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Notes

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NOTES

AIRPLANE WARRANTIES.—A complicated body of law has been developed, and continues to grow, around the liability of those who supply chattels for the use of others. This field of law has divided itself into two branches, (a) liability based on negligence, (b) and strict liability, which in this field of law has become associated with the term warranty.

In the case of the sale of chattels, both American and English law have deviated from the ancient rule of *Caveat emptor*, which made the buyer rely upon his own judgment, make his own inspection, and assume the risk of any hidden defects in the article he purchased.

Liability in tort for negligence grew out of the general duty placed by law upon anyone whose affirmative conduct would affect the interests of another, though it arises in these cases out of the relation created by the contract. The negligence of the seller can take several forms. It may consist of a misrepresentation of the character of the goods or of their fitness for a particular use. It may consist of a failure to disclose to the buyer facts of which the seller has knowledge which makes the goods dangerous for the buyer's purpose. Most frequently it consists merely in failure to exercise reasonable care to inspect the goods to discover defects.[1]

However, liability in negligence was found insufficient to cover all the legal problems arising from the function of manufacturers in modern society. Proof of negligence in many cases is impossible where human nature senses obligation. Liability in tort was therefore gradually superseded by the extension of the doctrine of warranty. This doctrine of implied warranty in the case of sales has been furthered by the courts, the tendency being to cover hazards to consumers.[2]

As stated by one authority,[3] "the consumer, barring his own fault in use, should have no negligence to prove, that the article was not up to its normal character should be enough. The first group liable, to any consumer, should be the manufacturer."

Warranty, by definition,[4] is an express or implied statement of something undertaken as part of a contract, colateral to its object. There are two kinds, express and implied. The early warranty cases involved express representations as to the character or quality of the goods, on which the buyer relied in making his purchase, and for which the seller was held strictly responsible. Warranties today are provided for by the Uniform Sales Act, which imposed them and made them part of the sales contract by virtue of law.

The desire to promote high standards in business and discourage sharp dealings came with a changing social viewpoint toward the seller's

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1 *Prosser on Torts*, Sect. 82, Pp. 666-7.
1 *Prosser on Torts*, Sect. 82. (1941)
3 Llewellyn, *Cases and Materiels on the Law of Sales*, 340-2 (1930).
4 *Corpus Juris Secundum*, Sect. 667, Vol. 55, P. 652.

responsibility led to the development of implied warranties. Implied warranties make the seller, in fact, an insurer of his goods.

The present law is crystallized by the Uniform Sales Act[5] as follows:

Subject to the provisions of this act and of any statute in its behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose, of goods supplied under a contract to sell, or a sale, except as follows:

(1) Where the buyer, expressly, or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, there is an implied warranty that the goods shall be of merchantable quality.

(3) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

(5) An implied warranty or condition as to the quality or fitness for a particular purpose may be annexed by the usage of trade.

Existence of an implied warranty of fitness by a seller of machinery depends upon the same considerations which govern the existence of a warranty of fitness generally.

The first inquiry is as to whether the purchaser under the circumstances of the individual sale may be deemed to have depended on the judgment, skill, or experience of the seller. It has been held that on the sale of machinery as an ordinary article of commerce, whether the seller is the maker or manufacturer or not, there is an implied warranty that the machine will do the work for which it is ostensibly intended.

The buyer may, either under the common law or the Uniform Sales Act rely on an implied warranty of fitness for the purpose indicated where he made known to the manufacturer and seller the purpose for which the machine was desired, and trusted to the latter's skill and judgment to furnish a machine suitable for the purpose. If the manufacturer undertakes to manufacture a machine according to his own judgment and plans, which is intended by the buyer for a disclosed purpose, there is an implied warranty that the machine will fit such purpose.

Warranties of quality or fitness for a purpose, however, contemplate reasonably good management in the use of the article by persons of ordinary skill, which warranty is not broken by failure of the article to give satisfaction due to the mismanagement of the purchaser.

The problem of airplane manufacturers' liability, nevertheless, can not be met by applying the law evolved in cases involving the tort or contract liability of manufacturers in general, without some qualifications.

The most cited case extending the liability in tort of the manufac-

5 Uniform Sales Act, Sect. 15 (1) & (2).

turers of machines, MacPherson v. Buick Motor Co.[6] laid down the law which has since 1916 been generally followed by the courts in the decisions involving this point. In the MacPherson Case Justice Cardozo held that the negligence of a manufacturer in incorporating into an automobile a defective wheel gave a cause of action, since this incorporated defect produced an imminently dangerous article. "If the nature of a thing," says Cardozo, "is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. To make negligence of manufacturers of the component parts a cause of imminent danger, an independent cause must often intervene, that is, the manufacturer of the finished product must have failed in *his* inspection."

This case decision is quoted at length because of its importance. It has been said that principles do not change, but that the things subject to the principle do change. This may be true, but the extension of manufacturers' liability to the case of aircraft creates new problems.

The first problem is the determination of whether or not an airplane is per se a dangerous instrumentality, as this is the basis in determining the extent of inspection and care required on the part of the manufacturer. An automobile, by the great weight of authority is at present not a dangerous instrumentality or dangerous per se.[7] The dangers result from the personal element in motoring rather than from the very nature of the vehicle. But even though automobiles may have been extracted from the class of dangerous instrumentalities, it is still imminently dangerous, and may become a dangerous instrumentality, as laid down in the MacPherson Case, if negligently or defectively made.

In the one case in point available[8] for the first time there was a definite judgment that airplanes are not inherently dangerous, but become dangerous only by reason of careless operation. In the same case the court further instructed the jury that the fundamntal rules governing automobile cases furnish criteria to control aviation, that a duty arose by reason of the possibilities of danger, and that in the case of aviation "reasonable care" meant a high degree of care. The judgment in the subject case was for the defendants, but the judge suggested and encouraged an appeal to be taken. The case therefore stands unreported, and unfortunately the plaintiff died thereafter leaving an estate in dispute, so that the appeal today awaits the settlement of the estate.

As a matter of common knowledge there are many accidents which may often occur without anyone's fault—tire blowouts, skidding automobiles, etc. In the present state of the development of aviation most courts consider that airplane crashes are to be placed in this category.

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6 McPherson v. Buick Motor Co. 217 N. Y. 382, 111 N. E. 1050. (1916)

7 4 *Journal of Air Law* 103.

8 Herrick, Olsen, et al v. Curtiss Flying Service 1932, U. S. Avi. R. 110.

The burden of proving negligence in air law cases is a difficult one. Not only is it impossible for the plaintiff to prove what has occurred in the defendant's plant, but also there is usually little evidence or testimony which can be introduced to verify the facts surrounding an air accident.

Attempts to extend the doctrine of *res ipsa loquitur* to aircraft accidents have met with little success. One of the first cases on the point was Wilson v. Colonial Air Transport, Inc.,[9] to the effect that there is as yet no such common knowledge and experience in aviation as to have an accident raise the question of presumed negligence, making the doctrine of *res ipsa loquitur* applicable. This view was upheld in Herndon v. Gregory,[10] a later case, and more recently in the case of Cohn v. United Air Lines.[11] In the latter case a plane crashed, killing the plaintiff's intestate. There was no evidence available as to the cause of the crash. The court held that *res ipsa loquitur* did not apply, stating that it was common knowledge that such accidents (plane accidents) could occur without negligence, that many did occur which were unexplainable, and that until flying reached such a point of mathematical certainty that an accident would occur only because of negligence of the carrier, the doctrine would not apply.

If the doctrine of *res ipsa loquitur* were extended to cover airplane accidents the carriers could be held liable to passengers if the latter could fulfill the burden of proof resting on the plaintiff in such cases, and establish the negligence of the carrier, and the carrier in turn, by proving absence of negligence on its part, could extend the doctrine to make manufacturers liable.

However, another element is interposed. The customs or usual practice of air transport companies as to operation, inspection, and repair of their airplanes are in part a matter of company policy, and in part a matter of law as imposed by the Civil Aeronautics Act of 1938. Once the planes have been subjected to inspection by the skilled mechanics of the carrier, and to repair by them, or by a skilled independent contractor, their actions would intervene in the duty of the original manufacturer to inspect, as there can be no recovery where the defects in the machine are known to the buyer, or where he elects to make his own inspection and rely solely on it. It would be contradictory to require a carrier to make a thorough inspection of aircraft under the Federal Law, and still hold the manufacturer liable for failure to inspect.

The degree of inspection required by carriers to relieve them for liability in an action for negligence is a point of contention as yet unsettled.

In a recent American case[12] failure to properly inspect was held

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9 Wilson v. Colonial Air Transport Inc. 278 Mass. 420, 180 N. W. 212, 83 ALR, 329. (1932)

10 Herndon v. Gregory 81 S.W. 2nd 849. (1935)

11 Pearl E. Cohn v. United Air Lines. 17 Fed. Supp. 865, U.S. D.C. of Wyo. 2-8-37. (1937).

12 American Airlines Inc. v. Ford Motor Company, 10 N. Y. S. (2nd) 816, 170 Misc. 721. (1939)

to constitute negligence. In this case the defendant entered into a contract with the plaintiff agreeing to install certain new equipment in the plaintiff's plane, and to constantly inspect the equipment. The plane fell because of a crack in one of its hubs, the crack having propagated from tool marks or abrasions on the inner surface of the hub, which marks were discoverable on reasonable examination. The defendant knew such marks were a grave source of danger, and neither reported the facts nor the existence of the marks to the plaintiff. The court held that the defendant by breach of its contract failed in its duty, and as between the parties the plaintiff had the right to rely on the defendant's performance.

Contra is the Canadian case of Galer v. Wings.[13] Here a propeller broke, causing a motor to tear itself loose and the plane to crash. It was found that the propeller broke due to inherent defective design of the blade which caused an instantaneous fatigue break. Officials of the defendant company were not deemed to have known that propellers failed due to "fatigue cracks," nor could they have known, the court held, of the inherent defect in the design of the propeller.

As regards the status of the manufacturer in case of negligent construction it is well settled that where a manufacturer knows, or should have known, that his product is dangerous for certain purposes, a third party injured by reason of his negligence may recover against such manufacturer. The relationship between designer and airplane manufacturer has been held similar to that of builder and contractor. Both have been held to be independent contractors.

Negligence of an architect or designer in exercising ordinary skill of the profession with respect to preparation of plans will make him liable, but it is essential in an action for negligence against him to prove that the manufacturer complied with his specifications, and that the plaintiff was thereby injured.

The builder's or manufacturer's liability is restricted in construction and the burden of proof rests on the plaintiff. Where both designer and manufacturer are negligent, action will be against either of them, and full recovery can be had against either.

Charles M. Urruela.

HOW FAR WILL THE LAW OF PRIVACY EXTEND IN RADIO?—Few will deny the fact that the science of law must advance to meet the progress and exigencies of society. Such a statement is axiomatic in that human endeavor is continuously exploring, discovering, and developing those things which were hobbies yesterday but which today are strong avocations and potential professions, while tomorrow they may blossom into fields of specialty and industries of unlimited scope. But simultaneous with this progress, concomitant with the coming of greater specialization,

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13 Galer v. Wings, Kings Bench Manitoba, 11-11-38. (1938) 1938 U.S. Avi. R. 177.

legal problems which were formerly comparatively simple will necessarily become more complex.

The post-war era, will bring forth these legal complexities much more rapidly than heretofore. War has a way of developing man's productive rate both mentally and physically, thus giving him less time to concentrate on problems as they arise singularly. In pre-war days man was adjusted to his normal production rate and his solutions were properly combined with facts and philosophy. His problems were shot at him by the cannon of social condition in well-loaded and well-spaced blows. Now, however, we perceive that the post-war era will present its problems at a tempo which will be in accordance with the machine-gun rate of social conditions. This latter condition should prompt us, therefore, to concentrate on the inventions and possible post-war developments in regard to their ultimate social effects.

Such a development is expected in radio, even by those who are the conservatives of the industry. From what is known of present war developments in radio, we can expect improvements in our existing radio sets and accessories and, most important, new inventions which will visibly spark our daily life. For example, the soldier's "walkie-talkie" presents innumerable possibilities. Soon we may find ourselves assigned to different frequencies, equipped with a pocket-size combined sending and receiving set, and speaking to acquaintances just as we would on the telephone—without having to bother with wires, or without the need for designed places from which to send your message. Just how soon these developments will come along with the much-improved frequency modulation and a perfected method of television is naturally difficult to say. But the consequences of this world-wide war and its corresponding pressure on our best brains and potentialities in this field are inevitable. We will be faced with a growth of complex legal problems arising out of revealed and newly acquired inventions such as the three just mentioned.

When these inventions and improvements are released upon the public and private world, we will automatically become more concerned about our privacy. And when we speak of privacy we mean that individual sanctum of a citizen, that right to live in peace, without disgrace or anxiety being heaped upon him by an invention which has almost become a household necessity. The right of privacy has been defined as the right of "inviolate personality" [1] or, better yet, as "the right to be let alone" [2]. Radio, we must remember, can be thought of in two ways when we speak of its listeners. First we may approach the problem from the angle that the broadcasting station numbers its listeners by the thousands and adjusts its reception, advertising, and program arranging for the general public as a whole. Secondly, the problem may be approached by considering the radio as a medium which attracts the individual and appeals directly to him as such. The majority, however, will admit that advertising by today's radio is directed primarily at the individual listener not at the public as a whole.

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1 Warren and Brandeis, "The Right of Privacy" 4 Harvard Law Review 205. (1890)
2 Cooley on Torts 192. (1907)

How much does the law of privacy extend in radio? In order to arrive at any conclusion or axiom which might govern our daily life, we must go back to a time when the transmission and reception of signals by means of electric waves without a connecting wire was not contemplated by anyone except a man by name of Fessenden, who is generally credited with originating the possibility of speech transmission by radio and whose assistants finally succeeded in transmitting in 1900. But nine years previously, in 1890, Warren and Brandeis wrote one of the most important and provocative articles in the development of Anglo-American law.[3] This article is cited time and time again in written decisions and it is for this reason that we must thoroughly understand, disagree, and deduce certain principles from it. This article is one of the main foundations in any discussion concerning the rights of privacy, yet it is one which did not contemplate the coming of the radio and its far-reaching effects. As pointed out, the Warren and Brandeis article was written in 1890, while the radio reached only initial success for the first time in 1900. This statement from the article points out that at the time of the article talking pictures and radio were unknown, that they were still in embryonic stage, and that Messrs. Warren and Brandeis didn't mean to lay down an all-inclusive statement that would rule out the possibility of social and modern developments:

> "3. The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage.
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> "The same reason exists for distinguishing between oral and written publications of private matter as is afforded in the law of defamation by the restricted liability for libel. The injury resulting from such oral communications would ordinarily be so trifling that the law might well, in the interest of free speech, disregard it altogether."

We shall find, however, that because of their vast audiences today protection against unwarranted injury by radio stations seems mandatory. After 1900 the courts gradually recognized the individual's right to privacy in connection with the radio until today there is little hesitancy in the matter. For example in *Mau v. Rio Grande Oil, Inc.*,[4] the plaintiff had been the victim of a hold-up which had left him in an extremely nervous condition, and the mere mention of the hold-up brought on severe nervous attacks. The defendants dramatized this hold-up, without the plaintiff's permission, in a radio broadcast. The nerve-immersed plaintiff heard the broadcast and was subjected to repeated comments from his friends and acquaintances concerning it. Soon afterwards his nervous condition was aggravated to the extent that he lost his job as a chauffeur. The United States District Court for the Northern District of California, S. D., has this to say when a motion to dismiss was filed in this case:

> "It is settled in tort cases in which the jurisdiction of the jurisdiction of the Federal courts rests upon diversity of citizen-

3 Warren and Brandeis, "The Right of Privacy" 4 Harvard Law Review 193. (1890)
4 Mau v. Rio Grande Oil, Inc., 28 F. Supp. 845 (1939).

ship, they will follow the law of the place where the tort was committed. Applying the holding of *Melvin v. Reid* to the facts here, it follows that the plaintiff's right to be let alone, has been violated and, upon proof of his case, he may recover damages."

This brings our attention to the case of *Melvin v. Reid*,[5]. Here the plaintiff had at one time in her life been a prostitute, and had been tried for murder and acquitted. She then reformed, married, and had led a model life up until the time of the suit. Her past was completely unknown to new found friends and acquaintances. Eight years after her reformation had begun, the defendants produced a motion picture based on her past life, her permission not having been obtained. This exposure of the plaintiff's past life caused substantial damage. The court in this case surprisingly said:

"The right of privacy can only be violated by printings, writings, pictures, or other permanent publications or reproductions, and not by word of mouth."

However, the court, in the *Mau v. Rio Grande Oil* case, treated the above statement as pure dictum and reasoned otherwise. It is fortunate that it did so.

Just who is entitled to this right of privacy? As a general rule, the right is extended to all persons irrespective of social or professional standing.[6] There is, however, one class of persons who are deemed to have renounced the right to live in strict privacy, public characters. The courts have held that these people have sacrificed their privacy in proportion to the public recognition which they have received.[7] But the right of privacy is not necessarily confined to little known persons, as Warren and Brandeis point out:

"The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever; their position or station, from having matters which they may properly prefer to keep private, made public against their will. It is the unwarranted invasion of individual privacy which is reprehended, and to be, so far as possible, prevented. The distinction, however, noted in the above statement is obvious and fundamental. There are persons who may reasonably claim as a right, protection from the notoriety entailed by being made the victims of journalistic enterprises. There are others who, in varying degrees, have renounced the right to live their lives screened from public observations. Matters which men of the first class may justly contend, concern themselves alone, may in those of the second be the subject of legitimate interest to their fellow-citizens. Peculiarities of manner and person, which in the ordinary individual should be free from comment, may acquire a public importance, if found in a candidate for political office. Some further discrimination is necessary, therefore, than to class facts or deeds as public or private according to a standard to be applied to the fact or deed per se.

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5 112 Cal. App. 285, 297 Pac. 91 (1931).

6 Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937).

7 Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91. (1931)

The case of *King v. Winchell*[8] was a case in which the plaintiff was not a prominent public character. Acting on a motion to dismiss, the court held that the defendant did not violate the New York statute by a mere mention of the plaintiff's name during a sponsored broadcast. The court decided the case on the theory that the commentator's narration of the story was in reality a news report.

It has also been held that the single use of a person's name in a sustaining newscast would not be a violation of the right of privacy.[9]

The difference between a broadcast which puts forth legitimate news information and one which is solely a dramatization for the purpose of trade is extremely important, especially in view of the increased production of more elaborate and extensive shows in radio. At common law "both the advertiser and the station would probably be exempt from liability because their broadcast of news information is in the public interest. But many point out that today's broadcasting commentator gives his news in editorial form and that it is only superficially akin to a program which features the dramatization of news. This is not the majority view, however, and most courts hold that the program must be an outright dramatization of fictionalization of the news before the cloak of public interest falls and the advertiser as well as the radio station will be liable to all persons whose privacy is thus invaded. This is true both at common law and under the statutes.[10] The facts in each and every case will differ accordingly, but this distinction is not one our courts should skim over lightly. The right of the individual to keep his private life to himself when he has not held himself up to be a public character or an item of news value must be protected to the fullest degree. The exploitation of vicious gossipers who disguise their collection of strictly personal affairs as legitimate news information and who seek to disturb one's privacy by causing him public disgrace and ruin should be carefully regulated by the proper officials. If this regulation is not fulfilled, then the injured party should have his wrong duly adjusted. Too many advertisers and stations have sought the exemptions which the common law gave them and relied upon the argument that it was all "in the public interest."

Another possibility of invasion of our rights of privacy lies in the playing of recordings over the air. With modern developments in the recording field reaching a point where it is hard and at times impossible to tell whether it is a recording or the person actually talking, we must fortify the individual against unauthorized publicity with the same vigor as we would if his photograph or name were being used for such a purpose. The common law will protect an artist where he has restricted his recordings solely for non-commercial purposes. Here, in the case of *Waring v. WDAS*[11] Broadcasting Station, Inc., the court held that the

8 290 N.Y.S. 558 (1936).
9 A. Walter Socolow, "Law of Radio Broadcasting" (page 835).
10 Binns v. Vitagraph Co., 210 N.Y. 51, 103 N.E. 1108 (1913).
11 Waring v. WDAS Broadcasting Station Inc., supra.

plaintiff's distinctive interpretation of music should be protected by a right of privacy. The court said:

> "I think plaintiff's right which was invaded by defendant was his right to privacy and this is a broader right than a mere right of property. A man may object to any invasion of his right to privacy or to an unlimited invasion of that right. He may choose to render interpretations to an audience of one person in a private home or to an audience in a great amphitheatre.
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> "The defendant by buying a phonographic disk on which plaintiff had impressed his orchestral rendition of musical compositions, which disk was expressly not to be used for radio broadcasting, and then by 'tattling abroad' by means of broadcasting what was on that disk, was invading the same right to privacy which the common law protected against eavesdroppers."

In this matter of recordings being used as an invasion of the rights of privacy it is interesting to note a hypothetical case which is mentioned in "The Law of Radio Broadcasting," by A. Walter Socolow (page 839):

> "An interesting incident occurred during the 1936 presidential campaign. Senator Vandenberg broadcast a program in the form of a debate between himself and certain portions of President Roosevelt's previously recorded speeches (New York Times, October 20, 1936, p. 8). Did such a program violate the President's right of privacy?"

Mr. Socolow continues to reason that in the case of a public character an exception is noted, and that the situation is analogous to newspaper publications. He points out that a person who participates in a public event emerges from his seclusion and that his right of privacy is not invaded by a publication of his photograph or an account of the incident.[12] In regard to this point it is well to note what Warren and Brandeis had to say:

> "There are persons who may reasonably claim as a right, protection from the notoriety entailed by being made the victims of journalistic enterprise. There are others who, in varying degrees, have renounced the right to live their lives screened from public observation."
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> "Gossip is no longer the resource of the idle and of the vicious but has become a trade, which is pursued with industry as well as effrontery." [13]

We have briefly looked into the rights of one whose privacy has been invaded by the modern radio. In reviewing the subject we cannot help but admit the inadequate remedies at law which the average state has given to the injured person, thereby leaving little doubt that some states should better cloak the lone individual against the aggressive force of an unlimited technological development such as radio.

We must first universally recognize the existence of the invasion of privacy and stop side-stepping the issue by granting the injured party

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12 Warren v. Brandeis, "The Right of Privacy," supra, p. 215.

13 Warren v. Brandeis, "The Right of Privacy," supra, p. 196.

relief on evasive grounds such as implied contracts, invasions of the plaintiff's property, the breaching of a trust, or any other legal guise. The breach and remedy must be clearly recognized in the invasions of privacy by our different states if we are to have justice done with the progress of these technological developments. When those states which have not done so adopt the common law doctrine of the right of privacy, we shall have made our first stride towards protecting those injured by these mechanical spiders of progress which are every day reaching into the citizen's life. Warren and Brandeis put it ably when they said:[14]

> "Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demand of society."

Vail W. Pische

A REVIEW OF RECENT INCOME TAX DECISIONS:—In the past decade there have been a number of Supreme Court decisions dealing with income taxation which would be, and are, well worth the consideration of all lawyers regularly dealing with these problems. Unfortunately, the extent of this article does not permit us to review all of these important decisions but restricts us to a limited few which we have chosen because of their apparent present and future interest in different divisions of the law.

The first of these cases we will consider deals with corporate distribution, and, established as a fact that compliance with the exact terms of the reorganization and exchange provisions are not enough. In this unusual case, Gregory v. Helvering,[1] the Supreme Court was bluntly given the occasion to determine just what would constitute compliance with the reorganization and exchange provisions as stated in section 112 (g) of the Revenue Act of 1928. Although this case was decided under the provisions of that act, of which section 112 (g) was omitted from the 1934 act, the theory expounded by the court is none the less equally applicable to the other reorganization provisions of the 1934 Act. In the present case it appears that the taxpayer owned all the capital stock in the United Mortgage Corporation which corporation owned 1000 shares of another corporation known as the Monitor Securities Corporation. Wishing to sell this stock and at the same time lessen the amount of tax which would be due if the shares were given outright to the petitioner as a dividend of the United Mortgage Corporation a new company, the Averill Corporation, was formed. In return for the transfer to it by the United Mortgage Corporation of all the shares of the Monitor Securities Corporation, the Averill Corporation issued all of its stock to the petitioner. Three days later this corporation was dissolved, and the shares of the Monitor Corporation were given as a liquidating dividend to the petitioner who then sold them. In filling her (the petitioner's) tax return, she treated as a capital gain an amount equal to the difference between the price received for the stock and the

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14 Warren v. Brandeis, "The Right of Privacy," supra, p. 193.

1 293 U.S. 465, 55 S. Ct. 266 (1935).

apportioned cost of the shares of the Averill Corporation on the ground that the original transaction was a reorganization within the meaning of the Revenue Act of 1928. Under the Act a reorganization is defined as "a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders, or both, are in control." [2] A ruling in favor of the petitioner was reversed and a deficiency tax assessed on the full value of the shares of the Averill Corporation as a dividend from the United Mortgage Corporation. A writ of certiorari was granted and the court held that since the transfer was not in pursuance of a plan of reorganization in accord to the business of either corporation it did not come within the terms of the statute. It is obvious that there was a literal adherence to the express language of the statute in the above transaction, but, apparently by finding the additional requirements that a reorganization must be for a business purpose, the court was able to determine that there was not "a plan of reorganization" within meaning of the Act,[3] and, it is said that a later case, Groman v. Comissioner,[4] did even more damage to the utility of the reorganization provisions.[5]

If after the war, we have an era of corporate reorganization, which appears probable, the Treasury and Congress will certainly have to act to prevent uncertainties in these provisions.

The second of these cases for our consideration, Helvering v. Horst[6] and Helvering v. Eubank[7] deal with assigned interest coupons and assigned commissions respectively. It has been an established rule of law since 1930 that assignments of income to be earned by the assignor in the future were generally taxable to the assignor[8] and when the issue was presented before the Supreme Court in these two cases the assignor was held taxable in both cases.

In the first of these cases, Helvering v. Horst, the respondent was the owner of negotiable bonds from which he detached negotiable interest coupons shortly before their due date and delivered them as a gift to his son, who in the same year collected them at maturity. The commissioner of internal revenue ruled that the interest payments were taxable to the respondent donor, brought before the circuit court of appeals the order of the board of tax appeals sustaining the tax was reversed. Later, reaching the Supreme Court, the commissioner was held to be correct in including such interest payments in the taxable income of the donor.[9]

In the Eubank case, the respondent was a general life insurance

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2 45 Stat. 818, 26 U.S.C.A.
3 23 Cal. L. R. 642.
4 Groman v. Commissioner of Internal Revenue, 293 U. S. 108 (1937).
5 Roswell Magill, The Impact of Federal Taxes, (1943) p. 183.
6 Helvering v. Horst, 314 U. S. 122, 61 S. Ct. 144 (1940).
7 Helvering v. Eubank, 314 U.S. 122, 61 S. Ct. 149 (1940). Rehearing denied. See 312 U.S. 713, 61 S. Ct. 609.
8 Lucas v. Earl, 281 U.S. 111 (1930).
9 39 Mich. L. R. 495 (1941).

agent who after the termination of his agency made assignments in 1924 and 1928 respectively of renewal commissions to become payable to him for services which had been rendered in writing policies of insurance under two of his agency contracts. The commissioner assessed the renewal commissions paid by the companies to the assignees in 1933 as income taxable to the assignor in the year.[10] The circuit court of appeals reversed the boards decision in favor of the commissioner.[11] The Supreme Court reviewing the case held the commissioner was correct in including such payments in the taxable income of the assignor. Justice McReynolds dissented in both cases and his dissent was concurred with by Chief Justice Hughes and Justice Roberts.[12]

Both of these cases deserve our special attention because never before has the definition of income gone so far beyond any previous standards and may, in the future, be given an even broader application. Their decisions should especially be remembered when we have to deal with cases where there is or may be some question as to whom the income is to be taxed.

Years ago, in the case of Gould v. Gould,[13] it being determined that alimony was not taxable to the recipient and not deductable by the payee, the courts concluded that income of a trust for the benefit of a divorced wife, sanctioned, of course, by the official court decree, was taxable to the settlor. But there seems to exist two classes of cases wherein the settlor is taxed on the trust income. First, the settlor may be taxed because of a retention of ownership or control of the *res* and its income, as in cases where the right of revocation is reserved, and secondly, the settlor may be taxed even though he has parted with all control because it is claimed that in a sense he continues to receive benefits from the use of the trust corpus. Although partly treated in the revenue acts,[14] the boundaries of this field are almost as uncertain as the elusive concept of taxable income.[15] An interesting case which would seem to fall well within these boundaries is that of Willcuts v. Douglas.[16] In this case it was decided by the court that benefits arising from the discharge of a legal obligation constituted a sufficient basis for taxing the trust income to the settlor. This decision, while clarifying a somewhat uncertain situation, was rendered logically inevitable by recent cases in which the Supreme Court has shown itself alert to prevent evasion of the federal income tax by use of the trust device.[17]

The Senate, in 1941, proposed that alimony and separate maintenance

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10 Winslow v. Commissioner, 39 B.T.A. 373 (1939).

11 Eubank v. Commissioner (C.C.A. 2nd. 1934), 110 F. (2nd.) 737, reversing 39 B.T.A. 583 (1939).

12 39 Mich. L.R. 495 (1941).

13 Gould v. Gould, 245 U.S. 151 (1917).

14 Rev. Act 1934, see 167 (a) (3), U.S.C. tit. 26 sec. 5167 (a) (3), the insurance note referred to in note 9.

15 33 Mich. L. R. 634-35 (1935).

16 Willcuts v. Douglas, 73 F. (2nd.) 130 (1934).

17 33 Mich. L. Rev. 634 (1935).

payments, whether paid by a trust or not, should by right be taxable to the spouse receiving them and not the other.[18]

In Halvering v. Clifford the settlor had set up a five year trust of securities for the benefit of his wife in which he, the settlor was trustee. The commissioners found, and their decision was sustained by the board of tax appeals, that the income was taxable to the settlor, but the circuit court of appeals reversed the decision.[19] The Supreme Court, in turn on a writ of certiorari, reversed the circuit court of appeals finding and upheld the tax under section 22 (a) of the Revenue Act of 1934.[20] The court concluding that section 22 (a) provided authority to tax the grantor on the income of a trust whose existence was limited to five years after which the corpus reverted to the settlor.

Lower courts have since attempted to determine the application of varients of these factors in other cases and have properly regarded them as complementary.[21] The likelihood of the settlor's success in close cases is not great; even though the trustee is a trust company or an outsider, the income is apt to be taxed to the settlor if the beneficiaries are members of the "intimate family group" and the settlor possesses some degree of control.[22] Substitute a term of less than five years for some control by the settlor and the result has been the same.[23] However, the settlor has, in cases where though the term was three years and he was one trustee, the beneficiary an educational institution, succeeded.[24]

Thus we see that the protective devices of powers of revocation or alteration, or of other forms of control have been pretty well outlawed.[25]

Norman B. Thirion

LABOR UNIONS AND THE SHERMAN ACT.—In determining the relationship between labor unions and the Sherman Act, it is necessary to look to two cases only, namely, *Apex Hosiery Co. v. Leader*[1] and *United*

18 H. R. 5417, 77th Congress, 1st session (1941) 32. Amendment was first defeated but later (1942) was adopted.

19 Helvering v. Clifford, 309 U.S. 331 (1940), 84 L. Ed. 504.

20 Rev. Act of 1934, 48 Stat. 1, 686.

21 Helvering v .Elias, 122 F. (2nd.) 171.
Certiorari denied, 314 U.S. 692, 62 S. Ct. 361 (1941).

22 Commissioner v. Buck, 120 F. (2nd) 775, (C.C.A. 2nd. 1941).

23 Commissioner v. Barbour, 122 F. (2nd) 165, certiorari denied, 314 U.S. 691, 62 S. Ct. 361 (1941).

24 Commissioner v. Chamberlain, 121 F. (2nd) 765 (C.C.A. 2nd 1941).

25 Impact of Federal Taxes, Roswell Magill (1943) p. 189.

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1 'Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S. Ct. 982, 84 L. Ed. 913 (1940) Noted in 128 A.L.R. 1044. A suit for treble damages suffered from a sitdown strike conducted by defendant in plaintiff's plant, allegedly in violation of the Sherman Anti-Trust Act. 15 U.S.C.A. sec. 1.

States v. Hutcheson.[2] I make this my thesis in spite of the attempt by Chief Justice Stone and many other learned writers to reconcile the aforementioned two cases with precedents established by earlier Supreme Court Justices. Regardless of what may be thought of the wisdom of Justice Frankfurter's opinion in the Hutcheson case, it must be admitted that he leaves little room for doubt as to his conception of the status of labor unions in relation to the Sherman Act.

Two tests are apparently laid out and applied in the Apex case, the former of the two cases, and I think it can be said, upon analysis, that neither will form a sound footing for the decision of later controversies. Chief Justice Stone speaks of the restraints which are only so substantial as to affect market prices, or to affect the supply in the market; these are the restraints which must fall within the contemplation of the Sherman Act. If these are the tests which are to be followed in subsequent decisions, it might be well to see if, when applied to the Apex case itself, a different result might not have been reached.[3]

In the first place, the purpose of the strike is to raise wages. It is elementary in the study of cost-accounting, that all costs of manufacturing may be classified as material cost, labor cost, or overhead cost. It is equally as obvious that if any one of the three is raised, the final cost of the article produced is increased. Now, if the manufacturing process is carried out on a low margin of net profit, it follows that a slight increase in any of the three major costs will necessarily give rise to an increase in the market price of the commodity produced. To apply these elementary principles, if the labor cost of an article is forty percent of its total cost, and the item is sold at a net profit of three percent, a ten percent increase in wages will give rise to a one percent increase in the market price so that the manufacturer can just break even on his operation. If he is to operate at a profit at all, the market price must rise beyond the one percent increase. Therefore, the strike by the union, although it is a purely local one, may remove from the interstate market completely the commodity produced, if the market is a highly competitive one. Under such circumstances, any distinction drawn between "direct" and "indirect" effect of a strike, is a distinction without a difference. When applied to the Apex case, it is not difficult

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2 United States v. Hutcheson, 312 U. S. 219, 61 S. Ct. 463, 85 L. Ed. 422 (1941). For a severe criticism of the case, see 8 University of Chicago Law Review 503. Also discussed in 26 Washington Law Quarterly 375. The defendant is under indictment for violation of the Sherman Act in regard to a jurisdictional strike between two unions as to who should have certain work on the premises of the Anheuser-Busch brewery. The unions requested through circular letters and official publications that union members refrain from buying Anheuser-Busch beer.

3 Chief Justice Stone has an answer ready for this in saying, "Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, . . . an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act." This statement greatly weakens the test laid down by the Chief Justice in so far as it completely negates the test instead of being an exception to it.

to see how a "substantial" and "direct" effect on the market price of the Apex hosiery might have been sought by the union.[4]

In the second place any "market" with which we are concerned are consumers' markets since it is the consumer whom Congress seeks to protect in the Sherman Act. It is conceivable that the buyers of Apex hosiery buy such because they have qualities peculiar to themselves not found in other hose. Is it not evident that the users of Apex hose, in a state other than the one where they are produced, would have difficulty in procuring such hosiery? Is it not also true that the reason for the depleted supply of Apex hosiery is directly traceable to the strike at the Apex plant? Finally, is it not true that this test, as with the test of price control, when applied to the Apex case, might have given rise to an opposite result?

At any rate, it seems difficult if not impossible to apply the market control test to the boycott cases[5] in the manner in which it was applied in the Apex case, and not arrive at a different result in those cases. The result of the Apex case would seem to be, according to Chief Justice Stone, that only boycotts by labor unions against commodities in interstate commerce would amount to violation of the Sherman Act. He indicates this in his attempt to reconcile the Apex case with the previous cases wherein boycotts by labor unions of commodities in interstate commerce were held violative of the Sherman Act.

The Hutcheson case being the later case, and Justice Frankfurter having the influence on the other members of the court which he apparently has, it is well to look to some of the statements he makes in his decision of that case in regard to any reliance on previous cases and in regard to the decision of future cases.[6] When he says that "The Norris-LaGuardia Act was a disapproval of *Duplex Printing Press Co. v. Deering* . . . and *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association*[7] . . . as the authoritative interpretation of sec. 20 of the

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5 Loewe v. Lawlor, 208 U.S. 274, 28 S. Ct. 301, 52 L. Ed. 488 (1908), wherein a restrain was held to exist in the form of a conspiracy of a nation wide labor organization to force all manufacturers of fur hats to organize their workers by maintaining a boycott against the purchase of the product of non-union manufacturers shipped in interstate commerce. Duplex Printing Press Co. v. Deering, 254 U.S. 443, 41 S. Ct. 172, 65 L. Ed. 349 (1921), wherein the defendant coerced and threatened the customers of plaintiff into not using the plaintiff's products. The boycott was carried on on an interstate scale. Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association, 274 U.S. 37, 47 S. Ct. 522, 71 L. Ed. 916 (1927) wherein the defendant threatened strikes to the contractors, in states other than the one wherein the stone was produced, from using the plaintiff's stone. For a discussion of these cases in relation to the Apex case and for historical background in connection therewith, see 26 Cornell Law Quarterly 191.

6 As to probable decisions in future controversies, see 39 Michigan Law Review 462; 31 Illinois Law Review 424; 28 University of Chicago Law Review 516.

7 Note 5 *supra*.

8 Section 20 of the Clayton Act, 29 U.S.C.A. sec. 52.

Clayton Act,[8] for Congress now placed its own meaning upon that section"; and later that "There is no profit in discussing those cases under the Clayton Act which were decided before the courts were furnished the light shed by the Norris-LaGuardia Act on the nature of the industrial conflict," he apparently means that the Sherman Act, with one exception to be discussed later, is to be read in light of the Norris-LaGuardia Act alone so far as labor unions are concerned. That is, they are not subject to the Sherman Act. The one exception is where he says "So long as a union acts in its self-intrest *and does not combine with non-labor groups*, the licit and the illicit under sec 20 (*of the Clayton Act*) are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." In citing *United States v. Brims*[9] in a note, Justice Frankfurter apparently means that unless a labor union joins ranks with an employer group for the purpose of controlling a market, the union is not subject to the Sherman Act. Such leaves small room for relief against union activity so far as the Sherman Act is concerned.[10]

A great deal of respect is due to Chief Justice Stone's opinion in the Apex case in that he does attempt to lay down rules as a basis for future decisions, regardless of what may be thought of those rules. He leaves himself and the court open for the future contingency of an industrial-wide closed shop strike. In that case there is no remedy suggested for such a case. When Chief Justice Stone speaks of a "substantial" and "direct" restraint on interstate commerce, it may be the closed shop that he has in mind. In the decision of such a case he will not have to repeal the Apex case. On the other hand it is hardly evident how Justice Frankfurter could decide such a case on the basis of any suggestion in the Hutcheson case. In fact, he concludes that there would be no remedy in such a controversy. The case would have to be overruled to give any relief at all since he includes within the contemplation of the Sherman Act only those cases like the Brims case wherein labor unions combine with other groups. By his inference of the effect of a "direct" or "substantial" restraint, Chief Justice Stone may be arriving at a doctrine whereby the "bigness" of a union will be the criterion of the lawfulness or unlawfulness of the restraint it exerts. Since in the growth of industrial unions over craft unions, it is reasonable to expect a nation-wide closed shop, the problem is not of mere academic interest. It may be that Chief Justice Stone's opinion, in such far-sightedness, is entitled to more respect than we give it.

R. F. Swisher.

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8 For a similar criticism, see 28 California Law Review 747.

9 United States v. Brims, 272 U.S. 549, 47 S. Ct. 169, 71 L. Ed. 403, involving a conspiracy between manufacturers and union members to exclude non-union made goods.

10 See The Sherman Act v. Labor by Charles O. Gregory, 8 University of Chicago Law Review 222 and a subsequent article in the same volume by the same author at page 503 for the effect of the Hutcheson case on the Apex decision.

LEGAL RIGHTS AND LIABILITIES OF A FUNERAL DIRECTOR.—In considering the Funeral Director and the relation of the law to his business, we find that practically every phase of the fundamental principles in law affect the Funeral Director, his business and his relations to and with the public. This is due to the threefold relation of the modern Mortician to his clients, to whom he is not only an embalmer and merchant but also financial advisor.

Our first consideration arises in connection with contracts for burial services. This is from a practical standpoint the most important phase of the funeral director's business, since the dead body may not be held for funeral costs [1]; and any interference by the funeral director with the burial of the deceased may be redressed by an action at law.[2] This makes it imperative that the mortician know to whom to make the charges, and in order to protect himself must bind such parties by contract. This is especially true when more than one person asserts the right to possession for the purposes of burial. In cases of such contest the funeral director may make his charges against the estate [3] and if there is no estate the funeral director is protected by the contract with the person asserting the right to possession and who is liable for the funeral expenses,[4] although ultimately the estate is liable.[5]

It is well to note here the nature of the contract for burial services. As we have seen [6] the right to possession of a dead body is a quasi-property right,[7] the violation of which is protected by law.[8] Thus in Renihan v. Wright [9] it was alleged that the contract for burial was a contract of bailment. In Finley v. Atlantic Transport Co.[10] it was stated that a person who has possession of the body holds it in trust for those who are charged with the duty of burial. In addition the burial contract is for the personal services of the funeral director and his staff, and thus it can be said that the nature of the contract is personal with a delegation of rights incidental to the possession of the dead body.

A different question is presented when a funeral director undertakes a pre-arranged funeral contract by which the mortician contracts to furnish a complete funeral, as selected, upon the death of the selector or his near relative or some member of his family. This contractual relation between the funeral director and one who is providing himself

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1 Jefferson Co. Burial Soc. v. Scott, 218 Ala. 354, 118 So. 644 (1928).

2 *Supra* note 1.

3 Pettengill v. Abbott et al. 45 N. E. 748 (1897) Mass.

4 Hatton v. Cunningham 162 N. Y. S. 1008 (1917).
McClellan v. Filson 44 Oh. St. 184 5 N. E. 861 (1886).
Supra note 3.

5 State v. Willett, 171 Ind. 296, 86 N. E. 68 (1908).

6 "Legal Rights and Obligations to a Corpse" *Notre Dame Lawyer*, Vol. XIX No. 1 page 69.

7 Orr v. Dayton & Muncie Traction Co. 178 Ind. 40, 96 N. E. 462 (1911).
Renihan v. Wright et al. 125 Ind. 536, 25 N. E. 822 (1890).

8 Aetna Life Ins. Co. v. Burton 104 Ind. App. 576, 12 N. E. (2nd) 360 (1938).
Burns Indiana Statutes Sec. 40-1227 (1933).

9 *Supra* note 7.

10 Finley v. Atlantic Transport Co. 220 N. Y. 249, 115 N. E. 715 (1917).

with the satisfaction and knowledge of the fact of his burial and its quality, is founded upon a legal consideration.[11] The validity of this "prearranged funeral" contract has been much discussed and questioned. The nature of the contract and the peculiar circumstances of its inception and the indefiniteness of its existence prior to consummation make it an instrument by which the obligee may easily be defrauded. Furthermore, the ability of the mortician to perform at this future and indefinite date may also be questioned.

Burial associations have been formed in practically all of the states very often in connection with a funeral director who through this method seeks to play upon the credibility of certain peoples to increase his personal profits. This practice created evils and the "pre-arranged burial contract" fell into disrepute.[12] In the Southern states the religious sentiment and credulity of the Negro was exploited. The Negroes were offered funerals of a definite class for what seemed to be reasonable expenditures, however due to the inherent defects in this type of contract [13] he was very often the recipient of a much cheaper funeral than he paid for. In Montana [14] contracts for "pre-arranged funerals" were forbidden by statue, however the statute was declared to be unconstitutional as a violation of due process and equal protection provisions of the Federal constitution and the State constitution guaranteeing the safety and happiness of citizens seeking it in lawful ways.

The writing of contracts for "pre-arranged funeral services" is actually a form of insurance subject to State regulation and control and the courts have ruled them valid when entered into by organizations which have complied with the provisions of the statute governing the writing of insurance.[15] In Indiana [16] it was ruled that such contracts by organization purely charitable are in no sense insurance contracts, that would be subject to regulation of the State.

If any of the terms of the funeral contract are breached by either party both have a remedy. The person who has the right to the possession of the body of the deceased may maintain an action for damages for breach of contract.[17] While the Funeral Director in order to enforce such contract against the estate of a decedant must show that either the deceased or someone rightfully acting on the deceased's behalf prevented him from performing the contract.[18] We may thus conclude that contracts for "pre-arranged funerals" are valid and enforceable.[19]

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11 *Supra* note 5.

12 State v. Gateway Mortuaries 87 Mont. 225, 287 Pac. 156 (1930).

13 *Ibid.* Note 12.

14 *Ibid.* Note 12.

15 68 A. L. R. 1526.

16 Cowan v. N. Y. Caledonian Club 46 App. Div. 288, 61 N. Y. S. 714 (1899).
State ex. rel Coleman v. Wichita Mutual Burial Assoc. 73 Kansas 179, 84 Pacific 757 (1906).
Supra note 5.

17 Gadbury v. Bleitz 133 Wash. 134 233 Pac. 299 (1925).

18 113 A. L. R. 1130.

19 *Supra* note 5.

The writer here suggests the possibility for the funeral director to arrange with such person or persons seeking a prearranged funeral service a valid testamentary trust showing clearly the intent of the trust, the name of the funeral director and the purpose of the trust. It is the writer's belief that the trust arrangement is favorable over the contract for burial in that the trust arrangement eliminates possible friction between relatives and makes definite the funeral directors collection upon the performance of the condition subsequent in the trust.

Contracts for funeral services are express as to merchandise, materials and personal services, however, much is implied, therefore the law reads into such contracts, an additional obligation, the breach of which is in the nature of a tort and damages for mental anguish are recoverable.[20]

The first question arising out of the implied contractual liability of the mortician arises in connection with his employment for the removal of a dead body to his establishment. This should be done when authorized by the person upon whom the law places the duty to bury.[21] Any unauthorized removal of a dead body makes the Funeral Director guilty of a felony.[22] Although this has reference to bodies that have been buried; it only seems logical that it may apply where a funeral director without authorization removes a dead body from the residence or hospital in which death took place. The technicality here is that no contract yet exists, however that may be explained in that the Funeral Director's liability attaches when he assumes the duties of burial. Furthermore it may be considered as a preliminary agreement with the implied intent to incorporate or consummate upon the signing of a formal contract.

Removal of the dead body is subject to the Laws of Health and Sanitation and embalming is therefore made necessary by statute.[23] Here again liability attaches where the mortician has improperly and negligently embalmed the body of the deceased.[24] In the case of Renihan v. Wright[25] in an action against morticians for negligence in caring for a dead body, it was held proper for the court to instruct the jury that in assessing the damages they might take into consideration the mental anguish of the plaintiffs, for where a person contracts, upon a sufficient consideration, to do a particular thing, the failure to do which may result in anguish and distress of mind on the part of the other contracting party, the funeral director is presumed to have contracted with reference to the payment of damages if he should breach the contract. Where a mortician breaches his contract through mistake and the mistake is rectified before any damages occur; recovery is denied.[26] How-

20 Aaron v. Ward 213 N. Y. 351, 96 N. E. 736 (1911).
Koeber v. Patek 123 Wis. 453, 102 N. W. 40 (1905).
Renihan v. Wright *supra* note 7.
21 *Supra* note 7.
22 Burns Indiana Statutes 63-607 (1933).
23 Burns Indiana Statutes 63-705, 35-111, 35-106, 63-602 (1933).
24 Brown Funeral Homes & Ins. Co. v. Baughman 226 Ala. 661, 148 So. 154 (1933).
25 *Supra* note 7.

ever, where damages occur and a cause of action arises rectification of the mistake in no way satisfies the cause of action [27] even where there is a subsequent agreement between the parties that rectification would be accepted in satisfaction of the damages, the mortician does not escape liability because of failure of consideration, in so far as it was already his duty to rectify his error.

In an Alabama case [28] where the contract arose out of a "pre-arranged funeral contract" the funeral director held the body of the deceased for release of his liability under the contract, this was held for the jury to decide whether the funeral director was within his rights. Whereas an earlier case [29] in the same state held that upon refusal to surrender the dead body the relative may sue and need not show wherein the refusal was wrongful nor show time or place or manner of demand, the mere allegation of refusal to surrender on demand being sufficient. In Gadbury v. Bleitz [30] the funeral director was held liable in damages where he refused to deliver the body until he had been paid. Thus it may be said that any interference by the funeral director which may delay or speed the funeral because of his negligence in a contractual relationship imputes a wrong in the nature of a tort and recovery may be had for mental anguish [31]; Excepting where exigencies beyond control require the burial of a body not in accordance with the wishes of those whose duty it is to bury,[32] and where the funeral director has been prevented from performing by someone authorized and rightfully acting on the behalf of the deceased.[33]

Protection of the deceased body from mutilation is another factor to which liability is attached, and a funeral director is liable for illegal acts committed while the body of the deceased is in his possession.[34] In Mensinger v. O'Hara [35] the court imputed to the act of the mortician the words wrongful and wilful in order to allow a recovery for cutting of the decedants hair. Where a funeral director permits an autopsy to be held in his mortuary knowing that the examination is wrongful and without the consent of the deceased's family; he participates in the wrong and is jointly liable in damages.[36] When the autopsy was performed in the funeral director's mortuary and he had no knowledge that no consent was obtained from the deceased's family the funeral director was held not liable.[37]

It has been held that the mortician is under no affirmative duty to

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26 Jennis v. Cassidy 247 Mass. 256, 141 N. E. 879 (1924).
27 *Supra* note 7.
28 Jordan Undertaking Co. V. Asberry, 159 So. 683, 230 Ala. 97 (1935).
29 *Supra* 1.
30 *Supra* 17.
31 *Supra* note 20.
32 *Supra* note 10.
33 113 A. L. R. 1130.
34 Konecny v. Hohenschuh 188 Iowa 1075, 173 N. W. 901 (1919).
35 Mensinger v. O'Hara 189 Ill. App. 48 (1915).
36 *Supra* note 8 and note 34.
37 *Supra* note 36.

protect a body against an unauthorized autopsy.[38] The foregoing rulings as to non-liability of the mortician seem to be erroneous and inconsistent with the bailment contract under which the funeral director has custody of the deceased's body. It would seem to be that while the deceased's body is in the custody of the mortician it would be his duty to protect it from mutilation and thus prior to permitting the autopsy he should inquire as to whose permission or by what right the autopsy is to be performed. Failure to inquire should be considered *prima facia* as evidence of negligence and the funeral director should be held liable as if he had known that no consent had been given; for where the law requires a positive act (protection of the bailed object) non-action should not be construed to relieve liability.[39]

Other actions based on implications not expressed in the formal contract of burial but added by oral instructions to the funeral director by those whom the law has delegated to provide for the burial of the deceased are varied as are the decisions. In Ohio[40] a mortician in removing jewelry from the body of a deceased wife just before burial, contrary to the instructions of the husband, was held not liable to the husband for damages for mental suffering. In Indiana,[41] a similar decision, denied recovery for mental anguish against a mortician for negligent breach of contract to photograph deceased daughter of the plaintiff before burial.[42] In the latter decision it was claimed that the decisions set out in the case of Renihan v. Wright had been overruled by Western Union Telegraph Co. v. Ferguson, the writer believes that the decision in the telegraph case in no way has done so. The basis for this belief is that the contract to deliver messages is far removed from a contract that imposes positive liabilities such as the bailment contract between the funeral director and his clients. Thus in denying relief in the Indiana case the court has allowed a direct violation of the provisions of a valid contract in substance saying that a negligent breach of contract which causes no actual damages is without remedy.

The decisions in the foregoing cases establishes that the law is still developing swinging from strict interpretations on damages for wounded feelings to more liberal views allowing for remedies in cases of mental suffering involving morticians and the families of the deceased. The nature of the relationship of the funeral director to his clients makes it difficult under the existing principles of law to afford a remedy in all cases. The development of the law is definitely attached to the development of higher standards of ethics in the funeral profession. Recent improvements by the establishment of the State Board of Embalmers and Funeral Directors and the Funeral Directors associations and strict rules as to education and moral qualities definitely are raising the stand-

38 Hasselback v. Mt. Sinai Hosp. 173 App. Div. 89, 159 N. Y. S. 376 (1916).
39 *Supra* note 20.
40 Grill v. Abele Funeral Home 69 Oh. App. 51, 42 N. E. 2nd 788 (1940).
41 Plummer v. Hollis, 213 Ind. 43, 11 N. E. 2nd. 140 (1937).
42 *Supra* note 41 see Western Union v. Ferguson, 157 Ind. 64, 60 N. E. 674 (1901). 60 N. E. 674, *Contra,* Renihan v. Wright *Supra* note 7.

ards of practice in the funeral profession. Perhaps the recent decisions reflect the opinion of the law toward the funeral director in that the earlier decisions definitely held the funeral director liable even where he acted in good faith,[43] while recent cases are more liberal in not holding the funeral director liable unless the act was wilful and grossly negligent, causing some damage upon which to base recovery.

Peter Francis Nemeth

LIABILITY OF STOCKHOLDERS AS PARTNERS.—While ordinarily the stockholders and directors of a corporation are subject to a limited liability, the question arises under certain circumstances as to their unlimited liability as partners for the debts of the corporation. The problem to be determined is; when are such stockholders and directors of a corporation, real or fancied, to be held liable as partners for the debts of the corporation?

The first situation to be examined is the case of an improperly organized corporation. In the case of *Globe Publishing Company v. State Bank of Nebraska*[1] the court held that until the requirements of a statute have been complied with, providing that until certain things are done by persons forming a corporation, the stockholders thereof shall be liable for the debts of the corporation. Thus a de jure corporation does not exist, and the stockholders thereof are jointly and severally liable for the debts contracted by such a voluntary association of persons. In Missouri persons who sign articles of association and record them in the county and thereupon engage in business supposing themselves legally incorporated, are liable as partners if they have not filed their articles with the secretary of state, *Glenn v. Bergmann.*[2] The case of *Smith v. Colorado Fire Insurance Company*[3] involved the failure of those who organized a corporation and began business without dividing up the stock provided for in the articles of incorporation, and without subscribing for or distributing it to any person. The court held such parties liable for the debts of the corporation but also held that such liability cannot be enforced in a joint action against the individuals and the corporation. Violation of the Wisconsin Rev. Stat. §§ 1771-1773, providing that no corporation shall have legal existence until articles of incorporation are filed for record and that the stockholders shall be personally liable until one half of the capital stock has been subscribed and twenty percent thereof paid, was held in *Wechselberg v. Flour City National Bank*[4] to result in the stockholders' liability as partners when such persons began to do business after filing the proper articles of incorpora-

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43 Boyle v. Chandler 33 Delaware 323 138 Atl. 273 (1927).

1 41 Neb. 175, 59 N. W. 683, 27 LRA 854 (1894).
2 20 Mo. App. 343 (1886).
3 14 F. 399, 4 McCrary 583-(1882).
4 64 F. 90, 12 C.C.A. 56, 26 LRA 470 (1894).

tion but before the proper steps toward organization had been fully complied with.

The supreme court of Arizona ruled in the case of *Sawyer v. Pabst Brewing Company*[5] that persons attempting to do business as a corporation are not liable as partners if the acts done toward the organization of the corporation are sufficient to constitute it a corporation de facto. With more force, the case of *First National Bank of Salem v. Almy*[6] (Mass.) held that persons transacting business before the whole of the capital stock of the company has been paid in, in violation of a statute which prohibits the corporation from transacting business until all the capital has been paid in, and a certificate of that fact filed in the office of the secretary of state, do not thereby become liable as partners.

Corporation Acts Without State License.—The second question to be determined concerns the liability of the stockholders and directors of a corporation doing business in a foreign state without proper license from such state. Holding the stockholders and officers liable as partners when the foreign corporation has not become domesticated within the state, upon contracts arising out of the business done there, is the case of *Campbell-Moss-Johnson, Inc. v. Lupton*[7] in which the court based its conclusion upon the non-recognition of the corporate existence of the foreign corporation. Likewise, in another Tennessee case, *Equitable Trust Company v. Central Trust Company*,[8] the court held the stockholders of the foreign corporation liable as partners, when the corporation failed to comply with the statutory requirements relating to such corporations, even though the stockholders did not know of such noncompliance. In the case of *Tribble v. Halbert*[9] the supreme court of Missouri was less anxious to hold the stockholders liable as partners in its ruling that 'the bare fact, if proven, that a foreign corporation has not complied with local laws, is not sufficient to authorize judgment against the stockholders of the corporation as partners, under contracts executed in the name of the corporation; but, in order to establish such liability, it must be shown that there was fraud of some kind connected with the organization of the corporation, or that the persons sought to be held liable under the contracts were themselves guilty of fraud in connection therewith'. The Commonwealth of Pennsylvania has refused to hold the incorporators and members of a foreign unregistered corporation liable as partners for the debts of the corporation, *Stephenson v. Dodson*.[10] In agreement with this holding is the subsequent case of *Bala Corporation v. McGlinn*.[11] In a relatively recent case the supreme court of Indiana in determining the liability of the stockholders of one of its corporation which did business in the state of Tennessee without

5 22 Ariz. 384, 198P. 118, 18 ALR 277 (1921).
6 177 Mass. 476 (1875).
7 155 Tenn. 93, 290 S.W. 992, 51 A.L.R. 372 (1927).
8 145 Tenn. 148, 239 S.W. 171 (1922).
9 143 Mo. App. 524, 127 S. W. 618 (1910).
10 36 Pa. Super. Ct. 343 (1908).
11 295 Pa. 74, 144 A. 823 (1929).

having been domesticated, held that the mere fact of ownership in that corporation was insufficient to hold such stockholders liable as partners for obligations arising out of the transaction of business in Tennessee, *Towle v. Beistle*[12]. The court further stated that the liability of the stockholder according to the law of the jurisdiction in which business is transacted by the corporation rests upon his consent to be bound by such laws.

Ultra Vires Acts.—Are the stockholders liable as partners when the corporation is exercising ultra vires powers? In the case of *Van Schaick v. Fidelity and Casualty Company of New York*[13] (N.Y.) it was the reasoning of the court that 'a corporation is a mere conception of the legislative mind, and, when the law prohibits it from doing an act, such prohibition extends to the board of directors and to each director separately and individually. However, as to the obligation of the stockholders, the courts appear to be reluctant to hold them liable for such ultra vires acts. Thus, the case of *Ward v. Joslin*[14] ruled that the word 'dues' in a provision of the company's charter imposing added liability makes the stockholders liable for all contracted liabilities of the corporation, but not for unauthorized or ultra vires engagements made by its officers. Stockholders are not liable as individuals or partners for goods bought in the name of the corporation by an ultra vires act of the directors, *Smucker v. Duncan*[15] (Pa). There is no authority in the directors of a bank after it has gone into liquidation to transact any business which will bind the stockholder except such as is implied in the duty of liquidation, where the president of the bank, after it has gone into liquidation, attempts to continue the bank's liability on a guaranty, his acts in this regard in no way affect the liability of the stockholders. *Schrader v. Manufacturers' National Bank*[16] (U.S.).

Acts Beyond Charter.—The final problem to be investigated is the liability of stockholders and directors for business done by the corporation beyond the term set out in its charter. According to the court in the case of *Wasson v. Boland,*[17] under the law as administered in Iowa, stockholders of a corporation which continued to do business after its charter had expired, cannot be held liable as partners, in the absence of a statute imposing such liability. In accord is the case of *Sawyer v. Pabst Brewing Company*[18] in which it was held that persons who attempt to do business under the guise of a dormant corporation, paying in subscriptions to capital stock by consent of the one holding the office of president and treasurer with the expectation that the corporation will be reorganized, are not liable as partners for its debts, although no reorganization is effected. However, the stockholders were held liable

12 97 Ind. App. 241, 186 N.E. 344 (1933).
13 152 Misc. 449, 274, N.Y.S. 331 (1934).
14 186 U. S. 142, 22 Sup. Ct. 807, 46 L. ed. 1093 (1902).
15 10 Pa. Co. Ct. Rep. 430 (1891).
16 133 U. S. 67, 10 S. Ct. 238, 33 L. ed. 504 (1890).
17 136 Mo. App. 622, 118 S.W. 663 (1909).
18 22 Ariz. 384, 198 P. 118, 18 ALR 277 (1921).

in the case of *National Union Bank v. Landon*[19] (N.Y.) under facts where the corporation had become extinct by the expiration of the time limited for its existence by its charter and the stockholders agreed to furnish, in proportion to the stock respectively owned by them, the necessary capital to carry on the business of the corporation and appointed one of their number as agent or superintendent for that purpose, the parties being entitled under the agreement to participate in the profits in proportion to their interest therein, and being liable in the same proportion, as between each other, for any loss that might be incurred. In a later case, *Central City Savings Bank v. Walker*,[20] the high court of the state of New York ruled that the stockholders in a corporation were not liable as partners, where, after the expiration of the company's charter, its business was continued as before, the stockholders and agents, being ignorant of the expiration of the charter. They did not hold themselves out as co-partners; neither did they, by word or act, assent to the making of the note involved, or to the transaction of any business in the name of the corporation in their behalf, or with knowledge that its legal existence had terminated. The court distinguished this case from that of *National Union Bank v. London*, supra, by the fact that in the Landon case there was a special agreement between the stockholders, under which the business was conducted after the expiration of the charter, by which they made themselves partners in fact as well as in law.

In conclusion from the authorities cited and others examined it appears that the courts are not in full harmony upon the question of the liability of stockholders and directors of corporations under the various situations given. Particularly, under the circumstances of an improperly organized corporation, there is a conflict of authority. However, the peculiar character of the corporation has undoubtedly influenced the weight of authority in holding the members liable as partners. Without requiring strict compliance with the requirements set forth by the statutes, the courts would open the door to gross injustice to creditors by permitting persons to escape full liability under the guise of a defectively organized corporation. By being permitted to so exist, the dishonest could avail themselves of the advantages of an incorporated concern and yet escape many of the obligations imposed upon such legally established corporations by statute. Underlying the rulings holding the stockholders and directors not liable as partners in an improperly organized corporation, probably in most cases, is the good faith of the persons concerned and the resulting hardships that would follow the imposition of partnership liability.

In the other three situations reviewed there seems to be a tendency on the part of the courts not to hold the parties concerned liable as partners. The determining factor appears to be the good faith of those involved and the absence of fraud on their part.

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19 45 N. Y. 410, 18 ALR 283 (1871).
20 66 N. Y. 424, 18 ALR 284 (1876).

THE QUESTION OF A VALID DELIVERY WHERE THE GRANTOR RETAINS THE DEED.—Perhaps nothing is more disconcerting to an owner of land than to find, when he is ready to sell his land, that the deed by which he got possession of the land was invalid because of some deficiency. This situation arises not too infrequently because of some error in the formalitites of delivery. An example of one of these problems is disclosed in the following situation:

> A is the owner of Blackacre. On July 7, 1930, for consideration of one dollar and love and affection, he executed, acknowledged and delivered a deed to his daughter, K. K returned the deed to A with a request that he keep it for her (K). A did so until 1935 when he died. After his death, X, the son of A, and half brother of K, administrator of A's estate, took the deed and placed it on record. In 1942 K died and willed the property to W. The question arises as to whether W has a merchantable title to Blackacre. W wants to sell the property to Y, but he won't take the property unless X signs a quit claim deed because Y isn't sure that the delivery from A to K was a good delivery.

Under this situation several important possibilities are evident. First, can a valid delivery be established between A and K, even though A, the grantor, regained or retained possession of the deed. Second, what presumptions arise when the deed is retained by the grantor, and what presumptions arise when there is a conveyance between a father and his daughter. Thirdly, since X as the son of A is the only person who can attack the delivery between A and K, is he estopped from exerting his claim because of his own voluntary act of recording the deed?

In order to understand this situation better, it is best to examine the requirements of a valid delivery of a deed. First it should be noted that it is a general rule that it is essential to the validity of a deed that there should be a delivery of the instrument.[1] Now the first element which must be present in the delivery of the instrument is the intention on the part of the parties. "The intention of the parties, particularly the grantor, is an essential and controlling element of delivery of a deed."[2] The question whether in a particular case there has been a delivery of a deed that will pass title to land, when there has been a ceremonial delivery depends largely on the facts and circumstances of the case, from which an intention to make a delivery passing a present title may be implied or inferred and it is often a matter of extreme difficulty to determine whether the facts of the particular case established such a transfer of a deed from the grantor to the grantee as to constitute a legal delivery of it and make it operative as a conveyance. No precise formula of acts or words is necessary and there is no universal test applicable to all cases, whereby the sufficiency of delivery can be determined.[3] It is generally accepted that delivery can be made by

1 Bisard v. Sparks, 133 Mich. 587, 95 N.W. 728 (1903); Pollock v. McCarthy, 198 Mich. 66, 104 N.W. 391 (1917); Meade v. Robinson, 234 Mich. 322, 208 N.W. 41 (1926).

2 U. S. ex rel McBride v. Schurz, 102 U. S. 378, 26 L. Ed. 167 (1880).

3 16 Am. Jur. 504.

words and acts, by acts without words, or by words, without acts, just so long as the grantor parts with his control over the deed with an intention to pass title.

In the case of Phillips v. Farmers' National Fire Insurance Company[4] the court of Michigan held that "intention has been called the 'essence of delivery' and not only is often the determining factor among other facts and circumstances but it is the crucial test where constructive delivery is relied upon." The rule can be summed up and given that it is essential to the delivery of a deed that there be a giving of the deed by the grantor and a receiving of it by the grantee, with a mutual intention to pass the title from one to the other.

The next important essential in delivery is that the grantor pass all control of the deed to the grantee. It has been seen that while delivery may be by words or acts, or by both combined, and manual transfer of the deed from the grantor to the grantee is not required, yet it is an indispensable feature of every delivery of a deed, whether absolute or conditional, that there be a parting with the possession of it and with all power of dominion and control over it by the grantor for the benefit of the grantee at the time of the delivery.[5] Several cases in Michigan serve to explain this element. In Gardiner v. Gardiner[6] the court said "delivery takes place when it is either actually or constructively by record placed beyond the control of the grantor". In the case of Taft v. Taft[7] the court said "it is not infrequently said that there is no delivery if the grantor still retains control or dominion over the deed." Then in the case of Schuffert v. Grote[8] it was held that "there is no delivery at law, where the grantor keeps the deed in his own possession with the intention of retaining it, and this is particularly true where the grantor keeps possession of the property as well." Thus it can be said that dominion over the judgment must pass from the grantor with the intent that it shall pass to the grantee, if the latter will accept it. Where the proof fails to show that the grantor did any act by which he parted with the possession of the deed for the benefit of the grantee, the question of control is immaterial. In other words, delivery may be affected by any act manifesting an unequivocal intention to surrender the instrument so as to deprive the grantor of all authority over it or of the right of recalling it, but if he does not evidence an intention to part presently and unconditionally with the deed, there is no delivery.[9] This brings up the first important question in our situation under discussion, namely, does the fact that the deed was in possession of the grantor defeat the idea of a valid delivery?

In direct answer to this the case of Blackwell v. Blackwell[10] said

4 208 Mich. 84, 175 N.W. 144 (1919).
5 16 Am. Jur. 506.
6 134 Mich. 90, 95 N. W. 973, (1903).
7 59 Mich. 185; 50 Am. Rep. 291, 26 N. W. 426 (1886).
8 88 Mich. 650, 50 N. W. 657 (1891).
9 16 Am. Jur. 507, 508.
10 146 Mass. 186, 81 N. E. 910 (1907).

that "while the grantor's possession of the deed raises a presumption that the deed was never delivered, it may be shown by evidence that a delivery was consumated; and if the fact is made to appear, the deed is operative notwithstanding the grantor's subsequent custody of it". Then the court said in Upton v. Merriman[11] that "in particular its (the deed's) return to the grantor for some specific purpose such as to record or hold, does not destroy the effect of legal delivery."

The Federal Courts recognize this same principle for in the case of Young v. Gulbeau[12] the court held that, apart from proof of delivery by a showing of a change of physical custody, a deed is constitutionally delivered when the grantor has parted with the right to retain it. In all cases where a deed is found in the grantor's possession, the question is, did the grantor have the right to retain the deed as against the grantee. Thus the mere fact that the continued possession of the deed by the grantor gives him opportunity to destroy it is immaterial because the deed is operative by reason of prior constructive delivery. But the deed must pass with intent of all separation of control on the part of the grantor or otherwise there is no delivery.[13]

The court of Michigan said in the case of Bisard v. Sparks[14] that "it has been said that the fact that the instrument remains in the possession of the grantor raises a presumption that it has not been delivered. This appears to be merely another way of saying that delivery is an affirmative fact, the burden of proving which is upon the person alleging it. If he cannot support this burden of proving by evidence of a change of possession of the instrument, he must support it by other evidence."

Thus from these cases it can be seen that while there has to be a valid delivery from the grantor to the grantee with all its elements of separation of control over the deed by the grantor, the fact that, after such delivery, the grantor regains possession of the instrument, his physical control over the deed is immaterial because the transfer to the grantee in the first place was already complete. However, these cases show that when the grantor has possession of the deed a strong presumption arises that the deed was never delivered, and evidence must be introduced to defeat the presumption or it will stand and signify no delivery. The question of the burden of proving these facts of delivery and presumptions will be discussed later under the appropriate topics.

In this present situation it is interesting to note that if K were in possession of the land a stronger presumption would go in favor of K. For in the case of Blackwell v. Blackwell[15] the court held that "con-

11 116 Minn. 358, 133 N. W. 977, (1911); Trumbull v. Hale, 250 Mich. 117, 229 N. W. 414, (1930).

12 3 Wall. 636; 18 L. E. 262 (1866).

13 16 Am. Jur. 511.

14 133 Mich. 587; 95 N. W. 728. (1903); Also Tiffany on *Real Property* 3rd Ed. Vol. 4, Sec. 1039, p. 211.

15 146 Mass. 186; 81 N. E. 910 (1907).

sidered in connection with other facts and circumstances, the giving of possession of the land by the grantor is a matter aiding the conclusion that the deed was delivered, but no presumption arises that a deed not in the grantee's possession has been delivered, using the word 'presumption' in the legal sense, or that the issue will be decided in favor of the grantee, as a matter of law, if the only fact shown is that the grantee was let into possession of the land."

In our present situation A acknowledged the deed which he made to K. This fact may or may not have effect on delivery. For in the case of Hartman v. Thompson[16] the court said "acknowledgment by the grantor of his execution of the deed is a factor from which, with other circumstances the jury may determine that the deed was delivered." However, in the case of Kerchensteiner v. Northern Michigan Land Co.[17] the court held that "deeds to real estate to be entitled to record must be acknowledged, but the acknowledgment is not a part of the conveyance and is unnecessary to a transfer of title." Thus in order to have an acknowledgment weigh in favor of a vaild delivery, other facts which we have considered must be also present, for an acknowledgment standing alone does not prove a valid delivery.

Also in the present case a recording was made of the deed. The recording was made by X after A's death. The impact and effect of this will be discussed later under the subject of estoppel. However, it should be noted that "the mere fact that the grantee agrees that a deed which is handed to him should not be recorded until the grantor's death does not defeat a legal delivery."[18] It should be remembered that recording has only an effect when the interests of a third person are involved. The fact that a deed is unrecorded has no effect on a delivery between the grantor and the grantee. As between these two parties the deed is binding if it has been delivered regardless of recording. This view has been upheld in Gugens v. Van Gorder.[19] Then in the case of Hendricks v. Rasson[20] the court said that "the record of a deed is not conclusive proof of its delivery." This case seems to give rise to the view that recording may, with other circumstances be considered as partial evidence of a valid delivery. However, taken alone recording will not be evidence of a delivery.

It is interesting to note in connection with this element of recording that a strong presumption of delivery is raised where a father makes a deed and has it recorded for his child. This is true even where the deed is returned to the father's hands and possession.[21] The reason for this view is based on the relationship of father to child. This is important in our case also under the topic of presumptions.

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16 104 Md. 389; 65 A. 117, (1906).
17 244 Mich. 403; 221 N. W. 322 (1928).
18 Dyer v. Shadane, 128 Mich. 348, 87 N.W. 277 (1901).
19 10 Mich. 523 (1862).
20 53 Mich. 575; 19 N. W. 192 (1884).
21 Colee v. Colee, 122 Ind. 109; 23 N. E. 687 (1890).

The next important point of valid delivery is the element of acceptance. There are some different views of this as necessary to delivery but the better view is that in order to make a delivery good there must be an acceptance. In the case of Emmons v. Harding[22] the court said, "in order to complete delivery of a deed, whether said delivery is actual or constructive, and to make the instrument operate as a conveyance of title, an acceptance on the part of the grantee is essential." Adding to this it was said in Defreise v. Lake [23] that "if the grantee in a deed refuses to accept it, the instrument is not in law delivered, although the grantor has done all on his part that is required to consumate delivery and title does not pass by virtue thereof." The case of Stokes v. Anderson[24] adds that "in the determination of whether there has been an acceptance of a deed on the grantee's part, the inquiry is as to his intention as manifest by his words and acts". However, it has been held that express words and acts are not necessary, for acceptance can be inferred from some conduct on the part of the grantor.

Thus with this understanding of the elements of delivery let us turn to the presumption which arises in favor of delivery as against it from different circumstances. These presumptions will be discussed under the same elements of delivery as set forth above, namely: (1) as to delivery in general, (2) as to acceptance, and (3) as to recording and acknowledgment.

A presumption of delivery of a deed arises from various facts. The view has been taken that a presumption of delivery may arise, even though there has been no change in the possession of the instrument such as that the deed has been fully executed in the presence of the grantee. Thus in the case of Hayes v. Boylan[25] the court held that "where a parent executes a deed to an infant child in the child's interest and manifests by his words and conduct an intention that the deed shall operate at once, a delivery will be presumed; proof of actual delivery is unnecessary". Then in the case of Gould v. Day[26] the federal court held that "the delivery will be presumed, in the absence of direct evidence of the fact, from the concurrent acts of the parties recognizing a transfer of the title." A stronger presumption arises in the case of a voluntary settlement by the grantor upon a child than in the ordinary case of bargain and sale.[27] The presumption of delivery is greater where the relation of parent and child exists than in cases where there is a stranger as grantee. However, there must be some evidence as to delivery before a presumption can be raised. The mere fact that a parent and child relationship exists is not enough alone to raise the presumption. But, less evidence is needed to bring about the presumption in the case of a parent and child than in other cases. The Michigan

22 162 Ind. 154; 70 N. E. 142 (1904).
23 109 Mich. 415; 67 N. W. 505 (1896).
24 118 Ind. 533, 21 N. E. 331 (1889).
25 141 Ill. 400; 30 N. E. 1041 (1892).
26 94 U. S. 405; 24 L. Ed. 232 (1877).
27 Sheids v. Bush, 189 Ill. 531, 59 N. E. 962 (1901).

court said in Patrick v. Howard[28] that "if the parties to the instrument acted as if the title to the property passed to the grantee named, it has been regarded as showing or tending to show delivery." Then if the grantee and the grantor acted between themselves as if the property has been conveyed, the presumption of delivery is made much stronger. In the present case, then, if the grantor and grantee from 1930 to 1935 acted as if the property had passed to the grantee, K, the presumption of a valid delivery would arise. This would be a matter of evidence to find out just whether any such acts or conduct between A and K showed that A and K considered the property conveyed to K.

On the subject of acceptance it has been held that "a presumption of acceptance of a deed has been held to arise in certain cases, especially in the case of an infant grantee. The general presumption of acceptance arises although the transaction is without the grantee's knowledge. It has been held that in the case of an infant grantee particular knowledge of the conveyance and the delivery is not essential.[29] The court said in the case of Holmes v. McDonald[30] that "the existence of the presumption of acceptance is usually conditioned on the fact that the deed creates no obligation or burden on the grantee, or that it is beneficial to him." A question always exists as to whether a grant is beneficial to the grantee. The law presumes that every estate is beneficial to the party to whom it is conveyed.

As to the subject of recording and acknowledgment, the court in Holmes v. McDonald[31] said the record of a deed regularly executed and acknowledged raises a presumption of delivery. This is particularly true in a conveyance from a parent to his child. In other words a *prima facie* case is made of such showing. Then in the case of Patrick v. Howard[32] the court said "it has been frequently asserted that the mere fact that the instrument is of record raises a presumption of delivery, without any reference being made to the identity of the person who had it recorded". In the case of Dennis v. Dennis[33] the same court said, "that the attestation clause under which the witnesses write their names reciting the delivery of the instrument has occasionally been regarded as creating a presumption of delivery and the presence of such a clause is referred to as some evidence of delivery."

In Blanchard v. Tyler[34] it was held that "where a deed is acknowledged on the day subsequent to its date, and there is no proof of delivery prior to the acknowledgment, it must be presumed to have been delivered afterwards; such being the usual course and practice in reference to the delivery of deeds and other instruments intended for record". In John-

28 47 Mich. 40; 10 N.W. 71 (1881).
29 16 Am. Jur. 658.
30 119 Mich. 563; 78 N. W. 647 (1889).
31 Ibid.
32 47 Mich. 40; 10 N. W. 71 (1881).
33 119 Mich. 563; 78 N. W. 647 (1889).
34 12 Mich. 339; 86 Am. Dec. 57 (1864).

son v. Moore[35] it was held that "it must be assumed that the delivery of a deed takes place at the time of its acknowledgment if nothing shows that it was delivered earlier or later".

However, it must be added that all these presumptions given above are not conclusive but in each case may be rebutted by proper proof. For example, in Taft v. Taft[36] the court said that "the presumption of delivery disappears when the facts show non-delivery or circumstances inconsistent with the presumption".

The presumption of intention to deliver which may arise from the execution of a deed is generally regarded as overcome by discovery that the grantor had the deed in his possession and under his control at the time of his death. In a few jurisdictions the view obtains that the presumption of the delivery of a deed of voluntary conveyance is so much stronger than that applying to a deed of bargain and sale that it is not overcome by the fact that the deed is found among the effects of the grantor at his death.[37] There may be facts under which a delivery can be shown although the grantor had possession of the deed at his death. Direct evidence of a manual delivery is sufficient to overcome the presumption of non-delivery arising from the fact that the deed was found in the grantor's possession at the time of his death. That a deed of voluntary conveyance was placed on record is a strong circumstance in favor of the delivery despite the fact that it was found among the grantor's effects after his death.[38]

In direct line with this decision the court in Colee v. Colee[39] held that "the fact of possession of the deed by the grantor after it has been duly recorded is not entitled to much consideration as rebutting the presumption of delivery arising in such case". This is particularly true where the grantees are members of the grantor's family and it does not as a matter of law rebut the presumption. Then in the case of Brown v. Stutson[40] the court said "the delivery of a deed must ordinarily come from outside the deed, the deed does not upon its face show delivery. Delivery may be shown by parol". Proof of intent to deliver may be deduced from all the surrounding circumstances. Hence parol evidence is admissible to show delivery. The facts and circumstances surrounding the parties are determinable and can be testified to.

One more point should be made before the present case is discussed in the light of the points made above. This is with regard to the burden of proof in case of delivery of deeds. In the case of Salisbury v. Salisbury[41] the court held that "complainant in a bill to remove a cloud from his title by setting aside deeds made by his ancestor, but which he

35 28 Mich. 3, (1873).
36 59 Mich. 185; 26 N. W. 426 (1886).
37 See Wall *v.* Wall, 30 Miss. 91; 64 Am. Dec. 147 (188).
38 16 Am. Jur. 661.
39 122 Ind. 109, 23 N. E. 687, (1890); Patre v. Patre, 69 Ind. App. 51; 121 N. E. 285 (1918).
41 49 Mich. 306; 13 N. W. 602 (1882).

claims were never delivered, has the burden of proof, and must make out his case by preponderance of testimony". Then in the case of Camp v. Guaranty Trust Co,42 the court said "the burden of proving delivery of a deed is upon parties claiming under it". However, a different view was taken in Barras v. Barras.43 The court held "in an action of ejectment where defendant claimed under a deed from a deceased parent, an instruction that the burden was on the plaintiff to show by a preponderance of evidence that the deed from the parent to defendant had not been delivered was erroneous, and the burden of proving delivery of the deed by a preponderance of evidence rested upon the defendant." These points about the burden of proof are extremely important to our original case. The reason for this is that only one person is able to claim the property directly on the grounds of an invalid delivery. That person is X, the son of A and half brother of K. Now if the heirs of K, the grantee of the deed, bring suit to quiet title, they being the plaintiffs would have the burden of proving by the preponderance of evidence that there was a valid delivery between A and K. If X sued to assert his own claim to the land and K's heir merely put the deed, fully executed and recorded, in as a defense, X would have to at least establish a *prima facie* case for his claim. In order to do this X would have to overcome the defense of delivery of the deed to K. However, by the case of Barras v. Barras, supra, the defendants, heirs of K, would have to prove by the preponderance of evidence a valid delivery if they tried to make an affirmative defense out of the deed. In other words if heirs of K, as defendants tried to make a cross claim on X to settle X's interest, the burden of proof would shift from X to the heirs when they started claiming under the deed to quiet X's claim. However, if the heirs let the deed stand alone as a defense and made no positive move under it against X, I believe that X would have the burden of proof. So it would make a difference in the whole situation just who sued in the first place. Whichever side starts the fight, the burden will be upon him.

Now let us consider our original problem in the light of the entire discussion of delivery and presumptions. In the first place the grantor's intention was evident from the deed. He wanted to convey the land to K. The great problem arises as to the actual manual delivery of the deed to K by A and of her giving it back to A to hold since neither K nor A are alive. However, it has been seen that actual manual delivery is not necessary to make a valid delivery.44 In fact delivery can be accomplished by acts and words or by either alone.45 Thus if anyone saw or heard A give or confer the deed upon K, a valid delivery can be established. This is a question of witnesses and evidence but since delivery can be established outside of the deed itself, parol evidence is admissible to establish any of A's acts or remarks. In direct line with

42 262 Mich. 223; 247 N. W. 162 (1933).
43 192 Mich. 584; 159 N. W. 147 (1916).
44 See Thatcher v. St. Andrews Church, 37 Mich. 264 (1877).
45 16 Am. Jur. 504.

this, the Michigan Statutes[46] provide that all deeds executed in the state shall be executed in the presence of two witnesses who must sign the deed as such. Thus when A made the deed, signed it, acknowledged it, and had the deed witnessed, any remarks which he made at that time about his intention to grant the land to K are admissible as showing a valid delivery. If A at this time, declared to the witnesses and the official making the acknowledgment that he intended to grant the land to K and that he thereby, at that time, divorced himself from all control of the deed, a valid delivery might be established. However, whether it would be valid depends on certain presumptions. These are that since K is the daughter of A, and since the deed is a voluntary conveyance, a very strong presumption arises that the deed is valid. The relationship between A and K gives rise to this presumption in the first place without any further proof of delivery on K's part. Thus if A made any remarks as to his intention at the time of execution, further strength would be given to this basic presumption. In direct line with this, the acceptance on K's part can be presumed very strongly because not only is there a parent-child relationship, but also the land being a beneficial estate, the presumption is that K accepted it at the time A's intention and words were made.

The case would be simple if A acknowledged the deed and had it witnessed by two people as prescribed by statute, while K was present. This would allow the witnesses and the official making the acknowledgment to testify as to a manual delivery of the deed between A and K. However a manual delivery would not have to be made. If A merely confirmed his intention to convey the property to K, signified his intention to divorce himself from any control of the deed and by words expressed all this, the witnesses could testify as to these words and a valid delivery would be established.

Another presumption which would aid in making for the delivery would be the recording of the deed. Even though it was recorded by X, it was seen in the case of Patrick v. Howard,[47] supra, that the presumption of delivery is raised when the deed is recorded without any reference as to the identity of the person who recorded it. This is a valuable and yet basic presumption for a valid delivery. This is another presumption which rises in favor of K without any move on her part or on the part of those claiming under her.

On the other hand there is one big point against a valid delivery. This is the fact that the deed remained in the hands of A. This raises a presumption of no delivery as we have seen. This must be overcome by evidence on the part of those claiming a valid delivery. So if K's heirs were suing to quiet title, while they have the aforementioned presumptions in their favor, they must overcome the presumption. One point which these heirs could bring up would be that K certainly knew

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46 *Michigan Statutes Annotated* 1938-1943, Vol. 19 Sec. 26. 527.
47 47 Mich. 40; 10 N. W. 71 (1881).

he had consummated a valid delivery with A and considered the property as her own, from the fact that K willed the property to these heirs.

This last point brings up another important fact in favor of a valid delivery. The fact is that from 1935 when A died and X recorded the deed, until 1942 when K died, a period of seven years elapsed. During that seven years K certainly did certain acts with regard to the property which would tend to show her reliance on the deed as a valid instrument. During this time K probably without any stretch of the imagination, paid the taxes, caused the land to be kept up, and even might have made valuable improvements on the land. With these conditions present good grounds are evidenced for estoppel against any claim by X who claims under A. The basis of estoppel is that one person by his acts or lack of action, allows another person to so change his position with regard to the subject in controversy, that to allow the first person to assert his legal right, a fraud would be inflicted on the innocent second party. Thus in our present case, the fact that X, himself, recorded the deed and then allowed seven years to go by without even claiming his rights, real or imaginary, to the land, I am inclined to believe that X might be estopped from claiming any interest to the land. In the case of Sprunger v. Ensley[48] the court said that "recording of a deed gives rise to the presumption that it was delivered, in the absence of evidence to the contrary". Now the fact that X recorded the deed would not raise the presumption in favor of a delivery since A was dead. But since by X's action of recording the deed and allowing K to continue believing she was the owner of the land and allowing seven years to go by during which time K, as was stated before, probably materially changed her position with regard thereto, X would be estopped from asserting any claim which he might have. The estoppel is not raised because of any question of delivery or any act on the part of A. The estoppel is raised only because of X's actions. Since X is the only person who can attack the original delivery between A and K and since his claim would be estopped, all the presumptions and aids that have been discussed above in favor of the original delivery to K would stand as valid because of the presumption in favor of such delivery based on the relation of parent and child; the fact of K's reliance on the deed as making the property hers; and the fact that the deed was a voluntary conveyance. All of these would support a valid delivery while the only presumption against the delivery, namely that no delivery can be presumed where the deed is left in the grantor's possession, would not be raised because the only person who could raise it would be estopped.

Another important point should be made in passing. This is that A's intention to convey and his intention of separating his control over the deed could be established by the fact that A did nothing to exercise any control over the land while he was alive. The original conveyance was made in 1930. A died in 1935 which left a period of five years during which time someone would have to pay taxes on the land as

48 211 Mich. 103, 178 N. W. 714 (1920).

well as keep it up. If K did this and A didn't do anything to the land, A's intention to convey and his separation of control over the deed and land would be complete. Thus if during the five year period A did nothing with regard to the land, it would show that he considered the deed validly delivered to K. Thus the fact that the deed was in A's hands at his death would be immaterial because a valid delivery would be consummated beforehand.

Thus as attorney for K's heirs, you would proceed first to investigate the five year period from 1930 to 1935. If you found that K had paid the taxes and had kept up the land and/or K had made any improvements thereto, and that A had done nothing during this period to give any basis for a claim of ownership on his part, you would say that the heirs now have a merchantable title against everyone including X. However, if the five year period disclosed nothing as to A's conduct or K's conduct you would rely on all the above named presumptions in favor of a valid delivery to K, and rely on estoppel to prevent X from attacking the delivery with the presumption of no delivery because of the possession of the deed by A at his death. Thus under the first procedure X and the presumption in his favor would be immaterial because a valid delivery would be established by the evidence. If this failed, the second theory of estoppel would stop X, the only one who could attach the heirs' position. However, if no evidence could be proved or discovered at all which would tend to substantiate a valid delivery in the first place, the benefit of most of these presumptions would be lost since some evidence of intention and delivery must be shown before the presumptions arise. But it would seem that during the periods of 1930 to 1935 and 1935 to 1942, some evidence could be discovered which would tend to disprove a delivery all together or tend to establish a valid delivery and thus give rise to the presumption which would reinforce the evidence. The whole question of a merchantable title in W, the heir of K, would rest on the disclosures of some evidence to at least call forth the presumptions. However, it must be remembered that there is still the theory of estoppel against X also.

Therefore, as the attorney for K's heirs, you could say that they have a merchantable title if the conditions in the above paragraph are found. From the foregoing analysis in light of the rather detailed discussion of delivery, presumptions, and all the variations arising thereunder, you could say that the heirs have a title which can be defended against the whole world.

If you are the attorney for Y, however, the purchaser in this case, and since no matter what is found or done there probably is going to be a lawsuit between X and K's heirs, you would recommend that the heirs bring a quiet title suit to settle their claim to title. You would not want your client, Y, to buy the land and at the same time buy a law suit. So, in spite of the heirs having a good title as discovered and based on the above discussion, you would, as attorney for Y, the purchaser, insist that the heirs bring a quiet title suit before you allowed

your client, Y, to buy the land. Y should not take the land and then be forced into a law suit to defend his title on the delivery between A and K.

Charles M. Boynton

REGULATION OF RADIO STATIONS.—The problem of the regulation of radio has received national and international consideration. To carry out the provisions of the International Treaty of London [1] of 1912 to avoid interference the United States enacted the Radio Law of 1912.[2] That act required licenses from the Secretary of Commerce for the operation of all radio apparatus and made the licenses subject to the regulations contained in the act and all subsequent acts and treaties. This act was directed to the problem then existing, which had to do with radio telegraphy and not broadcasting, although the language was broad enough to include radio telephony.

As the number of radio stations increased the courts found in the acts limitations upon the authority of the government to deal adequately with questions of interference.[3] When the Attorney General ruled [4] that the act did not give the Secretary of Commerce authority to assign channels, fix hours of operation, limit use of power, or grant licenses of limited operation, there resulted a condition of general confusion. There was a scramble for preferred channels. The Secretary was required to issue licenses to all. Many new stations were built, most of them asserting property rights in wave lengths and the control of the ether.

On December 8, 1926, Congress passed a joint resolution limiting license periods and requiring waiver of claims to wave lengths or the use of ether as a condition precedent to license.[5]

On February 23, 1927 the Radio Act of 1927 was approved.[6] It asserts governmental control over all channels of radio transmission, provides a license system for radio stations, and prohibits radio transmission, under penalty, except with a license in that behalf granted under provisions of the act. For purposes of the Act the United States is divided into five zones, amongst which are apportioned licensed radio facilities.

A Radio Commission was created by the Act, which consists of five commissioners "appointed by the President by and with the consent of the Senate." It is the duty of this commission, as public convenience, interest or necessity requires to classify stations, regulate the nature of service, assign wave lengths, regulate apparatus, prevent interference, establish station areas, and regulate chain broadcasting.[7]

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1 38 Stat. 1672.
2 47 USCA Sect. 51-60.
3 United States v. Zenith Radio Corporation, 12 F. 2d, 614. (1926)
4 35 Opinion of Attorneys General 126.
5 44 Stat. 918.
6 47 USCA Sect. 81-119.
7 47 USCA Sect. 84.

The power of the Federal government to regulate, by means of the commission, the use of radio, has been upheld by the Supreme Court. In one famous case [8] the Court clarified the status of radio as follows:

> "The essential purpose and indispensable effect of all broadcasting is the transmission of intelligence from the broadcasting station to distant listeners. It is that for which the customer pays. By its very nature broadcasting transcends state lines and is national in its scope and importance—characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause."

The question of conflict between state and federal regulation have been dealt with in another famous decision:[9]

> "The authority of Congress extends to every instrumentality by which commerce is carried on, and the full control by Congress of the subjects committed to its care and regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. The execution by Congress of its Constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so intermingled therewith that the effective government of the former incidentally controls the latter."

* * *

By Section 9 of the Radio Act it is provided that the licensing authority, if public convenience, interest and necessity will be served, subject to the limitations of the act, shall grant licenses, and in so doing, when and in so far as there is a demand for the same, shall make such a distribution of licenses, bands of frequency or wave lengths, periods of time for operation, and of power among the different states and communities, as to give fair, efficient, and equitable radio service each to the same.

"The emphasis should be laid on the receiving public, whose interest it is the duty of the Government to protect."

Provisions of the act for actual franchising follow:

"The commission may grant such permits if public convenience, interest or necessity will be served by the construction of the station.

"Application when made shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station; the ownership and location of the proposed station and of the stations with which it is proposed to communicate, the frequency desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be

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8 Fisher's Blend Station v. Tax Commission 297 U.S. 650, 80 L. ed. 956 (1936).

9 United States v. American Bond & Mortgage Co. 31 F. 2d 448. (1929)

completed and in operation, and such other information as the commission may require. Such application shall be signed by the applicant under oath or affirmation.

"This permit for construction shall show the earliest and latest date between which the actual operation of such station is expected to begin and shall provide that said permit will be forfeited if the station is not ready for operation within the time specified, or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee.

"This permit may not be assigned without the approval of the Commission. Upon completion of the station, and upon it being made to appear to the Commission that all terms, conditions, obligations set forth in the application and permit have been fully met and that no cause arising that such would make the operation of such station against public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit."

Charles M. Urruela

OHIO ASPECTS OF SEIZURE OF NON-RESIDENTS' BANK DEPOSITS IN SERVING PROCESS.—This note is intended to be a brief and concise discussion of the procedure in obtaining jurisdiction over a non-resident in an action for a breach of contract where the defendant has money in a bank in a county of the State of Ohio. In its scope the note will be devoted to a short consideration of the leading cases involving the service of process on a non-resident by means of attaching his property held within the jurisdiction of the forum and publication, the availability of bank deposits as subject to seizure proceedings, and lastly the Ohio statutes providing for this procedure and their construction in so far as they have been construed in the courts of Ohio.

The problem herein involved is substantially and historically a part of the general problem of jurisdiction and procedure required to acquire jurisdiction. The authority of every tribunal is necessarily restricted by the territorial limits of the state in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every forum an illegitimate assumption of power, and be resisted as mere abuse.[1] No natural person is subject to the jurisdiction of a court of the state, unless he appear in the court, or be found within the state, or be a resident thereof, or have property therein. Every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory.

Now that we have stated these basic general principles, let us take up the question of the service of process on a non-resident by seizure of his property within the jurisdiction of the forum and publication.

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1 D'Arcy v. Ketchum, 11 How. 165, 13 L. ed 648 (1848).

The leading and pioneer case on this problem is *Pennoyer v. Neff*.[2] In that we understand that the state possesses exclusive jurisdiction over persons and property within its territory, the conditions under which a person is subject to the jurisdiction of a court, and the local limits of the state courts, we will consider a few of the salient points brought out in the leading cases on the power of state courts over the person and property of those not residents.

" . . . the state, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the state where the owners are domiciled. Every state owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. . . . " [3]

"Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the subject of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or some interests therein, by enforcing a contract. . . . In other words, such service may answer in all actions which are substantially proceedings in rem. But where the entire object of the action is to determine the personal rights and obligations of defendants, that is, where the suit is merely in personam, constructive service in this form, upon a non-resident is ineffectual for any purpose." [4]

By jurisdiction 'in rem' here is not meant an action good against all the world, but we mean only that the thing being within the jurisdiction of the state, the state may deal with it as it pleases. This jurisdiction is exercised most simply over tangible things. Every tangible thing within the territory of the state is without question in its jurisdiction and the courts of the state may, if empowered by the sovereign, deal with it by the exercise of its jurisdiction.[5]

"The substituted service of process by publication, where actions are brought against non-residents, is effectual only where, in connection with process against the person for commencing the action, property in the state is brought under the control of the court, and subjected to its

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2 95 U.S. 714, 24 L. ed. 648 (1848).
3 Pennoyer v. Neff, 95 U.S. 714, 24 L. ed. 565 (1877).
4 Pennoyer v. Neff, 95 U.S. 714, 24 L.ed 565 (1877).
5 Beale, Treatise On The Conflict of Laws (1935), v 1, p. 435, § 98.1.

disposition by process adapted to that purpose. . . . ; in other words, where the action is in the nature of a proceeding in rem. . . . for any other purpose than to subject the property of a non-resident to valid claims against him in the state, "due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered." 6

May the property of the non-resident be attached after a judgment is rendered or must it necessarily be seized before any action is taken up in the court? "The jurisdiction of the court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it. The judgment, if void when rendered, will always remain void; it cannot occupy the doubtful position of being valid if property be found, and void if there be none." 7

So far, it seems, we have stressed the element of seizure of property over the equally important requisite of notice by publication, or at least to the neglect of the latter. In *Hassall v. Wilcox*,8 a claimant in a receivership was pressing a mechanic's lien which had been foreclosed in a state court without notice to the bondholders. The court said: "But we do not think that the proceeding in the state court can be sustained as one in rem. It is essential to such a proceeding that there should at least be constructive notice, by some form of publication or advertisement, to adverse claimants, to appear and maintain their rights before a judgment in such a proceeding can operate. . . ." The Supreme Court has held that some notice, actual or implied, must be given to adverse claimants in an action in rem or quasi in rem.9

The case of *Harris v. Balk*,10 a leading case on the attachment of a non-resident's debt through garnishing proceedings, brings us closer to our particular problem. Several excerpts from this case should serve as an enlightening approach to the aspects of our case, which this case fortunately contains.

"Attachment is the creature of the local law; that is, unless there is a law of the state providing for and permitting the attachment, it cannot be levied there. If there be a law of the state providing for the attachment of the debt, then, if the garnishee be found in that state, and process be personally served upon him therein, we think the court thereby acquires jurisdiction over him, and can garnish the debt due

6 Pennoyer v. Neff, 95 U.S. 714, 24 L. ed 565 (1877).
7 Pennoyer v. Neff, 95 U.S. 714, 24 L. ed. 565 (1877).
8 130 U.S. 493 at p. 504, 9 S. Ct. 590, 32 L. ed. 1001 (1888).
9 Earle v. McVeigh, 91 U.S. 503, 23 L. ed. 398 (1875).
10 198 U.S. 215, 25 S. Ct. 625, 49 L. ed. 1023, 3 Ann. Cas. 1084 (1905).

from him to the debtor of the plaintiff, and condemn it, provided the garnishee could himself be sued by his creditor in that state." [11]

" . . . . it is recognized as the duty of the garnishee to give notice to his own creditor, if he would protect himself so that the creditor may have the opportunity to defend himself against the claim of the person suing out the attachment. . . . While the want of notification by the garnishee to his own creditor may have no effect upon the validity of the judgment against the garnishee (the proper publication being made by the plaintiff), we think it has and ought to have an effect upon the right of the garnishee to avail himself of the prior judgment and his payment thereunder." [12]

We, having considered the leading cases involving the service of process on a non-resident by means of (1) attaching his property held or situated within the jurisdiction of the forum and (2) publication or other sufficient notice (both are required together), come now to the question of the seizure of bank deposits as property of a non-resident in the state of the forum subject to the statutory appropriation proceedings.

In the *Security Savings Bank v. State of California*[13] it was held that the state may seize bank deposits. The case stated that the liability of a state bank doing business in the state for unclaimed deposits is intangible property within the state, over which the state has the same dominion as it has over tangible property. No right of a state bank under the Federal Constitution is infringed by the state's requiring it to turn over to it deposits which have remained unclaimed for a long period of time, and it is immaterial whether the state will receive the money merely as depositary or take it as an escheat. Also, where a deposit is turned over to the state in obedience to a valid law, the obligation of the bank to the depositor is discharged. Obviously, there is a distinction between unclaimed deposits and deposits claimed by a non-resident; nevertheless this case brings out the fact that the state can seize a deposit in a state bank, and it expressly states that the purpose of the state's seizure may be merely in a depositary capacity.

We find cases which are much more to the concern of this discussion. In an 1896 Ohio case, *Goebel v. Kanawha Valley Bank*,[14] we find that in an action against a non-resident defendant, the credits of such defendant may be attached by serving the process of garnishment on his debtor, without personal service on defendant. Again it was held that bank deposits are property of the depositor which may be attached by process against the bank.[15]

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11 Harris v. Balk, 198 U.S. 215, 25 S. Ct. 625, 49 L. ed. 1023, 3 Ann. Cas. 1084 (1905).

12 Harris v. Balk, 198 U.S. 215, 25 S. Ct. 625, 49 L. ed. 1023, 3 Ann. Cas. 1084 (1905).

13 263 U.S. 282, 44 S. Ct. 108 (1923).

14 4 Oh. St. C. P. Dec. 127, 3 Ohio N. P. 109 (1896).

15 Omaha Nat. Bank v. Federal Reserve Bank, 26 Fed. 884, 263 U.S. 282, 31 ALR 391 (1928).

Looking to text writers for secondary authority on the question of attachability of bank deposits, we learn that since a deposit is a debt due from the bank to the depositor, it may be attached by the depositor's creditors like any other property belonging to him; and when it is so attached, it becomes the bank's duty to retain the deposit until the court has made a proper order concerning its disposition.[16] After a deposit has been attached, the bank cannot apply it on an unmatured debt due to itself.[17] For the purposes of garnishment a bank deposit prima facie belongs to the person in whose name it stands, the general test being whether, but for the garnishment, the deposit would be subject to defendant's check, or whether defendant could sue the bank therefore.[18] A deposit to the credit of a second person to whom the bank acknowledges indebtedness by a certificate may be subjected to garnishment in the hands of the bank as his debtor in a suit against him.[19]

Now that we have considered the general aspects of service on a non-resident by attachment of his local property and publication and also the more specific question of attachment of bank deposits, we take up the particular statutes and procedure in Ohio regarding these points. We are, of course, concerned with the statutes on constructive service.

"Service may be made by publication in any of the following cases:

> 7. In an action in which it is sought by a provisional remedy to take or to appropriate in any way property of the defendant, when the defendant is not a resident of this state or is a foreign corporation, or his place of residence cannot be ascertained." [20]

The statute on publication in Ohio requires that the notice be published in a newspaper in the county where the petition is filed and such publication is to be for six consecutive weeks. If it is in a daily paper one insertion each week will suffice. The notice by publication should contain the object and prayer of the petition, the name of the person served, the court in which the proceedings are to be heard, and when the person is to answer.[21] In the Ohio courts it has been told that upon service by publication the constable's return should show that the property attached belonged to the defendant.[22] This procedure which by state statute authorizes publication to be sufficient to impart notice to non-resident, when the method is reasonable, has been held by the federal courts to be binding on the federal court.[23]

Section 11293 of the Ohio General Code provides that: "Before service by publication can be made, an affidavit must be filed that service of summons cannot be made within this state on the defendant sought

16 7 Corp. Jur. Secund. 248 § 74 (2).
17 7 Corp. Jur. Secund. 248 § 74 (2).
18 28 Corp. Jur. 116 § 162 (8).
19 Waples, Attachment and Garnishment (2 ed.) § 367 at p. 266.
20 Ohio General Code § 11292.
21 Ohio General Code § 11295.
22 Pelton v. Platner, 13 O. 209 (1844).
23 Blauner v. Hirsch, 57 F. 2d 114 (1932).

to be served, and that the case is one of those mentioned in the next preceding section."

Now that we have set forth the statutes on publication requirements, we shall look into those concerning the methods of appropriation of the property of the non-resident held within the state of the forum.

The statute providing for the attachment of property held within the state is our first concern. It states that in a civil action for the recovery of money, at or after its commencement plaintiff may have an attachment against the property of the defendant upon any one of the grounds enumerated. Among the list of enumerated grounds we find that the second is that the defendant is not a resident of this state. Then this section further provides that an attachment shall not be granted on the ground that defendant is a foreign corporation or not a resident of this state, for any claim other than a debt or demand, arising upon contract, judgment or decrees, or for causing damage to property or death or personal injury by negligent or wrongful act.[24] This expressly limits the method of procedure to cases which are in the nature of in rem or quasi in rem.

Let us now investigate a few of the cases which have been decided in Ohio and can be considered as construing this section of the statute. *Pope v. Insurance Co.*[25] explains that the jurisdiction of a non-resident defendant cannot be acquired unless the affidavit shows that the action arises on contract, judgment or decree. We have an interesting situation where the defendant is a partnership within the state and all the individual members of the partnership are non-residents. An Ohio decision[26] states that the plaintiff may have attachment on the ground that the defendant was a non-resident even though all the members of the defendant partnership reside out of Ohio and though said partnership has a place of doing business in Ohio and was formed to do business in this state. The case of *St. John v. Parsons*[27] contains much that is pertinent to an understanding of the statute providing for attachment of a non-residents property. It states that jurisdiction of a non-resident defendant may be obtained in an action by a non-resident plaintiff when the defendant has property within the jurisdiction of the court against which attachment may issue, and service may be had by publication. It seems that if it is proper for a non-resident to bring suit against another non-resident in a court of this state under these conditions, there should be much more reason for allowing a citizen of the state, who depends on the state for protection, to sue said non-resident under these circumstances.

Bank of Marysville v. Wirdisch-Muhlhauser Brewing Co.,[28] gives us

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24 Ohio General Code § 11819.
25 24 O. S. 481 (1874).
26 Byers v. Schlupe, 51 O. S. 300, 38 N. E. 117 (1894).
27 54 Ohio App. 420, 7 N. E. 2d 1013 (1936).
28 50 O. S. 151, 33 N. E. 1054, 40 Am. St. Rep. 660 (1893).

an insight to the relation existing between the bank and the depositor. In that case the court held that money received by a bank on general deposit becomes the property of the bank, and its relation to the depositor is that of a debtor, and not of bailee or trustee of the money.

Section 11820 of the General Code provides that: "An order of attachment should be made by the clerk of the court in which the action is brought in any case mentioned in the next preceding section, when there is filed in his office an affidavit of the plaintiff, his agent or attorney, showing: (1) The nature of the plaintiff's claim. (2) That it is just. (3) The amount which the affiant believes the plaintiff ought to recover; and (4) the existence of any one of the grounds for an attachment enumerated in such section. Such affidavit may be made before any person authorized to administer oaths whether an attorney in the case or not."

In *Cooper Tire and Battery Co. v. Farmers' Bank and Trust Co.*,[29] an affidavit for attachment charging defendant was a corporation under the laws of Florida, and a non-resident of Ohio, was sufficient to authorize attachment. This case makes it clear that it is not sufficient to state in the affidavit that the party sued is a non-resident as far as the state is concerned, but that something more than such conclusion must be stated, i.e., that the party sued, for example, is a foreign corporation.

Seizing property without an affidavit does not give the court jurisdiction over the defendant or his property.[30]

The case of *Weirick v. Mansfield Lumber Co*[31] points out that the affidavit for attachment must state the nature of the claim and show that it is one arising upon contract. Now, must this claim be one arising upon an express contract? *Ross v. Poor*[32] explains that where an action is brought against a non-resident and attachment is sought under authority of General Code § 11819, the petition should contain avertments from which the court could at least infer that the cause of action arose on contract, express or implied.

When the ground of the attachment is that the defendant is a foreign corporation, or not a resident of this state the order may be issued without a bond.[33] Hence failure to file bond does not render the attachment void but is a mere irregularity of which the defendant alone can take advantage.[34]

"The order of attachment shall be directed and delivered to the sheriff, and require him to attach the lands, tenements, goods, chattels, stocks, or interest in stocks, rights, credits, money, and effects of the defendant, in his county, not exempt by law from being applied to the

29 29 Ohio App. 336, 163 N. E. 504 (1928).
30 Endel v. Leibrock, 33 O. S. 254 (1877).
31 96 O. S. 386, 117 N. E. 362 (1917).
32 12 Ohio App. 486 (1920).
33 Ohio General Code § 11821.
34 O'Farrell v. Stockman, 19 O. S. 296 (1869).

payment of plaintiff's claim, or so much thereof as will satisfy it, to be stated in the order as in the affidavit, and the probable costs of the action, not exceeding fifty dollars." 35

*Root v. Railway*36 states that in levying under attachment the officer must take the personal property into his custody but afterwards may turn it over to a keeper, but that he cannot leave it in the possession of the (plaintiff's) debtor.

When the property of the non-resident which we are seeking to attach is in the form of bank deposits, it is at that time strictly speaking the property of the bank which holds it as its own and has incurred a debtor-creditor relation with the party we seek to serve process by attachment and publication, and this we have seen before.37 A situation like this requires the special statutory type of attachment which is known as garnishment.

"When the plaintiff, his agent or attorney, makes oath in writing that he has good reason to believe, and does believe, that any person, partnership, or corporation in the affidavit named, has property of defendant in his possession, describing it, if the officer cannot get possession of such property he must leave with such garnishee a copy of the order of attachment, with a written notice that he appear in court and answer as hereinafter provided. When the garnishee does not reside in the county in which the order of attachment was issued, the process may be served by the proper officer of the county in which he resides, or be personally served." 38

Ohio General Code § 11830 provides that the answer of the garnishee is to be made before the clerk of the common pleas court of the county in which he resides, or, if he resides out of the state, before the clerk of the common pleas court of the county where he was served, or where the action is pending. It further stipulates that a special examination of the garnishee is to be made, and actions against him will be taken for failing to appear, or to answer satisfactorily, or to comply with the order of the court, and these actions are to be taken in the county where the garnishee resides.

"The clerk of the common pleas court before whom the answer is made shall transmit it to the clerk of the court in which the suit is pending." 39

"If the garnishee is a person, a copy of the order and notice shall be served upon him personally or left at his usual place of residence. When a partnership is garnished by its company name, they shall be

35 Ohio General Code § 11822.

36 45 O. S. 222, 12 N. E. 812 (1887).

37 Bank of Marysville v. Windisch-Mulhauser Berwing Co., 50 O. S. 151, 33 N. E. 1054, 40 Am. St. Rep. 660 (1893).

38 Ohio General Code § 11828.

39 Ohio General Code § 11831.

left at its usual place of doing business, or with a member of such partnership, and if a corporation, with the president or other principal officer, or its secretary, cashier, or managing agent." [40]

Ohio General Code § 11836 stipulates that the officer serving the copy of the order of attachment upon the garnishee must return upon every order of attachment what he has done under it. The return must show the property attached and the time of attachment. When garnishees are served, their names, and the time each was served, must be stated in the return.

Concluding, we think it well to crystalize the problem by mentioning several of the pertinent points treated by Mr. Waples in his text on the problems of attachment and garnishment.[41] The attachment against the property of the non-resident when he is not found in the state where the suit is brought and served with process, but is merely notified by publication is a foreign attachment. The distinction between foreign and domestic attachment is not observed by all of the states. When it is observed foreign attachment is usually associated with garnishment or the trustee process. However, in all the states the creditor has his remedy by attachment against the property of his non-resident debtor, whatever the term by which the process is designated. The statutes providing for service by attachment and publication designedly employ the term 'non-resident' instead of 'foreign resident'; for the condition upon which attachment issues is, not that the debtor be a resident of another state, but that he be not a resident of the state in which the suit against him is brought. Non-residence means not residing in the state.

Finally, we think it clear that Ohio has statutory procedure authorizing service on a non-resident in an action for a breach of contract where the defendant has property within the state of the forum; that bank deposits within a state are such property subject to appropriation proceedings; that Ohio has the necessary statutory provisions for appropriation of property by means of attachment and specifically garnishment in our problem; and that the Ohio legislature has provided for sufficient notice in constructive service by means of publication. Therefore, plaintiff suing for breach of contract should have no difficulty in securing jurisdiction in Ohio over a non-resident who has bank deposits within this state.

Theodore P. Frericks.

WAR RISK INSURANCE.—Every soldier, sailor, marine, coast guardsman and Nurses, both Army and Navy, who are on active duty in the service of their country may take out an insurance policy. This policy is sponsored by the government and is called War Risk Insurance. This

40 Ohio General Code § 11833.

41 Waples, Attachment and Garnishment (2 ed.) § 32-33 at p. 23.

type of insurance is a form of state insurance devised by Federal enactment to meet the emergencies of a great war. It is completely statutory and the rights of the parties are made dependent upon the statutes and regulations in force, or afterwards adopted.[1]

The purpose of Congress in passing the War Risk Insurance Act was two-fold. Of course the main purpose was for the protection of the persons eligible and their dependents. The secondary purpose of Congress was that this insurance should take the place of veterans compensation or endowment after the war.

The persons eligible for War Risk Insurance are set out in the statute. The statute says that every commissioned officer and enlisted man and every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or the Navy Department may, upon application to the Veterans Administration, payment of premiums and evidence satisfactory to the Administrator showing such person to be in good health at the time of the application, be eligible for War Risk Insurance. The insurance must be applied for within one hundred and twenty days after enlistment. Any multiple of five hundred dollars ($500.00), and not less than one thousand dollars ($1,000.00) or more than ten thousand dollars ($10,000.00) is the amount obtainable for any person so eligible.[2]

The question arises at to whether or not this type of insurance is cheaper or higher than a corresponding policy of "old line" insurance. The statute says "The United States shall bear the expenses of administration and the excess mortality and disability cost resulting from the hazards of war. The premiums shall be the net rates based upon the American Experience Table of Mortality and interest at 3½ per centum per annum."[3] "Old line" insurance is based upon the Mortality Table and the interest is approximately three (3) or 3½ per cent per annum. The answer to the question is that the actual cost is practically the same. However some consideration should be given to the fact that no person is eligible for War Risk Insurance unless he is on active duty and so subject to all the hazards and risks of war. By taking into consideration the actual risk insured against by War Risk Insurance it seems that it is cheaper than "old line" insurance because the risk insured against is so much greater.

The statutes creating War Risk Insurance also provide who may be made beneficiaries of the insurance. The insured is allowed to name his beneficiary but persons eligible are restricted by the statute. War Risk Insurance is "payable to a widow, widower, child (including stepchild or illegitimate child if designated as beneficiary by the insured), parent (including person in loco parentis if designated as beneficiary

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1 Eblen vs. Jordan, 161 Tenn. 509, 33 S. W. (2d) 65 (1930).
Coleman vs. United States, 100 F. (2d) 903 (1939).
United States vs. McPhee, 31 F. (2d) 243 (1929).

2 Title 38, Secs. 511 and 802 of the U. S. C. A.

3 Title 38, Sec. 511, U. S. C. A.

by the insured), brother or sister of the insured."[4] The statute is exclusive and only those named in the statute may be made beneficiaries.

The question of changes of beneficiary has been brought before the courts for decision. The courts hold that the insured has an absolute right to change the beneficaries so long as the new beneficiary is included in the class enumerated by the government.[5] It has been held that when an insured made his estate his beneficiary he could, by an unprobated will change his beneficiary although the instrument could not be probated as a will in the state court.[6] In another case a will held invalid on other grounds still operated as a valid designation of a beneficiary by the insured.[7]

An important factor in insurance law is the construction the courts put upon the insurance contracts. War Risk Insurance, being statutory and administered by the government, is construed differently than the construction put upon "old line" insurance contracts. The courts hold that the United States government, in putting into effect its plan of War Risk Insurance, does not become an insurer in a commercial sense, for gain, and can be held on its contracts only to the extent that it has expressly consented to be bound.[8] The courts hold that War Risk Insurance is a special statutory kind of insurance and contracts issued thereunder are not to be interpreted and construed according to principles of law governing other contracts of insurance.[9] The courts say that

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4 Title 38, Sec. 802 U. S. C. A.

(g) "The insurance shall be payable only to a widow, widower, child (including a stepchild or an illegitimate child if designated as beneficiary by the insured), parent (including person in loco parentis if designated as beneficiary by the insured), brother or sister of the insured. The insured shall have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries but only within the classes herein provided."

(h) "Such insurance shall be payable in the following manner: (1) If the beneficiary to whom payment is first made is under thirty years of age at the time of maturity, in two hundred and forty equal monthly installments. (2) If the beneficiary to whom payment is first made is thirty or more years of age at the time of maturity, in equal monthly installments for one hundred and twenty months certain, with such payments continuing during the remaining lifetime of such beneficiary. (3) Any installments certain of insurance remaining unpaid at the death of any beneficiary shall be paid in equal monthly installments paid to the first beneficiary, to the person or persons then in being within the classes hereinafter specified and in the order named, unless designated by the insured in a different order—(A) to the widow or widower of the insured, if living; (B) if no widow or widower, to the child or children of the insured, if living, in equal shares; (C) if no widow, widower, or child, to the parent or parents of the insured, if living, in equal shares; (D) if no widow, widower, child, or parent, to the brothers and sisters of the insured, if living, in equal shares."

5 Johnson vs. White, 39 F. (2d) 420 (1928).

6 Shoeder vs. United States, 24 F. (2d) 420 (1928).

7 United States vs. Mallery, 48 F. (2d) 6 (1931).

8 Birmingham vs. United States, 4 F. (2d) 508 (1929).

9 Birmingham vs. United States, 4 F. (2d) 508 (1929).

War Risk Insurance should be liberally construed but subject always to the statutes and proper regulations made by directors acting pursuant to the act.[10] Another group of cases gave the contracts a slightly more strict construction and in particular cases held that having accepted the insured for service the government is foreclosed from defending on ground of prior disability.[11] These cases seem to be the weight of authority but should be restricted to the point decided in the cases as set out above. Another case seemingly contra to this point of view held that ordinary rules of liberal construction of terms of an insurance contract and liberal application of the doctrine of waiver do not apply to War Risk Insurance.[12] Another point decided in this case was that the United States was not liable for interest, in the absence of a statute or stipulation to the contrary.[13]

An important factor in insurance law is the doctrine of estoppel applied to the insurance company. The rule is that estoppel will not lie against the United States and also The United States is not liable nor responsible for the laches, unauthorized or wrongful acts of its servants or agents in administering the act. It is held that War Risk Insurance must be construed with reference to the statutes rather than by laws and decisions governing private companies and the court held that when the agent of the bureau accepted the check of the insured it did not estop the United States government from denying reinstatement to the insured.[14] Another case held that the United States was not estopped from denying liability on War Risk Insurance policy though its agent neglected to answer the plaintiff's letters promptly when the plaintiff asked about converting the insurance and asked about paying his premiums, the court holding that the United States cannot be estopped by acts or omissions of officers or agents representing it in handling the insurance.[15]

The Act was formerly administered by the Bureau of War Risk Insurance but was given to the Veterans Administration after the war and is now administered by the Administrator of the Veterans Administration.[16]

When first passed War Risk Insurance was for marine risks; for owners of American vessels, cargo and crew exposed to war risks. Later the Army, Navy and Coast Guard and related services were added. It is type of insurance at special rates providing insurance covering marine risks and convertible term insurance against disability or death for persons in the military, naval, and related services of the United States.

Hal Hunter.

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10 United States vs. Law, 299 F. 61 (1924).
11 State Bank & Trust Co. vs. United States, 16 F. (2d) 439 (1926).
Jackson vs. United States, 24 F. (2d) 981 (1928).
12 United States vs. Lyhe, 19 F. (2d) 876 (1927).
Jensen vs. United States, 29 F. (2d) 951 (1925).
13 United States vs. Lyhe, 19 F. (2d) 876 (1927).
14 Sternfield vs. United States, 32 F (2d) 789 (1929).
15 United States vs. Loveland, 25 F. (2d) 447 (1928).
16 Title 38, Sec. 801, U. S. C. A.

WAY OF ESTABLISHING A RADIO STATION.—The establishment of a radio communication is entirely within the sphere of the Federal government's jurisdiction, regardless of whether the radio communication is going to be interstate or intrastate. Radio has been unanimously designated as being clearly within the limits of interstate commerce, and as such, comes directly under the supervision, control and regulation of Congress. The Federal court sustained this opinion in General Electric Company v. Federal Radio Commission,[1] and states:

> . . . Under the commerce clause of the constitution (Art. 1, Sec. 8, Cl. 3) Congress has the power to provide for the reasonable regulation of the use and operation of radio stations in this country and to establish agencies such as the Federal Radio Commission to give effect to that authority.

When this opinion was first expressed, it gave rise to many acrimonious debates, for it was difficult for many to conceive that something so invisible and intangible could be dubbed commerce. It had no wires that could be attached, but yet through the joint operation of a transmitter and receiver, sound and fully intelligent ideas were transmitted and received, and this transmission is intercourse, and that intercourse is commerce.

The Radio Act of 1927[2] explicitly defines and regulates any communication in the United States, territories and possessions and provides:

> That no person, firm, company, or corporation shall use or operate any apparatus for the transmission of energy, or communications or signals by radio (d) within any state when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communication or signals from within said State "to any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communication, or signals from and to places beyond the borders of said State.

The Federal Communication Commission was created in 1934 by Congress in order to regulate interstate, intrastate and foreign commerce in communication by wire and radio, so as to make available to all the people of the United States a rapid, efficient, nation-wide and world-wide wire and radio communication service. If this agency was to be at all effective, it was necessary for Congress to endow it with all the necessary powers to enable it to prescribe all the rules, regulations and laws necessary for a rapid, efficient, nation and world wide wire and radio communication service for the people of the United States. Clearly then, our first step toward securing a radio establishment for intrastate communication, would be to submit an application to the Federal Communication Commission, who has the power of reviewing all such application and of issuing the licenses necessary in the operation of a radio station.

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1 31 Federal (2nd) 630. (1929)

2 Radio Act 1927, Sub-Chap. 111, Part 1, Sec. 301, Title 47 USCA, Page 47.

The Commission in deciding the worthiness of applicant for a license to communicate with radio, has set up certain qualifications which they consider desirable for even consideration. Foremost among these, is the duty of the applicant to show that he can provide the best practicable service to the community reached by his broadcasts. Of course it might seem simple enough for the applicant to prove that his service would be of interest which certainly gives him a wide latitude, but the commission will determine this aspect by investigating the financial qualification upon which he proposes to operate his radio station. It is also imperative that the applicant show citizenship, the need of the radio service at the place in question, and the ability of the community to support the station and to furnish the talent.

In the Colonial Broadcaster v. Federal Communication Commission [3] it was pointed out that the applicant besides furnishing the above qualifications, must also show that he is financially capable to construct the station and that no objectionable interference will result with other licensed operators.

The next important step in the establishment of a radio station would be the securing of a license for the operator of the station, since it also provides in the Radio Act of 1927,[4] that:

> The actual operation of all transmitting apparatus in any radio station for which a station license is required shall be carried on only by a person holding an operator's license issued hereunder and no person shall operate any such apparatus in such a station except under and in accordance with an operator's license issued to him by the Commission.

Though we have our license to broadcast and the operators license, in order to begin our broadcasts, it is still necessary to apply once more to the Commission for the permission to construct a station, as the Radio Act [5] also specifies that,

> . . . The commission may grant such (construction) permits, if public convenience, interest, or necessity will be served by the construction. This application shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character and the financial, technical and other ability of the applicant to construct and operate the station, the ownership and location of the proposed stations and of the stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is being used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require.

In conclusion therefore, the establishment of a radio station is something which is completely out of State control, and any attempt by a state to do so, is unconstitutional and void.

J. D. Kelly

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3 105 Federal (2nd) 781. (1939)

4 Radio Act of 1927, Sub-chap. 111, Part 1, Sec. 318, Title 47 USCA.

5 Radio Act of 1927, Sub-chap. 111, Part 1, Sec. 319, Title 47 USCA.

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OSWALD RYAN, who formerly practiced law at Anderson, Indiana, served as a member of the Special European Immigration Commission of 1923; as General Counsel of the Federal Power Commission from 1932 to August 1938 when he was appointed by President Roosevelt as a member of the Civil Aeronautics Authority, subsequently re-named the Civil Aeronautics Board. He was reappointed on January 1, 1942. The author has represented the government in important cases before the United States Supreme Court involving questions of administrative law and procedure.

Mr. Ryan's article in this issue of the LAWYER is an address delivered to the Air Traffic Conference of America at Kansas City, Missouri on November 10, 1943.

IDEN S. ROMIG has served the Indiana Bar for well over fifty years. Born near Plymouth, Indiana, Mr. Romig received his early education in the Marshall County schools and Valparaiso University before entering Indiana University Law School where he received the LL.B. degree in 1892. He represented the City of South Bend as City Attorney under three administrations; was Attorney for the Park Commissioners; for the St. Joseph County Commissioners, and was president of the St. Joseph Bar Association. Mr. Romig never wanted a political office and never accepted a public appointment except in legal lines, and should be qualified to speak of the growth of and changes in Indiana Jurisprudence.

HON. EDWARD G. RYAN was born in Ireland in 1810, was well educated in the schools of that country, and came to America at the age of 20. After being admitted to practice, he located first in Chicago, then in Racine and finally in Milwaukee. He won distinction at the bar but it was not until he was 64 years of age that he was elevated to the supreme bench where he served for six years, 1874-1880. Judge Ryan was chairman of the Committee appointed to organize the State Bar Association of Wisconsin.

The Address to the Law Class of the University of Wisconsin was delivered by Judge Ryan on June 16, 1873 at Madison. This classic exhortation to the young lawyers of another era is reprinted in the December LAWYER with the permission of the State Bar Association of Wisconsin.—*Editor*

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