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Recent Decisions

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exceptions it is evident that there is no competition in the classical sense, so that sales below the contract stipulations could not be unfair competition. The exceptions define the principle.

A Wisconsin case bears out this proposition. The state statute exempted sales by cooperatives from the provisions of the fair trade restrictions. This exemption was declared unconstitutional in a case where a cooperative was selling in competition with other retailers.[94] Still within the logical framework is another decision[95] which held that exclusive sales by a cooperative to its own retail members below the fair trade price was not a violation of the statute. There was no horizontal competition with other wholesalers, as the cooperative was merely the purchasing and distributing agent of its member retailers.

Summarizing, several dominant concepts evolve. There can be no over-all theory of enforcement applicable to all phases of the non-signer clauses. Attempts to apply the theories of tortious interference with contractual relations and the imposition of equitable servitudes upon chattels have failed. The former theory is inapplicable where the interference with the contract was not such as would normally be considered tortious, or where, if tortious acts did exist, they were too remote from the contract to cause any proximate interference. The equitable servitude theory cannot be invoked because notice before purchase is not required to meet the purposes of the law, and the enforcement of the restrictions does not inhere in the ownership of the fair-traded commodities. The theory of enforcement has been found to be twofold: as to the interest of the producer or owner of the brand or trade-name, it is the protection of his property of good will evidenced by his trade name; as to the competing retailer or distributor, it is the prevention of unfair practices by his competitors.

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RECENT DECISIONS

ADMINISTRATIVE LAW—LICENSING FOR RADIO BROADCASTING—MONOPOLISTIC PRACTICES BY NEWSPAPER COMPANY APPLICANT AS AFFECTING PUBLIC INTEREST AND QUALIFICATION.—*Mansfield Journal Company v. Federal Communications Commission*, ... F. (2d) .... (D. C. Cir. 1950). The Mansfield Journal Company, publisher of the only newspaper in the city of Mansfield, Ohio, appealed from a decision of the Federal Communications Commission denying the com-

94 Weco Products Co. v. Reed Drug Co., 225 Wis. 474, 274 N. W. 426 (1937).

95 Welch Grapejuice Co. v. Frankford Grocery Co., 36 Pa. D. & C. 653, cited in 6 U. OF NEWARK L. REV. 177, 204 (1941).

pany's applications for the construction of AM and FM radio stations in that city. The only other medium of mass communication in the city was a radio station which was under the direction and control of another owner. The radio station had been in competition with the newspaper for the local advertising business. The Commission found that the newspaper company had attempted to coerce certain advertisers into exclusive advertising contracts with the newspaper. The coercive device used was the threat of exclusion of the radio advertiser from advertising space in the newspaper. Other monopolistic acts of the newspaper company were evidenced by its refusal to print the program log of the radio station or any comments concerning the radio station which were other than unfavorable. The Commission concluded that these actions were taken with the intent of suppressing competition and securing a monopoly in the dissemination of news. Under the belief that these practices would continue, if not increase, with the acquisition by the company of a radio station, the Commission refused to issue the licenses. The specific reasons for the rejection of the applications were that to grant them would be "inconsistent with the public interest and that it [the applicant] was unqualified."

The appellant made five major objections to this action by the Commission, which the Court of Appeals for the District of Columbia Circuit considered, and overruled, seriatim.

The first objection, the resolution of which constitutes the chief significance of this case, was that consideration by the Commission of the newspaper's past activities of a monopolistic nature was beyond the Commission's jurisdiction, and that any attempt to enforce the findings based thereon would be ultra vires of the Commission.

The Communications Act, 48 STAT. 1083 (1934), 47 U. S. C. § 307(a) (1946), contains the standard to be applied by the Commission in granting or refusing a license. This section provides that: "The Commission, if public convenience, interest, or necessity will be served thereby . . . shall grant to any applicant therefor a station license provided for by this chapter." The Supreme Court, in *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 137, 60 S. Ct. 437, 84 L. Ed. 656 (1940), described the criteria contained in the above section as the "touchstone for the exercise of the Commission's authority."

Despite the apparently broad scope of the standard provided, it was not intended thereby to permit the Commission arbitrarily to deny a license. *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 53 S. Ct. 627, 77 L. Ed. 1166 (1933). By way of specification of the contents of the concept of "public convenience and interest," the Supreme Court stated, in *National Broadcasting Co. v. United States*, 319 U. S. 190, 216, 63 S. Ct. 997, 87 L. Ed. 1344 (1943), that an important element was "the ability of the licensee to render the best practicable service to the community." In looking into the character of the applicant, the Commission was within the mandate of the Communications Act which makes such consideration relevant. 48 STAT. 1084 (1934), 47 U. S. C. § 308 (1946). *Mester v. United States*, 70 F. Supp. 118 (E. D. N. Y. 1947), *aff'd.*, 332 U. S. 749, 68 S. Ct. 70, 92 L. Ed. 336 (1947).

The court thought an appraisal of the applicant's past actions would be an appropriate, if not a necesssary part of the evaluation of the character of the applicant. As a result of such appraisal, the Commission made a finding of fact to the effect that the past history of the applicant had been one of attempting to suppress competition and to establish a monopoly in the field of news dissemination and advertising. Since the Commission concluded that it would be contrary to the public interest to grant a license to a newspaper which had engaged in such practices, it became material, on appeal, to determine the propriety of this application of the standard supplied by Congress. The legislative intent as to the disqualifying effect of past monopolistic practices by an applicant was declared by the Supreme Court in *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U. S. 470, 60 S. Ct. 693, 84 L. Ed. 869 (1940). In that case, the Court stated that Congress intended that there be competition in the radio broadcasting industry. Some confusion on this point might arise upon a superficial examination of the Communications Act, which does treat communication by telephone and telegraph as a common carrier activity and regulates them accordingly. But no such regulations were placed on the radio broadcasting industry which, prior to the Communications Act, had been within the area of free competition. The *Sanders Brothers Radio Station* case removes all doubt and affirms the proposition that Congress did not intend to abandon the doctrine of free competition in this industry.

The appellant's assertion that enforcement by the Commission of this public policy would be an ultra vires enforcement of the antitrust laws was denied by the court, on the ground that the legality or illegality of the questioned monopolistic practices, in the strict sense of the anti-trust laws, was not in issue before the Commission. As the Commission stated, monopolistic practices of this nature would be contrary to the public interest even if not in terms proscribed by the anti-trust laws. The Communications Act, 48 STAT. 1086 (1934), 47 U. S. C. § 311 (1946), provides in substance that one who has been finally adjudged guilty of monopolistic practices under the anti-trust laws may be refused a license on these grounds. That this provision of the Act does not preclude the Commission's consideration of the question of monopolistic practices other than those which have been adjudged criminal was decided in *National Broadcasting Co. v. United States*, 319 U. S. 190, 223, 63 S. Ct. 997, 87 L. Ed. 1344 (1943), where in the majority opinion Mr. Justice Frankfurter stated:

> Nothing in the provisions or history of the Act lends support to the inference that the Commission was denied the power to refuse a license to a station not operating in the "public interest," merely because its misconduct happened to be an unconvicted violation of the anti-trust laws.

The *National Broadcasting Co.* case may be distinguished from the present case, in that general regulations applicable to the industry as a whole were involved there, while here the question was one of original licensing. Notwithstanding this distinction as to the type of administrative function involved, the court thought the reasoning in the *National Broadcasting Co.* case should be controlling here. The decision in the present case thus becomes significant as representing judicial recognition of the power of the Commission to inquire into past monopolistic practices in connection with its function of licensing as well as in its function of laying down general regulations for the entire industry.

The appellant's second objection was that the Commission's finding of an intent and practice of suppressing competition was equivalent to conviction of a crime, and that the withholding of the license under such a finding was, in effect, the imposition of a penalty. The court repudiated this contention by reiterating that the important consideration was not the guilt of the applicant under the anti-trust laws, but the qualification of the applicant. Its conduct became material only in so far as it affected the question of qualification, and the finding of disqualification of the applicant disposed of the allegation that a penalty had been imposed. A penalty would arise only if a fully qualified applicant were denied a license without sufficient reason. Thus this objection failed when the court upheld the reasonableness of the standard or considerations employed in the denial of the license.

Denial of the right of free speech was the next objection relied upon. The applicant asserted that the refusal to grant the license on the ground that the newspaper had refused to print certain things was a violation of the First Amendment of the United States Constitution. The court reassured the applicant that its application had not been denied because it was a newspaper, but because it had used its position as a newspaper to attempt a monopoly in the field of news dissemination. The court here relied upon the opinion of Mr. Justice Black in *Associated Press v. United States,* 326 U. S. 1, 20, 66 S. Ct. 6, 90 L. Ed. 489 (1945), wherein, after stating the policy of the First Amendment as one promotive of and concerned with the widest possible dissemination of news and information—a free press in a free society—he went on to say:

> Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.

The court emphasized the fact that the First Amendment does not serve to immunize the press from the anti-trust laws. *Associated Press v. United States, supra.* A realistic attitude toward the problem of free speech was exhibited by the court in the instant case when it stated: "Only by keeping the dissemination of news free from monopoly can the constitutional guarantee of free speech and free press ever be fully achieved." This view recognizes the simple but often overlooked fact that the over-all conditions precedent to free speech must be fulfilled before giving vent to an excessively individualistic clamor for exclusive recognition. This attitude is in consonance with the attitude toward free speech expressed by the majority opinions of the Supreme Court for the past decade.

The substantial evidence rule was used by the court to dispose of the fourth objection: that the findings of the Commission were capricious and unsupported by the evidence.

The question of sufficiency of notice was then raised. The applicant alleged that it was not informed by the designation for the license hearings that the question of past monopolistic practices was to be raised. The court relied upon the analogy between a designation for hearing, and the place of the pleadings in modern code procedure. The purpose of each is reasonably to apprise the party of the issues involved. Appealable error results only when they contain or constitute a prejudicial deficiency. *New York Central & H. R. R. Co. v. Interstate Commerce Commission,* 168 Fed. 131 (C. C. S. D. N. Y. 1909). Applying these criteria, the court concluded that the applicant was given ample notice by the language of the designation for hearing.

In summary, the decision in the present case constitutes a recognition of the power of the Federal Communications Commission to inquire into past monopolistic practices of an applicant for a radio broadcasting license. Heretofore, the power had been judicially upheld when exercised in the formulation of general regulations for the industry. By the use of such investigations the community receives the benefits of preventive jurisprudence in the attempt to solve the problem of monopoly. Those familiar with the inadequacy of remedial legislation in carrying out the policy of the anti-trust laws should welcome this extension of the application of preventive measures. The degree of concentration of control in the newspaper field serves to emphasize the importance of free radio in supplying information to a democratic society. The constitutionally guaranteed right of free speech becomes more meaningful and beneficial with every increase in the diversity and comprehensiveness of the information available to the exercisers of such a right.

Francis W. Collopy

AIR LAW—TRESPASS BY AIR TRAFFIC—COMMERCE CLAUSE AS APPLIED TO AERONAUTICS.—*Strother et al. v. Pacific Gas & Electric Co. et al.*, ...Cal....., 211 P. (2d) 624 (1949). The plaintiff alleged that while operating his private airplane, in which his father was a passenger, he attempted to land at Patrick Air Field, that due to the defendants' negligence, the plane collided with high voltage wires of the defendant company, and that the collision and subsequent crash onto the airfield resulted in serious injury to the plaintiff, the death of his father, and the destruction of the airplane. The manager and operator of Patrick Air Field was also named as a defendant.

The defendant company was charged with having constructed and maintained a system of poles and high-power lines in violation of the rules of the United States Civil Aeronautics Administration, and was further charged with negligently having failed to display any signs or warnings of the danger of said wires. The manager-operator of the airport was charged with negligence in failing to display signs or give warning of the dangerous high power lines to the patrons of the airport.

It was further alleged that Patrick Air Field had been in operation for seventeen years; that nine years subsequent to its establishment, the defendant Pacific Gas & Electric Company erected, on its easement nearby, poles and wires extending twenty-six feet above the ground in dangerous proximity to the landing field; that plaintiff and other pilots had, for more than nine years, used the airlane over the Pacific Gas & Electric Company's property; and that the public and the Patrick Air Field had acquired prescriptive rights to the airlane over the adjoining property of the Pacific Gas & Electric Company.

The court held that the complaint failed to state a cause of action. The negligence count failed because the defendants owed no duty toward the plaintiff to display signs or warn him of the danger of the wires and poles which were erected and maintained on private property. The allegations of prescriptive rights were held ineffective on the ground that the plaintiff could not assert a prescriptive right to an airlane across which high-power lines were strung for the reasonable and beneficial use and enjoyment, by the defendant company, of its own easement rights.

The court's holding that the plaintiff was a trespasser in the airspace occupied by the Pacific Gas & Electric Company's poles is not, as might appear at first glance, in opposition to the present trend away from the ancient maxim, *"Cujus est solum ejus est usque ad coelum."* In the case of *Swetland et al. v. Curtiss Airports Corporation et al.*, 55 F. (2d) 201 (6th Cir. 1932), the court traced this maxim back to *Baten's Case*, 9 Co. Rep. 53 (b), 77 Eng. Rep. 810 (1611), where a landowner had been deprived of airspace by an overhanging building. The *Swetland* case held that the landowner's rights must be considered in relation to the necessities of the moment. The landowner has a dominant right of occupancy for purposes incident to his use and enjoyment of the surface. See Lashbrook, *The "Ad Coelum" Maxim as Applied to Aviation Law*, 21 NOTRE DAME LAWYER 143 (1946).

It is said in *Rochester Gas & Electric Corporation v. Dunlop*, 148 Misc. 849, 266 N. Y. S. 469 (1933), that outside of the sovereign police power, there is no basis for a rule abridging the exclusive rights of the owner of land to the space above it, to such a height as he may utilize to build a structure on the land. The court further reasons that when an airplane strikes a tower, the rights and responsibilities of the respective parties are exactly the same as they would have been had the airplane struck the ground below, instead of the tower.

In *Capitol Airways, Inc. v. Indianapolis Power & Light Co.*, 215 Ind. 462, 18 N. E. (2d) 776 (1939), cited in the principal case, the power company erected steel towers ninety feet in height, within 100 feet of an airport. The airport sought damages resulting from destruction of its usefulness, but the court held that the company's power line did not interfere with any of the airport owner's rights. The owner of property is under no duty to keep the premises safe for a trespasser who comes without enticement or invitation.

As a general rule, a landowner's right to the surface is subject to the public right of flight in the airspace above so long as it does not interfere with the effective use of the surface. This is the theory of the Uniform Aeronautics Act, which is in effect in twenty states. 11 UNIFORM LAWS ANN. 160, §§ 3, 4 (1938).

In regard to the rules of the Civil Aeronautics Administration, which plaintiff claimed were violated, the court held that these rules did not apply because (a) the pertinent rule did not come into effect until three years after the poles and wires were erected and (b) even if it had been in effect at the time of construction, it would be inapplicable, since there was no allegation that the owner of Patrick Air Field was engaged in interstate commerce.

Plaintiff further maintained, however, that the Federal Government has exclusive sovereignty of the air throughout the United States, and may exercise control of air traffic therein, whether it consists of interstate or intrastate commerce. The court, however, rejected this contention, stating that the control of intrastate air traffic is within the police power of the state. It substantiated this position by references to the Federal Air Commerce Act of 1926, 44 STAT. 568 (1926), as amended, 49 U. S. C. § 171 *et seq.* (1946), and interpreted the Act as leaving with the states the power and authority to regulate the navigation, registration and licensing of aircraft where such aircraft are used for pleasure or commercial flights solely within the boundaries of a state. California held similarly on the question of intrastate air traffic in *Parker et al. v. James E. Granger, Inc.*, 4 Cal. (2d) 668, 52

P. (2d) 226 (1935), wherein the court ruled that under the Federal Constitution and state statutes, California was vested with exclusive power to govern the operation of aircraft in intrastate flights. In the Minnesota case of *Erickson v. King,* 218 Minn. 98, 15 N. W. (2d) 201, 204 (1945), the court said:

> The necessity for a unified, integrated, centralized system of control of all classes of aerial traffic in the common "air ocean" above the state, as a safety measure, calls for centralized control by the state government functioning in its sovereign capacity. That power of control is subject only to the constitutional powers of congress over interstate traffic. . . .

A contrary view is stated in In re *Veterans' Air Express,* 76 F. Supp. 684 (N. J. 1948). There the court said, basing its reasoning on the Civil Aeronautics Act of 1938, 52 STAT. 973 (1938), as amended, 49 U. S. C. § 401 *et seq.* (1946), that there could be no air pocket so closed and confined within the geographical limits of any state as to be incontiguous with the interstate or international highways of the air, and that Congress therefore has full power to control all aviation activity. The same view is taken in *Escanaba Company v. Chicago,* 107 U. S. 678, 682, 2 S. Ct. 188, 27 L. Ed. 442 (1883), where the Court stated that there is no part or area of the navigable atmosphere which is not a part of ". . . a continuous channel for commerce among the states or with foreign countries."

Rosenhan v. United States, 131 F. (2d) 932 (10th Cir. 1942), in accord with In re *Veterans' Air Express, supra,* held that federal statutory precautions requiring a certificate of airworthiness of all airplanes do not transcend the powers granted to Congress over interstate commerce or unduly encroach upon the powers reserved to the sovereign states.

Thus the question as to control of interstate and intrastate air traffic appears to be undetermined on the state court level, with the federal decisions favoring complete control of the air by the Federal Government, on the theory that there is no feasible method by which air may be allocated to certain zones or states.

William J. Verdonk

CONFLICT OF LAWS—LIMITATION OF ACTIONS.—*Lewis v. Reconstruction Finance Corporation,* 177 F. (2d) 654 (D. C. Cir. 1949). The plaintiff's decedent met his death in Nebraska as the result of the alleged negligence of the defendant's predecessor, the Defense Plant Corporation. The Nebraska wrongful death statute provided for a limitation period of two years. The plaintiff, administratrix of the decedent's estate, sued in the District of Columbia, where the statute of limitations on a similar right of action was one year. This suit was commenced twenty-two months after the alleged negligence occurred. The question arose as to whether the District of Columbia statute, when asserted as an affirmative defense, constituted a bar to the plaintiff's right of action. The district court held that the action was barred, but the Court of Appeals reversed the decision.

The District of Columbia statute peculiarly limited itself to ". . . an injury done or happening within the limits of the District of Columbia . . . ." D. C. CODE § 16-1201 (1940). This fact prompted the court to hold that it was not possible for the local statute to affect a right resulting from wrongful death in another state. However, the broad, controversial subject of local public policy versus vested rights comprised a substantial portion of the court's opinion, and is worthy of consideration here, albeit this portion may be dicta.

It is generally conceded that pleading the statute of limitations is a matter of procedure and, according to conflict of laws principles, is governed by the law of the forum. GOODRICH, CONFLICT OF LAWS 240 (3d ed. 1949). But where the right of action is purely statutory, as in the case at hand, and the statute which creates the right also prescribes the period of limitation for enforcing the right, the limitation as well as the right created has been held by many courts to be a matter of substantive law and not merely procedure. GOODRICH, *op. cit. supra,* at 243. The theory is, as stated by the court in the instant case, that the period is a ". . . limitation of the liability itself as created by the statute, and not of the remedy alone." Professor Beale has considered the result of this theory where the period set by the statute of the state in which the right accrued is shorter than that prescribed by the forum —a situation which is the converse of the present case. He states that, "The consequence is, of course, that after the designated period has elapsed the right is gone and no action can be maintained either in the jurisdiction in which the rights accrued or elsewhere." 3 BEALE, CONFLICT OF LAWS 1627 (1935).

It is pointed out in GOODRICH, *op. cit. supra,* at 243, that "A difficult point in this class of cases is to determine whether the limitation is in reality one upon the right." The court in the case at hand endorses the view that purely statutory rights of action which have interwoven statutes of limitation give rise to a limitation which is itself a part of the substantive right. From this the court concludes that when the period designated by the state in which the right arose has not elapsed, the right remains despite the expiration of a shorter limitation on similar rights in the forum. There is a minority view which would apply the statute of limitations of the forum, on the grounds that the local statute manifests a public policy which serves to overcome the effect of the fact that the right still exists in the state where it accrued. *Tieffenbrun v. Flannery,* 198 N. C. 397, 151 S. E. 857 (1930). Also, the statute of limitations in the forum has been construed to restrict the exercise of the foreign-created right. *Rosenzweig v. Heller,* 302 Pa. 279, 153 Atl. 346 (1931).

If the statute of limitations is a part of the substantive right in these minority cases, it would appear that the effect of such decisions is to deny to sister states the enforcement of substantive rights created under their laws. The Supreme Court has not expressly ruled that the Full Faith and Credit Clause can compel recognition of the foreign-created right when sued upon in a forum which declares a policy against the longer limitation. Until it does, it must be assumed, as a practical matter, that the forum may refuse to hear the plaintiff's cause. The Supreme Court has held that substantive rights acquired under a statute in one state, which are a *defense* to an action brought in another state, cannot be denied full faith and credit despite the fact that such matters are merely procedural with the forum. *John Hancock Mutual Life Ins. Co. v. Yates,* 299 U. S. 178, 57 S. Ct. 129, 81 L. Ed. 106 (1936). In other instances the Supreme Court has determined that the interests of the state where the right accrued and the interests of the forum must be balanced, and that the local interest must outweigh that of the sister state before the public policy contention will be allowed to prevail. For example, in the case of *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.,* 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178 (1934), a contract was made and performed in Tennessee while the mere payment of money was to take place in the forum. It was held that Mississippi policy could not ignore the right which had lawfully vested in Tennessee, since the interest of the forum had but slight connection with the substance of the obligation.

In further clarification of the Supreme Court's position, Chief Justice Stone, in *Pink v. A. A. A. Highway Express,* 314 U. S. 201, 210, 62 S. Ct. 241, 86 L. Ed. 152 (1941), said:

> . . . the full faith and credit clause is not an inexorable and unqualified command. It leaves some scope for state control within its borders of affairs which are peculiarly its own . . . When such conflict of interest arises it is for this Court to resolve it by determining how far the full faith and credit clause demands the qualification or denial of rights asserted under the laws of one state, that of the forum, by the public acts and judicial proceedings of another.

Perhaps the difficulty would be minimized were the state courts to accept, generally, the theory that the right having once vested in the state where the wrong occurred, the forum, by giving it cognizance, would not be subjecting itself to foreign laws violative of its own local policy, but would merely be acknowledging the force and effect of an existing right. This demands, of course, the modification made in *Loucks v. Standard Oil Co. of New York,* 224 N. Y. 99, 120 N. E. 198 (1918), that the forum cannot be expected to recognize a right which violates fundamental principles of justice, or prevalent conceptions of good morals. Mr. Justice Jackson places great reliance upon enforcement of the Full Faith and Credit Clause as a means of halting the abuses of the local policy doctrine. In Jackson, *Full Faith and Credit—the Lawyer's Clause of the Constitution,* 45 COL. L. REV. 1, 34 (1945), he expresses the following unofficial opinion:

> . . . . the full faith and credit clause is the foundation of any hope we may have for a *truly national system* of justice, based on the preservation but better integration of the local jurisdictions we have. (Emphasis supplied.)

In any event, the statutes of the District of Columbia and Nebraska relating to different periods of limitations do not of themselves, as pointed out by the court in the instant case, ". . . manifest any conflict in policy between the two jurisdictions." This being so, the application of general conflict of laws principles which look to the law of the state in which the substantive right arises would seem to be a proper basis for the statement of the court that the plaintiff's action was not barred by the expiration of the District of Columbia statute of limitations.

Vincent C. A. Scully

CONSTITUTIONAL LAW—POLICE POWER—MANDATORY MINIMUM PRICE MARK-UPS.—*Schwegmann Brothers v. Louisiana Board of Alcoholic Beverage Control,* .... La. ...., 43 So. (2d) 248 (1949). The plaintiff, a commercial partnership, operated a retail market in which it merchandised groceries, alcoholic beverages and other items. The partnership had been charged with the violation of certain provisions of an act the title to which commenced, "To license, regulate and control all traffic in beverages containing more than six per centum of alcohol by volume." La. Acts 1948, No. 360, §§ 1(s), 24, 26. This action was instituted to enjoin the enforcement of an order of the Board suspending the plaintiff's off-premise retail liquor license for thirty days. The only violation charged was the selling of alcoholic beverages at prices below the minimum price mark-up required of retailers by the statute. The violation was admitted by the plaintiff who challenged the statute as unconstitutional on various grounds.

Plaintiff's initial action was to obtain a temporary restraining order against the defendant in the civil district court. After a trial on the merits, the court rendered a judgment which set aside the order suspending the plaintiff's license. It was concluded that the pertinent sections of the Act were unconstitutional in that they delegated legislative power to private persons. On appeal the Supreme Court of Louisiana affirmed the judgment, but on different grounds. In holding that the Act violated the due process clauses of the state and federal constitutions, the court said:

> . . . the mandatory minimum mark ups (Sections 1(s), 24 and 26) do not tend, in a degree that is perceptible and clear, toward the accomplishment of the announced purpose of the statute, namely the regulation and control of the liquor traffic so that it "may not cause injury to the economic, social and moral well-being of the people of the State" . . . [and] are . . . unreasonable within the contemplation of the state's police power. . . .

The majority of the court reasoned that since the Act did not bind the distillers and was not applicable to beer or "over the bar" sales, the announced purpose of preventing unfair practices was not accomplished.

The issue involved here is whether the police power of the state in its control over intoxicating liquors is broad enough to prescribe mandatory minimum mark-up provisions; whether, specifically, such provisions have a substantial relation to a legitimate legislative end. The Supreme Court of Louisiana affirmed the holding of the lower court that the statute was unconstitutional, but over a vigorous dissent. In order to resolve this question, the extent of the state's power over liquor must be examined.

In a majority of states today it is well settled law that there is no inherent right in a citizen to sell intoxicating liquors by retail; it is a privilege of a citzen of the state. *Crowley v. Christensen,* 137 U. S. 86, 11 S. Ct. 13, 34 L. Ed. 620 (1890). Furthermore, being a noxious business, which is dangerous to the community, it may be entirely prohibited, or permitted under such conditions as will most effectively limit its evils. *Mugler v. Kansas,* 123 U. S. 623, 8 S. Ct. 273, 31 L. Ed. 205 (1887). The power to prohibit it absolutely also includes the authority to regulate it in a lesser degree. *State Board of Equalization v. Young's Market Co.,* 299 U. S. 59, 57 S. Ct. 77, 81 L. Ed. 38 (1936). As to the manner and extent of regulation, the discretion of the legislative will is controlling. *Allyn's Appeal,* 87 Conn. 734, 71 Atl. 794 (1909). And the right to regulate is "practically limitless." *Meehan v. Board of Excise Commissioners,* 73 N. J. L. 382, 64 Atl. 689 (1906). Thus, the state may adopt measures reasonably appropriate to effectuate these controls, and may exercise full police power authority in respect to them. *Samuels v. McCurdy,* 267 U. S. 188, 45 S. Ct. 264, 69 L. Ed. 568 (1925); *Clark Distilling Co. v. Western Maryland Ry. Co.,* 242 U. S. 311, 37 S. Ct. 180, 61 L. Ed. 326 (1917); *Seaboard Air Lines Ry. v. North Carolina,* 245 U. S. 298, 38 S. Ct. 96, 62 L. Ed. 299 (1917).

As to the extent to which the police power over liquor may legitimately be exercised, two views have been expressed. The first, followed in the instant case, rests upon the premise that when the liquor traffic is lawful, all regulation must be pursuant to a legitimate exercise of the police power, which includes the respecting of constitutional guarantees. *State* ex rel. *Galle v. City of New Orleans,* 113 La. 371, 36 So.

999 (1904). This case interpreted a statute, which was enacted under a constitutional provision, LA. CONST. Art. 188 (1898), granting the state express power to regulate and control liquor. Furthermore, it has been held that although traffic in intoxicating liquors, where permitted or tolerated, is as lawful as any other business or property and is as fully entitled to protection, yet the liquor traffic is admittedly dangerous to public health, safety and morals. *Pabst Brewing Co. v. Crenshaw,* 198 U. S. 17, 25 S. Ct. 552, 49 L. Ed. 925 (1905); *Mugler v. Kansas, supra.* Therefore, it is essentially within the regulation and protection of the police power. *South Carolina v. United States,* 199 U. S. 437, 26 S. Ct. 110, 50 L. Ed. 261 (1905). Other courts have refused to apply the same degree of adherence to constitutional limitations. In *Foster v. Kansas,* 112 U. S. 201, 5 S. Ct. 8, 28 L. Ed. 696 (1884), the Court held that the character of the liquor business is such that it cannot invoke those constitutional guarantees which protect other personal or property rights. The Supreme Court of North Carolina in *Paul v. Washington,* 134 N. C. 363, 47 S. E. 793 (1904), recognized that what would normally be a deprivation of the use of property without due process, or an infringement of personal liberty against one engaged in a useful trade, is not necessarily such when considered in connection with the property of one engaged in the liquor traffic. Accord: *State* ex rel. *George v. Aiken,* 42 S. C. 222, 20 S. E. 221 (1894).

Statutes similar to the one in the principal case have been construed by other courts. In this regard, it is well to note the words of one writer, FREUND, THE POLICE POWER 194 n. 2 (1904), who said: "There is hardly any other branch of law in which there has been so much shifting and reversing of policies." The main reason advanced for the enactment of mandatory minimum mark-ups is the protection of the public health, safety and morals. Due to the vicious and frequent price wars among retailers, and vigorous competition among manufacturers and wholesalers, coupled with the realization by the states that they were not subject to as many constitutional limitations because of the increased power under the Twenty-first Amendment, bold and drastic experiments in price control have been undertaken. See de Ganahl, *Trade Practice and Price Control in the Alcoholic Beverage Industry,* 7 LAW & CONTEMP. PROB. 655 (1940).

The court in the instant case distinguished a Kentucky minimum mark-up statute, KY. REV. STAT. ANN. § 244.390 (Cum. Supp. 1943), which was held constitutional in *Reeves v. Simons,* 289 Ky. 793, 160 S. W. (2d) 149 (1942). The Kentucky statute requires all sales to be made according to a fair trade contract, and it imposes upon the distiller a mandatory minimum mark-up. Here too, it was urged that the mark-ups were arbitrary and discriminatory and had no reasonable relation to the regulation of the sale of alcoholic beverages. In answering these contentions, the court said, 160 S. W. (2d) at 151:

> . . . by statute its sale has been limited to select persons and only at select places, and regulations which would be called discriminatory, arbitrary and unreasonable if applied to any other business have been upheld by the courts as a reasonable exercise of the police power in restraining the liquor traffic.

The court then pointed out that because of the failure of other types of controls, it could not be said that the strict price control and the elimination of ruinous competition had no relation to the protection of the public.

The Supreme Court of Florida has tested an almost identical statute, FLA. STAT. § 566.01 (1941), in *Scarborough v. Webb's Cut Rate Drug Co.*, 150 Fla. 754, 8 So. (2d) 913 (1942). The statute was held unconstitutional as a violation of the due process and equal protection clauses of the federal and state constitutions. This statute provided that the wholesaler must file with the Beverage Department a list of all intoxicating liquors offered for sale. The court held that since the liquor business was authorized by constitutional provision, FLA. CONST. Art. XIX, § 2 (1934), the statute must be enforced in the light of the constitutional guarantees. The court said, 8 So. (2d) at 921:

> So far as we have been able to find, no statute has been upheld which attempted to compel the producer of a trade-marked commodity to enter into contracts with retailers fixing retail prices. Nor do we think that such provision could be upheld because it is contrary to the due process and equal protection clause of both State and Federal Constitutions.

The dissent in the principal case argued that the statute could be upheld on the basis of the broad police power of the state. It asserted that since liquor licenses are neither contracts nor rights of property, but a mere privilege, the revocation of the liquor license could not be a deprivation of due process. It was further maintained that price mark-ups "however arbitrary" did not deprive the plaintiff of any personal or property right.

While the legislature has the power to pass laws for the protection of the public health and welfare, yet there must be some reasonable relation between the statute and its achievement of the legislative object. Conceding that the state has complete authority and control over the liquor traffic, it is another thing to say that they do not have to observe due process requirements. The court in the instant case made it quite plain that they were not determining the broad question of whether the state could ever establish prices on intoxicants. It seems that the solution of these questions must be answered by the legislature in the light of current economic conditions. *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1936). Whatever may be the outcome in the states' attempts to control prices on intoxicants, it appears that the view that liquor is exempt from traditional constitutional restrictions has met a temporary reversal.

John F. Mendoza

CONSTITUTIONAL LAW—STATES—WHEN DOES A STATE WAIVE ITS CONSTITUTIONAL IMMUNITY AGAINST BEING SUED?—*State v. Ruthbell Coal Co.*, ... W. Va. ...., 56 S. E. (2d) 549 (1949). The state director of unemployment compensation brought an action to recover allegedly overdue unemployment contributions from the defendant-employer. The defendant filed a special plea denying liability and asserting a counterclaim for allegedly illegal contribution payments made by the state to defendant's employees and charged to defendant's account. The court allowed the defendant not only to defend against the state's claim, but also to assert its counterclaim growing out of the same transaction, and thus to obtain affirmative relief.

The question before the court was whether the counterclaim set forth in the special plea constituted a suit prohibited under the state constitution, W. VA. CONST. Art. VI, § 35, making the state immune from actions at law or in equity. This question was resolved into two subsections: (1) Was the counterclaim an action against the state within the meaning of the constitutional provision? (2) If it was a suit or action for other purposes, did the State of West Virginia, when it brought defendant into court, discard its constitutional immunity?

In deciding the question in subsection (1), the court discussed the fact that the unemployment compensation fund is required to be kept in a special fund, separate and apart from all public money or funds of the state. Therefore, since the purpose of the constitutional provision of immunity from suit is to protect the financial structure of the state, and since the unemployment fund in no way affects this structure, the court held that the state was involved in such an indirect way that the counterclaim was not a suit or action against the state within the meaning of the constitutional provision. As to the question in subsection (2), the court held that the plaintiff's claim and the defendant's counterclaim were so closely related that the state's immunity against a suit or action under the immunity clause of the state constitution did not constitute a defense. The court, therefore, was of the opinion that the defendant had a right to recover the amount of its counterclaim, if its pleadings were sustained by proof.

It appears that four states have constitutional provisions forbidding suits against the state by its citizens. ALA. CONST. Art. I, § 14; ARK. CONST. Art. V, § 20; ILL. CONST. Art. IV, § 26; W. VA. CONST. Art. VI, § 35. The constitutions of nineteen other states provide that the state shall be subject to suit in such manner and in such courts as the legislature shall determine: Arizona, California, Florida, Indiana, Kentucky, Louisiana, Nebraska, New York, Nevada, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Washington, Wisconsin and Wyoming. However, even in the absence of a constitutional provision, it is the established rule that a state, because of its inherent sovereign nature, is not amenable to the suit of an individual without its consent. In re *State of New York,* 256 U. S. 490, 41 S. Ct. 588, 65 L. Ed. 1057 (1921); *Beers v. State of Arkansas,* 20 How. 527, 15 L. Ed. 991 (1858).

When the action is brought by the state, it is held by the weight of authority that the general statutes providing for set-offs and counterclaims do not in themselves permit a set-off or counterclaim against the state. *State* ex rel. *Young v. Holgate,* 107 Minn. 71, 119 N. W. 792 (1909); *People v. Dennison,* 84 N. Y. 272 (1881); *Raymond v. State,* 54 Miss. 562 (1877); *Moore v. Tate,* 87 Tenn. 725, 11 S. W. 935 (1889). It also appears to be the weight of authority that the defendant in a suit brought by the state cannot, even defensively, claim the benefit of a set-off or counterclaim which is not related to the subject matter of the original action; for such a set-off or counterclaim would be in the nature of an independent action and would violate the rule that a state cannot be sued without its consent. *Alabama Girls' Industrial School v. Reynolds,* 143 Ala. 579, 42 So. 114 (1904); *State v. Liberty Oil Co.,* 154 La. 267, 97 So. 438 (1923); *State v. Baltimore & O. Ry. Co.,* 34 Md. 344 (1871); *State v. Holgate, supra*; *Moore v. Tate, supra*; WATERMAN, THE LAW OF SET-OFF, RECOUPMENT AND COUNTERCLAIM § 35 (1869).

However, the defendant may maintain against the state a counterclaim which relates to the subject matter of the plaintiff's action, although no independent affirmative relief can be obtained. *State v. Arkansas Brick & Mfg. Co.,* 98 Ark. 125, 135 S. W. 843 (1911); *Howard v. Cook,* 59 Idaho 391, 83 P. (2d) 208 (1938); *Stetson v. Dimke,* 110 Kan. 686, 205 Pac. 596 (1922); *State v. Schurz,* 143 Minn. 218, 173 N. W. 408 (1919); *State v. Weatherby,* 344 Mo. 848, 129 S. W. (2d) 533 (1939); *Moore v. Tate, supra*; *Anderson, Clayton & Co. v. State,* 122 Tex. 530, 62 S. W. (2d) 107 (1933). Some difficulty has arisen in determining how closely the defendant's claim must relate to the plaintiff's cause of action. The usual expression in the counterclaim statutes is that the claims must arise out of the same transaction. POMEROY, CODE REMEDIES § 602 (5th ed. 1929). The term "transaction" is not legal and technical, but common and colloquial, and is therefore to be construed according to context and approved usage. As so construed, it is broader than "contract" or "tort" and may include either or both. "It is that combination of acts and events, circumstances and defaults, which viewed in another aspect, results in the defendant's right of action." POMEROY, CODE REMEDIES § 650 (5th ed. 1929); *Haberle-Crystal Spring Brewing Co. v. Handrahon,* 100 Misc. 163, 165 N. Y. S. 251 (1917). It would appear that the majority of courts in state-initiated actions are really allowing the common law remedy of recoupment, with the scope of the remedy enlarged by giving the words "same transaction" their common rather than technical or legal meaning. In re *Monongahela Rye Liquors,* 141 F. (2d) 864 (3d Cir. 1944).

A few courts have held that in an action brought by the state, the defendant is entitled to any defense that may be interposed against a private litigant, except that no affirmative relief may be sought without statutory authority. *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273, 26 S. Ct. 252, 50 L. Ed. 477 (1905); *Howard v. Cook,* 59 Idaho 391, 83 P. (2d) 208 (1938); *State* ex rel. *McCain v. Metschan,* 32 Ore. 372, 46 P. (2d) 791 (1896).

Thus it appears that, in a majority of jurisdictions, a state waives its constitutional or inherent immunity against being sued to some extent whenever it commences an action. The extent of the waiver generally is limited to counterclaims in the nature of the common law remedy of recoupment, i.e., those arising out of the same transaction and not seeking affirmative relief. Statutes may specifically provide for an enlargement of this remedy to include independent transactions or the granting of affirmative relief. But it would appear that in states where there exists a constitutional provision providing for immunity from suit, the court could not grant affirmative relief. *Alabama Girls' Industrial School v. State,* 143 Ala. 579, 42 So. 114 (1904); *Holmes v. State,* 100 Ala. 291, 14 So. 51 (1893); *State v. Arkansas Brick & Mfg. Co.*, 98 Ark. 125, 135 S. W. 843 (1911).

The granting of affirmative relief in the instant case would seem to place the case in opposition to the weight of authority in that respect; but as for the allowance, defensively, of the counterclaim arising out of a matter closely related to plaintiff's claim, the instant case is in accord with the majority view.

James L. O'Brien

CORPORATIONS—CONSTRUCTIVE TRUSTS OF CORPORATE PROPERTY—DIRECTORS AND OFFICERS.—*Deep Oil Development Co. et al. v. Cox et al.*, 224 S. W. (2d) 312 (Tex. Civ. App. 1949). The plaintiff corporation was engaged in the oil producing business. The plaintiff corporation's production superintendent, also a director of the corporation, was at the same time engaged in the oil business on his own account, with the consent of the corporation. His chief duty for the corporation was to find oil properties for sale that he considered would be desirable acquisitions for the Deep Oil Development Company, and to bring such properties to the attention of the company. On August 29, 1947, the superintendent recommended the purchase of an eighty acre lease, and by resolution, the five members present of the seven-man board unanimously authorized the transaction. On the same day, the superintendent obtained from the owner of the lease an oral agreement to sell it to the company. Later, a majority of the members of the board of directors agreed individually to rescind the earlier resolution. The president thereafter loaned some money to the superintendent in order that the latter could purchase the property for himself. Later, a half-interest was purchased from the superintendent for the president's children.

Prior to the proposed acquisition of the lease, a majority of the stockholders had decided to discontinue the business of the corporation. In pursuance of this plan, but after the resolution of August 29, a majority of the stockholders sold their interests in the corporation, and a new board of directors was formed, composed partially of the old members. The president of the corporation testified that prior to the proposed acquisition of the lease, when the discontinuance and subsequent sale of the corporation were being contemplated, he had made an agreement with the prospective purchasers that the capital structure of the corporation would not be disturbed while the assets and stock value of the corporation were being checked. The president offered the foregoing as the reason why the corporation did not go through with the purchase of the lease.

Some time later, after the stock had been sold, the new board formed, and the corporation subsequently dissolved, it was discovered that the lease was of considerable value. Thereupon, the corporation brought a suit by and through its officers and directors, by certain stockholders and other interested parties, to impress a constructive trust on the lease. The director who acquired the lease, the other persons to whom interests in the lease were transferred, and the former president of the company were made defendants in the suit. The court refused to impose a constructive trust on the oil lease because the evidence supported the conclusion that a majority of the original board, even though they acted individually and not in a meeting, together with the president of the company, intended to and did abandon the purchase, and knew that the superintendent had purchased the lease after the company had failed to go through with the purchase. Furthermore, the court stated that it would be inequitable and against good conscience for the plaintiffs, on the facts found by the jury, to obtain the oil lease after waiting until it proved to be of considerable value before bringing the action.

In reaching its decision, the majority of the court gave little attention to the importance of the fiduciary relationship that exists between a corporation and its directors, whereas the dissenting judge emphasized this point. The general rule concerning directors and other officers as trustees is that, while they are not trustees in the technical sense, they occupy a fiduciary relationship to the corporation and to the stockholders as a body. 3 FLETCHER, PRIVATE CORPORATIONS § 838 (1947). In *Farmer v. Standeven*, 93 F. (2d) 959 (10th Cir. 1937), the court stated that, although the director was not a trustee of an express trust arising from contract or privity, he was a trustee of an implied or resulting trust created by operation of law from his official relation to the corporation, so far as his liability to the corporation for transactions with it was concerned. In *Wool Growers Service Corporation v. Ragan*, 18 Wash. (2d) 655, 140 P. (2d) 512 (1943), the court stated that a director occupied a position of "extreme trust."

A strict rule of fiduciary relationship was applied in *Bovay v. H. M. Byllesby & Co.*, 27 Del. Ch. 381, 38 A. (2d) 808 (1944), where an action was brought to force directors to account for moneys obtained by fraud from the corporation. The court stated that when the directors enriched themselves to the injury of the corporation, a court of conscience would not regard such acts as mere torts, but as serious breaches of trust. The court emphasized that, although the directors were not trustees in fact, they would be treated as trustees of an express and subsisting trust, without the protection of the statute of limitations, especially when the insolvency of the corporation was the result of their wrongdoing.

Generally, it is to be assumed that all or a majority of the board of directors will profit from a transaction which breaches their fiduciary relationship; however, it may be possible that only one of the directors will actually profit therefrom. Such a transaction is tainted with the same illegality and fraud as though all were interested or had profited. *Winger v. Chicago City Bank & Trust Co.*, 394 Ill. 94, 67 N. E. (2d) 265 (1946).

In *Russell v. Republic Production Co.*, 112 F. (2d) 663 (5th Cir. 1940), where a director who, as a result of his position with the corporation, acquired oil interests on behalf of himself, using confidential information, the court stated that when a director violates his fiduciary duty by acquiring an adverse interest, equity will consider him a trustee for the corporation.

It is the general rule that corporate directors who make personal profits through an improper use of their positions must account to the corporation for such gains. In a case in which a director formed another organization to purchase natural gasoline for resale, at a marked-up price, to the corporation of which he was a director, the latter was held accountable for the secret profits. *Durfee v. Durfee & Canning, Inc.*, 323 Mass. 187, 80 N. E. (2d) 522 (1948). In another case, a defendant who served as a director of two corporations which merged to form a new company, and who profited from the consolidation, was held to be in a position of trust and therefore was required to account for the profits arising from the breach of the fiduciary relationship. *Equity Corp. v. Groves*, 294 N. Y. 8, 60 N. E. (2d) 19 (1945).

It is well to note the fact that there are situations in which the director is not liable for special benefits obtained, although he has been dealing with corporate property. An early case in which this viewpoint was maintained was *Tenison v. Patton,* 95 Tex. 284, 67 S. W. 92 (1902). The defendant, the director and cashier of a bank which had gone into liquidation, had the chief management of the remaining assets among which was land, the title to which was in dispute. The defendant had loaned money to the bank in exchange for which the president conveyed title to the land. The defendant found a purchaser who would not complete the transaction unless the director would assume the management of the purchased land, for which he would receive one-half the net profits. The offer, apparently for a fair valuation, was accepted by the board of directors. The court held the sale valid, since a quorum of directors represented the bank, and there was a full and fair disclosure by the defendant.

In *Green v. Hall,* 228 S. W. 183 (Tex. Com. App. 1921), in which a director obtained a lease which had been forfeited by his corporation, the court held that there was no breach of the fiduciary relationship so long as the failure to develop the property was due only to the company's inability to finance the project.

Where a corporation is insolvent and unable to avail itself of an opportunity to purchase property, an officer or director does not violate his fiduciary duty by purchasing it for himself, when the benefits of the transaction do not belong to the corporation. A business opportunity ceases to be a corporate opportunity and becomes a personal one when the corporation is no longer able to avail itself of the opportunity. *Hart v. Bell,* 222 Minn. 31, 23 N. W. (2d) 375 (1946).

Not only must there be a confidential or fiduciary relationship existing between the corporation and the directors, but there must be also some specific fund or property to which the directors owe some duty. If one is directed to buy a certain piece of property for another, the fiduciary relationship exists between the two parties as to that property, but this does not prevent the former from dealing with other properties at his own expense and for his own use. *Northern Oil & Gas Co. v. Birkeland,* 164 Minn. 466, 206 N. W. 380 (1925).

In conclusion, it may be stated that the director breaches the fiduciary relationship whenever he gains a profit from an opportunity which could and should have been obtained for the corporation, if he had exercised the duties of his office for the benefit of the corporation. The rule does not depend on an existing interest or an expectancy in the property involved. In acquiring property, the director must act with the utmost good faith. In *Guth v. Loft, Inc.,* 23 Del. Ch. 255, 5 A. (2d) 503 (1939), the court stated that no hard and fast rule can be formulated to determine whether corporate officers and directors have dealt with the corporation with honesty, good faith and loyalty. The business opportunity must be within the scope of the corporate activities, and of present or potential advantage to the corporation. If an opportunity for profit is made available to a corporation with a full disclosure of the facts and it decides not to take advantage of the opportunity, there is no reason why a director cannot then acquire the property for himself. In the instant case, the court felt that the superintendent-director had exercised good faith in acquiring property which would yield a profit. Furthermore, the company and stockholders made no attempt to instigate a court action until they discovered that the lease was valuable. Thus the court in the instant case refused to impress a constructive trust on the lease.

Bernard L. Weddel

CRIMINAL LAW—CONFESSION BY CODEFENDANT AS GROUNDS FOR SEVERENCE OF TRIAL.—*State v. Abbott*, ... Ohio ...., 89 N. E. (2d) 147 (1949). In January, 1948, Morris Abbott discovered an adulterous relationship between his wife, the defendant in the instant case, and the hired man. The man was discharged but found other work in the neighborhood and continued to see the defendant. Later an altercation took place between the two men and the defendant's husband was killed. Shortly afterwards the former hired man was arrested and made a full confession implicating the defendant in the crime. The confession indicated that the defendant had intimated that her husband would have to be killed if they were to be free to marry. The defendant, while admitting her illicit relationship, steadfastly denied any plan to murder her husband.

The parties were jointly indicted for murder and the state made application for a joint trial under a statute, OHIO GEN. CODE ANN. § 13443-3 (1938), which requires a separate trial in capital offenses unless "good cause" is shown for having a joint trial. The state alleged that the death of Abbott was the fruition of a conspiracy between the parties and that a joint trial was necessary to prove the conspiracy. The court granted the state's motion and later overruled a motion by the defense to have the order vacated. On the defendant's appeal from this ruling, the Supreme Court of Ohio reversed the decision, stating that the granting of a joint trial over the defendant's objection was prejudicial error, it having been known prior to trial that a confession —admissible as to one defendant only, but implicating his codefendant —was to be introduced in evidence. The burden of proof was upon the state to show good cause why such joinder should be permitted and, where the nonconfessing defendant would be prejudiced by the admission of such evidence, it was an abuse of discretion by the trial judge to permit a joint trial. Thus in the instant case the Ohio court reemphasized its previous decision in *State v. Rosen et al.*, 151 Ohio St. 339, 86 N. E. (2d) 24 (1949), and impliedly its decision in *State v.*

Shafer, 71 Ohio App. 1, 47 N. E. (2d) 669 (1942), to the effect that the existence of such a confession is good and sufficient grounds for insisting on severance of trials.

It is a general rule that where defendants are jointly indicted for the commission of a crime, they are to be tried together. Whether a separate trial should be granted is a matter resting largely within the sound judicial discretion of the court. *People v. Eudy et al.,* 12 Cal. (2d) 41, 82 P. (2d) 359 (1938). It is with regard to the problem of what constitutes an abuse of this discretion, however, that a division of opinion arises in the courts. As the principal case points out, there exists a sharp conflict of authority as to whether a denial of a separate trial, where one of the codefendants has made a confession admissible only as to himself but implicating the moving defendant, is such an abuse.

With regard to this problem, the majority of jurisdictions would seem to hold contrary to the Ohio court's ruling. *Hall v. United States,* 168 F. (2d) 161 (D. C. Cir. 1948); *United States v. Needleman et al.,* 6 F. R. D. 205 (1946); *Nolan et al. v. State,* 205 Ark. 103, 167 S. W. (2d) 503 (1943); *Bennett et al. v. State,* 201 Ark. 237, 144 S. W. (2d) 476 (1940); *People v. Isby et al.,* 30 Cal. (2d) 879, 186 P. (2d) 405 (1947); *People v. Burton et al.,* .... Cal. App. ...., 205 P. (2d) 1065 (1949); *State v. McCarthy et al.,* 133 Conn. 171, 49 A. (2d) 594 (1946); *Commonwealth v. Millen et al.,* 289 Mass. 441, 194 N. E. 463 (1935); *People v. Campbell et al.,* 301 Mich. 670, 4 N. W. (2d) 51 (1942); *State v. Lord et al.,* 42 N. M. 638, 84 P. (2d) 80 (1938); *State v. Guerzon,* 23 Wash. (2d) 242, 160 P. (2d) 603 (1945). The courts in these jurisdictions are of the opinion that the rights and interests of the nonconfessing defendant are adequately protected by instructions to the jury that the confessions are referable only to the defendant making the confession. The considerations of achieving maximum speed, efficiency and economy in the administration of justice are deemed paramount. The attitude of these courts is well expressed in *People v. Isby et al.,* 30 Cal. (2d) 879, 186 P. (2d) 405, 416 (1947):

> It is not an abuse of discretion to refuse to grant a demand for separate trials because damaging testimony, admissible against one defendant and not against the other, may be received in the case, but it is then incumbent upon the court to limit such evidence in its application to the defendant to whom it is referable.

Regardless of whether in fact the evidence is so limited, the instructions by the court are considered presumptive proof that the jury acted in compliance with them. The Arkansas Supreme Court in *Lindsey v. State,* 201 Ark. 87, 143 S. W. (2d) 573, 574 (1940), declared:

> It is argued that the jury could not consider the confessions for any purpose without considering them against appellant. But this does not necessarily follow. The jury was told to do so, and we perceive no reason why they may not have done it.

Thus the federal courts and the majority of jurisdictions have been reluctant to find any abuse of judicial discretion in ordering joint trials under facts similar to those in the instant case, when the jury is adequately instructed as to the applicability of the confession or confessions involved.

On the other hand, a number of courts have decided that the rights of the nonconfessing defendant can only be safeguarded by a separate trial. *Palmer et al. v. State,* 106 Fla. 237, 145 So. 69 (1933); *Suarez et al. v. State,* 95 Fla. 42, 115 So. 519 (1928); *People v. Serritello et al.,* 385 Ill. 554, 53 N. E. (2d) 581 (1944); *People v. Barbaro et al.,* 395 Ill. 264, 69 N. E. (2d) 692 (1946); *State v. Cook et al.,* 215 La. 163, 39 So. (2d) 898 (1949); *State v. Bonner et al.,* 222 N. C. 344, 23 S. E. (2d) 45 (1942); *Flamme et al. v. State,* 171 Wis. 501, 177 N. W. 596 (1920).

The court in *People v. Blumenfeld,* 351 Ill. 87, 183 N. E. 815, 817 (1932), stated the position of these jurisdictions when it laid down the rule that:

> . . . where a motion for a separate trial is made on the ground of confessions of other defendants implicating the defendant making the motion, a severance should be ordered, unless the state's attorney agrees that the confessions or admissions will not be offered in evidence on the trial, or unless there be eliminated from the confessions any reference to the complaining defendant.

Thus this minority view adopts the position that, as a practical matter, a fair trial is denied a defendant when such a confession is introduced — that repeated warnings to the jury about its limitation is an inadequate protection, that such confessions necessarily make the defenses so antagonistic that a fair and impartial trial on the merits is in fact denied. Taking a realistic view of such jury instructions, the Supreme Court of Illinois said in *People v. Barbaro,* 395 Ill. 264, 69 N. E. (2d) 692, 696 (1946):

> Only theoretically did the instruction withdraw the evidence from the consideration of the jury. The prejudicial effect inevitably remained. Upon the record made, separation of the admissible evidence from the inadmissible becomes almost impossible—even for a court of review.

As is readily apparent, the problem is basically one of conflicting policy considerations. On the one hand, we have the interest of the community in the speedy and inexpensive administration of justice, with certain minimum safeguards. On the other hand, we have the necessity of preserving traditional guarantees of liberty and justice from unwarranted inroads made in the guise of efficiency. In the harmonizing of these interests lies the problem of the courts.

For example, the New York courts have apparently adopted the majority holding that the mere fact that one defendant has made a confession which may not be competent against the other is insufficient to justify a severance. *People v. Doran,* 246 N. Y. 409, 159 N. E. 379 (1927); *People v. Fisher et al.,* 249 N. Y. 419, 164 N. E. 336 (1928); *People v. Feolo et al.,* 282 N. Y. 276, 26 N. E. (2d) 256 (1940); *People v. Gold et al.,* 36 N. Y. S. (2d) 990 (1942). However, in *People v. Wargo et al.,* 149 Misc. 461, 268 N. Y. S. 400 (1933), in exactly the same factual situation as the Ohio decision under discussion, the court held that the right of the defendant to a fair trial had been denied by the ordering of a joint trial. And again in *People v. Feolo, supra,* while repeating the general rule, the court held the denial of a separate trial prejudicial error, where without the confession there was insufficient evidence to convict. Thus while the majority rule would seem to have been adopted, yet, under particular factual situations, there is a great deal of flexibility in its application.

Tennessee courts, too, would seem to waver between the conflicting policy considerations. The decision in *Kennon v. State,* 181 Tenn. 415, 181 S. W. (2d) 364 (1944), denied the claim that there was an abuse of discretion in a trial court's refusal of severance where there was a confession competent as to only one defendant. Yet, in *Stallard et al. v. State,* 187 Tenn. 418, 215 S. W. (2d) 807 (1948), a severance was granted where the confessing defendant refused to take the stand to be cross-examined. The court held that the defendant was denied the right of confrontation. Using this test, the court denied severance in *Stanley v. State,* .... Tenn. ...., 222 S. W. (2d) 384 (1949), where the confessing defendant did take the stand. Thus it would seem that the Tennessee court has modified its position somewhat since 1944—the emphasis now being upon the factual situation to determine whether the denial of severance has actually been prejudicial error as to the nonconfessing defendant.

The New York and Tennessee decisions show the effect of these changing and fluctuating policy considerations, and are indicative of the general conflict with regard to the problem. In the instant case, however, the Supreme Court of Ohio has reaffirmed its determination to preserve undiminished the protections thrown about the rights and liberties of its citizens. It would seem, upon dispassionate consideration of the arguments on both sides, that the fullest measure of fairness consistent with an impartial trial can only be achieved by permitting the severance. The prejudicial effect of "limited" confessions cannot be lightly dismissed. Miscarriages of justice will happen occasionally, but it is the duty of our courts to limit such occurrences by imposing strong safeguards for the rights of the accused. The constitutional guarantees should be preserved in the spirit in which they were conceived. Those who find the consideration of efficiency most impelling may well heed the warning of Justice Lehman, in his spirited dissent in *People v. Fisher et al.,* 249 N. Y. 419, 164 N. E. 337, 341 (1928), where he said:

> We secure greater speed, economy, and convenience in the administration of the law at the price of fundamental principles of constitutional liberty. That price is too high. Our ideal is that justice should be swift and certain. Human justice is still far from that ideal; and sometimes I feel that a proper zeal to destroy technicalities and achieve a more efficient administration of justice leads us to disregard fundamental principles and guarantees.

William B. Wombacher

EVIDENCE—HEARSAY—SCOPE OF RES GESTAE—SPONTANEOUS EXCLAMATIONS.—*Aetna Life Ins. Co. v. Jones*, ... Ga. App. ...., 56 S. E. (2d) 305 (1949). The question before the Georgia Court of Appeals was whether certain statements of the insured decedent were to be admitted as within the scope of the res gestae exception to the hearsay rule. The court held that the testimony of the beneficiary, who was seeking to recover under the double indemnity provisions of the policy, as to what the insured had told him within a few minutes after her fall, was properly admitted.

The insured was an elderly lady who suffered from Parkinson's disease. Her nurse saw her fall but did not see what caused the accident. The insured had not been moved when her son arrived fifteen minutes later. He asked the insured what had happened, and she replied, "I fell and hurt myself . . . My hand slipped off the table and I fell."

The insured died within ninety days after the fall, and the plaintiff then brought this action against the insurance company. After a verdict for the plaintiff, the defendant assigned as error the admission of that part of the plaintiff's testimony wherein he repeated the decedent's statement as to her fall. The only positive evidence in the case that the fall was accidental, and thus within the double indemnity provisions of the policy, was that statement.

As to hearsay evidence in general, the Georgia statute, GA. CODE § 38-301 (1933), provides:

> Hearsay evidence is that which does not derive its value solely from the credit of the witness, but rests mainly on the veracity and competency of other persons. The very nature of the evidence shows its weakness, and it is admitted only in specified cases from necessity.

In determining whether the testimony in issue was within the res gestae exception to the hearsay rule, the court referred to the applicable section of the code, GA. CODE § 38-305 (1933), which states:

> Declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, shall be admissible in evidence as part of res gestae.

The court then quoted from *Davis v. Metropolitan Life Ins. Co.,* 48 Ga. App. 179, 172 S. E. 467, 468 (1934):

> Such admissibility does not depend upon any arbitrary time or any general rule for all cases, but is left to the sound discretion of the courts in determining from the time, circumstances, and statements in question, whether the declaration meets the legal requirement of being "free from all suspicion of device or afterthought."

This language is in general accord with early Georgia decisions on this point. *Carter v. Buchannon,* 3 Ga. 513 (1847); *Mitchum v. State,* 11 Ga. 615 (1852). However, some variation is discernible in the Georgia decisions. In *Western & A. Ry. v. Beason,* 112 Ga. 553, 37 S. E. 873 (1901), the statements of a fatally injured brakeman made shortly after the injury were held inadmissible. That court stressed the fact that the res gestae statements must be contemporaneous with the occurrence, and exclamatory rather than narrative in nature. Only five years after the *Beason* decision, in an almost identical case, an injured brakeman's statements were admitted. *Southern Ry. v. Brown,* 126 Ga. 1, 54 S. E. 911 (1906). The *Brown* case revealed a more liberal attitude than that adopted in the *Beason* case. The narrative nature of the declaration was not thought to be conclusive; additional factors were to be considered.

Such consideration of additional factors had been approved in Georgia in the earlier case of *Hall v. State,* 48 Ga. 607, 608 (1873), where it was said, "No precise point of time can be fixed *a priori* where the *res gestae* ends. Each case turns on its own circumstances. Indeed, the inquiry is rather into events than into the precise time which has elapsed." In another case, the youth of the declarant was a salient factor and, although the statement was made a half hour after the injury and in a different place, it was admitted. *Augusta Factory v. Barnes,* 72 Ga. 217 (1884). Contra: *Citizen's Street Ry. v. Stoddard,* 10 Ind. App. 278, 37 N. E. 723 (1894). In a later case, the Georgia court recognized the general rule that declarations made to an attending physician are admissible to show suffering, but not to determine the cause of the injury. However, the court decided that there are exceptions that make admission necessary if a miscarriage of justice is to be prevented. The court then held that since the witness had died and the statement had been made to a doctor, such a necessity existed. *Lathem v. Hartford Acc. & Indem. Co.,* 60 Ga. App. 523, 3 S. E. (2d) 916 (1939).

From an early date, Georgia has recognized that a single rule of narrow scope is impractical. *Carter v. Buchannon, supra; Mitchum v. State, supra.* This view was expressed in *Cox v. State,* 64 Ga. 375, 410 (1879):

> The difficulty of formulating a description of the res gestae which will serve for all cases seems insurmountable. To make the attempt is

something like trying to execute a portrait that shall enable the possessor to recognize every member of a very numerous family.

Two general rules have been recognized in Georgia. Where the admissibility of evidence is doubtful, the court will admit it and leave its weight and effect to the jury. *Savannah Ry. v. Flanagan*, 82 Ga. 579, 9 S. E. 471 (1889); accord: *Augusta Factory v. Barnes, supra.* This principle has been adhered to even where the statement admitted was quite prejudicial. See *Goodman v. State*, 122 Ga. 111, 49 S. E. 922 (1905). The second general principle is referred to in the principal case when the court states, citing *Davis v. Metropolitan Life Ins. Co., supra,* that such admissibility "is left to the sound discretion of the court." To the same effect are *Carter v. Buchannon, supra,* and *Mitchum v. State, supra.* This is usually the rule in other jurisdictions. See, e.g., *Hartford Acc. & Indem. Co. v. Olivier*, 123 F. (2d) 709 (5th Cir. 1941); *Towne v. Northwestern M. L. Ins. Co.*, 58 Idaho 83, 70 P. (2d) 364 (1937); *Kelly v. Dickerson*, 213 Ind. 624, 13 N. E. (2d) 535 (1938); *Smith v. Pine*, 234 Iowa 256, 12 N. W. (2d) 236 (1943); *Sands Springs Ry. v. Piggee*, 196 Okla. 136, 163 P. (2d) 545 (1945); *Marks v. Pearlstine & Sons*, 203 S. C. 318, 26 S. E. (2d) 835 (1943).

A United States Supreme Court decision, *Travelers' Ins. Co. v. Mosely*, 8 Wall. 397, 19 L. Ed. 437 (1869), is similar to the principal case. There the Court permitted the deceased's widow to testify that the insured told her that he had fallen and hurt himself. The ruling was broader than in the instant case. At the time of trial in the *Mosely* case, there was no one who could testify to having seen the deceased fall, so that the statement was necessary to prove the principal fact. In the instant case, the nurse did see the insured fall. The *Mosely* case mentioned the element of necessity due to the death of the only witness, but Georgia has noted that factor only where there was present the additional factor of the statement having been made to a physician.

Wigmore vehemently criticizes the term res gestae as both useless and harmful. 6 WIGMORE, EVIDENCE § 1767 (3d ed. 1940). He approves a division of statements of this sort into two main classes. The first, "spontaneous exclamations," he defines as statements made immediately after some exciting occasion by a participant or spectator, which assert the circumstances of that occasion. He maintains that the nervous excitement makes reflection unlikely and truth probable. *But see* Hutchins and Slesinger, *Some Observations on the Law of Evidence*, 38 YALE L. J. 432 (1928). Many courts have adopted Wigmore's theory and the Model Code includes it. See Rule 512(b), MODEL CODE OF EVIDENCE (1942); Rule 170, WIGMORE, CODE OF EVIDENCE (3d ed. 1942). Wigmore would refer to the second class of such statements as "verbal acts." These are utterances which may be admitted as the verbal part of an act. Wigmore adheres to the theory that spontaneous exclamations do not have as many limitations as the verbal acts, and that many courts, by confusing the two, place improper limitations on the former. 6 WIGMORE, EVIDENCE § 1745 (3d ed. 1940); *Keefe v. State,* 50 Ariz. 293, 72 P. (2d) 425 (1937). Georgia does not seem to recognize this distinction. The instant case, which appears to be an illustration of a spontaneous exclamation, cites other cases which would illustrate the verbal acts theory. See, e.g., *Mitchum v. State, supra.*

Morgan disapproves of the careless use of the term res gestae, but states that the confusion can be alleviated by analyzing and classifying the different situations. See Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae,* 31 YALE L. J. 229 (1922). It would seem desirable that for each situation to which a different set of factors as to trustworthiness, necessity, trial convenience and public policy apply, there should be a different rule.

The *Mosely* case and Wigmore's writings have been influential in the trend toward liberality in these cases. California expressly overruled many of its previous decisions which adhered to the strict view that the admissibility of post-accident statements is dependent on their proximity in time to the principal event, and thereby adopted the Wigmore test of shock and nervous excitement. *Showalter v. Western Pac. Ry.,* 16 Cal. (2d) 460, 106 P. (2d) 895 (1940). The past decisions of other states also clearly indicate the trend. Compare: *Morse v. Consol. Ry.,* 81 Conn. 395, 71 Atl. 553 (1908), with *Perry v. Haritos,* 100 Conn. 476, 124 Atl. 44 (1924); *Texas & N. O. Ry. v. Crowder,* 70 Tex. 222, 7 S. W. 709 (1888), with *International & G. N. Ry. v. Anderson,* 82 Tex. 516, 17 S. W. 1039 (1891); *Mutcha v. Pierce,* 49 Wis. 169, 5 N. W. 490 (1880), with *Kressin v. Chicago & N. W. Ry.,* 194 Wis. 480, 215 N. W. 908 (1927).

Generally, it can be said that the instant case is in substantial accord with the previous Georgia decisions involving the question of what constitutes res gestae. In turn, the Georgia decisions are in accord with the more liberal rule which prevails in most states today. The United States Supreme Court and various state courts have admitted the specific type of testimony in issue in the principal case. See *Travelers' Ins. Co. v. Mosely, supra*; *Rothrock v. Cedar Rapids,* 128 Iowa 252, 103 N. W. 475 (1905); *Jacobs v. Village of Buhl,* 199 Minn. 572, 273 N. W. 245 (1937).

Thomas L. Smith

TAXATION—TAX COURT OF THE UNITED STATES—TAXPAYER'S BURDEN OF PROOF AND CREDIBILITY AS A WITNESS.—*Scurlock v. Commissioner,* TC Memo. Op., Dkts. 19168-9 (January 10, 1950); *Zeller v. Commissioner,* TC Memo. Op., Dkt. 15979 (January 10, 1950). These memorandum opinions, rendered by Judge Disney of the Tax Court of the United States are, on first perusal, seemingly contradictory. In the *Scurlock* opinion, the court stated that the credibility of the petitioning taxpayer was affected because:

> . . . adherence of testimony to the amounts set forth in petition, in nearly all instances, bore evidence of study if not memorization of the amounts, and one of the witnesses was found to be consulting a list, copied down from one of the returns, which list contained notations of other facts . . . Such indications of preconceived, even written, account of testimony to be given affects credibility, as did tendency to give very positive answers. . . .

At the same time, the *Zeller* decision turned on the contradiction between the return filed and the testimony given: namely, the failure to state with definiteness and certainty. As the court said:

> It was apparent that there was considerable "puffing" or overstatement of deductions desired by the petitioner. Thus, he stated the contribution to the Red Cross was $35.00 or $40.00, that he so computed it, when in fact the return claimed only $25.00, again he testified that $10.00 or more was donated to the March of Dimes, whereas the return lists $5.00. On the other hand, the return claims deduction of $36.00 for special shoes whereas he testified that he bought only one pair for $11.95. . . .

Undoubtedly the factor that most influenced the latter decision was the filing of a deduction for expenses incurred in an automobile accident. It appeared from the income tax returns that this claim was made on several occasions. Since the filing of the accident deductions should assuredly place a stigma on any other or subsequent evidence, it follows that the court's emphasis on the ill effects of "puffing" and indefiniteness obscures the basic issue and introduces an element of confusion.

As previously stated, the two cases appear contradictory, the court refusing to condone positive and memorized statements in one instance, and stressing the undesirability of uncertain and indefinite declarations, e.g., "puffing," in the other.

The end result presents a dilemma with regard to the rules of evidence. The question is raised: does the Tax Court have an anomalous criterion for the burden of proof, credibility and the rules of evidence *per se*? This inquiry is best answered by an analysis of the history of the Tax Court and its established rules of practice. At the outset it must be noted that the Tax Court of the United States is technically not a court but "an independent agency in the Executive Branch of the Government." INT. REV. CODE § 1100. Hence, it is necessary to ascertain what rules of evidence govern in a proceeding before this agency. The consensus is:

> Section 1111 of the Code provides that the proceedings of the Court shall be conducted in accordance with the rules of evidence applicable in the Courts of the District of Columbia in the type of proceedings which prior to September 16, 1938 (the date of the adoption of the Federal Rules of Civil Procedure) were within the jurisdiction of the Courts of equity of said District. There is nothing particularly distinctive in these rules as they are the same, without material exception, as those in courts of law throughout the country. [Morris, *Selected Problems in the Preparation and Trial of Cases in the Tax Court of the United States* in 1 THE AMERICAN UNIVERSITY TAX INSTITUTE LECTURES 354 (Mann ed. 1948).]

In view of the general applicability and adaptibility of the rules of evidence, the use of notes by the taxpayer in the *Scurlock* case appears justified. This procedure is recognized in a number of jurisdictions under what is most frequently termed the "present recollection revived" rule. 3 WIGMORE, EVIDENCE §§ 759 n. 1, 760 n. 1 (3d ed. 1940). The rule, as outlined in RICHARDSON, EVIDENCE §545 (7th ed. 1948), reads:

> . . . any paper whatsoever may be used to refresh the recollection of a witness, provided it actually serves that purpose, so that, after inspecting the paper, the witness is able to recall the facts sufficiently to testify to them from memory.

Because the writing itself is not evidence, it should not be mandatory that the memorandum be made at the time of the event. *Mahoney's Adm'r. v. Rutland R. Co.*, 81 Vt. 210, 69 Atl. 652 (1908).

Turning again to a necessarily brief survey of the Tax Court, legislative history shows that the court's very *raison d'etre* is to provide the taxpayer with an expeditious determination of the contested amount prior to the payment of this amount. 1 SEIDMAN, LEGISLATIVE HISTORY OF FEDERAL INCOME TAX LAWS (1938-1861) 759, 760 (1938). The Tax Court was originally instituted in 1924 as the Board of Tax Appeals:

> . . . in response to a need created by the unsatisfactory character of the previous practice which had consisted of an appeal to the Committee on Appeals and Review prior to assessment. While this Committee functioned with great fairness, it was but another branch of the agency which had proposed the assessment. Many taxpayers had theretofore felt that the Committee would be loathe to reverse the Commissioner's ruling, especially since only the taxpayer might contest an adverse decision before the courts. [9 MERTENS, THE LAW OF FEDERAL INCOME TAXATION § 50.01 (1943).]

Therefore, since the taxpayer must petition the court for a hearing, he is the plaintiff in a trial *de novo*. The burden of proof generally rests on the petitioning taxpayer. See *Commissioner v. Tower,* 327 U. S. 280, 286 n. 4, 66 S. Ct. 532, 90 L. Ed. 670 (1946). However, in transferee cases, the burden is on the Commissioner to show that the petitioner is liable as a transferee of property. *Chris D. Matrangos,* TC Memo. Op., Dkts. 11674-5, 11677 (June 29, 1949). Where fraud is involved, it is the burden of the Commissioner to so prove. *Estate of Joseph Nitto,* 13 T. C. 471 (1949). If the Commissioner desires to impose a penalty on, or to increase the deficiency of the taxpayer, then he must carry the burden of proof. *Municipal Securities Co.,* TC Memo. Op., Dkts. 112287-8 (January 27, 1948); *William U. Watson,* TC Memo. Op., Dkt. 15869 (April 20, 1949).

Of course, in accordance with the generally uniform practice of most courts, in the event that the taxpayer has introduced new matter, for example, the Commissioner then must assume the duty of going forward. *Walter Bachrach,* TC Memo. Op., Dkts. 17025, 17083-4 (April 22, 1949). The plaintiff must prove his facts by a preponderance of the evidence. *Dorothy W. Sammons,* TC Memo. Op., Dkts. 13068-9 (December 8, 1948), *aff'd.,* .... F. (2d) .... (7th Cir. 1949). It is essential that credible evidence be presented. *Mrs. W. H. Berry,* BTA Memo. Op., Dkt. 106134 (November 27, 1941). In the latter opinion the court stated that the oral evidence, without other proof, was not sufficient.

In as much as the petitioners in the *Scurlock* and *Zeller* cases either failed to bring into court adequate records of expenditures, or any such records at all, it would seem that the court's decision could have rested on such inadequacies alone, precluding the necessity for broaching the confusing issues of memorization, definiteness, "puffing" and the like. Nevertheless, it has been held that even if the oral evidence is unsupported, if it is not discredited or contradicted on cross-examination, it will be acceptable. *Abraham G. H. Reimold,* TC Memo. Op., Dkt. 111789 (June 25, 1943), *aff'd.,* 144 F. (2d) 390 (3d Cir. 1944).

Though the Tax Court's rule three, INT. REV. CODE § 1111, permits a taxpayer to present his own case, a wiser course would be to retain an attorney, or one who has met the qualifications, to appear before the court, especially in view of the apparent difficulties posed by the *Scurlock* and *Zeller* decisions and the interpretation of the rules of evidence that governed in each. It is not obligatory that the counsel be an attorney, for the court is not one of record.

The court's rules of practice permit anyone to appear who is accredited before the highest court of his state, or in lieu of being an attorney, one who successfully completes the prescribed written examination. This factor has brought forth much protest, primarily from the accountants. The question relative to practice presented an extremely controversial point when the new Title 28, Judiciary and Judicial Procedure Code, was presented for enactment in 1947. The House Judiciary Committee had included the Tax Court in the provisions of the new code, thus placing the court in the judicial branch of the Government. However, the strong antipathy to making the court one of record finally resulted in the exclusion of the Tax Court from the provisions of Title 28. See 93 CONG. REC. 8550-59 (1947); 94 CONG. REC. 8108-11, 8613, 8675-78 (1948). This exclusion is regrettable, for it was primarily a political question, and the argument posed that the court was designed to enable the taxpayer to circumvent legal phraseology seems academic in view of the strict procedure required for filing a petition, taking a deposition, etc. Inclusion would have provided the following, in whole or part: life tenure for judges, prescribed records of the court, uniform rules of evidence. Placing the court in the judicial branch most certainly would have clarified the last named point and obviated the present need for specially trained tax counsel to appear before the court, thus further diminishing the problems of the average, legally inexperienced taxpayer.

Henry M. Shine, Jr.

TORTS—CHARITIES—LIABILITY OF A PRIVATE CHARITY FOR NEGLIGENCE.—*Foster v. Roman Catholic Diocese of Vermont*, ... Vt. ...., 70 A. (2d) 230 (1950). The plaintiff, as she was leaving Church, was injured in a fall on some ice that covered a driveway extending from the Church premises across a public sidewalk. In an action of tort the plaintiff alleged that the defendant negligently constructed and maintained the driveway, in that it served as a conduit for rainwater and thawing snow, which became a danger to pedestrians in icy weather. In answer, the defendant claimed that it was immune from liability on the grounds that it was a private corporation existing for charitable and religious purposes; that it had selected its agents and servants with due care; and that the plaintiff had been its beneficiary. The lower court overruled the plaintiff's demurrer to defendant's answer, and for a determination of exceptions made to its ruling, passed the case to the Supreme Court of Vermont. On the issue of whether a private charity is immune from liability for an injury caused by its negligence, the court, being hampered in its determination neither by stare decisis nor statute, held that a private institution conducted solely for religious and charitable purposes is not by that fact exempt from liability for an injury occasioned by its negligence. Leading cases in accord with the rule announced in the instant case are: *Tucker v. Mobile Infirmary*, 191 Ala. 572, 68 So. 4 (1915); *Mulliner v. Evangelischer Diakonniessenverein of Minnesota*, 144 Minn. 392, 175 N. W. 699 (1920); *Glavin v. Rhode Island Hospital*, 12 R. I. 411 (1879). For a critical analysis of theories underlying contrary decisions, see *Georgetown College v. Hughes*, 130 F. (2d) 810 (D. C. Cir. 1942). See also Note, 5 NOTRE DAME LAWYER 389 (1930).

A Massachusetts charitable institution was held not to be liable in tort, because negligence was not shown in the selection of its agents and servants. It was further intimated that even if negligence had been shown it would not affect the decision, since the assets of the institution constituted a trust fund for particular purposes and could not be reached for payment of judgment. *McDonald v. Massachusetts General Hospital,* 120 Mass. 432 (1876). Other courts following the lead of the Supreme Court of Massachusetts resurrected the trust fund doctrine attributed to a dictum of Lord Cottenham in *Heriot's Hospital v. Ross,* 12 C. & F. 507, 8 Eng. Rep. 1508, 1510 (1846):

> There is a trust, and there are persons intended to manage it for the benefit of those who are to be the objects of the charity. To give damages out of a trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be to divert it to a completely different purpose.

To the Vermont court, the core of this theory lies in a preference for the preservation of the trust fund over the right of an injured party to obtain redress. Consequently, some courts, in exercising that preference, subject the right to obtain a judgment to the ability of the wrongdoer to satisfy it out of trust property. But there is a distinction between the right to obtain a judgment and a right to have the judgment satisfied. Even in jurisdictions that do not grant nonliability to charities, an execution of judgment may not be permitted on that property of the charity used solely for charitable purposes. *O'Connor v. Boulder Colorado Sanitarium,* 105 Colo. 259, 96 P. (2d) 835, 133 A. L. R. 819 (1939); *Spivey v. St. Thomas Hospital,* .... Tenn. ...., 211 S. W. (2d) 450 (1948). In any event, a seizure and sale of such property under a writ for execution of judgment is invalid, since the law does not endow trustees with the power to divert trust property for other and different purposes. *Lord v. Hardie,* 82 N. C. 241 (1880). The trust fund theory has been criticized as contrary to the general rule in that "other trust funds are not exempt from liability for torts committed in administering the trust." See PROSSER, TORTS § 108 (1941). It has been proposed that the distinction between ordinary corporations and charities be dissolved in this respect, and the rules applicable to the former in regard to negligence of an employee or servant be applied to charities. Appleman, *The Tort Liability of Charitable Institutions,* 22 A. B. A. J. 48 (1936). If the trust funds of religious institutions involved in charitable works were generally considered to be in no better position than ordinary trusts, it would be difficult to harmonize the policy of state courts with the policy of their respective state constitutions, as that policy is recognized in *Church of Holy Trinity v. United States,* 143 U. S. 457, 468, 12 S. Ct. 511, 36 L. Ed. 226 (1892), where the Court stated:

> If we examine the constitutions of the various states we find in them a constant recognition of religious obligations. Every constitution . . .

either directly or by clear implication recognizes a profound reverence for religion and an assumption that its influence in *all* human affairs is essential to the well being of the community. (Emphasis supplied.)

The recent tendency to consider the status of a charitable trust as being the same as that of an ordinary trust with respect to tort liability may result from the dissatisfaction of some courts with regard to the protection afforded the private desire of the donor in preference to the right of the injured party to redress. One writer has indicated that this dissatisfaction springs from emphasizing the defeat of the donor's desire rather than stressing, more properly, the effect a diversion of the trust funds would have upon the public. See McCaskill, *Respondeat Superior as Applied in New York to Quasi-Public and Eleemosynary Corporations,* 6 CORN. L. Q. 56 (1920).

Another theory advanced by the courts granting nonliability is the beneficiary doctrine; that is, that one who receives a benefaction from a charity ought not to subject the charity to a tort claim incurred while accepting the benefits of the charity. This theory is supported by one or the other of two lines of reasoning: first, implied waiver or, second, the non-applicability of the doctrine of respondeat superior. Under the first line of reasoning, the beneficiary is deemed to have waived his right to recover for any injury sustained in the reception of the benefit. *Powers v. Massachusetts Homeopathic Hospital,* 109 Fed. 294 (1st Cir. 1901). As the court pointed out in the instant case, the waiver theory is obviously fictitious, for an infant or an unconscious person, for example, cannot knowingly waive a right to recover for future negligence. Courts have held that unless a charity is negligent in the selection of its agents and servants, the doctrine of respondeat superior does not apply. *Evans v. Lawrence and Memorial Associated Hospitals,* 133 Conn. 311, 50 A. (2d) 443 (1946); *Burgess v. James,* 73 Ga. App. 857, 38 S. E. (2d) 637 (1946). The rationale of this group of cases is that a charity, unlike an employer, does not receive any profits from the services of its agents and servants. *Hearns v. Waterbury Hospital,* 66 Conn. 98, 33 Atl. 595 (1895). Although a charity may be engaged in incidental variations from its charitable purpose, such variations do not affect its exemption from liability, where the negligent act is committed in a course of activity directly accomplishing its charitable purpose, unless they are mainly commercial in nature. *Carpenter et al. v. Young Men's Christian Ass'n.,* 324 Mass. 365, 86 N. E. (2d) 634 (1949). The New York rule makes a distinction between torts committed by persons under the direct supervision of the trustees, and torts committed by employees while acting in their professional capacity. If the employees in the latter case were selected with due care, the trustee is not liable. *Necolayff v. Genesee Hospital,* 270 App. Div. 648, 61 N. Y. S. (2d) 832 (1946). See also *Greenberg v. Society of the Hillside Hospital,* .... Misc. ...., 73 N. Y. S. (2d) 21 (1947) (complaint failed to show whether a negligent act was attributed to administrative failure of the hospital or to a professional act). Some courts couple the beneficiary theory with public policy theories in order to hold a charity exempt from tort liability in a suit by a beneficiary. *St. Vincent's Hospital v. Stine,* 195 Ind. 350, 144 N. E. 537 (1924); see *Edwards v. Hollywood Canteen,* 27 Cal. (2d) 802, 167 P. (2d) 729 (1946); *Rose v. Raleigh Fitkin-Paul Morgan Memorial Hospital-Ann May Foundation,* 136 N. J. L. 553, 57 A. (2d) 29 (1948).

The courts in *Bodenheimer v. Confederate Memorial Ass'n.,* 68 F. (2d) 507 (4th Cir. 1934) (plaintiff beneficiary injured in a fall caused by the defective condition of a sidewalk), and *Ellsworth v. Brattleboro Retreat,* 68 F. Supp. 706 (Vt. 1946), followed the decision in *Ettlinger v. Trustees of Randolph-Macon College,* 31 F. (2d) 869, 872 (4th Cir. 1929), where Judge Parker, in concluding that public policy underlies all of the decisions granting nonliability, stated:

> A policy of the law which prevents him who accepts the benefit of a charity from suing it for the torts of its agents and servants, and thus taking for his private use the funds which have been given for the benefit of humanity, which shields gifts made to charity from "the hungry maw of litigation" and conserves them for purposes of the highest importance to the state, carries on its face its own justification, and without the aid of metaphysical reasoning, commends itself to the wisdom of mankind.

The Vermont court considers the public policy theory almost analogous to the trust fund theory. This theory holds that, in the interest of the public, suits for injuries ought not to be allowed, for they would tend to empty the coffers of the charity and suffer the public to forego its benefits. In order to preserve these benefits, "it is better that one rather than many suffer." According to this court, the consequence is to force "the injured person to contribute to the charity against his will." Such a policy encourages carelessness and ultimately may burden the public with the support of those injured.

It is claimed that donors expect modern charitable organizations operating on the pattern of "big businesses" to be equally responsible for the injuries they cause. The court cites *Andrews v. Young Men's Christian Ass'n. of Des Moines,* 226 Iowa 374, 284 N. W. 186 (1939), where the Iowa court argues in this vein and further suggests that such institutions should protect themselves by expending a portion of their donations for public liability insurance. This in effect forces the "Good Samaritan" to wear gloves in ministering to the indigent or bear the risk of infection. If he chooses the former alternative, he must pay premium rates based not only on the cost of defending suits, but also for the cost of satisfying unfavorable judgments. See *Moore v. Moyle,* 335 Ill. App. 342, 82 N. E. (2d) 61 (1948); *Dille v. St. Luke's Hospital,* 355 Mo. 436, 196 S. W. (2d) 615 (1946). It is doubtful, however, that the cost of premiums would destroy *substantial* charities. See *Georgetown College v. Hughes*, 130 F. (2d) 810, 823 (D. C. Cir. 1942); but see *Stedem v. Jewish Memorial Hospital Ass'n. of Kansas City*, ... Mo. ...., 187 S. W. (2d) 469, 470 (1945) (excessive premium rates would dissipate the funds). The fact that many charities may be modeled along the lines of "big businesses," in order to distribute their benefits and serve the public with greater efficiency, does not appear to be a sufficient reason for forcing them actually to become commercial. The objectives of a "business" on the one hand and a "charity" on the other are generally speaking, quite different, albeit in a given case a "charity" may have many characteristics of a "business."

The diversity in the reasoning of those courts granting nonliability may suggest that when the judicial eye sees charity resting on the scales of justice, it seldom sees the scales at rest; yet the granting of nonliability does indicate that charity is recognized — that it functions as an important element in aiding society to attain its common good. The instant case illustrates the failure of the courts in recent cases to maintain a proper perspective of the good of the individual and that of society.

James D. Matthews

TORTS—LIMITATION OF ACTIONS—FAILURE TO FILE AUTOMOBILE ACCIDENT REPORT EXTENDS TIME FOR FILING ACTION.—*St. Clair v. Bardstown Transfer Line, Inc.*, 310 Ky. 776, 221 S. W. (2d) 679 (1949). The plaintiff's decedent was killed in a collision involving his automobile and a truck driven by the defendant's employee. More than a year after the death, his widow was appointed administratrix of his estate, and shortly thereafter she filed this action, alleging in her petition that defendant's employee was guilty of negligence. The defendant answered, pleading the one year statute of limitations to actions for wrongful death. The plaintiff in reply sought to avoid the plea under the provision of the tolling statute, KY. REV. STAT. ANN. § 413.190(2) (1943), which reads:

> When a cause of action . . . accrues against a resident of this state, and he by . . . concealing himself . . . obstructs the prosecution of the action, the time . . . shall not be computed as any part of the period within which the action shall be commenced.

The plaintiff alleged that the defendant, by failing to report the accident to the police as required by statute, KY. REV. STAT. ANN. § 189.580(2) (1943), had concealed itself and thus tolled the limitation, to which the defendant demurred. The court stated that, "The sole question involved in the case . . . is the sufficiency of plaintiff's reply in avoidance of the statute of limitations as prescribed in the tolling statute."

The court, after thus stating the issue, held that the failure to file the report constituted a concealment, so that the cause of action *did not accrue* until after discovery of defendant's identity, and that an action filed within one year thereafter was timely. In reaching this conclusion the court said:

> . . . where the defendant conceals plaintiff's cause of action in such a way as that it could not be discovered by the exercise of ordinary diligence on the latter's part . . . the right of action did not accrue until such discovery was made . . . See Falls Branch Coal Co. v. Proctor Coal Co., 203 Ky. 307, 262 S. W. 300 [1924] . . . .

In *Falls Branch Coal Co. v. Proctor Coal Co., supra,* the only case cited in the opinion, the court held that a cause of action for removing coal from beneath one's land through an opening on adjoining land accrues only when the trespass is actually discovered or when discovery was reasonably possible. The rationale of the holding was that it is the duty of the trespasser to know when he crosses the line, and it is his duty to notify the landowner, and failure to do so constitutes constructive fraud. However, in the *Falls Branch Coal Co.* case, the court was careful to distinguish between concealment of the identity of the party liable on a cause of action and concealment of the cause of action, saying, 262 S. W. at 306, that:

> There is nothing in the opinion in the case of Dragoo v. Cooper, 9 Bush. 629 (1873), militating against the above expressed views, since in that case the *cause of action* was not concealed . . . It was not a case of being ignorant of possessing a cause of action, but rather one where the person to be sued was not located within the limitation period and we therefore do not regard it as applicable to the facts of this case.

For other cases holding that concealment of the identity of the person against whom a cause of action may be brought does not constitute concealment of a cause of action, see *Staples v. Zoph,* 9 Cal. App. (2d) 369, 49 P. (2d) 1131 (1935); *Landers v. Evers,* 107 Ind. App. 347, 24 N. E. (2d) 796 (1940).

Furthermore, in *Falls Branch Coal Co. v. Proctor Coal Co., supra,* the court's authority to create exceptions to the statute of limitations was expressly denied. The court stated:

> That the courts are without authority to create exceptions to the terms of a statute, be it one of limitation or one dealing with other subjects, when those terms are broad enough to cover all cases, regardless of their hardships under particular circumstances, is a well settled rule.

In the instant case there is an express exception to the statute of limitations, namely the tolling statute, KY. REV. STAT. ANN. § 413.190(2) (1943), upon which the plaintiff based her reply and upon which the court said "the sole question involved in the case" depends. But the tolling statute expressly applies "when a cause of action accrues." It would seem that the court's decision that the cause of action did not accrue until discovery of the defendant's identity was neither presented by the pleadings, nor supported by the purported authority cited.

When the period of limitations is put in issue in an action for wrongful death, two factors must be considered: (1) the time from which the limitation begins to run, and (2) whether the period of limitation is a condition of the right to maintain the action or a mere statute of limitations subject to being tolled.

According to the great weight of authority, the limitation period applicable to an action for wrongful death begins to run from the time of the death. *Wilson v. Jackson,* 48 Ind. App. 150, 95 N. E. 589 (1911); *Carden v. Louisville & N. R. Co.,* 101 Ky. 113, 39 S. W. 1027 (1897); *Bickford v. Furber,* 271 Mass. 94, 170 N. E. 796 (1930). In *Faulkner's Adm'r. v. Louisville & N. R. Co.,* 184 Ky. 533, 212 S. W. 130 (1919), it was held that under the Kentucky statute an action for wrongful death was barred one year from the death of the intestate rather than one year from the qualification of the administrator. Similarly, in *Van Vactor's Adm'r. v. Louisville & N. R. Co.,* 112 Ky. 445, 66 S. W. 4 (1902), it was held that the infancy of decedent's wife and child did not extend the period, since the cause of action accrued at the time of death to the personal representative, KY. REV. STAT. ANN. § 411.130(2) (1943); and that the infancy of persons who were not entitled to bring the action could have no effect upon the running of the statute. In *Vassil's Adm'r. v. Scarsella,* 292 Ky. 153, 166 S. W. (2d) 64 (1942), it was held that a foreign administrator could not bring an action for wrongful death, and that the bringing of an action by him prior to his appointment in Kentucky was without legal effect and did not toll the statute of limitations which began to run at the date of the intestate's death.

The majority of states take the view that, since a wrongful death statute creates a right of action which did not exist at common law, the provision limiting the time within which the action may be brought is technically not a statute of limitations, but is a condition of the right to maintain the action, which must be strictly complied with; that the right as well as the remedy is extinguished by the expiration of the period of limitation. *Antony v. St. Louis, I. M. & S. R. Co.,* 108 Ark. 219, 157 S. W. 394 (1913); *Westcott v. Young,* 275 Mass. 82, 175 N. E. 153 (1931); *Sabol v. Pekoc,* 148 Ohio St. 545, 76 N. E. (2d) 84 (1947); *Smith v. Eureka Pipe Line Co.,* 122 W. Va. 277, 8 S. E. (2d) 890 (1940). A minority of states hold that the period during which an action for wrongful death may be brought is a mere technical statute of limitations, subject to being tolled as in the case of any other action. *Sharrow v. Inland Lines,* 214 N. Y. 101, 108 N. E. 217 (1915); *Brookshire v. Burkhart,* 141 Okla. 1, 283 Pac. 571 (1929). From an early date Kentucky held that the period of limitation in a wrongful death action was a mere statute of limitations. *Chiles v. Drake*, 2 Met. 146 (Ky. 1859).

As has already been indicated, the court's holding that the cause of action did not accrue until discovery of the defendant's identity does not seem warranted by the pleadings or supported by the authority cited, the theory of the case being confined, for the most part, to cases involving trespass to underground minerals and timber, and referring to the discovery of the cause of action, not the discovery of the identity of the party liable. *Falls Branch Coal Co. v. Proctor Coal Co., supra.* The court has previously held that the cause of action accrues at the death of the decedent and the period within which to bring the action is not extended by delay in the qualification of an administrator. *Faulkner's Adm'r. v. Louisville & N. R. Co., supra*; *Vassil's Adm'r. v. Scarsella, supra.* Assuming that the failure to file an accident report constituted a concealment within the meaning of KY. REV. STAT. ANN. § 413.190(2) (1943), the plaintiff still did not qualify as personal representative for more than a year after the death of the decedent, so that during the running of the statute there was no person qualified to bring the action. KY. REV. STAT. ANN. § 411.130(1) (1943). Therefore, there was no one in existence in whose favor the statute could be tolled. *Van Vactor's Adm'r. v. Louisville & N. R. Co., supra.* Or to put it another way, if, at the time of the accident defendant had made its identity known to the plaintiff, her failure to qualify as administratrix within one year would have barred the action.

Clifford A. Goodrich, Jr.

TRADE REGULATIONS—OIL AND GAS—FEDERAL REGULATION OF INTRASTATE COMPANIES.—*Federal Power Commission v. East Ohio Gas Co.*, ... U. S. ...., 70 S. Ct. 266 (1950). The East Ohio Gas Company operates wholly within the state of Ohio. Its high pressure pipelines connect, inside the Ohio borders, with pipelines of interstate companies. Its lines then carry gas to its own distribution centers in Ohio. At these centers, the pressure is reduced for distribution to local consumers. The question presented by this case was whether the flow of gas within Ohio constituted interstate transportation and commerce, thus bringing the company's operations under the control of the Federal Power Commission, or whether they were excluded as involving only "local distribution of natural gas or . . . facilities used for such distribution," as provided in the Natural Gas Act, 52 STAT. 821 (1938), as amended, 56 STAT. 83 (1942), 15 U. S. C. § 717 *et seq.* (1946).

The Court stated that it found no language in the Act which would enable it to say that Congress had intended to exclude from its provisions those companies engaged in transporting interstate gas within one state only. It held that the Natural Gas Act applies to interstate gas in transportation in high pressure lines, and that the fact that the company is entirely intrastate does not matter. Congress, according to the Court, intended to exclude from the provisions of the Act only those companies engaged solely in distributing in low pressure lines to ultimate consumers.

According to this and prior decisions of the Court, the Act applies to (1) the transportation of natural gas in interstate commerce; (2) the sale of natural gas in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale. The Court found that there were two criteria by which the operations of a natural gas company could be measured to determine whether or not federal control should apply. First, applying the concept of interstate commerce in its usual sense and not in a more restricted meaning, the Court ruled that if interstate gas is flowing through a company's pipeline, it is engaged in interstate commerce. The second criterion found was the resale provision of the Act—that is, if interstate gas is sold to a company for resale to the ultimate consumers, the Act does not apply to the purchasing company. The Court here, however, decided that these two standards are distinct, and the fact that a company is excluded from the terms of the Act according to one does not mean that it is entirely exempt; it may (and in the instant case did) fall under the Commission's power by virtue of the other standard.

The question posed is, when does the gas cease to be subject to federal regulation? Is it when state control attaches? The question has been answered in the affirmative by prior decisions of the Court: *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 64 S. Ct. 281, 88 L. Ed. 333 (1944); *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U. S. 682, 67 S. Ct. 1482, 91 L. Ed. 1742 (1947); *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 69 S. Ct. 1251 (1949).

The question at the other end of the pipeline—i.e., when does the gas first become subject to federal regulation—has been considered in an earlier article. See Scanlan, *Administrative Abnegation in the Face of Congressional Coercion: The Interstate Natural Gas Company Affair*, 23 NOTRE DAME LAWYER 173 (1948). The case therein discussed announced that the meaning of "interstate commerce" in the Natural Gas Act is no more restricted than that theretofore given to the term by the Court. *Interstate Natural Gas Co. v. Federal Power Commission, supra.* The Court, as already noted, adopted this meaning in the instant case.

If "interstate commerce" is no more restricted in the Natural Gas Act than in other instances, then natural gas is in interstate commerce from the time it leaves the ground in the producing area until, as the Supreme Court once held, it reaches the consumer's burners in another state. *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23, 40 S. Ct. 279, 64 L. Ed. 434 (1920). However, the court retreated from this position in *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298, 44 S. Ct. 544, 68 L. Ed. 1027 (1924), with the result that a hiatus was created between the respective areas of federal and state regulation. The rationale of that decision was that the states were prevented from regulating high pressure lines because, by so doing, they would be burdening interstate commerce, while the power of Congress to regulate had not yet been exercised. In the *Kansas Natural Gas Co.* case, the state attempted to prevent an increase in the price of gas to local distributors by a company which brought the gas in from another state, and was prevented from doing so by the Court under the Interstate Commerce Clause; and, as Congress had not yet acted, the rates were not subject to any control.

The avowed purpose of the Natural Gas Act was to close this gap. The Act, by express language, included in the field of federal control any company engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of natural gas for resale to ultimate consumers. All other companies were excluded. In *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U. S. 507, 68 S. Ct. 190, 92 L. Ed. 128 (1947), this exclusion was held sufficient to permit state regulation of sales made *directly* to a consumer by an interstate pipe line company. The rule there applied was that only where the sale was to be followed by resale to the ultimate consumer would the first sale be beyond the power of state regulation.

Mr. Justice Jackson's dissent in the instant case goes into the legislative history of the Act, pointing up the fact that the Act was intended to regulate only that which was then unregulated, and not to invade or supersede state regulation. He sharply disagrees with Mr. Justice Black's statement as to the distinguishing feature between the East Ohio Gas Company's operations and those of the Illinois Natural Gas Company in *Illinois Natural Gas Co. v. Illinois Public Service Co.*, 314 U. S. 498, 62 S. Ct. 384, 86 L. Ed. 371 (1942). In that case, the company was buying gas from interstate sources and reselling it to local distributors. The Court held that the company was engaged in interstate commerce, even though all its business was transacted within the state of Illinois. The Illinois Natural Gas Company's intrastate pipeline connected with an affiliate's interstate line at various points within the state. To Mr. Justice Black, the fact that the gas was bought from an interstate pipeline and resold to local distributors was a mere incident to the fact that the gas was in interstate commerce. Mr. Justice Jackson was of the opinion that the reselling was the important factor, and cited the *Panhandle Eastern Pipeline Co.* case, to substantiate his position that the state should have been allowed to regulate the sales in question.

At the producing end of the pipeline, the emphasis has been on determining when the gas leaves the producing fields and enters commerce. Mr. Justice Jackson's opinion in *Champlin Refining Co. v. United States,* 329 U. S. 29, 67 S. Ct. 1, 91 L. Ed. 22 (1946), took a liberal view of what constituted interstate commerce, in order to prevent the refining company from escaping federal regulation. But he insists upon a narrower application of the law at the "distributing" end. The purpose of the apparently inconsistent position in this instance is to allow state regulatory machinery to assume control, without subjecting the companies to double regulation. Mr. Justice Jackson never loses sight of the purpose of the Act: namely, to bridge the gap between federal and state regulation which existed prior to the passage of the present law. Likewise, it was asserted by the chairman of the Public Service Commission of West Virginia, soon after the Act was passed, that the law applied only to transportation of gas in interstate commerce, the sale in interstate commerce of gas for resale to ultimate consumers, and natural gas companies engaged in such transportation or sale. The chairman considered the regulation under the Act as a supplement to state authority, rather than an attempt to supersede it. See Preston, *Regulation of the Natural Gas Industry,* 45 W. VA. L. Q. 250 (1939).

The Court, then, has abandoned the resale criterion as to when federal regulation shall apply, and has adopted what the dissent calls the "peculiarly mechanistic formula" used in a 1931 tax case (which involved, coincidentally, the same company as in the instant case), *East Ohio Gas Co. v. Tax Commissioner of Ohio,* 283 U. S. 465, 51 S. Ct. 499, 75 L. Ed. 1171 (1931). In that case, the step-down from high pressure to low pressure lines was compared to "breaking the original package" so that the state could reach the retail sales for tax purposes.

This case reverses the recent trend of deciding what shall be the division between state and federal control solely from the resale criterion, and approaches it from the interstate commerce aspect. Whether this will have any influence on the extent of federal regulation at the source remains unanswered.

Wilmer L. McLaughlin

WORKMEN'S COMPENSATION—WHEN IS A CORPORATION OFFICER AN "EMPLOYEE" WITHIN THE MEANING OF THE STATUTE?—*Brook's, Inc. v. Claywell,* .... Ark. ...., 224 S. W. (2d) 37 (1949). The claimant filed for compensation under the Arkansas Workmen's Compensation Law, ARK. ANN. STAT. § 81-1301 *et seq.* (1947), alleging in his claim that he was employed by appellant corporation, which regularly employed five or more employees, and that he was injured in the course of his employment. The Arkansas Workmen's Compensation Commission found that Brook, president and manager of the corporation, which was engaged in the retail appliance business, acted in a dual capacity as both corporation officer and employee, thus bringing the total number of employees to five and giving the commission jurisdiction over the claim. Upon this finding, the commission approved the claim, and awarded compensation. The defendant corporation appealed to the Supreme Court of Arkansas, contending that Brook was not an employee within the meaning of the statute, that the corporation did not, therefore, have five employees, and that the commission was thus without jurisdiction to entertain the claim. The supreme court affirmed the award, one justice dissenting.

The majority opinion stated that in determining whether the corporation had the minimum number of employees necessary to give the commission jurisdiction of a claim, only those covered by the act could be counted, reducing the question in the case to whether the president of the corporation would be covered—i.e., whether he was an employee within the meaning of the statute. The commission's findings of fact showed that Brook drew no fixed salary, that he had no fixed duties to perform, but that he supervised the shop and sales staff, waited on customers in the store, and assisted in repairing and installing appliances, etc. Upon these facts, the commission found that Brook acted in a dual capacity as corporation officer and employee, and that he could be counted as an employee in determining the commission's jurisdiction. The court affirmed these findings, viewing the problem of whether corporation officers may be considered as employees in the light of the particular duties performed. The dissenting justice took the view that the existence of the employer-employee relationship must be tested by the presence of supervision and control. The majority opinion and the dissent represent the two divergent views on the question presented, and it is from this aspect that the cases in other states will be discussed.

The dual capacity doctrine states that if a person is both an executive officer of a corporation and at the same time an "employee" of that corporation, as that term is understood in connection with the several states' Workmen's Compensation Acts, such person may recover under the statute for injuries sustained while acting in the "employee" capacity. The doctrine is nearly universally applied. The conflict of authority in the cases arises from the interpretation of the word "employee." The usual statutory definition states that an employee is any person under a contract of hire, express or implied, oral or written.

The cases in those states which hold that the nature of the duties and services performed by the corporation officer are determinative of his employee status have relied on a line of authority stemming from In re

Haynes, 66 Ind. App. 321, 118 N. E. 387 (1917), where the court allowed recovery by one who was both a director and secretary-treasurer of a corporation, but who also had duties as buyer, salesman, and collector of accounts. In justifying its decision, the court made a clear distinction between the larger corporations, whose officers could not be brought within the intended scope of the act (i.e., the alleviation of the need and poverty of injured workmen), and those "of humbler proportions where such an official might serve in a dual capacity." In re *Haynes, supra*, 66 Ind. App. at 332. The Indiana court reiterated the doctrine in *Hurst v. Hunley*, 81 Ind. App. 203, 141 N. E. 650 (1923), and allowed recovery under the statute for the death of the receiver of a coal mine, who had also been hired to act as its "top boss" during the period of receivership. Cases in several other jurisdictions have used this interpretation of the word "employee" and disregarded the element of control as evidencing an employer-employee relationship. In *Southern Surety Co. et al. v. Childers et al.*, 87 Okla. 261, 209 Pac. 927 (1922), recovery was allowed a garage owner who had incorporated his business but continued to perform manual labor, although he possessed and exercised complete control over all phases of the conduct of business. In *Kuehnl v. Industrial Commission of Ohio*, 136 Ohio St. 313, 25 N. E. (2d) 682 (1940), where the president and general manager of a construction company had "employee" duties and his salary was included in a payroll on which the premium was paid into a state insurance fund by the corporation, the claim was approved. Where the secretary-treasurer of an incorporated printing company owned forty-eight of one hundred shares of issued stock and also had the duty of operating printing machinery, the Illinois courts permitted recovery. *Stevens v. Industrial Commission et al.*, 346 Ill. 495, 179 N. E. 102 (1931).

An interpretation of the word "employee" which makes control and supervision essential to recovery under the act has been adopted in varying degrees in other states. In several states, a strict rule originally adopted has been eased in its application in succeeding cases. Thus in New York, in *Bowne v. S. W. Bowne Co.*, 221 N. Y. 28, 116 N. E. 364 (1917), it was held that the president and majority stockholder of a corporation was not entitled to recover even though injured while performing manual labor, because in the court's opinion it was not the intent of the legislators that such persons be benefited. The court stressed the fact that the claimant was responsible to no one in the discharge of his duties and, lacking this essential element of control, no employer-employee relationship existed. But in later cases, the New York court has allowed recovery to corporation executives, holding that such persons are "employees" if their regular duties include such duties as an ordinary employee would perform. *Skouitchi v. Chic Cloak and Suit Co., Inc. et al.*, 230 N. Y. 296, 130 N. E. 299 (1921); *Goldin v. Goldin Decorating Co.*, 247 N. Y. 603, 161 N. E. 199 (1928).

The Wisconsin court has lessened the effect of its decision in *Leigh Aitchison, Inc. et al. v. Industrial Commission et al.,* 188 Wis. 218, 205 N. W. 806 (1925)—a case much cited by courts which have adopted the test of control and supervision—in much the same manner. In the latter case, the claimant owned all but the qualifying shares of stock, and was in absolute control of all business policy. Recovery was denied although the injury was sustained while the claimant was running a simple errand bearing no relation to her executive duties. But in *Milwaukee Toy Co. et al. v. Industrial Commission et al.,* 203 Wis. 493, 234 N. W. 748 (1931), the court ignored the fact that the claimant's decedent controlled the conduct of the business, and discovered the employer-employee relationship on the strength of a board resolution appointing the decedent general manager of the corporation, in which capacity he was held to be an employee.

In *Brown v. Conway Electric Light and Power Co.,* 82 N. H. 78, 129 Atl. 633 (1925), recovery was denied for the death by electrocution of the company's treasurer and general manager, who was killed while observing the installation of electrical transformers. While the court gave recognition to the dual capacity doctrine, its decision was controlled by the fact that the deceased was under no superior's control at the time of the accident, and that his observation of the operation was not one of his regular duties. But where a treasurer-stockholder performed regular services as a salesman apart from his executive duties, the same court found that, while acting in his capacity as salesman, the claimant was an employee and under the control of the corporation. *White et al. v. Arnold Wood Heel Co.,* 90 N. H. 315, 8 A. (2d) 737 (1939).

The case of *Donaldson v. Wm. H. B. Donaldson Co. et al.,* 176 Minn. 422, 223 N. W. 772 (1929), relied heavily upon the authority of the *Leigh Aitchison* case. Both cases were cited in the dissent in the principal case. In the *Donaldson* case, the court omitted all discussion of the facts surrounding the injury and the duties of the claimant, but merely pointed out that he was in executive control of the company and that he was subject to discharge by no one. Recovery was denied. In *Carville v. A. F. Bornot and Co. et al.,* 288 Pa. 104, 135 Atl. 652 (1927), the claimant's decedent owned one-fifth of the stock in a family corporation, served as its vice-president, and also "worked around" the corporation's dry-cleaning plant. The court held that to permit recovery the employer-employee relationship must exist, and thus denied recovery, placing significance upon the fact that the deceased's work at the plant was performed voluntarily and not as one of his duties, indicating the absence of supervision and control.

An interesting variation of the supervision and control test was introduced in *Emery's Case,* 271 Mass. 46, 170 N. E. 839, 840 (1930), where it was said: "In the absence of special circumstances, a stock-