he defends the suit successfully he will be reimbursed from corporate funds may overpower the stockholder by expending far more in his defense than he otherwise would have done.

Statutes similar to New York's may provide the answer but as seen from the cases, the courts will still construe them as they deem fit and proper as regards the benefit doctrine. The corporations themselves can meet the difficulty through by-laws or special contracts providing for reimbursement of the directors. Without the general use of such provisions, however, the courts must still decide the cases. If they apply the benefit rule, and it appears from a consideration of the above factors that they should, the construction placed on the term should be liberal so as to include such intangible benefits as were mentioned in *Solimine v. Hollander et al., supra.*

John E. Lindberg

DOMESTIC RELATIONS—GROUNDS FOR ANNULMENT—SUFFICIENCY OF FRAUDULENT REPRESENTATION OF PRIOR ILLEGITIMATE OFFSPRING. —*Rhoades v. Rhoades*, ...N. J....., 77 A. (2d) 273 (1950). To the wife's suit for separate maintenance on grounds of abandonment and non-support, the defendant husband counter-claimed for annulment alleging that he had been induced to marry her because of false representations that an illegitimate child had been born as a result of the prior illicit relations of the parties. The marriage took place in July, 1947; cohabitation continued until August, 1948, at which time the husband was informed of the falsity of the wife's story and terminated the marital relations. It was not shown that the husband had made any attempt, either before or after the marriage ceremony, to verify the wife's claims, except for questions concerning the child's whereabouts directed to the wife herself. Affirming the trial court's dismissal of the counterclaim, the Superior Court of New Jersey held that, as a matter of law, a false representation of illegitimate offspring resulting from prior illicit relations is not of that species of fraud going to the essence of the marriage contract sufficient to void it.

The question presented by this case arises from the judicial conflict as to what type of false representations will constitute fraud sufficient to justify the annulment of a marriage; more specifically, whether the fraud rule applicable to ordinary civil contracts applies to marriage contracts, or whether the marriage contract is peculiar in itself. To justify annulment must there be proof of fraud of an extreme character affecting its very essence?

Proper analysis of the question posed will necessitate the examination of the marriage contract in order to determine if it is essentially the same as an ordinary civil contract. Story declared, STORY, CONFLICT OF LAWS § 108 n.4 (4th ed. 1852), that it is:

> . . . something more than a mere [civil] contract. It is rather to be deemed an institution of society, founded upon the consent and contract of the parties; and in this view it has some peculiarities in its nature, character, operation, and extent of obligation, different from what belong to ordinary contracts.

The marriage contract is *sui generis* in many respects; that is, it is of its own kind or class, and peculiar to itself. *Carris v. Carris*, 24 N. J. Eq. 516 (1873). Ecclesiastical authority, MARRIAGE PREPARATION SERVICE, UNIVERSITY OF OTTAWA 175 (1946), states that:

> This contract consists essentially in the mutual consent of the husband and wife. . . . by which the husband and wife give and receive reciprocally, in a permanent and exclusive manner, the conjugal right to procreate. As a result of this mutual consent, Matrimony becomes a lasting union of the man and woman and constitutes a permanent manner of living. The purpose of this union is the procreation and education of children, mutual help of husband and wife, and the legitimate satisfaction of the instincts that God has placed in human nature.

Marriage is a status more than it is a contract, notwithstanding the fact that free mutual assent is necessary to it.

There is a definite split of authority as to what type of false representations will constitute fraud sufficient to justify the annulment of a marriage. The major premise of the majority rule is that the fraud must go to the very essentials of the marriage contract. In *Hyslop v. Hyslop,* 241 Ala. 223, 2 So. (2d) 443 (1941), the court held that where the husband entered into marriage with intent not to consummate the marriage, followed by immediate disavowal and refusal to perform, there was fraud that went to the essence of the marital relation. See *Stegienko v. Stegienko,* 295 Mich. 530, 295 N. W. 252 (1940); *Allen v. Allen,* 126 W. Va. 415, 28 S. E. (2d) 829 (1944).

Where the sole motive of the defendant in entering marriage was to obtain for himself a preferential entry into the United States, this false representation was sufficient to warrant annulment. *Babis v. Babis,* .... Del. ...., 75 A. (2d) 580 (1950). In a case very similar to the instant case, the court held that the fraud relied on did not go to the essentials of the marriage and therefore did not grant annulment. There the woman falsely represented to the man, with whom she had had an illicit relationship, that she was pregnant by him, thereby persuading him to marry her. *Brandt v. Brandt,* 123 Fla. 680, 167 So. 524 (1936). A Missouri court, in *Watson v. Watson,* 143 S. W. (2d) 349 (Mo. App. 1940), granted annulment where the wife fraudulently misrepresented and concealed the fact that she was suffering from syphilis at the time of marriage. The court concluded that the fraudulent concealment went to the very essence of the marriage. In *Akrep v. Akrep,* 1 N. J. 268, 63 A. (2d) 253 (1949), a Catholic wife was induced to consent to a civil marriage on her husband's promise, which he did not intend to keep, that they would subsequently have a religious ceremony in keeping with the wife's religious obligation. The marriage was never consummated. The court held that the wife was entitled to annulment. Thus it can be seen that under the majority *essentalia* doctrine the fraud must go either to the capacity of the parties to make the contract, or their ability and intent to perform its fundamental and basic obligations. All other fraud is considered immaterial and not actionable.

The minority rule rests in the stronghold of the New York courts. Following *DiLorenzo v. DiLorenzo,* 174 N. Y. 467, 67 N. E. 63 (1903), the New York courts have held that proof of fraud sufficient to set aside an ordinary contract is all that is required to terminate the marriage relationship. *Thurber v. Thurber,* 186 Misc. 1022, 63 N. Y. S. (2d) 401 (S. Ct. 1946); *cf. Schwind v. Schwind,* 99 N. Y. S. (2d) 108 (Sup. Ct. Monroe County 1950); *King v. King,* 98 N. Y. S. (2d) 686 (Sup. Ct. Albany County 1950). The very recent case of *Woronzoff-Daschkoff v. Woronzoff-Daschkoff,* 100 N.Y.S. (2d) 441 (Sup. Ct. N.Y.

County 1950), exemplifies the extent to which the courts of New York have gone in granting annulments for fraud. The defendant represented that he was marrying plaintiff for love and not for her money, and that he would earn his own living, which in fact he did not do nor intend to do. The court held that such representations were material to the decision of the plaintiff to marry the defendant, and thereby granted her relief. It appears that the court placed a very high premium upon the subjective idea of the plaintiff as to what was material.

In *Croce v. Croce,* 100 N. Y. S. (2d) 97 (Sup. Ct. Queens County 1950), the court, while following the *DiLorenzo* doctrine, tended to straddle the fence by stating that the fraud must go to the very essence of the marriage contract. In that case the husband attempted to get an annulment because his wife deceived him as to the virtue of her daughter by a prior marriage. He discovered that the daughter had two illegitimate children and sought annulment on that ground. The court held that the husband must be held to have acquiesed, and having consummated the marriage, would not be heard to complain. It was apparent that the husband's claim was of strained construction, and afforded the court ample room in which to assert statements sounding of the *essentalia* doctrine. Other New York cases, in which appear traces of this doctrine are, *Siek v. Siek,* 196 Misc. 165, 93 N. Y. S. (2d) 470 (1949), *aff'd,* 276 App. Div. 1035, 95 N. Y. S. (2d) 234 (3d. Dept. 1950), and, more distinctly, in *Washburn v. Washburn,* ....Misc....., 62 N. Y. S. (2d) 569, 570 (S. Ct. 1946), where the court said:

> Fraud sufficient to vitiate a marriage contract must go to the very essence of the contract. Promises of undying love and affection, of dutiful and faithful cunnubial demeanor, and of comfortable and happy home surroundings are insufficient, notwithstanding plaintiff's claim that he relied upon such promises and would not have entered into the marriage had the same not been made. . . . After the marriage has been consummated, and presumably the marriage herein was consumated, the fraud is not material unless it goes to the essentials of the contract.

It is submitted that these three cases are not significant, inasmuch, as in none of them were the false representations relied upon of any great import, *i. e.,* they were fairly obvious decisions to make because in none of them were the essentials of the marriage contract under attack.

The vast majority of New York cases follow the very liberal view of *DiLorenzo v. DiLorenzo, supra,* with a few cases here and there holding to the contrary, *Washburn v. Washburn, supra.* In almost every type of circumstance the New York courts have granted the relief prayed for; see Notes 9 BRK. L. REV. 51 (1940); 41 COL. L. REV. 503 (1941). This is undoubtedly caused by the strict New York statutory divorce law which allows divorce only for adultery; N. Y. DOM. REL. LAW § 6. Thus, the courts are prone to allow annulment on the most liberal grounds possible.

In the principal case, the court found that the husband indulged himself in blind credulity in failing to investigate the claim of his former paramour before marrying her. But the fact that no child actually was born could in no way affect the life of the parties during their marriage; they possessed the ability to produce children and carry on a normal married life together. Hence, the fraud did not go to the essence of the marriage in any respect, and this decision is in accord with the majority and preferable rule today. To be sufficient to warrant an annulment, the fraud must go to the very essence of the marriage relation, especially where, as in the principal case, the marriage has been consummated and the parties have assumed all the mutual rights and duties of the relationship.

Maynard R. Bissonnette

EVIDENCE—PRESUMPTIONS—FREEDOM FROM CONTRIBUTORY NEGLIGENCE IN ABSENCE OF EYEWITNESS.—*Riedesel v. Koch et al.*, ...Iowa ...., 45 N. W. (2d) 225 (1950). The plaintiff's decedent was killed in a collision between an automobile owned by the defendant, R. T. Koch, being operated by his son, Donald, and a bicycle operated by the decedent, who died of injuries the day following the accident.

The defendant excepted to the court's instruction on the no-eyewitness rule, arguing that defendant and his guest were eyewitnesses; that whether they were eyewitnesses was properly a jury question so that no instruction should have been given to apply the rule. In sustaining the trial court the Supreme Court of Iowa held that the no-eyewitness rule was properly applicable to the case and that it was to be considered to determine whether the negligence of decedent contributed to his injury.

In the absence of eyewitnesses or other direct evidence, the no-eyewitness rule raises a presumption in favor of the deceased that he was in the exercise of ordinary care when the accident occurred. *Mast v. Illinois C. R. R.*, 176 F. (2d) 157 (8th Cir. 1949). In determining who is an eyewitness, a court has held that one who observed the deceased person during the material part of the transaction in the moments preceding the accident is an eyewitness. *Graby v. Danner*, 236 Iowa 700, 18 N. W. (2d) 595 (1945); *Hayes v. Stunkard*, 233 Iowa 582, 10 N. W. (2d) 19 (1943). In *Patterson v. Pittsburg, C. C. & St. L. R. R.*, 210 Pa. 47, 59 Atl. 318 (1904), a fireman who observed the deceased as he approached a railroad crossing, was held not to be an eyewitness since physical conditions were such that deceased was not at all times within his range of vision.

By the great weight of modern authority the burden of proof of contributory negligence is upon the defendant. *Washington and*

Georgetown R. R. v. Glandmon, 15 Wall. 401, 21 L. Ed. 114 (U. S. 1872); *Vanceburg Telephone Co. v. Bevis,* 148 Ky. 285, 146 S. W. 420 (1912); *Hopper, McGaw & Co. v. Kelly,* 145 Md. 161, 125 Atl. 779 (1924); *Cooperstein v. Eden Brick & Supply Co.,* 238 N. Y. 200, 144 N. E. 501 (1924); PROSSER, TORTS § 42 (1941). The instant case, however, follows an earlier view, still prevalent in a few jurisdictions, which places upon the plaintiff the burden of proving due care on his part. *Kotler v. Lalley,* 112 Conn. 86, 151 Atl. 433 (1930); *Holt v. Illinois Cent. R. R.,* 318 Ill. App. 436, 48 N. E. (2d) 446 (1943); *Spooner et al. v. Wisecup et al.,* 227 Iowa 768, 288 N. W. 894 (1939). The obvious hardship of this burden to the plaintiff is immediately evident where there have been no eyewitnesses to the injury. Generally it has been held that in these instances, or where there is no other direct evidence obtainable relating to the conduct of the deceased, the presumption is that he was in the exercise of ordinary care for his own safety. *Downing v. Southern Pac. Co. et al.,* 15 Cal. App. (2d) 246, 59 P. (2d) 578 (1936); *Edwards v. Perley et al.,* 223 Iowa 1119, 274 N. W. 910 (1937).

It was said in *Ames v. Waterloo and C. F. Rapid Transit Co.,* 120 Iowa 640, 95 N. W. 161 (1903), that the rule raising a presumption of freedom from contributory negligence when there were no eyewitnesses to the accident arose from the common law rule imposing the duty upon the plaintiff to prove a lack of contributory negligence. It was introduced in order to avoid the patent injustice which would result in cases where there was no evidence, one way or the other, of the exercise of due care by the injured party, and where no such evidence was obtainable by reason of the death of the party injured and the absence of any proof of the circumstances attending the injury. If there were no affirmative evidence showing due care by the decedent, the plaintiff would fail to meet his burden, and would automatically lose. The basis and the application of the no-eyewitness rule is exceptionally well stated in *Downing v. Southern Pac. Co. et al., supra,* 59 P. (2d) at 583:

> The presumption is one which may be invoked for the benefit of plaintiff when unable to produce any eyewitnesses to a collision, and is based upon the sound foundation of the natural law of self-preservation. Where it is possible to call eyewitnesses to testify positively to the facts and circumstances surrounding the accident, the presumption is not applicable.

In CAL. CODE CIV. PROC. §1963 (4) (1949), it is succinctly pointed out, "That a person takes ordinary care of his own concerns. . . ." The same theory is enunciated in *Crabbe v. Mammoth Channel Gold Mining Co.,* 168 Cal. 500, 143 Pac. 714, 716 (1914), with the added observation that: "This is a controvertible presumption . . . but until controverted it is evidence in accordance with which the jury is bound to decide."

It seems to be definitely established that the majority of those jurisdictions which place the burden of disproving contributory negli-

gence upon the plaintiff generally adhere to the no-eyewitness rule. Nevertheless, even within these jurisdictions there has been a hard core of conflict. The rationale adopted by the courts refusing to apply the no-eyewitness rule concedes, that although it is a well-nigh universal characteristic of human nature for men to have an instinctive impulse to avoid physical pain and death, nevertheless, neither this nor any other universal instinct prevents them from being careless. Very few men intelligently seek death, but very many are guilty of negligence leading to fatal results. As was said in *Wright v. Boston & M. R. R.*, 74 N. H. 128, 65 Atl. 687, 690 (1907):

> The instinct of self-preservation may furnish an explanation or excuse for his careless acts after he got into a place of danger, but it is not evidence that his acts were the acts of an ordinarily prudent man before the danger became imminent.

Also, see *Collison v. Illinois C. R.R.*, 239 Ill. 532, 88 N. E. 251 (1909); *Wisniewski v. New York C. R.R.*, 228 App. Div. 27, 238 N. Y. Supp. 429 (4th Dep't 1930).

It must be noted in this connection that in New York (a jurisdiction which requires the plaintiff to show freedom from contributory negligence), by virtue of statute, the plaintiff in an action for wrongful death no longer has the burden of proving freedom from contributory negligence. The statute expressly provides that "the contributory negligence of the person killed shall be a defence, to be pleaded and proven by the defendant." N. Y. DECEDENT ESTATE LAW §131. In effect, this has been regarded as merely raising a presumption that the deceased was free from contributory negligence, thus placing the burden on the defendant of proving otherwise. See RICHARDSON, EVIDENCE §137 (7th ed. Prince 1948).

The Missouri courts admit the artificiality of the no-eyewitness rule agreeing that the instinct of self-preservation in man is present to the same degree in cases of accidents observed by eyewitnesses as in those not so witnessed. However, in the same breath the courts of this state invoke the presumption as the only clear remedy for a difficult procedural situation. *Wolf v. New York, C. & St. L. R.R.*, 374 Mo. 622, 148 S. W. (2d) 1032 (1941).

The no-eyewitness rule and the presumption raised by it is of importance only in jurisdictions which place the burden of proof of freedom from contributory negligence squarely upon the plaintiff. *Wabash R. R. v. De Tar*, 141 Fed. 932 (8th Cir. 1905). Otherwise it merely amounts to an application of the rule of the burden of proof, or of a permissible inference from ordinary experience. See, 15 MINN. L. REV. 473 (1931).

These presumptions and inferences seem highly artificial, and are plainly contrived to escape the harsh common law rule, still surviving in a large minority of jurisdictions, whereby the plaintiff must estab-

lish due care on the part of the decedent. As pointed out, the no-eyewitness rule has no basis in logic or fact. It is merely another cumbersome necessity created by the preservation of a common law rule. The presumption has no logical application where the burden is upon the defendant to show contributory negligence, since it has no application when evidence of the conduct of the deceased is introduced, unless it would be given some weight as an inference. Placing by statute the burden of proof upon the defendant to establish contributory negligence on the part of decedent, already the rule in the majority of jurisdictions by decision, appears to be the logical path to follow for those states still adhering to the inadequate common law rule. With the elimination of the rule demanding the plaintiff prove freedom from contributory negligence, there would be no necessity for a no-eyewitness rule.

Joseph H. Harrison

EVIDENCE—WIRETAPPING—DEFENDANT'S RIGHT TO EXAMINE DATA AS HAVING BEEN USED IN EVIDENCE OR AS HAVING GIVEN LEADS TO EVIDENCE.—*United States v. Coplon,* 185 F. (2d) 629 (2d Cir. 1950). Judith Coplon was convicted of conspiring to defraud the United States and of attempting to deliver defense information to a citizen of a foreign nation. At her trial it was shown that the Government had gathered information of her activities by wiretapping. The taps were recorded by automatic recording discs and handwritten logs. For use at the trial, copies of the originals were given the defendant to enable her to see that none of the evidence introduced had been obtained from the taps, because under the Federal Communications Act, 48 STAT. 1103 (1934), 47 U. S. C. § 605 (1946), evidence and leads to evidence acquired as a result of wiretapping is inadmissible in federal courts. However, certain passages had been expurgated from the copies because it was thought that their disclosure would be inimical to national security. The trial judge examined the original discs and logs in private and was of the opinion that they did not constitute leads to the Government evidence, but he refused to allow the defendant to examine them on the ground that they contained information vital to national security.

In reversing the conviction, the court of appeals held that if the Government is in possession of any information secured through wiretapping, the accused has the right to inspect all that data to determine whether any of it has been used in evidence, or as leads to other evidence, introduced against him at the trial. It is not sufficient that the trial judge, *in camera,* determine whether or not the evidence introduced was obtained, directly or indirectly, through wiretapping activi-

ties, even though the reason for the private examination by the judge is national security.

The decision in the instant case brings to light a conflict between society's right to protect state secrets from public disclosure and the defendant's right in a criminal prosecution to determine that no illegal evidence is introduced against him at the trial.

Divulgence of information obtained by unauthorized interception of telephone messages is forbidden under the Federal Communications Act, *supra*. Evidence obtained by wiretapping, *Nardone et al. v. United States,* 302 U. S. 379, 58 S. Ct. 275, 82 L. Ed. 314 (1937), or as a result of wiretapping, *Nardone et al. v. United States,* 308 U. S. 338, 60 S. Ct. 266, 84 L. Ed. 307 (1939), is inadmissible in federal courts. Consequently, the accused has a right to examine in open court all wiretapping information obtained by the prosecution and to determine for himself whether the wiretappings were used as evidence or as leads to evidence. In other words the accused has the privilege of examining documents that are inadmissible as evidence.

There can be no distinction between introducing evidence which the defendant is not allowed to examine and denying him the right to introduce evidence in his own behalf. Both suppress information vital to the accused's defense. But there is also the extremely important right of society to have state documents privileged from disclosure because they contain secrets vital to the security of the nation. This privilege from disclosure is accorded to official documents because public policy requires secrecy of the proceedings of certain branches of the government that the national interest may better be served. *Boske v. Comingore,* 177 U. S. 459, 20 S. Ct. 701, 44 L. Ed. 846 (1900); *Brewer et al. v. Hassett,* 2 F. R. D. 222 (D. Mass. 1942). But this privilege is not absolute. If the documents are the basis of a criminal prosecution, their confidential nature is terminated to the extent that the Government must choose either to "leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully." *United States v. Andolschek et al.,* 142 F. (2d) 503, 506 (2d Cir. 1944). See also *United States v. Krulewitch,* 145 F. (2d) 76 (2d Cir. 1944); *Fleming v. Bernardi,* 1 F. R. D. 624 (N. D. Ohio 1941).

The general rule is that to be subject to inspection documents must be evidence themselves, because the right to inspect documents does not give the accused the right to inspect memoranda in the possession of the prosecution which are inadmissible as evidence. *People* ex rel. *Lemon v. Supreme Court of New York et al.,* 245 N. Y. 24, 156 N. E. 84 (1927); *Lehan v. Chicago & N. W. Ry.,* 169 Wis. 327, 172 N. W. 787 (1919). Neither can the accused's demand for an inspection be in the nature of a fishing expedition nor constitute an unfounded probing into the prosecution's case. *United States v. Warren,* 53 F. Supp.

435 (D. Conn. 1944). But whenever it appears that the production of documents is necessary for the support of the defense, the power to compel the production should be exercised. *Miller v. Price,* 260 Ky. 488, 86 S. W. (2d) 152 (1935); *Sprinkle v. State,* 137 Miss. 731, 102 So. 844 (1925). When the prosecution is in possession of evidence favorable to the defendant, it should be made available to him. *People v. Walsh et al.,* 262 N. Y. 140, 186 N. E. 422 (1933); *Gaffney v. Kampf,* 182 Misc. 665, 49 N. Y. S. (2d) 151 (S. Ct. 1944). This production of evidence must be made in open court and not merely to the judge in a private inquiry, for such a procedure "would invade not only the constitutional rights of persons accused of crimes . . . but would be contrary to correct ideals of judicial procedure." *Caldwell v. State,* 164 Tenn. 325, 48 S. W. (2d) 1087, 1097 (1932). See also *Ross v. State,* 130 Tenn. 387, 170 S. W. 1026 (1914).

When the Federal Government is in possession of wiretapping records, the burden is on the prosecution to prove that they did not provide leads to trial evidence. *United States v. Goldstein et al.,* 120 F. (2d) 485 (2d Cir. 1941), *aff'd,* 316 U. S. 114, 62 S. Ct. 1000, 86 L. Ed. 1312 (1942); this burden cannot be met by the trial judge's scrutiny *in camera,* but only by examination in open court, because under the Sixth Amendment the accused has a right to a "public trial" and "to be confronted with the witnesses against him." U. S. CONST. AMEND. VI; *United States v. Barracota et al.,* 45 F. Supp. 38 (S. D. N. Y. 1942).

While the authorities cited above strongly support the decision handed down in the principal case, it has been held that the constitutional right of the accused to be confronted with the witnesses against him is not applicable to the proof of facts which in their nature are essentially documentary. *People v. Purcell,* 22 Cal. App. (2d) 126, 70 P. (2d) 706 (1937); *People v. Reese,* 232 App. Div. 624, 250 N. Y. Supp. 392 (1st Dept. 1931), *rev'd on other grounds,* 258 N. Y. 89, 179 N. E. 305 (1932). The distinction made in these cases between oral and documentary evidence seems unfounded. If certain documents were lost the prosecution would have to prove the subject matter contained in the missing documents by the oral testimony of witnesses. The accused could not be denied the right of examining the witnesses; neither does there seem to be any logical reason why he should be denied the right to inspect documents placed in evidence. In proving a writing production must be made, unless it is not feasible, of the writing itself whenever the purpose is to establish its terms. 4 WIGMORE, EVIDENCE § 1178 (3d ed. 1940).

There are two English cases that may throw some light on the problem. In *Hennessy v. Wright,* 21 Q. B. D. 509 (1888), a civil suit for libel, the court refused the defendant's request to inspect documents in the plaintiff's possession on the ground that they contained

privileged matters of state, even though the defendant claimed the documents would vindicate him. Justice Field, speaking for the court in dicta said, 21 Q. B. D. at 515:

> . . . I should consider myself entitled to examine privately the documents to the production of which he objected, and to endeavor, by this means and that of questions addressed to him, to ascertain whether the fear of injury to the public service was his real motive in objection.

This decision seems to form a precedent for the trial judge's action in the *Coplon* trial of examining the original taps in private, but actually it forms a precedent for the dicta in *United States v. Andolschek et al., supra,* where it was held that the Government is not required to publicize privileged documents in civil suits between third parties, although such documents might serve to settle the controversy. In a memorandum dissent in *Beatson v. Skene,* 5 H. & N. 838, 157 Eng. Rep. 1415, 1422 (1860), it was contended that a judge should examine documents privately to determine whether their exhibition would prejudice the public interest, and if it would not, to compel their production notwithstanding the reluctance of the government. The majority held however that if a document is privileged, its production in court could not be compelled. These English cases seem to support the view of the trial judge that if documents are privileged because they contain state secrets they do not have to be produced at a trial, even though they could provide a favorable defense for the defendant. But it must be remembered that these are both civil cases where society's right to protect state secrets is opposed merely by a defendant's personal right to adequately defend in a suit for damages. In the civil case the right of society is not outweighed by the defendant's personal right and therefore no production of privileged communications is compelled. But in criminal cases the public right of society to prevent disclosure of privileged documents is opposed by the right of the accused to be confronted with the witness against him and of a public trial, and these rights are public rights available to all citizens under the Constitution, U. S. CONST. AMEND. VI. According to the dicta in the *Andolschek* case, in criminal prosecutions these rights outweigh the right of society to protect state secrets, and the production of documents relevant to the defense in a criminal prosecution will be compelled. Therefore the decision in the principal case is not contrary to the English cases, and also finds a number of established precedents in American cases. *United States v. Andolschek et al., supra; United States v. Krulewitch, supra; People v. Walsh et al., supra.*

From a consideration of the law preceding the decision in the instant case, it is to be concluded that the doctrine that a defendant in a criminal case is entitled to examine all the evidence introduced against him at the trial has been extended; the defendant has now the right to examine all material and information in the possession of the prose-

cution that is the basis of the evidence, in order to determine for himself the legality of its procurement. In cases where the material and information consists of privileged documents demanding secrecy in the public interest, the prosecution will be faced with the choice of exposing the documents or discontinuing the action. Inasmuch as allowing the trial judge to privately examine the documents for the defendant would violate the constitutional rights of a trial in open court and confrontation by witnesses, the only plausible remedy for the situation is statutory amendment to permit admission in federal courts of evidence secured through wiretapping. While this decision may be a logical outgrowth of established precedents, it places on the Government a difficult choice, the burden of which may prove too onerous for efficient criminal prosecution, especially with regard to seditious and treasonable activities.

Peter J. Donahue

INSURANCE—PRINCIPAL AND AGENT—EFFECT OF CONTRACTUAL LIMITATION UPON THE AUTHORITY OF AN AGENT.—*Fay v. Swicker et al.; Lara v. Swicker et al.*, ... Ohio ...., 96 N. E. (2d) 196 (1950). Plaintiffs recovered judgments for damage resulting from an automobile accident. The judgments being unsatisfied, the plaintiffs filed supplemental petitions against the insurance company which had issued an automobile liability policy to the defendant. When applying for the policy, the defendant gave true answers to questions asked by the agent who nevertheless inserted false answers in the application. The defendant, without reading the application, signed it. By the terms of the written application, the defendant expressly warranted the statements to be true and agreed that the insurance company might rely upon those statements in issuing the policy, which it did. The policy contained a provision which stated that no knowledge possessed by the agent should estop the company from asserting any rights under the policy, or effect a waiver or change in any part of the policy. After the defendant's accident with the plaintiffs and notice of it to the insurance company, the latter learned of the falsity of the recorded answers in the application, and declared the policy void from the beginning.

In the instant case, the Supreme Court of Ohio, held that the parties could enter into a valid contract which substituted a different rule for the common law doctrine of imputed knowledge and agree that it should not be binding on them, even in view of *Ohio Gen. Code Ann.* § 9586 (1938), which made the solicitor an agent of the insurer. Such an agreement was held not contrary to public policy. The court relied

upon the agreement in the application and the insurance policy, both of which abrogated the common law rule of imputed knowledge.

The question in this case was whether the insurer and the insured can supplant the common law rule imputing knowledge of an agent to his principal, by an agreement that notice to, or knowledge of, an agent should not estop the principal from asserting any right under the terms of the policy.

It is a general rule of agency that notice to, or knowledge of, an agent while acting within the scope of his authority and in reference to a matter over which his authority extends is notice to, or knowledge of, the principal. 2 MECHEM, AGENCY § 1803 (2d ed. 1914). The reason for the rule was stated in the leading case of *Kennedy v. Green*, 3 My. & K. 699, 40 Eng. Rep. 266, 274 (1834):

> . . . policy and the safety of the public forbids a person to deny knowledge while he is so dealing as to keep himself ignorant, or so as that he may keep himself ignorant, and yet all the while let his agent know, and himself, perhaps, profit by that knowledge.
>
> In such a case it would be most iniquitous and most dangerous, and give shelter and encouragement to all kinds of fraud, were the law not to consider the knowledge of one as common to both, whether it be so in fact or not.

The foundation of this rule is based upon two general theories. The first is that the agent is legally identified with the principal during the continuance of the agency. The second is that it is the duty of the agent to disclose to his principal all knowledge which the agent may possess and which appears to be necessary for the principal's protection or guidance. The law conclusively presumes that the agent has performed this duty. 2 MECHEM, *supra*, §§ 1805-6.

There are two incidents of the agency relationship which are especially important in insurance law. One is that the principal is liable for any fraud or wrong perpetrated by the agent while acting within the scope of his employment. The other is that any information material to the transaction which is either possessed by the agent at the time of the transaction or acquired by him before its completion is deemed to be knowledge of the principal, at least in so far as the transaction is concerned, even though in fact the knowledge is not communicated to the principal. VANCE, INSURANCE § 117 (2d ed. 1930). These incidents of agency are created by law and are not contractual in nature. The insurer is bound by the knowledge acquired by his agent in making the contract, not because he consented to be charged, but because of the legal consequence of the relation he sustains to the agent. It follows, therefore, that since this incident is created by law, it should not be alterable or destroyable by an agreement of the parties. The cases which hold otherwise are ignoring the basis upon which it is founded. So, when a loss caused by a dishonest agent must fall on

either the principal or the third party, both innocent, the courts should not hesitate to put the burden on the party who selected the agent. See VANCE, *supra*, § 117.

The common law principle being well established, it necessarily follows that any general limitation or agreement to the effect that knowledge acquired by the agent shall not be imputed to the principal is but an attempt to contract away a rule of law, which attempt has been held to be nugatory. *Sternaman v. Metropolitan Life Ins. Co.*, 170 N. Y. 13, 62 N. E. 763 (1902).

Since the principal cannot wholly escape the operation of this rule of law, the question arises as to whether he can partially avoid the operation of this rule by providing that he shall not be bound by any information acquired by his agent unless that information be communicated in a specified manner. Various methods are employed to accomplish this result. The provision most frequently encountered is a stipulation that no statement or representation made to the person soliciting the application for the policy shall be binding on the company, or in any manner affect its rights, unless reduced to writing in the application. See *Schuler v. Metropolitan Life Ins. Co.*, 191 Mo. App. 52, 176 S. W. 274 (1915). Whether this limitation is binding or not has been the subject of conflicting decisions. It has been held invalid on the ground that whether an agency exists for a particular purpose is to be determined by settled legal principles rather than by a stipulation inserted by one seeking to avoid liability as a principal. *Mutual Aid Union v. Blacknall*, 129 Ark. 450, 196 S. W. 792 (1917); *Byrd v. Mutual Benefit Health & Accident Ass'n*, 73 Cal. App. (2d) 457, 166 P. (2d) 901 (1946); *Hart v. Prudential Ins. Co.*, 47 Cal. App. (2d) 298, 117 P. (2d) 930 (1941); *Stillson v. Prudential Ins. Co. of America*, 202 Ga. 79, 42 S. E. (2d) 121 (1947); *Despain v. Mutual Life Ins. Co.*, 81 Kan. 722, 106 Pac. 1027 (1910); *Oredson v. Woodman of World Life Ins. Soc.*, 211 Minn. 442, 1 N. W. (2d) 413 (1941); *Stubbins v. State Farmers Mutual Ins. Co.*, 229 S. W. 407 (Mo. App. 1921); *Deitz v. Providence Washington Ins. Co.*, 31 W. Va. 851, 8 S. E. 616 (1888). On the other hand there are a substantial number of cases which support the principle that an insurer may, through limitations upon the authority of its agent brought to the attention of the insured, be permitted to disclaim responsibility for errors of the agent in recording the answers of the insured in the application. *Aetna Life Ins. Co. v. Moore*, 231 U. S. 543, 34 S. Ct. 186, 58 L. Ed. 356 (1913); *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 6 S. Ct. 837, 29 L. Ed. 934 (1886); *United States Life Ins. Co. v. Smith*, 92 Fed. 503 (6th Cir. 1899); *Curry v. Washington National Ins. Co.*, 56 Ga. App. 809, 194 S. E. 825 (1937); *Metropolitan Life Ins. Co. v. Coddington*, 131 N. J. Eq. 430, 26 A. (2d) 41 (1942); *Bernard v. United Life Ins. Ass'n*, 14 App. Div. 142, 43 N. Y. Supp. 527 (1st Dep't 1897); *Kasmer v. Metropolitan Life Ins. Co.*, 140 Pa. Super. 46, 12 A. (2d) 805 (1940).

The *Fletcher* case, *supra,* the leading authority for the latter view, proceeds upon the assumption that the insurer had no knowledge of the answers given by the insured, and that it had every reason to believe that it was contracting upon representations substantially different; the insured, therefore, had no right to treat the contract as based on the unknown rather than the known representations. In contemplation of law, these assumed facts do not and cannot exist. Rather, a principal may be ignorant of every act done, every representation made, and every fact known by his agent and still be held liable. It is against sound public policy to permit a principal who has delegated authority to an agent of his own choosing to stipulate against the usual consequences of the relationship. If an insurance company can stipulate against every fact learned by its agent, not communicated to it, so may any other principal; and if immunity may be secured from the operation of this principle of the law of agency, it may, in the same mode and with equal propriety, be secured against all other portions of the law of agency from which, in the contemplation of the principal, it may be profitable to be free. See Note, 9 Am. St. Rep. 229 (1888).

Another method employed by the insurer to evade the rule of imputed knowledge is by a provision inserted in the *policy* that the person taking the application should be regarded as the agent of the insured. 2 JOYCE, THE LAW OF INSURANCE § 508 (2d ed. 1917). Though some courts felt bound to enforce this limitation on the principle of freedom of contract, *Rohrbach v. The Germania Fire Ins. Co.,* 62 N. Y. 47 (1875), other courts have held it invalid; mere words could not be substituted for that which was already a fact. *Kansel v. Minnesota Farmers' Mutual Fire Ins. Ass'n,* 31 Minn. 17, 16 N. W. 430 (1883). In the *Kansel* case it was also determined that notice should have been given in the application for the policy stipulation to become binding on the insured. Other courts have stated that this stipulation was not merely a restriction of power, but actually a dissolution of one agency and the attempted establishment of another between different parties. See, *Supreme Lodge, K. P. v. Withers,* 177 U. S. 260, 20 S. Ct. 611, 44 L. Ed. 762 (1900).

To avoid the objection of lack of notice in the *application* raised in the *Kansel* case, the insurer placed a stipulation in the application that the person filling it out should be deemed the agent of the insured. Some courts have upheld this stipulation on the theory of freedom of contract. This provision, according to these courts, contravened no sound principle of public policy. See *e.g., Dimick v. Metropolitan Life Ins. Co.,* 69 N. J. L. 384, 55 Atl. 291 (1903). But courts have also denied this stipulation's validity and determined that a well established relation cannot be abrogated by the ingenious use of words. *Continental Ins. Co. of New York v. Pierce,* 39 Kan. 396, 18 Pac. 291 (1888). See also, *Deitz v. Providence Washington Ins. Co., supra.*

As the principles above are based upon the premise that the false answers are made by the agent of the insurer and not by an agent of the insured, it has been expressly held that, notwithstanding the fact that the statements contained in the application are warranties, their effect, so far as the insured is concerned, is a nullity. *Parno v. Iowa Merchants' Mutual Ins. Co.,* 114 Iowa 132, 86 N. W. 210 (1901); *Hoffman et al. v. Mutual Fire Ins. Co.,* 274 Pa. 292, 117 Atl. 917 (1922). Further, the insured is not bound by false statements of the agent in the application, whether made in his presence or not, since the applicant answered the statements truthfully. Even though he failed to read the application, he could rely on the agent to properly prepare the application. *Andrews v. Bulldog Auto Fire Ins. Ass'n of Chicago,* 258 Mo. 714, 291 S. W. 508 (1926).

In some states the legislature has intervened and enacted statutes making any person, other than the applicant, who solicits, procures, or transmits an application for insurance the agent of the company. See, *e.g.,* OHIO GEN. CODE ANN. § 9586 (1938). Under this type of statute, it has been held that the act of soliciting applications for insurance and filling them in by an agent is the act of the company itself, even though the application contained an express provision to the contrary. *Continental Life Ins. Co. v. Chamberlain,* 132 U. S. 304, 10 S. Ct. 87, 33 L. Ed. 341 (1889). See also *New York Life Ins. Co. v. Russell,* 77 Fed. 94 (8th Cir. 1896).

In appraising the relative claims of the insured, who is setting up the fraud of the insurer's agent, and the insurer, who is relying on the passive negligence of the insured, the Kansas Court in *Pfiester v. Missouri State Life Ins. Co.,* 85 Kan. 97, 116 Pac. 245, 247 (1911), very appropriately stated:

> Few persons solicited to take policies understand the subject of insurance or the rules of law governing the negotiations, and they have no voice in dictating the terms of what is called the contract. . . . In writing the application, the agent does what the company sent him out to do. He negotiates for the company, asks questions for the company, writes down answers for the company. . . . It is not carelessness or imprudence in fact, as people in general understand those terms, for the applicant to take it for granted that the agent will accurately and truthfully set down the result of the negotiations. If he fail to do so, good sense and common justice regard the company as responsible, and not the insurer [insured]. The subject, therefore, is sui generis, and the rules of a legal system devised to govern the formation of ordinary contracts between man and man cannot be mechanically applied to it.

Some courts have failed to recognize the distinctive character of insurance contracts and have created a division of authority in applying well-settled legal principles to them. In *Griego v. New York Life Ins. Co.,* 44 N. M. 330, 102 P. (2d) 31, 37 (1940), the court recognizing this problem stated:

> This glaring inconsistency of authority upon the question before us rests upon the one single issue, viz., whether an insurance policy or a

> contract therefore, is not so distinctive in the field of commercial intercourse that a somewhat different rule from that which governs contracts and agency generally, governs.

There is much to be said for this realistic view; the uniqueness of insurance contracts and their tremendous economic importance are readily discernible. The true issue is whether the active fraud of the agent in supplying false answers in the application, outweighs the merely negligent omission of the insured to discover the fraud by failing to read the application after the agent has completed it. However, the insurance company should not be allowed to say to the insured, as held in the instant case, and as stated in *Griego v. New York Life Ins. Co., supra,* 102 P. (2d) at 38:

> You have misplaced your trust in *our* (the company's) agent, and, while *we* will escape the disappointments and losses occasioned thereby, *you* cannot. Your assumption that we would have in our employ only such agents as are trustworthy and honest is incorrect as we must now for the first time advise you.

Louis J. Mustico

LEGISLATION—BARRING OF SUBVERSIVE PERSONS FROM PUBLIC SCHOOL SYSTEMS.—*Thompson et al. v. Wallin et al.; L'Hommedieu et al. v. Board of Regents of University of New York et al.; Lederman et al. v. Board of Education of City of New York,* ....N. Y....., 95 N. E. (2d) 806 (1950). The actions were brought to enjoin enforcement of and to have declared unconstitutional the Feinberg Law, N. Y. EDUCATION LAW § 3022, which provided that membership in subversive organizations should be prima facie evidence of disqualification for appointment or retention in the public school system of the state.

In 1917 the New York legislature enacted N. Y. EDUCATION LAW § 3021, which provided that:

> A person employed as a superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position.

In 1939, the N. Y. CIVIL SERVICE LAW § 12-a, was enacted, providing that any person employed in any of the public schools of New York should be dismissed from employment if such person advocated, advised or taught the doctrine that the Government of the United States or of any state should be overthrown by force, violence or any unlawful means.

Ten years later Section 3022 of the N. Y. EDUCATION LAW was added. This section provides for the dismissal of subversive persons from the public school system. The Act gave the Board of Regents,

the governing body of the state's public schools, the power to adopt and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers, or employees in the public schools who violate N. Y. EDUCATION LAW § 3021, *supra,* or who are ineligible for appointment to or retention in any position in the public schools on any of the grounds set forth in N. Y. CIVIL SERVICE LAW § 12-a, *supra.* The Board of Regents also was given the authority to make a listing of organizations, after inquiry and hearing, which it found to be subversive. This Act was attacked by the plaintiffs on the grounds that it was a violation of the Constitutions of the United States and of New York in that it deprived the teachers of freedom of speech and press, that it was an arbitrary exercise of the police power of the state, and that it was a bill of attainder. The Court of Appeals held that the Feinberg Law was not an unreasonable or arbitrary exercise of the state police power, was not a bill of attainder, nor an unwarranted infringement of any constitutional right of free speech, assembly, or association. The court further held that the legislature had the right to eliminate subversives from its public school system upon the finding of a necessity for their elimination, and that the legislature had the power to provide the reasonable means for doing so. Without deciding the wisdom, it found the means reasonable.

In making this determination the court relied heavily on the decisions of the United States Supreme Court in *American Communications Ass'n, C. I. O. et al. v. Douds,* 339 U. S. 382, 400 S. Ct. 674, 94 L. Ed. 926 (1949); *Schenck v. United States,* 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919); and a former decision of the Court of Appeals of New York, *People v. Nebbia,* 262 N. Y. 259, 186 N. E. 694 (1933). These cases enunciated the doctrine that where the legislature has found a situation which requires remedial measures, and in pursuance of this finding has enacted the necessary remedy the courts may not substitute their judgment for that of the legislature as to the expediency and wisdom of the legislation. To do so would be to transcend the limits of the field of inquiry permitted the courts. The only time the courts may question legislation is when it clearly invades some constitutional safeguard.

In reliance upon this doctrine legislatures in other states have found the same need for anti-subversive legislation to prevent the infiltration of subversives into their public school systems. The means used to prevent infiltration varies. Some states merely require an affirmative oath by the public school employees to support the Constitutions of the United States and of the state. Others in addition to the affirmative oath, require that the public school employee also take a negative oath by which he denies membership in any subversive organization or that he gives allegiance to any foreign country. A third group makes membership in a subversive organization a criminal offense punishable by

fine and/or imprisonment. A fourth group contents itself with a statutory provision barring members of subversive organizations from employment in the public schools. A large number of states have not, as yet, enacted legislation to meet the problem.

Although all public school anti-subversive legislation thus far enacted falls into one of these categories, there is substantial variation within each group. Arizona is a state in the first group that requires an affirmative oath only. ARIZ. CODE ANN. § 54-1002 (1939), provides that all teachers employed in the public schools of that state must take the oath prescribed in ARIZ. CODE ANN. § 2-301 (1939). The tenor of this oath is that the teacher will support the Constitutions of the United States and of Arizona, and that he will bear faith and allegiance to them. This is the same oath prescribed for all public officials of that state.

Michigan has a similar statute, MICH. STAT. ANN. § 15.701 (Cum. Supp. 1949), as does Massachusetts, MASS. ANN. LAWS. c. 71, § 30A (1945). The Massachusetts Act has an interesting addition which provides:

> Nothing herein contained shall be construed to interfere in any way with the basic principle of the constitution which assures every citizen freedom of thought and speech and the right to advocate changes and improvements in both the state and federal constitutions.

The provisions of this Act have not yet been the subject of litigation. However, the above quoted provision apparently prescribes a rule of construction rather than a limitation upon the oath requirement.

A second group of states apparently felt that it was necessary to create more exhaustive protection and require public school employees to take a negative oath in addition to the affirmative one. The New Jersey enactment exemplifies this group. N. J. STAT. ANN. § 18:13-9.1 (Cum. Supp. 1950), requires that all teachers take an oath of allegiance before being permitted to teach. The required oath is to be found in N. J. STAT. ANN. §§ 41:1-1 *et seq.* (Cum. Supp.1950), in which the person taking it swears to defend this country against all enemies, foreign and domestic; that he does not advocate the overthrow of the Government of the United States or New Jersey by force, violence or unlawful means; that he belongs to no organization or society which advocates that objective; and that he is not bound to any foreign sovereignty. This statute enumerates those to whom it is to be applied, listing in addition to teachers, the governor, senators, and members of the General Assembly. The case of *Imbrie et al. v. Marsh et al.*, 5 N. J. Super. 239, 68 A. (2d) 761 (1949), *aff'd*, 3 N. J. 578, 71 A. (2d) 352 (1950), held that the oath did not apply to the governor, senators, or members of the General Assembly because it was a qualification of the constitutional oath required to be taken by them; but as to the others listed, including teachers, the oath was constitutional.

Maryland has enacted legislation very similar to New Jersey. MD. LAWS, c. 86 (1949), requires that every employee of the state or of its subdivisions is required to execute a written statement that he is not a subversive person as defined in the Act. This Act does not require an affirmative oath by the employee to support the Constitution of the United States and of Maryland. In the case of *Shub et al. v. Simpson*, ... Md. ...., 76 A. (2d) 332 (1950), that portion of the Maryland statute which requires candidates for state office to file an anti-subversive affidavit along with his candidacy papers was held to be constitutional as a valid exercise of the state's police power. However, it was held that this did not apply to candidates for federal office. This statute has a provision which exceeds those of the New Jersey statute, in that it is made a statutory felony for any person after June 1, 1949, to become, or after September 1, 1949, to remain a member of a subversive organization, with knowledge that the organization is subversive. Any person convicted under these provisions would be barred from any public employment. The Act further stipulates that reasonable grounds of belief that an employee is a subversive is grounds for immediate discharge. This legislation also applies to private institutions of learning which wish to qualify for state aid. A private institution must, before receiving state aid, file a written report with designated state officials setting forth what procedures it has adopted to discover subversive persons in its employ, and what steps are being taken to terminate their employment.

Dworken v. Cleveland Board of Education, ...Ohio St....., 94 N. E. (2d) 18 (1950), presents an example of the litigation arising from this class of legislation. In this case there was no statute involved, but a resolution passed by the Cleveland Board of Education, requiring all new employees, and requesting all present employees, of the Cleveland School District to execute an oath that such employee is not a Communist or a member of any organization advocating seditious practices or the overthrow of the Government of the United States. The Board had the authority to pass the resolution, as a part of its statutory powers and duties. Plaintiff, not a school teacher, sought an injunction against the Board to prevent them from enforcing the resolution, alleging grounds of unconstitutionality practically identical with those claimed in the instant case. The relief was denied, the court making the interesting observation, 94 N. E. (2d) at 32:

> Some of the opponents of the anti-Communist oath have contended that it is unnecessary in the educational field. Should it later develop that it here was unnecessary then no harm will have been done.

The fact that the required oath was prescribed by the Cleveland Board of Education may be an indication that the legislature of Ohio has decided to leave it to the individual school boards to determine the necessity in their own districts for anti-subversive oaths.

Alabama has enacted the third type of legislation. There it is a criminal offense to advocate the overthrow of the government of the United States or of Alabama, or to be a member of any organization which advocates their overthrow, ALA. CODE ANN. tit. 14, §§ 22(1) *et seq.* (Cum. Supp. 1947). Another state with a similar enactment is Arkansas. This state forbids any person from membership in any organization or political party which advocates the overthrow of the present constitutional form of government. ARK. DIG. STAT. § 3-1404 (1947). In addition, ARK. DIG. STAT. § 41-4113 (1947), provides that any member of a Nazi, Fascist, or Communist society or affiliated organization shall not be eligible for employment by the State of Arkansas, or by any of its subdivisions.

The Pennsylvania statute typifies the fourth category. This enactment makes it grounds for dismissal for a public school teacher to be a member of a subversive organization. PA. STAT. ANN. tit. 24, § 1122 (1949), lists as one of the grounds for the termination of a teacher's contract advocation of or participation in un-American or subversive doctrines. In addition, PA. STAT. ANN. tit. 65, § 152 (Cum. Supp. 1950), provides for dismissal of any employee of any agency created or supported in whole or in part by state funds, who advocates subversive doctrines as defined by the Act. This section specifically mentions employees of school districts. The case of *Pawell v. Unemployment Compensation Board of Review,* 146 Pa. Super. 147, 22 A. (2d) 43 (1941), upheld the constitutionality of this Act, although it should be noted that the case did not involve a school teacher, but a state civil service employee.

Texas has adopted this type of sanction. With respect to teachers in the tax supported public schools of Texas, TEX. STAT., REV. CIV. art. 2908a (1948), states that it shall be grounds for dismissal for any teacher to be found guilty of openly advocating doctrines which seek to undermine or overthrow by force the Government of the United States; or who in any way seeks to establish a government that does not rest upon the fundamental principle of the consent of the governed. As to employees of state-supported colleges or universities, Texas requires both the affirmative and negative oaths exemplified in the second class of legislation. This Act, TEX. STAT., REV. CIV. art. 2908b (Supp. 1950), also requires that the oath be taken by all students before they are allowed to register in any state-supported college or university.

The various statutory provisions discussed typify the categories of legislative attempts to eliminate subversive elements from the public school systems. It is notable that no other state has gone as far as New York in attempting to solve the problem. The New York legislature, by placing in the hands of the Board of Regents the power to determine which organizations are subversive, and making membership in such organizations prima facie evidence of disqualification for ap-

pointment to or retention in any office or position in the public schools of the state, has created a dangerous instrumentality which has the potentialities of becoming a political weapon for the suppression of unpopular doctrines. Those states which require their public school teachers to take an affirmative oath to support the Constitutions of the United States and the particular state have achieved a just and democratic means of effectuating their purpose. The means employed by the other states, especially New York, are too dangerous, and are likely to abuse personal constitutional rights. This author cannot concur in the dictum, which is the thesis underlying this type of legislation, expressed in *Dworken v. Cleveland Board of Education, supra,* that: "Should it later prove that it . . . was unnecessary then no harm will have been done."

Donald John Tufts

OIL AND GAS—INTERSTATE COMMERCE—STATE PRICE FIXING OF WELLHEAD GAS TO PREVENT ECONOMIC WASTE.—*Cities Service Gas Co. v. Peerless Oil and Gas Co. et al.,* 340 U. S. ...., 71 S. Ct. 215, 95 L. Ed. .... (1950); *Phillips Petroleum Co. v. Oklahoma et al.,* 340 U. S. ...., 71 S. Ct. 221, 95 L. Ed. .... (1950). Oklahoma's Corporation Commission ordered the appellants, Cities Service and Phillips, to establish minimum wellhead prices on all natural gas taken from the Guymon-Hugoton Field and the Commission's action was sustained by the Oklahoma Supreme Court. This was upheld in the instant cases by the Supreme Court. With the exception of the method of contesting the authority of the Corporation Commission, the two cases are similar. The main issue, posed in the *Cities Service* decision, was: may a state fix prices at the wellhead on natural gas produced within its borders but sold in interstate commerce?

Peerless, an independent producer, having no pipe outlet, offered to sell the potential output of its wells to Cities Service. When the parties were unable to reach an agreement, Peerless requested the Corporation Commission to order Cities to make a connection with a Peerless well and purchase the output of that well ratably at a price fixed by the Commission, and to fix the price to be paid by all purchasers of natural gas from the field. Phillips contested the latter portion of the request, for it had its own gathering system and did not purchase from other producers. A hearing was conducted by the commission, to which all producers were invited, and on the basis of the testimony the commission concluded that the taking of the gas at the then prevailing prices resulted in both economic and physical waste of gas, loss to the state in gross production taxes, inequitable taking of gas from the common source of supply, and discrimination against va-

rious producers in the field. Concluding that the Peerless requests were reasonable and necessary the commission issued the minimum price order. Appellants reached the United States Supreme Court on the issues of due process, equal protection, unlawful price fixing, and interference with federal authority to regulate interstate commerce.

The Supreme Court quickly disposed of the due process and equal protection contentions by reference to legislation designed to curb waste of natural resources through ratable taking. *Champlin Refining Company v. Corporation Commission,* 286 U. S. 210, 52 S. Ct. 559, 76 L. Ed. 1062 (1932). Another ground obviating the Court's necessity for discussing due process and equal protection is the power of the state to protect its economy. *Railroad Commission of Texas v. Rowan & Nichols Oil Co.,* 310 U. S. 573, 60 S. Ct. 1021, 84 L. Ed. 1368 (1940).

Since 1934 price fixing substantially related to a legitimate end sought to be attained has been upheld as valid. *Nebbia v. New York,* 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940 (1934). It should be noted, however, that price fixing *per se* was not one of the specific powers delegated to the Corporation Commission by the Oklahoma Legislature. OKLA. STAT. ANN. tit. 52, §§ 23-5, §§ 231-2 (1941). Impliedly the Oklahoma statute gives the commission such power where there is a common source of supply or a common purchaser. Under Section 239 the commission may limit the amount of gas taken by a producer to "such proportion of the natural gas that may be marketed without waste." OKLA. STAT. ANN. tit. 52, §§ 239-40 (1941). Thus, Oklahoma, with excellent natural gas provisions, may be classed with the great majority of gas producing states who have no actual price fixing provisos. Other gas producing states are in accord with the Oklahoma law and merely infer that their regulatory bodies have price fixing powers. See ARK. DIG. STAT. § 53-111 (1948); COLO. STAT. ANN. c. 118, § 66 (1949); KAN. GEN. STAT. ANN. § 55-701 *et seq.* (1935); N. M. STAT. ANN. § 69-211 (1941); MISS. CODE. ANN. § 6132-01 *et seq.* (Supp. 1950); TEX REV. CIV. STAT. ANN. art. 6008 *et seq.* (1948). Apparently Michigan stands alone by having enunciated specific authority in 1937, MICH. STAT. ANN. § 13.138(28) (Cum. Supp. 1949).

In the main, the interstate commerce question presented the pivotal issue. Justice Clark, writing the opinion, said, 71 S. Ct. at 219:

> The Commerce Clause gives to the Congress a power over interstate commerce which is both paramount and broad in scope. But due regard for state legislative functions has long required that this power be treated as not exclusive.

Some of the arguments posed by the successful counsel in the *Cooley v. Board of Wardens of Port of Philadelphia,* 12 How. 299, 13 L. Ed. 996, 999 (U. S. 1851), decision certainly appear applicable to the case under consideration. In the *Cooley* decision the counsel contended that:

> The Act in question is no regulation of commerce. It was passed in the exercise of a power of the State not granted or surrendered. . . . It is local in character and object, an essential exercise of one branch of the police power of the State, to aid, and not to regulate commerce. . . . Even if it be a regulation of commerce, the power of Congress is not exclusive.

Since the *Cooley* decision was cited by Mr. Justice Clark as authority it would appear that the arguments posed therein are valid.

A problem somewhat similar to that of the instant case was presented in *Milk Control Board of Pennsylvania v. Eisenberg Farm Products,* 306 U. S. 346, 59 S. Ct. 528, 83 L. Ed. 752 (1939), in which the State of Pennsylvania required milk dealers to pay producers at least the minimum prices prescribed by a state administrative agency. Eisenberg, a dealer, bought milk from one hundred and seventy-five farmers in the neighborhood and after retention for less than twenty-four hours, shipped *all* of the milk to New York City. The Supreme Court held that "the effect of the law on interstate commerce is incidental and not forbidden by the Constitution, in the absence of regulation by Congress." 306 U. S. at 353. Here, as in the *Eisenberg* case, there was no inherent discrimination against interstate commerce, for the Oklahoma commission's order was issued primarily for the purpose of preventing waste and sustaining the state's natural gas conservation program.

Since the Natural Gas Act, 52 STAT. 821 *et seq.* (1938), 15 U. S. C. §§ 717 *et seq.* (1946), is concerned particularly with the control of interstate transportation and sale for resale of natural gas, leaving a middle ground bounded by production and gathering at one end and by local distribution at the other, it is patent why the appellants did not assert that the Oklahoma Corporation Commission invaded the jurisdiction of the Federal Power Commission. It was explicitly stated that the Oklahoma commission's prime concern was the waste in the Hugoton Field, thereby limiting itself to the production and gathering phase, though undoubtedly interstate commerce was affected because of the large amount of gas that was piped into neighboring states.

Though the Court was not faced with the jurisdictional conflict of the Federal Power Commission vis-a-vis a state regulatory body, the Kansas Supreme Court conclusively met such a problem two months before the interstate commerce question was raised in the United States Supreme Court. *Kansas-Nebraska Natural Gas Co. v. State Corporation Commission et al.; Panhandle Eastern Pipe Line Co. v. State Corporation Commission et al.; Northern Natural Gas Co. v. State Corporation Commission et al.,* 169 Kan. 722, 222 P. (2d) 704 (1950). In the Kansas decision the appellant gas companies, in litigation over Kansas price fixing for the Kansas area of the Hugoton Field, contended that the Kansas Corporation Commission had no authority to determine wellhead gas prices, for that would constitute an invasion of

the domain of the Federal Power Commission. However, the court held that producing and gathering was without the cognizance of the FPC and that the action of the Corporation Commission was a reasonable one, within the power entrusted to it by the Kansas legislature. KAN. GEN. STAT. ANN. § 55-701 *et seq.* (1935). The Kansas Court felt that the jurisdictional issue anent the Natural Gas Act was resolved by the decision of the Court of Appeals for the Third Circuit where it was held that the transfer of gas leases was not within the control of the FPC. *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 172 F. (2d) 57, 58 (3d Cir. 1949), *aff'd*, 337 U. S. 498, 69 S. Ct. 1251, 93 L. Ed. 1499 (1949). The Kansas Court also referred to the actual wording of the Natural Gas Act, which reads 52 STAT. 822 (1938), 15 U. S. C. § 717(b) (1946):

> . . . but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

The reasoning of the Kansas Court was further augmented by the views of two of the Federal Power Commission members, who believed that production and gathering includes the operations by which gas is withdrawn from the earth, processed and brought by feeding lines from the field to central points of connection with transmission systems. See FPC, NATURAL GAS INVESTIGATION (Smith-Wimberly Report) 108 (1948).

It should be noted that the Kansas Court could have alluded to the intent of Congress when the Natural Gas Act was presented for consideration. The purpose was "to fill the gap in regulation that . . . exist[ed] by reason of the lack of authority of the State commissions." H. R. REP. No. 709, 75th Cong., 1st Sess. 3 (1937).

In view of an earlier Kansas State Corporation Commission determination that it had power to fix a minimum price for wellhead gas, where the Commission stated, In re *Hugoton Gas Field,* 77 P. U. R. (N. S.) 150, 158 (1949):

> We are of the opinion that this Commission has jurisdiction and authority to establish a minimum fixed price at the wellhead in this field when fixing a minimum price is necessary or appropriate regulatory means of giving effect to the intent and purpose of the statute relating to the production and conservation of natural gas.

it is apparent that Kansas may be classed as one of the articulate and forthright proponents of state regulatory powers in the field of natural gas conservation.

Comparing the United States and Kansas Supreme Court decisions, the specific issue of wellhead gas price fixing seems rather conclusively settled. On the one hand, price fixing is permissible in the interest of conservation where Congress has not exercised jurisdiction, though a major portion of the gas may be piped interstate. See *Cooley v. Board*

of Wardens of Port of Philadelphia, supra; Milk Control Board of Pennsylvania v. Eisenberg Farm Products, supra. On the other hand, price fixing of gas that is largely destined for interstate traffic is said to be a state matter and valid because it does not contravene Section 717 (b) of the Natural Gas Act, the purpose of which is primarily one of aiding and filling the gap where state commissions are powerless or ineffective.

Thus, the federal and state courts have paid heed to the intent of Congress, though legislative measures to preclude such controversies failed to become law because of a presidential veto. (See H. R. 1758 and S. 1498, 81st Cong., 1st Sess., bill to insure immunity of natural gas producers and gatherers from federal regulation; and H. R. 4001, H. R. 4028, and S. 1831, 81st Cong., 1st Sess., bills to exempt certain local retail and wholesale distributors from federal control.)

Reading the Michigan statute giving detailed price fixing authority, the Kansas Corporation Commission's determination, and the United States and Kansas Supreme Court decisions, *pari materia,* it should be readily discernible that the states have not forsaken their regulatory powers in the field of natural gas. It is difficult to ascertain what legal basis remains for natural gas producers to use in remonstrating about state conservation regulatory authority, in the delimitated phase of wellhead gas price fixing. Natural gas producers should note well the emphasis placed on the state power of conservation by the Supreme Court.

Henry M. Shine, Jr.

TAXATION—FEDERAL GIFT TAXES—PROPERTY SETTLEMENT AGREEMENT WHICH SURVIVES DIVORCE DECREE—DISCREPANCIES IN VALUE OF PROPERTY EXCHANGED NOT SUBJECT TO GIFT TAX.—*Harris v. Commissioner,* 340 U. S. ...., 71 S. Ct. 181, 95 L. Ed. .... (1950). In contemplation of obtaining a divorce, the petitioner and her husband reached a settlement of their intangled property interests. It was found that the value of the property transferred to the husband exceeded that received by the petitioner by some $107,150.00. The Commissioner assessed a gift tax on the basis of INT. REV. CODE § 1002:

> Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration, shall, for the purpose of the tax imposed by this chapter, be deemed a gift. . . .

Transfers pursuant to family settlements are classified as ante-nuptial and post-nuptial transfers. The latter may be further subdivided into transfers per an agreement incorporated into a divorce decree and those independent of a divorce decree.

Transfers made by a man to his intended wife in consideration of the relinquishment by her of her prospective rights in his estate, or vice versa, may be subject to the gift tax. *Merrill v. Fahs,* 324 U. S. 308, 65 S. Ct. 655, 89 L. Ed. 963 (1945); *Commissioner v. Wemyss,* 324 U. S. 303, 65 S. Ct. 652, 89 L. Ed. 958 (1945). The Supreme Court's upholding the tax in these cases was predicated on the theory that the ante-nuptial transfer in relinquishment of property rights was not an "adequate and full consideration in money or money's worth," as required by Section 1002. In the *Wemyss* case a widow stood to lose the income from a trust fund amounting to $5,484.00 annually if she remarried, so her intended husband transferred a block of stock of value in excess of $149,000.00 to her. Within a month they were married and the Commissioner ruled the transfer taxable as a gift. The Supreme Court felt that Congress intended to use the term "gift" in its broadest and most comprehensive sense, that the test of "donative intent" was abrogated by the test Congress laid down, that is, "adequate and full consideration in money or money's worth." The *Merrill* case, on the other hand, was the relinquishment by the wife to be of all marital rights against her future husband's estate, which was in excess of five million dollars, except her right to maintainance and support. In the suit for a refund of the gift tax imposed, Justice Frankfurter turned to the "guiding light," as he aptly phrased it, found in *Estate of Sanford v. Commissioner,* 308 U. S. 39, 44, 60 S. Ct. 51, 84 L. Ed. 20 (1939), and declared: "The gift tax was supplementary to the estate tax. The two are in *pari materia* and must be construed together." INT. REV. CODE § 812, as applied by the Court states in part:

> The deduction herein allowed in the case of claims against the estate, unpaid mortgages, or any indebtedness shall, when founded upon a promise or agreement, be limited to the extent that they are contracted bona fide and for an adequate and full consideration in money or money's worth. . . . For the purpose of this subchapter, a relinquishment or promised relinquishment of dower, curtesy or of statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration in money or money's worth.

It follows, therefore, that if the transfer of property in relinquishment of marital rights was not deductible upon the death of the transferor, it likewise must be considered, for tax purposes, as a gift. In the case at bar the Court reiterates the view that the gift and estate taxes must be construed in *pari materia.*

The test applied in the *Merrill* case—"adequate and full consideration in money or money's worth"—has been extended by the courts to transfers pursuant to post-nuptial family settlements with one exception: transfers pursuant to an agreement incorporated in a divorce decree, wherein the transfer is effected by the decree rather than by the promise or agreement. *Harris v. Commissioner, supra; Estate of Josephine F. Barnard,* 176 F. (2d) 233 (2d Cir. 1949); *Commissioner v. Con-*

verse, 163 F. (2d) 131 (2d Cir. 1947). See *Krause v. Yoke,* 89 F. Supp. 91 (D. W. Va. 1950), for results of transfer made under agreement not judicially sanctioned by a decree until after the transfer. Also in *George J. McMurty,* 16 T. C. No. 23 (Jan. 24, 1951), P-H 1951 FED. TAX REP. DEC. ¶ 16.23, the effectiveness of the agreement was in no way dependent upon the entry of a divorce decree; therefore the gift tax was applied. However, these agreements not sanctioned by a decree may still be exempt from the gift tax and are still governed by E. T. 19, 1946-2 CUM. BULL. 166, which provides: to the extent that a transfer does not exceed the reasonable value of the support rights of the wife, it is to be treated as made for an adequate and full consideration in money or money's worth.

In the *Barnard* case the wife transferred to her husband $50,000.00 under a separation agreement incident to a divorce, and the transfer was approved by the court granting the divorce. The husband's consideration for this transfer was the release of all rights in his wife's estate. The transaction was not a gift so as to be subject to a gift tax because the claims of the husband were unliquidated; hence, it was assumed that she received her money's worth. Another reason the courts have given for holding transfers of property pursuant to an agreement incorporated into a divorce or separation decree not subject to gift tax, is that if the judgment under the decree remains unsatisfied until the taxpayer's death, its eventual payment becomes a deductible claim in the estate tax computation, and, as always, the gift tax must be construed in *pari materia* with the estate tax. If it is deductible under the estate tax provisions it is not taxable under the gift tax statute. *Commissioner v. Converse, supra.*

The Court, in the principal case, reiterated a third and still more compelling reason for excluding transfers as these from the gift tax. Reasoning that the estate and gift tax are construed together, and that the estate tax allows deduction for any indebtedness when founded upon a *promise or agreement* to the extent that they were contracted bona fide and for an adequate and full consideration in money or money's worth, still in such a case as this, it is the *decree* that creates the rights and the duties, not the agreement; and a *decree certainly is not an agreement or promise* in any sense. Therefore the gift tax should not be applied.

Up to this point, the case under discussion falls into the transfers made under an agreement incorporated in a divorce decree. This case, however, is an extension of that doctrine. The agreement in question contained an innocent clause which occasioned the split in the Supreme Court over this case: "The covenants in this agreement shall survive any decree of divorce which may be entered." Also, the decree stated: "It is ordered that said agreement and said trust agreement forming a part thereof shall survive this decree." In construing the effect of this

stipulation in the agreement the Court said, 71 S. Ct. at 184, that, "the gift tax statute is concerned with the source of rights, not with the manner in which rights at some distant times may be enforced." This was in reply to an argument of Judge Learned Hand, who in this case below, 178 F. (2d) 861, 865 (2d Cir. 1949), sustained the Commissioner on the basis that there were two sanctions for the transfer, contempt under the decree and execution under the contract.

Assuming that the gift tax statute is concerned with the source of right, does it necessarily follow that a condition precedent, in this case the divorce decree, is the source of the right, or is it the agreement which is the source? This is the issue upon which the disagreement arises. Granting that "if the transfer is effected by court decree, 'no promise or agreement' of the parties is the operative fact," there yet remains the difficulty of determining just what is the operative fact in an agreement which states, 71 S. Ct. at 187:

> This agreement shall be submitted to the court for its approval, but nevertheless the covenants in this *agreement shall survive any decree* of divorce which may be entered. It is of the essence of this agreement that the settlement herein provided for shall not become operative in any manner nor shall any of the Recitals or covenants herein become binding upon either party unless a decree of absolute divorce between the parties shall be entered in the pending Nevada action. The parties hereto, however, shall proceed as expeditiously as possible to carry into effect the covenants herein, which it is provided are to be *performed* by either of the parties *prior to the entry of the decree* as aforesaid. [Emphasis supplied.]

Is the condition precedent to the existence of the contract the operative fact or is the agreement itself the operative fact? Justice Frankfurter in his dissenting opinion said, 71 S. Ct. at 188:

> The fact that the undertakings defined by this agreement would come into force only on the occurrence of a condition, to wit, the entering of a divorce decree, is apparently regarded as decisive of taxability. But does this make any real difference? . . . The condition on which an agreement comes into force does not supplant the agreement any more than a deed in escrow ceases to be a deed when it comes out of escrow.

To repeat what Judge Learned Hand said in sustaining the Commissioner in the court below, the transfers were founded not only on the decree but upon both the decree and a "promise or agreement." 178 F. (2d) at 865. Even though a divorce decree directs different payments than those specified in the agreement, if the agreement is construed to survive the decree, an action may be brought on the agreement. *Seuss v. Schukat,* 358 Ill. 27, 192 N. E. 668 (1934); *Freeman v. Sieve,* 323 Mass. 652, 84 N. E. (2d) 16 (1949); *Goldman v. Goldman,* 282 N. Y. 296, 26 N. E. (2d) 265 (1940).

Are the federal estate and gift tax truly construed in *pari materia* in this case, as claimed by the majority? Under the federal estate tax, even a judgment obtained on a promise given for inadequate consider-

ation is not deductible from the gross estate. *Markwell's Estate v. Commissioner,* 112 F. (2d) 253 (7th Cir. 1940).

This exception in favor of transfer pursuant to an agreement incorporated into a divorce decree is an unwarranted discrimination in favor of divorce settlements as contrasted with ante-nuptial arrangements. Regardless of the propriety of the existence of such an exception it is imperative that practicing attorneys realize the full import of this decision. From all appearances, the instant case indicates that the Court has a very strong tendency to hold any transfer of property pursuant to an agreement that is incorporated in a divorce decree, whether or not the agreement survives the decree, as not subject to the federal gift tax regardless of the rights surrendered by the agreement and regardless of the excessive value of the property transferred over the value of the rights surrendered.

Arthur L. Beaudette

TORTS—NEGLIGENCE—LIABILITY FOR DAMAGE DUE TO BLASTING. —*Reynolds et al. v. W. H. Hinman Co.,* .... Me. ...., 75 A. (2d) 807 (1950). The complaint alleged that the defendant, a highway construction company, while engaged in blasting, caused severe damage to the property of the plaintiffs by the resulting vibrations and concussions. The plaintiffs relied for the most part upon the rule of strict liability, maintaining that persons engaged in blasting are insurers against resulting injuries even in the absence of fault. In affirming the decision of the trial court where the defendant's demurrer was sustained, the court held that fault is a requisite for liability in a negligence case, and therefore, if an act is lawful, properly conducted, and is a reasonable use of one's property, no liability is incurred without fault.

The issue raised in the case is one of the most controversial in the law of torts,—the test of liability to be applied to one lawfully engaged in perilous and dangerous activities. With regard to blasting there are three distinct theories extant in the United States. One view applies the doctrine of absolute liability to all cases in which the injury is proximately caused by the blasting. This doctrine was first laid down in the famous English case of *Fletcher v. Rylands,* L. R. 3 H. L. 330, 339-40 (1868), where the court held:

> . . . the person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the Plaintiff's default; or perhaps, that the escape was the consequence of *vis major,* or the act of God. . . .

Although the rule of *Fletcher v. Rylands* has not been followed in America to the full extent of its implications, yet in numerous blasting cases it has been applied in principle if not in fact. This rule as applied to blasting was aptly stated in *Richard v. Kaufman et al.*, 47 F. Supp. 337, 338 (E. D. Pa. 1942), where the court held that blasting was an ultra hazardous activity for which the person engaged in it is liable for damages proximately caused thereby, even in the absence of fault or negligence and regardless of whether the damage was caused by flying debris or concussion. Among the numerous decisions in accord with this rule are: *Exner et ux. v. Sherman Power Const. Co.*, 54 F. (2d) 510, (2d Cir. 1931); *Watson v. Mississippi River Power Co.*, 174 Iowa 23, 156 N. W. 188 (1916); *Stocker v. Richmond Heights*, 235 Mo. App. 277, 132 S. W. (2d) 1116 (1939); *Louden v. Cincinnati et al.*, 90 Ohio 144, 106 N. E. 970 (1914); *Baier et ux. v. Glen Alden Coal Co.*, 131 Pa. Super. 309, 200 Atl. 190, *aff'd*, 332 Pa. 561, 3 A. (2d) 349 (1938); *Jones v. Oman et al.*, 28 Tenn. App. 1, 184 S. W. (2d) 568 (1944) (defendant held to insurer's liability).

The second view attempts to distinguish the manner by which the damage was caused. If the injury was the direct result of debris being thrown onto the person or property of another the correct action is *trespass*, whereas *case* is the action for injuries resulting from concussion and vibration, such damage being considered consequential. Though the forms of action no longer control, the distinction is maintained to determine the test to be applied. In *Jenkins et al. v. A. G. Tomasello & Son, Inc. et al.*, 286 Mass. 180, 189 N. E. 817, 820 (1934), it was held that by the common law, a blaster was liable for all direct injuries to the person or property of another, but that without negligence he was not liable for harm caused by concussion. Similarly, in an action for damages caused by incidental jarring, the New York Court of Appeals, in *Booth v. Rome W. & O. T. R. R.*, 140 N. Y. 267, 35 N. E. 592, 593 (1893), said that mere proof of damage by blasting would not sustain the action The plaintiff must further show the violation of a duty owing to him by the defendant or a failure to use due care. *Bacon v. Kansas City Terminal Ry.*, 109 Kan. 234, 198 Pac. 942 (1921); *Campbell et al. v. Adams et al.*, 228 Ky. 156, 14 S. W. (2d) 418 (1929); *Dolham et ux. v. Peterson*, 297 Mass. 479, 9 N. E. (2d) 406 (1937); *Lewis et al. v. Dunbar & Sullivan Dredging Co.*, 178 Misc. 980, 36 N. Y. S. (2d) 897 (S. Ct. 1942); *Universal Atlas Cement Co. v. Oswald et al.*, 138 Tex. 159, 157 S. W. (2d) 636 (1941).

The third view appears to be more in accord with the general rule that tort liability must be predicated upon fault. In the principle case, the court, basing its decision upon this theory, supported its position by *Chickering v. Lincoln County Power Co.*, 118 Me. 414, 108 Atl. 460, 461 (1919), where this rule was stated:

> When a person attempts to do that which is useful, usual, or necessary, as well as lawful, if done under proper conditions, and injury unexpectedly

> results, . . . the question of whether he reasonably exercised that right turns upon his negligence, within the latitude for discrimination or distinction which that form of action affords.

It is apparent, therefore, that the quesiton of whether the use of the property of the defendant was reasonable or unreasonable has considerable bearing on the question of liability, particularly if the defendant is engaged in a lawful act. One is entitled to the reasonable use of his property even if the use incidentally injures another; but liability for the injury will arise when such injury is caused by the unreasonable use of property in a manner the user should have reasonably anticipated would result in damage to another. *Button v. Pennsylvania R. R.*, 115 Ind. App. 210, 57 N. E. (2d) 444 (1944). Blasting is a lawful act, *Cary Bros. & Hannon v. Morrison,* 129 Fed. 177 (8th Cir. 1904), and a reasonable and necessary use of land. *Georgia Granite Co. v. Simms,* 11 Ga. App. 295, 75 S. E. 143 (1912); *Cashin v. Northern Pacific Ry.*, 96 Mont. 92, 28 P. (2d) 862 (1934); *Arthur v. Henry et al.*, 157 N. C. 393, 73 S. E. 206 (1911); *McKay et ux. v. Kelly,* 229 S. W. (2d) 117 (Tex. Civ. App. 1950); *Standard Paving Co. v. McClinton,* 146 S. W. (2d) 466 (Tex. Civ. App. 1940). See also, Smith, *Liability for Substantial Physical Damage to Land by Blasting—The Rule of the Future,* 33 HARV. L. REV. 542 (1920), in which the author urges the adoption of a rule predicating liability upon fault.

Though this latter view is a departure from absolute liability, modern public policy requires the courts to resort to it on many occasions. The practical result of imposing absolute liability, as pointed out by the court in *Booth v. Rome, supra,* would be too far reaching. If sustained, it would impose a serious restriction upon the use of property and greatly impair its value, would enable the first occupant to control the use of adjoining property, and would prevent or tend to prevent the improvement of property. But even then the court did not completely reject the doctrine, but merely limited it to instances where the damage resulted from flying debris. Some writers maintain that these distinctions are unwarranted. SALMOND, TORTS 231 (7th ed. 1928). Others maintain that there is little or no reason for applying the doctrine of strict liability in cases involving blasting damage. As pointed out by Smith, *supra,* at 553, a plaintiff who has a plausible case by present standards can generally recover without resorting to the rule of absolute liability. Likewise, the present tendency of the courts is to restrict the use of the doctrine to as few situations as possible. However, this does not eliminate the doctrine of *Rylands v. Fletcher* but rather limits it to a more strict application.

This diversity of views is not without an historical significance. The rule placing strict liability on persons engaged in blasting was well established before the scope of the law of negligence had begun to be realized. As it progressed, the changes in the prevailing law were

made when necessitated by the circumstances. In Thayer, *Liability Without Fault,* 29 HARV. L. REV. 801, 805 (1916), the author states that the law of negligence is so modern that the judges who sat in *Rylands v. Fletcher* "had but an imperfect sense of its reach and power," and that in its present development it renders obsolete much that went before it.

In general, the application of the rule of negligence to blasting has resulted in a more uniform rule, unencumbered with numerous exceptions and untenable distinctions. In the principal case, the court refused to adopt a rule of absolute liability in a case of first impression on concussion damages resulting from blasting operations. In doing so, it lent its weight to the growing tendency in tort law to restrict liability to the performance of culpable acts rather than imposing it for an otherwise reasonable and lawful use of one's own property.

Luke R. Morin

TRADE REGULATION—PRICE DISCRIMINATION—MEETING COMPETITION AS AN ABSOLUTE DEFENSE UNDER ROBINSON-PATMAN ACT.—*Standard Oil Co. v. Federal Trade Commission,* 340 U. S. ...., 71 S. Ct. 240, 95 L. Ed. .... (1951). The petitioner was engaged in the business of selling gasoline in interstate commerce. It sold to four large jobbers in the Detroit area at a lower price per gallon than it did to its small service station customers. One of these jobbers, through its own retail stations, was thereby enabled to sell its gasoline at a lower price than the retail rate prevailing in the area. A cease and desist order was issued against Standard Oil by the Federal Trade Commission on the ground that the price differential given to the jobbers on the same grade and quality of gasoline was a violation of Section 2 of the Clayton Act, 38 STAT. 730 (1914), as amended by the Robinson-Patman Act, 49 STAT. 1526 (1936), 15 U. S. C. § 13 (1946). Standard Oil contended that the price differentials were made in good faith to retain the jobbers as customers by meeting the equally low price of a competitor. The commission ruled that even though the seller acted in good faith to meet competition, that fact did not constitute an absolute defense because injury had resulted to competition at the lower retail level. With a slight modification, the commission's determination was affirmed by the court of appeals. *Standard Oil Co. v. Federal Trade Commission,* 173 F. (2d) 210 (7th Cir. 1949). The Supreme Court speaking through Justice Burton reversed the lower court in the instant case and stated, 71 S. Ct. at 248:

> . . . there has been widespread understanding that, under the Robinson-Patman Act, it is a complete defense to a charge of price discrimination for the seller to show that its price differential has been made in good

> faith to meet a lawful and equally low price of a competitor. . . . We see no reason to depart now from that interpretation.

The issue before the court was whether Section 2(b) constituted a mere procedural rule fixing the burden of proof or was an absolute defense against the charge of unlawful discrimination in price. It was the commission's contention that whenever injury resulted or might result to competition at the buyer's resale level (here the retail level), Section 2(b) would render the seller who gave a price differential liable for an unlawful price discrimination.

In attempting to construe an ambiguous statute by reference to its legislative history resort may be had to extrinsic aids. Sutherland chronologically divides these aids as follows: (1) events prior to the time of the statute's introduction in the legislature; (2) events from the time of its introduction to its passage; (3) events after its enactment. 2 SUTHERLAND, STATUTORY CONSTRUCTION § 5001 (3rd ed. 1943). In proceeding to answer the question proposed, this division will be followed in this analysis.

The history of legislative events leading to the introduction of the Robinson-Patman Act began in 1914. In that year the first federal enactment against discriminatory price differentials was incorporated in Section 2 of the Clayton Act. The intent and purpose of this act was to prohibit those practices which unlawfully restrained trade and fostered monopolies. Because of its broad language, this section proved to be inadequate protection from the mischief at which it was aimed. *Final Report on the Chain-Store Investigation,* SEN. DOC. No. 4, 74th Cong., 1st Sess. (1934). Prior to the enactment of the Robinson-Patman Act Section 2 of the Clayton Act provided:

> . . . it shall be unlawful . . . to discriminate in price between different purchasers . . . where the effect of such discrimination may be to substantially lessen competition . . . Provided, that nothing herein contained shall prevent . . . discrimination in price in the same or different communities made in good faith to meet competition.

By this section a seller could establish an absolute defense against a charge of unlawful price discrimination by showing that it was done in good faith to meet competition. This exemption weakened the effectiveness of the Act because it tended "to substitute the remedy of retaliation for that of law." 80 CONG. REC. 3113 (1936). Another defect lay in the fact that a large buyer could demand a preference by finding several sellers willing to sell at a lower price than that charged by their competitors. H. R. REP. No. 2951, 74th Cong., 2d Sess. 7 (1936).

In order to remedy the weaknesses of Section 2, Congress amended it by the Robinson-Patman Act. The passage of this Act was materially aided by the fears expressed in the congressional report, *supra,* on chain store practices. Consequently, this amendment has been referred to as the "anti-chain store law." McAllister, *Price Control By Law in*

the United States: A Survey, 4 LAW & CONTEMP. PROB. 273 (1937). It is interesting to note that neither the original draft of the House nor the Senate bill contained a section similar to Section 2(b). This indicates that the legal temper of the times favored exclusion of the meeting-of-competition exemption entirely. But after some discussion the present section was included. 80 CONG. REC. 3119 (1936). The Act divided Section 2 of the Clayton Act into two paragraphs. The first, Section 2(a), specifically enumerated the absolute defenses against the charges of unlawful discrimination. The second paragraph, Section 2(b), purportedly was intended as a mere rule of evidence to be used in proceedings before the Federal Trade Commission. H. R. REP. No. 2951, 74th Cong., 2d Sess. 7 (1936). On the other hand, it was also characterized as only "a contraction of an exemption . . . contained in section 2 of the Clayton Act." H. R. REP. No. 2287, 74th Cong., 2d Sess. 16 (1936).

Section 2(b) of the Robinson-Patman Act provides:

> Upon proof being made . . . that there has been discrimination in price or services or facilities furnished, 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 thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor. . . .

From the language of this section it is seen that once the commission has established jurisdiction over the cause and proves that there has been a price differential made in interstate commerce, a prima facie case of price discrimination is made out. AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT 82 (1950). The burden of proving that the differential was made in good faith to meet the equally low price of a competitor then is upon the seller. At this point it becomes important to determine whether Section 2(b) is a substantive defense or a mere procedural rule. If it is a substantive defense, and the seller proves that he made the price differential "in good faith to meet an equally low price of a competitor," he is absolved of any guilt. But, if it is merely a procedural rule, upon a showing by the commission that injury has resulted to competition, the seller is deemed to have violated the statute.

While admittedly there is confusion as to whether Section 2(b) is procedural or substantive, the following statement seems to dispel doubt as to the intent of Congress. In the Conference Report to the House, Congressman Utterback, Chairman of the House Conferees, said, 80 CONG. REC. 9418 (1936):

> . . . this does not set up the meeting of competition as an absolute bar to a charge of discrimination under the bill. It merely permits it to be shown in evidence. This provision is entirely procedural. It does not

> determine substantive rights, liabilities and duties. . . . If this proviso were construed to permit the 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 competing sellers of the same product. One violation of law cannot be permitted to justify another.

Thus, this section was not intended to be construed as a "justification" or as an affirmative defense but was meant only to allow the seller to overcome the presumption of injury to competition arising from the Commission's showing of a discrimination. 80 CONG. REC. 10,017 (1936); AUSTIN, *supra* at 92. Conversely, one authority has stated that the courts would probably construe this section to be an absolute defense in order to avoid the question of its constitutionality. He implies that this section might have been struck down on the grounds that it impairs the freedom to contract or that it deprives a person of property without due process of law. Gordon, *Robinson-Patman Anti-Discrimination Act—The Meaning of Sections 1 and 3,* 22 A. B. A. J. 593 (1936).

Since the passage of the Act, it definitely appears that sentiment has gone against the interpretation of Section 2(b) as a mere procedural device. Some members of the Federal Trade Commission and of the Department of Justice believed that this section should be treated as an absolute defense. *Hearings before Committee on Interstate and Foreign Commerce on S. 236,* 81st Cong., 1st Sess. 66, 77 (1949); *Hearings before Committee of the Judiciary on S. 1008,* 81st Cong., 1st Sess. 72 (1949). This same view was expressed in a recent article devoted to the problem. Berger and Goldstein, *Meeting Competition Under the Robinson-Patman Act,* 44 ILL. L. REV. 315 (1949). While this is the first case to deal specifically with the issue raised, the majority opinion cites two prior decisions as recognizing this section as an absolute defense. *Corn Products Refining Co. v. Federal Trade Commission,* 324 U. S. 726, 65 S. Ct. 961, 89 L. Ed. 1320 (1945); *Federal Trade Commission v. A. E. Staley Mfg. Co.,* 324 U. S. 746, 65 S. Ct. 971, 89 L. Ed. 1338 (1945). In both cases it was held that the evidence was insufficient to show that the discrimination was made in good faith to meet competition. Although the court was not called upon to construe Section 2(b), they inferred in the *Staley* case that it might be an absolute defense had good faith been proven.

In spite of the legislative history of the measure, the Court in the instant case proceeded to hold that a showing of good faith in an attempt to meet the lower price of a competitor exonerates the seller of a charge of price discrimination. It characterized Section 2(b) in these terms, 71 S. Ct. at 250:

> . . . the proviso is readily understandable as simply continuing in effect a defense which is equally absolute but more limited in scope than that which existed under § 2 of the original Clayton Act.

The Court gave two examples of the limitations on Section 2(b). They concluded that since reference to the "same or different communities" phrase of the old section had been omitted in the present act, the paragraph was meant to apply only to price discriminations made in *actual competition.* The second limitation prevents the seller from lowering his price *below* that of his competitor; he may only *meet* the competitive price. The majority therefore concluded that the legislative purpose in subdividing the original section was not to deprive Section 2(b) of its status as a defense, but merely to limit its scope.

In conclusion, it is submitted that the Supreme Court was more intent on construing the section in the light of recent opinionated utterances, than in following the legislative intent. Under the guise of preserving competition, the Court has reopened the way for injurious practices. Whatever may be the economic arguments for or against the Act, it seems that the Court has judicially reinstated a serious defect of the original Clayton Act in most of its ramifications.

John F. Mendoza

TRUSTS—ALLOCATION BETWEEN PRINCIPAL AND INCOME.—*Wachovia Bank & Trust Co. et al. v. Grubb et al.*, ...N. C....., 62 S. E. (2d) 719 (1950). The testator devised and bequeathed to the petitioners, in trust, all the residue of his estate, after the payment of debts, costs of administration, and legacies. He directed that "the entire net income derived from my trust estate shall be paid . . . after the expiration of three years from the date of my death . . ." to his widow and other beneficiaries. The testator's widow claimed her ratable share of the income earned from the residuary estate from the time of the death of the testator. The legatees who were to share in the corpus of the estate after the trust period terminated contended that the income accruing during the three year period after the death of the testator became a part of the corpus of the trust estate and was not distributable as income. The trustees sought the advice of the court, and were directed to pay over the disputed income to the income beneficiaries.

The exact question in this case is whether the income accruing during the three year period belonged to the corpus, or was part of the income to be distributed after the lapse of three years to the income beneficiary. Apart from the problem of construction here, this is very closely related to the problem of the allocation of income earned during the period of administration of an estate. This problem can be stated: when the residue of an estate, after payment of debts, costs of administration, and legacies, is bequeathed in trust for certain named beneficiaries, there is income earned upon the money that is eventually used to pay the debts, administration costs, and legacies. This income

accrues during the period of the administration. Should it constitute a part of the corpus, or should it be dispersed to the income beneficiaries as income?

The law in American courts is by no means settled on this point. There exists today a sharp divergence of opinion, which is irreconcilable; one view is titled the Massachusetts rule, the other is known as the English rule.

It is the general rule in the overwhelming majority of American and English courts that, in the absence of directions in the will to the contrary, a life beneficiary of a residuary trust is entitled to the income thereon from the date of the testator's death. *Sargent v. Sargent,* 103 Mass. 297 (1869); *Williamson v. Williamson,* 6 Paige 298 (N. Y. 1837); *Wachovia Bank & Trust Co. v. Jones,* 210 N. C. 339, 186 S. E. 335 (1936); In re *Leitsch,* 185 Wis. 257, 201 N. W. 284 (1924); *Taylor v. Clark,* 1 Hare 161, 66 Eng. Rep. 990 (1841); *Angerstein v. Martin,* Turn. & R. 232, 37 Eng. Rep. 1087 (1823).

The so-called Massachusetts rule, which is set out in 2 SCOTT, TRUSTS § 234.3 (1939), states that unless it is otherwise directed by the testator in his will, any income earned by the estate during the period of administration, including the earnings upon the testator's property used to pay the debts and costs of administration, should be treated as income and not as principal. This rule is based upon a long line of well-reasoned Massachusetts decisions. *Old Colony Trust Co. v. Smith,* 166 Mass. 500, 165 N. E. 657 (1929); *McDonough v. Montague,* 259 Mass. 612, 157 N. E. 159 (1927); *Cushing v. Burrell,* 137 Mass. 21 (1884); *Treadwell v. Cordis,* 71 Mass. 341 (1855); *Lovering v. Minot,* 63 Mass. 151 (1851); *Minot v. Amory,* 56 Mass. 377 (1848). These early Massachusetts cases based their rejection of the English rule upon a studied argument. The court in *Minot v. Amory, supra,* held that the residue was to be considered as formed, subject to the payment of debts, legacies, and charges, and that income was to be computed and payable at and from the death of the testator. The court said, 56 Mass. at 382:

> This carries a clear implication, that the formation of the trust fund, for purpose of yielding income, should be coevil with the time from and after which income would be required from such fund . . . from decease of testator; and it manifests his intention, expressed by the will, that the income of his whole property, not necessary for the payment of debts and legacies, should go to form that fund. . . . The income accruing after decease of testator was properly received by the executor; but it should be indicated as income in their executorship account.

This same result was reached in *Lovering v. Minot, supra,* where the court likewise based its decision on the intent of the testator. The court stated that if it were to rule that the income during the period of administration should go to the corpus, it would remove it from the first taker selected by the testator, and apply it to an accumulation for

the benefit of the secondary recipient. The court pointed out that it was contrary to the presumed intention of the testator to narrow the benefit intended for the first object of his bounty, for the benefit of one more remote.

In the leading case of *Treadwell v. Cordis, supra,* these holdings were re-affirmed. It was pointed out that in the absence of words to the contrary, the residue must be considered as formed at the moment of the death of the testator. Where the gift of the residue is after the payment of debts, charges, and legacies, the residue is to be formed subject to these payments even though they are made at a later time.

Later cases have not departed from these earlier decisions as can be seen in *McDonough v. Montague, supra.* And in 1929, the Massachusetts rule was crystallized in *Old Colony Trust Co. v. Smith, supra,* which was a case similar to the instant one. There the testator gave "the rest, residue and remainder" of his estate in trust for investment and reinvestment for collection and payment of the income as directed, and for final distribution of the principal of the trust. The controversy arose as to the amount which represented the income derived from funds used to pay the debts, legacies, and expenses of administration between the date of the testator's death and the time the trust estate was turned over to the trustee. The precise question was whether that sum ought to be distributed to the beneficiary of the trust fund as income or added to and incorporated into the principal of the residue. The court reviewed the Massachusetts decisions on the problem, pointed out the reasons as stated above on which the Massachuetts rule was founded, and declared the unwillingness of the court to deviate from that precedent.

The Massachuetts rule has been adopted in North Carolina, the state in which the instant case has arisen, New York, Ohio, Rhode Island and Wisconsin. *Cannon v. Cannon,* 225 N. C. 611, 36 S. E. (2d) 17 (1945); *Wachovia Bank & Trust Co. v. Jones, supra; Davidson v. Miners' & Mechanics S. & T. Co.,* 129 Ohio St. 418, 195 N. E. 845 (1935); *City Bank Farmers' Trust Co. v. Taylor,* 53 R. I. 126, 163 Atl. 734 (1933); In re *Leitsch, supra.* All of these cases adhere to and reiterate the reasoning of the Massachusetts courts.

New York, in the leading cases of Matter of *Benson,* 51 Sickels 499 (N. Y. 1884), and *Williamson v. Williamson, supra,* had adhered to the English rule. But, in 1931, New York passed a statute adopting the Massachusetts rule. N. Y. PERS. PROP. LAW § 17-b. The reason for the New York amendment, as pointed out in *City Bank Farmers' Trust Co. v. Taylor, supra,* a Rhode Island case, was to simplify the computation of the residue where it is given in trust for certain named beneficiaries. The amendment provides that income earned on the funds during the period of administration should be paid to the income beneficiary. The former practice of capitalizing this income was claimed to

be unduly complicated and imposed too great a burden upon the attorneys and accountants, a further reason why the courts which follow the Massachusetts rule adhere to it. A statute similar to the one in New York, also has been passed in Maryland. Md. Laws, c. 672 (1949).

The *Restatement of Trusts* has adopted the English rule, and declares that income received during the period of administration, obtained from property which subsequently is used in paying debts, legacies, and costs of administration, and which has not been applied to the payment of interest on such debts and costs, should be taken by the trustee and added to the principal. RESTATEMENT, TRUSTS § 234(g) (1935). (It must be noted that the instant case states that the *Restatement* has adopted the Massachusetts rule; however, it is clearly seen that this is the more general allocation rule that the court is referring to.)

This rule, adhered to by many American courts, is founded upon early English decisions, and is still followed by the courts of that nation. *McEuen v. Phelps,* [1913] 2 Ch. 704; *Allheusen v. Whittell,* L. R. 4 Eq. 295 (1867); *Hewitt v. Morris,* Turn. & R. 241, 37 Eng. Rep. 1090 (1824); *Angerstein v. Martin, supra.* The English cases were discussed in the early American case of *Williamson v. Williamson, supra,* 6 Paige at 304 (which has been overruled by the New York statute), where the court said:

> The result of the English cases appears to be . . . that in the bequest of a life estate in a residuary fund, and where no time is prescribed in the will for the commencement of the interest or the enjoyment of the use or income of such residue, the legatee for life is entitled to the interest or income of the clear residue, as afterwards ascertained, to be computed from the time of the death of the testator.

This view has been affirmed in the District of Columbia and the states of Connecticut, Delaware, Kentucky, New Hampshire, New Jersey, and Virginia. *Proctor v. American S. & T. Co.,* 98 F. (2d) 599, (D. C. Cir. 1938); *Bridgeport Trust Co. v. Fowler,* 102 Conn. 318, 128 Atl. 719 (1925); *Bradford v. Fidelity Trust Co.,* 12 Del. Ch. 56, 104 Atl. 777 (1918); *Grainger Executors & Trustees v. Pennebaker et al.,* 247 Ky. 324, 56 S. W. (2d) 1007 (1932); *White v. Chaplin,* 84 N. H. 208, 148 Atl. 21 (1929); *Trust Co. of New Jersey v. Glunz,* 121 N. J. Eq. 593, 191 Atl. 795 (1937); *Rosenberger v. Rosenberger,* 184 Va. 1024, 37 S. E. (2d) 55 (1946).

Proctor v. American S. & T. Co., supra, is one of the leading cases supporting the English rule. There also a testator died possessed of a large estate, which he bequeathed in trust, with direction to convert all "rest, residue, and remainder" of his estate into cash and sound securities, the net income to be paid to several named beneficiaries, with remainders over. The court pointed out that the difference between the two rules lies in their respective interpretations of the words "rest, residue, and remainder." It stated that when a testator sets up a residuary

trust and directs that the residue of his estate be transferred to such trust, and that the life beneficiaries are to take the net income therefrom, the testator's intention is just as he has literally expressed it. The court reasoned that the portion of the estate which has not been expressly disposed of by will after the payment of administration expenses, debts, and legacies is the residue actually intended, and until that time it cannot be ascertained. It is impossible to have any income on the residue before the residue is ascertained.

It is upon this meaning of the term residue that the adherents to the English rule have based their decisions. The courts have reasoned that the income from assets which are later used to pay debts and legacies is not income from the residue, but income from property which never becomes a part of the residue because it is given to other uses. Hence, the income itself is a part of the residue. So the income received from property sold to pay costs of administration, debts, and legacies is not to be paid to the income beneficiaries, but is to be added to the corpus of the residuary estate.

The *Proctor* case contained an excellent discussion of the words "rest, residue and remainder." The court, in commenting on *Stanley v. Stanley,* 108 Conn. 100, 142 Atl. 851 (1928), quoted from the Connecticut decision in which the court very concisely pointed out the definition of those words:

> The residue is that portion of an estate that remains after the payment of debts, legacies, and administration charges. Into it, and forming a part of it, must go . . . the income and accretions of the estate which are undisposed of. The residue includes every part of the etsate not otherwise disposed of by the will.

The court, in the *Proctor* case, further felt that the difficulty of computation, which is advanced by the adherents of the Massachusetts rule as a reason for rejecting the English rule, would not justify a breaking away from "authority, reason, or fairness to parties."

Both the rules seem to be well-reasoned, yet irreconcilable. Since the divergence rests simply upon the different interpretations of the word "residue," it is difficult to determine which is the better rule based upon that consideration alone. However, the followers of the Massachusetts rule attempt to point out that the intent of the testator is to benefit those closer to his heart, and place the English rule interpretation on the word "residue" would be to benefit those who were more remote in his affection and esteem. Since there is this presumed intent of the testator, coupled with the practical consideration of the facility of computation, it is submitted that the Massachusetts rule, as is applied in the principal case, is the better doctrine.

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