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NOTES

Conservation

CONSTITUTIONAL ASPECTS OF TIMBER CONSERVATION LEGISLATION

The nation's goal in forestry should be to make the forest lands of this country capable of serving the national welfare permanently and abundantly. With improved management and regulation the productivity of our forest lands can be built up so that ultimately they can supply our own future requirements on a permanent basis.

The supply of saw timber is shrinking. Many forest ranges are rundown, and critical watershed problems exist in many areas.[1] About one-tenth of the area of the United States contained saw timber suitable for lumber before World War I. Between the years 1929 and 1940 this supply was decreased by twenty percent, and a further twenty percent decline is predicted by the year 1960.[2] Recent Government studies indicate that more than one-half of the total land in the United States has already been damaged, with fifty

1 REP. SEC. AGRICULTURE 120 (1949).
2 PETERSON, ECONOMICS 103 (1949).

million acres rendered unfit for any future cultivation. This condition is the proximate result of the decrease in the amount of water-absorbing timber.[3]

The nation must restore millions of acres of depleted forest and range land to productivity. Timber-growing stock must be replenished. Good management and regulation of all forest lands must be achieved. Every effort must be made to reduce waste in the utilization of forest products. The United States Forest Service in 1947 completed a study of wastage in the utilization of wood in the United States. It reported that of the 188,500,000 tons of wood cut in the forests of this country each year for lumber, pulp, paper and other commercial products, 108,900,000 tons or fifty-seven percent is burned for fuel or wasted. Logging waste alone amounts to 49,000,000 tons, or forty-five percent of the total waste.[4] Large logging companies have been notorious in their practice of coming into a forest area for the purpose of cutting all the valuable timber and then "getting out." This practice has resulted in the abandonment of large areas, with the result that an enormous amount of revenue is lost to the states each year by virtue of tax delinquency.[5]

This present day crisis in regard to depleted forests is the result of the failure of the judiciary and legislatures to take cognizance of the overall problems.

I.

The legal concept that the Crown or Government has the power to regulate property for the purpose of conserving the natural resources of a nation dates back to the year 1567.[6] But the basic foundation of the conservation movement was laid in the Eighteenth Century with the genesis of the Sociological School of Jurisprudence.[7]

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3 See Note, 50 YALE L. J. 1056 (1941).

4 REP. SEC. AGRICULTURE 128 (1947).

5 Millions of acres of cut-over land which has become tax delinquent and abandoned has been an acute problem of the Pacific Northwest, the Lake States and parts of the South. In Oregon and Washington, the amount of forest lands thus forfeited rose from about 1,140,000 acres in 1933 to more than 1,859,000 in 1938. In three Lake States alone, tax delinquency on cut-over forest lands rose from 6,000,000 acres in 1929 to more than 20,000,000 in 1939. See LIEBER, AMERICA'S NATURAL WEALTH 105 (1942).

6 Case of Mines, 1 Pl. Comm. 310, 75 Eng. Rep. 472 (1567). More than three centuries ago, some questions arose as to the prerogative of the Crown over the scanty deposits of resources available. All the Judges in England were assembled at Sergeant's Inn to consult. Their remarkable declarations of the public interest in the nation's supply of gunpowder, even in peacetime, has come down to us as perhaps the earliest statement in the Common Law on the principle of conservation.

7 Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911).

This school based its philosophy on the principle that "law is not made but is found." [8] Rather than use a historical method of approach, as did most jurists during the era preceding this school, judges who were members of this school looked to the future as well as the present by basing their decisions on the general welfare concept of government. These judges formulated decisions the effect of which amounted to a growing limitation on the use of property and the exercise of the incidents of ownership. Through the efforts of this Sociological School of Jurists, the Nineteenth Century idea that property rights revolved solely around the rights of the owner and his immediate neighbor, was gradually disappearing. Limitations were placed on the *jus utere et abutere,* for to them the law was a social institution existing for social rather than individual ends.[9]

In the United States, the dawn of liberal thinking concerning property rights took place in the first half of the Nineteenth Century. However, the movement did not gain any positive acceptance with the judiciary until about the period of the administration of Theodore Roosevelt.[10] The leading and most important case of this early era of liberal thinking was set down by Justice Shaw of the Massachusetts Supreme Judicial Court in *Commonwealth v. Alger,* decided in 1851.[11] This often cited decision is the first important case in the conservation movement, since it recognized that the right of a person to the use of his property is not an absolute right, but is subject to certain reasonable limitations. Judge Shaw stated: [12]

> . . . every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.

In spite of the *Alger* decision, the prevailing concept of property during the Nineteenth Century period was decidedly individualistic.

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8 Pound, *The Scope and Purpose of Sociological Jurisprudence,* 24 HARV. L. REV. 606 (1911).

9 POUND, THE SPIRIT OF THE COMMON LAW 197 (1921).

10 See 36 STAT. 1244 (1911); 36 STAT. 531 (1909); *In re* Opinion of the Justices, 103 Me. 506, 69 Atl. 627, 19 L. R. A. (N. S.) 422 (1908).

11 61 Mass. 53, 7 Cush. 53 (1851).

12 *Id.* at 84.

This conservatism is probably best reflected in the decision of Justice Patterson in the case of *Van Horne's Lessee v. Dorrance,* where it was stated: [13]

> . . . the right of acquiring and possessing property and having it protected, is one of the natural inherent and unalienable rights of man. Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects that induced them to unite in society . . . The preservation of property then is a primary object of the social compact . . . no one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community. . . .

This strict property concept was gradually being driven into the background by the ever-increasing number of cases following the principle set down in the *Alger* case.[14] By the year 1880, and for years following, another notable change in the judicial and legislative attitude towards property took form in the idea of *res publicae,* and in the abandonment of the idea of *res communes* and *res nullius.*[15] At one time things such as wild animals, water and other unbridled substances were held to be *res communes,* and following the Roman Law, some things were said to be incapable of ownership by anyone, but their use was said to be common to all. Other things were said to be *res nullius,* that is, no one owned them for the time being, but one who took possession of them intending to make them his own might become the owner by so doing. But by the year 1881 courts tended to treat things as being *res publicae*: things are owned by the state in trust for the people; the conservation and socially advantageous use of things, such as natural resources, required that no one be suffered to acquire any property in them or any property right in the use of them, but that these things should be regulated by the state to secure the widest and most beneficial use consistent with conserving them.[16]

The social interest in the conservation of natural resources had come to be recognized, and a compromise was sought between the exigencies of the social interest and the interest in the free exercise of individual power and the interest in security of acquisitions.[17]

In the last few years of the Nineteenth Century, legislatures and courts were gradually recognizing the need for conservation legisla-

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13 Van Horne's Lessee v. Dorrance, 2 Dall. 304, 310, 1 L. Ed. 391 (1795). See also Wilkinson v. Leland, 2 Pet. 627, 7 L. Ed. 542 (1829).

14 See Commonwealth v. Charles Bailey, 95 Mass. 541, 13 Allen 541 (1866); Commonwealth v. Tewksbury, 52 Mass. 55, 11 Met. 55 (1846); Commonwealth v. Enoch Chapin, 22 Mass. 199, 5 Pick. 199 (1827).

15 POUND, THE SPIRIT OF THE COMMON LAW 203 (1921).

16 Geer v. State of Connecticut, 161 U. S. 519, 16 S. Ct. 600, 40 L. Ed 793 (1896); Magner v. People, 97 Ill. 320 (1881); POUND, THE SPIRIT OF THE COMMON LAW 203 (1921).

17 ISE, THE UNITED STATES FOREST POLICY 1-19 (1920).

tion.[18] The reason for this change in attitude was that in the last quarter of the Nineteenth Century many Americans became seriously concerned over the rapid rate at which our resources were being dissipated. They were especially disturbed by the destruction of the forests over large areas of the country. The agency most responsible for this exploitation was not the individual farmer, but the lumbering and logging firms which, with abundant capital, were able to appropriate large areas of timber land and thereby use such timber as they pleased. This destruction of forests resulted not only from the waste of saw timber, but also from fires and wasteful methods of lumbering. It was a serious matter, not only because it endangered our future supplies of lumber, but also because it tended to increase land erosion and floods. Until 1880 legislatures had shown an utter incapacity to deal with timber conserving measures, and all hope for future conservation centered in the provision of the act enabling the President to set aside forest reserves.[19] This led eventually to the creation of the Forest Service in 1905. In 1909 President Theodore Roosevelt gave considerable impetus to the conservation movement when the Enlarged Homestead Act was passed.[20]

This early Twentieth Century concern over the growing need for methods of combating the unscruplous and wasteful destruction of the nation's natural resources, such as timber, stimulated state legislatures to enact legislation for the purpose of preserving this natural wealth of their states. The majority of the statutes prior to 1935 involved voluntary cooperative plans. Today, state timber conservation legislation can be grouped into three major categories: (1) the voluntary group.[21] This group of statutes generally sets up a For-

18 At an inquiry by the Department of the Interior, Justice Brandeis said in 1911: "The old method of distributing and developing the great resources of the country is creating a huge privileged class which is endangering liberty. There cannot be liberty without financial independence, and the greatest danger to the people of the United States today is in becoming, as they are gradually more and more, a class of employees. Shall the only question be, who is to be the master? Resistance to such conditions is, I take it, what underlies this conservation movement. LIEF, THE BRANDEIS GUIDE TO THE MODERN WORLD 103 (1941).

19 ROBBINS, OUR LANDED HERITAGE 303 (1942).

20 36 STAT. 531 (1909). This act specified that one-fourth of the land granted as homesteads be cultivated and that no irrigable, timber or mineral land should be entered.

21 Alabama—ALA. CODE tit. 8 § 184 *et. seq.* (1940).
Connecticut—CONN. GEN. STAT., § 3454 (1949).
Florida—FLA. STAT. § 590 (Cum. Supp. 1947).
Georgia—GA. CODE ANN. § 43-201-3 (1933).
Idaho—IDAHO CODE ANN. § 37-201 *et seq.* (1932).
Maine—ME. REV. STAT. c. 32, § 1 *et seq.* (1944).
New York—N. Y. CONSERVATION LAW § 50-6 (1941).
Virginia—VIR. CODE ANN. § 10-51 *et seq.* (1950).
West Virginia—W. VA. CODE ANN. § 2300 (1949).

estry Division appointing a state forester whose duty it is to provide private landowners with technical, educational and experimental assistance purely on the basis of voluntary cooperation. (2) indirect control type of legislation by means of various taxation measures.[22] Many states have special methods of taxing forest lands, designed to promote conservation. Although there is considerable variance in the provisions for taxing forest lands in various states, the most common type of statute is the partial or total exemption of forest lands. Such exemptions may take the form of a deferment of taxes, or the substitution of a special type of assessment which amounts to a low-fixed valuation or low-rate specific acreage tax in lieu of general property taxes. Other states, base the tax upon yearly yield, and impose a stumpage or severance tax at the time of the removal of the timber.[23] (3) the licensing and regulation type of group.[24] This type of legislation is by far the most important and progressive of the three general types. These statutes generally provide for the issuance of permits to cut timber on private land only upon compliance with the statutory regulations by the private owner or by the lessee of the logging rights. These regulations are reasonable limitations on the use of forest lands in that they require the logger to allow a certain number of trees to remain standing for reseeding purposes. This third category of legislation has provoked the most criticism from lumbering and logging interests, and such criticism is likely to increase in the future due to the possibility of more states passing similar legislation.

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22 Alabama—ALA. CODE. tit. 8, § 189 (1940).
Arkansas—ARK. DIG. STAT. § 84-32102 (1947).
Indiana—IND. ANN. STAT. § 32-301 *et seq.* (Burns 1949 Repl.).
Iowa—IOWA CODE § 441.14 (1946).
Michigan—MICH. STAT. ANN. § 13.98 (Henderson 1947) (Cum. Supp. 1949).
Minnesota—MINN. STAT. § 88.1 *et seq.* (Henderson 1945).
Mississippi—MISS. CODE ANN. § 101-3 (1942); MISS. CODE ANN. tit. 37 § 9416 (1942).
Oregon—ORE. COMP. LAWS ANN. § 110-1001 (1940).
Wisconsin—WIS. STAT. § 77.01 *et seq.* (1947).

23 Alabama—ALA. CODE tit. 8, § 191 *et seq.* (1940).
Arkansas—ARK. DIG. STAT. § 84-2103 (1937).
California—CAL. PUB. RESOURCES CODE § 4850 (1944).
Florida—FLA. STAT. § 590.17 *et seq.* (Cum. Supp. 1947).
Massachusetts—MASS. ANN. LAWS c. 132, § 40 *et seq.* (1933) (Cum. Supp. 1948).
Mississippi—MISS. CODE ANN. § 6046-12 (1942) (Cum. Supp. 1948).
Virginia—VIR. CODE ANN. § 10-76 (1949).
Washington—Wash. Laws 1945, c. 193, as amended by Wash. Laws 1947, c. 218.

24 CCH STATE TAX REP. ¶ 4501 (1948).

II.

The physical characteristics of light, air, timber and of waters above and below the surface of the earth are such that their use is likely to affect private owners' use and enjoyment. Consequently, through a long line of judicial decisions, the privileges of landowners which affect these physical substances, have been limited by the rights of neighboring owners and members of the community. The removal of timber may affect adjoining landowners directly or indirectly by the dwindling of seed supply and the increased run-off of water and its consequential effects, particularly erosion.

What would seem to be on its face a combination of desirable legal relations, actually indicates two seemingly conflicting policies concerning timber cutting and production: the policy that individual landowners have the right freely to cut and produce timber without limitation; the policy that the community and state have the right to conserve their natural resources.

Until 1908 the constitutionality of statutes regulating the use and cutting of timber had not been passed upon by any court. The issues had not yet been decided whether such legislation was a denial of due process of law, deprivation of property without just compensation, impairment of the obligations of contracts, or a denial of equal protection of the laws. Although there had been no decisions written prior to 1908 concerning the constitutionality of statutes regulating the use of timber, a number of important decisions concerning the constitutionality of statutes regulating the drilling and the use of oil and gas had been handed down during this period, so as to leave the constitutionality of such statutes reasonably free from doubt.[25] Perhaps the leading case on this question was *Ohio Oil Co. v. Indiana*,[26] where the Supreme Court of the United States decided that a statute making it unlawful to allow gas to escape into the open air was constitutional. In that case the defendants raised the common objection that such a statute was a denial of their privilege to produce from their lands, which privilege was limited only by the duty to refrain from committing surface nuisances. The Court held that the state could in the public interest limit the privilege to produce, as a means of preventing waste, and as a means of protecting the rights of the community to a more stable productive future.

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25 Walls v. Midland Carbon Co., 254 U. S. 300, 41 S. Ct. 118, 65 L. Ed. 276 (1920); Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 31 S. Ct. 337, 55 L. Ed. 369 (1911); Ohio Oil Company v. Indiana, 177 U. S. 190, 20 S. Ct. 576, 44 L. Ed. 729 (1900); Given v. State, 160 Ind. 552, 66 N. E. 750 (1903); Townsend v. State, 147 Ind. 624, 47 N. E. 19 (1897).

26 See note 25 *supra*.

The basis for the upholding of regulatory statutes which deal with timber has been placed wholly within the police power of the state, inasmuch as the term police power embraces the system of internal regulation thereof.[27] The maxim *sic utere tuo et alienum non laedas* has been used in order to justify legislative action to define the method and manner in which a person may use his property.

In *In re Opinion of the Justices,*[28] it was stated that it was constitutional for the legislature to enact a statute which provided for the conservation of timber, the purpose of which was to promote the common welfare. The Maine court declared that such a statute would not constitute a taking of property for which compensation must be made as required under the Fourteenth Amendment of the Constitution of the United States. It further stated that the Fourteenth Amendment was never intended to interfere with the police power of the state. The court stated, with reference to a certain regulatory law, that: [29]

> While it might restrict the owner of wild and uncultivated lands in his use of them, might delay his taking some of the product, might defer his anticipated profits and even thereby might cause him some loss of profit, it would nevertheless leave him his lands, their product, and increase untouched, and without diminution of title, estate, or quantity. He would still have large measure of control and large opportunity to realize values. He might suffer delay, but not deprivation. While the use might be restricted, it would not be appropriated or "taken". . . .

The reasons which the Maine court gave for construing the Fourteenth Amendment to give wide latitude to the States in conservation legislation were that such property is not the result of productive labor but is derived solely from the state itself, the original owner; and that if the owners of large tracts of lands can waste them at will without state restriction, the state, and its people, might be hopelessly deprived of its natural wealth. The court, following the *Alger* case, further stated that to allow individual landowners the unrestricted use of their land would, in effect, frustrate the end and purpose of government, which is to maintain order for the common good.

Although the above rule of property seems to represent the weight of authority, numerically at least, there is the contrary view that the owner of land "has the absolute right of property therein, with complete authority to use the same for any industrial purpose, and he cannot be deprived of such right by the state without just compen-

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27 Lawton v. Steele, 152 U. S. 133, 14 S. Ct. 499, 38 L. Ed. 385 (1894); Dexter v. State, ___Wash.....__, 202 P. (2d) 906 (1949); State v. Pitney, 79 Wash. 608, 140 Pac. 918 (1914).

28 See note 10 *supra.*

29 See *In re* Opinion of the Justices, *supra* note 10, 69 Atl. at 629.

sation, for the reason that to do so appears violative of the fourteenth amendment. . . ." [30] The Supreme Court of Montana formulated its decision in the latter case on the grounds that if an opposing rule should be sanctioned, there would be no limit to which a legislature could go in the exercise of its powers. Such regulatory legislation, according to the court, would be paternalistic in character and would be contrary to the theory upon which our Government was formed. In a more recent case, Judge Simpson contended, in his dissenting opinion in *Dexter v. State,* that: [31]

> If there is a continuation of the policy as indicated in the present law, there can be no end to final and complete control and domination of the forests and farms of every type, as well as other business activities of the people of the state under the guise of the police power.

There can hardly be justification for such a contention in light of the fact that industry has grown and progressed with *reasonable* regulation.

In answer to the arguments propounded by the opponents of such regulatory legislation, it is appropriate to mention the general rules set down by Justice Holmes in *Pennsylvania Coal Co. v. Mahon.*[32] The problem arises in determining whether the right sought to be regulated is subject to such regulation or prohibition, and whether in a particular case the legislature has gone beyond its power, with the resultant unlawful taking. It cannot be disputed that the right of property is a right that must be protected by the state itself, and any undue restriction on the use and enjoyment thereof is as much "a taking for constitutional purposes as appropriating or destroying it." [33] If a statute involves a question between the taking of private property and a proper exercise of the police power, the statute will generally be upheld.[34] It has been held in an Oregon case [35] that where a great amount of public opinion prevails to the effect that a particular measure is urgently needed and necessary to the public welfare, that opinion is an important factor and influence in

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30 Gas Products Co. v. Rankin, et. al., 63 Mont. 372, 207 Pac. 993, 24 A. L. R. 294 (1922).

31 See note 27 *supra,* 202 P. (2d) at 914.

32 260 U. S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922).

33 See Pennsylvania Coal Co. v. Mahon, note 32 *supra;* Missouri Pac. Ry. Co. v. State of Nebraska, 164 U. S. 403, 17 S. Ct. 130, 41 L. Ed. 489 (1896); Pumpelly v. Green Bay and Mississippi Canal Co., 13 Wall. 166, 20 L. Ed. 557 (1872).

34 Gorieb v. Fox, 274 U. S. 603, 47 S. Ct. 675, 71 L. Ed. 1228 (1927); Zahn v. Board of Public Works, 274 U. S. 325, 27 S. Ct. 594, 71 L. Ed. 1074 (1927); Levy Leasing Co., Inc. v. Seigel, 258 U. S. 242, 42 S. Ct. 289, 66 L. Ed. 595 (1922).

35 Muller v. State of Oregon, 208 U. S. 412, 28 S. Ct. 324, 52 L. Ed. 551 (1908).

establishing the limitations of the police power in a particular case. However, this view is necessarily subject to the qualifications expounded by Mr. Justice Holmes in *Pennsylvania Coal Co. v. Mahon*: "The general rule is at least that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." [36] Thus it may be concluded that the police power of the state embraces not only the power to regulate for the purpose of promoting the public health, the public morals and the public safety, but also, to some extent, the power to regulate for the purpose of promoting the general prosperity of the community.

In consideration of the argument that such regulatory legislation is an impairment of the obligations of contracts, the case of *Home Bldg. & Loan Ass'n. v. Blaisdell* [37] is a clear refutation of any such contention. In the majority opinion of that case, Justice Holmes stated that the interdiction of statutes which *indirectly* impair the obligations of contracts does not prevent the state from the exercise of such powers as are vested in it for the promotion of the good of the state, or which are requisite for the general good of its citizens, though existing contracts might be affected. The economic interest of the state, warranting the exercise of the police power must be considered in the light of the economic situation of today, not what it was a hundred years ago.[38] In view of this, it necessarily follows that legislation of a regulatory nature must be aimed not for the advantage of a particular class of individuals but for the protection of a basic and valid interest of society.

The right of equal protection of the laws, as guaranteed by the Fourteenth Amendment of the Constitution of the United States, is not violated by the provisions of these regulatory statutes for the reason that this constitutional amendment has no application to statutes passed by state legislatures under the exercise of the police power. The Supreme Court of the United States, in *Powell v. Commonwealth of Pennsylvania,* where a proper exercise of the police power of the state as being violative of the Fourteenth Amendment was at issue, stated: [39]

> . . . it is settled doctrine of this court that, as government is organized for the purpose, among others, of preserving the public health and the public morals, it cannot divest itself of the power to provide for those objects, and that the fourteenth amendment was not designated to interfere with the exercise of that power of the states.

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36 See note 32 *supra,* 260 U. S. at 415.

37 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413 (1934).

38 *See* Missouri v. Holland, 252 U. S. 416, 40 S. Ct. 382, 64 L. Ed. 641 (1920).

39 Powell v. Commonwealth of Pennsylvania, 127 U. S. 678, 48 S. Ct. 992, 32 L. Ed. 253 (1888).

Therefore, so long as an enactment in the exercise of the police power does not violate any other positive mandate of the constitution, the defense of equal protection of the laws is not applicable.

The problem of statutes which impose a tax on the severance of natural resources, such as timber, has given rise to a great deal more litigation than has the regulatory type of legislation. Since the state legislatures may exercise a wide discretion in selecting the subjects of taxation, so long as such legislation refrains from a clear and hostile discrimination against particular classes of persons, most of these statutes have been held to be valid.[40] In *Lake Superior Mines v. Lord*,[41] the Supreme Court of the United States held that where a severance tax is imposed on the extraction of iron ore, but not in respect to other natural resources, equal protection of the laws was not denied, as the state legislature may reasonably treat certain classes of property differently. Where the interests of society are being depreciated, a state may impose a tax on such detrimental use. The Fourteenth Amendment of the Constitution of the United States does not here require uniformity of taxation, nor does it forbid double taxation. All that is required is that there be some adequate and reasonable basis for the classification made by the legislature.[42]

Some courts have viewed this type of tax as a privilege or occupation tax, and a proper exercise of the power to impose such taxes has been given to the legislatures.[43] The constitutional requirements relating to the imposition of property taxes have no relation to this type of tax.

Conclusions

In view of the foregoing facts and decisions, it is evident that there is a growing need for more positive measures to halt the ever-increasing destruction of American forests. Although legislation is needed, it is not likely that many states will enact such legislation. Although this detrimental condition prevails, the Federal Government lacks the constitutional power to prevent the wasteful cutting of timber by means of regulatory control. However, it is noteworthy that the Department of Agriculture has recommended that the Federal Government provide financial assistance to the state in applying state regulatory laws. Such legislation would authorize the Federal

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40 Oliver Iron Mining Co. v. Lord et al., 262 U. S. 172, 43 S. Ct. 526, 67 L. Ed. 929 (1923).

41 271 U. S. 577, 46 S. Ct. 627, 70 L. Ed. 1093 (1926).

42 Swiss Oil Corporation v. Shanks, 273 U. S. 407, 47 S. Ct. 393, 71 L. Ed. 709 (1927).

43 Flynn, Welch & Yates, Inc. v. State Tax Commission et al., 38 N. M. 131, 28 P. (2d) 889 (1934).

Government to apply these laws directly on the request of the state government. Present federal-state cooperation providing local advice and technical assistance in forest management is reaching only a small fraction of the more than four million owners of commercial forest lands. Even though an expansion of this cooperative service is much needed, additional state licensing and state regulatory systems of taxation of forest lands, although indirect in its effect, is probably one of the most important means of inciting reforestation. State and federal tax laws should be revised so that the private owners will not be induced to diminish their supply of timber merely to reduce their tax burden. Under the Internal Revenue Code of the Federal Government, the effect of the present provisions which deal with "gain and loss" and "depletion" seem to frustrate the ultimate purpose of present conservation movements.[44]

While constitutional protection has now been afforded the present program, the potent force of public opinion cannot be overlooked. Those entrusted with the carrying out of the legislative will cannot afford to disregard the property rights of the individual in the interest of controlled regulation, without the risk of defeating the entire objective.

William G. Greif
Louis Albert Hafner

Domestic Relations

Recovery of Antenuptial Gifts Under the Heart Balm Statutes

Under the common law's theory of redress for every recognized wrong, there arose the actions for breach of marriage promise, alienation of affections, criminal conversation, and seduction. Since the damages flowing from these actions seldom dealt with material injury, but almost exclusively constituted salve for wounded pride and feelings, the recovery became known as "heart balm." That these actions with their obvious "jury appeal" and comcomitant speculative damages became nefarious tools of the unscrupulous is well attested to by the so-called "scandal sheets" bizarre handling of some

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44 2 CCH 1949 Fed. Tax Rep. ¶ 1689. Percentage-of-income depletion or discovery value depletion are allowed in the case of timber. See Int. Rev. Code § 23(m). Under this section, depletion is allowed for the timber felled during the taxable year, and not the timber sold. The taxpayer may elect to treat the cutting of timber as a sale or exchange. See Int. Rev. Code § 117(k) (1).

of the more prominent and lurid trials.[1] The sordid trials that accompanied these actions became sledgehammers of blackmail to coerce the withdrawing partner into handsome out-of-court settlements, regardless of guilt or innocence, since the accusations and testimony were an indelible stain upon even the most innocent.

Naturally, in time, the public's revulsion to this legally sanctioned blackmail gelled into legislative correction, which has been popularly termed the "heart balm" statutes. These enactments were designed to prevent fraud, blackmail, and perjury that generally were integral constituents of the typical action by the rejected suitor or the spurned paramour. The statutes attempted to remove these abuses by *completely abolishing* actions for damages for mental suffering occasioned by a breach of promise to marry.

After the initial enactment[2] in 1935 of a heart balm statute by Indiana, several other states[3] immediately followed with identical or similar legislation. Since then, however, there has been a somewhat more cautious approach to the adoption of these statutes because of certain unanticipated judicial construction of them.[4] This construction was the prevention of the recovery of antenuptial gifts after a promise to marry had been breached by the donee or the parties had mutually agreed that it was all a mistake.

In the public clamour for the abolition of the heart balm actions, the object sought was the denial of damages based upon mental suffering. Nothing was mentioned concerning any recovery of tangible injuries, such as loss of an engagement ring by the spurned suitor.

One of the most obvious blemishes today in the field of domestic relations is the result being accomplished under these statutes when there has been a promise of marriage, followed by exchanges of prop-

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1 Garmong v. Henderson, 115 Me. 422, 99 Atl. 177 (1916).

2 IND. ANN. STAT. § 2.508 (Burns 1946).

3 The following states enacted heart balm statutes in 1935:
Alabama, ALA. CODE ANN. tit. 7, § 14 (1940);
Illinois, ILL. ANN. STAT. c. 38, § 246.1, 1264.2 (Smith-Hurd 1935) (unconstitutional):
Michigan, MICH. COMP. LAWS § 25.191 (Mason Cum. Supp. 1940);
New Jersey, N. J. REV. STAT. § 2.39A-1 (1937);
New York, N. Y. CIV. PRAC. ACT § 61;
Pennsylvania, PA. STAT. tit. 48, § 171 (1936);
Since 1935 the following states have enacted heart balm statutes:
California, CAL. CIV. CODE § 43.5 (1941);
Colorado, COLO. STAT. ANN. c. 24a, §§ 1-4 (Cum. Supp. 1949);
Florida, FLA. STAT. ANN. § 771.01 (Cum. Supp. 1947);
Maine, ME. REV. STAT. c. 99, § 91 (1944);
Maryland, MD. ANN. CODE GEN. LAWS art. 75c (Cum. Supp. 1947);
Massachusetts, MASS. ANN. LAWS c. 207, § 47 A (1949);
Nevada, NEV. COMP. LAWS ANN. § 4071.01 (Supp. 1941);
New Hampshire, N. H. REV. LAWS c. 385, § 11 (1942).

4 Last state to adopt a heart balm statute was Florida in 1945.

erty, and then a subsequent breach of the promise to marry. Generally there are three views as to what disposition should be made of these gifts given in reliance upon the contemplated marriage. The first view is that there shall be no recovery whatsoever of any antenuptial gifts when the promise to marry has been breached, or rescinded by mutual consent. The rationale behind this is that the statutes provide that all actions *based upon* the breach of promise shall be abolished. The second view holds that the statute in no way affects the common law rules appertaining to the recovery of gifts made in contemplation of marriage. The adherents of this view contend that the recovery of antenuptial gifts is outside the letter and purpose of the statutes. The third view is that *all* gifts given during the engagement period shall be recoverable upon rescission by mutual consent or breach of the promise by the donee, if such recovery is justified under the circumstances of the case in the opinion of the jury or court. This is an affirmative statutory provision in one state, California.[5]

The recovery of the antenuptial gifts at common law depended upon the intent of the donor at the time the gift was made. If he intended to make an absolute gift, then subsequent events could not divest the donee of the gift.[6] On the other hand if it could be shown either from express declarations made at the time of the gift, or inferred from the circumstances that the gift was conditioned upon the donee's willingness to enter into the marriage, then the gift was subject to this condition and the donee could be divested of the gift upon nonperformance.[7] Proof of a condition undoubtedly was facilitated by the existence of an engagement; however, the mere giving of the gift during the period of the engagement did not, as a matter of law, entitle the rejected donor to a return of such gifts. The conditional character of the giving must be shown.[8] It was inferred that such gifts were conditional if they were of considerable size, as bank accounts, cars, pianos, homes, and furniture, while smaller gifts were deemed absolute. While the magnitude of the gift would appear pertinent, even more indicative is the nature of the article given. Certainly a house, furniture, and, of course, an engagement ring indicate that the gift was conditionally given upon the anticipated marriage.[9]

Before considering the merits of the three aforementioned views, a clear distinction must be drawn between the two types of breach,

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5 CAL. CIV. CODE § 1590 (1941).

6 Robinson v. Cumming, [1742] 2 Atk. 409, 26 Eng. Rep. 646.

7 Young v. Burrell, Cary's Causes in Ch. 54; 21 Eng. Rep. 29, and cases gathered in Cohen v. Sellar, [1926] 1 K. B. 536, 15 B. R. C. 85 (1925).

8 Richmond v. Nye, 126 Mich. 602, 85 N. W. 1120 (1901).

9 Sloin v. Levine, 11 N. J. Misc. 899, 168 Atl. 849 (1933).

and the recission of the contract to marry. When the breach is by the donor of the gift, there is little question that the donee may retain the gifts.[10] But when the donee breaches the promise, the authorities are in conflict as to whether the gift is to be returned or not. It is with this type of breach that this note is concerned. Lastly, there is the situation where the parties mutually agree to terminate the contract to marry; generally in this case the law places the parties in status quo and allows a recovery of any gifts.

New York, ascribing to the first view prohibits recovery of any antenuptial gifts on the judicial construction of its statute. In the two cases [11] to reach the court of appeals of that state, the donors' actions for the recovery of engagement gifts were summarily dismissed in memorandum decisions which held that the actions were based upon the breach of the marriage promise, and that the statute precluded such actions.

The first of the two cases was *Andie v. Kaplan* [12] in which Andie sought to recover money and jewelry given by him to Miss Kaplan in conjunction with their mutual promises to marry. In the complaint, Andie alleged that his former fiancé held the goods in trust for him because she made the promise to marry without any intention to fulfill it. The recovery of the money and the value of the jewelry given was attempted upon the theory of quasi-contract to prevent unjust enrichment, and not upon the breach of the promise to marry. However, the court of appeals, affirming the dismissal of the action by the trial court, based its decision on the premise that the action, even though quasi-contractual, was grounded upon the breach of the promise to marry, and that such action was contrary to the express prohibitions of the New York statute.

In the other case, *Josephson v. Dry Dock Savings Institution,*[13] the court dismissed the complaint for failure to state a cause of action, and expressly followed the *Andie* decision. Here the action was in replevin for the return of the engagement ring and two other articles of jewelry.

Although these cases have been followed by the lower courts in New York, it has been with express reluctance.[14] Nevertheless it is considered the settled law of the state, and the rule is applied to all

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10 *Ibid.*

11 Andie v. Kaplan, 288 N. Y. 685, 43 N. E. (2d) 82 (1942); Josephson v. Dry Dock Savings Institution, 292 N. Y. 666, 56 N. E. (2d) 96 (1944).

12 See note 11 *supra.*

13 See note 11 *supra.*

14 Morris v. Baird, 54 N. Y. S. (2d) 779, 780 (1945); Nichols v. Gesselien, 191 Misc. 641, 78 N. Y. S. (2d) 2 (1948).

remedies, legal [15] or equitable,[16] which attempt to recover antenuptial gifts after there has been a breach of the promise to marry.

The reasoning underlying these decisions is that although the statute only specifically provides that: [17]

> The rights of action heretofore existing to recover sums of money as damage for . . . breach of contract to marry are hereby abolished. . . ,

notwithstanding this apparently clear and unambigious language the policy statement preceding this clause must be read in conjunction with the above and intergrated within it in order to interpret the intent of the legislature. This policy clause states: [18]

> The remedies heretofore provided by law for the enforcement of actions based upon . . . breach of contract to marry, having been subjected to grave abuses, causing extreme annoyance, embarrassment, humiliation, and pecuniary damage to many persons wholly innocent and free from any wrongdoing, who were merely the victims of circumstances, and such remedies having been exercised by unscrupulous persons for their unjust enrichment, and such remedies having furnished vehicles for the commission or attempted commission of crime and in many cases having resulted in the perpetration of frauds, it is hereby declared as the public policy of the state that the best interest of the people of the state will be served by the abolition of such remedies. Consequently, in the public interest, the necessity for the enactment of this article is hereby declared as a matter of legislative determination.

The rationale is that since the legislature chose the phrase "remedies . . . based upon . . . breach of contract to marry," the courts will endeavor to carry out the express words of the policy provisions of the statute by extending the prohibitions to any action which is ultimately based upon the breach of the marriage promise. The actions are based upon the breach of the marriage promise, it is reasoned, since if it were not for the breach there certainly could be no injury nor resulting cause of action.[19] But is this reasoning correct?

Section 61b by its express words abolishes *only* the right of action to *recover money as damages* for breach of the marriage promise. Certainly the court of appeals cannot construe this section to prevent replevin of the specific article nor prevent a suit for the declaration of a constructive trust. What it abolishes is an action for damages for mental suffering — nothing more.

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[15] See Josephson v. Dry Dock Savings Institution, note 11 *supra;* see Nichols v. Gesselien, note 14 *supra;* Reinhardt v. Schuster, 192 Misc. 919, 81 N. Y. S. (2d) 570 (1948); Alberelli v. Manning, 185 Misc. 281, 56 N. Y. S. (2d) 493 (1945).

[16] See Josephson v. Dry Dock Savings Institution, note 11 *supra;* Morris v. Baird, 269 App. Div. 948, 57 N. Y. S. (2d) 890 (1945); see Nichols v. Gesselien, note 14 *supra.*

[17] N. Y. Civ. Prac. Act § 61b.

[18] N. Y. Civ. Prac. Act § 61a.

[19] See Andie v. Kaplan, note 11 *supra.* For annotation of this type of case, see 158 A. L. R. 623 (1945).

If the decisions of the court of appeals are not based upon Section 61b, they must either be grounded upon Section 61a, the policy declaration, or are pure figments of judicial reason. To fall within the obvious scope of Section 61a, the cause of action must be *based upon* the breach of the marriage promise. While granting that there would be no action unless there had been a breach of the promise, this is far from saying that the action is based upon the breach merely because it follows the breach. Patently, recovery should be based upon the unjust enrichment of the donee. The "actions based upon the breach" phrase was intended to prevent actions such as was brought in *Sulkowski v. Szewczyk*.[20] In this case the defendant proposed to the plaintiff and they became engaged. The defendant had asserted that he was single when in fact he was married, and was therefore incapable of fulfilling his promise to marry. The plaintiff sued for false representations. Her action was properly dismissed under the statute because it was in essence nothing more than a suit for damages for breach of the promise based upon impossibility. It was plainly the type of action against which the policy section of the statute was directed.

A further reading of this policy enunciation (which must be read as a whole) indicates that the absolute abolition of actions to recover antenuptial gifts was far from the intent of the legislature. The section clearly points out that the remedies which it is designed to abolish were those which had been used to the embarrassment, humiliation and pecuniary damage of innocent persons who were the victims of circumstances; that these remedies were used by unscrupulous persons for their unjust enrichment; and that they had furnished vehicles for the commission of crime. Can it be said that the remedies for the recovery of antenuptial gifts caused any of the evils which the policy statement sought to prevent? It would be preferable if the court of appeals would recognize the realities of the situation, and admit that nowhere in the heart balm statute of New York is there any indication that it was intended to absolutely prohibit the return of antenuptial gifts.

In fact it appears that the express provisions of the policy statement as well as the provisions of Section 61b are being misinterpreted by the court of appeals. The lower courts of New York have reluctantly followed the interpretation of the state's highest court.[21] Their position is summed up by the dissent in the appellate division in the *Andie* case: [22]

> Plaintiff asserts that defendant never intended to marry him and made the promises in order to obtain the money and jewelry. He

20 255 App. Div. 103, 6 N. Y. S. (2d) 97 (1938).
21 See note 14 *supra*.
22 263 App. Div. 884, 32 N. Y. S. (2d) 429 (1942).

> asked damages . . . The action, in effect, is to recover a trust fund and, while it grows out of a breach of promise to marry, it is not for damages for such breach. Glazer v. Klughaupt, 116 N. J. L. 507, 185 A. 8. The claim for the value of the jewelry arises out of the breach of promise to marry, but it does not come within the spirit of the statute. To deny recovery would be to justify an unjust enrichment of a wrongdoer. The purpose of the new legislation was to prevent a recovery for alleged pecuniary loss, blighted affections, wounded pride, humiliation, and the like, against the one who violated the promise, but not to enable the latter to receive benefits out of his wilful act.

Similarly, in dicta in *Grishen v. Domagalski,* the City Court of City of New York said: [23]

> Grave doubt exists as to whether the Legislature contemplated a prohibition against an action to recover engagement rings and other valuables actually exchanged in consideration of the mutual promise of marriage. It does not seem just or logical that engaged couples who pool their resources for the purpose of buying or furnishing a home or to meet the expenses of the marriage, should have no recourse in the event a mutual termination of the engagement results in a refusal to redivide the money or property so involved. This is wholly different from the evil of prospective damages by way of "heart balm" for breach of promise of marriage which the Legislature sought to forever ban by the enactment of the legislation in question.

Thus the lower courts have been repelled by the court of appeal's reasoning, but nevertheless they have dutifully followed it. Their dicta on the other hand has focused the true nature of the action to recover the gifts. Such action is not based upon the breach of the contract to marry, but rather upon the inequitable retention of the gifts by the donee following the breach of the contract. A pertinent analogy might be drawn to contracts unenforceable under the Statute of Frauds. In such case the contract is unenforceable and there can be no action for damages for the breach thereof; however, one of the parties thereto who has received a benefit under the unenforceable contract is liable in quasi-contract for the benefit conferred or the value thereof.[24] Certainly the common sense quasi-contractual recovery is an eminently just solution where there is an unenforceable contract under the Statute of Frauds, and it is submitted that this quasi-contractual recovery should be allowed for the recovery of antenuptial gifts in states which have adopted the heart balm statutes. The public policy in both instances is opposed to the recovery of damages for the breach of the contract, but nothing is said in either type of statute concerning the disposition of property transferred in reliance upon the contract.

The recovery of antenuptial gifts in New York state should be universally granted where the contract has been *rescinded.* Where

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23 191 Misc. 365, 80 N. Y. S. (2d) 484, 485 (1948).

24 WOODWARD, THE LAW OF QUASI CONTRACTS § 95 (1913).

there has been a rescission by mutual consent it cannot be asserted that the action is based on the breach of the contract to marry since there is no breach. Thus, the extension of Section 61a of the Civil Practice Act to these rescission cases is manifestly unwarranted especially in view of the fact that not only has there been no breach of the contract, but also that there is no opportunity for the fraud and unjust enrichment sought to be prevented by the statute. Fortunately, the New York courts' decisions refusing recovery in these rescission cases are in the minority, but they are nevertheless present. In 1943, shortly after the *Andie* decision, the appellate division in *Hecht v. Yarnis* [25] denied an appeal of the lower court's decision which had stated, "It is immaterial whether the agreement to marry was breached by defendant or 'cancelled' by mutual consent."

Fortunately, this attitude of obliviousness to the manifest nature of rescission is not general. In 1940, before the *Andie* decision, there was no doubt in minds of the justices of the supreme court of New York as to the donor's right to recover the engagement ring. In *Hutchinson v. Kernitzky* the court, in allowing recovery of the ring, said: [26]

> It appears without dispute that the defendant received from the plaintiff a ring on the occasion of their engagement to be married. It likewise appears without dispute that the engagement was either cancelled by mutual consent or was broken by the defendant. Under the circumstances, plaintiff was entitled to the return of the ring.

Shortly after the *Andie* decision it was held in *Unger v. Hirsch* [27] that there could be a recovery of the engagement ring where there was a mutual rescission, since after a rescission the parties are restored to the position in which they were immediately preceding the contract, and the claim is in no way based upon a breach of the contract to marry.

This rule seems to be in accord with the law existing prior to the passage of the New York statute. The rule obtaining until 1934 is aptly stated in *Wilson v. Riggs,* wherein an engagement ring was sought to be recovered: [28]

> In the ordinary course, when an agreement of engagement of marriage is rescinded by mutual consent, this rescission has reference to that agreement alone, and cannot be said to comprise an abrogation of the condition attaching to all antenuptial gifts; namely, that, if the agreement of engagement is abrogated, all such gifts would be returned. In such a contract the intention of the parties is primarily concerned with the rescission of the contract of engagement, leaving the status

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25 42 N. Y. S. (2d) 596 (1943), *aff'd.,* 268 App. Div. 771, 50 N. Y. S. (2d) 170 (1944).

26 23 N. Y. S. (2d) 650, 651, *appeal denied,* 260 App. Div. 1028, 24 N. Y. S. (2d) 1013 (1940).

27 180 Misc. 381, 39 N. Y. S. (2d) 965 (1943).

28 243 App. Div. 33, 276 N. Y. S. 232, 233 (1934).

> of the gifts exchanged during the period of the engagement to stand on their own base, with the conditions intact which attached to them at the time they were given.

In 1945, subsequent to both the *Andie* and *Josephson* cases, the supreme court of New York allowed recovery of various gifts of jewelry given in contemplation of marriage where the contract was rescinded. After mentioning the rule of the *Andie* case, the court said, in *Spitz v. Maxwell*: [29]

> In any event, even if there be some doubt as to the extent of the holding by the courts upon the specific facts in each case, it seems to me that the breach of the agreement made after the contract was mutually cancelled and rescinded gives rise to a valid cause of action, for the new contract has no relation whatever to the contract to marry.

Thus the law in New York has been in a great state of flux with no established tendency at the present time in regard to the recovery of antenuptial gifts. When a rescission is alleged, *generally* there is recovery of the conditional gifts given during the engagement. If, however, the donee breaches the marriage contract the recovery of the gifts by replevin or a quasi-contractual remedy will *probably* be denied because of the weight of the decisions of the court of appeals.

This completely confusing state of the law has not gone unnoticed by the legislature. A bill entitled "An Act to amend the Civil Practice Act, in relation to restitution for property transferred in contemplation of marriage," was introduced in the state assembly on January 17, 1950.

In part it reads: [30]

> This article shall not be deemed to prevent a court in a proper case from granting restitution for property or money transferred in contemplation of the performance of an agreement to marry, which is not performed.

The bill was passed by the Assembly and Senate but was vetoed by the Governor. Since no memorandum accompanied the veto there has been no explanation of the reason for destroying this unquestionably beneficial legislation. The passage of the bill by the legislature more clearly than ever before demonstrates that the courts are misconstruing what the legislature had intended. The will of the people exhibited through their representatives is also thus shown to be opposed to the continuance of the present injustice accomplished by the current interpretation of the effect of Section 61 of the Civil Practice Act.

The second view—that the recovery of antenuptial gifts depends upon whether they were absolutely or conditionally given, the com-

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29 186 Misc. 159, 59 N. Y. S. (2d) 593, 595 (1945).

30 Assembly Int. 766, Pr. 2322.

mon law view—is exhibited by the holdings of the courts of New Jersey, which has a statute [31] similar to that of New York. Here the courts uniformly have permitted the recovery of all conditionally given gifts whether the contract has been breached by the donee, or has been mutually rescinded.

In *Beberman v. Segal* [32] the parties were engaged when the defendant-donee broke the engagement. The plaintiff sued for the recovery of the engagement ring or the equivalent in damages. The defendant asserted that the statute prohibited such an action. The court in allowing recovery said: [33]

> The right of action which plaintiff seeks to enforce is not, in its essence, a cause of action for damages based upon the breach of the claimed marriage contract. Plaintiff seeks to recover a conditional gift, not damages consequent upon a breach of respondent's alleged undertaking to marry her.

The same common sense approach is applied in *Albanese v. Indelicato* [34] where the plaintiff attempted to recover not only the engagement ring but also a dinner ring and a sum of money. Plaintiff was allowed recovery of the engagement ring, but was denied relief on the other two items, because the dinner ring was not shown to be conditionally given, and the money, although conditionally given, had been expended for the stipulated purpose.

In the initial case [35] following New Jersey's adoption of its heart balm statute, it was held that a secretary, a portion of whose wages had been withheld for over three years in contemplation of marriage to her employer, could recover the amount withheld upon the employer's breach of the contract to marry.

These decisions well illustrate the desirable distinction which should be drawn between the heart balm statutes' sphere of operation and the problem of the recovery of property given in contemplation of marriage. The former deals with actions for monetary damages for mental suffering; the latter is an action to prevent unjust enrichment after a contemplated marriage is not completed. As distinguished from the New York view, New Jersey, in following the common law rule for the recovery of gifts, exhibits a position which has common sense, promotes justice, and appears to coincide with the express words of the statute.

The third view concerning the recovery of antenuptial gifts is an express statutory provision in the Civil Code of California. To pre-

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31 N. J. REV. STAT. § 2.39 A-1 (1937).

32 6 N. J. Super. 472, 69 A. (2d) 587 (1949).

33 *Id.* 69 A. (2d) at 587.

34 25 N. J. Misc. 144, 51 A. (2d) 110 (1947).

35 Glazer v. Klughaupt, 116 N. J. L. 507, 185 Atl. 8 (1939).

vent any judicial misinterpretation of the usual provisions of its heart balm statute, a unique clause was enacted, which provides: [36]

> Where either party to a contemplated marriage in this State makes a gift of money or property to the other on the basis or assumption that the marriage will take place, in the event that the donee refuses to enter into the marriage as contemplated or that it is given up by mutual consent, the donor may recover such gift or such part of its value as may, under all of the circumstances of the case, be found by a court or jury to be just.

This statute represents the return of the pendulum from the extreme position of non-recovery of some New York courts to a position where gifts not recoverable at common law might well be recovered under the statute. A gift given absolutely in California during the period when marriage is contemplated could be ordered returned by the court or jury under this statute, since there is no mention of a necessity of a condition attaching to the gift. Instead of retaining only the common law grounds for the recovery of the antenuptial gifts, California has seen fit in these instances to attempt to arrive at justice by allowing the court or the jury to determine whether it is equitable for the donee to retain possession of the gifts when the promise to marry is not fulfilled through the donee's fault or when there is a mutual rescission. It is submitted that this California solution is more flexible than the common law rule and therefore perhaps more capable of accomplishing justice as between the parties.

In applying the statute, the court in *Priebe v. Sinclair* [37] permitted recovery of the engagement ring but denied recovery of a brooch and the value of improvements made on real estate. The court apparently denied recovery of the last two items on the basis that the gifts were made not in contemplation of marriage, but were an absolute transfer of property in furtherance of the illicit cohabitation which had taken place over a period of eleven months. It is probable that the same result would have been reached under both of the other views.

In conclusion it is submitted that in some jurisdictions, notably New York, the letter and the purpose of the heart balm statutes have been ignored. This legislation, which was enacted to prevent unjust enrichment as well as the perpetration of fraud and blackmail, has been utilized under the judicial interpretations to cause unjust enrichment by the prohibition of the recovery of any antenuptial gift, even though it is the donee who has breached the promise to marry. It is difficult to fathom the rationale beneath this unwarranted extension of the scope of these statutes. The express words of the heart balm statutes do not call for this extension, the underlying policy does not require it, and certainly the extension is opposed to

36 CAL. CIV. CODE § 43.5 (1941).
37 90 Cal. App. (2d) 79, 202 P. (2d) 577 (1949).

all common sense ideas of justice. To prohibit the recovery of antenuptial gifts only allows the unscrupulous to induce proposals and consequent gifts, and then under the protection of the courts refuse to enter into the marriage and return gifts made in contemplation thereof. The reason for such a rule is not indicated in the decisions applying it.

Fortunately other courts have viewed the heart balm statutes in the true perspective of what they were enacted to prevent, and have completely disassociated the recovery of heart balm damages from the just and reasonable recovery of antenuptial gifts. Whether this recovery be under an affirmative statute covering all antenuptial gifts, or under the common law proof of a conditional gift, the result attained is the nearest to complete justice that can be reached upon the termination of these hapless engagements.

William T. Huston

Insurance

JUDICIAL INTERPRETATION OF AVIATION RISKS EXCLUSION CLAUSES

In the relatively short span of forty-seven years,[1] travel by air has become a conventional means of transportation. As thousands of private and commercial[2] airplanes fill the airways each day, aviation casualties increase.[3] Along with the heartaches caused the surviving relatives of those killed in aviation disasters, many a legal headache has resulted from the multiplicity of litigation and reversals of precedents regarding the aviation exclusion clauses in insur-

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1 "Man flew for the first time on December 17, 1903, when Wilbur and Orville Wright launched themselves into the air at Kitty Hawk, North Carolina." MCMAHON, THE WRIGHT BROTHERS 4 (1930).

2 Government statisticians estimated air travel in the United States during 1949 at about nine billion "passenger-miles." N. Y. Times, Jan. 1, 1950, p. 5, col. 6.

3 Although 1949 was the safest year as to the number of casualties per "passenger-mile," there were still more deaths through air travel in 1949 than in the previous year. This of course is due to the fact that there was a great increase in the number of persons traveling by air last year. The scheduled airlines reported only one death for every one hundred million "passenger-miles" during 1949. N. Y. Times, Jan. 1, 1950, p. 5, col. 6. The Civil Aeronautics Association estimated that the airlines had flown about 16,500,000 passengers in 1949, which is about 2,000,000 more than in 1948. N. Y. Times, Jan. 2, 1950, p. 37, col. 1. Perhaps these statistics are helpful in understanding the liberal interpretations which courts have given aviation exclusion clauses in insurance policies in recent years. Today, air travel is an accepted and common mode of transportation and the casualties resulting therefrom are proportionately few.

ance policies. It is the purpose of this article to point out the conflicting decisions in this field of law, and attempt to determine whether there is any rule or test which can be applied to settle future litigation, even if it cannot explain many of the existing decisions.

Before any discussion of the cases can begin, it is necessary to deal with rules of law which are well settled but have arisen as secondary issues in many of the cases discussed herein. First, many policies of insurance contain incontestable clauses [4] to meet with state statutory provisions [5] stipulating that the insurer shall not contest the policy after it has been in force for a certain length of time. It is quite often argued that such a clause conflicts with the aviation exclusion clauses since the insurer should have no grounds for contesting a policy other than for non-payment of premiums and other conditions expressly provided for in contestable clauses.[6] However, in a New York case, *Metropolitan Life Ins. Co. v. Conway*,[7] Chief Justice Cardozo decided that an incontestable clause meant only ". . . that within the limits of the coverage the policy shall stand, unaffected by any defense that it was invalid in its inception, or thereafter became invalid by reason of a condition broken."

Secondly, in determining the law applicable to each case where a conflict of laws appears, the law of the state where the policy was written and where the premiums were paid prevails.[8]

Throughout the cases dealing with this type of litigation there is a reoccurrence of two important factors, ambiguity and public policy. Courts have frequently seized upon these elements to grant recovery to the insured's beneficiaries. Whenever the courts find what they believe to be ambiguity existing in a policy, they apply the well established rule of resolving all doubts against the insurance company,[9] the party who drew the contract. Although none of the courts use the phrase, public policy, in their reasoning, many of them go out of their way to find an ambiguity where apparently

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[4] A typical example of an incontestable clause: ". . . the policy . . . shall be incontestable after it shall have been in force during the life of the insured for two (2) years from its date, except for non-payment of premiums and except for violations of the policy relating to naval and military service in time of war." Burns v. Mutual Ben. Life Ins. Co. of Newark, N. J., 79 F. Supp. 847 (W. D. Mich. 1948).

[5] For an interesting case in point as to the statutory requirements concerning incontestable clauses, see Metropolitan Life Ins. Co. v. Conway, 252 N. Y. 449, 169 N. E. 642 (1930).

[6] Wilmington Trust Co. v. Mutual Life Ins. Co. of New York, 177 F. (2d) 404 (3d Cir. 1949).

[7] 252 N. Y. 449, 169 N. E. 642 (1930).

[8] See note 6 *supra*.

[9] Conaway v. Life Ins. Co. of Va., 148 Ohio St. 598, 76 N. E. (2d) 284 (1947).

none exists. This procedure seems to be motivated by the general public feeling that large insurance companies can bear the losses better than the individual.[10]

There are several phrases used in aviation exclusion clauses of insurance policies which have been construed by the courts with conflicting results. Those treated in this article are: "participating in aviation or aeronautics," "engaged or participating in aviation or aeronautics as a passenger or otherwise," "fare-paying passenger" and those dealing with members of the military services.

I.

Where the phrase "engaged" in aviation or aeronautics has been used, there has been little conflict. From the very outset, courts have uniformly given this phrase an occupational connotation. In 1927, the Supreme Court of Arkansas in deciding the *Benefit Ass'n. of Railway Employees v. Hayden* case,[11] held that "engaging in aeronautics" meant engaging in such as an occupation. Passengers were not included in this exclusion nor were passengers held to be included where the phrases "engaged in aeronautic expeditions," or "engaged in aeronautic activity" were used. Courts in Indiana,[12] Florida,[13] Missouri,[14] New York,[15] Oklahoma,[16] Pennsylvania,[17] West Virginia,[18] and Wisconsin[19] have so held. The term "engaged in . . ." has also been given an occupational connotation by the United States Courts of Appeals for the Third,[20] Sixth,[21] Seventh,[22]

10 Paradies v. Travelers Ins. Co., 183 Misc. 887, 52 N. Y. S. (2d) 290 (1944). "Public policy" appears to be the dominant factor in the determination of the cases dealt with in this article under the subject of "military service" decisions.

11 175 Ark. 565, 299 S. W. 995 (1927).

12 Masonic Accident Ins. Co. v. Jackson, 200 Ind. 472, 164 N. E. 628 (1929).

13 Price v. Prudential Ins. Co., 98 Fla. 1044, 124 So. 817 (1929).

14 Flanders v. Benefit Ass'n. of Railway Employees, 226 Mo. App. 143, 42 S. W. (2d) 973 (1931).

15 Peters v. Prudential Ins. Co., 133 Misc. 780, 233 N. Y. S. 500 (1929); *accord,* Hartol Products Corporation v. Prudential Ins. Co., 290 N. Y. 44, 47 N. E. (2d) 687 (1943); Lee v. Guardian Life Ins. Co. of America, 187 Misc. 221, 46 N. Y. S. (2d) 241 (1944).

16 Reed v. Home State Life Ins. Co., 186 Okla. 226, 97 P. (2d) 53 (1939).

17 Provident Trust Co. v. Equitable Life Assur. Soc., 316 Pa. 121, 172 Atl. 701 (1934).

18 Beveridge v. Jefferson Standard Life Ins. Co., 120 W. Va. 256, 197 S. E. 721 (1938).

19 Charette v. Prudential Ins. Co., 202 Wis. 470, 232 N. W. 848 (1930).

20 Faron v. Penn. Mutual Life Ins. Co., 179 F. (2d) 480 (3d Cir. 1949).

21 Maver v. New York Life Ins. Co., 74 F. (2d) 118 (6th Cir. 1934).

22 Gits v. New York Life Ins. Co., 32 F. (2d) 7 (7th Cir. 1929), *cert. denied,* 280 U. S. 564, 50 S. Ct. 24, 74 L. Ed. 618 (1929).

Eighth,[23] and Tenth [24] Circuits and also the federal district courts of Michigan [25] and Illinois.[26]

Some of the earliest insurance policies containing aviation exclusion clauses denied liability or refused double indemnity recovery where the insured's death resulted from "participating or in consequence of having participated in aeronautics." [27]

In 1921, the New Jersey Court of Errors and Appeals [28] held that a passenger was "participating" in aeronautics and refused recovery to the insured's beneficiaries. The reasoning of the court was influenced by the fact that aviation was yet in its embryonic stage and the court merely reflected the general public opinion that anyone who ascended in an airplane, as a pilot or passenger, was "participating" in aeronautics, and assuming a risk. In the same year, the Supreme Court of Florida [29] reached a similar conclusion in treating an identical provision. In 1923, the Court of Appeals of Missouri [30] followed the reasoning of the New Jersey and Florida courts.

In 1930, the United States Court of Appeals for the Tenth Circuit [31] held that an insurance agent who went up in a plane to inspect the plane, preparatory to writing a property damage policy for the owner of the plane, was "participating in aeronautics."

The turning point in this line of decisions came in 1934 when the Supreme Court of Arkansas in the *Martin v. Mutual Life Ins. Co.* case [32] held that a person who was an invited guest in an airplane was not "participating in aeronautics." However, the courts were still reluctant to follow the precedent established by the Arkansas Supreme Court and in 1935 the Supreme Court of New

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23 Goldsmith v. New York Life Ins. Co., 69 F. (2d) 273 (8th Cir. 1934), *cert. denied,* 292 U. S. 650, 54 S. Ct. 860, 78 L. Ed. 1500 (1934).

24 Head v. New York Life Ins. Co., 43 F. (2d) 517 (10th Cir. 1930).

25 Irwin v. Prudential Ins. Co., 5 F. Supp. 383 (E. D. Mich. 1933).

26 Christen v. New York Life Ins. Co., 19 F. Supp. 440 (N. D. Ill. 1937).

27 Bew v. Travelers Ins. Co., 95 N. J. L. 533, 112 Atl. 859 (1921). The policy in this case contained an exclusion of the insurer's liability for injuries ". . . sustained by the insured while participating in or in consequence of having participated in aeronautics."

28 See Bew v. Travelers Ins. Co., note 27 *supra.*

29 Travelers' Ins. Co. v. Peake, 82 Fla. 128, 89 So. 418 (1921).

30 Meredith v. Business Men's Accident Ass'n., 213 Mo. App. 688, 252 S. W. 976 (1923). "This policy does not cover any injury . . . sustained . . . while participating in or in consequence of having participated in aeronautics. . . ."

31 See Head v. New York Life Ins. Co., note 24 *supra.*

32 189 Ark. 291, 71 S. W. (2d) 694 (1934). This policy provided that: ". . . double indemnity shall not be payable if death resulted . . . from participation in aeronautics. . . ."

Mexico [33] held that a guest passenger in a plane was "participating in aviation, aeronautics. . . ." The exclusion clause in this case included the term aviation. The court emphasized the use of this additional broader term in rendering its opinion.

In 1938, the United States Court of Appeals for the Eighth Circuit [34] decided that the insured was not "participating in aeronautics" when he rode in his own airplane as a passenger. This case was granted certiorari by the Supreme Court of the United States [35] which vacated the judgment and remanded the case for re-determination, limiting the question to the right of the insured to recover under the laws of New Mexico. Upon reconsideration of the case, the court of appeals affirmed its previous decision.[36] This court had previously rendered similar decisions.[37]

The Ninth Circuit Court of Appeals in 1938 in *Swasey v. Massachusetts Protective Ass'n.*[38] and *Marks v. Mutual Life Ins. Co.*,[39] ruled that a passenger does not "participate in aviation or aeronautics." This court held that the exclusion clauses in question were ambiguous and must be construed most favorably for the insured. In the following year, the United States Court of Appeals for the Sixth Circuit decided the *Massachusetts Protective Ass'n. v. Bayersdorfer* case,[40] which has apparently put an end to the conflicting decisions involving the use of the word "participating . . ." in aviation exclusion clauses. In this case the insured, a merchant, embarked at Camden, New Jersey, for Pittsburgh, Pennsylvania, as a "fare-paying passenger." The plane crashed in a dense fog and the insured was killed. After citing the conflicting interpretations of the phrase "participating . . .," the court stated:[41]

> We think that the later cases reflect a changing attitude towards aviation. . . . In the early days, flight was a venture. . . . Today, transport flying is a business . . . passengers no more participate in the operation of their [the airlines'] planes than do passengers upon

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33 Sneddon v. Massachusetts Protective Ass'n., 39 N. M. 74, 39 P. (2d) 1023 (1935). The exclusion clause in this case reads as follows: "This policy does not cover death or other loss due to . . . or sustained as the result of participating in aviation, aeronautics. . . ."

34 Mutual Ben. Health & Accident Ass'n. v. Bowman, 96 F. (2d) 7 (8th Cir. 1938).

35 304 U. S. 549, 58 S. Ct. 1056, 82 L. Ed. 1521 (1938).

36 99 F. (2d) 856 (8th Cir. 1938), *cert. denied*, 305 U. S. 611, 59 S. Ct. 70, 83 L. Ed. 389 (1938).

37 Gregory v. Mutual Life Ins. Co., 78 F. (2d) 522 (8th Cir. 1935); Sulzbacher v. Continental Casualty Co., 88 F. (2d) 122 (8th Cir. 1937).

38 96 F. (2d) 265 (9th Cir. 1938).

39 96 F. (2d) 267 (9th Cir. 1938).

40 105 F. (2d) 595 (6th Cir. 1939). "This policy does not cover death . . . sustained as the result of participation in aviation, aeronautics or subaquatics."

41 *Id.* at 597.

> a railroad train participate in operating the train. . . . The passenger is not permitted to direct or control him [the pilot] as to how, where or when he shall fly. . . . If it was ever true, it cannot now be said that a fare-paying passenger on a commercial airliner "participates in aviation or aeronautics."

The United States Courts of Appeals for the Sixth,[42] and Tenth[43] Circuits and the courts of Florida,[44] Missouri,[45] New Jersey[46] and New Mexico[47] have held that passengers are to be regarded as "participating" in aviation or aeronautics; however, the United States Courts of Appeals for Second,[48] Sixth,[49] Eighth,[50] Ninth[51] Circuits and the courts of Arkansas[52] and West Virginia[53] have held that passengers, who in no way direct or control the operation of the airplanes in which they fly, are not participating in aviation. The more recent decisions have followed the reasoning of the latter group of cases; however, the older cases appear to state the more sound rule. There can be no doubt that the underwriters of the policies in these cases meant to preclude passengers in airplanes from insurance coverage when they used the phrase "participating in aviation or aeronautics." Otherwise, the claims of the insured in each case would be allowed and no subsequent litigation would result. Also, it is questionable whether the average man would consider himself covered by an insurance policy with an exclusion clause such as this. It is submitted that the intention of the parties to the insurance contract should be given greater consideration by the courts.

In a further attempt to exclude passengers from recovery, insurance companies added another condition to the aviation exclusion

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42 First National Bank v. Phoenix Mutual Life Ins. Co., 57 F. (2d) 731 (E. D. Tenn. 1931). Decision limited on appeal, 62 F. (2d) 681 (6th Cir. 1933). This case is distinguishable on the facts. The insured here chartered a plane and had complete control over the flight although he did not actually pilot the plane.

43 See Head v. New York Life Ins. Co., note 24 *supra.*

44 See Travelers' Ins. Co. v. Peake, note 29 *supra.*

45 See Meredith v. Business Men's Accident Ass'n., note 30 *supra.*

46 See Bew v. Travelers Ins. Co., note 27 *supra.*

47 See Sneddon v. Massachusetts Protective Ass'n., note 33 *supra.*

48 Neel v. Mutual Life Ins. Co., 131 F. (2d) 159 (2d Cir. 1942).

49 Massachusetts Protective Ass'n. v. Bayersdorfer, 105 F. (2d) 595 (6th Cir. 1939).

50 See Mutual Ben. Health & Accident Ass'n. v. Bowman, note 34 *supra.*

51 Mutual Benefit Health & Accident Ass'n. v. Moyer, 94 F. (2d) 906 (9th Cir.), *cert. denied,* 304 U. S. 581, 58 S. Ct. 1054, 82 L. Ed. 1543 (1938). Also see note 39 *supra.*

52 Missouri State Life Ins. Co. v. Martin, 188 Ark. 907, 69 S. W. (2d) 1081 (1934); Martin v. Mutual Life Ins. Co., 189 Ark. 291, 71 S. W. (2d) 694 (1934).

53 Chappel v. Commercial Casualty Ins. Co., 120 W. Va. 262, 197 S. E. 723 (1938).

clauses previously discussed. Policies were issued containing clauses denying liability of the insurer where the insured participates in aviation "as a passenger or otherwise." Even today, courts have not reached any definite conclusion or general rule as to the interpretation of this clause. The United States Courts of Appeals for the Tenth [54] and District of Columbia Circuits [55] and the courts of Arkansas,[56] New York,[57] Pennsylvania [58] and Tennessee [59] have held that such a clause does not limit or exclude passengers on airplanes. On the other hand, the United States Courts of Appeals for the Sixth [60] and Eighth [61] Circuits, the federal district courts of Alabama,[62] California,[63] Illinois,[64] Pennsylvania [65] and the Supreme Court of West Virginia [66] have reached the opposite conclusion.

New York is the only jurisdiction that has indicated a trend in the interpretation of exclusion clauses containing the addition of the words "as a passenger or otherwise." In 1931, the New York Court of Appeals in *Gibbs v. Equitable Life Assur. Soc.*,[67] held that a passenger was within the operation of the exclusion clause due to the fact that at the time the policy was issued travel by air was an extraordinary and hazardous event. This case was overruled by the same court in 1943 in *Hartol Products Corp. v. Prudential Ins. Co.*,[68] where the court stated that at the time the policy was issued, 1930, a trip by air was not uncommon or hazardous as it was in 1924.

In a 1948 case, *Phoenix Mutual Life Ins. Co. v. Flynn*,[69] the United States Court of Appeals for the District of Columbia Circuit

54 Day v. Equitable Life Assur. Soc., 83 F. (2d) 147 (10th Cir.), *cert. denied*, 299 U. S. 548, 57 S. Ct. 11, 81 L. Ed. 44 (1936).

55 Phoenix Mutual Life Ins. Co. v. Flynn, 171 F. (2d) 982 (D. C. Cir. 1948).

56 Equitable Life Assur. Soc. v. Dyess, 194 Ark. 1023, 109 S. W. (2d) 1263 (1937).

57 Funk v. New York Life Ins. Co., 60 N. Y. S. (2d) 349 (1946). Also see note 15 *supra*.

58 See Provident Trust Co. v. Equitable Life Assur. Soc., note 17 *supra*.

59 National Bank of Commerce v. New York Life Ins. Co., 181 Tenn. 299, 181 S. W. (2d) 151 (1944).

60 See Maver v. New York Life Ins. Co., note 21 *supra*.

61 See Goldsmith v. New York Life Ins. Co., note 23 *supra*.

62 Ivy v. New York Life Ins. Co., 33 F. Supp. 841 (N. D. Ala. 1940).

63 Pacific Bridge Co. v. National Life Ins. Co., 1943 U. S. Av. R. 38 (N. D. Cal. 1942).

64 See Christen v. New York Life Ins. Co., note 26 *supra*.

65 National Exchange Bank & Trust Co. v. New York Life Ins. Co., 19 F. Supp. 790 (W. D. Pa. 1937).

66 See Beveridge v. Jefferson Standard Life Ins. Co., note 18 *supra*.

67 256 N. Y. 208, 176 N. E. 144 (1931).

68 290 N. Y. 44, 47 N. E. (2d) 687 (1943).

69 See note 55 *supra*.

decided a controversy over an exclusion clause which provided "that death of the insured resulting directly or indirectly from participating in aeronautics, as a passenger or otherwise . . . is a risk not assumed by the Company. . . ." The court ignored the words "as a passenger or otherwise" and looked only to the phrase "participating in aeronautics." Other courts have ignored this and other phrases of exclusion clauses and have confined themselves to dealing only with the "participating in aeronautics" phrase. In this way, they have been able to arrive at practically any conclusion they desire.

In the *Flynn* case, for example, the court took only the words "participating in aeronautics" from the above quoted exclusion clause and allowed recovery where the insured was killed while a passenger in a United States Navy plane. This court relied on previous decisions construing the meaning of the word "aeronautics" and held that a passenger did not "participate in aeronautics" even though the policy exclusion clause expressly precluded passengers from recovery. Such reasoning hardly gives any import to the intention of the parties as evidenced by the insurance contract. The average man, when he reads his insurance policy, would not expect coverage while traveling by air if the policy excluded the liability of the insurance company when the insured was "participating in aeronautics *as a passenger or otherwise.*" (Emphasis supplied.) If such a clause were intended to cover persons as passengers in airplanes, the insurance companies would undoubtedly require a higher premium because of the increased risk involved. Any person who desires insurance coverage while he is a passenger in flight can obtain such from his insurance agent or broker by merely requesting it and paying an additional premium.

No doubt the conflicting decisions regarding the interpretation of the aviation exclusion clauses account for the wariness of insurance companies to litigate. In many instances, unjust or doubtful claims against insurance companies are settled out of court. Even though the courts' sentiments might be with the insured, an extension of policy provisions in order to give these persons coverage does not make for sound precedents where the obvious intent of the insurance contract does not warrant such extension. Be that as it may, the trend in the more recent cases appears to be that passengers are not precluded from coverage even though insurance policies contain exclusion clauses limiting the liability of the insurer if the insured meets his death "while participating in aviation or aeronautics as a passenger or otherwise."

Another example of an aviation clause found in insurance policies over which some controversy has arisen is that type which does not give coverage to the insured while engaging or participating in avia-

tion or aeronautics "except as a fare-paying passenger." Courts have generally given this clause a strict construction, but as yet there is not complete harmony among the decisions rendered. In 1942, the Supreme Court of Nebraska, in the *Krause v. Pacific Mutual Life Ins. Co.* case,[70] held that although the insured met his death in a crash of a T.W.A. transport plane, he was not a "fare-paying passenger," since he paid only $8.00 for a "trip pass" which would cost $94.03 at regular rate. Another court has held that anyone whose occupation is flying, such as pilots and stewardesses,[71] cannot be considered "fare-paying passengers" while they are on duty.

The Supreme Court of North Carolina[72] in 1934 held that an employee who was a passenger in a plane piloted by his employer was not a "fare-paying passenger" since no fare was paid or contemplated to be paid by either. The facts do not state whether or not the employee was on business for the employer. If he were, the case would probably be decided differently today since the employee whose fare is paid by his employer is considered a "fare-paying passenger." In this case, the employer was not licensed to fly passengers for hire but, by flying the employee, he in effect paid the employee's fare without violating the conditions of his license. In 1935, the United States Court of Appeals for the Ninth Circuit[73] arrived at a conclusion similar to that of the North Carolina Court[74] by deciding that since the pilot of the plane in which the insured was riding was not licensed to carry passengers for hire, the insured could not be a "fare-paying passenger" even though he had agreed to pay for the services of the pilot and the use of the plane.

The only case not construing this exclusion clause strictly is the case of *Quinones v. Life & Casualty Co.*,[75] which is discussed in this article under the subject of "military service" decisions. Briefly, this case held that an army physician who was being transported from one base to another in a government plane was a "fare-paying passenger" since his employer, the Government, paid his fare.

Within the past few months, a decision in the Superior Court of Baltimore City[76] held that the mere fact that the insured does not

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70 141 Neb. 844, 5 N. W. (2d) 229 (1942).

71 Mutual Life Ins. Co. v. Shain, 344 Mo. 276, 126 S. W. (2d) 181 (1939).

72 Padgett v. Metropolitan Life Ins. Co., 206 N. C. 364, 173 S. E. 903 (1934).

73 Metropolitan Life Ins. Co. v. Halcomb, 79 F. (2d) 788 (9th Cir. 1935).

74 See Padgett v. Metropolitan Life Ins. Co., note 72 *supra*.

75 209 La. 76, 24 So. (2d) 270 (1945).

76 Treide v. Commercial Casualty Co., 1950 U. S. Av. R. .... (Superior Court of Baltimore City, Jan. 19, 1950).

physically hand money to an agent of a flying service and receive a "ticket" in return does not deprive him of his status as a passenger. In the instant case, the insured, a lawyer, was killed while a passenger in a plane chartered by his client. The fare, as on past occasions, was to be paid by the insured's client.

This case is unusual because it treats in detail each policy exclusion clause which was put in issue, and presents a succinct and accurate opinion of the law as it exists today in a majority of jurisdictions. In addition, the more recent exclusion provisions are covered, such as "operated on a public schedule," "flying on a regular route," and "licensed transport pilot." It appears to be the first to deal with the phrase "licensed transport pilot." The policy here used the words "transport pilot" whereas no such rating existed under the Civil Aeronautics Regulation at the time the policy was written. The Civil Aeronautics Regulation did however have an "airline transport" rating. The pilot in the instant case held a "commercial pilot" license but not an "airline transport" rating. The court reasoned that since there was no such rating as "transport pilot" under the Civil Aeronautics regulations, the words should be interpreted in their ordinary sense. Thus, the court allowed recovery, holding that the exclusion clause did not apply, stating that: [77] "One reasonable interpretation of the words 'transport pilot' would seem to be a pilot 'authorized to transport passengers.'"

II.

The second category of cases involves members of the military services who were insured under policies containing an aviation exclusion clause but no standard war clause. These cases over-lap and include others discussed herein and show a more evident conflict. In the absence of a war clause, courts have held that the aviation exclusion clause in an insurance policy refers to civilian flying and not to flight while the insured is in military service.[78] Other reasons have been advanced by courts for entering judgment for the beneficiaries of those killed while in the armed forces. One court held that an aviation exclusion clause did not apply to members of the military services since there was no voluntary assumption of risk by such persons.[79] This court went on to say that members of the armed forces were required to fly by compulsion. This is not necessarily so since the great majority of those who served in the air forces were volunteers. True, those who met the required standards were compelled

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77 See note 76 *supra*.

78 Sovereign Camp, Woodmen of the World v. Compton, 140 Ark. 313, 215 S. W. 672 (1919).

79 Janco v. Hancock Mutual Life Ins. Co., (1948) U. S. Av. R. 33 (Munic. Ct. of Philadelphia, Penn. 1947).

to serve in the military services, but very few were required to serve in the air forces. Other courts have made distinctions between cases where the insured was killed instantly in a plane crash and cases where the pilot managed to make a successful forced landing and was subsequently drowned or strafed.

The first case to deal with aviation exclusion clauses in reference to members of the military services was *Woodman of the World v. Compton.*[80] This case, decided in 1919, has had a great influence upon subsequent decisions involving not only members of the armed forces but also cases where the insured was a civilian. The insured in the *Compton* case was drafted into the army and assigned to the air forces. Subsequently, he was killed while flying. The court reasoned that the language of the aviation exclusionary clause ". . . is directed solely to persons engaged in private occupations," and allowed recovery by the insured's beneficiaries. Since no reference was made to members of the military services in the aviation exclusion clause, the court felt that they were not covered by said clause. A separate clause of exclusion referred to members of armed forces, but was not incorporated into the aviation exclusion clause. Thus, the court felt justified in reasoning that the aviation clause did not exclude members of the armed forces. Today, in order that such liability be avoided, many insurance companies incorporate one exclusion clause into several others. As a result, many policies, of necessity, become extremely complex. When such complexity results, courts are more apt to construe the policy as ambiguous and against the insurance company.

Reasoning similar to that of the *Compton* case, can be found in *Paradies v. Travelers Ins. Co.*,[81] decided in 1944. Here, the insured was a bombardier in a military airplane on a combat mission over Italy at the time of his death. The court allowed recovery on the ground that the exclusion applied only to civilian flying, either business or pleasure. There was no exclusion made in the policy for military or naval service. The court stated: "In this case, Lieutenant Paradies followed the colors into the shock of invasion. He is a military casualty."

The insured, in *Bull v. Sun Life Assur. Co. of Canada*,[82] was a navy pilot on duty in the South Pacific when his sea plane was shot down. He made a forced landing but was strafed while on top of the fuselage of his plane attempting to launch a rubber life raft. The

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80 See note 78 *supra.*

81 183 Misc. 887, 52 N. Y. S. (2d) 290 (1944).

82 141 F. (2d) 456 (7th Cir. 1944). The policy in this case provided: "Death as a result, directly or indirectly, of service, travel, or flight in any species of aircraft, as a passenger or otherwise, is not a risk assumed . . . under this policy. . . ."

court allowed recovery on the ground that the insured was a casualty of war rather than an aviation casualty. Emphasis was placed on the fact that the flight of the insured had ended before he met his death. Only two cases were cited in the majority opinion, neither of which was in point. There was a strong dissent, however, which relied upon *Neel v. Mutual Life Ins. Co.*,[83] *Wendorff v. Missouri State Life Ins. Co.*,[84] and *Blonski v. Bankers Life Co.*[85] It appears in cases such as this where the insured disengages himself from his plane after a crash and leaves the scene of the crash uninjured, that the test of proximate causation should be left to the jury. Perhaps this test has never been raised directly by the attorneys for the *insurer* since they might prefer to leave their fate in the hands of a court rather than to allow a jury to resolve the question.

In the *Neel* case the insured, a civilian, flew solo out over the Atlantic and was later found afloat apart from his plane. The court granted that the insured emerged from his plane safely and was later drowned but denied recovery on the ground that the insured was "participating in aeronautics" and such was the proximate cause of his death. As a matter of law, there should be no difference in the findings of the courts where the insured is a civilian and findings under similar facts where the insured is a member of the armed forces. In the absence of a military service exclusion clause, the aviation exclusion clauses should apply equally to both civilian and military personnel in order that some uniformity in these decisions might be reached. Courts dealing with cases where the insured was a civilian often cite cases involving members of the armed forces and vice versa.

In the *Wendorff* case, cited by the court in the *Neel* case, the insured, also a civilian, was traveling from Florida to the Bahama Islands when the seaplane in which he was a passenger developed motor trouble and made a successful landing in the Atlantic Ocean. Subsequently, waves capsized the plane and the insured was drowned. The court refused recovery since death resulted from "falling from a flying machine." Here again the problem of proximate causation appears. Certainly the death of the insured was the result of his flight. However, the court did not go into any penetrating discussion of the causation factor. Undoubtedly, the court's decision would have had a more sound basis had they applied the test of proximate causation expressly rather than by implication.

In 1945, the Supreme Court of Louisiana, in the *Quinones* case,[86] rendered a very questionable decision. The court allowed recovery

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83 See note 48 *supra.*
84 318 Mo. 363, 1 S. W. (2d) 99 (1927).
85 209 Wis. 5, 243 N. W. 410 (1932).
86 See note 75 *supra.*

under the following facts: The insured was an army physician being transported by the government in a government plane at the time of his death. The issue in the case was whether or not the insured was a "fare-paying passenger" as required by the provisions of his policy. The court held that he was, in the light of the rule that the passenger whose fare is paid directly or indirectly by his employer (here, the government) is a "fare-paying passenger." In the same year, the Supreme Court of Massachusetts, in deciding *Hyfer v. Metropolitan Life Ins. Co.*,[87] reached an opposite conclusion on similar facts. Here, the insured was an army private acting as a radio operator on an official army transport plane on a scheduled flight at the time he met his death. The court ruled that the insured was not a "fare-paying passenger." In its opinion the court merely stated that the *Bull* case [88] was distinguishable and that the *Compton* case [89] was no authority contra, without stating any reasons. As to the facts, the only distinguishable feature would seem to be that in the *Quinones* case [90] the insured was not a crew member whereas in the *Hyfer* case [91] he was. Even so, this would hardly seem to be much of a distinction since in both cases the insured were under orders from their military superiors and would hardly be considered in that class of which the average person thinks when speaking of "fare-paying passengers." The holding—that the insured was not a fare-paying passenger, and thus was excluded from coverage—in the *Hyfer* case appears to be the better rule and is followed by the majority of courts that have dealt with this question. There seems to be no justification for not applying this reasoning under the facts of the *Quinones* case.

Burns v. Mutual Ben. Life Ins. Co.,[92] is the leading case on this point today. The insured was a passenger on an authorized flight traveling from one post to another when his plane exploded. The court expressly rejected the reasoning and conclusion of the *Quinones* case and held: [93]

> The insured's transportation may have been an expense to the army, but that fact did not make him a fare-paying passenger within the ordinary and generally accepted meaning of that term as used in the aviation clause of the policy.

The court in the *Hyfer* case [94] relied on *Green v. Mutual Benefit Life Ins. Co.*[95] for authority. The *Green* case contained facts simi-

87 318 Mass. 175, 61 N. E. (2d) 3 (1945).
88 See note 82 *supra*.
89 See note 78 *supra*.
90 See note 75 *supra*.
91 See note 87 *supra*.
92 79 F. Supp. 847 (W. D. Mich. 1948).
93 *Id.* at 853.
94 See note 87 *supra*.
95 144 F. (2d) 55 (1st Cir. 1944).

lar to those of the *Neel*,[96] *Wendorff*,[97] and *Bull*[98] cases in that the insured was a naval cadet who made a forced landing in Lake Michigan and became separated from his life raft before he could inflate it. The cause of death was drowning and exposure, but the court disallowed the claim since the insured was engaged in "aerial flight" at the time of his death. This decision is indicative of a causation test.

The trend today in holding that an insured who makes a controlled forced landing and later meets his death is precluded from insurance coverage by reason of an aviation exclusion clause is probably best shown by the decision in *Order of United Commercial Travelers of America v. King*.[99] The insured, a Civilian Air Patrol pilot, made an emergency landing in the Atlantic in 1943. He emerged from his plane without serious injury and donned his life jacket. Four and one half hours later he was found dead. The cause of death was drowning, but recovery was denied since the insured was "participating in aviation." The court held that there was no ambiguity. In the same case, the lower court allowed recovery on the insured's policy, stating in part:[100]

> . . . Lieutenant King arrived by way of aircraft at the place where he was later accidentally drowned, but he was not injured in the arrival or in leaving the plane which had brought him there . . . The plane had not crashed. . . . Service, travel, flight and participation in aviation or aeronautics in that plane had come to an end without injury to Lieutenant King. . . .
>
> I find that disengagement from participation in aviation or aeronautics had taken place, and . . . it cannot be said that Lieutenant King's death resulted from participation, as a passenger or otherwise, in aviation or aeronautics. . . . His death was too remote to be considered the result of participation in aviation or aeronautics.

The federal district court then expressly denied the theory of proximate causation by saying that the insured's death was too remote to be connected to his participation in aeronautics. However, the United States Court of Appeals for the Fourth Circuit overruled this decision stating:[101]

> By stressing particularly the insured's uninjured physical disengagement from the airplane, and coupling this with the rule of construction that ambiguous or doubtful clauses must be resolved against an insurer, the District Court reached the conclusion that the exclusion clause of the policy was not applicable. We are unable to agree with that conclusion either in reason or authority.

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96 See note 48 *supra*.

97 See note 84 *supra*.

98 See note 82 *supra*.

99 333 U. S. 754, 68 S. Ct. 70, 92 L. Ed. 341, *rehearing denied*, 333 U. S. 878, 68 S. Ct. 900, 92 L. Ed. 1153 (1948).

100 65 F. Supp. 740, 747 (W. D. S. C. 1946).

101 Order of United Commercial Travelers of America v. King, 161 F. (2d) 108, 109 (4th Cir. 1947).

The Court of Appeals here stressed the use of the word "resulting" in the exclusion clause and went on to say:[102]

> In undertaking an aerial flight over the ocean in a land-based plane, man must reckon with the perils of the sea which are as imminent and real as the unrelenting force of gravity. . . . We think it a rather violent fiction to say that death, under such circumstances, comes from accidental drowning.
>
> It is true that rescue, routine or fortuitous, may remove a man from peril. But it does not follow that the failure of rescue brings the peril that causes death.

The United States District Court of Pennsylvania in 1945 reached a similar conclusion to that of the *King* case, in *Barringer v. Prudential Life Ins. Co.*,[103] where the insured, an army major, was on an army transport plane enroute from Puerto Rico to Trinidad when the plane and all its occupants disappeared and were never found. The court held that the insured met his death while riding in an airplane and denied recovery. Here the word "result" was used in the exclusionary clause which put the insurance company on firm ground. The causation test was not applied expressly but might well have been with the same result.

Those cases in which the insured was killed as a result of enemy gun fire have used a causation test by implication and have generally allowed the insured's beneficiaries to recover on the policy despite the presence of an aviation exclusionary clause. In 1948, the case of *Boye v. United Services Life Ins. Co.*[104] was decided by granting recovery under an exclusion clause similar to that in the *Barringer* case. The court, however, distinguished the facts of the two cases. In this, the *Boye* case, the insured was the pilot of a B-17 which was believed to have been destroyed by enemy fire over Germany. The court held that this was not an ordinary risk connected with aeronautics whereas the defects of the plane in the *Barringer* case was such a risk. A similar conclusion was reached in *Temmey v. Phoenix Mut. Life. Ins. Co.*[105] Here, the insured was an aviation radioman serving aboard a navy airplane on an authorized flight over enemy territory in the Pacific Ocean when he met his death. The court assumed that the insured's death was the result of enemy gun fire, and went on to say:[106]

> It must be observed that there is no evidence whatsoever to show that the crash resulted from any of the risks ordinarily associated with aeronautics. . . . We, therefore, conclude that the death of the

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102 *Ibid.*

103 62 F. Supp. 286 (E. D. Pa. 1945), *aff'd.* 153 F. (2d) 224 (3d Cir. 1946).

104 168 F. (2d) 570 (D. C. Cir. 1948).

105 .... S. D. ...., 34 N. W. (2d) 833 (1948).

106 *Id.*, 34 N. W. (2d) at 835.

insured resulted from a war risk and not from "participating in aeronautics, as a passenger or otherwise."

Riche v. Metropolitan Life Ins. Co.[107] is the leading case concerning members of the armed forces shot down in action. In this case, the insured was a crew member of an air force bomber which was destroyed by enemy anti-aircraft fire or machine gun fire from enemy pursuit planes while on a mission over Austria. In reviewing the previous cases on this point, the court stated:[108]

> If the insured had died in an explosion of an airplane . . ., in a crash . . ., or by reason of a situation in which he was and could have reasonably been expected to be placed following a crash . . ., or even in a case where the plane never appeared at its destination and the only likely explanation of such failure was a crash . . ., plaintiff could not recover. Assured's death was not the result of any event proceeding out of [the flight of] an airplane. . . . Death was the result of a deliberate act of a third person and was not connected in any way with any risk ordinarily associated with aerial flight.

In these cases involving members of the military services who are shot down while in flight, a causal connection test could also be applied where the policy provisions permit it. If the word "resulting" or words of similar meaning were to be used in aviation exclusion clauses, the courts would be called upon to determine whether or not the insured, civilian or military, met his death as the result of travel by air. This would alleviate some of the conflicting decisions in this field of law and would also show a more logical distinction between cases involving civilians and those involving members of the air forces.

Since the cases discussed herein under the subject of "military service" decisions have been used as authority in cases where the insured was a civilian, they will be of lasting value as long as similar wording is used in exclusionary clauses. As yet, only a few courts have attempted to distinguish between the different status of the insured except in those cases where the plane is destroyed by enemy gun fire.

Conclusion

There is an evident and irreconcilable conflict in the decisions involving identical exclusion clauses; this is primarily attributable to the fact that cases involving military crashes are used as precedent for civilian accidents, and vice versa, when the reasoning used in the two types of cases is entirely different. In the military cases, the courts generally have leaned over backward in a display of sentiment to allow recovery to the survivors of the dead war hero. On the other hand, although they are favored, civilians do not

107 193 Misc. 557, 84 N. Y. S. (2d) 832 (1948).
108 *Id.*, 84 N. Y. S. (2d) at 835.

receive equivalent indulgence. The existing decisions cannot be reconciled; future cases can only be consistently decided by not using the military decisions as precedent, and then by applying a standard test to both types of cases without distinction.

This universal test should be that of *proximate causation.* Using this as the test to interpret the exclusion clauses, the insurer will be able to exclude itself from liability by the use of a clause which clearly excludes coverage when the death or injury of the insured is proximately caused by air flight. If the flight was not the proximate cause, but some intervening factor had caused the death, the exclusion clause would not apply.

This approach to the problem adopts the test of *tort liability, proximate causation,* in the *determination of contract liability.* The adoption of this norm should serve to eliminate the confusion created by the conflicting decisions where the insured has been shot down, or where he has been able to extricate himself from his plane only to meet death at the hands of the surrounding elements.

Finally, it is the cardinal rule of contract law that the intent of the parties to the contract is to control in deciding all disputes involving the contract. In the decisions involving the interpretation of the aviation exclusion clauses there is a shocking lack of the application of this axiomatic rule. The policies should be interpreted as the average policy holder would construe it. Too often, in attempting to hold against the insurance company who wrote the policy, the courts find ambiguity where reasonably none exists.

Maurice J. Moriarty

Torts

Employees in Interstate Commerce and the Federal Employers' Liability Act

The precursors of labor legislation in this country have been members of the railroad fraternity. While their trailblazing has been the forerunner of the modern Workmen's Compensation Laws for others, they themselves have been left with an antiquated system which has failed to meet the needs of the changing times. The Federal Employers' Liability Act was inspired by laudable motives at a time when remedial state legislation was in its infancy, but it has outlived its usefulness and has become an obstacle to the fulfillment of its own purposes.[1]

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1 Schoene and Watson, *Workmen's Compensation on Interstate Railways,* 47 Harv. L. Rev. 389, 424 (1934).

An early demand for federal action on the subject of railroad liability was prompted by the hazardous nature of railroad work and the abuses and miscarriages of justice under the common law method of recovery for death or injury due to company negligence. The common law fellow servant rule and the doctrine of assumption of risk were constant stumbling blocks in the employees' attempt to obtain industrial justice.[2] It was because of this that Congress invoked its plenary power over interstate commerce[3] to legislate on the liability of interstate common carriers to their employees. The first Federal Employers' Liability Act was passed in 1906,[4] and provided that every common carrier was liable to its employees for all damages which resulted from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency of its cars or equipment. In 1907 the United States Supreme Court, in *Howard v. Illinois Central Railroad Co.*,[5] declared the statute unconstitutional because it rendered the carrier liable for damages to all its employees without discrimination between those engaged in intrastate and those engaged in interstate commerce. This was regarded as a usurpation of the state's reserved power over the master and servant relationship.[6] The necessity for positive action in this field of tort liability caused Congress to change the wording of the statute to conform to the decision of the Supreme Court and to repass the legislation in the session of 1908.[7] There were two major changes. The revised Act applied only to interstate rail carriers, and secondly, it imposed liability only for the negligent injury or death of employees while actually engaged in interstate commerce at the time of injury. Liability without fault, which has become so prevalent in the present Workmen's Compensation laws, was not imposed on the railroad company, and it continued to be essential for the employee to show negligence on the part of a company employee or a defect in railroad equipment.[8] (It should be noted that, since workers coming within the

2 Albertsworth and Cilella, *A Proposed New Deal for Interstate Railway Industrial Harms*, 28 ILL. L. REV. 587, 774 (1934).

3 Gibbons v. Ogden, 9 Wheat. 1, 196, 6 L. Ed. 23 (1824).

4 34 STAT. 232 (1906): "That every common carrier engaged in trade or commerce . . . between the several states . . . shall be liable to any of its employees . . . for all damages which may result from the negligence of any of its officers, agents or employees."

5 207 U. S. 463, 28 S. Ct. 141, 52 L. Ed. 297 (1907).

6 *Id.*, 207 U. S. at 504. Mr. Justice White states: "Concluding, as we do, that the statute, whilst it embraces subjects within the authority of Congress to regulate commerce, also includes subjects not within its constitutional power, and that the two are so interblended in the statute that they are incapable of separation, we are of the opinion that the courts below rightly held the statute to be repugnant to the Constitution and nonenforceable . . . ."

7 35 STAT. 65 (1908), 45 U. S. C. § 51 (1946).

8 *Id.*, which provides that ". . . every common carrier by railroad while engaging in commerce between any of the several States or Territories . . .

federal statute are excluded from the benefits of state Workmen's Compensation, there can be no recovery for non-negligent injuries in interstate commerce.[9] The federal law makes no provision for such remedy, and the state law has no jurisdiction.)

The functioning of this statute was, from the beginning, beset with the problem of determining just when an employee was engaged in interstate commerce. The Supreme Court, in 1913, set forth a test to be applied in ascertaining whether an employee, in a particular case, came within the terms of the Act when it stated that, "The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?" [10] This test was somewhat altered in 1916 to meet the changing needs when the same Court, in deciding the case of *Shanks v. Delaware, Lackawanna & Western Ry.*,[11] stated that, "the true test of employment in such commerce in the sense intended is, Was the employee, at the time of the injury, engaged in interstate transportation, or work so closely related to it as to be practically a part of it?" The use of this vague and indecisive language failed to insure any degree of certainty in the separate tribunals of the forty-eight states. This lack of certainty which plagued the courts and gave rise to continued litigation was recognized by Mr. Justice McKenna in 1922 when he said, "we are besought to declare a standard invariable by circumstances or free from confusion by them in application. If that were ever possible, it is not so now." [12] The passage of time emphasized the undesirable circumstances which attended the application of the 1908 Act, for it resulted in an increase in litigation, with little cor-

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shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

9 See Tiller v. Atlantic Coast Line Ry. Co., 318 U. S. 54, 71, 63 S. Ct. 444, 87 L. Ed. 610 (1943), where Mr. Justice Frankfurter states, in his concurring opinion: "But the 1939 amendment left intact the foundation of the carrier's liability — negligence. Unlike the English enactment which, nearly fifty years ago, recognized that the common law concept of liability for negligence is archaic and unjust as a means of compensation for injuries sustained by employees under modern industrial conditions, the federal legislation has retained negligence as the basis of a carrier's liability."

10 Pedersen v. Delaware, Lackawanna, and Western Ry., 229 U. S. 146, 152, 33 S. Ct. 648, 57 L. Ed. 1125 (1913).

11 239 U. S. 556, 558, 36 S. Ct. 188, 60 L. Ed. 436 (1916).

12 Industrial Accident Commission v. Davis, 259 U. S. 182, 188, 42 S. Ct. 489, 66 L. Ed. 888 (1922).

responding advantage to the employee.[13] Over-refinements of factual situations and petty, academic distinctions obstructed the realization of substantial justice.[14] The impracticability of setting down a hard and fast rule as to which employees were covered by the Act led to such a degree of uncertainty that many persons could only determine whether their cause should be brought under the Act by experimenting, i.e., by going to court to settle the issue; and in many instances an adverse judgment cost the claimant his cause of action, because the statute of limitations might bar any further litigation.[15]

The growing need for remedial legislation on this subject was answered in 1939 when Congress amended the 1908 Act in an effort to eliminate the twilight zone of federal control. It was intended that the borderline cases should be reduced in number by the broad language of the amendment which reads that, "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall . . . be considered as entitled to the benefits of this chapter." [16] The Report of the Senate Committee on the Judiciary,[17] which has been employed as a means of determining the proper application of the statute, states that: "This amendment is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers who, while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations." It appears, by this report and the statute, that it would no longer be necessary for an employee to be engaged in an activity "closely related" to interstate commerce in order to maintain a suit under the Act, so long as his general duties were in some way "the furtherance" of such commerce.[18] This interpretation was given to the statute in a carefully reasoned opinion by Judge Kiley of the Third Division of the Illinois Appellate Court.[19] In that case the employee was engaged in switching intrastate cars at the time of his injury; however, his general duties included the switching of cars in interstate commerce. It was pointed out that: [20]

13 DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION 773-780 (1936).

14 McLeod v. Threlkeld, 319 U. S. 491, 495, 63 S. Ct. 1248, 87 L. Ed. 1538 (1943).

15 See note 12, *supra*.

16 53 STAT. 1404 (1939), 45 U. S. C. § 51 (1946).

17 SEN. REP. No. 661, 76th Cong., 1st Sess. (1939).

18 Patsaw v. Kansas City Southern Ry., 56 F. Supp. 897 (W. D. La. 1944); Rogers v. New York, Chicago & St. Louis Ry., 328 Ill. App. 123, 65 N. E. (2d) 243 (1946).

19 Ernhart v. Elgin, Joliet & Eastern Ry. Co., 337 Ill. App. 56, 84 N. E. (2d) 868 (1949).

20 *Id.*, 84 N. E. (2d) at 872.

> It is not possible to break up plaintiff's duties at the moment of injury. His duty then was presumably to board the car. It is inconceivable that part of a switchman's duties at a given moment can be interstate and part intrastate. The work of a switchman does not differ with the type of commerce . . . These operations cannot be broken up so that one part is in interstate and one part in intrastate commerce.

Judge Kiley, in construing the statute literally and in referring to the Senate Report as a source of congressional intent, concluded that it was "unnecessary to attempt the division of an immediate operation of a workman into parts so as to determine whether any part was in interstate commerce." [21] The switchman was held to be within the Act. While this case would appear to be correctly decided, the Illinois Supreme Court differed as to the proper interpretation of the statute in affirming the decision.[22] The latter court stated:

> We are constrained to believe that the criterion for the applicability of the act is still the work at which the employee is engaged at the time of his injury. While it need no longer be shown that the employee was engaged in interstate commerce at the precise moment of his injury, it must be shown that his employment at the time was in furtherance of interstate commerce, or that it directly or closely and substantially affected such commerce.

The state supreme court, in reaching this conclusion, seemed to attach little importance to the Senate Report [23] which has so frequently been referred to in other litigation concerning the amendment. Instead it chose to expand the area of those activities which are said to be "the furtherance" of interstate commerce rather than recognize the extension of the Act, in certain instances, to purely intrastate activities, as did the lower court. This was, perhaps, due to an earlier Illinois case [24] which found a view similar to the one taken by the Appellate Court to be untenable in the light of existing constitutional limitations.

The success of the 1939 legislation was dependent upon the ability of the courts to employ the words of the statute as a means to develop predictability, in the interest of the employee. This predictability has, unfortunately, not been realized, and the confusion and uncertainty which pre-dated the 1939 amendment continues. This fact is shown by the large number of cases which continue to be incorrectly brought under State Compensation Laws,[25] as well as by

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21 *Ibid.*

22 Ernhart v. Elgin, Joliet & Eastern Ry., Docket No. 31162, Ill. S. Ct., November 1949.

23 See note 17, *supra.*

24 Thomson v. Industrial Commission, 380 Ill. 386, 44 N. E. (2d) 19 (1942).

25 For cases incorrectly instituted under Workmen's Compensation, see: Southern Pacific Co. v. Industrial Accident Commission, 19 Cal. (2d) 271, 120 P. (2d) 880 (1942), where the worker, when injured, was repairing a combina-

the variance in the results in related cases. Several instances of this variance can be shown.

In *Thomson v. Industrial Commission*,[26] the court applied the test of "whether the activity in which the employee is engaged at the time of the accident, directly or closely and substantially affects interstate commerce." It was then found that a nightwatchman employed in a yard handling both interstate and intrastate carriers was not covered by the Act, for the character of his employment could not be changed by the fact that he was employed by an interstate carrier. It was said that, "To so hold would emasculate the constitutional limitations inherent in the grant of power, as well as the explicit reservations of the tenth amendment." [27] A very similar case arose in Maryland,[28] when a night watchman was injured while on duty in a yard which handled both intrastate and interstate commerce. The Maryland court did not feel that any constitutional limitations were pertinent when it ruled, in accord with a previous case,[29] that "if there is an element of interstate commerce in a traffic or employment it determines the remedy of the employee," and then proceeded to find that the watchman was covered by the Act. The test applied in reaching this decision was "whether at the time of the injury any part of the employee's duties as such was in 'furtherance of interstate or foreign commerce,' or did in any way directly or closely and substantially affect such commerce." The facts as well as the test employed by the court were similar in each case, and yet there was a very real difference in the decisions. The anomaly is further emphasized by the case of *Fitzgerald v. Great Northern*

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tion truck and boom car which was used to remove obstacles and obstructions from tracks on which both interstate and intrastate commerce traveled; Rainwater v. Chicago, Rock Island and Pacific Ry., 207 La. 681, 21 S. (2d) 872 (1945), where the employee was engaged in loading piling on cars for the railroad company, destined for use in repairing roadway at various points on the line and within the state; Harris v. Missouri Pacific Ry., 158 Kan. 679, 149 P. (2d) 342 (1944), where plaintiff's duties were to clean the shop grounds, haul materials, knock and clean fires and firepans, wash engines, clean out trash from inside the roundhouse, clean the yards, shovel and clean up dirt, old papers, waste or anything that he was asked to do outside of the shops; Albright v. Pennsylvania Ry., 183 Md. 421, 37 A. (2d) 870 (1944), *cert. denied*, 323 U. S. 735, 65 S. Ct. 72, 89 L. Ed. 589 (1944), where the employee was a night watchman who guarded both interstate and intrastate shipments; Johnson v. Chicago and North Western Ry., 69 S. D. 111, 7 N. W. (2d) 145 (1942), where the employee shoveled coal from out of a state carrier into a chute, and the coal was thereafter used for other interstate carriers.

26 See *supra* note 24, 44 N. E. (2d) at 23.

27 *Ibid.*

28 Albright v. Pennsylvania Ry., 183 Md. 421, 37 A, (2d) 870 (1944), *cert. denied*, 323 U. S. 735, 65 S. Ct. 72, 89 L. Ed. 589 (1944).

29 Philadelphia & Reading Ry. v. Polk, 256 U. S. 332, 333, 41 S. Ct. 518, 65 L. Ed. 958 (1921).

Ry.,[30] which was decided prior to the 1939 amendment. There it was found that a nightwatchman who protected both intrastate and interstate carriers was engaged in interstate commerce under the supposedly narrower wording of the 1908 Act. Thus it would seem that the Minnesota court found the 1908 Act broader before the amendment than the Illinois court did after the amendment.

The distinction between those engaged in construction work and those engaged in repair work has also received inconsistent treatment. A federal court in 1942 [31] found that an employee engaged in construction under a re-alignment program was within the terms of the Act, since his work was in furtherance of interstate commerce. It was said,[32] in comparing this employee's work with repair work, that it is "just as important to place rails as to replace rails." The court reasoned that it could not be said that the employee did not in any way further interstate commerce. Thus, new construction on a route over which interstate commerce had not yet tread was held to be in furtherance of interstate commerce. Such was not the view taken by the Idaho Supreme Court [33] when they distinguished between new construction and repairs on existing tracks, the former being said to fall without the purview of the federal statute. The court affirmed the finding of the Industrial Accident Board, and quoted the board:[34]

> . . . his duties were wholly in the construction of railroad property to be at some future time, when completed, put to such service, and, while said property when completed, became a direct instrumentality of interstate commerce, claimant's duties in connection therewith involved merely a secondary relation to an interstate instrumentality.

In this case the construction work was a part of a rearrangement plan which was to increase the efficiency of operations.[35] The similarity with the *Agostino* case is striking, and should it be said that the cases can be distinguished, this would only serve to exemplify the hair-splitting technicalities which render the Act ineffective.

An interesting situation is also posed by the various recent cases which deal with workers in and about roundhouses and other related maintenance facilities. A mechanic's helper, who lost his hand while working on the stoker of an engine which had been taken from inter-

30 157 Minn. 412, 196 N. W. 657 (1923).

31 Agostino v. Pennsylvania Ry., 50 F. Supp. 726 (E. D. N. Y. 1943).

32 *Id.*, 50 F. Supp. at 730.

33 Moser v. Union Pacific Ry., 65 Idaho 479, 147 P. (2d) 336 (1944).

34 *Id.*, 147 P. (2d) at 337.

35 The court cited as authority Gulf, Mobile and Northern Ry. v. Madden, 190 Miss. 374, 200 So. 119, 122 (1941), where it was said: ". . . employees engaged in the original construction of roadbeds or tracks to be used in interstate commerce are not engaged within the meaning of the statute, while on the other hand those employed in the repair or maintenance of interstate railroad tracks are within the Act." It is interesting to note that this case was decided under the Act as it read prior to the amendment.

state commerce for repairs, was found to be within the Act,[36] as was a worker engaged in making repairs on an interstate freight car.[37] The same was held to be true of a yard repairman, who was electrocuted when coming into contact with a pipe containing shorted wires, while he was repairing a roundhouse door.[38] Although the courts in the preceding cases apparently experienced no difficulty in holding the employee to be in furtherance of interstate commerce, a New York court applied a contrary rule, and stated: [39]

> It must be borne in mind that even under the amendment the duties of the employee must still be in furtherance of interstate commerce. "Commerce" in this sense has long been interpreted as meaning "transportation," and the test has been whether the employee's work was directly related to the interstate movement of persons and things in commerce.

The claimants in this case were a blacksmith and two machinists who were "back shop" employees and who repaired locomotives which had been taken from interstate commerce for extensive repairs. Although this case was reversed by the New York Court of Appeals,[40] it is apparent that while the applicability of the Act to such workers was a settled issue in several jurisdictions as early as 1944,[41] the question was very much in dispute in New York as late as 1949.

The Kansas Supreme Court, in the case of *Skanks v. Union Pacific Ry.*,[42] held that a worker could not recover under state Workmen's Compensation Laws because he was "a very necessary link in the chain" of interstate commerce. This workman was filling bags with sand and placing them on a flatcar. The sandbags were to be used to retain the waters of a flooding river in order to protect interstate lines. On the other hand, the Kansas Supreme Court found that a worker who unloaded coal into a chute was not within the Act even though the coal had come from another state and was subsequently used by interstate carriers.[43] The court reasoned that the coal had been removed from the interstate flow of commerce as it had arrived, at the point where the injury occurred, seven or eight days before. Can it be said, however, that what the man was doing was not *a very necessary link in the chain?*

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36 Edwards v. Baltimore & Ohio R. Co., 131 F. (2d) 366 (7th Cir. 1942).

37 Maxie v. Gulf, Mobile & Ohio R. Co. 358 Mo. 1100, 219 S. W. (2d) 322 (1949), *cert. denied,* ....U. S....., 70 S. Ct. 69, 94 L. Ed. 42 (1949).

38 Zimmerman v. Scandrett et al., 57 F. Supp. 799 (E. D. Wis. 1944).

39 Baird v. New York Central Ry., 274 App. Div. 577, 86 N. Y. S. (2d) 54, 56 (1948), *rev'd,* 299 N. Y. 213, 86 N. E. (2d) 567 (1949). The Court of Appeals gave impetus to the trend toward greater liberality by reversing the lower court and finding such "back shop" employees within the Act.

40 See note 39, *supra.*

41 See notes 36 and 38, *supra.*

42 155 Kan. 584, 127 P. (2d) 431 (1942).

43 Harris v. Missouri Pacific R. Co., 158 Kan. 679, 149 P. (2d) 342 (1944).

There can be little doubt, in view of the language used by the courts in the foregoing cases, that even the freight claim clerk,[44] whose duty it was to trace the route traveled by lost interstate freight, could have been brought within the terms of this statute. It may be that such work was only remotely connected with interstate commerce; yet this worker was *a very necessary link in the chain.* The clerk's work was almost exclusively concerned with the cargo of the interstate carrier, and it cannot be said that this work was not *in any way in furtherance of interstate commerce.*

In 1934 it was estimated that eighty-two per cent of railroad accidents or injuries occurred in interstate commerce.[45] The proportion probably has risen, but definitely has not declined from that figure today. The 1939 amendment purports to cover not only this eighty-two per cent but also any men in the remaining eighteen per cent who "in any way directly or closely and substantially affect such commerce." [46] What are the constitutional aspects of this attempt? Where will this construction offend the reasons proposed by the Supreme Court in holding the original Act unconstitutional? [47] This is largely a matter of conjecture. But the judicial climate has changed greatly since 1907, and the Court has already changed its mind on the proposition that Congress cannot regulate strictly local affairs that affect interstate commerce.[48] In interpreting the Fair Labor Standards Act,[49] there are decisions stretching interstate commerce to cover any activity affecting commerce between the states. In the *McLeod* case,[50] Justice Murphy said, dissenting: "In using the phrase 'engaged in commerce' Congress meant to extend the benefits of the Act to employees 'throughout the farthest reaches of the channels of interstate commerce'."

Even with this extension of what constitutes interstate commerce, there are still courts that resist the application of the amendment to intrastate commerce. As witness, note the statement of the Illinois Supreme Court that: "It seems clear that until *Howard v. Illinois Central Railroad Co.,* supra, and the *Jones* & *Laughlin* case, supra, are overruled, the amendment in so far as it attempts to include the employees of interstate carriers at all times, regardless of whether or not their immediate employment is in interstate commerce or

44 See Holl v. Southern Pacific Co., 71 F. Supp. 21 (N. D. Cal. 1947).

45 See Albertsworth and Cilella, *A Proposed New Deal for Interstate Railway Industrial Harms,* 28 ILL. L. REV. 587, 602 (1934).

46 See note 16, *supra.*

47 See note 5, *supra.*

48 National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (1937); Board of Trade v. Olsen, 262 U. S. 1, 43 S. Ct. 470, 67 L. Ed. 839 (1923).

49 52 STAT. 1060 (1938), 29 U. S. C. § 201 (1946).

50 See *supra,* note 14, 319 U. S. at 498.

affects such commerce is beyond the power of Congress." [51] It would seem that if Congress has the admitted power to regulate the working conditions of those in the farthest reaches of interstate commerce, it also has the power to regulate the method for recovery due to accidents in that employment.

The course of years, plus the tendency of the court to permit regulation by Congress of affairs that are of a mixed (local and interstate) nature, has practically brought the statute to the same place occupied by the 1906 Act, which was declared unconstitutional. All employees of interstate carriers are covered by the Act except those few who have no contact or influence on interstate commerce. There are indeed few employees who would be excluded from the Act if it is logically followed. The ultimate extent of the position that the Supreme Court now holds with reference to interstate commerce was shown in the dissent of Justices Lamar, Holmes and Luston in the *Pedersen* case: [52]

> It is conceded that a line must be drawn between those employees of the carrier who are employed in commerce and those engaged in other departments of its business. It must be drawn so as to take in, on one side, those engaged in transportation, which is commerce; otherwise there is no logical reason why it should not include every agent of the company; for there is no other test by which to determine when we must sue under the state statute and when under the act of Congree; for if a man on his way to repair a bridge is engaged in interstate commerce, then the man in the shop who made the bolts to be used in repairing the bridge is likewise so engaged. If they are, then the man who paid them their wages, and the bookkeeper who entered those payments in the account are similarly engaged. For they are all employed by the carrier, and the work of each contributes to its success in hauling freight and passengers.

The statement made by these dissenting judges in 1916 is almost prophetic of the position now occupied under the amended Act. Logically, there is no constitutional obstacle to the application of the Act to any man whose duties affect interstate commerce. The Act reaches the stage of taking jurisdiction of the person of interstate employees rather than the acts in which they are engaged. Thus, the personal jurisdiction follows the employee even when he is engaged in strictly local matters. This taking of jurisdiction of persons because some duties are in interstate commerce has not yet been considered by the Supreme Court. But since Congress has plenary power in interstate commerce and matters affecting such commerce,[53] it does not appear open to question that Congress could take this direct, personal jurisdiction rather than pursue the former method of taking jurisdiction of the machines and instrumentalities and in this manner indirectly protect the railroad employee. Constitution-

51 See *supra*, note 24, 44 N. E. (2d) at 22.

52 See *supra*, note 10, 229 U. S. at 154.

53 See note 3, *supra*.

ally the Act appears to be on solid ground in assuming authority where the person, at any time in his employment, affects interstate commerce rather than attempting to set a requirement that the particular act engaged in at the time of injury be an actual interstate operation.

Conclusions

The question of what should be done to bring railroad employees on a par with other industrial workers in recovering for accidents and injuries has frequently been considered. Three choices seem to have been proposed:

1. Extend the present Federal Employers' Liability Act to cover all employees of interstate railroads and to clarify the operation of the Act.[54]
2. Establish a federal system of Workmen's Compensation to cover the employees of interstate railroads.[55]
3. The release by Congress of regulation of the railroad employees, and the integration of such employees into the compensation systems of the various states.[56]

Each of these choices is beset with problems. In the first plan, that is, the plan for the extension of present legislation, the variances in interpretation would still vex the application of the statute. The extension of an antiquated system would only serve to confuse rather than remedy the situation. The fact that the present system fails to recognize the now generally accepted principle of liability without fault in industrial accidents is its greatest drawback.[57]

The establishment of a Federal Workmen's Compensation System, while it appears desirable in principle would have many ramifications and difficulties in application.[58] The necessity for centralized operation and uniform awards would cause disparity between local state awards and federal awards. The variations between sections of the country could not be adequately met by a central administration which would cause discrimination against interstate employers, and consequently, would penalize those engaged in interstate commerce.

The third choice, the release to the State Compensation System, appears to be the best solution. The various states have systems

54 HOROVITZ, WORKMEN'S COMPENSATION 69 (1944).

55 Albertsworth and Cilella, *A Proposed New Deal for Interstate Railway Industrial Harms*, 28 ILL. L. REV. 587, 774 (1934); Miller, *Workmen's Compensation for Railroad Employees*, 2 LOYOLA L. REV. 138 (1944).

56 Schoene and Watson, *Workmen's Compensation on Interstate Railways*, 47 HARV. L. REV. 389, 424 (1934).

57 See note 9, *supra*.

58 New York Central Ry. v. Winfield, 244 U. S. 147, 168, 37 S. Ct. 546, 61 L. Ed. 1045 (1917). Mr. Justice Brandeis, dissenting, points out many disadvantages of a federal system of accident compensation.

functioning now, and with a minimum of disruption they could assume the supervision of all railroad employees within their state boundaries. The employees would then have the assurance of knowing what their remedy would be at all times. They would be more assured of receiving compensation for injuries, with less litigation and lower legal costs. But they would lose any chance to wager on acquiring a large lump sum judgment.[59] This set-back to the gambling nature of some Americans could hardly be treated as a valid objection to a system that attempts to give prompt, equitable awards with efficient administration.

The employers would benefit from the consistent, foreseeable extent of the awards rather than the random verdicts of sympathetic juries. The employers would be able to meet their social obligations to their employees and their families on an insurance basis rather than as a result of contentious litigation that only served to injure their employment relationships and injure their community standing.

The assumption of supervision by the state systems would insure the conformity of awards to those given to other workers in the state. The present unfavorable position of railroad workers would disappear with the integration of this group in the other industries of the locality. This would accord with the natural law principle of equal justice for equals. The employment of state boards would also meet the requirements of the principle of subsidiarity. The use of the smallest unit competent to meet the need would insure efficient administration without unnecessarily removing the operation from the people to whom it is responsible.

While the state compensation systems can still be improved, they have had a sufficient period to show their utility. They have been generally accepted by employers and employees as a just means of meeting the toll of human misery that is concomitant with industrial development. Their extension to the interstate railroad field would serve to bring the fruits of the system to the men who gave impetus to such legislation in earlier years.

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[59] $40,000 for injury to spine: see note 19, *supra;* $40,000 for loss of a leg: Cunningham v. Pennsylvania Ry., 55 F. Supp. 1012 (E. D. N. Y. 1944); $35,000 for severe injuries suffered while getting off an engine: Michael v. Reading Co., 82 F. Supp. 54 (E. D. Pa. 1948), *aff'd.,* 174 F. (2d) 828 (1949); $40,000 to brakeman for injury causing temporarily paralyzed legs plus necessity to wear a brace: Hannigan v. Elgin, J. & E. Ry., 337 Ill. App. 538, 86 N. E. (2d) 388 (1949); $47,500 to thirty-five year old fireman for rib and vertebrae fractures that incapacitated him for twenty years: Henderson v. Pennsylvania Ry., 338 Ill. App. 653, 88 N. E. (2d) 95 (1949); $7,500 for rupture of stomach ulcer while turning switch: St. Louis & San Francisco R. Co. v. Dyson, ...Miss....., 43 S. (2d) 95 (1949).