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THE MARYLAND ORDER OF ABATEMENT OF LEGACIES AND DEVISES

By RUSSELL R. RENO*

Because of the usual lapse of time between the date of the execution of a testator's last will and the date of his death, the executor often finds that the assets available for distribution among the legatees and devisees are insufficient to satisfy all of the provisions in the will as contemplated by the testator. This may be due to: (1) the fact that the estate was depleted between the date of the execution of the will and the testator's death, or (2) the necessity of using a large portion of the assets in order to pay the debts of the deceased, or (3) the use of a large portion of the assets to pay taxes, usually the Federal Estate Tax. This situation raises the problem of the priority rights of the various types of legatees and devisees to payment in full of their respective legacies and devises. This order of priority in payment, where the assets are insufficient to pay all, is the inverse of the order of abatement of legacies and devises for the purpose of paying debts of the estate and costs of administration.

HISTORICAL DEVELOPMENT

In the development of the feudal system in England, the protection of rights in land came within the jurisdiction of the manor courts, while the administration of decedents' estates came under the control of the ecclesiastical courts. As a result of this division in jurisdiction, the principle became firmly established that the title to real property devolved directly to the heir in case of intestacy or to the devisee in case of testacy, and that only personal property passed to the administrator or executor as an asset of the estate. As a consequence of this devolution of title, real property was not subject to the debts of the deceased, ex-

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cept in the cases of debts arising out of specialties and then only if the specialty was expressly made binding on the debtor's heirs. In such cases the heir became bound by contract upon the decedent's debt to the extent of the real property inherited from the debtor. But even in this case of a debt arising on a specialty which expressly bound the heir, the debtor could defeat the right of the creditor to reach the realty by devising the land to persons other than the heir at law. In 1691 the Act against Fraudulent Devises[1] was enacted making the devisee of land subject to liability for specialty debts of the testator on the same basis as the heir.

Thus in colonial Maryland land of the decedent was not subject to his simple contract debts, but only to his specialty debts and then only if the specialty expressly bound the heir.[2] To eliminate this distinction between specialty debts and simple contract debts of the decedent, the Act of 1785[3] was enacted making the real property of the decedent subject to the claims of all types of creditors of the estate after the personalty has been exhausted. This statute has the effect of making the personal property of the decedent in the hands of the administrator or executor the primary source of funds for the payment of the debts of the estate, and only permits equity to intervene and sell the realty in the hands of the heirs or devisees upon proof of an insufficiency of personal property in the estate to pay such debts.

Since the Act of 1916 Directing Descent[4] provides for the descent of real property to the same persons who are the distributees of the personal property and in the same proportions, there is no financial loss in case of intestacy to any heir from the application of this principle that exhausts the personalty in the payment of the debts before touching the realty. As the heirs taking the realty are the same persons as the distributees taking the personalty and take in the same proportions, it is immaterial to them whether the personalty or realty is sold first to pay debts. But in the case of a will, the devisees of the realty may be entirely different persons from the legatees of the personalty. Thus in the case of testacy the application of this principle may operate to deprive the legatees of all or a major portion of their share in the estate, while leaving

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[1] 3 W. & M. Ch. 14, 2 ALEX. BRIT. ST. (2d ed. 1912) 781.
[2] Van Bibber v. Reese, 71 Md. 608, 18 A. 892 (1889).
[3] MD. CODE SUPP. (1957), Art. 16, Sec. 254.
[4] MD. CODE (1951), Art. 46, Sec. 1.

the devisees their entire share without diminution for payment of the debts or costs of administration.

The Maryland Court of Appeals has consistently taken the position, that in the case of testacy as well as in the case of intestacy, the realty cannot be reached for the payment of debts until the personalty has been exhausted;[5] unless the testator has by the terms of his will shown an intention to exonerate all or part of the personalty from the payment of debts, or has shown an intent to charge the payment of some or all of the legacies against his realty. Although the testator cannot by his will remove personalty from the reach of his creditors, he can charge the realty with the payment of his debts and exonerate any or all personalty from such payments.[6] In such cases the legatees are entitled to have equity sell the realty for the payment of decedent's debts without first exhausting the personalty. But a mere direction in the will to pay all debts before the devises and bequests are paid cannot in itself be a basis for charging the realty with the payment of the debts jointly with the personalty.[7] On the other hand, many states have taken the position that the blending of the residuary realty and personalty into a single clause does show an intent to charge the residuary realty with the payment of general legacies, thereby exonerating these general legacies from the payment of the debts at the expense of the residuary realty.[8] Certainly it can be argued, that where a testator disposes of his residuary realty and personalty in a single clause to the same person, he has shown an intention to treat residuary realty and residuary personalty the same, and that he was thinking of the residue as consisting of both realty and personalty remaining after all other devisees and legatees in his will had been paid in full. Yet even in this situation the Maryland Court of Appeals has

[5] However, in the case of specialty debts expressly binding on the heir, which by the Act against Fraudulent Devises, *supra*, n. 1, are also binding on a devisee, the specific devisee of realty becomes primarily liable under the terms of specialty. In Chase v. Lockerman, 11 G. & J. 185 (Md., 1840), the Court of Appeals held that a specific legatee whose property is used to pay specialty debts of the estate has a right of contribution against a specific devisee. Likewise, in Knox v. Stamper, 186 Md. 238, 46 A. 2d 361 (1946), this possibility was recognized but taxes and administration expenses were held to be simple contract debts and not to be classified as specialty debts. Because of the disappearance in business usage of specialties expressly binding on the debtor's heirs, it is doubtful as to whether this right of contribution in the specific legatee against the specific devisee has any significance today.

[6] Buchanan v. Pue, 6 Gill 112 (Md., 1847).

[7] White v. Kaufman, 66 Md. 89, 5 A. 865 (1886).

[8] Michigan Trust Co. v. Driver, 270 Mich. 698, 259 N. W. 867 (1935); In re Kendrick's Estate, 210 Wis. 218, 246 N. W. 306 (1933).

taken the position that the intent to exonerate the general legacies from the payment of the debts at the expense of the residuary realty and to charge the residuary realty with the payment of such general legacies cannot be read from the words of the will.[9] Under these cases neither intestate realty, residuary realty, nor realty specifically devised could be used to pay debts until all of the personalty had been exhausted, and likewise the general legacies were not payable out of either residuary or intestate realty.

In 1894 the first breach in this historic principle occurred with the enactment of the present statute which makes "the real estate of every testator not specifically devised" chargeable with the payment of pecuniary legacies, where the personalty is insufficient after payment of debts, unless the contrary intent clearly appears.[10] This statute uses the words "not specifically devised" in describing the realty charged with the payment of general pecuniary legacies. These words clearly include realty devised in the residuary clause, whether it is a single clause blending both residuary realty and residuary personalty together, or whether it is a separate residuary devise to a person other than the residuary legatee; but the wording is ambiguous as to whether it includes intestate realty where the will contains no residuary devise. However, the Maryland Court of Appeals has construed these words to include intestate realty as well as residuary realty.[11] This leaves only realty included within a specific devise still subject to the old principle that personalty is the primary fund for the payment of debts, and that realty cannot be charged with the payment of general legacies.

PRESENT ORDER OF ABATEMENT

The effect of this statute, in making both intestate and residuary realty subject to the payment of pecuniary general legacies, is to create a revised order of abatement as follows:

1. *Intestate Personalty.* Under common law principles any intestate personalty was the first source of funds for the payment of debts of the estate. Normally there can be no intestate personalty if the will contains a residuary legacy; but if the residuary legacy or any part thereof is

[9] White v. Kauffman, *supra*, n. 7; Pearson v. Wartman, 80 Md. 528, 31 A. 446 (1895), where the clause "the remaining portion of my estate" was used.

[10] MD. CODE (1951), Art. 93, §361.

[11] St. Johns Church v. Dippoldsmann, 118 Md. 242, 84 A. 373 (1912).

void, then intestate personalty may exist in the hands of the executor for the payment of debts of the estate.

2. *Residuary Legacy.* As just pointed out, if the will contains a valid residuary legacy, there can be no intestate personalty, and the residuary personalty becomes the first source of funds for the payment of debts of the estate. The very use of the term "residue" shows an intention to charge the general legacies against the residuary personalty, so that the residuary legacy must abate in favor of the general legacies.[12]

3. *Intestate Realty.* Here also there will normally be no intestate realty if the will contains a residuary devise. But often wills are executed without a residuary devise where the testator has disposed of all the realty that he owned at the date of the execution of the will by specific devises. Likewise, a residuary devise may be void in its entirety or in part; and also under Maryland case law realty devised by a void specific devise passes as intestate realty and does not fall into the residuary devise.[13] Prior to the enactment of the Act of 1894[14] such intestate realty could not be subjected to the payment of the debts of the estate until all the personal estate had been exhausted.[15] This meant that neither specific legacies nor general legacies could be exonerated at the expense of the heirs taking the intestate realty. Now this statute changes this rule to the extent of making intestate realty subject to the payment of pecuniary legacies. It should be noted that the statute uses the term "pecuniary legacies", which comprises all of the usual general legacies found in a will,[16] but does not include specific legacies. This presents two problems of

[12] England v. Prince George's Parish, 53 Md. 466 (1880); Church Extension M. E. Church v. Smith, 56 Md. 362 (1881).

[13] *Disposition of Void and Otherwise Failing Devises in Maryland*, 2 Md. L. Rev. 142 (1938).

[14] *Supra*, n. 10.

[15] Chase v. Lockerman, *supra*, n. 5, lists the order of abatement at common law as follows:

1. Personal estate.
2. Lands devised to be sold for the payment of debts.
3. Lands descended.
4. Estates specifically devised even though they are generally charged with the payment of debts.

[16] Cases have often construed a gift of a certain number of shares of stock or a sum of money in bonds, without describing the particular stock or bonds other than by the name of the corporation, as being a general legacy. Dryden v. Owings, 49 Md. 356 (1878). In such cases if the stocks or bonds are not in the estate at the testator's death, the legacy is treated as a pecuniary legacy payable out of general assets. Robinson v. Addison, 2 Beav. 515, 48 Eng. Rep. 1281 (1840); Mecum v. Stoughton, 81 N. J. Eq. 319, 86 A. 52 (1913). Under this reasoning all such general legacies can be considered pecuniary legacies and within the Act of 1894.

interpretation: first, can the executor petition equity for the sale of the intestate realty upon a showing that the personal estate will be insufficient to pay the debts and the general legacies; and second, if the personal estate is exhausted in the payment of the debts so that the pecuniary legatees are entitled to payment out of the intestate realty, are the specific legatees also entitled to reimbursement from the intestate realty?

The first question was answered in *St. Johns Church v. Dippoldsmann*[17] where the executor instituted suit in equity to have the intestate realty sold to pay the pecuniary legacies, the personal estate being insufficient after payment of debts. The Court held that the executor had no authority to bring this suit, but only the pecuniary legatees, who had not received full payment of their legacies, were entitled to maintain a suit in equity to enforce the lien of their legacies against the intestate realty. It should be noted that in this case there was sufficient personal estate to pay all of the debts, and the suit was instituted by the executor solely to obtain funds for the payment of the pecuniary legacies. If the debts had exceeded the personal estate, then a different conclusion might have been reached on the theory that by the express terms of the Chancery Act[18] the executor has authority to institute a suit in equity for the sale of the decedent's realty where the personal estate is insufficient to pay the debts and costs of administration. But whether the suit is instituted by the pecuniary legatees themselves or by the executor, the ultimate result is to abate the intestate realty to pay the debts, thereby exonerating the pecuniary legacies from abatement so long as the intestate realty is sufficient.

This then presents the second question, namely, whether the specific legacies can also be exonerated from the payment of the debts at the expense of the intestate realty. Two different situations can exist: first, the debts of the estate exhaust the personalty not specifically bequeathed, such as the cash on hand, but not the specific chattels which have been specifically bequeathed by the will. In that case the general pecuniary legatees would be entitled to proceed against the intestate realty, and thereby in result the specific legacies as well as the general pecuniary legacies have been preferred over the intestate realty. Thus intestate realty has abated in favor of both specific legatees

[17] *Supra*, n. 11.

[18] MD. CODE SUPP. (1957), Art. 16, §254. Likewise, MD. CODE SUPP. (1957), Art. 93, §315, confers concurrent jurisdiction upon the Orphans' Courts where the appraised value of the real estate does not exceed $2500.

and general pecuniary legatees. The second situation is where the debts of the estate exceed the general funds of the estate so that the specific chattels that have been specifically bequeathed must also be sold to pay the debts. Then the question arises as to whether these specific legtees have any right to have the intestate realty charged with the payment of their specific legacies in the same manner as the general pecuniary legacies. The Act of 1894,[19] charging the pecuniary legacies upon all realty not specifically devised, is silent as to specific legacies; so it might be assumed that the common law principle, making the personal estate the primary fund for the payment of debts, applies in a conflict between the intestate realty and specific legacies. Under such reasoning we would have a result where the intestate realty would be abated in favor of the general pecuniary legacies but not in favor of the specific legacies. In effect the general pecuniary legacies would be paid in full while the specific legacies would be abated to pay the debts. This is contrary to the accepted principle of the common law that between general legacies and specific legacies, the former should be abated in favor of the latter.[20] The Court of Appeals has not passed on this problem to date, but it is the author's opinion that the Act of 1894 should be construed as showing an intention to make all realty not specifically devised subject to abatement in favor of both specific legacies as well as general pecuniary legacies. Certainly a testator has as great an intent to have specific legacies paid in full as he has to have pecuniary legacies paid in full. And if realty not specifically devised should be charged with the payment of the latter it should also be charged with the payment of the former.[21]

4. *Residuary Devise.* Prior to the enactment of this Act of 1894,[22] residuary realty like intestate realty could not be subject to the payment of the debts of the estate until all the personal estate had been exhausted. With the enactment of this statute residuary realty along with intestate realty became charged with the payment of pecuniary lega-

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[19] *Supra*, n. 10.

[20] Negro Cornish v. Willson, 6 Gill 299 (Md., 1848); Nash v. Smallwood, 6 Md. 394 (1854).

[21] This argument can be stated in the following form:

> Specific legacies are preferred over general legacies under common law principles.
>
> General pecuniary legacies are preferred over intestate and residuary realty by statute.
>
> Therefore specific legacies are also preferred over intestate and residuary realty.

[22] MD. CODE (1951), Art. 93, §361.

cies.[23] This then raises the same two questions of interpretation of the statute discussed in connection with intestate realty. If the author's interpretation of the statute is correct as making both intestate realty and residuary realty subject to abatement in favor of both specific legacies and general pecuniary legacies, then the only problem remaining is whether intestate realty must abate before residuary realty.

At common law all devises of realty were considered specific due to the fact that after-acquired lands could not pass under a will, and therefore a residuary devise being specific would abate proportionally along with other specific devises.[24] However, today in all states a residuary devise will operate to pass after-acquired lands,[25] therefore a residuary devise is now considered a general devise that must abate prior to a specific devise.[26] This principle is impliedly recognized in the Act of 1894 by charging all realty except that specifically devised with the payment of pecuniary legacies. But as between intestate realty and residuary realty, the statute is silent as to whether intestate realty must be abated first. The case of *Mitchell v. Mitchell*,[27] in a conflict between the heirs and the specific devisees, recognized intestate realty as the primary source for the payment of debts of the estate in the absence of personalty, and it can likewise be argued that the intestate realty should also be the primary source in a contest between the heirs and a residuary devisee. In both situations the devisees whether specific or residuary have been the express objects of the testator's bounty, while the heirs have taken by operation of law merely because the will did not validly dispose of the entire estate of the testator. Remember, it will not be possible to have both intestate realty and residuary realty unless some devise in the will has failed.[28] Should the Court of Appeals be presented with the situation where both intestate and residuary realty exist in the same estate, probably the Court would consider the intestate realty the primary source for the payment of debts in the absence of personalty and abate the intestate realty in favor of the residuary realty.[29]

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[23] Bristol v. Stump, 136 Md. 236, 110 A. 470 (1920).

[24] Lancefield v. Iggulden, L. R. 10 Ch. App. 136 (1874).

[25] Bordwell, *Statute Law of Wills*, 14 Iowa L. Rev. 172, 187 (1929).

[26] In re Nelson's Estate, 278 Pa. 416, 123 A. 326 (1924).

[27] 21 Md. 244 (1864).

[28] *Disposition of Void and Otherwise Failing Devises in Maryland*, 2 Md. L. Rev. 142 (1938).

[29] This clearly would be the result under the provisions of the MODEL PROBATE CODE (1946), §184 (Michigan Legal Studies — Simes).

5. *General Legacies.*[30] A general legacy is a legacy payable out of the general assets of the estate and not charged against a specific chattel or fund. As previously pointed out, the customary and usual type of general legacy is the pecuniary legacy. Occasionally courts have construed a gift of a certain number of shares of stock or a sum of money in bonds as a general legacy rather than a specific legacy, where the bequest contained no words describing the particular stock or bonds other than the corporate name.[31] In such cases the courts treat the legacy as a direction to take from general assets either a sufficient number of shares of such stock or bonds to satisfy the legacy, or to take money from the general assets sufficient in amount to buy such stock or bonds at market price.[32] Since general legacies are payable out of general assets and not charged against a specific chattel or fund, the courts have assumed that a testator would prefer payment of the specific legacies over the general legacies. Upon this assumption the rule has become firmly established that general legacies must abate in favor of specific legacies in the payment of debts or costs of administration.[33] The corollary of this principle is that the rule that general legacies are not payable out of chattels or funds that have been specifically bequeathed by the will but only out of general assets, and if the general assets are insufficient the general legacies fail.

Among the general legatees abatement will normally take place on a pro rata basis,[34] unless a particular general legacy is entitled to a preference. But certain types of general legacies have been recognized as being entitled to a preference over other general legacies. The most important of these is a general legacy to the widow in lieu of dower. Since the widow by accepting the general legacy is waiving her right to dower, she has become a purchaser of the legacy and should be entitled to preference over all

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[30] Theoretically a general devise might be found in a will in addition to a residuary devise. An example of this would be a devise of "40 acres of land" without any designation of the specific tract, followed by a residuary devise. However, in practice the only type of general devise found in a will is the residuary devise. Thus we can classify devises in wills in only two classes: residuary devises and specific devises.

[31] Dryden v. Owings, 49 Md. 356 (1878).

[32] Robinson v. Addison, 2 Beav. 515, 48 Eng. Rep. 1281 (1840); Mecum v. Stoughton, 81 N. J. Eq. 319, 86 A. 52 (1913).

[33] Negro Cornish v. Willson, 6 Gill 299 (Md., 1848); Nash v. Smallwood, 6 Md. 394 (1854).

[34] Matthews v. Targarona, 104 Md. 442, 65 A. 60 (1906).

the other general legatees. Several Maryland cases[35] have recognized this preference. The question is then raised as to whether the widow's preference should also apply against specific legacies as well, on the theory that her right of dower was prior to the specific legacies and since she is taking the general legacy in lieu of dower, she should be preferred over the specific legatees as well. The cases in other jurisdictions are conflicting, some preferring the widow over specific legatees,[36] and others preferring her only over other general legatees.[37] Two Maryland cases have considered this question. In the first case, *Mayo v. Bland*,[38] the Court held that a general legacy to a widow could only be preferred over specific legacies in an amount equal to the value of her common law dower that she had waived, and that in the absence of proof it would be assumed that the portion of the general legacy to the widow being abated to pay debts was in excess of the value of her dower and therefore must abate before specific legacies. In the subsequent case of *Addison v. Addison*,[39] the Court preferred a pecuniary legacy to a widow, in lieu of dower, over both specific devises and specific legacies, on the theory that by waiving her common law dower she stood in the position of a creditor and should have priority over all devisees and legatees. In that case there was no evidence that the amount of the general pecuniary legacy was grossly in excess of the value of her common law right of dower. From these cases it can be deduced that a general legacy to a widow in lieu of dower is entitled to a preference over specific legacies and specific devises, where the amount of the legacy is not grossly disproportionate to the value of the common law dower that she waived by taking under the will. Whether the burden of proving the relative values of the general legacy and the waived dower right rests on the widow as required in the *Mayo* case is questionable.

General legacies to creditors are also entitled to a preference over other general legacies provided the amount of the legacy is reasonably equivalent to a valid subsisting debt.[40] But if the evidence shows that the alleged debt was actually for gratuitous services rendered the deceased without any expectation of payment, then the general legacy is

[35] Mayo v. Bland, 4 Md. Ch. 484 (1851); Durham v. Rhodes, 23 Md. 233 (1865); Addison v. Addison, 44 Md. 182 (1876).

[36] Borden v. Jenks, 140 Mass. 562, 5 N. E. 623 (1886).

[37] Boykin v. Boykin, 21 S. C. (37 Ann. ed.), 513 (1884).

[38] *Supra*, n. 35.

[39] *Supra*, n. 35.

[40] Matthews v. Targarona, *supra*, n. 34.

not entitled to any preference over general legacies to other volunteers.[41]

A third type of general legacy that should receive a preference is one given for the support and maintenance of minor children of the testator.[42] In such a case the moral obligation that the parent owes his minor children will justify the assumption that he intended this general legacy to be paid irrespective of whether the funds are sufficient to pay other general legacies. This same principle has been extended to apply to general legacies for the support of other near relatives, particularly in cases where a relationship of dependency exists. The case of *Chester Co. Hospital v. Hayden*[43] recognized this principle as applicable to a general legacy for the support of a dependent father. Where the general legacy for the support of minor children or dependent relatives is in the form of a trust with only the income used for this purpose, then the question arises as to whether the gift of the corpus of the trust should also be entitled to a preference over other general legacies. If the legatee receiving the corpus of the trust is not entitled to a preference in his own right, then clearly the corpus should abate pro rata with the other general legacies.[44] But in the *Chester Co. Hospital* case, the Court refused to abate the gift of the corpus along with the other general legacies on the theory that the testatrix, by setting aside a trust fund for the support of her dependent father, had shown an intent to also prefer the gift of the corpus of the trust at the father's death.

Where several preferred general legacies are found in the same will, the problem may arise as to which category of preferred legacies is entitled to preference over other categories. Although authority is scarce, it seems reasonable to assume that the order of preference among preferred general legacies would be as follows: (1) legacies in lieu of dower, (2) legacies to creditors, and (3) legacies for support of dependents.[45] The order of abatement among these preferred legacies after abatement of all other general legacies would be the inverse of the above.

6. *Specific Legacies.* The Act of 1785,[46] making realty subject to simple contract debts of the deceased where the

[41] *Ibid.*

[42] Towle v. Swasey, 106 Mass. 100 (1870) ; In re Neil's Estate, 238 N. Y. 138, 144 N. E. 481 (1924).

[43] 83 Md. 104, 34 A. 877 (1896).

[44] In re Cameron's Estate, 278 N. Y. 352, 16 N. E. 2d 362 (1938) ; Towle v. Swasey, *supra*, n. 42.

[45] Comment, 36 Mich. L. Rev. 297, 310 (1937).

[46] MD. CODE SUPP. (1957), Art. 16, §254.

personalty is found insufficient, clearly recognizes the primary liability of the personal estate for the payment of the debts and costs of the administration in the absence of a contrary intention found in the will. But whether the presence of both specific devises of realty and specific legacies of personalty in the same will shows a contrary intention on the part of the testator to charge both his realty and personalty with the payment of his debts on a pro rata basis, is a question on which courts have reached conflicting conclusions. Several recent cases have taken the position that specific legacies and specific devises should abate proportionally, on the theory that the testator did not intend to show any preference between specific gifts merely because he gave one person realty and another personalty.[47] In the case of *Chase v. Lockerman*[48] this principle was applied and both specific devises and specific legacies were abated proportionally to pay the debts of the estate. However, the Court carefully limited the application of this rule to cases involving specialty debts as distinguished from simple contract debts. Then in the subsequent case of *Dugan v. Hollins*[49] the Court refused to abate the specific devises proportionally with the specific legacies for the payment of simple contract debts, holding that a specific legatee whose chattel was taken to pay simple contract debts could not obtain contribution from the specific devisees but only from the other specific legatees. Finally in the recent case of *Knox v. Stamper*[50] the Court reviewed the earlier cases, and after holding that costs of administration were simple contract debts, held that specific legacies must abate prior to specific devises in order to pay simple contract debts of the estate. To the argument that this defeated the intent of the testator to treat his specific devisees and legatees equally, the Court said that the law was well established in Maryland and that any change would have to be made by legislative action.

The rule that in the case of specialty debts, both specific devises and specific legacies must abate proportionally had its most unusual application in the case of *Addison v. Addison*.[51] In that case the Court held that a general legacy in lieu of dower was entitled to a preference over both specific legacies and specific devises because the widow

[47] Baker v. Baker, 319 Ill. 320, 150 N. E. 284 (1925); Farnum v. Bascom, 122 Mass. 282 (1877).
[48] 11 G. & J. 185 (Md., 1840).
[49] 11 Md. 41 (1857).
[50] 186 Md. 238, 46 A. 2d 361 (1946).
[51] 44 Md. 182 (1876).

stood in the position of a quasi creditor, and then proceeded to abate both specific devises and specific legacies on a pro rata basis on the principle that the testator intended to treat his specific devisees and legatees equally. Why a general legacy to a widow in lieu of dower should be treated as a specialty debt rather than as a simple contract debt was not explained in the case. Thus only in the cases of specialty debts and general legacies in lieu of dower, can the specific devises be abated proportionally with the specific legacies; and since specialty debts expressly binding on the testator's heirs have disappeared from business usages, we can say that specific legacies must abate prior to specific devises in Maryland.

Among the specific legacies, abatement will ordinarily be on a pro rata basis.[52] But the case of demonstrative legacies deserves special consideration. A demonstrative legacy is normally a pecuniary legacy charged against a specific chattel or fund. If the pecuniary amount is payable only out of the specific fund or chattel, then it is merely a specific legacy.[53] But if the intent to have the legacy paid out of general assets, if the specific chattel or fund is insufficient, can be found from the wording of the gift, then it is described as a demonstrative legacy. In other words, if the chattel or fund is merely designated as a primary source for payment, it is demonstrative; but if the chattel or fund is the sole source of payment, it is specific. In cases of abatement a demonstrative legacy abates along with the specific legacies to the extent to which the legacy does not exceed the amount of the fund or value of the chattel.[54] But if the pecuniary amount of the legacy is in excess of the amount of the fund or value of the chattel, or if the fund is no longer in existence, the excess amount is treated as a general legacy and must abate with the general legacies. Where several demonstrative legacies are payable out of the same fund or chattel, there is a double aspect to the problem of pro rata abatement: first, there is the problem of pro rata abatement between the specific legacies and the demonstrative legacies, and secondly, there is the problem of abatement among the demonstrative legatees themselves. As between the specific legacies and the demonstrative legacies abatment must be proportional, but among the demonstrative legatees the question arises as to whether any demonstrative legacy is entitled to a

[52] Sparks v. Weedon, 21 Md. 156 (1864).
[53] Gelbach v. Shively, 67 Md. 498, 10 A. 247 (1887).
[54] Dugan v. Hollins, *supra*, n. 49; Braden v. Coale, 165 Md. 150, 166 A. 730 (1933).

preference over the other demonstrative legacies on the same basis of priority as applied among general legacies. This question was raised in the case of *Matthews v. Targarona*[55] where five demonstrative legacies were charged against a single specific fund. The Court indicated that the fact that a specific fund was set aside to pay these five legacies showed an intention to treat all equally, and that the very nature of demonstrative legacies as being specific refuted any intention of the testator to have one preferred over the others. Therefore demonstrative legacies whether charged against a single fund or separate funds should abate among themselves as well as with the specific legacies purely on a pro rata basis.

7. *Specific Devises.* This order of abatement leaves specific devises as the last item in a testator's estate to abate to pay debts or costs of administration. As pointed out, only in the case of specialty debts expressly binding on the heirs and general legacies in lieu of dower, can specific devises be required to abate proportionally with the specific legacies. But among themselves specific devisees are required to contribute toward the payment of debts on a pro rata basis the same as among the specific legatees.

DEPLETION THE RESULT OF WIDOW'S RENUNCIATION

In addition to the three situations previously discussed where the decedent's estate is insufficient to carry out his testamentary scheme of distribution, a fourth situation frequently arises from the action of the surviving spouse in renouncing the will and electing to take as a statutory heir.[56] This situation differs from the other three in two respects: first, the assets are still there to carry out the testator's testamentary scheme, but the surviving spouse has elected to disregard his desires and to upset his plans; and secondly, in most cases the surviving spouse by renouncing the will has also renounced a beneficial interest provided for her in the will, thereby creating undisposed of property.

When this situation exists, the first question arising is the effect upon the other dispositions of the surviving spouse's election to take as a statutory heir.[57] The setting

[55] 104 Md. 442, 65 A. 60 (1906).

[56] MD. CODE (1951), Art. 93, §325.

[57] Under the Code, *ibid*, the surviving spouse may elect to take common law dower in the realty plus a statutory share in the personalty; but since a dower interest in realty is only for life while a statutory share is abso-

up of this statutory share may be handled in one of three ways: (1) The statutory share may be treated as a debt of the estate similar to the Federal Estate Tax and the devises and legacies abated under the established order of abatement for the payment of debts.[58] Under this treatment the residuary legacy and devise may be exhausted while the specific legacies and devises are exonerated. (2) The order of abatement to pay debts may be entirely disregarded and all devises and legacies required to contribute on a pro rata basis.[59] Under this rule specific legacies and devises must be abated proportionally with the residuary legacy and devise. (3) The election to take a statutory share may be treated as a loss by operation of law falling upon all the assets of the estate, similar to a fire or act of God. Under this theory the surviving spouse will take as a tenant in common in all the specific realty and chattels and a share of the money.

The earliest Maryland case[60] adopted this last theory of treating the renunciation and election as a loss by operation of law. Subsequent cases[61] took the same position until the case of *Marriott v. Marriott*,[62] where the Court appeared to apply the order of abatement rule so that both specific legacies and pecuniary legacies were exonerated from loss at the expense of the residuary legatee. However, the effect of this case is greatly weakened by the fact that in a subsequent case[63] the Court repeated the rule applied in the earlier cases without even recognizing the *Marriott* case as being inconsistent in language. Under this rule of treating the renunciation and election as a loss by operation of law, the surviving spouse takes her statutory share in kind,[64] that is, she becomes vested with the legal title to each specific piece of realty and each specific chattel as a tenant in common, and in addition takes from the liquid assets such as money a statutory share. The effect upon specific legatees and devisees is to make them tenants in common with the surviving spouse, thus depriving them of the

lute, the usual election will be a statutory share in both realty and personalty. Only if the estate was subject to large debts, would the surviving spouse obtain an interest in the realty of greater financial value by electing to take common law dower.

[58] Lewis v. Sedgwick, 223 Ill. 213, 79 N. E. 14 (1906).

[59] In re Povey's Estate, 271 Mich. 627, 261 N. W. 98 (1935).

[60] Darrington v. Rogers, 1 Gill 403 (Md., 1843).

[61] Devecmon v. Kuykendall, 89 Md. 25, 42 A. 963 (1899); Mercantile Trust Co. v. Schloss, 165 Md. 18, 166 A. 599 (1933).

[62] 175 Md. 567, 3 A. 2d 493 (1939).

[63] Webster v. Scott, 182 Md. 118, 32 A. 2d 475 (1943).

[64] Kuykendall v. Devecmon, 78 Md. 537, 28 A. 412 (1894); Mercantile Trust Co. v. Schloss, *supra*, n. 61.

priority that their specific devise or bequest would have had over general legatees and residuary devisees and legatees in abatement to pay debts.[65] On the other hand, pecuniary general legacies are payable out of the general assets of the estate; so if there remains in the residuary portion of the estate sufficient funds to pay all of these legacies, then the general legacies are paid in full at the expense of the residuary legatee or devisee.[66] Thus, this rule of treating the surviving spouse's renunciation and election as a loss by operation of law has the effect of throwing the loss upon the specific legatees and devisees, along with the residuary legatee and devisee, while exonerating the general legacies from the loss, provided the general assets remaining in the residue are sufficient to satisfy these general legacies in full.

In the usual situation where the surviving spouse renounces the will and elects to take as a statutory heir, there has been a devise or bequest in the will to such spouse which is thereby annulled. This raises the problem of the proper disposition of that portion of the estate which has been renounced. Of course, an aliquot share of this property, as well as all other property of the testator, becomes part of the surviving spouse's statutory share. But there may still remain a portion which is not disposed of by the will. Where a devise or bequest fails, the rule followed in most states is to treat such property as part of the residue. But, as previously pointed out, in Maryland realty subject to a void or failing devise passes as intestate realty,[67] while personalty under the same circumstances will fall into the residuary legacy. Therefore, any realty renounced by the surviving spouse and not included in her statutory share should become intestate realty, while personalty would become part of the residue. However, these principles are usually found inapplicable because of the application of the doctrine of acceleration of remainders and the principle of sequestration. In most wills where the widow has been dissatisfied with her husband's disposition for her benefit and has renounced the will, it has been because her share had been set up as a trust for life rather than an absolute interest. Thus, by renouncing the will she has been able to avoid the trust and obtain an

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[65] Devecmon v. Kuykendall, *supra*, n. 61; Mercantile Trust Co. v. Schloss, *supra*, n. 61; Webster v. Scott, supra, n. 63.

[66] Read v. Maryland Gen'l. Hospital, 157 Md. 565, 146 A. 742 (1929). The same conclusion is implicit in the case of Mercantile Trust Co. v. Schloss, *supra*, n. 61.

[67] *Disposition of Void and Otherwise Failing Devises in Maryland*, 2 Md. L. Rev. 142 (1938).

absolute interest. In all such cases we run into the accepted Maryland rule that renunciation of a life estate is equivalent to death, so as to accelerate the remainderman's interest, provided the remainder is capable of accelaration.[68] As contrasted with this doctrine, Maryland also has accepted the principle that where the renunciation and election by the surviving spouse has disarranged the provisions of the will so as to disappoint the other legatees and devisees, the renounced property should be sequestered and used to alleviate the loss suffered by the other legatees and devisees.[69]

This conflict between the principle of acceleration of the remainder, where a life estate has been renounced, and the equitable principle of sequestration of the renounced interest has caused considerable confusion in the Maryland cases as well as in other states. The American Law Institute has attempted to formulate a set of rules to be applied to determine when sequestration should be applicable.[70] These rules rest upon the hypothesis that if the surviving spouse's renunciation and election causes "substantial distortion" among the other testamentary dispositions, sequestration should be applied; but if no "substantial distortion" takes place, then acceleration of the remainder should normally follow. An examination of the Maryland cases discloses that sequestration was applied in several to avoid a "substantial distortion". In *Hinkley v. House of Refuge*[71] the remainder following the widow's life estate was to be distributed to the testator's grandchildren and his sister, but only after payment of large pecuniary legacies to charities. By the renunciation and election the corpus of the remainder was reduced one-third in amount, although the pecuniary legacies were still payable in full. This resulted in "substantial distortion" between the pecuniary legatees and the remaindermen. The Court, therefore, to alleviate this loss of one-third of the corpus, sequestered the widow's life estate in the two-thirds remaining and directed that the income for the widow's life be added to the corpus in order to rebuild that fund before the pecuniary legacies became payable. Then in the case of *Mer-*

[68] Cockey v. Cockey, 141 Md. 373, 118 A. 850 (1922); Safe Dep. & Tr. Co. v. Gunther, 142 Md. 644, 121 A. 479 (1923).

[69] Hinkley v. House of Refuge, 40 Md. 461 (1874); Mercantile Trust Co. v. Schloss, *supra*, n. 61; Dowell v. Dowell, 177 Md. 370, 9 A. 2d 593 (1939).

[70] RESTATEMENT, PROPERTY (1936), §234, and 1948 Supp. 459. See monograph in Appendix: *Aspects of the Law of Acceleration and Sequestration*, *ibid*, Ap. 48.

[71] *Supra*, n. 69.

cantile Trust Co. v. Schloss[72] the Court again applied the sequestration doctrine. There the widow renounced a life estate and elected to take one-half as statutory heir. This election operated to take half of a tract of land which was the subject of a specific devise. Here both the specific devisee and the remaindermen lost one-half of their dispositions, but acceleration would give the remaindermen the additional sum of the income on the remaining half of the residue during the widow's lifetime, while the specific devisee would still lose one-half of the tract of land. Considering this result a "substantial distortion", the Court applied the principle of sequestration by reimbursing the specific devisee for the value of land lost to the widow out of the corpus of the trust estate remaining and then applying acceleration for the remaindermen's benefit. The case of *Dowell v. Dowell*[73] is similar to the *Mercantile Trust Co.* case in that specific devisees and legatees lost one-third of their dispositions by the widow's renunciation and election. The Court refused to accelerate the remainder following the widow's renunciation of a life interest in a trust fund, but sequestered the income during the widow's life to reimburse the specific devisees and legatees for their losses. These cases clearly indicate that where "substantial distortion" results from the renunciation and election or will result from applying acceleration, the equitable principle of sequestration will be interposed to alleviate this distortion.

The application of sequestration to a renounced life estate can be carried out by several legal devices. The one most commonly used is to continue the trust for the life of the surviving spouse in the portion not used to satisfy her statutory share and sequester the income for the benefit of those legatees and devisees suffering excessive losses. This was the device used in the *Hinkley* case and the *Dowell* case, and is the machinery recommended in the Restatement of Property.[74] Another method of accomplishing sequestration is to determine the present value of the renounced life estate in the property remaining in the trust, deduct that from the corpus of the trust, and then accelerate the remainder. This was the machinery used in the *Mercantile Trust Co.* case where the amount sequestered was only a small portion of the actual present value of the renounced life estate. This second method should always be used where the amount to be sequestered is less than

[72] 165 Md. 18, 166 A. 599 (1933).

[73] *Supra*, n. 69.

[74] *Op. cit.*, *supra*, n. 70, §235, comment a.

the present value of the renounced life estate, so that acceleration can be permitted as to the excess valuation. Also it has the advantage of closing the estate immediately by terminating a trust whose principal purpose is no longer possible of accomplishment, namely, keeping the property from the absolute control of the surviving spouse.

In contrast to the above cases where the principle of sequestration has been applied so as to reduce the "substantial distortion" caused by the surviving spouse's renunciation and election, we find several Maryland cases where sequestration was denied and acceleration of the remainder took place. Three of these cases can be justified on the grounds that the renunciation and election did not cause a "substantial distortion" among the testamentary dispositions and therefore sequestration was not necessary to effectuate the testator's intent. In *Cockey v. Cockey*[75] the only question before the Court involved the acceleration of a vested remainder following the renounced life estate of the widow. Since this vested remainder was limited to one child only, with executory devises over to the other children in case that child died before the widow, the renunciation and election caused no distortion among remaindermen. Acceleration of the remainder had the effect of compensating this sole vested remainderman for loss of one-third of the corpus. The case does not disclose whether there were any other dispositions to the other children in the will that were distorted by the renunciation and election. The case of *Safe Dep. & Tr. Co. v. Gunther*[76] involved a residuary legacy to the widow for life followed by a remainder to the testator's four children in equal shares. Renunciation by the widow caused no distortion among these remaindermen, and acceleration benefited all equally. The case does disclose other dispositions in the will to these same four children, but they were minor in amount compared with the residuary estate, and also the dispositions were relatively equal in value so that the renunciation and election caused no "substantial distortion" among the legatees in respect to these other dispositions. Only in the case of *Davis v. Hilliard*[77] has it been argued that "substantial distortion" resulted from the renunciation of a life interest and election of a statutory share, yet acceleration was allowed.[78] However, a careful examination of the case

[75] *Supra*, n. 68.

[76] *Supra*, n. 68.

[77] 129 Md. 348, 99 A. 420 (1916).

[78] *Op. cit., supra*, n. 70. Appendix: *Aspects of the Law of Acceleration and Sequestration*, Ap. 69-70, fn. 36, lists this case as contrary to the "substantial distortion" test.

discloses no "substantial distortion" resulting from the renunciation and election followed by acceleration of the remainder. The will grouped the objects of the testator's bounty other than his widow into two classes: first, his children, and second, his grandchildren. As for his children he set up life annuities payable out of the income of the trust, and then provided for equal distribution among his grandchildren of the corpus at age 30. The widow's renunciation did not affect the children so long as sufficient assets remained in the trust to pay their life annuities, and the acceleration of the remainder benefited all the grandchildren equally. So clearly sequestration was entirely unnecessary as no "substantial distortion" existed.

The only Maryland case denying the doctrine of sequestration, where "substantial distortion" resulted from the widow's renunciation and election, was the case of *Darrington v. Rogers*,[79] the first case in Maryland involving this conflict between the principle of acceleration and the doctrine of sequestration. In that case the testator divided his entire estate into moieties, one to be held in trust for the widow during her life with remainder to his children, and the other moiety in trust for other relatives. The widow renounced the will and elected to take an absolute interest in one-third of the estate. The Court upheld the action of the lower court in deducting the widow's one-third before dividing the estate into moieties, and in accelerating the moiety to the children. Under this holding the widow's renunciation resulted in a loss of one-third to both moieties, so a "substantial distortion" resulted to these other relatives to whom one-half of the estate had been bequeathed. The Court treated this loss to these other relatives as one suffered by operation of law, and then accelerated the remainder to the testator's children, so that they received the remaining two-thirds of their moiety immediately rather than the entire one-half of the estate at the widow's death. If the widow had a long life expectancy then the children gained by her renunciation and the acceleration, since two-thirds of the moiety immediately would be of greater value than the entire moiety at her death. Here a "substantial distortion" resulted under the rules of the Restatement of Property,[80] and sequestration of the widow's renounced life estate in the children's moiety was in order to alleviate the loss to the other relatives of one-third of their moiety. It should be noted that this was the

[79] 1 Gill 403 (Md., 1843).
[80] RESTATEMENT, PROPERTY (1936), §234, comment l.

first case in Maryland involving this problem, and that the doctrine of sequestration, as applied in renunciation and election cases, had not at that time been developed by the Court of Appeals.

Where acceleration of the remainder is allowed in cases of renunciation of the life estate, there may arise a question as to the effect of acceleration on contingent interests of third parties in the remainder. This problem arises where the interest of the remainderman is vested, but not indefeasibly vested, *i.e.*, vested subject to opening or vested subject to defeasance. Where the period, during which the vested remainder is to remain subject to opening or subject to defeasance, is the period of the renounced life estate, then the question arises as to whether the renunciation of the life estate and the acceleration of the remainder cut off these contingent interests as effectively as if the life tenant had in fact died. This question has been considered in several Maryland cases,[81] and in each instance the Court held that the act of renunciation was equivalent to death so that the acceleration of the remainder had the same effect as if the life tenant had in fact died. Thus, any contingent future interests, that were contingent upon events to occur during the life estate, were effectively cut off. This rule is justified on the theory that the testator only intended the remainderman's interest to remain subject to opening or defeasance while he was out of possession, and that when his possession commenced, whether through death of the life tenant or by renunciation, the testator intended the possession of the remainderman to be absolute and indefeasibly vested from then on.

In all of the cases discussed above, the renounced disposition of the surviving spouse was a life interest, and therefore the problem of sequestration was intermingled with the problem of acceleration of the remainder. Where the renounced disposition is an absolute interest rather than a life estate, then the sole problem is whether to apply the doctrine of sequestration so as to avoid a "substantial distortion" or allow the renounced property to fall into the residuary clause or pass as intestate property. In the case of *Kuykendall v. Devecmon*[82] the widow renounced certain specific devises and legacies as well as a one-third interest in the residue and elected to take one-third of the entire estate. She was awarded a one-third interest in kind

[81] Randall v. Randall, 85 Md. 430, 37 A. 209 (1897); Cockey v. Cockey, 141 Md. 373, 118 A. 850 (1922).

[82] 78 Md. 537, 28 A. 412 (1894). See also the sequel in Devecmon v. Kuykendall, 89 Md. 25, 42 A. 963 (1899).

in all devises and legacies, including a one-third interest in a specific devise of realty to a nephew. The Court refused to sequester the renounced dispositions so as to alleviate the loss to the nephew, but held that the renounced dispositions passed as part of the residuary clause. A "substantial distortion" certainly resulted to the nephew, but the Court repudiated the sequestration doctrine with the argument that the widow's act of renunciation defeated the testator's plan, and any property renounced must be treated as either part of the residue or as intestate property. The only justification for this decision lies in the fact that the resulting "substantial distortion" was in favor of the testator's only child, the natural object of his bounty. Likewise, in the case of *Webster v. Scott*[83] a "substantial distortion" resulted from the husband's renunciation of the testatrix's will which provided for a pecuniary general legacy to the husband, yet the Court failed to sequester this renounced pecuniary legacy to alleviate the loss suffered by a specific devisee and legatee. It should be noted that the reason given for failing to sequester this pecuniary legacy was the fact that there were no assets in the residue to pay this renounced general legacy, because other general legacies exceeded the total general assets of the estate. The Court failed to realize that this renounced general legacy to the husband could have been considered as being entitled to a pro rata share of the general assets along with the other general legacies, and therefore to that extent it could have been sequestered to reimburse the specific devisee and legatee for his loss from the renunciation.

On the whole, it appears from the decided cases that the Court of Appeals recognizes the equity of the sequestration doctrine where a "substantial distortion" of the testator's plan of distribution has arisen through the renunciation and election of the surviving spouse. Where there are no assets available in the renounced disposition, then the doctrine can not be applied; but where such assets are available, they should be sequestered to reimburse the specific devisees and legatees for their losses. If no "substantial distortion" resulted, then sequestration is not needed; but where "substantial distortion" is recognized, the doctrine will usually be applied to re-establish the testator's plan. The failure of the Court to apply sequestration in a few of these latter cases has resulted from the failure of counsel to properly argue the issue. With the aid of the

[83] 182 Md. 118, 32 A. 2d 475 (1943).

rules set out in the Restatement of Property,[84] it is believed that in the future the Court of Appeals will apply the doctrine of sequestration in all cases where a "substantial distortion" has resulted from the renunciation and election of the surviving spouse, whether the renounced interest is an absolute estate or a life interest.

Conclusion

In the case of abatement of legacies and devises to pay debts and costs of administration, the present Maryland order of abatement probably effectuates the testator's intent in most instances. A testator usually contemplates the possibility of debts; and when he makes a specific devise or bequest, he probably contemplates a priority in its satisfaction; and likewise, when he devises or bequeaths the residue of his estate, he is probably contemplating the payment of debts and costs from this residue. But where a testator makes specific devises of realty and specific bequests of personalty, there is little justification for the rule that abates the specific legacies before abating the specific devises. The average testator in such a circumstance probably desires his specific devisees and legatees to be treated equally. The same can probably be said of a testator who inserts separate clauses disposing of his residuary realty and his residuary personalty to different persons. He probably doesn't contemplate the exhaustion of his residuary personalty in paying debts to the exoneration of his residuary realty. A more realistic interpretation of the testator's intent would result if the act of 1785[85] were amended to make real property of a decedent subject to the claims of all types of creditors on the same basis as personal property, where such real property is disposed of by the terms of a will. Such an amendment would adopt the modern order of abatement making specific devises and specific legacies abate on a pro rata basis, thus effectuating the desires of the average testator. Also it would make a separate residuary devise abate with the residuary legacy on a pro rata basis.

On the other hand, the depletion of the testator's estate by the renunciation and election of the surviving spouse was probably not contemplated by the testator, so there is little justification for applying the order of abatement as in the payment of debts. The Maryland rule of treating

[84] *Op. cit., supra*, n. 80, §234, and 1948 Supp. 459.

[85] MD. CODE SUPP. (1957), Art. 16, §254.

this as a loss by operation of law is simple of operation, but its application may result in a "substantial distortion" of the testator's scheme of distribution. If equity will exercise its power of sequestration over the renounced interest, this distortion can be greatly reduced. Great flexibility exists in the equity court under this doctrine, but this is probably more desirable than the arbitrary application of the Maryland order of abatement to these cases. It should be noticed that the application of the doctrine of sequestration, whereby the specific legatees and devisees are reimbursed for their losses, tends to reach the same result that would be reached if the Maryland order of abatement had been applied. However, the very fact that flexibility exists permits the equity court to exercise its discretion in applying sequestration both as to amount and procedure. Thus, the testator's plan of distribution can be carried out on a modified scale with little distortion between the types of legacies and devises.

PROBATION IN THE CRIMINAL COURT OF BALTIMORE CITY

By H. B. MUTTER*

Probation is an outgrowth of the common-law practice of the suspended sentence which, in turn, probably had its origin in some ancient and medieval practice of amnesty or grace; *e.g.*, "benefit of clergy", "right of sanctuary", and "judicial reprieve".[1] The institution of probation in our modern system of criminal jurisprudence implements our present day theory of correction. Management of a criminal has always posed a dilemma in regard to the ultimate end to be accomplished. "Correction" has taken on many motives throughout history, but it suffices to say that our present day thinking on the subject puts new emphasis on the redemption of the individual.[2] Underneath it all, society will eventually be the real beneficiary if the individual is benefited so that he becomes a useful member of society rather than an habitual criminal.[3] Probation plays a most important role in the field of crime control and correction, and it can be said that probation is a non-punitive method of treating criminal offenders within the framework of a system, which, in general, is punitive.[4] Statutory authorization for probation is a departure from strict adherence to law, since constitutionally, there is no right to probation, and a prisoner cannot insist on terms or strike a bargain.[5] The granting of probation, aside from being an act of clemency extended to one who has committed a crime, is also in substance and effect a bargain made by the people, through legislation and courts, with the malefactor.[6] A broader definition of probation might be stated as follows:

> "Probation is the status of a convicted offender during a period of suspension of the sentence in which he is given liberty conditioned on his good behavior and in

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[1] BARNES AND TEETERS, NEW HORIZONS IN CRIMINOLOGY (1951), 758-775. Also see ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES (1939), Volume 2, Ch. I.

[2] See TAPPAN, CONTEMPORARY CORRECTION (1951 ed.), 3-17; see also STRAHORN, PROBATION, PAROLE, AND LEGAL RULES OF GUILT, 26 J. Cr. Law and Cr. (1935) 168.

[3] People v. Molz, 415 Ill. 183, 113 N. E. 2d 314 (1953).

[4] SUTHERLAND, PRINCIPLES OF CRIMINOLOGY (4th ed.), 381-411.

[5] *Supra*, n. 3.

[6] People v. Johnson, 134 Cal. App. 2d 140, 285 P. 2d 74 (1955).

which the state by personal supervision attempts to assist him to maintain good behavior",[7]

or:

"[Probation is] to provide an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement under the tutelage of a probation official and under the continuing power of the Court to impose institutional punishment for his original offense in the event that he abuse this opportunity."[8]

The terms *probation* and *parole*, although dealing in the same area, are not one and the same.[9] There exists an important and definite distinction between the two, in that probation is afforded to an individual without his having to suffer incarceration, and parole is afforded to an individual who has suffered a period of incarceration; the former is a judicial power while the latter is an executive or administrative power. Both, however, are intended to be a means of restoring offenders who are good social risks to society and to afford the unfortunate another opportunity by clemency.[10]

The first probation law in this country was passed in Massachusetts in 1878, but the practice of probation was carried on informally much earlier. It is noted that as early as 1831, a member of the Boston judiciary, Judge Peter O. Thatcher, placed young offenders under supervision without incarceration. But perhaps probation as we know it can probably be attributed to John Augustus, a shoemaker in Boston who informally began probationary services.[11] Many other states soon followed the New England beginning and passed similar statutes. Maryland became the second state to adopt the principle and philosophy of probation.[12] In 1894, the Maryland legislature passed an act authorizing the Criminal Courts of the state to suspend sentence and release offenders upon such terms as the Court might deem proper.[13] This act, however, created no probation department to oversee supervision of released offenders. Hence, judges were compelled to impose upon

[7] *Supra*, n. 4.
[8] Roberts v. United States, 320 U. S. 264, 272 (1943). Parenthetical material supplied.
[9] See Strahorn, *supra*, n. 2.
[10] Korematsu v. United States, 319 U. S. 432 (1943).
[11] *Op. cit, supra*, n. 1.
[12] Stuckert, Report of the Probation Department of the Supreme Bench for the Decade: 1929-1938.
[13] Ch. 402, Acts of 1894.

the hospitality and good offices of the Prisoners Aid Association to supervise the conduct of persons released on probation. However, in 1931, the Supreme Bench of Baltimore City recommended legislation to establish a probation department under the management of and responsible to the Supreme Bench; the recommended legislation was adopted by the passage of Chapter 132, Acts of 1931.[14] Authorization for the Probation Department of the Supreme Bench of Baltimore City can presently be found in the Charter & Public Local Laws of Baltimore City (Flack, 1949), Sections 276-288. The department, headed by a Director of Probation, is administratively divided into two parts, consisting of the Domestic Relations Division — dealing with cases of non-support, bastardy, alimony, and the like, and the Criminal Division — dealing with general criminal cases in the narrow sense. This article is limited to a discussion of that latter division.

The Criminal Division of the Probation Department of the Supreme Bench of Baltimore City provides services for investigation and supervision of offenders appearing in the three parts of the Criminal Court of Baltimore City, with special emphasis on the Youth Court (Part III). Presently, the personnel of the Criminal Division consists of two court representatives, present throughout all Youth Court sessions, six investigating officers, and nine supervising officers, with offices located in the Baltimore City Court House. The staff of the department is appointed by the Supreme Bench, being selected after competitive examination.

Investigation, an essential and important function of any probation department, provides background material from which the judiciary may gain insight and better understanding of a criminal case, so as to permit "justice" under the circumstances. Embodied in all investigation reports is certain basic background data: *e.g.*, family history, employment record, educational achievements, previous criminal record, etc. The report also contains, as well as a narrative summary of the background data, circumstances of the instant offense and individual observations, concluding in a recommendation or suggestion as formulated by the investigating officer.[15] Very often, in conjunction with probation investigations, the Medical Department of the Supreme Bench will submit psychiatric or general reports,

[14] Report of the Supreme Bench of Baltimore City for the year ending January, 1931.

[15] ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES (1939), Chs. V and VI.

thus making more technical information available to the Court. Needless to say, this added service to the Court is of utmost importance, and rounds out the scope of investigatorial services.

Investigations are made only at the discretion of the Court and are not binding as to the judgment in a particular case.[16] Formal written investigations are essentially divided into three types: Pre-Trial, Pre-sentence, and Post Sentence. It should be noted that the Pre-Trial Investigation is limited in use and only recommended in special circumstances;[17] *e.g.*, where agreement is made between defense counsel and the Court that a plea of guilty will be forthcoming; the basic reason, among others, for such limited use should be clear, for under our principles of criminal jurisprudence, the facts incidental to the commission of a crime have no bearing on the finding of a verdict. In some instances, investigations are done orally where the Court is desirous of a speedy disposition, and in such situations, the Court representatives of the probation department make an "on the spot" investigation, usually, the same day of the trial. This latter type of inquiry is necessarily quite limited in scope. From time to time, the Court may require information concerning some specific facts; *e.g.*, a probation officer may be directed to investigate and report on the physical conditions of an area where an alleged crime has occurred.

To assist in the investigation of criminal cases, officers undertaking this duty can utilize legal processes, such as the *subpoena duces tecum,* to aid them in procuring information from sometimes reluctant sources. Completed investigations and, as a matter of fact, all information and records of the probation department, are given quasi-judicial protection by way of privilege.[18]

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[16] People v. Molz, 415 Ill. 183, 113 N. E. 2d 314 (1953).

[17] In 1956, 12 Pre-Trial Investigations were made as compared to 340 Pre-Sentence Investigations and 55 Post Sentence Investigations.

[18] §281 of the CHARTER AND P. L. L. OF BALTIMORE CITY (Flack, 1949), provides in part that:

> "All information and data obtained in the discharge of official duty by any probation worker or appointee of the Supreme Bench serving in the Probation Department, from whatsoever source the same shall be obtained shall be privileged information and shall not be receivable as evidence in a tribunal or court . . . and shall not be disclosed directly or indirectly outside the membership of the Probation Department in the discharge of his official duties to any one other than to a member or members of the Supreme Bench of Baltimore City, unless and until otherwise ordered by the Supreme Bench of Baltimore City or by any member thereof."

It is the general opinion of members of the Supreme Bench that information in the possession of the probation department should not be used in any collateral issue.

The question of "Due Process of Law" in reference to probation investigation has often arisen,[19] but probably the Supreme Court of the United States has cleared up this problem to a large extent by holding, in recent litigation, that a conviction is not void under the "Due Process" clause solely by reason of the fact that the Court before imposing sentence had considered additional information obtained through the Court's probation department and through other sources.[20] Justice Black, speaking for the majority, stated that under the practice of individualizing punishments investigational techniques have been given an important role. Probation workers making reports of their investigation have not been trained to prosecute but to aid offenders. Their reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guess work and inadequate information. Justice Murphy, in the dissent, held that the lower court's decision had deprived a man of life in reliance on material made available to it on probation reports consisting almost entirely of evidence that would have been inadmissible at the trial — irrelevant facts, records of other crimes, and hearsay evidence, none of which had been subject to the scrutiny of the defendant. Authority also has it, that where the judge proceeds to fix a sentence in a criminal case, after a plea of guilty or verdict of guilty, his inquiry is not limited by the rules applicable to a jury trial, and he may consider circumstances that should effect a mitigation or aggravation of the penalty.[21]

The Maryland Court of Appeals has also ruled recently in this area and has held that after a conviction, the Court could exercise a broad discretion in the use of evidence to assist it in determining the kind and extent of punishment to impose within the limits fixed by law. Before imposing a sentence, a judge may consider information concerning a person's reputation, past offenses, health, habits, mental and moral propensities, social background, and any other matters that a judge ought to have before him in determining the kind of sentence that should be imposed. Also, information, which might influence the Court's judgment, obtained in a pre-sentence investigation but not received from the defendant himself or not given in his

[19] See Rubin, *Probation & Due Process*, Focus Magazine, Vol. 31, No. 2 (1952).

[20] Williams v. New York, 337 U. S. 241 (1949).

[21] 1 WIGMORE ON EVIDENCE (3rd ed.) 25, §4(8).

presence should be called to the accused's attention or to the attention of his counsel so that he may be afforded an opportunity to refute or discredit it. The procedure in the sentencing process is not the same as that in the trial process and the sentencing judge may consider information even though obtained outside the courtroom from persons whom the defendant has not been permitted to confront or cross examine.[22] The Judges of the Baltimore City Criminal Court have made it a practice to make available to defense counsel investigation reports, although no copy is given.

The Baltimore City Criminal Court besides having the right to suspend a sentence generally, provides for probation under the following terms: probation before conviction (similar to probation without verdict),[23] conditional suspension of sentence, and probation in the ordinary sense. Probation before conviction is a relatively recent innovation intended to bring legal and social philosophy closer together in the area of rehabilitation of criminal offenders. The practice has been to provide the aforementioned type of probation to individuals whom the Court feels are deserving of some protection from the stigma of a criminal record. However, in receiving this probation, the individual "consents" to abide by such conditions as those imposed in probation in the ordinary course.[24] It is important to note that probation before conviction is not intended to be a compromise verdict.

The conditional suspension of sentence is utilized where no supervision *per se* is ordered other than the "supervised" collection of some financial obligation: *e.g.*, a fine, court costs, restitution, etc.[25] The manner of payment may be specifically set out in the order or left to the sound judgment of the probation department subject to judicial approval. It might be added that the probation department has an extensive collection and accounting department to facilitate such matters. The order conditionally suspending the sentence contains also the general proviso requiring of the defendant "good behavior". This is distinguished from what might be determined the ordinary rules of probation, where acts less than a conviction of a subsequent offense can amount to a violation of probation, while evidently, it

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[22] Driver v. State, 201 Md. 25, 92 A. 2d 570 (1952). The Court was concerned with a Pre-Sentence Medical Report, but the implication would appear to be the same for Pre-Sentence Probation Reports.

[23] *Supra*, n. 18, §277.

[24] *Ibid.*

[25] The conditional suspension of sentence can be provided for other purposes; *e.g.*, exile requirements, but they would not fall within the purview of the jurisdiction of the probation department.

would appear, only a subsequent offense could breach the "good behavior" clause.[26]

Probation in the ordinary sense, as distinguished from probation before conviction, is received by an offender after a verdict or plea of guilty has been entered, and the imposition of sentence is suspended. The defendant is thereafter placed in the custody of the probation department for supervision during the term specified. There apparently exists no right to place a defendant under an order of an indefinite period of probation,[27] and in conformity with this rule, Section 279 of the Charter and Public Local Laws of Baltimore City (Flack, 1949), provides that the period of probation shall not exceed the maximum sentence of imprisonment to which such person may be sentenced on any count of the indictment or charge with which he stands accused, or, in any case, the period of probation shall not exceed five years. Extensions of the original period of probation, also authorized by the aforementioned statute, may be accomplished by petitioning for such extension, with the reasons therefore set out in the petition. The practice for securing such an extension has been by the submission of a petition to the Court by a probation officer without requiring the appearance of the defendant. Some comment has been made that the defendant should be allowed to appear and represent his position on such an extension. But, in most instances, the extensions are applied for in behalf of the defendants; *e.g.*, to provide for further time to enable compliance with an order requiring payment by way of restitution. However, the noted comment might be applicable where the extension is sought counter to the defendant's wishes.[28]

The next question that presents itself concerns the period within which a Court may suspend a sentence and place a defendant on probation. In 1942, Judge Eugene O'Dunne wrote an extensive opinion, in the case of *State v.*

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[26] See State v. Hardin, 183 N. C. 815, 112 S. E. 593 (1922), and cited in State v. Millner, 240 N. C. 602, 83 S. E. 2d 546 (1954).

[27] See Horton v. United States, 151 F. 2d 406 (5th Cir., 1945).

[28] §278 of the CHARTER & P. L. L. OF BALTIMORE CITY, *supra*, n. 18, provides that after notice to the probationer and the full opportunity to be heard, the Court may alter, enlarge, modify or change any condition of suspension of sentence or probation. §279 of the same act provides that the Court, from time to time may continue to extend the period of probation and suspension of sentence. This latter section makes no mention of the right to notice and a hearing when probation is extended.

However, from the reasoning in the case of Palumbo v. Pepersack, *The Daily Record*, Jan. 7, 1957, it could be implied that §278 is broad enough to provide authorization for notice and hearing upon application for a change in the original order of probation.

Pettis and Smith,[29] in justification of his reduction of a sentence after the term of Court in which such sentence had been rendered had expired. Eight years later, however, the Court of Appeals in *Czaplinski v. Warden,*[30] ruling on this problem, held that the power of a criminal court to modify its sentence expires at the end of the term of court in which rendered. In *dictum,* it was inferred that an attempt to modify a sentence after the term of court had expired would be an invasion of the parole power of the Executive.[31] As a result of this decision, the Maryland legislature in 1951 passed a law (Sec. 277) providing that the judges in the Criminal Court of Baltimore City may at any time before the expiration of sentence *suspend such sentence* and provide for probation.[32] A rule was proposed to the Court of Appeals in the same year and provided that a *criminal sentence may be reduced* within thirty days (changed to ninety days in 1952) after the sentence was imposed, but [by Sec. (d)] that such rule should not limit the power of the Criminal Court of Baltimore under Section 277 as amended by the Laws of 1951.[33] However, in adopting this rule, the Court of Appeals left out Section (d).[34] Even in the absence of the deleted provision, however, in accordance with generally accepted rules of construction, by holding that a suspension of sentence is not a reduction thereof, the two may be resolved to be not in conflict.

The problem then arises as to whether section 277 of the Charter and Public Local Laws of Baltimore City (Flack, 1949), as amended by Chapter 529 of the laws of 1951, is

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[29] *The Daily Record,* May 26, 1942.

[30] 196 Md. 654, 75 A. 2d 766 (1950).

[31] Federal authority also has it that after a sentence has been imposed and a defendant has begun serving his sentence, he is under the control of the executive branch of the government and the judicial branch should thereafter not attempt to exercise power properly exercised by the parole board. Mann v. United States, 218 F. 2d 936 (4th Cir., 1955).

[32] MD. LAWS 1951, Ch. 529, amending §277. The preamble to this statute stated as follows:

> "WHEREAS, the Court of Appeals of Maryland recently held in the case of State ex rel. Czaplinski v. Warden, 75 A. (2) 766, that the power of a Criminal Court to modify sentence in criminal cases expires with the end of the term of court in which rendered, and the decision has cast doubt upon the authority of the Criminal Court of Baltimore City to suspend sentence and grant probation to offenders after the lapse of the term, and
>
> "WHEREAS, it is desirable in the opinion of the legislature that the Judges of the Criminal Court of Baltimore shall have the power and authority . . ."

[33] See, Seventh Report of the Standing Committee on Rules of Practice and Procedure of the Court of Appeals of Maryland, June 12, 1951, and draft of Rule thereto attached.

[34] *The Daily Record,* July 2, 1952, now Maryland Rules of Procedure (1956), Rule 744(c).

violative of the principle of separation of powers, in light of the dictum in *Czaplinski v. Warden.*[35] In view of section 60 of Article III of the Maryland Constitution, the answer would appear to be in the negative.[36]

The general rules governing the conduct of offenders placed on probation are of standard form as decided upon by the Supreme Bench of Baltimore City and are as follows:

1. The defendant shall report to his probation officer as directed.
2. The defendant shall not leave the City of Baltimore without consent of the Court, nor change his address within the city without first obtaining the approval of his probation officer.
3. The defendant shall maintain regular employment and (when applicable) adequately support his dependents.
4. The defendant shall conduct himself in a law-abiding manner and shall avoid places and associations of an undesirable character.
5. The defendant shall report in response to any notice served upon him by the probation department or the police department.
6. The defendant shall make the following payments (when applicable).[37]

In addition to the above-stated general conditions, the Court has the authority to provide for additional requirements where and when necessary; *e.g.*, abstinence from alcohol, psychiatric treatment, etc.[38] The Court may also alter, modify, or change any condition of the suspended sentence or probation during the course of supervision.[39]

A criminal offender is not entitled to release on probation as a matter of right but such decision rests in the

[35] *Supra*, n. 30, 664.

[36] The constitutional provision is as follows:

"The General Assembly of Maryland shall have the power to provide by suitable general enactment (a) for the suspension of sentence by the Court in criminal cases; (b) for any form of the indeterminate sentence in criminal cases, and (c) for the release upon parole in whatever manner the General Assembly may prescribe, of convicts imprisoned under sentence of crimes."

[37] A fine, court costs, and restitution are examples of financial obligations collectible under the probation order.

[38] CHARTER AND P. L. L. OF BALTIMORE CITY (Flack, 1949), §277.

[39] *Ibid*, §278.

sound discretion of the Court,[40] and refusal to suspend a sentence is not reviewable except in the case of arbitrary abuse of discretion.[41] The Court in granting probation seeks to provide a deserving individual with another opportunity to adjust in his community, which is afforded with assistance through supervision. Suspension of sentence without supervision, from the theoretical point of view, is not probation.[42] The supervision of a probationer is delegated to a probation officer, whose responsibility it becomes to aid the offender while seeing that the conditions of probation are fulfilled.[43] This is indeed a difficult and sometimes exacting task, requiring sufficient training and experience plus human understanding and tact. A probation officer may be called upon to assist, advise, or solve problems in a multitude of areas; *e.g.*, domestic problems, financial crises, employment and educational problems, etc. He, the probation officer, generally follows a course of supervision best suited to individual circumstances. The expression of the Supreme Court of the United States that probation officers have not been trained to prosecute but to aid offenders,[44] is recognition from the highest court of the land of the task predominant in the minds of these officers. But, this predominant task must sometime give way to a further responsibility; *i.e.*, protection of the community. By and large, a sufficient number of individuals profit from probation, and from a community's point of view, probation has paid for itself. There are those, however, who cannot adjust even with the opportunity of probation, and they must be proceeded against to protect the community.[45] It is on such an occasion that the probation officer must act as a "police agency" for the Court.

The Court, on written charges preferred under oath, of violation of any conditions of probation, may issue a warrant or notice requiring the traverser, probationer, or person accused to be brought before, or appear before said court, to answer such charges of violation.[46] Strikingly enough, there is a conflict among jurisdictions as to whether there exists a constitutional right to notice and hearing

[40] People v. Marks, 340 Mich. 495, 65 N. W. 2d 698 (1954), and State ex rel. Stauffer v. Wright, 192 Md. 715, 64 A. 2d 125 (1949).

[41] Mann v. United States, *supra*, n. 31.

[42] SUTHERLAND, PRINCIPLES OF CRIMINOLOGY (4th ed.) 381-411.

[43] In 1956, 1,257 cases were under supervision and of this figure 700 were new cases received in that year. The 700 new cases were divided as follows: 355 Youths and 345 Adults.

[44] Williams v. New York, 337 U. S. 241, 249 (1949).

[45] In 1956, 83 bench warrants were issued, while 225 police notices were issued.

[46] *Supra*, n. 38, §279.

preceding revocation of probation or parole.[47] Justice Cardozo, speaking for the majority in *Escoe v. Zerbst*,[48] expressly rejected the contention that such a privilege has a basis in the Constitution, apart from any statute.

Also, the question of constitutional right to a hearing has had an uncertain course in Maryland. The Court of Appeals, in dealing with *Wright v. Herzog*,[49] stated that no right to a hearing existed under the statute or the state constitution, unless demanded by due process of law, and held that absent any allegation or showing of arbitrary action by the Governor (the parolee did not deny his violations) no constitutional violation existed. The Court indicated that arbitrary action, without hearing, could be challenged by *habeas corpus* upon allegation and proof of arbitrary and capricious action. Thereafter, in *Murray v. Swenson*,[50] the Court ruled that a defendant in a revocation of parole (and by implication, probation) proceeding must be afforded a reasonable opportunity to defend himself, and in *Swan v. State* and *Hite v. State*,[51] the Court has flatly stated that a hearing is a requisite of "due process of law". In a very recent *nisi prius* case,[52] Judge Michael J. Manley cited the annotation in 29 A. L. R. 2d 1074 at 1124 as stating that Maryland cases, "are in direct conflict in principle, as a result of the Court's failure in the *Swenson* case to distinguish between 'procedural' and 'substantive' due process".

It is possible that some of the difficulty is encountered because of the tendency to follow the traditional approach of revocation of license proceedings that no hearing is required for revocation of a "privilege" but is if a "right" is involved,[53] and at least an early tendency to think of conditional pardons, paroles, and probation as constituting only "privileges".[54] Actually, attempting to categorize between "rights" and "privileges" doesn't help unless it is approached from the two-fold angle of: (1) Is the claimed right or privilege of such personal or monetary value to the individual that fundamental requisites of fair play re-

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[47] 29 A. L. R. (2d) 1074-1140.

[48] 295 U. S. 490 (1935).

[49] 182 Md. 316, 34 A. 2d 460 (1943).

[50] 196 Md. 222, 76 A. 2d 150 (1950).

[51] 200 Md. 420, 90 A. 2d 690 (1952); 198 Md. 602, 84 A. 2d 899 (1951).

[52] Palumbo v. Pepersack, *The Daily Record*, Jan. 7, 1957. The case arose under a habeas corpus proceeding for the denial of the parole board to allow the petitioner to be represented by counsel at a parole revocation hearing. Judge Manley held for the petitioner.

[53] DAVIS, ADMINISTRATIVE LAW (1951) 246-254.

[54] *Ibid*, 249, Wright v. Herzog, *supra*, n. 49.

quire that it be not forfeited without a hearing (in which case it should be a "right") and (2) Should the scope of the hearing extend to all matters of law and of fact or only those matters which a trial type hearing may be particularly helpful in solving?[55] The Maryland Courts in the area of pardons, parole, and probation, would seem to have gotten the desirable result of requiring a hearing on the fact of breach of condition before revocation. This result can be supported most clearly and simply by reasoning which directly recognizes that whether labeled "rights" or "privileges" these several means of seeking to rehabilitate criminals involve vital interests of the criminal in every case, which should not be destroyed without affording the person involved the opportunity of a hearing, and that like all rights of substance they are entitled to constitutional protections as to fair hearing before forfeiture.

The practice in Baltimore City in revocation of probation proceedings has been to provide notice and hearing with the "right" to be represented by counsel. Judge Manley, in his opinion in the *Palumbo* case,[56] notes, as follows:

> ". . . that in order to alter or modify or add to the conditions of probation, the probationer must be given an opportunity to be heard either in person or by counsel. There is no provision in Section 279 relating to the revocation of probation that specifically gives the probationer the right to have counsel, but it would hardly be contended by anyone that the probationer would not have such right even though none is provided for in the statute, and even though such a judicial proceeding is technically not a criminal prosecution."

Generally, in revocation proceedings in Baltimore City, notice is given by way of summons served by the Police Department, and these proceedings are commonly referred to as "Police Notice Hearings". Bench Warrants are issued where it is deemed necessary to retain a defendant in custody, prior to a hearing.[57] Although a defendant, in revocation proceedings, must be afforded a reasonable opportunity to defend himself against the charge that he has

[55] *Ibid.* And see particularly, Brill v. State, 159 Fla. 682, 32 So. 2d 607, 609 (1947); Fleenor v. Hammond, 116 F. 2d 982, 132 A. L. R. 1241 (6th Cir., 1941). Also see, Weihofen, *Revoking Probation, Parole or Pardon Without Hearing*, 32 J. Crim. Law & Crim. 531, 532 (1942).

[56] *Supra*, n. 52.

[57] Where the circumstances require it, there is authority for allowing the retention and custody of a probationer prior to the issuance of a warrant. See Ex parte Longoria, 161 Tex. Cr. Rep. 142, 275 S. W. 2d 810 (1955).

violated his conditions of probation, he is not entitled to a trial in any strict or formal sense.[58] Such hearings are usually held before the presiding judge of Part III of the Criminal Court of Baltimore, and one day each week has been set aside for these proceedings, taking place before the regular assignment.[59] The manner and form of the proceedings for revocation of probation have been either formal or informal, at the discretion of the trial judge.[60]

The issue of whether a defendant has the "right" to be represented by his own counsel has heretofore been considered; whether or not a defendant is entitled to counsel at the expense of the state is another problem. The answer to this would appear to be dependent upon what standards must be met in order to satisfy the substantive requirements of "due process of law".[61]

The rules of evidence in the aforementioned proceedings would appear not subject to the formal regulations required in the trial of a criminal offense, and this proposition can be supported by implication from the decisions in *Williams v. New York*[62] and *Driver v. State*,[63] but, having the right to weigh any testimony, the Court still has a duty to preserve and protect the basic rights of an individual. The evidence presented need not establish guilt beyond a reasonable doubt as in criminal offenses, but all that is required is that the evidence be such as to reasonably satisfy the judge that the conduct of the probationer has not measured up to the standards required by the conditions of probation.[64]

Testimony is begun by the presentation of the probation officer's report, and thereafter may be followed by the testimony of witnesses called to support the probation officer's evidence. The defendant is given the opportunity to cross

[58] Murray v. Swenson, *supra*, n. 50, 231, and Jett v. Superintendent, 209 Md. 633, 640, 120 A. 2d 580 (1956).

[59] However, probation can be revoked by any judge assigned to the Criminal Court of Baltimore. CHARTER & P. L. L. OF BALTIMORE CITY (Flack, 1949), §280.

[60] See Murray v. Swenson, *supra*, n. 50, and People v. Molz, 415 Ill. 183, 113 N. E. 2d 314 (1953), to the effect that mere informalities or irregularities in the proceedings which do not prejudice the defendant in any manner may be disregarded.

[61] Counsel was appointed in a case where the defendant claimed a mental defect and there existed evidence thereof. The defendant had previously been released from custody after a hearing of a habeas corpus petition, alleging an unfair trial for not being represented by counsel. State v. Bray, Baltimore City Criminal Court, January Term, 1948. See also United States v. Moore, 101 F. 2d 56 (2nd Cir., 1939).

[62] 337 U. S. 241 (1949).

[63] 201 Md. 25, 92 A. 2d 570 (1952).

[64] Manning v. United States, 161 F. 2d 827 (5th Cir., 1947).

examine all witnesses, including the probation officer. After the "state's case", the defendant may call any witness in his behalf and/or take the stand in his own defense. The Court, and in some instances the probation officer, directs examination of the witnesses. A representative of the State's Attorney's Office does not participate unless requested to so do by either the Court or the probation department.

The rules governing a probationer's conduct have been mentioned before, and the Court must find a violation of one or more of said rules to hold a defendant guilty of violating his probation. What amounts to a violation of these rules is largely a question of fact within the discretion of the trial judge,[65] and it has been held that probation can be revoked on the basis of a probation officer's report.[66] In reversing a trial court's finding of a violation of probation, the Court of Appeals of Maryland held that such a finding is reviewable not only as to the abuse of discretion, but also as to whether an erroneous construction has been placed by the trial judge on the condition on which the sentence was suspended.[67]

If a verdict of not guilty is decided upon, naturally, the defendant continues on probation; but, if a verdict of guilty has been decided upon or guilt has been admitted, the Court may either impose the suspended sentence or, in a deserving case, continue the defendant on probation. The Court upon revoking probation may impose, under the specific authority of Section 279 of the Charter and Public Local Laws of Baltimore City (Flack, 1949), any sentence which might have originally been imposed for the crime of which said probationer was convicted.[68] However, it could be argued that to impose a sentence greater than that which was originally passed, could in effect subject the defendant to "double jeopardy".[69] It is also unresolved whether the Court could at that point impose a reduced sentence consistent with Rule 744(c) of the Maryland Rules of Practice.[70]

Quaere, what sentence, if any, can be imposed where an order granting probation before conviction has been revoked? Two views on this question are noted, one of them having held that probation before conviction is tantamount to a finding of guilty, and it therefore follows that upon its

[65] Swann v. State, 200 Md. 420, 425-6, 90 A. 2d 690 (1952).
[66] People v. McClean, 130 Cal. App. 2d 439, 279 P. 2d 87 (1955).
[67] *Supra*, n. 63.
[68] *Cf.* Hite v. State, 198 Md. 602, 607-8, 84 A. 2d 899 (1951).
[69] *Cf.* Pollard v. United States, ... U. S. ..., 77 S. Ct. 481 (1957).
[70] *Supra, circa*, n. 33.

revocation a sentence can be imposed.[71] The remaining view holds that the finding of probation before conviction does not of itself record any verdict in a criminal case, and upon revocation a defendant must be retried in a different proceeding for his original offense before any sentence can be imposed.[72]

In conclusion, the foregoing text has outlined the highlights of the probationary services of the Supreme Bench of Baltimore, with some historical background. As a final note, it should be observed that probation, as heretofore stated, is a relatively new process for handling the criminal offender. Treatment philosophy has progressed greatly since the common-law days of chopping off the hands of convicted pickpockets, and modern methods seek to provide earnest social adjustment and control to those in our community who have strayed from the path of social order. Presently, at least from the academic point of view, probation is but a mere fractional phase of the transition from common-law standards of punishment to the modern day philosophies of criminologists and sociologists. This should not be the extent of our progression. Probation points out a path and direction for future development of the control and treatment of the malefactor. It should be the responsibility of the legal profession, shared equally with the criminologist and sociologist, to discover new methods to overcome a social handicap.

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[71] See State v. Palmer, Baltimore City Criminal Court, September Term, 1953, also State v. Stump, Baltimore City Criminal Court, May Term, 1953.

[72] See State v. Primeaux, Baltimore City Criminal Court, May Term, 1954. When a rehearing of the original case is ordered, testimony previously obtained can be used in lieu of requiring former witnesses to appear, for in receiving probation before conviction, a defendant agrees in writing to the use of recorded testimony in subsequent hearings.

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THE EDITOR'S PAGE

Those of you who attended the School of Law in recent years undoubtedly remember with fondness Professor Russell R. Reno, who, without exception, made each class a stimulating, as well as instructive, session. This effect, apart from sheer academic ability, is the result of an almost limitless enthusiasm for the subject matter, coupled with an enviable capacity to organize its presentation to the fledgling law student. His lead article "The Maryland Order of Abatement of Legacies and Devises", demonstrates the aforementioned qualities as an aid to the attorney who finds himself charged with the administration of an estate, the assets of which are insufficient to accomplish in full the testator's directions. After tracing the historically inferior position of the legatee of personalty as contrasted to the devisee of realty, the author succinctly presents and intricately analyzes the current revised order of abatement in this State. This is followed by an exhaustive discussion of the difficulties arising upon renunciation of a will by the

surviving spouse and an election to take as a statutory heir, together with the means by which the courts seek to preserve the testamentary scheme so often marred by such election. Professor Reno obtained both his A.B. (1931) and LL.B. (1927) at the University of Illinois, and an LL.M. from Columbia University in 1940. He is currently teaching courses in Real Property I, Real Property II (Conveyances), Testamentary Law and Restitution.

The REVIEW is particularly pleased when it is able to present a lead article by one of the more recent graduates of the School. Mr. Herbert B. Mutter's "Probation in the Criminal Court of Baltimore City" affords an interesting and informative glimpse into a department, the operations and purposes of which are perhaps little known by many Maryland attorneys. For the offenders who are investigated and supervised by the department, however, the relationship may have profound consequences. Criminological theories of the ethics of punishment have evolved from the vengeance, through the deterrence and into the recidivistic. The Probation Department is by its very nature interwoven into the last of these theories, its purpose being neither to punish for punishment's sake nor to deter others from pursuring the same course of criminal conduct, but to deal with the offender as an *individual*, evaluating his potentialities for future social good, or damage. The author, in a clear and interesting article, tells us how this is accomplished. A political science and sociology major at the University of Maryland, Mr. Mutter was a June, 1957, graduate of the School of Law. During 1952 and 1953, he was employed by the National Training School for Boys in Washington, D.C., and the District of Columbia House of Correction. Since 1953 he has been associated with the Probation Department of the Supreme Bench of Baltimore City, where he is a probation officer, making investigations for the Criminal Court, as well as supervising released offenders. Mr. Mutter was appointed by Governor McKeldin as a member of the Maryland Commission for the Prevention and Treatment of Juvenile Delinquency, and presently serves in that capacity.

The REVIEW enters the school year 1957-58 with the following student editors: Editor, Samuel Lyles Freeland; Casenote Editor, Robert F. Hochwarth; Recent Decisions Editor, Martin B. Greenfeld; and Assistant Casenote Editor, J. M. Roulhac. The last named post is newly created with the intent that it be filled, as currently, by a fourth year evening student with the primary responsibility of super-

vising at student level those evening students participating in Law Review activities. The editors wish to thank their predecessors for winding up their year with publication on schedule and with a good start on the material for the current issue.

The REVIEW announces the appointment of a second faculty advisor, Professor Lewis D. Asper. The advisability of having two faculty advisors has been under consideration since the current organization of the REVIEW was first announced in the Summer issue of 1956, and action was stimulated late this summer at Professor Reiblich's request after his appointment by Governor McKeldin to the newly established "Self-Survey Commission of the Maryland State Government" and his subsequent selection to be its Executive Secretary. Professor Reiblich felt that these new duties, added to those as a member of the Advisory Board of the Patuxent Institution, might preclude his giving the REVIEW the time required for its continuing successful operation, and further that the faculty had available in Professor Asper a younger man, with experience at the Bar as well as wide teaching experience, who could render the necessary assistance. Professor Asper, a member of the New York Bar, came to Maryland in 1954 and is currently teaching the courses in Contracts, Negotiable Instruments, Trade Regulation and a Seminar in Selected Legal Problems. In addition to these fields, he has previously taught International Law, Comparative Law, Conflict of Laws, and Insurance. He has his A.B. degree from the University of Minnesota, 1943, and his LL.B. from Columbia University, 1951, having served with the United States Marine Corps during 1943-1945. He taught at the University of Puerto Rico, 1951-52, and practiced law in New York City, 1952-1954, with the firm of Kissam & Halpin. The REVIEW is gratified that he is willing to assist with its work.

NEWS OF THE LAW SCHOOL

There are 433 students enrolled in the Law School for the school year 1957-58. Of these 167 are in the Day School, with 72 in the entering class; 266 are in the Evening School, with 97 in the entering class. There are 116 colleges and universities represented in the pre-legal training of the student body.

Comments and Casenotes

"Gross Receipts" Apportionment Formula In State Taxation Of Foreign Corporation Operating Partly Through Subsidiaries

Household Finance Corp. v. State Tax Commission[1]

In 1953, Household Finance Corporation, a foreign finance corporation, was engaged in a nation-wide small loan business. Although the corporation itself did business in Maryland, a part of its out-of-state operations was conducted through ten wholly owned subsidiaries. Maryland imposes an annual tax on "[s]o much of the capital stock of foreign finance corporations doing business in Maryland as represents the business done in this State . . ."[2] The State Tax Commission is directed to determine the total value of all the capital stock of such a company.[3] It next must allocate to Maryland that portion of this total value as fairly represents the business done in Maryland. The statute provides that:

> ". . . in apportioning the value of the shares between the business within and without Maryland, it shall be presumed in the absence of clear evidence to the contrary that the value of the property and business within Maryland bears to the value of the total business and property the same ratio which the gross receipts or earnings in Maryland . . . bears to the total gross receipts of earnings . . ."[4]

In the year 1953, the Commission arrived at $163,262,300 as the total value of all the stock. In order to allocate to Maryland its proper portion of this valuation, the Commission multiplied it by a fraction the numerator of which was the gross receipts of Household in Maryland ($2,481,626), and the denominator of which was the total gross receipts of Household everywhere ($61,812,951). This last figure was not the gross receipts of Household and all its subsidiaries figured on a consolidated basis ($75,000,000); it

[1] 212 Md. 80, 128 A. 2d 640 (1957).

[2] MD. CODE (1951), Art. 81, sec. 7(7).

[3] *Ibid*, Art. 81, secs. 20(a), 20(b), 19(a).

[4] *Ibid*, Art. 81, sec. 20(a). Omitted from the quotation of the statutory language are several references to the treatment of income from permanent investments which were not material in the instant case.

was the gross receipts of the parent corporation alone. The result of this multiplication was a figure of about $6,500,000, which was the Commission's assessment of the value of that part of the capital stock of Household that represented "the business done in Maryland". Household appealed to the Circuit Court of Baltimore City, claiming, *inter alia,* that the failure of the Commission's gross receipts fraction to include in its denominator *consolidated* gross receipts of the parent and the subsidiaries necessarily resulted in a larger portion of the total capital stock being attributed to Maryland than should have been, and that the tax was invalid because it was not imposed in accordance with the Maryland statutory language and because it accomplished the taxation of extra territorial values in violation of the "due process" clause of the Fourteenth Amendment to the United States Constitution. The Circuit Court found for Household. On appeal, the Maryland Court of Appeals affirmed, Judges Hammond and Henderson dissenting.

The majority opinion written by Judge Prescott explains the holding as follows:

> ". . . if the Commission sees fit to arrive at the total value of a unitary enterprise on a consolidated basis, it cannot in fairness apportion that value as between Maryland and other jurisdictions on a basis which is inconsistent with, and which rejects, an element used in building up that value. Here, of course, that element is the earnings of the subsidiaries. They have been discarded and the gross earnings of the parent company only have been used for the apportionment.
>
> "We have reached the conclusion above stated on the basis of our statute, and we have not found it necessary to seek to determine the limit of the constitutional power of the State in imposing or apportioning a tax such as that here involved."[5]

Judge Hammond in his dissenting opinion[6] disputed the Court's holding that the Commission's use of the apportioning formula was at odds with the statutory directive that "it shall be presumed in the absence of clear evidence to the contrary that the value of the property and business within Maryland bears to the value of total business and property the same ratio which gross receipts or earnings in Maryland . . . bears to the total gross receipts of earn-

[5] *Supra*, n. 1, 98.
[6] *Supra*, n. 1, *dis. op.* 99, in which Judge Henderson concurred.

ings . . ."[7] He presented various comparative financial data to support his belief that this presumption was justified in this instance.[8] It is interesting that nowhere in the majority opinion was there presented any factual evidence in the nature of operating or financial statistics to refute the presumption in the statute. The Court relied on the fact that:

> "The result has been to produce a considerably larger apportionment of value to Maryland than would have been reached if the gross earnings of subsidiaries, . . . had been used in determining the ratio of gross receipts in Maryland to gross receipts outside of Maryland."[9]

This fact is indisputable, but does it *per se* establish that the statutory formula used by the Commission imputes to Maryland a higher percentage of the value of Household's total business than actually belongs here? Or, should the presumption be discarded only when concrete facts and figures are submitted proving that the presumption is factually incorrect in the particular case? This was the line of cleavage between the members of the Court, and upon this point the case was decided.

It was therefore unnecessary to examine the constitutionality of the apportioning formula as applied to Household, but this second aspect of the matter is of interest in its own right and also to the extent that it reflects light on the initial problem of statutory interpretation. The constitutional doctrine here applicable seems to be that any statutory formula reasonable on its face (as is the one in the instant case)[10] is valid and constitutional unless it is

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[7] *Supra*, n. 4.

[8] *Supra*, n. 6, 104. For instance, consolidated net income of Household everywhere was 43.3% of consolidated gross income, but Maryland net income was 50% of Maryland gross. Each dollar of consolidated assets produced 9 cents of net income; each dollar of Maryland assets produced 12 cents. Maryland assets comprised only 2.8% of consolidated assets but produced 3.81% of consolidated net income. Judge Hammond argued from these figures that the Maryland business of Household had a relatively higher "going concern" value than Household's average business and concluded that the figure of $6,500,000 (about 4% of the value of Household's entire property and business) was perfectly reasonable as a proper evaluation of the Household property and business in Maryland.

[9] *Supra*, n. 1, 98.

[10] The fact that in the case of a unitary enterprise, property outside of the taxing state may be taken into consideration in order to arrive at a value of the taxable property within the state has long been well settled.

> "The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic

shown by clear and cogent evidence that the formula produces "a palpably disproportionate result".[11] In other words, there is a presumption of constitutionality which can be rebutted only by clear evidence that values outside the state are being taxed in the present instance. It is apparent that this constitutional presumption and the statutory presumption in Sec. 20(a) are very nearly identical.[12] Hence, it would appear that the same considerations used in determining when this presumption of constitutionality breaks down would be helpful also in determining when the statutory presumption in Sec. 20(a) is invalid. And, of course, the most important consideration that concerns us is what is meant by "clear and cogent evidence".

There is an astonishing lack of direct authority on the problem posed by the fact situation in the instant case. In one of the few similar cases, *People v. Knapp*,[13] Judge Cardozo sitting on the Court of Appeals of New York, was asked to rule upon the validity of a franchise[14] tax imposed

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system of wide extent, that gives them a value above what they otherwise would possess."

Wallace v. Hines, 253 U. S. 66, 69 (1920).

The Maryland Court of Appeals had no difficulty at all in finding that Household was engaged in such a unitary enterprise.

". . . Through the operation of its headquarters, and the combined borrowing power . . ., the most advantageous rates of interest may be attained with resultant benefit to all parts of the corporate body. The branches in Maryland, . . . contributed to the whole; and, naturally, obtained many benefits therefrom."

212 Md. 80, 95, 128 A. 2d 640 (1957).

[11] N. & W. Ry. Co. v. N. Carolina, 297 U. S. 682, 688 (1936); Harvester Co. v. Evatt, 329 U. S. 416, 422 (1947).

[12] This should not be surprising because undoubtedly the statutory presumption was created and designed among other reasons to minimize the possibility of unconstitutional applications in particular cases.

[13] 230 N. Y. 48, 129 N. E. 202 (1920).

[14] It may be well at this point to consider the nature of the tax imposed on foreign finance corporations by Md. Code (1951), Art. 81, sec. 20(a), (b). There are two broad classifications in the area of state taxation of foreign corporations: (1) "property" taxes and (2) all the various other types, which can be lumped together under the term "excise" taxes. Property taxes are subject to the constitutional requirements of uniformity of taxation and the requirement of taxation according to value, whereas the excise taxes are not. See 14 FLETCHER CYCLOPEDIA CORPORATIONS (Perm. ed., 1945), §6902. On the other hand, sometimes an excise tax will fail when, if it had been deemed to be a property tax, it would have been sustained. See Railway Express Agency v. Virginia, 347 U. S. 359 (1954), where the Court decided that the tax was not a property tax and hence was void as a privilege tax imposed on the privilege of doing interstate business.

Often it is difficult to determine in which category a particular income, franchise, license, privilege, or other tax belongs. The distinction is often very subtle. For instance, it is settled that it is beyond a state's power to tax the privilege of carrying on interstate commerce; yet taxes can validly be levied on property used in interstate commerce, *e.g.*, see Adams Express Co. v. Ohio, 165 U. S. 194 (1897).

It would appear that the Maryland tax concerned here is a property tax. It is listed as such in the statute itself, and is clearly designed to operate

on that part of a foreign corporation's net income which was attributed to New York by the following statutory formula. Its net income was to be multiplied by a fraction the numerator of which consisted of the monetary value of certain of its assets located in New York, and the denominator of which consisted of the total value of these types of assets wherever situated. The resulting figure was taxable in New York. It happened that a substantial part of the taxpayer's net income derived from bonds held outside New York and that the value of bonds held by the corporation was not includable in either numerator or denominator of the apportioning fraction. The Court held that the tax was bad on constitutional grounds.[15] It made no finding that the actual result was disproportionate or excessive. For all that appears the formula may have attributed a smaller percentage of the entire net income to New York than was in fact earned there. However, under the circumstances of the case the formula was bad in theory and was therefore rejected without further ado.[16]

However, other cases in which taxes of this sort have been struck down have emphasized and relied on the fac-

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as a tax on the value of the business in Maryland; Art. 81, Sec. 7(7). Also, the tangible personal property of the taxpayer is exempt from the ordinary tax imposed on such personalty; Sec. 8(14). Likewise the assessed value of realty owned by such a corporation is to be subtracted from the value of the tax base (total capital stock) before the tax is assessed; Sec. 19(b). These provisions evidence a legislative intent not to tax the corporation's physical property twice and to this extent indicate that the tax is a property tax. The problem was touched upon, but not decided, in Commercial Corp. v. Tax Comm., 181 Md. 234, 239, 29 A. 2d 294 (1942), where the Court mentioned in passing the Commission's contention that the tax was not on the property of the corporation but on the privilege of doing business in the state (which would make it an excise tax).

[15] *Supra*, n. 13, 206.

> "Here, . . . the statute prescribes a rule of allocation which, as applied to foreign corporations holding bonds . . . in other states, involves an artificial and arbitrary augmentation of the value of the local privilege. It measures the value of the franchise, here and elsewhere, by income from all sources, and excludes some of the same sources when the value is apportioned. To take from assets elsewhere is equivalent to adding to assets here."

[16] Certiorari to the U. S. Supreme Court was denied; 256 U. S. 702 (1921). Judge Cardozo cited and relied heavily on Oklahoma v. Wells Fargo & Co., 223 U. S. 298 (1912). In this case the tax was imposed on that part of the gross receipts of an express company which were apportioned to Oklahoma by the use of a fraction, the numerator of which was "business done" in Oklahoma and the denominator of which was "business done" everywhere. Apparently substantial income was realized from bonds and land outside of Oklahoma. This income was included in the measure of the tax, *i.e.*, the total gross receipts, but was excluded from the denominator of the apportioning fraction, evidently on the theory that it was not a part of the "business done" by the company. Judge Cardozo said of this case:

> "The scheme of allocation limited the assessors to the comparison of the receipts of business done within the state with the receipts of business there and elsewhere. Investments in bonds and lands were

tual showing of a disproportionate result effected in the individual instance. *Fargo v. Hart*[17] is an early leading case which condemned a property tax on the assets of an express company apportioned by using a mileage ratio (number of miles of track within the state to total miles everywhere), because the allocation fraction imputed much more property to the taxing state than was actually in the state. The Court speaking through Mr. Justice Holmes cited factual evidence to prove that the result reached was erroneous; *e.g.*, the total assets of the company were valued at $22,000,000; those situated in the taxing state at $8,000. But the worth of the latter was assessed at $800,000 by the operation of the statutory formula.[18] *Wallace v. Hines*,[19] a later case, made a similar holding. Another case[20] struck down a tax on freight cars produced by an apportionment formula which attributed a daily average of over 400 freight cars to the taxing state; the taxpayer proved by its figures that the actual daily average was 57 cars. In the celebrated *Hans Rees* case,[21] the Court condemned the tax on a showing that the allocation formula allotted 80% of total income

disregarded in the apportionment, though the income from such investments was included in the measure. On that ground, as well as on others, the statute was held invalid."

Supra, n. 13, 206. There is little doubt that the case was authority for the proposition made out for it by Judge Cardozo, but it seems to have lost its vitality in this regard because it has never since been cited for this purpose, but has repeatedly been used as authority for its other entirely distinct doctrine that a state tax on the gross receipts of interstate business is violative of the "commerce clause" of Article 1, §8 of the U. S. Constitution. See, for example, Lemke v. Farmers' Grain Co., 258 U. S. 50 (1922); Matson Nav. Co. v. State Board, 297 U. S. 444 (1936); McGoldrick v. Berwind-White Co., 309 U. S. 33 (1940); Northwest Airlines v. Minnesota, 322 U. S. 292 (1944).

In a later case involving the same New York statute under very similar factual circumstances, the Supreme Court rejected a demand for the application of the doctrine in the Knapp case and sustained the tax. It relied partially, however, on the fact that the issue had not been raised in the lower court. Bass, etc., Ltd. v. Tax Comm., 266 U. S. 271 (1924).

[17] 193 U. S. 490 (1904).

[18] The Court also based its decision on the impropriety of including in the measure of the tax (gross assets) investments which had nothing to do with the running of the business in the taxing state, *i.e.*, it made the point that when a business is not entirely unitary in its nature, that part of it which differs from the business carried on within the taxing state should not be considered in determining the value of the business in the taxing state.

[19] *Supra*, n. 10. Here, a North Dakota excise tax was imposed on that part of a railroad's capital that was used in the state. Again, the apportioning formula was a track mileage fraction, and again, the actual facts of the case indicated that the result of the statutory formula was erroneous. It was shown that the very valuable terminals of the railroad were in other states and that in North Dakota there were for the most part only long stretches of track running through sparsely populated territory.

[20] Union Tank Line v. Wright, 249 U. S. 275 (1919).

[21] Hans Rees' Sons v. No. Carolina, 283 U. S. 123 (1931).

to North Carolina, while the evidence showed that only 17% of it was in fact derived from operations in that state. In all these cases the statutory formula was constitutional on its face and the Court in voiding the tax relied to a greater or lesser degree on evidence that the *actual result* of the allocation formula (without regard to the theory of its composition and computation) was erroneous and unfair.

There are a number of decisions indicating that the theory of the allocating formula is immaterial if the result produced by it is in line with the realities of the situation.[22] *Norfolk & Western Railway Co. v. North Carolina*,[23] is a very significant case. There North Carolina sought to tax that part of an interstate railroad's net income that was attributable to the state. The statute required that the average gross income per mile of system track be computed and that North Carolina's share be assigned on the basis of the number of miles of track located in that state. The same procedure was to be followed in allocating to the state its portion of total operating expenses. The expenses attributable to North Carolina then were to be subtracted from the gross income allocated to it and the resulting figure was to be the net income taxable in North Carolina. The railroad sought to have the tax voided on the ground that its actual operating expenses were substantially greater than the expenses attributed to it by the statutory formula. Proof was submitted which left little question of this fact. Nevertheless, the Court sustained the tax. It reasoned that there was a possibility that the operation of

[22] "However, it is *apparent from the result reached* that we cannot say the evidence of the plaintiff clearly and convincingly shows the method used by the commission is in error, . . ."

Knappton Towboat Company v. Chambers, 202 Or. 618, 276 P. 2d 425, 429 (1954). (Emphasis supplied.)

"The method or formula used by the taxing authorities . . . is not disclosed. This we do not regard as of controlling importance. If the result arrived at was clearly within the permissive limits of their discretion, the particular method used would seem unimportant."

Bailey v. Megan, 102 F. 2d 651, 654 (8th Cir., 1939).

". . . The question lies solely in the result, which must not culminate in gross injustice or over-assessment."

Grand Trunk Western R. Co. v. Brown, 32 F. Supp. 784, 792 (E. D. Mich., 1940).

See also Pacific Fruit Express Co. v. McColgan, 67 Cal. App. 2d 93, 153 P. 2d 607, 612 (1944), where the Court conceded that the Commissioner's application of the allocating formula was in error, but refused to give the taxpayer any relief because the taxpayer:

". . . failed to show that the formula applied resulted in the payment of more taxes than in equity and good conscience it should have paid, or that under the formula applied it had paid a tax measured by more than the amount of net income reasonably and fairly attributable to the business done in the state."

[23] 297 U. S. 682 (1936).

the formula attributed to North Carolina less gross income than was in fact derived from that state and therefore there might have been a compensating error which would save the final result.[24] The *Norfolk & Western* case holds firmly and explicitly that the taxpayer must prove that the final net result of the allocation formula is wrong, and failing this, he cannot rely on defects or flaws inherent in the formula to save him.[25] And it seems to be established that in the case of an unitary enterprise it is very difficult to satisfy the court that the assessment is too high, that the result produced by the formula is arbitrary and unfair. Consider, for example, *Ford Motor Co. v. Beauchamp*,[26] upholding a franchise tax formula which attributed $23,000,000 of capital stock to the taxing state in spite of the fact that the company had tangible assets in that state in the value of only $3,000,000. Other cases hold similarly in analogous circumstances.[27]

One Pennsylvania case[28] dealt tangentially with the very problem in the instant case. The Court sustained the tax; it was not impressed by the argument that the gross receipts of the subsidiaries should be included in the denominator of the allocating fraction.[29]

It would seem that the courts have indicated that the net product of the formula is what counts, not its theoretical

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[24] "For all that appears in the case developed by the Railway, actual gross revenues in North Carolina may have been so far in excess of average gross revenues computed under the statute as to neutralize the discrepancy between actual and average cost of operation. If such a counter balance exists, appellant has not been injured through the application of the formula."

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"We must bear in mind steadily that the burden is on the taxpayer to make oppression manifest by clear and cogent evidence."

Ibid, 686, 688.

[25] Justice Cardozo asked:

"Would it have had to pay less if net income had been ascertained without reference to mileage? Would the difference have been so great as to overpass the bounds of reason? In the evidence for the railway, there is no answer to those questions. . . . the state in presenting computations did not lift the burden from the railway of satisfying the court, after all the evidence was in, that it was a victim of oppression."

Supra, n. 23, 688-9.

[26] 308 U. S. 331 (1939). The Court says at page 336:

"In a unitary enterprise, property outside the state, when correlated in use with property within the state, necessarily affects the worth of the privilege within the state. . . . The weight, . . . given the property beyond the state boundaries is but a recognition of the very real effect its existence has upon the value of the privilege granted within the taxing state."

[27] Underwood T'writer Co. v. Chamberlain, 254 U. S. 113 (1920); Atl. & Pac. Tea Co. v. Grosjean, 301 U. S. 412 (1937); Butler Bros. v. McColgan, 315 U. S. 501 (1942).

[28] Commonwealth v. Ford Motor Co., 350 Pa. 236, 38 A. 2d 329 (1944).

[29] *Ibid*, 334.

imperfections.[30] Perhaps this approach has merit also in construing these statutes. If so, a statutory presumption that "the value of the property and business within Maryland bears to the value of the total business and property the same ratio which the gross receipts . . . in Maryland bears to the total gross receipts . . ." should not be cast aside in the absence of clear factual evidence that it is wrong.

P. McEvoy Cromwell

Court Martial Jurisdiction Over Civilian Dependents Overseas — Unconstitutional

Reid v. Covert[1] *and Kinsella v. Krueger*[2]

Mrs. Covert and Mrs. Smith were tried and convicted by courts-martial of the alleged murder of their respective husbands, members of the United States military forces stationed outside the continental limits of the United States. Both women were returned to the United States and confined at the Federal Reformatory for Women, Alderson, West Virginia. Mrs. Smith's conviction was affirmed by the Board of Review and the Court of Military Appeals, while Mrs. Covert's conviction was set aside by the Court of Military Appeals and she was transferred to the District of Columbia jail to await rehearing by court-martial at Bolling Air Force Base, Washington, D.C.

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[30] See also Harvester Co. v. Evatt, 329 U. S. 416, 422 (1947), where the Court said:

> "Unless a palpably disproportionate result comes down from an apportionment . . . this Court has not been willing to nullify honest state efforts to make apportionments."

And Hump Hairpin Co. v. Emmerson, 258 U. S. 290, 296 (1922):

> "If this same amount of tax had been imposed . . . without reference being made to the basis of its computation, very certainly no objection to its validity would have been thought of."

Cf. State of Wisconsin v. J. C. Penney Co., 311 U. S. 435, 444 (1940), where the Court said:

> "The Constitution is not a formulary. It does not demand of states strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society."

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[1] 353 U. S. . . ., 77 S. Ct. 1222 (1957).

[2] *Ibid.*

Petitions for writs of *habeas corpus* were filed in Mrs. Smith's behalf and by Mrs. Covert, contending the prisoners were not subject to court-martial jurisdiction because Article 2(11) of the Uniform Code of Military Justice[3] violated Article III, Section 2 and the Sixth Amendment of the Federal Constitution guaranteeing the right to trial by jury to civilians. Mrs. Covert's petition also contended that whatever jurisdiction the military may have acquired to try her under Article 2(11) was lost by her return to the United States and delivery to the custody of civilian authorities. The United States District Court for the District of Columbia ordered the writ to issue on Mrs. Covert's petition and the government appealed directly to the United States Supreme Court. The District Court for the Southern District of West Virginia issued a preliminary writ on the petition filed in Mrs. Smith's behalf, but after hearing, discharged the writ. While an appeal was pending before the Court of Appeals for the Fourth Circuit, the Government itself sought certiorari.

In the original hearing, the Supreme Court held the provision of the Code extending court martial jurisdiction to civilians accompanying armed forces abroad in peacetime did not violate the constitutional right to trial by jury, and further held that such jurisdiction, once validly attached, was not lost by the transfer of the civilian to a penal institution in the United States after her conviction.[4] Mr. Chief Justice Warren, Mr. Justice Black and Mr. Justice Douglas dissented, indicating a belief the majority opinion would give to the military "new powers not hitherto thought consistent with our scheme of government",[5] but postponed filing their dissents until the next Term of Court. In an unusual "reservation", Mr. Justice Frankfurter neither concurred with nor dissented from the majority opinion but, after strongly criticizing that majority opinion, reserved for a later date the expression of his views.

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[3] 70 Stat. 911 (1956), 50 U. S. C. A. §552 (11) (1956).

Persons subject to this chapter (Article 2):

"(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, Guam, and the Virgin Islands;"

[4] Reid v. Covert, 351 U. S. 487 (1956); Kinsella v. Krueger, 351 U. S. 470 (1956).

[5] *Ibid, dis. op.* 485, 486.

Petition for rehearing in the cases as consolidated was granted[6] and counsel were invited to include discussion of four questions[7] relating to the practical necessity for and alternatives to court-martial jurisdiction over civilian dependents overseas, historical evidence bearing on the scope of court-martial jurisdiction, and the relevance of any distinction between civilian employees and civilian dependents and between major crimes and petty offenses. On the rehearing, the Court reversed its earlier decision,[8] *holding* Mrs. Smith and Mrs. Covert could not constitutionally be tried by military authorities and ordering their release from custody. Mr. Justice Brennan joined the three Justices who had dissented at the first hearing in the new majority opinion, and Mr. Justice Frankfurter and Mr. Justice Harlan concurred in separate opinions. Mr. Justice Clark and Mr. Justice Burton dissented.

In its first decision, the Court conceded that trial by court-martial of a civilian entitled to trial in an Article III court would be a violation of the Constitution,[9] but it found the Constitution does not require trial before an Article III court in a foreign country for offenses committed there by an American citizen. Relying on the decisions in *In re Ross*[10] and the "Insular Cases",[11] the Court stated that Congress had the power to establish legislative or consular courts and, since the choice among different types of legis-

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[6] 352 U. S. 901 (1956).

[7] *Ibid:*

"'1. The specific practical necessities in the government and regulation of the land and naval forces which justify court-martial jurisdiction over civilian dependents overseas; the practical alternatives to the exercise of jurisdiction by court-martial.

"'2. The historical evidence, so far as such evidence is available and relevant, bearing on the scope of court-martial jurisdiction authorized under Art. I, §8, cl. 14, and the Necessary and Proper Clause, and bearing on the relations of Article III and the Fifth and Sixth Amendments in interpreting those clauses. In particular, the question whether such historical evidence points to the conclusion that the Art. I, §8, cl. 14, power was thought to have a fixed and rigid content or rather that this power, as modified by the Necessary and Proper Clause, was considered a broad grant susceptible of expansion under changing circumstances.

"'3. The relevance, for purposes of court-martial jurisdiction over civilians overseas in time of peace, of any distinction between civilians employed by the armed forces and civilian dependents.

"'4. The relevance, for purposes of court-martial jurisdiction over civilian dependents overseas in time of peace, of any distinctions between major crimes and petty offenses'."

[8] *Supra*, n. 4.

[9] *Ibid*, 474, citing Toth v. Quarles, 350 U. S. 11 (1955).

[10] 140 U. S. 453 (1891).

[11] Downes v. Bidwell, 182 U. S. 244 (1901); Hawaii v. Mankichi, 190 U. S. 197 (1903); Dorr v. United States, 195 U. S. 138 (1904); Balzac v. Porto Rico, 258 U. S. 298 (1922).

lative tribunals "is peculiarly within the power of Congress",[12] the power to establish such courts necessarily includes the power to provide for trial before a military tribunal if that choice is "reasonable and consonant with due process".[13]

In the second hearing, the Court could find no constitutional basis for military trial of the prisoners but rather "under our Constitution courts of law alone are given power to try civilians for their offenses against the United States".[14] Justices Frankfurter and Harlan concurred on the narrow ground that the constitutional bar applied to the trial by court-martial in capital cases of civilian dependents accompanying members of the armed forces abroad in peacetime. The reversal resulted from an analysis — actually, three separate analyses — of the power of Congress under Article I, Section 8, Clause 14, of the Constitution " 'to make Rules for the Government and Regulation of the land and naval Forces' " — a power the Court found "no need to examine" in its first opinion.[15]

Civilian courts are the normal repositories of power to try persons charged with crimes against the United States and the Constitution has provided a number of specific safeguards to protect persons brought before these courts.[16] The jurisdiction of military tribunals, in the words of the four Justices joining in the Court's opinion, is a "very limited and extraordinary jurisdiction"[17] arising out of the Article I power, the scope of which cannot be so extended by the "Necessary and Proper" Clause[18] to permit military jurisdiction over any other group of persons than those literally in the land and naval forces.[19] "Having run up against the steadfast bulwark of the Bill of Rights, the Necessary and Proper Clause cannot extend the scope of Clause 14".[20]

Neither the concurring Justices nor the dissenting Justices could find such rigid confines on the power of Congress to make rules for the government and regulation of

[12] *Supra*, n. 4, 478.

[13] *Ibid*, 476.

[14] 353 U. S. ..., ..., 77 S. Ct. 1222, 1243 (1957).

[15] 351 U. S. 470, 476 (1956).

[16] *Supra*, n. 14, ..., 1232-3, citing Article III and the Fifth, Sixth and Eighth Amendments.

[17] *Ibid*, 1233.

[18] Art. I, §8. cl. 18.

[19] Although the Court recognized "there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform." *Supra*, n. 14, ..., 1233.

[20] *Ibid*.

the land and naval forces. The power cannot be looked at in isolation as "[t]he Constitution is an organic scheme of government to be dealt with as an entirety".[21]

Thus viewed, Justice Frankfurter stated the question:

> ". . . whether these women dependents are so closely related to what Congress may allowably deem essential for the effective 'Government and Regulation of the land and naval Forces' that they may be subjected to court-martial jurisdiction in these capital cases, when the consequence is loss of the protections afforded by Article III and the Fifth and Sixth Amendments."[22]

In reaching a negative answer, he emphasized that the Court was only dealing with the trial of civilian dependents in capital cases in time of peace. Unable to accept the theory that the Article I power is incapable of expansion under changing conditions, Justices Harlan, the only Justice reversing his view between the first and second opinions, found a rational connection between the court-martial jurisdiction invoked and the Article I power supplemented by the "Necessary and Proper" Clause but found capital cases to be on sufficiently different footing from those involving other offenses to warrant the full protection of trial by an Article III court.

The dissent[23] referred to the Court's decision in the *Toth* case[24] where "Art. I, §8, cl. 14 was 'given its natural meaning' and 'would seem to restrict court-martial jurisdiction to persons who are actually members *or part* of the armed forces'." Reviewing the practical situation which exists at military bases throughout the world and the "effect of such a double standard on discipline, efficiency, and morale", and the impracticality or undesirability of the alternatives to court-martial jurisdiction, Justices Clark and Burton concluded that the provision of the Code establishing the military jurisdiction is reasonably related to Congress' power to make Rules for the Government and Regulation of the land and naval Forces.

In reversing the earlier decision, the four Justices composing the Court did not overrule *In re Ross*[25] and the "Insular Cases",[26] which provided that earlier decision's

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[21] *Supra*, n. 14, *conc. op.* ..., ..., 1243, 1245.

[22] *Ibid.*

[23] *Supra*, n. 14, *dis. op.* ..., ..., 1262, 1266.

[24] Toth v. Quarles, 350 U. S. 11 (1955).

[25] 140 U. S. 453 (1891).

[26] Downes v. Bidwell, 182 U. S. 244 (1901); Hawaii v. Mankichi, 190 U. S. 197 (1903); Dorr v. United States, 195 U. S. 138 (1904); Balzac v. Porto Rico, 258 U. S. 298 (1922).

precedents, but it relegated those decisions to the limbo of obsolescence: "At best, the Ross case should be left as a relic from a different era",[27] and "it is our judgment that neither the (Insular) cases nor their reasoning should be given any further expansion".[28] Again, both Justice Frankfurter and Justice Harlan, though concurring, join the dissenting Justices in attempting to preserve the validity of the Ross and the Insular Cases decisions, at least to the extent of their narrow, specialized settings. In fact, Justice Harlan cites these much-battered decisions as authority in his concurrence.

Probably the two most pertinent criticisms of the decision of the Court are those raised by the dissent. In reversing two prior majority decisions in these cases, the Court does not do so with a majority opinion. Rather, it delivers three opinions which are farther apart in some ways than the concurring opinions and the dissent. Four Justices see the Bill of Rights as a "bulwark" against Congressional power to make Rules for the Government and Regulation of the land and naval Forces. Justice Frankfurter views the power and the rights as co-equal threads from the same Constitutional fabric, while to Justice Harland the value of the Article III rights increases or decreases when measured against the Congressional power, depending on the gravity of the offense or the possible punishment involved.

But the most serious criticism raised by the dissent is that the Court "gives no authoritative guidance as to what, if anything, the Executive or the Congress may do to remedy the distressing situation in which they now find themselves".[29] The geographic and numerical extent of United States military installations and personnel abroad requires the hiatus created by this decision be filled — a repair job which could much more satisfactorily be done had the Court at least indicated which materials might be acceptable.

RICHARD R. SIGMON

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[27] 353 U. S. ..., ..., 77 S. Ct. 1222, 1228 (1957).
[28] *Ibid*, ..., 1229. Parenthetical material supplied.
[29] *Supra*, n. 27, *dis. op.*, ..., 1262.

Respondeat Superior In "Shoplifting" Cases*

Safeway Stores v. Barrack[1]

Plaintiff brought suit against the defendant foodstore and one of its employees to recover damages for malicious prosecution and false imprisonment. The plaintiff had made purchases in other stores, and upon entering defendant's store, he placed these bundles in a pushcart along with various articles he wished to purchase from the defendant. After the plaintiff paid his bill, and while he was in the act of placing his purchases in a box along with the bundles he had when he entered the store, a pound of butter and a small can of pepper fell to the floor. Smith, an employee of the defendant, who was standing near the counter, immediately came up to the plaintiff, showed him a badge, and charged him with trying to avoid payment by placing the butter and the pepper in the parcels which he had when he entered the store. The plaintiff denied Smith's charges, but offered to pay for the items, which offer Smith refused, whereupon he left the store followed by Smith. Smith forced the plaintiff to return to the store, to be taken to a back room where, in the presence of the store manager, the police were called and plaintiff was arrested. Smith testified that it was his job to break up shoplifting; that the retail operations manager had told him, that he, as retail operations manager, wasn't going to stop any means of helping to protect the company's property; that the plaintiff had been nasty about the whole affair; and, finally, that the retail operations manager had told him to use his own discretion if people acted nasty, and to do what he wanted to with them. The store manager testified that he did not interfere with the detention of the plaintiff, since matters of this nature were usually left up to Smith.

The lower court allowed the case to go to the jury, which returned a verdict for the plaintiff for $2,500, which was reduced by remittitur to $1,250. From this verdict the defendant appealed, contending that the evidence was insufficient to support a finding that Smith was acting within the scope of his authority in having the plaintiff arrested, so as to make the defendant store liable for his actions under the doctrine of *respondeat superior*. The Court of

* To illustrate how serious and extensive the problem of shoplifting is, it has been conservatively estimated that goods worth over $300,000,000 are taken from stores by shoplifters annually.

[1] 210 Md. 168, 122 A. 2d 457 (1956).

Appeals affirmed the judgment, on the ground that the evidence warranted findings that Smith was employed for the very purpose of apprehending and prosecuting shoplifters and that his actions were in the regular course of and within the scope of his employment, making the defendant liable. In support of its decision the court cited *McCrory Stores v. Satchell*[2] and *B. C. & A. Ry. Co. v. Ennalls,*[3] following the majority rule that, where in false imprisonment cases, there is conflicting evidence as to the scope of employment of the agent, it is for the jury to decide the scope and the extent of the agent's implied authority in order to determine the principal's liability under *respondeat superior.*[4]

It is interesting to note that, in the development of the law of principals' responsibility for false imprisonment, the Court of Appeals in several early cases had accepted and relied upon the view taken by the New York case of *Mali v. Lord,*[5] which held that liability for false imprisonment by an agent could not be imputed to the principal under the doctrine of *respondeat superior.* The New York case reasoned that the principal should not be held, since an agent could have no implied authority to do an act which the principal could not justify if he were present himself. In the *McCrory* case, relied on in the instant case, the Court of Appeals of Maryland retreated from its earlier position, apparently on the theory that all the New York case decided was that the plaintiff had not introduced evidence as to the agent's scope of authority sufficient to take the case to the jury. The court also explained the earlier case of *Bernheimer v. Becker,*[6] on the ground that the agent in that case was merely an ordinary agent from the scope of whose employment the authority to cause a false

[2] 148 Md. 279, 129 A. 348 (1925).

[3] 108 Md. 75, 69 A. 638 (1908), where the court held that the determination of whether an alleged false imprisonment of a suspected thief was within the general scope of employment of a special officer hired to protect the property of the Railway Company was for the jury.

[4] West v. F. W. Woolworth Co., 215 N. C. 211, 1 S. E. 2d 546 (1939); Gillis v. Great Atlantic & Pacific Tea Co., 223 N. C. 470, 27 S. E. 2d 283 (1943); Great Atlantic & Pacific Tea Co. v. Dowling, 43 Ga. App. 549, 159 S. E. 609 (1931); Friedman v. Martin, 43 Ga. App. 677, 160 S. E. 126 (1931); Combs v. Kobacker Stores, 114 N. E. 2d 447 (Ohio, 1953); Perkins Bros. Co. v. Anderson, 155 S. W. 556 (Tex. Civ. App., 1913); McCrory Stores v. Satchell, *supra*, n. 2; 1 RESTATEMENT, AGENCY (1933) §245; 2 MECHEM, AGENCY (2d ed., 1914) §1982.

[5] 39 N. Y. 381 (1868). Maryland cases which cited this case, apparently adopting its reasoning, are Carter v. Howe Machine Co., 51 Md. 290, 297 (1879); Central Railway Co. v. Brewer, 78 Md. 394, 407, 28 A. 615 (1894); Bernheimer v. Becker, 102 Md. 250, 255, 62 A. 526 (1905).

[6] *Ibid.*

imprisonment could not be implied so as to make the principal liable.

The *McCrory* case constituted a virtual repudiation by Maryland of the rule of the *Mali* case, yet the court did not expressly reject the rule, seeking to explain the earlier decision. The principal case, by relying on *McCrory v. Satchell,* finally lays to rest the ghost of *Mali v. Lord* in Maryland and brings this state squarely into line with the majority view, holding that the jury can find the principal liable for false imprisonment if the agent's authority for such an act can be implied from the general scope of his employment. The *Mali* case, which expresses the minority view, has been subjected to such severe criticism[7] and has been so drastically limited in later New York cases[8] that it is of questionable vigor today.

The liability of a master for a servant's wrong doing is founded upon the maxim *qui facit per alium, facit per se.*[9] Such liability, though it may involve various tortious acts by the servant, is governed by the principles of master-servant rather than by the principles of tort law, since the liability is imposed on the one who does not commit the wrongful act himself. It is evident that no problem arises where there is express authority granted to the agent to do the act in question, the principal being clearly liable. The area in which the questions arise is the more nebulous one of the extension of liability under the doctrine of implied authority. In ascertaining the agent's implied authority in this particular area, or any area, the character of the position and the duties incidental to it are important elements for consideration.[10] In studying the character of the position of agents who have no express authority to protect the principal's property, the terms "manager" and

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[7] See, *e.g.* Field v. Kane, 99 Ill. App. 1 (1901); Staples v. Schmid, 18 R. I. 224, 26 A. 193, 195-6 (1893); J. J. Newberry Co. v. Judd, 259 Ky. 309, 82 S. W. 2d 359, 362 (1935); Knowles v. Bullene & Co., 71 Mo. App. 341 (1897).

[8] Palmeri v. Manhattan Ry. Co., 133 N. Y. 261, 30 N. E. 1001 (1892); Dupre v. Childs, 52 App. Div. 306, 65 N. Y. S. 179 (1900). These cases limit the ruling of the *Mali* case to mean that the general employment of a superintendent, who has general management of the business, does not warrant his causing the arrest of a person suspected of stealing the principal's property; 35 A. L. R. 656. However, the *Mali* decision was held controlling in the later New York case of Homeyer v. Yaverbaum, 197 App. Div. 184, 188 N. Y. S. 849 (1921), which involved a store manager and a suspected shoplifter.

[9] 22 AM. JUR. 378, False Imprisonment, §35. "He who acts through another acts himself, [*i.e.*, the acts of an agent are the acts of the principal]." BLACK'S LAW DICTIONARY (4th ed., 1951) 1413.

[10] J. J. Newberry Co. v. Judd, *supra*, n. 7; MECHEM, *op. cit.*, *supra*, n. 4, §1973; 3 COOLEY, TORTS (4th ed., 1932) §396.

"assistant manager" carry an inference that their acts are the acts of the store, inasmuch as they are entrusted with the general management and custody of the entire business. This in turn renders the principal liable when such employees cause the false imprisonment of a customer with intention of protecting the principal's property, such actions being incidental to and consistent with the general scope of such agents' employment.[11] Usually a subordinate agent cannot cause his principal to become liable for false imprisonment since the protection of the principal's property is not normally entrusted to him nor is it his implied duty, in the absence of delegation to so protect the property.[12]

When an agent, regardless of his position, is expressly delegated the duty of protecting the principal's property, there arises an implied authority to do everything reasonable and necessary to protect the property, thus giving rise to liability on the principal for his acts in performance of such a duty.[13] In lieu of entrusting such a duty to inexperienced store employees, professional detectives are sometimes hired, the advantage being that better protection is afforded the store, and the possibility of liability for mistaken arrests is diminished by the experience and judgment of such trained persons.[14]

It is obvious that the principal cannot be held liable for false imprisonment caused by the agent's own malice or personal motives,[15] nor can the principal be held liable where the agent has caused the arrest after the crime has been committed and the only end it can serve is to vindicate public justice. This is true since the act was not committed under any authority from the principal, and bears no rela-

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[11] Birmingham News Co. v. Browne, 228 Ala. 395, 153 So. 773 (1934); McCrory Stores v. Satchell, *supra*, n. 2; Gillis v. Great Atlantic & Pacific Tea Co., *supra*, n. 4; Great Atlantic & Pacific Tea Co. v. Dowling, *supra*, n. 4.

[12] Bushardt v. United Inv. Co., 121 S. C. 324, 113 S. E. 637 (1922); Hammond v. Eckerd's of Asheville, 220 N. C. 596, 18 S. E. 2d 151 (1942); Rigby v. Herzfeld-Phillipson Co., 160 Wisc. 228, 151 N. W. 260 (1915); Conover v. Jaffee, 238 App. Div. 147, 263 N. Y. S. 618 (1932).

[13] Long v. Eagle, 5, 10, and 25¢ Store Co., 214 N. C. 146, 198 S. E. 573 (1938); Moseley v. J. G. McCrory Co., 101 W. Va. 480, 133 S. E. 73 (1926); Hurst v. Montgomery Ward & Co., 107 S. W. 2d 183 (Mo., 1937); Newton v. Rhoads Brothers, 24 S. W. 2d 378 (Tex., 1930); Staples v. Schmid, *supra*, n. 7; Knowles v. Bullene & Co., *supra*, n. 7; McCrory v. Stachell, *supra*, n. 2; J. J. Newberry Co. v. Judd, *supra*, n. 7.

[14] Adams v. F. W. Woolworth Co., 144 Misc. 27, 257 N. Y. S. 776 (1932); L. S. Ayres & Co. v. Harmon, 56 Ind. App. 436, 104 N. E. 315 (1914); Perkins Bros. Co. v. Anderson, *supra*, n. 4. Merely because detectives are hired does not give rise to an inference that the store owner has given express authority to arrest suspected thieves, the proper inference being they are hired to protect his property, with the implied authority attendant therewith as is necessary or customary to perform his duty.

[15] Cobb v. Simon, 124 Wisc. 467, 102 N. W. 891 (1905).

tion to the agency purpose of protecting the principal's property.[16] The Court pointed this out in the instant case by distinguishing it from *Nance v. Gall.*[17]

Special instructions to agents entrusted with the custody of the principal's property regarding the arrest of the suspected shoplifter have no effect on the principal's liability, if again the arrest is within the express or implied authority of the agent's general scope of employment.[18] Where the arrest is made by a public officer on the information furnished by a clerk or any agent, the principal can be held liable if furnishing such information is within the express or implied authority of the clerk or agent, since there is no distinction in regard to the master's liability in arresting or causing an arrest.[19] However, when an agent merely assists a public officer in making an arrest he is under the direction of the officer rather than his principal and is without the scope of his express or implied authority.[20]

In the instant case, the Court of Appeals affirms its alignment with the majority rule, eliminating the inconsistency which appeared in earlier cases.[21]

DAVID R. STAMBAUGH

Nuisance Based On Aesthetic Considerations

Feldstein v. Kammauf[1]

Residents of a suburb of Cumberland brought suit against Feldstein, asking that he be restrained from operating and maintaining a junk yard on premises owned by him and his sister. In 1939, the defendant had purchased prop-

[16] 35 A. L. R. 654-6; Pruitt v. Watson, 103 W. Va. 627, 138 S. E. 331 (1927); B. C. & A. Ry. Co. v. Ennalls, 108 Md. 75, 69 A. 638 (1908); 1 RESTATEMENT, AGENCY (1933) §245; 2 MECHEM, AGENCY (2d ed., 1914) §§1974-1976.

[17] Nance v. Gall, 187 Md. 656, 50 A. 2d 120, 51 A. 2d 535 (1947). This case involved the scope of employment of a railroad supervisor who caused the arrest of the plaintiff for damage which had already been repaired. The Court felt that the agent's act was to vindicate public justice, rather than protecting the railroad's property.

[18] J. J. Newberry Co. v. Judd, 259 Ky. 309, 82 S. W. 2d 359 (1935); Knowles v. Bullene & Co., 71 Mo. App. 341 (1897).

[19] Zinkfein v. W. T. Grant Co., 236 Mass. 228, 128 N. E. 24 (1920).

[20] Geary v. Stevenson, 169 Mass. 23, 47 N. E. 508 (1897); Meyer v. Monnig Dry Goods Co., 189 S. W. 80 (Tex. Civ. App., 1916).

[21] See Norvell v. Safeway Stores, Inc., 212 Md. 14, 128 A. 2d 591 (1956) and Banks v. Montgomery Ward & Co., 212 Md. 31, 128 A. 2d 600 (1956). These recent cases though primarily concerned with malicious prosecution (but not of shoplifters) cite the principal case with approval with the result that the prior inconsistencies in the Maryland case law, arising out of the rule of the *Mali* case, have been resolved.

[1] 209 Md. 479, 121 A. 2d 716 (1956).

erty, improved by a large warehouse, in a neighborhood containing other business and commercial properties and subject to neither use restriction nor zoning regulations. He immediately started storing scrap metal and junk and continued to use his land for this purpose. The original complainants purchased their property in 1947, at which time there was some junk stored on the defendant's land, but the complainants alleged that before 1954 this material was largely concealed by vegetation. The original complainants were joined by neighbors whose homes had been built between 1946 and 1954. In 1954, the defendant purchased a tract of land adjacent to his other property and began conducting junking operations on a large scale, hauling quantities of scrap by rail, smashing the unmanageable pieces with a large steel ball and burning wiring insulation. The yard contained an unsightly assortment of barrels, rails, wire, discs and tanks.

The chancellor decreed: (1) that the defendant reduce and conceal from the view of all the residents of nearby property the amount of scrap deposited on his property; (2) that he not handle any material on the property between the hours of 9 P.M. and 7 A.M.; (3) that he not burn anything which might cause offensive smoke, fumes or soot; (4) that he not block, or allow his customers to block, the county road leading to the property; (5) that he not allow rats or mice to congregate on the property; (6) that in the event he did not conceal the scrap and other materials, he should remove them from the premises. On appeal, the defendant contested only that part of the decree concerning the concealment of the scrap on the premises [(1) and (6)] which, he alleged, would compel him to discontinue his business on its present site. The only question which had to be considered, therefore, was whether the defendant should be required to abide by the contested part of the decree merely because of the unsightliness of his business. The complainants admitted that a junk yard is not a nuisance *per se*,[2] but they relied heavily on *Parkersburg Builders Material Co. v. Barrack*,[3] in which, although the court refused to enjoin the defendant from using his property as a storage yard for old automobiles because the area was clearly a residential community, it quoted with approval the following from *State v. Harper*[4]

[2] State v. Shapiro, 131 Md. 168, 101 A. 703 (1917); Landay v. Zoning Appeals Board, 173 Md. 460, 196 A. 293, 114 A. L. R. 984 (1938).

[3] 118 W. Va. 608, 191 S. E. 368, 370, 110 A. L. R. 1454 (1937).

[4] 182 Wis. 148, 196 N. W. 451, 455, 33 A. L. R. 269 (1923).

on the power of an equity court to enjoin the use of property on purely aesthetic grounds:

> "It seems to us that aesthetic considerations are relative in their nature. With the passing of time, social standards conform to new ideals. As a race, our sensibilities are becoming more refined and that which formerly did not offend cannot now be endured. That which the common law did not condemn as a nuisance is now frequently outlawed as such by the written law. This is not because the subject outlawed is of a different nature, but because our sensibilities have become more refined and our ideals more exacting. Nauseous smells have always come under the ban of the law, but ugly sights and discordant surroundings may be just as distressing to keener sensibilities. The rights of property should not be sacrificed to the pleasure of an ultra-aesthetic taste. But whether they should be permitted to plague the average or dominant human sensibilities well may be pondered."

The Court of Appeals reversed sections 1 and 6 of the decree and *held,* (Brune, C.J., dissenting) that since the neighborhood was not "clearly residential", since none of the property was subject to private use restriction or public zoning regulations, since complainants had bought with knowledge of the junk yard's existence, and since the decree would have the effect of putting defendant out of business, there was insufficient evidence of nuisance to require that the junk be hidden from view or removed, regardless of whether equity may enjoin for purely aesthetic considerations.

Although the sense of sight may perhaps be considered superior to that of hearing and smell for purposes of aesthetic perception, it has not traditionally been protected under the doctrine of nuisances. In explanation, an early English case stated that noises and odors manifestly may adversely affect repose and health, which, like light and air, are classed as necessities so that an action on the case lies for their protection.[5] This attitude of the early English law has been reflected in the United States with little exception.[6] Slowly, however, a change seems to be taking

[5] William Aldred's Case, 9 Co. Rep. 57b, 77 Eng. Rep. 816 (1587).

[6] Passaic v. Patterson Bill Posting, A. & S. P. Co., 72 N. J. L. 285, 62 A. 267, 268 (1905):

> "Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation."

place and matters of taste, which were judicially accounted as sentiment or luxury in the past, are now being considered among the necessities of a more sophisticated society.

Because of the judicial prejudice against any legal right predicated upon a "merely aesthetic" complaint, the courts have, at times, exercised devious reasoning in granting equitable relief. Where there have been eyesores so flagrant that their elimination became a necessity even from the standpoint of the "average man", they have been abated or brought under control through reasoning based upon established grounds rather than mere aesthetics.[7] An example of this circuitous reasoning is found in *Cochran v. Preston* where the validity of a Baltimore City statute regulating the height of a building in the Washington Mounment area was challenged as unconstitutional on the ground that the inspector of buildings was using the police power as a cloak to hide purely aesthetic purposes.[8] The Court categorically accepted the principle that in the exercise of the police power, property rights cannot be impaired by the legislative conception of artistic beauty. It was held, however, that the ordinance was enacted for a more substantial reason than an aesthetic one — that its purpose was to protect surrounding buildings from the ravages of fire. A long and eloquent account of the Baltimore fire of 1904 was included in the opinion in an attempt to justify the decision on the ground that tall buildings serve as large funnels, furnishing drafts for flames. It might be suggested that today the courts would be less critical of a legislative objective of preserving the architectural beauty of the particular locality.

While it is true that most cases have held that unsightly structures are not nuisances even though they adversely affect the value of adjoining property,[9] one noteworthy exception is *Yeager v. Traylor*.[10] There the Court held that the construction of a garage in a strictly residential area would be permitted if it conformed in architectural design to the general character of the community and that an effective screen be provided to hide the unsightly appear-

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[7] Comment, *Billboard Regulation and the Aesthetic Viewpoint with Reference to California Highways*, 17 Cal. L. Rev. 120 (1929).

[8] 108 Md. 220, 70 A. 113 (1908).

[9] Northfield v. Board of Freeholders, 85 N. J. Eq. 47, 95 A. 745 (1915); Houston Gas & Fuel Co. v. Harlow, 297 S. W. 570 (Tex. Civ. App. 1927). See also Crossman v. City of Galveston, 112 Tex. 303, 247 S. W. 810 (1923), where it was held that the mere unsightliness of a building which is the usual and natural result of dilapidation, does not make it a nuisance and a city would have no authority to declare it a nuisance for that reason alone.

[10] 306 Pa. 530, 160 A. 108 (1932).

ance resulting from the proposed practice of parking cars on the roof of the building.

A new cognizance of aesthetic considerations has been taken by the courts in the "funeral parlor" cases. Most courts have held that although a funeral parlor is not a nuisance *per se*, it may be enjoined as a nuisance in fact when it is maintained in close proximity to residential property.[11] In an attempt to justify the use of the injunctive power under the concept of a nuisance, however, several courts have added that a funeral parlor causes depressed feelings to persons of normal sensibilities living in the neighborhood and weakens the powers of some to resist disease.[12]

If excessive noise[13] and foul smells[14] are treated as nuisances, why should there remain this invidious distinction against the sense of sight? Although it may be true that perhaps noise and stench are more objectionable to the average person and more difficult to avoid than unsightliness, it seems clear that a thing which is visually offensive may seriously affect the residents of a community in the reasonable enjoyment of their homes. Of course, equitable relief should not be granted merely to protect fastidiousness of taste of a complainant, but only where the injury is of such a character as to diminish materially the value of property as a dwelling or seriously interfere with the ordinary comfort and enjoyment of it.[15]

A similar protection to the eye would hardly seem to establish a new principle but would at most simply extend a recognized one to its logical conclusion.[16] The instant case gives little indication whether or not the Court of

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[11] Smith v. Fairchild, 193 Miss. 536, 10 So. 2d 172 (1942); Clutter v. Blankenship, 346 Mo. 961, 144 S. W. 2d 119 (1940); Heimerle v. Village of Bronxville, 168 Misc. 783, 5 N. Y. S. 2d 1002 (1938).

[12] Fraser v. Fred Parker Funeral Home, 201 S. C. 88, 21 S. E. 2d 577 (1942); Jack Lewis, Inc. v. Baltimore, 164 Md. 146, 164 A. 220 (1933).

[13] Swimming Club v. Albert, 173 Md. 641, 197 A. 146 (1938).

[14] Fox v. Ewers, 195 Md. 650, 75 A. 2d 357 (1950); Fertilizer Co. v. Spangler, 86 Md. 562, 39 A. 270 (1898); Hendrickson v. Standard Oil Co., 126 Md. 577, 95 A. 153 (1915).

[15] Five Oaks Corp. v. Gathmann, 190 Md. 348, 58 A. 2d 656 (1948); Hamilton Corporation v. Julian, 130 Md. 587, 101 A. 558 (1917); Adams v. Michael, 38 Md. 123 (1873).

[16] Somewhat similarly, legislation to regulate the unsightly use of property, inspired solely by aesthetic motives, at one time met with great difficulty under the Federal Constitution. Comment, *Aesthetics and the Fourteenth Amendment*, 29 Harv. L. Rev. 860 (1916). But note the language of the Supreme Court in Berman v. Parker, 348 U. S. 26, 33 (1954):

> "The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."

Appeals would be favorably disposed toward such a conclusion. The holding, apparently based on a balancing of the equities of the parties, sidesteps the issue.[17]

ROY DRAGONE

Interpretation Of McGuire Act In Regard To Sales From Free Trade To Fair Trade Jurisdiction

General Electric Co. v. Masters Mail Order Co.[1]

The United States Court of Appeals for the Fourth Circuit recently held in *Bissell Carpet Sweeper Co. v. Masters Mail Order Co.*[2] that a mail-order house located in the District of Columbia, a non-fair trade jurisdiction, could not be enjoined from advertising in Maryland that fair-traded articles could be bought in Washington, D.C., at prices below the minimum retail prices in effect in Maryland. That decision was based exclusively upon an interpretation of the Maryland Fair Trade Act,[3] which was construed to extend only to advertising made in connection with sales to be consummated within the State. Since the sales took place in the District of Columbia, the Maryland statute had no application.[4] This decision left open the question whether, under the McGuire Act,[5] any state had the power to apply its fair trade laws to sales into the state from a free trade jurisdiction. The *Bissell* case, *supra*, was noted in the MARYLAND LAW REVIEW which pointed out that the court in that case confined its attention to the Maryland statute and that "[a] more binding interpretation of the extent of (the McGuire Act) is still wanting."[6]

Such an interpretation has been proffered by the instant case. Here plaintiff manufacturer sought to enjoin the de-

[17] But note that a century ago, the Court of Appeals affirmed a decree enjoining maintenance of a bawdy house in the vicinity of the plaintiff's homes, saying:

> ". . . if, as the authorities show, the court may interfere where the physical senses are offended, the comfort of life destroyed, or health impaired, these alone being the basis of the jurisdiction, the present complainants, presenting as they do a case otherwise entitling them to relief, should not be disappointed merely because the effect of the process will be to protect their families from the moral taint of such an establishment as the appellant proposes to open in their immediate vicinity."
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> Hamilton v. Whitridge, 11 Md. 128, 147-148 (1857).

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[1] 244 F. 2d 681 (2nd Cir., 1957), cert. den., Tr. Reg. Rep. ¶67,100, Dkt. 224, Oct. 14, 1957.

[2] 240 F. 2d 684 (4th Cir., 1957).

[3] Md. Code (1951), Art. 83, §§ 102-110.

[4] *Supra*, n. 2, 687-8.

[5] 66 Stat. 632 (1952), 15 U. S. C. A., Sec. 45(a) (1)-(5) (1956).

[6] 17 Md. L. Rev. 148, 152 (1957). Parenthetical material supplied.

fendant (the same defendant as in the *Bissell* case), a District of Columbia mail order discount house, from advertising, offering for sale, or selling plaintiff's products in New York below the duly-established New York fair trade prices. Defendant sent goods to New York customers in response to orders it received by mail in the District of Columbia. Order blanks had been distributed to prospective customers by mail and also over the counter in New York by defendant's parent corporation, a discount house located in New York. The District Court granted the injunction.[7] Because of the close supervision by the New York parent, the sales were considered as having taken place in New York. The decree was reversed, (2-1), on appeal. The Court considered the defendant and its parent to be distinct corporate entities and based its decision on an interpretation of the McGuire Act.[8] This statute permits the states to enact legislation validating resale price maintenance contracts, but only in those transactions in which the resale (or sale) occurs in the state attempting to apply its statute. The resales here occurred in the District of Columbia, a non-fair trade jurisdiction, and therefore the McGuire Act made the New York Fair Trade Act inapplicable to these transactions. Judge Clark held that the place of resale within the meaning of the statute was the place where title to the goods passed. Buyer and seller intended to take advantage of the non-fair trade prices in the District of Columbia, and since the intent of the parties governs the passage of title, the District of Columbia was the place of resale. Judge Waterman concurred in the result but on the ground that the place of resale was the situs of the retailer. Judge Lumbard dissented for the reasons offered by the District Court below.

Judge Waterman and Judge Lumbard indicated concern that the use of the concept of title in determining the place of resale might open the way to widespread evasion of fair trade law restrictions.[9] Both judges foresaw the possibility that parties located in the same or different fair trade jurisdictions could make specific provision for title to pass in a non-fair trade jurisdiction which had a direct and substantial relation to the transaction. However, circumvention of the statutes probably is not this easy. Contracting parties are not given that much latitude in stipulating where title is to pass. It is generally held in this country

[7] 145 F. Supp. 57 (S. D. N. Y. 1956).

[8] *Supra*, n. 5.

[9] *Supra*, n. 1, *conc. op.* 688, 690, for Judge Waterman's observation; and *dis. op.* 691, footnote 2 in Judge Lumbard's dissent.

that stipulation by the parties that a contract shall be governed by the law of a jurisdiction which is neither the place of making nor the place of performance of the contract is valid only if that jurisdiction has a *real and natural connection to the transaction.*[10] It seems evident, therefore, that the parties could go no further than to agree that title is to pass in the jurisdiction where either the vendor or the vendee is located. It is difficult to imagine any other situs which would have the necessary natural relation to the transaction.

A more pointed criticism of the title concept may be that the legislative history of the McGuire Act seems to indicate Congressional intent that the location of the vendor should determine the place of resale. *Sunbeam Corp. v. Wentling,*[11] held that the Pennsylvania Fair Trade Act did not apply to sales made from Pennsylvania into other states. A year later Congress passed the McGuire Act,[12] the apparent purpose of Section 4 of the Act being to overrule the *Wentling* decision.[13] It seems obvious that Congress intended that a seller in a fair-trade jurisdiction be subject to the fair trade prices in that jurisdiction, even when he sells to out-of-state consumers. Thus the District Court in Maryland in *Sunbeam Corp. v. MacMillan,*[14] enjoined a Maryland vendor from selling to an out-of-state buyer at less than the established fair trade price in Maryland, holding that the McGuire Act enabled the Maryland statute to reach this sale.[15] It becomes apparent that if the title concept is applied, then the result reached in *Sunbeam Corp. v. MacMillan* can easily be avoided by having the parties stipulate that title is to pass where the buyer is located. Stated another way, reading the title concept into the McGuire Act in effect frustrates the purpose for which Section 4 of the McGuire Act was enacted, *i.e.*, to close the "Wentling Loophole".

MARTIN B. GREENFELD

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[10] 112 A. L. R. 124 reviews the cases in numerous jurisdictions to this effect.

[11] 185 F. 2d 903 (3rd Cir., 1950), rev'd. 341 U. S. 944.

[12] *Supra*, n. 5.

[13] H. R. Rep. 1437, 82nd Cong., 2d Sess. (Feb. 27, 1952). Section 4 provides that the making and enforcing of fair trade contracts (lawful as applied to intrastate transactions) "shall (not) constitute an unlawful burden or restraint upon, or interference with, commerce". (Parenthetical material supplied.) Also see Sunbeam Corp. v. MacMillan, 110 F. Supp. 836, 842 (D. Md., 1953), which states that "[t]he language of subsection 4 (of the McGuire Act) seems very clearly to indicate that . . . Congress was expressing its public policy to the contrary of the Wentling decision. . . ."

[14] *Ibid.*

[15] Also see General Electric Co. v. Masters, Inc., 307 N. Y. 229, 120 N. E. 2d 802 (1954), where the New York Fair Trade Act was applied to sales from a New York vendor to out-of-state consumers.

Recent Decisions

Adoption — Age And Religion Of Adoptive Parents. *Frantum v. Department of Public Welfare, 133 A. 2d 408 (Md., 1957).* A two month old baby, in poor physical condition, was placed in the home of the petitioner, husband and wife, ages 54 and 48, respectively, for foster care. The petitioners nursed the child back to health and filed suit to adopt after the Department of Welfare refused to consent. The Probation Department of the court recommended the adoption. Petitioners were of the Lutheran faith, but the Catholic mother of the child had requested the child be reared a Catholic. The chancellor dismissed the petition primarily because of the advanced age of the foster parents; secondarily, because of the religious difference. The order was affirmed (4-1) on appeal. While Maryland law has established only a minimum — and not a maximum — age for adoptive parents, the age of the prospective parents was an important factor. It was held to be in the child's best interests to be placed in the home of younger parents, even though the petitioners were found to be "fine people", had given the child love and affection and had done an "excellent job" in nursing the baby back to good health. Moreover, it is the declared legislative policy of the state that the adoption be by persons of the same religious belief as the minor or his parents "whenever practicable", Md. Code Supp. (1957), Art. 16, Sec. 76. The Court pointed out that this statutory provision was not mandatory but held it practicable, nevertheless, to apply it in this case. (*Ed. Note:* Certiorari was denied by the Supreme Court, Nov. 25, 1957).

This is the first adoption case in Maryland where the age of the prospective parents has been considered such an important factor. *Ex parte Anderson,* 199 Md. 316, 86 A. 2d 516 (1952), cited by the Court as authority for this principle, denied an adoption petition almost exclusively on the bases that the petitioner was high strung and had retarded the development of the child. In reference to the question of religion, *Purinton v. Jamrock,* 195 Mass. 187, 80 N. E. 802 (1907), construed a statute similar to the one in Maryland as preferring the welfare of the child to the wishes of the natural parents, and allowed the adoption. Cases denying adoption on this ground are collected in 23 A. L. R. 2d 702 (Supp. Serv. 1957, 1422).

Corporations — By-Law Restricting Transfer Of Stock Must Be Stated On Certificate. *Hopwood v. Topsham Tele-*

phone Co., 132 A. 2d 170 (Vt., 1957). Plaintiff purchased 2 shares of stock of defendant corporation and brought an equity suit to compel defendant to transfer title to him on its books. Defendant resisted the suit on the grounds that the plaintiff, at the time of acquisition, had knowledge of non-compliance with the corporation's by-law, which prohibited the sale of any stock before first being offered for sale to the board of directors. By Vermont statute, Vermont St. (1947), Sec. 5880, there shall be no restriction on the transfer of stock unless said restriction is stated on the certificate. No restrictions were stated on the shares in question. The trial court's grant of relief to plaintiff was affirmed on appeal. The statutory requirement is absolute and is not limited to good faith purchasers without notice. Notice cannot take the place of compliance with the statute.

Decisions in at least two states are *contra, Baumohl v. Goldstein,* 95 N. J. Eq. 597, 124 Atl. 118 (1924), and *Doss v. Yingling,* 95 Ind. App. 494, 172 N. E. 801 (1930), holding that this statutory requirement is not for the protection of purchasers having notice of the corporation's by-law restricting the stock's transferability. 6 U. L. A., Stock Transfer, Sec. 15. Both of these cases were distinguished by the Vermont court because in each instance the purchaser was an officer of the corporation and thus stood in a fiduciary relationship to the other stockholders. The statute here involved is part of the Uniform Stock Transfer Act, Md. Code (1951), Art. 23, Sec. 110, and has not yet been construed by the Maryland Court of Appeals.

Husband And Wife — Husband's Liability For Wife's Attorney's Fees In Divorce Suit — Effect Of Reconciliation. *In Re De Pass, 97 S. E. 2d 505 (S. C., 1957).* A month after a wife instituted divorce proceedings against her husband, they were reconciled and the wife notified her attorney to withdraw the suit. The attorney petitioned the court to award him attorney's fees as against the husband before dismissing the case. The trial court refused the request, and the Supreme Court of South Carolina affirmed. To allow the award, which would necessarily require the continuance of the litigation against the will of the parties, would contravene public policy, which is to induce reconciliation. The decision is in accord with the rule in a majority of jurisdictions. Several states, however, allow continuance of a divorce suit after reconciliation for the sole purpose of decreeing attorney's fees of wife. See 45 A. L. R. 941, supplemented in 59 A. L. R. 355, discussing this conflict.

Although this point has never been specifically decided in Maryland, the Court of Appeals in *McCurley v. Stockbridge*, 62 Md. 422 (1884), sustained an action by a wife's attorney, in an *independent* suit against her deceased husband's estate, for counsel fees incurred by the wife in her divorce action, which was terminated by her husband's death and before any decree was issued. The prosecution of a reasonably justifiable divorce suit against husband is one of the "necessaries" of wife that is chargeable to husband. The general rule in the United States is *contra*, not allowing this type of recover by an attorney even in an independent suit against husband. See 25 A. L. R. 354, 42 A. L. R. 315.

Liens — Status Of Judgment Creditor As Against Administrator. *Smith v. Citizens National Bank In Okmulgee, 313 P. 2d 505 (Okla., 1957).* An heir was indebted to the deceased for an amount greater than his distributive share. The administrator claimed set-off and refused to give him a share in the estate. Plaintiff, a judgment creditor of the heir, filed suit to compel the distribution of the heir's one-fourth share in real property, since his judgment had been docketed before the death of the intestate. The trial court's dismissal of the petition and distribution to the other heirs was reversed by the intermediate court but reinstated by the Supreme Court of Oklahoma. Under Oklahoma statute intestate real and personal property passed through the administrator and as a result the distributive share was subject to a set-off of any amount owed by the heir to the deceased. This equitable lien was superior to that of a judgment creditor.

The jurisdictions appear to be about equally divided on this point. Courts adopting the orthodox theory, that realty passes at once to the heir, do not give the administrator such a lien; whereas in those states requiring intestate realty to pass through probate, the courts feel justified in giving the administrator a preferred lien before granting the heir his distributive share. 3 AMER. LAW OF PROPERTY (1952) Sec. 14.26. *Cf*, TURRENTINE, WILLS AND ADMINISTRATION (1954).

In Maryland in the case of intestacy title to land vests in the heirs immediately upon the ancestor's death. *Rowe v. Cullen*, 177 Md. 357, 9 A. 2d 585 (1939). Therefore, in Maryland the administrator should be in the same position as every other creditor. It is well settled that as among creditors, the one with the prior judgment lien prevails; *Messinger v. Eckenrode*, 162 Md. 63, 158 A. 357 (1932).

Option — What Constitutes An Acceptance. *Hunter Investment v. Divine Engineering, 83 N. W. 2d 921 (Iowa, 1957).* The parties entered into a five-year lease giving the lessee a two-year option to purchase, the rentals paid to the date of the exercise of the option to be applied to the purchase price. Before the expiration date, the lessee told the lessor, "We are going to exercise the option." The lessor refused to discuss the matter. No further action was taken until more than a year after the expiration date, when the lessor filed suit to quiet title to the premises and the lessee counterclaimed for specific performance of the option. The lower court's decree in the lessor's favor was affirmed on appeal. The acceptance of an option must be unqualified and unequivocal. Lessee's actions indicated only a possible future intent to purchase.

In *Foard v. Snider,* 205 Md. 435, 109 A. 2d 101 (1954), the optionee wrote the owner a letter which (1) expressed an *intention to purchase* and purported to be an exercise of the option right, (2) demanded that the owner give up possession of the land, but (3) refused to pay part of the purchase price called for by the agreement. The Court allowed the optionee to purchase the land but required him to pay the total stipulated purchase price. However, the question was avoided as to the sufficiency of this letter as an effectual acceptance of the option, because this issue had not been raised in the pleadings. *Trotter v. Lewis,* 185 Md. 528, 45 A. 2d 329 (1946) held that tender of the purchase price constituted due acceptance of an option. The Maryland cases emphasize that in addition to being "positive and unequivocal", the act purporting to be an exercise of the option (like any acceptance of an offer of contract) must be that act which the option prescribes as an acceptance or exercise.

Tenancy In Common — Tax Sale — Wife Of Co-Tenant As Purchaser. *Beers v. Pusey, 132 A. 2d 346 (Pa., 1957).* Plaintiffs and X were co-tenants of a tract of land. X's wife purchased the entire property at a public tax sale. The lower court decreed reconveyance to plaintiffs of that part of the land they formerly held as tenants in common with X. The Supreme Court of Pennsylvania affirmed. A co-tenant cannot buy at a tax sale for he stands in a confidential relationship to the other tenants. In light of the wife's knowledge of the facts and dower interest, public policy dictates that this disability be extended to her notwithstanding statutes emancipating married women from common law disabilities on account of coverture.

It has been held consistently that purchase of an outstanding title or incumbrance by one tenant inured to the benefit of the other co-tenants, 86 C. J. S., Tenancy in Common, 442, Sec. 59, even where the tenant purchased from a stranger who purchased at the sale, 86 C.J.S. 434, n. 46. These questions have not been squarely presented to the Maryland court. Assuming, however, that the Maryland Court would follow the majority of jurisdictions in holding that a co-tenant cannot buy in at a tax sale, the reasons offered by the Pennsylvania court for similarly restricting the wife would seem to be equally applicable in this state. Md. Code (1951), Art. 45 does remove the common law disability of a married woman to hold property. On the other hand, the Maryland wife does have the same dower right and presumably would have the same "knowledge of the facts" which was fatal to the wife's assertion of an independent right to purchase the property in the instant case.

Wire Tapping — Admissibility Of Evidence Procured Contrary To Statute. *Manger v. State, 133 A. 2d 78 (Md., 1957).* This is the first case arising under the recently enacted Maryland Wire-Tapping Statute, Md. Code Supp. (1957), Art. 35, Secs. 100-107. In substance, the Act makes admissible evidence procured through wire-tapping only if the wire-tapping was authorized beforehand by a court order. Police, without an order of court, tapped telephone wires leading to a certain house and overheard conversations (in which defendants were not involved) concerning the placing of bets on horse races. On this basis, a search warrant was issued for the premises and executed upon. The defendants were found in the house and arrested for violation of the gambling laws. Evidence of bookmaking was seized during the raid and admitted at the trial over defendants' objection. The conviction was affirmed on appeal and the evidence thus obtained was held admissible. The Court assumed for purposes of argument the correctness of the defendants' contention that the statute, if applicable to the case, made incompetent not only evidence as to conversations overheard by the unauthorized wire-tapping, but also evidence obtained *as a result of* unlawfully overhearing said conversations — in this case, the evidence seized in the raid. But the Court, pointing to the analagous situation of search and seizure, stated that the Wire-Tapping Statute, *supra,* must be construed with reference to the Bouse Act, Md. Code Supp. (1957), Art. 35, Sec. 5, which makes incompetent evidence obtained "by,

through, or in consequence of" an illegal search or seizure, in trials for misdemeanors. *Rizzo v. State*, 201 Md. 206, 209, 210, 93 A. 2d 280 (1952), held that one could not invoke the Bouse Act if he had no interest in the premises or property illegally searched or seized. Likewise, one who is not a *participant* in the intercepted telephone conversation (unless perhaps his own telephone is the one tapped) cannot invoke the protection of the Wire-Tapping Statute; and such evidence unlawfully obtained is admissible against him. The defendants here were not talking on the telephone when the wires were tapped. On admissibility or evidence obtained by Wire Tapping, see 3 Md. L. Rev. 266 (1939) and 13 Md. L. Rev. 235 (1953).

Workmen's Compensation — Claims By Common Law Wife And Illegitimate Child. *Humphreys v. Marquette Casualty Company, 95 S. 2d 872 (La., 1957).* This was a Workmen's Compensation proceeding by the common law wife and illegitimate child of a deceased workman. The trial court decreed an award only to the child. In affirming the judgment, the Court of Appeals of Louisiana declared that a common-law wife is not entitled to compensation under the statute either as a "surviving widow" or as a dependent member of the deceased workman's "family", since common law marriages are not recognized in the state. However, an illegitimate minor living in the household is considered a member of the family.

Recovery under the Maryland Act is based solely upon dependency and not relationship. Md. Code (1939) Art. 101, Sec. 48(4) precluding one from being a dependent who was not a wife, stepchild, or blood relative of the deceased, was supplanted by Md. Code (1951) Art. 101, Sec. 35(8)(d), which left the question of dependency to the State Industrial Accident Commission. The leading case of *Kendall v. Housing Authority*, 196 Md. 370, 76 A. 2d 767 (1950), declared that the effect of this amendment was to eliminate the requirement that a dependent be related to the deceased employee by blood or marriage. The claimant, who cohabited with the deceased for ten years prior to his fatal injury, but had refused to marry him because of religious scruples, was awarded compensation. That common law marriage was not recognized in Maryland did not bar recovery. This same Code section also abolished the requirement that an illegitimate child live in the household of the deceased workman to be entitled to compensation. See *Brooks v. Bethlehem Steel Co.*, 199 Md. 29, 85 A. 2d 471 (1952).

Book Reviews

The Law Of Admiralty. By Grant Gilmore and Charles L. Black, Jr. Brooklyn. The Foundation Press, Inc. 1957. Pp. xli, 866. $10.00.

Professors Grant Gilmore and Charles L. Black, Jr., of the Yale Law School, have performed a magnificent service to the American Admiralty Bar, as well as to their own teaching profession, in the publication of their "Law of Admiralty". The last work in the field was written by Professor G. R. Robinson in 1939, and since then there have been fundamental changes brought about by statute and case law. Moreover, the great fleet of American war-built merchant vessels recently sold to private operators, and our own Government's policy of assistance to the American shipping industry have made admiralty problems more important as well as more complex. The text of the new work has been prepared with great industry and scholarly care over the last two years, and includes not only abundant note reference to supporting statutes and cases but also refers to the English language texts, literature, and law review articles bearing on the various subjects under discussion. It is thus not only a digest of the law, but also an index of reference works. An adequate general index, and an index of over 1700 cases cited, are included.

The style of writing is clear and also interesting. The authors are, of course, at pains to state the law on the great number of points discussed as it appears from the latest statutes and decisions. But the interest of the practitioner, the student and even the general reader is aroused by the background history of earlier authorities that is brought in wherever it can throw light on the development of the law and the trend of expected decisions to come. And like other "Monday morning quarterbacks", the authors can point to many instances where trends appear to run in opposite directions, or where the judicial progress slows to a standstill. The authors never hesitate to speak their minds and their comments are not always flattering to either judges or legislators. In considering the development of principles governing personal injury at sea, the authors say at one point:[1]

> "The only thing which the agency cases did make clear was the ease with which last term's dissent could become this term's majority opinion."

[1] GILMORE and BLACK, 381.

and again at another point:[2]

> "The argument . . . illustrates the process of fusion and confusion which is going on between the Jones Act theory and unseaworthiness theory."

The quips and froth that leaven the work, that might otherwise become ponderous, do not detract from the serious approach of the authors to their main objective — to show the development and present state of the law. For instance, there is the trend toward a harmonious and uniform admiralty pattern applicable in all ports and to all situations of a nationwide commerce. In the *Jensen* case[3] a State Compensation Act was held inapplicable to harbor workers on shipboard, since it "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations". And in the *Chelentis* case[4] the land law of negligence was held inapplicable to seamen for the same reason, the Court saying:

> "[N]o State has power to abolish the well-recognized maritime rule concerning measure of recovery . . ."

When *Chelentis* was decided the doctrine of uniformity restricted the seaman's rights for personal injury recovery, but with the constant trend to improve the rights of the admiralty courts' favorite wards (the seamen and ship workers) the same doctrine, in the *Garrett* case,[5] the *Mahnich* case[6] and the *Sieracki* case[7] greatly broadened their rights in the same field. These admiralty decisions subjecting State law to the supremacy of Federal maritime law were coming out, as the authors point out, at the same time that the Supreme Court was establishing the supremacy of State common law over the general Federal common law.[8]

There is necessarily so much in the eleven chapters into which the book is divided that it will only be possible to consider in detail some of the newer statutes and decisions that have affected maritime law since Robinson's text of 1939. It is regretted that the authors have not discussed the statutes and practice relating to arbitration of maritime

[2] *Op. cit. ibid*, 303.
[3] Southern Pacific Company v. Jensen, 244 U. S. 205, 216 (1917).
[4] Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 382 (1918).
[5] Garrett v. Moore-McCormack Co., 317 U. S. 239 (1942).
[6] Mahnich v. Southern S. S. Co., 321 U. S. 96 (1944).
[7] Seas Shipping Co. v. Sieracki, 328 U. S. 85 (1946).
[8] Erie R. Co. v. Tompkins, 304 U. S. 64 (1938).

cases, particularly as they point out[9] that arbitration has largely taken the place of litigation in construing charter parties, adding:

> "The infrequency of litigation does not, any more than in the marine insurance field, imply that the subject is unimportant to the admiralty lawyer."

The book also leaves the practitioner without guidance or discussion (except for a short note, page 575) of the statutes and practices relating to the transfer of title of ships and the recording of documents, matters most important to the practitioner in searching and certifying marine titles.

Chapter I describes the sources of admiralty law brought into our Federal courts by the Constitutional grant of power. The early lines of demarcation, which excluded ship construction contracts, ship mortgages, and cases involving ship damage to land structures from admiralty consideration, have been modified, at least in the two categories last mentioned, by Federal statute.

Chapter II on marine insurance is most welcome. Recent texts on admiralty have not treated this subject, although its importance to the average practitioner cannot be overestimated. As the authors point out:[10]

> "[A]ll important possibilities of marine loss or liability are normally insured against. . . . To consider the rules and concepts of maritime law without reference to the all pervading 'insurance angle' is a stultifying process indeed."

The authors give a satisfactory explanation of usual marine policy language and various clauses which are brought in and which are so often in the trade abbreviated to mere initials, such as F.P.A., F.C. & S., etc. In the recent *Wilburn Boat Company* case,[11] the Supreme Court, in dealing with warranties in marine policies, appears to desert the principle of uniformity. Although the insured vessel in that case plied an inland lake, the principle announced, as pointed out by Mr. Justice Frankfurter, might equally apply to the Queen Mary.

In Chapter III the usual business practices relating to carriage of goods by sea under bills of lading are discussed. There is a brief review of the structure, both business and legal, within which international commerce and banking

[9] *Op. cit. supra*, n. 1, 173.
[10] *Ibid*, 48.
[11] Wilburn Boat Co. v. Fireman's Ins. Co., 348 U. S. 310 (1955).

are conducted, including the strict requirements relating to letters of credit and documentary sales based on the transfer of negotiable bills of lading. Here also is reviewed the law relating to whether ship or shipper (or their respective underwriters) suffer for loss or damage to goods in ocean transit. This, of course, has been governed for many years by statutes such as the Harter Act of 1893,[12] the Pomerene Act of 1916,[13] and the Carriage of Goods by Sea Act of 1936.[14] Basic in this area is the age-old conflict between the ocean shipper and the ocean carrier, which brought about a change in our own national policy as we developed from a carrying nation to a predominately shipping nation in the last half of the 19th Century.

Chapter IV discusses the essentials of the three types of charter parties — the voyage and time charters under which the owner has responsibility to man and operate, and demise or bare boat charters where he does not.

The authors devote a separate chapter to salvage, general average and collision, including pilotage and towage; also to the American limitation of liability statute. The new International Rules of the Road of 1954 are reviewed. Recent collisions between submarines and operating trawlers[15] and radar-equipped vessels[16] show that neither rules nor science can assure absolute safety at sea. In considering the amounts awarded in salvage cases by the courts, the authors show that the general principles governing awards are clear, but that every case stands on its own facts. The authors refer to the excellent tabulation of American salvage awards in the six Digests of American Maritime Cases covering the period 1923-1952, a table compiled like the corresponding English table appearing in Lloyd's List Digest.

In discussing whether owners' insurance should be surrendered to claimants in limitation of liability cases, the authors aptly summarize the situation as follows:[17]

> "The battle of the insurance proceeds, like the battle of Waterloo in the Duke of Wellington's opinion, was 'a damned close-run thing'."

In 1886 by a 5-4 decision in *The City of Norwich* case,[18] the Supreme Court held the owner's hull insurance pro-

[12] 27 Stat. 445-6, 46 U. S. C. A. §§190-195 (1928), §196 (1956).
[13] 39 Stat. 538, 49 U. S. C. A. §§81-124 (1951).
[14] 49 Stat. 1207, 46 U. S. C. A. §§1300-1315 (1944), §1302 (1956).
[15] United States v. Woodbury, 175 F. 2d 854 (1st Cir., 1949).
[16] United States v. The Australia Star, 172 F. 2d 472 (2nd Cir., 1949).
[17] GILMORE and BLACK, 713.
[18] 118 U. S. 468 (1886).

ceeds need not be surrendered. In 1954, by the same close majority, limitation claimants were allowed to reach the proceeds of an owner's liability insurance, even though the policy provided that payment should be made only after the insured "shall have been" held liable in damages.[19]

The authors' discussion of maritime liens, including liens under preferred ship mortgages, is particularly well handled. To know whether a lien exists in any circumstances is of vital importance to the practitioner, and he must also know what is its priority rating. The authors introduce the subject as follows:[20]

> "The beginning of wisdom in the law of maritime liens is that maritime liens and land liens have little in common. A lien is a lien is a lien, but a maritime lien is not."

The subject brings up the disregard which Mr. Justice Holmes as Supreme Court Justice had for the speculations of Mr. Holmes as a scholar and writer. In his "Common Law" he had argued that a lien on a ship for her faults arose because the ship was to be considered as a person. In *The Western Maid* case,[21] the ship was at fault in a collision while owned by the United States. Neither the ship nor the Government could then be sued, and the question later arose as to whether the ship, subsequently transferred to private hands, was liable in rem for the collision lien. Mr. Justice Holmes pointed out that the idea of the ship as a person did not go this far and continued:

> "But that is a fiction not a fact and as a fiction is the creation of the law. It would be a strange thing if the law created a fiction to accomplish the result supposed."[22]

Judge Hough, a great admiralty Judge of the Second Circuit, in a comment several years later said:

> "When it comes to hurdling a legal difficulty Holmes, J. is '*hors concours*', but in this effort he has surpassed himself";[23]

adding in the words of an old song:

> "It ain't so much as wot 'e said,
> As the narsty w'y 'e said it."

[19] Maryland Casualty Co. v. Cushing, 347 U. S. 409 (1954).
[20] *Op. cit. supra*, n. 17, 483.
[21] 257 U. S. 419 (1922).
[22] *Ibid*, 433.
[23] Hough, *Admiralty Jurisdiction — Of Late Years*, 37 Harv. L. Rev. 529, 543 (1924).

Finally, in the chapter on death and injury cases of seamen and maritime workers the authors trace the great changes that have recently been made in favor of maritime labor. For seamen the Jones Act of 1920 opened the way for recovery from the results of operating negligence, even of fellow servants, both in the Admiralty Court and on the law side with a jury. Under a recent decision the Act has been extended to apply to seamen's injuries even occurring on land.[24] Still later the hard rule requiring plaintiffs to elect between recovery under the old Admiralty Rule for unseaworthiness and recovery under the Jones Act for negligence set out in the *Peterson* case[25] was greatly softened in several circuits.[26] But the door has been opened even more widely for maritime labor recovery. Both seamen, and stevedores (even though not directly employed by the ship), are now able to recover for injury from any unseaworthiness, even resulting from operating negligence of the vessel's crew.[27] The authors point out that very little more help could be given by the courts to the maritime personal injury claimant, although the final rule has probably not been set as to where the ultimate loss should fall as between the shipowner and the employing stevedore company when a harbor worker is injured on board ship with the fault of both parties contributing. The development of this part of the law is set forth with detail and precision.

It takes no gift of prophecy to state that the new textbook will be promptly installed in the working libraries of the Maritime Law fraternity.

ROBERT W. WILLIAMS*

The Law Of AWOL. By Alfred Avins. New York. Oceana Publications. 1957. Pp. 288. $5.00.

The need or reason for such a volume might not be apparent to the average lawyer. However, the need for some knowledge of military law is becoming more widespread and the opportunity for utilizing such knowledge could well present itself to the average practicing attorney more often than might be supposed.

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[24] O'Donnell v. Great Lakes Co., 318 U. S. 36 (1943).

[25] Pacific Co. v. Peterson, 278 U. S. 130 (1928).

[26] McCarthy v. American Eastern Corporation, 175 F. 2d 725 (3rd Cir., 1949); Balado v. Lykes Bros. S. S. Co., 179 F. 2d 943 (2nd Cir., 1950).

[27] Mahnich v. Southern S. S. Co., 321 U. S. 96 (1944), as to seamen; Seas Shipping Co. v. Sieracki, 328 U. S. 85 (1946), as to stevedores.

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Since the adoption of the Uniform Code of Military Justice in 1951,[1] the need for qualified counsel in the military system has been greatly expanded and civilian counsel is being called upon more and more to defend persons charged under the Code. In addition, with the great number of lawyers still holding Reserve Commissions the opportunity for many attorneys to be called upon to prosecute or defend cases under the U. C. M. J. is not unlikely.

This volume is devoted primarily to the military offense known as Absence Without Leave — AWOL. However, the author also touches upon the related offenses of desertion of which AWOL is a lesser included offense, failure to repair and the similar offenses so closely related.

The military offense known as Absence Without Leave has been the plague of military commanders throughout the centuries and has been a violation of military law apparently as long as recognized warfare. As the author points out — the greatest percentage of court martials arise from violation of Article 86[2] of the Code of Military Justice: Absence Without Leave. In fact, AWOL always has been a major problem in the armed forces and it has been estimated by the United States Bureau of Navy Personnel that such AWOL has cost the armed services over $100,000,000 a year in lost time and official action. During World War I slightly over half of all the offenses in the United States Army were AWOL cases and during World War II an even larger proportion of the offenses committed were AWOL. In view of the tremendous volume of such offenses, the need for a text on this subject becomes apparent.

This small volume should go far to fill such a need, particularly among military lawyers as well as officers not necessarily trained in the law, who may be called upon to prosecute or defend within the military system, the military offense known as Absence Without Leave and the related offenses to it.

Although the author has drawn heavily on other great military legal writers who have preceded him, particularly Colonel William Winthrop, his work represents a great amount of research into the early codes and treatises and effectively traces the history of this military offense down to the present day. The volume is not strictly a text book nor a case book — it partakes somewhat of both, and the author has drawn heavily on military precedents from our

[1] 64 Stat. 108 (1950), 50 U. S. C. A. §§551-736 (1951). Note that the U. C. M. J. is now contained in 10 U. S. C. A., "Armed Forces".

[2] *Ibid*, §680 (10 U. S. C. A. §886).

own Military Court of Appeals, the Court Martial reports dating back to Colonial Days, and the Court Martial records of Great Britain and the English speaking world whose military law actually stems from the common law as does our own. Numerous citations of cases from Australia, the Malay States and India as well as Great Britain and Canada, appear.

He has dealt fully with the offense of AWOL and other related offenses under the Military Code and the elements which must be proven in order to make out the offense, that is, the breaking off of military control, what constitutes *absence* in a legal sense, the duration of the absence and its termination. He has also dealt fully with the various defenses which are available in such cases including impossibility, mistake of fact, illegal orders, the "*de minimis* rule" and condonation.

Military lawyers should find the volume valuable as a quick and ready reference although not an exhaustive authority. A practicing lawyer should find it valuable for that occasional case he might be called upon to defend at some time during his practice or perhaps it could be of value in a "line of duty" determination in a claim against the government. It should also be of value to the non-legal officer administering non-judicial punishment under the Uniform Code of Military Justice or the Summary Court officer called upon to dispose of minor AWOL cases.

Difficult legal points have been dealt with in detail and while minor matters have been touched on lightly, it seems to contain sufficient discussion of the law to permit even a non-legal officer to decide a matter according to law and to do substantial justice in those cases where no review, or only a limited review, is provided for in the military legal system.

The book cannot be described as a text book but in some places it resembles a text book and in others it resembles a law review article. Some cases are set forth fully and others only in an abbreviated version. However, the author has left the subject somewhat in doubt on occasion by a poorly written abstract of the case at point.

The volume is well indexed and the citations are full and complete. The wide range of cases covering several centuries and several countries have been chosen with discretion to illustrate the points involved.

In addition the book should prove of interest to the average lawyer who has absolutely no knowledge of the military legal system and the manner in which cases are

tried and reviewed. Furthermore, the cases cited should be of interest to many average readers for their historical interest — if for no other. The volume deals with many of the famous court martials of history, including the trial of Colonel Fremont in 1847 in the Mexican territory, and the court martial of Admiral Schley during the Spanish American War, as well as those of the many officers and men throughout history from the Plains of Runnymede to the Korean Front, who have had occasion to go AWOL for one reason or another.

Although this volume represents no great amount of scholarship, and certainly not much original thinking, it should serve a useful purpose and prove interesting and valuable to the officer or lawyer dealing with the military system of justice and particularly violations known as AWOL and related offenses.

LEROY W. PRESTON*

Compulsion. By Meyer Levin. New York. Simon & Schuster. 1956. Pp. 495. $5.00.

The crime of the century was the murder of Bobby Franks by Leopold and Loeb in 1920. "Compulsion" is the story of this crime. One reads with a certain snake-eyed fascination of two teenagers deliberately and coldly planning and executing a shocking murder. By their confessions the criminals lead the District Attorney, and Mr. Levin leads the reader, from the time the murder is conceived to the time of its execution. This devious path is one of horror, and from the beginning points up the homosexual relationship which existed between the defendants. In telling the story of this crime, Mr. Levin produces an historical novel packing as much suspense and terror as a Hitchcock production.

The author also succeeds in telling a gripping story of the notorious trial of Leopold and Loeb. Solely because of his skill in narrating the essence of the trial of the century, "Compulsion" is well worth reading, but the reader should bear in mind that the author is a writer and had been a newspaper reporter. He is not a lawyer and "Compulsion" is not a law book; yet he has carefully selected the material for his account of the trial and has omitted tiresome parts of the legal record. His narrative of the trial is sufficiently accurate to please an appellate judge; yet is so free from

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legal terminology that it does not bore or confuse lay readers. A comparison of the included excerpts of the authentic closing arguments of the attorneys shows excellent choice.

There is something extraordinary about this book. One gets the impression that the author was compelled to write "Compulsion". He seems to have felt responsible for sending them to prison. After all, as the book discloses, Leopold and Loeb may never have been apprehended but for Mr. Levin's detective ability, nor have committed the crime had the author and other fellow students accepted them as normal boys. Furthermore, Mr. Levin pondered over the dramatic material of this book for a period of thirty years before he commenced to write. That is a long time to lapse between inspiration and production. From the shreds of evidence contained in the book it appears that Mr. Levin may have written "Compulsion" as a means of making restitution to Leopold and Loeb for the wrongs he fancied he had done them. He seeks to make this restitution by answering a question that society specifically asked in the Leopold-Loeb case and has been asking generally ever since; namely, why do intelligent and wealthy boys of cultured families, knowing the difference between right and wrong, with frightening frequency, deliberately select a career of criminal conduct and thereby forfeit prospects of a brilliant and fruitful future?

Mr. Levin is a member of the deterministic school of conduct and his thesis is that Leopold and Loeb were predestined to commit this crime. Judges who do not agree with Mr. Levin would hang Leopold and Loeb and retort that if they were predestined to commit murder they were also predestined to hang for it. The fallacy in Mr. Levin's theory is that it offers society no hope for preventing crime and presupposes that man can learn nothing from his own or others' experiences. But, on the other hand, it is paradoxical that judges who hang criminals on the theory the criminal was predestined to hang, generally feel that they themselves achieved their judgeship by the proper exercise of their free will, industry and ability. It is odd how vehemently we claim to achieve the good things of life by a timely exercise of free will, but whine that the evil days we suffer are pre-determined — unless success comes to the other fellow, in which event, such success was predetermined.

The author gives a convincing chain of circumstances supporting his deterministic theory of this crime. It is

assumed that the crime was the result of a joint venture and would not have occurred had not the defendants been brought together by the connivance of their doting mothers. It is assumed they would not have stayed together had not their personalities been complementary. These assumptions lead the author to reconstruct all of the forces that went into the formation of the personalities of the criminals. He discusses with insight the factors which made Leopold an active homosexual. Leopold's character is clearly delineated, but Loeb is shown only as a disgusting and dissolute person who accepts Leopold's sexual advances for the purpose of putting Leopold within his power. Leopold, on the other hand, has information of Loeb's criminal activities which puts Loeb within the power of Leopold. This reciprocal knowledge induced them to become partners in crime. After the formation of this partnership, they conceived of committing a "perfect crime". In their warped minds, perfection was equated with non-disclosure and equal guilt. It was insurance to both that neither would "squeal" about the murder. In addition, Leopold had insurance that Loeb would not disclose his homosexuality and Loeb was insured against Leopold disclosing his prior criminal activity. This was a twisted type of blackmail generated by their unholy partnership.

Darrow's job as defense attorney was to stop the shedding of blood, and to do this he called upon the medical profession for an understanding of Leopold and Loeb, and he pleaded for forgiveness of the boys. The defense psychiatrists testified to some pretty thin stuff about glands, dreams and Teddy Bears. A comparison of the psychiatric testimony given in 1920 in this case to forensic psychiatry today shows the great development that has taken place in that science. One may reasonably question if the law of criminal insanity has kept apace with the growth of psychiatry.

One suspects Darrow was at the pinnacle of his remarkable powers while delivering his argument during those three days when he alone stood between death and his clients. It has been thought that Darrow won the case because his clients were not hanged. This is only partly true. He won the case because he was able to give the essence of his experience of seventy years of living in an argument that will be considered a masterpiece as long as forensic literature is treasured. He said in part:

> "The easy and popular thing to do is to hang my clients. I know it. Men and women who do not think will applaud. The cruel and the thoughtless will ap-

prove. It will be easy today; but in Chicago, and reaching over the length and breadth of the land, more and more fathers and mothers, the humane, the kind and the hopeful who are gaining understanding and asking questions not only about these poor boys but about their own, — these will join in no acclaim at the death of my clients. These would ask that the shedding of blood be stopped, and that the normal feelings of man resume their sway. And as the days and the months and the years go on, they will ask it more and more. But, your Honor, what they shall ask may not count. I know the easy way. I know your Honor stands between the future and the past. I know the future is with me, and what I stand for here; not merely for the lives of these two unfortunate lads, but for all boys and all girls; for all of the young and as far as possible, for all of the old. I am pleading for life, understanding, charity, kindness, and the infinite mercy that considers all. I am pleading that we overcome cruelty with kindness and hatred with love. I know the future is on my side. Your Honor stands between the past and the future. You may hang these boys, you may hang them by the neck until they are dead. But in doing it you will turn your face toward the past. In doing it you are making it harder for every other boy who in ignorance and darkness must grope his way through the mazes which only childhood knows. In doing it you will make it harder for unborn children. You may save them and make it easier for every child that sometime may stand where these boys stand. You will make it easier for every human being with an aspiration and a vision and a hope and a fate. I am pleading for the future; I am pleading for a time when hatred and cruelty will not control the hearts of men, when we can learn by reason and judgment and understanding and faith, that all life is worth saving, and that mercy is the highest attribute of man."

All in all, "Compulsion" is a powerful book. It is a thriller that should not be read by an imaginative person alone at night. Although it never satisfactorily explains the causes of the murder, nevertheless, it is an honest and thoughtful endeavor to probe more deeply into the riddle of criminal conduct. It is a step, and not an inconsiderable one, towards Darrow's objective — understanding.

BARNARD T. WELSH*

* Of the Maryland Bar.

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