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CONTENTS

LEADING ARTICLES

NOTES ON THE LAW OF LANDLORD AND TENANT
   Allan W. Rhynhart 1

EDITORIAL SECTION

THE EDITOR'S PAGE ................................................................. 49

COMMENTS AND CASENOTES

BEST EVIDENCE RULE — UNSIGNED CARBON COPY OF LETTER AS DUPLICATE ORIGINAL — Parr Construction Co. v. Pomer ................................................................. 50

GRADE OR CLASS PROVISION AS A BASIS FOR DISQUALIFICATION FOR UNEMPLOYMENT COMPENSATION — Bethlehem Steel Co. v. Board................................................................. 59

ESTATE TAX DEDUCTION FOR AN ENTIRE TRUST CONTAINING CHARITABLE BEQUEST WITH A POSSIBLE DIVERSION OF TRUST INCOME — Mercantile-Safe Deposit & Trust Co. v. U.S................................................................. 64

CONTINUING CORPORATE LIABILITY FOR FEDERAL CRIME AFTER STATE DISSOLUTION OF CORPORATION—Melrose Distillers, Inc. v. United States................................................................. 69

THE EFFECT OF THE INTERROGATORY FORM ON THE SUFFICIENCY OF THE ANSWER — Britt v. Snyder ................................................................. 74

RECENT DECISIONS

Constitutional Law — Bible Reading And Prayer Recital In Public Schools (*Engle v. Vitale, N.Y., 1959*)


Evidence — Improper Denial By The Trial Court Of A Witness’ Claim Of Privilege Cannot Be Taken Advantage Of By A Party (*Butz v. State, Md., 1959*)

Labor Law — States Pre-Empted From Awarding Damages Resulting From Peaceful Picketing (*San Diego Building Trades Council, Etc. v. Garmon, Sup. Ct., 1959*)

Libel And Slander — No Recovery Where Plaintiff Unable To Prove Application Of Defamatory Words To Himself (*Cohn v. Brecher, N.Y., 1959*)

Workmen’s Compensation — Mental Disability Unaccompanied By Physical Injury Not Compensable (*Chernin v. Progress Service Co., N.Y., 1959*)

**BOOK REVIEWS**

**LUMPKIN, CONFESSIONS OF A CRIMINAL LAWYER**

*Nelson Reed Kerr, Jr.* 87

---

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CONTENTS

LEADING ARTICLES

THE APPORTIONMENT OF STOCK DISTRIBUTIONS IN TRUST ACCOUNTING PRACTICE. Arthur W. Machen, Jr. 89

THE PRODUCTION AND ADMISSIBILITY OF GOVERNMENT RECORDS IN FEDERAL TORT CLAIMS CASES Goodloe E. Byron 117

LORD BALTIMORE AND THE MARYLAND COUNTY COURTS Aubrey C. Land 133

EDITORIAL SECTION

THE EDITOR’S PAGE 141

COMMENTS AND CASENOTES

EFFECT OF POWER OF REVOCATION VESTING SUBSEQUENT TO EXECUTION OF DEED OF TRUST ON MEASURING PERIOD OF PERPETUITIES — Fitzpatrick v. Mercantile Safe Deposit and Trust Co. 142

RIGHT OF OWNER OF PERSONAL PROPERTY TO CHALLENGE ASSESSMENTS OF REAL PROPERTY — National Can Company v. State Tax Commission 155

INSURANCE — RIGHT OF INSURER TO SUBROGATE TO COLLATERAL CONTRACT RIGHTS OF THE INSURED — In The Matter of Future Manufacturing Cooperative, Inc. 161

TIME LIMITATIONS ON ACTIONS AGAINST ADMINISTRATORS OR EXECUTORS — Chandlee v. Shockley 170

AUTOMOBILE DRIVER CANNOT BE HELD TO A NORMAL DEGREE OF CARE UNDER EXTRAORDINARY CIRCUMSTANCES — Robinson v. Walls 175
RECENT DECISIONS

Criminal Law — Circumstantial Evidence Of Corpus Delicti Held Sufficient For Murder Conviction (People v. Scott, Cal., 1959) .................................................................................................................. 180

Evidence — Admissibility, In A Rape Trial, Of Testimony Of Defendant's Prior Rape Victims (State v. Finley, Ariz., 1959) .................................................................................................................. 180


Negligence — Assumption Of Risk By Golf Course Employee (Meding v. Robinson, Del., 1959) ................................................................................................................................. 182

Practice — Length Of Time During Which Jury Is Kept Together Is Within The Discretion Of The Trial Judge (Commonwealth v. Moore, Pa., 1959) ......................................................... 183

Real Property — Taking Of Air Easements By Landings And Take-Offs Of Aircraft (Ackerman v. Port of Seattle, Wash., 1960) .............................................................................. 184

BOOK REVIEWS

DAVIS, ADMINISTRATIVE LAW TEXT .......... Bird H. Bishop 185

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Subscribers who move or change their mailing address should notify the REVIEW promptly.
CONTENTS

LEADING ARTICLES

Subchapter S Corporations: Uses, Abuses and Some Pitfalls ................................................. William P. Cunningham 195

The Maryland Law of Strikes, Boycotts, and Picketing .................................................... Leonard E. Cohen 230

EDITORIAL SECTION

The Editor's Page .................................................................................................................. 264

COMMENTS AND CASENOTES

Liquidating Dividends Under the Maryland Income Tax .................................................... P. McEvoy Cromwell 266

Inheritance By and From Illegitimates Under Maryland Intestacy Law — Penman v. Ayers .......... 276

Sufficiency of Description in a Chattel Mortgage—Phillips v. J. F. Johnson Lumber Company ................................................................. 282

Scope of the President's Power to Secure 80-Day Injunction Against Continuation of Steel Strike Under Labor Management Relations Act, Section 208 — United Steelworkers of America v. United States .................................................................................................................. 287

Governmental Records of Investigatory Nature Not Open to Public Inspection — Whittle v. Munshower 292

RECENT DECISIONS

Conflict Of Laws — Effect Of Foreign Ex Parte Divorce On Prior Maryland Separation Alimony Decree (Gregg v. Gregg, Md., 1959) ................................................................. 299

Criminal Law — Involuntary Manslaughter Conviction Affirmed Against Joy Racer (Commonwealth v. Root, Pa., 1959) ................................................................. 299

Estoppel — Corporate Officer Estopped From Claiming Ownership Of Property In Himself When By His Conduct He Has Represented It As Corporate Property (Solomon's Marina Inc. v. Rogers, Md., 1959) ................................................................................................................................. 300

Evidence — A Wife's Statement To Fellow Conspirator Is Admissible At Trial Of Conspirator-Husband (Commonwealth v. Garrison, Pa., 1959) ......................................................................................................................................................... 301

Evidence — Maryland Statute On Admissibility Of Criminal Conviction Limited In Scope (Gray v. State, Md., 1960) ........................................................................................................... 302

Mechanic's Lien — Notice To Resident Agent Of Corporation Effective (Jakenjo, Inc. v. Blizzard, Md., 1959) ................................................................................................................................................ 303

Taxation — A Church Parking Lot Is Not Exempt (Second Church v. Philadelphia, Pa., 1959) ................................................................................................................................. 303

BOOK REVIEWS

HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS............................................................ Nelson Reed Kerr, Jr. 305

READ AND WELCH, FROM TIN FOIL TO STEREO: EVOLUTION OF THE PHONOGRAPH............................... Nelson Reed Kerr, Jr. 307

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CONTENTS

LEADING ARTICLES

POST-MORTEM ESTATE PLANNING, OR THE MARYLAND EXECUTOR'S EIGHT TAX RETURNS...G. Van Velsor Wolf 309

EDITORIAL SECTION

THE EDITOR'S PAGE 337

COMMENTS AND CASENOTES

CIVILIAN DEPENDENTS AND EMPLOYEES AT OVERSEAS BASES NOT SUBJECT TO COURT MARTIAL JURISDICTION — Kinsella v. United States, McElroy v. United States, Grisham v. Hagan 338

HEALTH INSPECTIONS OF PRIVATE HOMES — Frank v. Maryland 345

LIABILITY OF MUNICIPAL CORPORATIONS UNDER THE STATE'S STATUTORY WAIVER OF TORT IMMUNITY — Schuster v. City of New York 353

UNEMPLOYMENT COMPENSATION — RECOVERY OF BENEFITS PAID — Waters v. State 363

EXTENSION OF ABSOLUTE PRIVILEGE TO EXECUTIVE OFFICERS OF GOVERNMENT AGENCIES — Barr v. Matteo 368

RECENT DECISIONS

Administrative Law — “Equal Time Act” Does Not Apply To Regular Weathercasts By Political Candidate (Brigham v. F.C.C., 5th Cir., 1960) 374


Criminal Law — The Diminished Responsibility Doctrine (State v. Padilla, N.M., 1960) ........................................ 376

Damages — A Court Sitting Without A Jury May Choose Between Different Measures Of Ex Contractu Recovery Where Plaintiff Fails To Make Election (Petropoulos v. Lubieniski, Md., 1959) .................................................. 377

Domestic Relations — Presumption Against Awarding Custody Of Minor Child To Adulterous Parent Not Overcome (Parker v. Parker, Md., 1960) .................................................. 378

Motor Vehicles — Failure To Remove Ignition Key From Unattended Automobile (Liberto v. Holfeldt, Md., 1959) .................................................................................................................. 379

Practice — Motion To Vacate Decree Does Not In Itself Toll The Thirty-Day Appeal Period (Monumental Engineering, Inc. v. Simon, Md., 1960) .................................................. 380

BOOK REVIEWS

Norris, The Law of Maritime Personal Injuries
David R. Owen 382

Roady, Jr., and Anderson (Editors), Professional Negligence G. C. A. Anderson 386

Bartley and Bair, Jr., Mobile Home Parks and Comprehensive Community Planning
C. Stanley Blair 390

Sheehan, Reflections With Edmund Burke
C. P. Ives 392

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NOTES ON THE LAW OF LANDLORD AND TENANT

By Allan W. Rhynhart*

I. WHEN RELATION EXISTS

The relation exists when the person in possession of lands occupies them in subordination of the title of another and with his express or implied assent. It always arises by contract express or implied, such as a lease which sets out the terms of the letting; or by operation of law as the result of the acts of the parties, as when one co-tenant moves and the remaining co-tenant takes another in possession, in which case, if the landlord accepts rent from those in possession, there is sufficient evidence of surrender and the acceptance of the new occupant as tenant. A primary test is whether there is an obligation to pay rent. While a valid demise may exist even though no rent is paid, for practical purposes it may be assumed that unless rent is paid or reserved, there is no tenancy. The rent must issue for the use or occupancy of land or a structure or a part of a structure on the land. The furnishing of services, such as housework, of an equivalent value to rent may create a tenancy when the occupant has exclusive possession and control of the quarters occupied. A provision in the lease of a farm for payment to the owner of a percentage of the net profits does not affect the landlord-tenant status, nor create a partnership.

---

*Chief Judge, People's Court of Baltimore City; LL.B., University of Maryland, 1920.

1 Citations to Alexander's British Statutes are to the Second Edition, published by Coe in 1912, which is hereinafter cited "ALEXANDER". Certain texts are frequently cited throughout this Article by the names of the authors only. The full title of each such text, and the edition thereof, together with the method of citation is as follows:

McAdam, Landlord and Tenant (1910), hereinafter cited "McAdam".

Poe, Pleading and Practice (5th ed., 1925), hereinafter cited "Poe".

Tiffany, Landlord and Tenant (1910), hereinafter cited "Tiffany".

Venable, Real Property (undated compilation), hereinafter cited "Venable".

*1 McAdam, n. 1, 127.

Ibid., § 23.

Kinsey v. Minnick, 43 Md. 112 (1875).

1 Tiffany, n. 1, 25, 1009.

*Green v. Shoemaker, 111 Md. 69, 73 A. 688 (1909).

II. WHEN RELATION DOES NOT EXIST

_Husband and wife._ Husband and wife, holding as tenants by the entireties, cannot lease the property so held to the wife or the husband since that in effect is a rental from a landlord to himself as a tenant.

Sub-tenants. There is no privity of estate or contract between the landlord and a sub-lessee. An unrecorded permissible assignment by the tenant in a recorded lease for a term in excess of seven years merely constitutes the assignee a sub-lessee. An occupant of premises who does not hold an assignment from the lessee and who therefore has assumed none of the obligations of a tenant, is not entitled to assert against the landlord provisions in the lease granting options to the tenant.

_Receivers._ A court appointed receiver who takes possession of leased premises does not thereby become the assignee of the lease and is not liable as tenant for use and occupation. However, such receiver has the right to adopt the lease, in which event he becomes liable on its covenants; and he has a reasonable time within which to make such determination.

_Lodgers and boarders._ There are occupancies where money is paid which do not amount to a landlord-tenant relation. A lodger is not a tenant when (although having exclusive use of the room) the landlord or his servant looks after the house and furniture; likewise a boarder who receives meals as well as lodging is not a tenant even though the living quarters occupied by him are for his exclusive use, nor is a servant of the owner. A lodger is a person whose occupancy is of a part of a house and subordinate to and in some degree under the control of the owner. Distinguishing between lodger and tenant, the rule seems to be that a tenant has an exclusive possession whereas the lodger has merely the use without actual or exclusive possession. The occupant of a room in an office building is a tenant, even though the owner provides ser-

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9 VENABLE, n. 1, 59.
10 Rubin v. Leosatis, 165 Md. 36, 166 A. 428 (1933).
12 Gaither v. Stockbridge, 67 Md. 222, 9 A. 632, 10 A. 309 (1887).
14 1 TIFFANY, n. 1, 34.
15 1 MCDANIEL, n. 1, 131.
16 43 C.J.S. 1137, Innkeepers.
services, such as cleaning and maintenance. The fact that the accommodations are in a hotel does not necessarily mean that the occupant is a lodger.

Remedies against lodgers and boarders. As to these, the owner is not entitled to summary ejectment for non-payment of rent, as the relationship is not that of landlord and tenant. Practically speaking it would appear that if the owner orders the boarder or lodger out of the premises and the latter refuses to go, the owner may call on public authority and have the police eject the erstwhile boarder as a trespasser. The owner has rights under the Code: Article 71, Section 5:18

"Any person taking boarders or lodgers into his house and renting to them a room or furnishing them with board or both shall have a lien upon any personal effects, goods or furniture brought upon the premises in pursuance of such contracting for room or board, . . . ."

It has been made a misdemeanor to fail to pay for lodging, food or credit at any hotel, boarding house, inn, hospital, or sanitarium.19 Hotels, rooming houses and lodging houses are defined as buildings containing five or more beds which are offered to the public for rental or hire.20

Illustrative rules to determine existence of tenancy. To determine whether a tenancy exists: (1) The occupancy must be for a fixed period. (2) It must be accepted by the parties that the occupant proposes to use the premises with some degree of permanence. (3) The right of occupancy must be exclusive with no right in others to use them except on the occupant's permission. (4) The occupant's rights are restricted to occupancy. Although services relating to occupancy, such as furnishing of cleaning services, linens, etc., may not change his status away from that of tenant, if he is entitled to other services such as food, nursing, etc., then ordinarily he is not a tenant.

III. CATEGORIES OF LETTINGS

All lettings fall into one of two categories: (1) leases for years, which are for a fixed term and (2) leases at will, which include both written and oral leases which run from year to year, and parole lettings from week to week, or month to month, as well as lettings at sufferance.

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20 Baltimore City Code (1950), Art. 12, § 63.
A. Leases for Years and From Year to Year.

The titles may be misleading. A lease for years simply means a lease for a fixed term, which may be for any particular period. A lease from year to year, or periodic tenancy, is a lease or letting which automatically renews itself; leases from week to week, month to month, or year to year, are included in this category. The fundamental difference between a tenancy for years and from year to year is that the first is for a definite period of time and terminates by lapse of that time, without notice, although for the exercise of the right to the summary remedy for the recovery of possession of the land a statutory notice must be given, and the second is for the first period of time with an indefinite succession of periodic renewals unless determined by a notice to quit to the other by either the landlord or the tenant, since the right of a notice to quit is reciprocal so that either landlord or tenant has the right to terminate a letting from year to year.

Statute of frauds. Under 29 Charles 2, Ch. 3, §§1, 2, and 4, an oral lease may be for a period not exceeding three years. Leases for more than three years must be in writing. Leases for more than seven years must be signed, sealed, witnessed, acknowledged and recorded.

Construction of written lease. The principle that a lease must be construed most strongly against a lessor and in favor of a lessee is resorted to only when the words of the instrument are doubtful in their meaning or susceptible to more than one construction.

Even though a document may not constitute a valid lease, as for example, a lease for more than seven years which has not been acknowledged, yet in a proper case it can be treated as an agreement to lease and may be specifically enforced. A lease from year to year containing a provision for automatic renewal, but which is terminable by either party at the end of the original or a succeeding term, does not create an estate for more than seven years.
B. Leases for Years or for a Fixed Term.

A lease for years is one for a fixed term and not necessarily one for a certain number of years. At common law there is no restriction upon the length of the term that may be created. There is some statutory limitation on this common law rule. A lease for more than seven years must be executed, acknowledged and recorded; provisions for renewal, optional with either landlord or tenant, do not necessarily make a lease for more than seven years; and even a lease for more than seven years which has not been executed and recorded according to the statute, is binding between the original parties to such lease. A lease for more than fifteen years sets up in the tenant a right of redemption, unless the premises are leased exclusively for business purposes and the term, including all renewals provided for in the lease does not exceed ninety-nine years. In the instance of a ground rent, when it is shown that the ground rent has been neither demanded nor paid for more than twenty consecutive years, the effect is to bar not only the rent already due but also the reversionary interest of the owner of the fee. It has been held that the mailing of a bill for ground rent by the owner of the fee within the twenty year period creates a presumption of demand, thus preserving his title. If the lease contains no provision for automatic renewal, then the relationship of landlord and tenant ceases to exist on the termination of the lease. If the tenant fails to move on the terminal date, then the landlord has the election (1) to treat the tenant as a trespasser in the sense that he is a tenant holding over; or (2) to treat the lessee as a tenant from year to year.

C. Leases from Year to Year or Periodic Leases.

Agreement. Such a letting may be created by express agreement of the parties, in which the terms and conditions of the letting, as well as the mode of termination are explicitly set forth.

Implication of law. Such a letting is created when the occupant goes into possession as tenant, without any understanding or agreement as to the term of the letting.

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29 Tiffany, n. 1, 45.
31 2 Md. Code (1957), Art. 21, § 1.
32 2 Md. Code (1957), Art. 21, §§ 103-104.
33 Ibid, § 108.
"[W]here there is no evidence as to the terms of the letting, . . . the monthly payment of rent would show a letting at a monthly rent, thereby creating a tenancy from month to month. . . ." Such a lease renews itself from term to term, but is terminable by the giving of a notice to quit by the landlord or a notice of termination by the tenant. When payments of rent are made weekly this creates a presumption of a tenancy from week to week.

Void lease. When a tenant enters upon land under a void or defective lease, the periodical payment of a yearly rent creates a tenancy from year to year. Prior to June 1, 1951, a lease for more than seven years which had not been executed and recorded in accordance with Article 21, Section 1, was invalid; if the tenant entered into possession and rent was accepted then a tenancy from month to month or from year to year was created and all of the provisions of the lease applied excepting those as to its duration. However, Chapter 565 of the Acts of 1951 modified this rule to provide that an unrecorded lease for more than seven years shall be valid and binding between the original parties to such lease.

A lease invalid at law may be enforced in equity as a contract to lease although otherwise the tenancy would be one from year to year by implication of law.

Tenant holding over. When a tenant for years holds over after the expiration of his term, he becomes a tenant from year to year by implication of law as when a tenant after termination remains in possession with the landlord's consent and without further contract, the election is in the landlord and not in the tenant. Any act of the landlord which recognizes an existing tenancy after the terminal date, such as acceptance of the rent, will be a binding election upon him of the existence of a lease from year to year. A landlord is not required to make a prompt election. When a tenant sends a check for one month's rent, proposing that it be accepted as an amendment of the ten-

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8 Tiffany, n. 1, 133.
13 Hyatt v. Romero, 190 Md. 500, 58 A. 2d 899 (1948).
15 Saul v. McIntyre, 190 Md. 21, 57 A. 2d 272 (1948).
17 Vrooman v. McKaig, 4 Md. 450 (1853).
ancy to a month-to-month one, acceptance and use of the check by landlord does not alter or reduce a landlord’s rights because the amount of the check is what the landlord is entitled to if he elects to treat the tenant as one holding over and, consequently, liable as tenant for another year. Once made such an election creates a tenancy upon the same terms and conditions as the original lease except that the subsequent letting is from year to year. If the landlord demands and receives an increased rent from the tenant, the new lease from year to year will be on the same terms as the former lease but at the higher rent. Provisions for premature termination of a tenancy are as applicable in a lease from year to year thus created as they were to the original lease for years. While a lease from year to year thus created contains all of the covenants in the original lease applicable to the new situation, so that an option in a tenant to purchase contained in the lease for years carries over into the subsequent tenancy, it is possible to so word an option contained in a lease for years that it will not carry over into the subsequent lease. Similarly, in a lease from year to year an option to purchase in the lessee may be so expressed as to be effective only during the original term and not during a succeeding term. However, if the landlord and tenant are actually negotiating for a new lease at the expiration of the old lease, and if the tenant remains in possession pending such negotiations, with either express or tacit consent of the landlord, the landlord is estopped from treating the tenant as holding over for another term. To establish this situation it is necessary that: (1) the landlord consent to the tenant remaining in the premises for a temporary period and; (2) that the parties were actually engaged in negotiating as to a renewal of the lease when the previous term ended. Unilateral acts or statements of the tenant do not constitute “negotiations”; there must be positive acts or statements on the part of the landlord.

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48 Hall v. Myers, 43 Md. 446 (1876); Gostin v. Needle, 185 Md. 634, 45 A. 2d 772, 163 A.L.R. 1013 (1946).
50 Gostin v. Needle, supra, n. 48.
52 Bagley v. Clark, 190 Md. 223, 57 A. 2d 739 (1948).
D. Tenants at Will And By Sufferance.

In this section will be found statements in conflict with other portions of this manual. The reason is that the draftsmen of our statutes and ordinances have not always employed precision in the use of technical words and it is not unknown for the Courts to fall into the same error. The definitions of the law writers are here included to emphasize the principle that in solving a problem in the vexing area of landlord and tenant, it is not always possible to rely on the literal wording of a statute or a decision.

A tenant at will always is in occupation as of right. A tenant by sufferance is one who enters by lawful lease and holds possession wrongfully. A tenant at will holds rightfully; a tenant at sufferance holds wrongfully. A tenancy at will exists as a result of permissive possession without any understanding as to the duration of the possession; as for example, one who goes into possession under a void conveyance. "As a general rule, a person who enters on land by permission of the owner for an indefinite period and without the reservation of any rent, is a tenant at will . . ." "A permissive possession constituting a tenancy at will because of payment of a periodic rent may be changed into a tenancy from year to year or other periodic tenancy." If a tenant at will transfers his interest in the land, and puts the transferee in possession, the latter is not a tenant at sufferance but a mere disseisor or trespasser since he did not enter by right. However, a sublessee of a tenant for years holding over after the expiration of the latter's term is a tenant at sufferance. A tenant at sufferance is "one holding possession, . . . who was not a trespasser and not a disseisor, and yet held of nobody".

IV. Co-Owner Landlords

One co-tenant cannot make a lease which will be binding upon his co-tenants without their consent, but he can lease his own interest with or without the consent of the others, and the lessee will become a tenant in common with the others. One co-lessor can terminate the lease as to his own interest without the concurrence of the others.

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26 1 McAdam, n. 1, 676.
27 1 Tiffany, n. 1, 153.
30 1 Tiffany, n. 1, 125.
32 Thompson v. Thomas & Thompson Co., 132 Md. 483, 104 A. 49 (1918).
33 Cook v. Hollyday, 186 Md. 42, 45 A. 2d 768 (1946).
When a husband and wife are owners by entireties and the husband leases the land giving warranties of title, he cannot bind his wife, as Maryland has not adopted the principle that under such circumstances the lease made by the husband is valid against the wife during coverture. However, after a divorce if the property leased comes into the individual ownership of the lessor he is estopped, and the lease will operate upon his estate as if vested at the time of its execution.64

The statute of 4 Anne Ch. 16, Sec. 27,65 authorizes a co-tenant to bring an action against his co-tenant for receiving more than his just share or proportion of the rent. But equity has no jurisdiction for an accounting for rents or claims for use and occupation by a single owner or one of several co-owners against a co-owner as tenant.66

VI. TERMINATION OF LANDLORD’S ESTATE IN MID-TERM

If the landlord has an estate for life and makes a lease for years and dies before the end of the term, then the estate of the life tenant’s lessee terminates with the death of the life tenant. However, when the estate of the lessor determines and the remainderman accepts rent from the tenant the terms of the lease continue.67

VI. ASSIGNMENTS OF LEASES

At common law restraints upon alienation are frowned upon. Therefore, in the absence of a prohibition in the lease the original tenant has the right to assign his interest or estate without consent of the landlord. Similarly, the holder of the reversion has the unqualified right to grant or convey his interest.

By the Statute 32 Hen. VIII c. 34, §§1 and 2,68 the grantee of a reversion in lands or tenements shall have like advantages against the lessee as the lessors or grantors themselves or their heirs or successors might have had.69 By this statute, "... all ... Lessees ... for a term of Years ... shall ... have like ... Advantage and Remedy against ... every person ... which have ... any Gift or Grant ... of the Reversion of the ... Lands ... so letten ... for any Condition, Covenant or Agreement ... expressed

65 2 ALEX. BRIT. STAT., n. 1, 664.
66 Paradise Amusement Co. v. Hollyday, 190 Md. 48, 57 A. 2d 308 (1948).
67 VENABLE, n. 1, 61.
68 1 ALEX. BRIT. STAT., n. 1, 335.
69 VENABLE, n. 1, 57; Outtoun v. Dulin, 72 Md. 536, 20 A. 134 (1890).
in the Indentures of their . . . Leases, . . . as the same Lessees . . . might . . . have had against the said Lessors and Grantors . . .

The construction of this statute over the years has produced many complexities. What follows is an over-simplification, and is intended to serve as but a guide in solving the simpler problems arising as a result of assignment of either the term or the reversion. In any case, care must be exercised to see whether the party to be held as tenant is actually the assignee of the term, and not merely a sub-tenant.

A. Effect of Conveyance of the Reversion.

The weight of authority at common law was that covenants ran with the land and not with the reversion.\(^7\)
Under the statute, without a formal assignment of the lease, the grantee of the reversion if it be a freehold title, has all of the rights of the original lessor against the lessee, or an assignee of the term of the lease, subject to the principle that only those agreements may be enforced which (1) run with the land, or (2) which, by the terms of the lease are binding upon the assignee thereof. The corollary to this appears to be that when the estate in reversion is less than a freehold estate (i.e. less than a fee or estate for life) that a transfer of the reversion does not carry with it any rights to enforce the lease, unless there is an assignment of the lease. Here, it would appear that under the provisions of 29 Char. 2, Ch. 3, Sec. 3,\(^7\) and Code Article 8, Section 1,\(^7\) that the assignment of the lease must be in writing. The statement in the text is debatable.\(^7\)

Chattels real. The prevalence of the ground rent system in Baltimore City, under which properties are held under ninety-nine year leases renewable forever indicates the wisdom, and probably the necessity, of requiring a written assignment of any sublease in existence at the time of the conveyance of the leasehold as the estate of the grantor is one less than freehold.

B. Assignment of Rent.

The assignee of the reversion is entitled to all rent falling due after the assignment. Rent which falls due before

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\(^7\) Liability to the tenant by the transferee of the reversion, on covenants of the original landlord is discussed in L.R.A. 1915 C 190.
\(^7\) 1 Poe, n. 1, § 332.
\(^7\) 2 Alex. Brit. Stat., n. 1, 509.
\(^7\) 1 Md. Code (1957).
\(^7\) See 1 Tiffany, n. 1, 33, and Outtoun v. Dulin, 72 Md. 536, 20 A. 134 (1890).
the assignment belongs to the assignor but may be assigned like any other debt.75 Rent follows the reversion so that when the lessor dies before the rent comes due, it goes to the person entitled to the estate;76 if the lessor dies after the rent becomes due, it goes to his personal representative.77

The English rule is that an assignee of a rent cannot distress for arrears arising previous to assignment.78 Adherence to this philosophy would deny the purchaser of property the right to either distress or summary ejectment for arrears of rent due at the time of purchase. An apparent departure from this rule was the decision in Kaufman v. Collick,79 wherein it was held that when in connection with a transfer of real estate there is no assignment of accrued rent in arrears, the vendor is left to his remedy in an action of debt without any right to distress or to summary eviction; but when the accrued rent is assigned to the purchaser at the time of transfer, then the vendee is clothed with every right of action which the former would have had if he had continued in ownership of the property, including the right of distress and summary ejectment.80

Payments to agents or assignees. All payments of money or other dealings had with a person acting under a power of attorney or other agency are binding upon the representatives or principals of such attorney or agent, even though the principal may have died or assigned his claim — provided that the person making the payment had no notice of the death or assignment.81 Under the statute of 4 Anne Ch. 16, Sec. 10,82 a tenant is not liable to a new landlord for rent if he has paid it to a former landlord without notice of the conveyance. However, a tenant may not defeat a claim of creditors of the landlord by anticipating payments of rent83 or transfer a growing crop to the damage of a mortgagee of the realty.84 It is a general principle that the assignee of a claim or chose in action cannot recover from the original debtor who had paid it to the assignor after, but without notice of, the assignment.85

An order by the landlord to the tenant to pay accruing rent

79 Outtoun v. Dulin, ibid.
80 Getzandaffer v. Gaylor, 38 Md. 280 (1873).
81 Martin v. Martin, 7 Md. 368 (1855).
83 Kaufman v. Collick, decided in Baltimore City Court, May 19, 1943.
84 Thomas, Procedure in Justice Cases (1917) § 166.
85 1 Md. Code (1957), Art. 10, § 42.
87 Martin v. Martin, 7 Md. 368 (1855).
to a third person may operate as an assignment, so that
the tenant may be bound to continue to pay such rent,
notwithstanding a later notice from the landlord or a
transferee of the reversion who took title knowing of the
assignment.86

Prepaid rent and security deposits. Advance rent that
has accrued and been paid (in other words, prepaid rent)
may not be recovered by the lessee's receiver when the
lease has been terminated as a result of lessee's miscon-
duct. In the circumstances of the particular case, recovery
claimed on the ground of unjust enrichment of the land-
lord was denied.87 In Tatelbaum v. Chertikof,88 a distinc-
tion was drawn between prepayment of rent and a security
deposit; if a security deposit, it remains the property of
the tenant and passes on to the tenant's trustee in bank-
ruptcy, subject to the landlord's claim; if a prepayment
of rent, then it becomes the property of the landlord and
is not recoverable by the tenant's trustee.

C. Effect of Assignment on Liability
of Original Lessee.

The liability of the original lessee is based upon two
principles: — privity of contract and privity of estate.89

Privity of contract. Expressed stipulations in a lease
continue to be binding upon the lessee in spite of an assign-
ment and its recognition by the landlord, an illustrative
stipulation being the covenant to pay rent.90 The theory
is that the lessee binds himself to pay the rent, and this
may be an agreement whose enforcement is independent
of retention of an interest under the lease. Thus, provided
the lease is under seal,91 the lessor may proceed against
the original lessee under the covenants contained in the lease.
To be freed from obligation, the original lessor or cove-
nantor must be released by an instrument of equal dignity
to that which created the obligation, i.e., an instrument
under seal.92

Privity of estate. The principle is that the person in
possession of land is liable to the owner on the covenants
or agreements that run with the land, contained in the
original lease, because he who has the benefit of the use
of the land as tenant, is bound to the owner.93

86 Abrams v. Sheehan, 40 Md. 446 (1874).
89 Consumers' Ice Co. v. Bixler & Co., 84 Md. 437, 35 A. 1086 (1896).
90 Insley v. Myers, 192 Md. 292, 64 A. 2d 126 (1949).
91 1 ALEX. BRIT. STAT., n. 1, 337.
92 I Poe, n. 1, § 388.
93 Consumers' Ice Co. v. Bixler & Co., 84 Md. 437, 35 A. 1086 (1896).
When letting is by sealed instrument. When the lease is under seal and contains a covenant to pay rent, the original lessee will remain liable to the lessor under the covenant, notwithstanding an assignment of the lease to a third party, and acceptance of rent by the landlord from the assignee of the term. When a lessee transfers his interest in the lease, he remains a proper party plaintiff in a suit against the lessor to enforce the covenants of the lease.

When letting is not by sealed instrument. An assignment of the term by the original tenant to another, plus surrender of possession to the assignee of the term, combined with an acceptance by the landlord of the assignee of the term as tenant, has the effect (1) of exonerating the original tenant from any obligations to the original landlord; and (2) making the assignee of the term responsible to the landlord. Even if the tenant has not legally terminated the tenancy, as by a written notice, the acceptance of a third person as tenant by the landlord, operates as a surrender in law and this acceptance consequently exonerates the original tenant from liability.

No covenant to pay rent. If there is no express covenant to pay rent, the lessee's liability ceases if the lessor consents to an assignment; and such assent may be inferred by his accepting rent from the assignee of the term, or by any other act accepting the assignee of the term as a tenant. However, to destroy the privity of estate of the original tenant (and thus his obligation, even though not express, to pay rent) there must exist the concurrence of the landlord in the transfer of the term by the original lessee to the assignee of the term.

D. Effect of Assignment on Assignee of Original Lessee.

Covenants that run with the land. The obligations of an assignee of the term or lease to the original lessor or to the grantee of the reversion, rest upon whether or not the liability asserted is one that runs with the land. Fundamentally, these obligations rest upon privity of estate. Such covenants are those which relate to or touch and concern the thing demised, or which extend to the land.

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1 1 Pos. n. 1, § 288.
2 Rubin v. Lesatlis, 165 Md. 36, 166 A. 428 (1933).
3 1 Pos. n. 1, 388.
5 Consumers' Ice Co. v. Bixler & Co., 84 Md. 437, 35 A. 1086 (1896).
so that the thing required to be done will affect the quality, value or mode of enjoying the estate.\footnote{Venable, n. 1, 58; 1 Tiffany, n. 1, § 149, pars. (2), (3), (4); Glenn v. Cunby, 24 Md. 127 (1866).} For example, as the covenant to pay rent runs with the land, the lessee is contractually bound to the lessor to the end of the term\footnote{Worthington v. Cooke, 56 Md. 51 (1881).} and the assignee of the lessee is bound by virtue of his possession because of privity of estate.\footnote{Union Trust Co. v. Rosenberg, 171 Md. 409, 189 A. 421 (1937).} Acceptance of an assignment of a lease does not impose upon the assignee any liability for rent other than that growing out of privity of estate.\footnote{Reid v. Wiesener & Sons Brewing Co., 88 Md. 234, 40 A. 877 (1898).} The increasing scope of the role of equity in enforcing covenants finds expression in Raney v. Tompkins,\footnote{197 Md. 98, 78 A. 2d 183 (1951).} in which a covenant by vendor against use of his remaining land as a filling station was enforced against his grantees having knowledge of the restriction.\footnote{Worthington v. Cooke, supra, n. 107.}

Rent and taxes. The covenant to pay rent and taxes runs with the land, so that an assignee of the term is under an obligation to pay the rent issuing from the land under the original lease, and this obligation does not depend upon his actual possession or entry.\footnote{Hart v. Home Owners’ Loan Corp., 169 Md. 446, 182 A. 322 (1936).} Similarly, the holder of the reversion has the right to enforce the payment of rent due by the assignee, accruing during assignee’s possession of the land.\footnote{Hughes v. Young, 5 G. & J. 67 (1832); Lester v. Baltimore, 29 Md. 415 (1868); Consumers’ Ice Co. v. Bixler & Co., 84 Md. 437, 35 A. 1086 (1896); Gibbs v. Didier, 125 Md. 480, 94 A. 109 (1915); 1 Poe, n. 1, 149.} However, a suit at law cannot be maintained against the assignee of a lease who has assigned over, for ground rent falling due after the assignment to him and before the assignment by him; the remedy of the lessor being in equity alone.\footnote{Gibbs v. Didier, supra, n. 107.} The rationale of the principle is that while there may be a debt, it is no longer enforceable at law because the essence of the right to bring suit is privity of estate and if there is no existing tenancy, then under the statute, the right to sue at law is lost to the landlord.\footnote{Glenn v. Canby, 24 Md. 127 (1866).}

\footnote{Reid v. Wiessner & Sons Brewing Co., 88 Md. 234, 40 A. 877 (1898).}

\footnote{Worthington v. Cooke, supra, n. 107.}

\footnote{Union Trust Co. v. Rosenberg, 171 Md. 409, 189 A. 421 (1937).}

\footnote{Reid v. Wiesener & Sons Brewing Co., 88 Md. 234, 40 A. 877 (1898).}

\footnote{197 Md. 98, 78 A. 2d 183 (1951).}

\footnote{The application of the principles to determine the covenants which do and which do not run with the land is a matter of great difficulty, far beyond the scope of this article. For beginning points of research into the principles see 1 Poe, n. 1, §§ 149, 328-335 A and 389-392; 1 Alex. Brit. Stat., n. 1, 337-355; Spencers Case, 1 Smith Lead. Cas. 137 (1872), 1 Tiffany, n. 1, 886. Regarding damages, or relief, for breach of restrictive covenants running with the land, see Easton v. The Carebry Co., 210 Md. 286, 123 A. 2d 342 (1956).}

\footnote{Williams v. Safe Dep. & Tr. Co., 167 Md. 499, 175 A. 331 (1934); Jones v. Burgess, 176 Md. 270, 4 A. 2d 473 (1939).}

\footnote{Hughes v. Young, 5 G. & J. 67 (1832); Lester v. Baltimore, 29 Md. 415 (1868); Consumers’ Ice Co. v. Bixler & Co., 84 Md. 437, 35 A. 1086 (1896); Gibbs v. Didier, 125 Md. 480, 94 A. 109 (1915); 1 Poe, n. 1, 149.}

\footnote{Hart v. Home Owners’ Loan Corp., 169 Md. 446, 182 A. 322 (1936).}

\footnote{Gibbs v. Didier, supra, n. 107.}
E. When Assignee’s Liability Begins.

Assignment of record. When the conveyance of the term to the assignee of the leasehold estate is by an assignment necessary to be recorded, any liability to which he is subject comes into being at the time the assignment is recorded. There can be no hiatus in a tenancy. Therefore, in the case of a lease for more than seven years, the assignor of the term remains liable under the covenants of the lease until the assignment is recorded. The recording is the final and complete act which passes title and until this is accomplished all else is unavailing. 110

Possession. If the estate acquired by the assignee is one not affected by the recording laws, as for example, a leasehold estate for less than seven years, 111 then liability under the lease for any covenant that runs with the land does not arise unless and until the assignee goes into possession, and this liability ceases when he goes out of possession.

Sub-tenants. When there is a covenant by the lessee that he will not assign his interest, a conveyance by him (in the absence of waiver by the landlord) creates no rights as tenant in the purported assignee who holds as a sub-tenant without liability to the landlord and without rights assertable against the landlord. Also, even though there may be no prohibition against assignment (or there being one, it has been waived) an incomplete or ineffective assignment creates the status of sub-tenant in the purported assignee, who again, so far as the landlord is concerned, has neither rights nor liabilities.

When there is a conveyance of land, signed only by the grantor but accepted by the grantee, a covenant in the conveyance that the grantee will pay mortgage debts existing against the land conveyed, has the effect of binding the grantee as though he had signed the deed. 112 By analogy, if an assignment of lease contains an agreement on the part of the assignee of the term to perform the covenants of the lease, then the assignee will be liable to the same extent as though he had executed the original lease, even though the assignee of the term simply accepts the assignment and takes possession of the demised premises thereunder. 113

Based in part upon the foregoing discussion the following principles appear to apply in a proceeding brought in Peoples Court or before a justice: (1) If the lease be under

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111 2 Md. Code (1957), Art. 21, § 1.
seal, suit may be brought against the original lessee for unpaid rent whether or not he holds possession. If the lease is not under seal, then a legally effective assignment of the term exonerates the original lessee from liability. (2) An assignee of the term of the lease may rid himself of future liability under the lease by effectively assigning the term to someone else. (3) To be legally valid, the assignment of a parole lease by the tenant or lessor must be in writing. (4) When the original lease was made by one whose estate determines, such as a life tenant, if the remainderman accepts rent from the lessee after the determination of the life estate, then the terms of the lease continue and the remainderman becomes the landlord and the original lessee retains his rights as tenant under the original lease. (5) The grantee of a reversion is not entitled to arrears of rent which became due prior to the transfer of the reversion. (6) When the original lessor did not hold title of record at the time of the lease, an assignee of the original lessor, being the holder of a chose in action, may bring suit or levy distress only upon a written assignment of the reversion. (7) When a tenant under a lease for years transfers his interest in the lease, he remains a proper party plaintiff in a suit against the lessor to enforce the covenants of the lease. (8) On the principle that the whole carries with it all of its parts, a grant of record title by the original lessor, vests in the grantee the right to enforce any of the covenants contained in a lease made by the grantor prior to the grant, including distress for rent; as the conveyance of the reversion carries with it all of the incidents thereof, including the right to collect rent from the tenant or occupant and to enforce the payment of the same. (9) Distress. Regardless of the term or nature of the lease, the assignee-occupant of the premises should be named as tenant in the landlord’s affidavit; as, after a legally effective assignment by the original lessee, the only liability that may be asserted against him is in covenant, arising out of privity of contract.

VII. IMPLIED COVENANTS

Fitness. When a lease contains no express warranty of fitness of the property for the purpose for which it is rented there is no implied warranty, and in case the prop-

114 29 Char. 2, Ch. 3, § 3, 2 ALEX. BRIT. STAT., n. 1, 521.
115 VENABLE, n. 1, 61.
116 1 ALEX. BRIT. STAT., n. 1, 355.
117 Rubin v. Leosatis, 185 Md. 36, 168 A. 428 (1933).
118 Outtoun v. Dulin, 72 Md. 536, 20 A. 134 (1890).
Property falls down because of an inherent defect, the lessor is not bound to repair, although the lessee will still be compelled to pay the rent.\textsuperscript{119}

**Possession.** There is no implied covenant in a lease that the landlord is required to give the lessee possession. When at the time of the lease premises are wrongfully held by a third person, such as a tenant holding over, the lessee, having the right of entry, has no action against the lessor, but is left to his remedy against the wrongdoer.\textsuperscript{120} Where landlord locks the demised premises and refuses tenant admission for the purpose of removing his furniture and effects, the landlord is exposed to a suit for conversion of the tenant's furniture and goods.\textsuperscript{121}

**Quiet enjoyment.** While there is an implied covenant of quiet enjoyment, this implication does not extend to indemnity against damage from the acts of a trespasser.\textsuperscript{122}

**Use.** When premises are leased for a specific purpose, there is an implied covenant on the part of the tenant that there will be no change of use and if such takes place the landlord may enjoin him in equity\textsuperscript{123} although when the lease is general in terms as to use of the premises, the tenant may use them for any lawful purpose not injurious to the reversion.\textsuperscript{124}

**Wall advertisements.** In the absence of a limitation in the lease itself, a lease of a building includes the external walls; and a landlord is not entitled to place an advertisement on the outside wall of demised premises, or to lease such rights to others.\textsuperscript{125}

**Waste.** A tenant is liable for all waste committed on the landlord's property, except when caused by an act of God, public enemy or the lessor himself.\textsuperscript{126}

**VIII. Construction of Leases**

**Description of premises.** When a bathroom is used in common by the tenants of a building, a lease of the portion of the building containing the bathroom does not give an...

\textsuperscript{119} Clark & Stevens v. Gerke, 104 Md. 504, 65 A. 326 (1906); See also, Decedent's Estate, infra, pp. 38-39.  
\textsuperscript{120} Sigmund v. Howard Bank, 29 Md. 324 (1868).  
\textsuperscript{121} Kirby v. Porter, 144 Md. 261, 125 A. 41 (1923).  
\textsuperscript{122} Baugh v. Wilkins, 16 Md. 35 (1860).  
\textsuperscript{123} Gale v. McCullough, 118 Md. 287, 84 A. 469 (1912); North Avenue Market v. Keys, 164 Md. 155, 164 A. 152 (1933).  
\textsuperscript{124} Gallagher v. Shipley, 24 Md. 418 (1869).  
\textsuperscript{126} White v. Wagner, 4 H. & J. 373 (Md., 1815).
exclusive right to its use by one tenant when his lease generally describes that portion of the demised premises which includes the bathroom, but specifies rooms not including the bathroom.\(^{127}\)

**Effect of new lease.** When, before the expiration of a written lease, a new lease is entered into between the parties, the new lease does not necessarily revoke the provisions of the old lease, so that options contained in the original lease are not necessarily extinguished by the execution of a new lease, if the continued existence of the options is not inconsistent with the provisions of the new lease.\(^{128}\)

**Modification by conduct.** By their conduct after a tenant has gone into possession, the parties may construe the terms of an ambiguous lease, as well as alter or modify the contract of letting.\(^{129}\) Thus, when an original lease did not oblige a landlord to consent to a tenant's application to a liquor license board for a license, the fact that landlord had given such consent in the past made such use a term of the letting, and the landlord was required to consent to a renewal application.\(^{130}\)

### IX. OCCUPANCY AS NOTICE

The doctrine is that possession is notice of the rights of the party in possession to the extent they would have been ascertained upon inquiry. The extent of this imputed knowledge is limited to those rights which are asserted under subsisting relations between the party in possession and the owner of the land, and thus to some actual outstanding title or equitable interest, and should not be extended to those which might arise from a non-existent, different and merely anticipated status with a third party.\(^{131}\)

Open possession inconsistent with the record title charges a prospective purchaser with notice of the occupant's rights,\(^{132}\) but possession by the tenants of a vendor is not notice to a mortgagee of rights in the vendor conflicting with the rights of the vendee-mortgagor.\(^{133}\) However, the purchaser of property occupied by a tenant is under notice sufficient to put him on inquiry as to the terms of the

\(^{127}\) Needy v. Middlekauff, 102 Md. 181, 62 A. 159 (1905).


\(^{130}\) Saul v. McIntyre, ibid.

\(^{131}\) Liggett Co. v. Rose, 152 Md. 146, 136 A. 651 (1927).


\(^{133}\) Wicklein v. Kidd, 149 Md. 412, 131 A. 780 (1928).
letting, and failing to make it he is visited with the con-
sequences of knowledge.\textsuperscript{134} The existence of a "For Rent" sign on property is not in itself sufficient to charge a subsequent purchaser with notice of a previous purchaser's rights.\textsuperscript{135}

X. Rent

\textit{Bankruptcy.}\textsuperscript{136}

\textit{Double rent.} The general law is that when the tenant
has the right to terminate the tenancy by giving notice
to the landlord; and actually gives a sufficient notice of
termination, but does not deliver up possession to the
landlord at the time contained in the notice, then the
tenant shall thenceforth pay to the landlord double the
rent originally contracted for during all the time the ten-
ant continues in possession.\textsuperscript{137} It should be noted that there
is no such right in the landlord at common law when the
landlord terminates the tenancy.\textsuperscript{138} In Baltimore City, in
the discretion of the judge, damages not exceeding double
rent may be assessed against a tenant holding over after
notice to quit.\textsuperscript{139} It has also been held that in addition
damages may be awarded the landlord for his expenses in
and about the proceedings.\textsuperscript{140} The Baltimore City Charter,
Section 743, provides:

"In all cases the tenancy mentioned in this sub-
division of this Article, if the tenant, after notice, fail
to quit at the end of the term, or at a period when he
shall begin as aforesaid to be holding over, such tenant,
his executors or administrators, may, at the election
of the lessor, his heirs, executors, administrators or
assigns, be held as a tenant and bound to pay double
the rent to which the said tenancy was subject, and
payable and recoverable in all respects and to every
effect as if, by the original agreement or the under-
standing as to such tenancy, said double rent were the
reserved rent of the demised premises, according to the
terms and conditions of payment of such originally
reserved rent."

\textsuperscript{134} Engler v. Garrett, 100 Md. 387, 59 A. 648 (1905); Achtar v. Posner, 189
Md. 559, 56 A. 2d 797 (1948).
\textsuperscript{135} Bldg. & Loan Assn. v. Treuchel, 164 Md. 636, 166 A. 404 (1933).
\textsuperscript{136} For a discussion of the landlord's rights respecting future rent when
bankruptcy terminates an unexpired lease, see In Bonwit, Lennon & Co.,
\textsuperscript{137} 11 Geo. II, ch. 19, par. 18, 2 Alex. Brit. Stat., n. 1, 990.
\textsuperscript{139} Charter & P.L.L. of Baltimore City (1949), § 741.
\textsuperscript{140} McElroy v. Wright, 1 Balto. City Rep. 26 (1889).
The application of this section is subject to some obscurities. The question is, to what do the words "the tenancy mentioned in this subdivision of this Article" refer? If they apply to Charter sections 728-730 inclusive, then double rent may be collected by the landlord in leases from year to year (Sec. 728), as well as leases for a fixed term for any period less than a year (Sec. 729), and to tenancies at will, at sufferance or per autre vie (Sec. 730). However, if the application is limited to the tenancies described in sections 729 and 730, then a tenant holding over at the expiration of a lease from year to year is not bound for double rent. The matter has not been passed upon by the Court of Appeals, although there have been a number of cases before that tribunal involving tenants holding over at the expiration of leases from year to year.\footnote{141}

*Increased only by agreement.* A landlord cannot alter or amend the terms of a tenancy by giving a written notice of the change. Any increase in the amount of rent must be accomplished by agreement of the parties; it cannot be unilaterally increased by an act of the landlord.\footnote{142}

*Necessity for demand.* Once the relationship of landlord and tenant is established, failure of the landlord to demand the rent does not justify the presumption that he has released or extinguished his right to rent under the lease,\footnote{143} as no demand is necessary for rent.\footnote{144}

*Not apportionable.* Rent does not accrue from day to day as interest does, but the entire rent falls due on the rent day, is not apportionable with respect to time and, unless otherwise specially stipulated, is always payable by the party holding the estate on rent day to the owner of the reversion at the rent day,\footnote{145} except with respect to rent when the lessor is a tenant for life and dies in mid-term.\footnote{146}

*Overpayment recoverable.* When rent is overpaid due to a mistake of fact by the tenant, he may recover the overpayment back from the landlord, and as a private estate is a complex conception, depending upon the facts and the consequences thereof, a mistake of a person regarding his

\footnote{141}{In Allegany County, there can be no action for double rent against a tenant holding over, Md. Laws 1890, Ch. 265, Flack's Code of Public Local Laws (1930), Art. 1, § 380.}

\footnote{142}{De Young v. Buchanan, 10 G. & J. 149 (1838).}

\footnote{143}{Myers v. Silljacks, 58 Md. 319 (1882).}

\footnote{144}{Offutt v. Trail, 4 H. & J. 20 (Md. 1815); Campbell v. Shipley, 41 Md. 81 (1874).}

\footnote{145}{Latrobe, Justices Practice (1889) 176 (736); Martin v. Martin, 7 Md. 308 (1855).}

\footnote{146}{11 Geo. II, Ch. 19, § 15, 2 Alex. Brit. Stat., n. 1, 738.
private legal rights may be regarded as a mistake of fact; it is not less a fact because it involves a conclusion of law.\textsuperscript{147}

\textit{Receivers}. A court appointed receiver is neither the assignee in fact or by operation of law of the premises and cannot be held liable as a tenant for use and occupation.\textsuperscript{148}

\textit{Services other than direct money payment}. A covenant to pay as rent taxes, water-rent and fire insurance premiums, is sufficiently certain and definite as to make such payments enforceable in the same manner as a money rent, even though such provisions may create a rent which is not uniform throughout the term of the lease.\textsuperscript{149}

\textit{Trustees}. A trustee appointed to foreclose a mortgage under the Charter of Baltimore City\textsuperscript{150} is not clothed with title to the mortgage; the title remains in the mortgagee. Consequently, the holder of the reversion may proceed against the mortgagor or mortgagee for a breach of the covenant to pay rent.\textsuperscript{151} When there is a decree for the sale of the reversion in lands to which rent is incident, the court may order any rent in arrear to be sold with such estate, and the purchaser shall have the same right to recover such rent by distress, entry or action, as if he had been owner of the estate when the rent accrued.\textsuperscript{152} If a lease is made prior to a mortgage the purchaser at foreclosure has no greater rights than the lessor, but leases subsequent to the mortgage are not valid against the purchaser at foreclosure.\textsuperscript{153}

\textit{When due}. The general rule is that rent is not due until earned and therefore rent is payable at the end of term or period unless otherwise agreed.\textsuperscript{154} Such an agreement can be implied. The actions of the parties at the inception of the letting govern their rights thereafter, except as amended by agreement. Thus, if rent is paid in advance at the time of the letting it rent is payable in advance thereafter. As rent may be paid by the tenant on Sunday, if the rent falls due on a Sunday and is not paid, it is in arrear on the following Monday and the landlord may then


\textsuperscript{148} Gaither v. Stockbridge, 67 Md. 222, 9 A. 632, 10 A. 309 (1887).

\textsuperscript{149} Theatrical Corp. v. Trust Co., 157 Md. 602, 146 A. 805 (1929); Feldmeyer v. Werntz, 119 Md. 285, 86 A. 986 (1913).

\textsuperscript{150} Charter & P.L.L. of Balto. City (1949) § 508.


\textsuperscript{152} 2 Md. Code (1957), Art. 16, § 160.


\textsuperscript{154} Castleman v. Du Val, 89 Md. 657, 43 A. 821 (1899).
distrain therefor.\textsuperscript{155} However, there may be a question arise because of our Sunday laws.\textsuperscript{156}

An obligation for the payment of a future rent cannot be commuted into a present debt, as in advance of the rent day there is no present debt for future payment.\textsuperscript{157}

\textit{Who may collect.} Payment of installments of rent to the husband in an estate by the entireties is sufficient during the continuance of the marriage.\textsuperscript{158}

\textit{Who may pay.} If the party in possession is not the tenant or his assignee then the landlord is not required to accept a tender of ground rent due, but such payment can be made by the next of kin of the tenant.\textsuperscript{159} Under the Baltimore City Charter\textsuperscript{160} the surviving spouse or any member of the immediate family or household who has occupied the premises with the deceased tenant may, upon payment to the landlord of the current rent and rent in arrears be substituted as tenant to the same extent as the original tenant.

\textbf{XI. ENFORCEMENT OF RENT}

\textit{Baltimore City.} Landlord’s rights when rent is unpaid are: (a) Housing accommodations — residences or dwellings — Letting of less than three months — summary ejectment exclusively. Letting of three months up to one year — either summary ejectment or distress. Letting in excess of one year — distress exclusively. (b) Commercial or business accommodations. Letting of less than three months — summary ejectment exclusively. Letting of more than three months — distress exclusively.

\textit{Counties.}\textsuperscript{161}

\textbf{XII. USE AND OCCUPATION}

When a tenant occupies premises before completion of renovation, his liability for use and occupation is the fair


\textsuperscript{156} Md. Code (1957), Art. 27, § 492. The practitioner is referred to the learned opinion of Judge Niles in Brennan v. Blouse, Baltimore City Court, The Daily Record, August 29, 1956, in which the Sunday laws are examined, although not in landlord-tenant litigation.

\textsuperscript{157} Boulevard Corp. v. Stores Corp., 168 Md. 532, 178 A. 707 (1935).

\textsuperscript{158} 2 Williston, Contracts (3rd ed. 1950) 747-8. However, see Columbian Carbon Co. v. Knight, 207 Md. 203, 209, 114 A. 2d 28, 51 A.L.R. 2d 1232 (1955), in which the Court of Appeals affirms previous holdings that since the passage of the Married Women’s Property Acts the wife shares equally with the husband in the income from a tenancy by the entireties. For a discussion of husband’s agency for his wife as regards real estate see Twilley v. Bromley, 192 Md. 465, 64 A. 2d 553 (1949).

\textsuperscript{159} Chesapeake Realty Co. v. Patterson, 138 Md. 244, 113 A. 725 (1921).

\textsuperscript{160} Charter & P.L.L. (1949) § 462.

\textsuperscript{161} See Rhynhart, Distress, 13 Md. L. Rev. 185 (1953).
value of the uncompleted accommodations and not necessarily the agreed rent.\textsuperscript{162} As regards city property, rents and profits chargeable for the occupancy are confined to a fair occupation rent for the purpose for which the premises are adapted.\textsuperscript{163}

When a tenant removes from demised premises in obedience to a notice to quit, but leaves trash and rubbish on the premises this does not amount to use and occupancy, nor can the tenant be deemed to have held over.\textsuperscript{164}

 XIII. \textit{Constructive and Partial Eviction}

In order that there be constructive eviction, the landlord's acts must involve a substantial interference with tenant's enjoyment and must be of a grave and permanent character.\textsuperscript{165} If the landlord makes a tortious entry on the lessee and expels him, it is a suspension of the rent for the time the tenant is kept out; if the lessee regains possession the rent will revive.\textsuperscript{166} An entry by the landlord without the expulsion of the tenant does not produce a suspension of the rent.\textsuperscript{167} When property is leased for a distillery and the landlord refuses to execute documents required by the United States showing his consent, then, since the tenant is entitled to the beneficial enjoyment of the premises for such a purpose, there is a constructive eviction as the lease for use as a distillery would be a nugatory and incomplete act and in an action in assumpsit for the rent the tenant had the right of recoupment for his damage to the extent of the rent.\textsuperscript{168} Partial eviction means more than mere trespass and must be something of a permanent character done by the landlord with the intention of depriving the tenant of a portion of the premises. Hence a negligent excavation by a landlord, resulting in a broken sewer pipe affecting the tenants' use of the demised property, is not a defense to a suit by landlord for the rent.\textsuperscript{169}

When deprivation of the beneficial use is not by the act of the landlord, the tenant remains liable for the rent.\textsuperscript{170} Notice from a zoning enforcement officer prohibiting a particular use of premises does not amount to constructive

\textsuperscript{162} Guilford Bldg. Co. v. Goldsborough, 140 Md. 159, 116 A. 913 (1922).
\textsuperscript{163} McLaughlin v. Barnum, 31 Md. 425 (1869).
\textsuperscript{164} 2 TIFFANY, n. 1, 1474, 64 L.R.A. 648.
\textsuperscript{165} Op. cit. \textit{ibid.}, 1260.
\textsuperscript{166} Mackubin v. Whetcroft, 4 H. & McH. 135, 155 (Md. 1798).
\textsuperscript{167} Martin v. Martin, 7 Md. 306 (1855).
\textsuperscript{168} Grabenhorst v. Nicodemus, 42 Md. 226 (1875).
\textsuperscript{169} Jackson v. Birgfeld, 189 Md. 552, 56 A. 2d 793 (1948).
\textsuperscript{170} Wagner v. White, 4 H. & J. 561 (Md. 1815).
eviction by the landlord. To constitute constructive eviction the act complained of must have been done by the landlord or by his procurement with the intent and effect of depriving the tenant of the use and enjoyment of the leased premises.  

Most commercial leases prohibit the use of the premises by the tenant for any but a specified business. If the business authorized by the lease becomes illegal then it would appear that the familiar rule of contract law that supervening objective impossibility rescinds would become effective and the lease would be terminated by the passage of the statute. However, when premises are leased to be used exclusively for saloon and restaurant purposes and subsequently a liquor licensing authority forbids its use for saloon purposes with which decision the landlord has nothing to do, then as the lessee is not entirely deprived of the beneficial use of the premises there is no constructive eviction and the tenant remains liable for the rent.

If by law a use of premises theretofore legal is prohibited, there may result an impossibility of performance or a frustration of the purposes of the lease that will allow the tenant to terminate the lease when the tenants do not bind themselves to pay rent regardless of such happening. When a tenant receives notice from an administrative authority challenging his use of premises, he is under an obligation to pursue his remedies until impossibility of performance becomes a fact, as distinguished from a possibility.

Zoning and use restrictions. A letting for a use prohibited by zoning law is not necessarily impossible of performance when there is an administrative authority with power to vary the zoning law.

In some jurisdictions a constructive eviction by the landlord operates to suspend the rent. It arises only by the act of the landlord amounting to serious interference with the tenant's enjoyment of the premises, such as maintenance of an unsafe wall, depriving tenant of the use of a part of the demised premises or maintenance of defective plumbing, causing foul and offensive odors. There
is no constructive eviction when the tenant is inconvenienced by the making of repairs. It has been held that a tenant constructively but not actually evicted has the right of recoupment or counterclaim on a suit by the landlord for the rent. Such constructive evictions have been held to exist for breach of a covenant to heat, denial of the use of an elevator, shutting off the water supply, defective plumbing, and breach of a covenant to repair.

The majority, and apparently the Maryland, view seems to be that there is no constructive eviction suspending the rent unless the tenant moves, and that acts of omission by the landlord, such as the failure to supply power, heat, or elevator service, or failure to perform a contract to repair, do not amount to constructive eviction.

**Criminal liability.** Any person who shall:

"... wilfully deprive a tenant of ingress to or egress from his dwelling, or who shall without the consent of the tenant diminish essential services to the tenant, such as the providing of gas, electricity, water, heat, light, furniture, furnishings, or similar services, to which, under the expressed or implied terms of the tenancy the tenant may be entitled, shall be guilty of a misdemeanor and upon conviction thereof, shall be subject to a fine not exceeding ... $50 and imprisonment of not more than Ten (10) days, or both, in the discretion of the court, for each and every offense."

**XIV. Tenant’s Right to Recoupment**

In a suit for rent the defendant has the right of recoupment for a breach or nonperformance by the landlord, to the extent of the rent, as when a lessee pays under compulsion taxes or mortgage interest owed by the lessor, he is entitled to deduct such payments from the rent. When a sub-tenant pays rent due from a lessee to the original lessor, he is entitled to deduct it from any rent he may owe the lessee. A tenant deprived of the beneficial use of premises by the failure of the landlord to make repairs contracted for, is entitled to an allowance for the proportion of the rent for the time he was so deprived.
There is no implied covenant requiring a landlord to make repairs so that when there is no agreement as to payment for repairs it is not the duty of the landlord to make repairs after the tenancy begins. Unless compelled by agreement, the landlord is not bound to make any repairs during the term of a lease, so that a covenant is never implied that a lessor will make repairs. Even though a landlord may be under no duty to make repairs, he can be held liable therefor in a suit by a third party who makes the repairs, notwithstanding that the order was given to the third party by the tenant, provided there is sufficient evidence to show tenant to have been landlord's agent for this purpose. The mere existence of a landlord-tenant relationship does not constitute the tenant as the agent of the landlord. But the landlord-tenant relationship does not preclude an agency status reached by express agreement or authorization.

However, when the tenant makes repairs at the request of the landlord, the tenant may be entitled to reimbursement. When a landlord contracts to make repairs and improvements and does not do so, the tenant has an action for breach of the agreement, in which the measure of damages is the difference between the fair rental value of the unrepaired premises and the agreed rent. Likewise, when the landlord has expressly agreed to make repairs, the tenant may, in a suit for rent, recoup to the extent of the landlord's rent claim any damages sustained as a direct result of the landlord's non-performance, including the cost of the repairs.

Even though there is a covenant by a landlord to make repairs, this covenant usually is independent of the covenant to pay rent and a failure to repair is no defense to an action founded upon nonpayment of rent, although there is obiter dicta in the Biggs case to the effect that when the repairs required are of a trifling nature requiring but a small outlay of money, the lessee may make the repairs and claim an allowance out of the rent. If the covenants,

196 WILLISTON, CONTRACTS (1936) 887 F; Biggs v. McCurley, supra, n. 194, 415.
by intention of the parties, are dependent then non-performance by landlord is a defense to a claim for rent.\(^{197}\)

In a summary proceeding to recover possession because of nonpayment of rent, the tenant cannot assert a counter-claim for breach of the landlord.\(^{198}\)

While neither the landlord nor the tenant, in the absence of an agreement, is under a legal duty to make repairs, any dangerous condition of the premises which imperils either the occupant or members of the community is forbidden. Under Ordinance 384, approved March 6, 1941, the Commissioner of Health of Baltimore City is empowered to require the occupant or tenant of premises to maintain them in a sanitary condition;\(^{199}\) likewise, the Commissioner is empowered to order that premises which are in any way detrimental to life or health be altered or improved by the owner.\(^{200}\)

In *Givner v. Commissioner of Health*,\(^{201}\) the Court of Appeals discussed the powers in the Commissioner of Health to require installation of inside toilets, prohibit the use of lead paint, and require a particular dwelling to be vacated, all in the interests of public health or safety; and held generally that if a particular regulation is fairly debatable, the "courts will not substitute their judgment for that of the official" charged with the duty of promulgation or enforcement.\(^{202}\)

**XVI. TERMINATION OF THE RELATIONSHIP**

**A. Notice to Quit**

Here, as in summary ejectment, complexities arise because the subject is affected by two statutes: one, the general law affecting all of the counties; and second, the public local law of Baltimore City. It is provided by the Code:

"Where the public general law and the public local law of any county, city, town or district are in conflict, the public local law shall prevail."\(^{203}\)

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\(^{197}\) Brady v. Brady, 140 Md. 403, 117 A. 882 (1922).

\(^{198}\) 2 Tiffany, n. 1, 1766.

\(^{199}\) §§ 156 B, 156 C.

\(^{200}\) 207 Md. 184, 113 A. 2d 899 (1955).

\(^{201}\) See also State v. Reisfeld, The Daily Record, Feb. 25, 1955, (Criminal Court of Baltimore City) where Niles, C.J., and Duer, J., held that the holder of the bare legal title is subject to the penalty provisions of Sections 112 to 119 of Article 12 of the Baltimore City Code of 1850, for failure to remedy conditions dangerous to health after having been served with appropriate notice by the Health Commissioner.

1. Public General Law

The Code provides:

"In all cases where any interest in real estate shall be let or leased for any definite term or at will and the lessor, his heirs, executors, administrators, or assigns shall desire to repossess the same after the expiration of the term for which it was demised and shall give notice in writing one month before the expiration of said term or determination of said will to the tenant or to the person actually in possession of the premises to remove from the same at the end of said term, and if the said tenant or person in actual possession shall refuse to comply therewith the lessor, his heirs, executors, administrators or assigns may make complaint thereof in writing to any justice of the peace of the county or city wherein such real estate is situate."

"The provision of the preceding sections shall apply to all cases of tenancies from year to year, tenancies by the month and by the week; provided, that in case of tenancies from year to year in the counties, a notice in writing shall be given three months before the expiration of the current year of the tenancy, except that in case of farm tenancies, the notice shall be given six (6) months before the expiration of the current year of the tenancy; and in monthly or weekly tenancies, a notice in writing of one month or one week, as the case may be, shall be so given; and the same proceeding shall apply, so far as may be, to cases of forcible entry and detainer; and the benefit of all such proceedings shall enure to the heirs, executors, administrators, or assigns of the owner of such estate as the case may be. In case of removal of such proceedings under a writ of certiorari, a sufficient record thereof shall be the original papers with a copy of the judgment and entries by the justice under his hand and seal. This section, so far as the same relates to notices, shall not apply to Baltimore City. Nothing contained in the laws relating to landlord and tenant contracts, shall be construed as preventing the parties to any such contract, by agreement in writing, from substituting a longer or shorter notice to quit than heretofore required or to waive all such notice, provided the property to which such contract pertains is located in

\[\text{Md. Code (1957), Art. 53, § 1. §§ 2 and 3 deal with tenants holding over.}\]
any special taxing area, or incorporated town of Montgomery County.”

“When the tenant shall give notice by parol to the landlord or to his agent or representatives, at least one month before the expiration of the lease or tenancy in all cases except in cases of tenancies from year to year, and at least three months’ notice in all cases of tenancy from year to year in the counties, except in all cases of farm tenancy the notice shall be six months, of the intention of such tenant to remove at the end of that year and to surrender possession of the tenement at that time, and the landlord, his agent or representative shall prove said notice from the tenant by legal and competent testimony, it shall not be necessary for the said landlord, his agent or representative to prove a written notice to the tenant, but the proof of such notice from the tenant as aforesaid shall entitle his landlord to recover possession of said tenement under the provisions of this article. This section shall not apply to Baltimore City.”

2. Baltimore City Local Law and Practice

Leases for years. At common law, no notice to quit is necessary to terminate a tenancy for years at the expiration of the term named in the lease. However, if the landlord desires to avail himself of the summary remedy provided by Article 53, Section 1, he must give three month’s written notice to the tenant before the expiration of the term. If the landlord fails to give the notice, if any, provided for in the lease, or the notice required by Article 53, Section 1, or that required by the Charter, Sections 728-731, then being barred from the summary proceedings which are brought in the Peoples’ Court, he must proceed in an action of ejectment in a court of higher jurisdiction.

When notice to quit or notice of termination is given with respect to a lease containing notice provisions, such notice must be in accordance with the provisions and terms

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205 Ibid., § 7.
206 Ibid., § 8.
207 Smith v. Pritchett, 188 Md. 347, 178 A. 113 (1935); 2 Taylor, Landlord and Tenant (1904) § 465; 2 Tiffany, n. 1, 1419.
211 2 Poe, n. 1, § 482.
of the lease itself. In the absence of estoppel or waiver by the landlord, the receipt by him of an oral notice of termination does not preclude him from insisting upon the requirements of a written notice as set out in the lease. When a lease for years contains no such provisions, then the notice must be given at least one month before the termination date of the lease.

Leases from year to year. When tenant is in occupancy under a lease from year to year, such as when he takes possession under a void lease and pays a yearly rent, the notice to quit necessary to be given by landlord upon which to base a suit against a tenant holding over is the same as that for a lease from year to year — i.e., ninety days.

3. Notice by Landlord

"Where any lands or tenements in the City of Baltimore are held from year to year, the tenancy shall be terminated if the lessor give to the tenant ninety days' notice before the end of the year."

If land or tenements be held in said city by tenancy at will, at sufferance or per autre vie, thirty days' notice by the landlord or reversioner to the tenant or occupant shall terminate such tenancy at the expiration of thirty days.

The Code provision is one month's notice; the Charter provision is thirty days. A reconciliation of these provisions is: (a) If the lease is one from month to month, then notice must be given at least one month prior to the terminal date on which the letting is to end. As examples: — If the day on which rent is due is the fifth of the month, then the notice must be served not later than midnight of the fourth and the tenancy will be terminated at midnight on the fourth of the following month. If the day on which rent is due is the first of the month, then the notice must be served not later than midnight of the last day of the month preceding the "notice month" at the end of which the tenancy is terminated. As regards tenancies beginning

212 Supra, n. 210, § 735.
215 Darling Shops v. Balto. Center, 191 Md. 289, 60 A. 2d 669, 6 A.L.R. 2d 677 (1948), noted, 9 Md. L. Rev. 362 (1948). See this annotation for a discussion of the incidents of a tenancy implied in fact by the tenant entering under a void or unenforceable lease and the notice necessary to be given by the landlord to terminate such a tenancy.
216 Charter & P.L.L. of Baltimore City (1949) § 728.
217 Ibid., § 730.
on the first of the month, the provisions of the City Charter cannot be applied because of two inconsistent factors: — (1) our Julian calendar contains months of 28, 29, 30 or 31 days, as the case may be; and (2) rent is not apportionable. Consequently, the provisions of Article 53, Section 1 control, and a notice of termination must be given on the day prior to the first of the month. There is room for argument that when the particular month contains thirty-one days, and a notice is served on the first of the month, under Baltimore City local law since there are thirty clear days between the date of service and date of termination, the tenancy is terminated. In view of the fact that tenancies may be terminated as regards months continuing as few as twenty-eight days, it would seem logical that the same rule should apply to all tenancies — so that as regards tenancies beginning on the first of the month, (because of the ambiguity contained in the local law in Baltimore City) notice to quit must be given prior to the first of the month of termination of the tenancy. (b) If the tenancy is one from week to week, then neither the Charter provision nor the Code provision can be literally applied. The practice in such case is to give five weeks notice, beginning with the rent day next succeeding the service of the notice to quit.

4. Notice by Tenant

A tenant may terminate a tenancy from year to year, from month to month, from week to week, at will, or at sufferance by giving to the landlord thirty days' notice previous to the end of the term. Notice by a tenant must be in writing.

Count of time. As rent is not apportionable, neither the landlord nor the tenant can give a notice by which a tenancy is terminated in mid-term, as for example, a notice to quit terminating the tenancy on the fifteen of the month, when the tenancy is one from month to month, with rent due in advance on the first of the month. Therefore, the count of time on a notice to quit begins with the next rent day following the service of the notice.

Sufficiency of notice.

"Such notice shall be sufficient in form if it contains a request by the landlord to the tenant to leave the premises, or if it states the intentions of the tenant

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219 Charter & P.L.L. of Baltimore City (1949) § 728.
220 Kinsey v. Minnick, 43 Md. 112 (1876).
to leave the same, and it need not state the time when
the tenant is requested to leave the same, or when the
tenant intends to do so."\textsuperscript{221}

Form of notice to quit:

"To Tenant: As I am desirous to have again and
repossess the premises which you now hold of me as
tenant, I hereby give you notice to vacate and remove
from the same at the end of the term of your tenancy,
which will expire on ...................."

Who may give notice.

"Notice on the part of the landlord may be given
either by the original lessor or by the person or per-
sons succeeding him in the ownership of the reversion.
One having merely an equitable title based on a con-
tract for the sale to him of the reversion has no
authority to give it. * * * An authorized agent of the
landlord may give the notice on behalf of his principal,
and he may . . . give it in his own name, if he has
general control over the property, as when he is an
agent to let and also to receive rents . . . while if
acting under a special authority for this particular
purpose he must, . . . give the notice in the name of
his principal. * * * \textsuperscript{222}

A notice to quit need not be signed by the landlord in per-
son. It is sufficient if it clearly shows on whose behalf it
is sent, to what property it relates, and of what facts it is
intended to inform the tenant. A landlord's agent having
authority to rent a property is presumed to have like
authority to give to the tenant a notice to quit.\textsuperscript{223}

"When the reversion is transferred, the proper per-
son to give the notice is the grantee and not the origi-
nal lessor. A purchaser of the reversion cannot give
the requisite notice before he has received his deed.
The grantee of the reversion may take advantage of a
notice to quit given by his grantor prior to the con-
voyance of the reversion."\textsuperscript{224}

\textit{Quaere}, can there be circumstances under which the
notice may be given by the purchaser before a conveyance

\textsuperscript{221} Charter & P.L.L., supra, n. 219, § 733.
\textsuperscript{222} 2 Tiffany, n. 1, 1438, § 198.
\textsuperscript{223} Benton v. Stokes, 109 Md. 117, 71 A. 532 (1908).
\textsuperscript{224} Walker v. Kirwan, 137 Md. 139, 111 A. 775 (1920).
of the property, on the theory that the contract purchaser is the equitable owner? When the object is to secure possession for the purchaser of tenant-occupied property, the practice is to give the notice in name of both the vendor-owner and the purchaser. The naming of an unnecessary person as landlord is treated as surplusage.

Service of notice. The notice required by the preceding sections shall be in writing and served on the tenant or left at his place of abode or business, or served on his agent or servant, or served on any occupant of the premises; and if there be no person living on the premises the same may be served by being set upon a conspicuous part of the premises.

Irregular notices. Service of a notice addressed to a wife (being the tenant) upon her husband (her agent in renting and living on the premises) is a sufficient notice. A misdescription of the premises, or a mistatement of dates which cannot mislead will not vitiate the notice; nor need it be directed to the person. Even if directed by a wrong name, such as the husband instead of the wife, if she keeps it without objection, the error is waived. However, reference is made to Wm. Penn Supply v. Watterson, which holds in a mechanic's lien case that agency as between husband and wife may not be implied from marital status.

Premature terminal date in notice. At nisi prius it has been decided that a notice to quit on April 28, when the expiration of the lease was February 28, was defective and did not terminate the tenancy. However, as a notice is good if upon the whole it is intelligible and so certain that the tenant cannot reasonably misunderstand it, an obvious mistake in some part will not invalidate it if it is otherwise so explicit that the party receiving it cannot be misled. If the person who gives the notice becomes committed thereby even though there may be an error in the terminal date, the notice is not thereby vitiated.

As a notice to quit can be given only by the landlord or on his behalf and as the tenant is bound by constructive notice as to ownership as shown by the Land Records, then the tenant may rely on the title as shown by the

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227 Cook v. Creswell, 44 Md. 581 (1876).
230 Cook v. Creswell, 44 Md. 581 (1876); Benton v. Stokes, 109 Md. 117, 121, 71 A. 532 (1908); Walker v. Kirwan, 137 Md. 139, 111 A. 775 (1920).
231 Dugan v. Yourtee, People's Court No. 13329-48, affd. in Baltimore City Court by Sherbow, J.
Land Records and this regardless of when the deed was recorded. By Article 21, Section 16, a deed recorded after six months is constructive notice from and after the date on which it is recorded. A notice to quit or a suit against a tenant holding over can be effective or maintained only when brought by the record title owner or by a landlord to whom attornment has been made, as persons dealing with the owner of the reversion are bound only by the title shown by the Land Records.

B. Surrender and Abandonment

A surrender of demised premises by a tenant before the expiration of his term does not relieve him from liability for rent unless the surrender is accepted by the landlord; and a reletting by the landlord at the risk of the tenant is not an acceptance of surrender by the landlord. However, in any such reletting the landlord faces the hazard that his act may discharge the tenant's liability if the landlord relets the premises for a period longer than the remainder of the term.

As a notice to quit by a landlord or a notice of termination by a tenant must be in writing, if the tenant removes from premises held by him under a tenancy from month to month, without a surrender accepted by the landlord, then the tenant may be liable for rent accruing after the removal, and beyond the succeeding month's rent. When a tenant abandons demised property without legal notice to the landlord he remains liable for the rent.

C. Fire

When premises become untenable because of fire or unavoidable accident, the letting being for seven years or less, the tenancy is thereby terminated and all liability for rent ceases proportionately. However, if the lease provides for such a contingency, then the provisions of the statute are inoperative. When premises are merely damaged by fire so that part thereof becomes untenable, the lease is not thereby terminated, as "untenantable by

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234 Gable v. Preachers' Fund Society, 59 Md. 455 (1883).
235 Oldewurtel v. Wiesenfeld, 97 Md. 165, 54 A. 969 (1903).
237 Kinsey v. Minnick, 43 Md. 112 (1875).
238 Emrich v. Union Stock Yard Co., 86 Md. 482, 38 A. 943 (1897).
"fire" means a permanently untenable condition rendering further occupancy impossible and necessitating not merely repairs, but rebuilding.\textsuperscript{241}

Where a lease provided for its termination upon substantial destruction of the premises by fire, the elements, or any other cause not the fault of the tenant, it was held that such destruction must make the premises permanently untenable, or be so extensive as to require practically the equivalent of a new building. When the cost of repairs amounted to $5,000 to a building valued at $100,000, and were completed within a month, the lessee was denied the right to terminate.\textsuperscript{242}

D. Judicial Sales

As a writ of possession under Article 66, Section 19,\textsuperscript{243} to a purchaser of lands sold at mortgage foreclosure is of the same nature as a writ of possession or habere facias possessionem under Article 75, Section 42,\textsuperscript{244} the rights respecting property sold at mortgage foreclosure or on execution against the occupant or tenant are as follows:

(a) Under Code Article 66, Section 20,\textsuperscript{245} a purchaser at a mortgage foreclosure sale has all of the rights against the tenant that the mortgagor had. Consequently, the purchaser may file appropriate actions in People's Court to the same extent as could the landlord or owner whose estate was sold.\textsuperscript{246} (b) The purchaser at a judicial sale may secure out of the court which ordered the sale a writ of possession against the occupants of the property, consisting either of the mortgagor or debtor or those who hold under him. (c) An assignee of the purchaser at a judicial sale may not have a writ of possession out of the court which directed the sale, as in Turner v. Waters,\textsuperscript{247} where it was held that the right to a writ of possession applied for by a purchaser at an execution sale, did not devolve upon the purchaser's administrator.

XVII. LANDLORD'S LIEN

A landlord has no lien for rent unless he distrains,\textsuperscript{248} nor does he have an equitable lien upon property taken in

\textsuperscript{241} Barry v. Herring, 153 Md. 457, 138 A. 266 (1927).
\textsuperscript{243} 5 Md. Code (1957).
\textsuperscript{244} 7 Md. Code (1957).
\textsuperscript{245} Supra, n. 243.
\textsuperscript{246} Smith v. Pritchett, 168 Md. 347, 349, 178 A. 113 (1935).
\textsuperscript{247} 14 Md. 62 (1859).
\textsuperscript{248} Buckey v. Snouffer, 10 Md. 149 (1856); Stewart v. Clark, 60 Md. 310 (1883); Mears v. Perine, 156 Md. 56, 143 A. 591, 62 A.L.R. 1100 (1928).
distress and replevied by the tenant. A landlord has a quasi-lien on the goods of his tenant subject to distress even before distress levied for arrearages of rent, but this potential right does not become a lien on the goods until they have actually been seized under a distress. This quasi-lien may be converted to a lien, even without a distress, under the Statute of 8 Anne, Ch. 14, and if the landlord's claim for rent is properly established it will take precedence over the debt on which an attachment issues and he is entitled to be first paid out of the proceeds of the property condemned. If a landlord permits distrained goods to remain in a tenant's possession for an unreasonable length of time, then a bona fide purchaser without notice of the distress takes the goods free of the landlord's lien. Three months has been held to be an unreasonable time.

In bankruptcy. A landlord has no lien upon distrainable goods passing into the hands of a trustee in bankruptcy unless he levied his distraint before the filing of the petition. If distress is levied by a landlord before the tenant's adjudication as a bankrupt, the landlord is entitled to priority for his accrued rent, out of the proceeds of sale of the bankrupt's assets by the bankruptcy trustee. The lien acquired by a distress within four months of a bankruptcy petition is not voidable as it is one secured other than through legal proceedings.

A. Attaching or Execution Creditor

By 8 Anne, Ch. 14, an execution creditor must pay rent in arrear for a period of not less than one year before the goods and chattels executed upon, may be removed by the officer. The same principle applies to the rights of the landlord against an attaching creditor. Therefore, when goods are sold on execution by the sheriff, the landlord is entitled to be paid the rent accrued and unpaid before the levying of the execution, provided he gives reasonable

253 Lamotte v. Wisner, 51 Md. 543 (1879).
254 In re Seward, 8 F. Supp. 865 (D.C. Md. 1934).
255 In re Potomac Brick Co. of Baltimore City, 179 Fed. 525 (D.C. Md. 1910).
256 2 ALEX., n. 1, 681.
notice to the sheriff or constable, and whether or not the goods are removed from the premises. The notice given by landlord to the constable to sell under a fi fa must state under oath the amount of rent due.

If the goods are not removed from the premises then the landlord has no action against the constable under the statute of 8 Anne, Ch. 14, if they be sold on the premises, a motion by the landlord that the constable pay the rent due out of the money in his hands is appropriate.

When goods are removed from demised premises by the sheriff under a writ of attachment, there being no rent due at the time of removal, the landlord has no claim against the proceeds of the sale, as he has no right to follow and distrain on the goods. As the purpose of the statute is to protect the landlord's right to distrain, there is no such priority in landlord's claims arising in Baltimore City, when the term of the lease is three months or less, for the right to distrain in such cases has been taken away and the right to summarily eject substituted. In a suit for taking goods under a void attachment, the defendant may mitigate damages by proving payment of rent in arrear to the landlord pursuant to 8 Anne, although such payment must be either compulsory or by court order.

B. Bankruptcy, Insolvency and Receivership

"Whenever any person or corporation shall make an assignment for the benefit of his or its creditors, or shall be adjudicated insolvent, or shall be adjudicated bankrupt, or shall be dissolved as a corporation, or a receiver is appointed to take possession of his or its
property or estate, in the distribution of the property or estate of such person or corporation, all the money owing from such person or corporation for rent of any real or leasehold property in this State due not more than three months, but not actually distrained for, before the execution of such assignment or the filing of the bill or petition for such receiver, dissolution or adjudication, shall constitute a lien on, and shall be paid in full out of, the distrainable property of such person or corporation, to the same extent but no further than if distress for said rent had been levied by the landlord before such execution or filing.\textsuperscript{266}

This preference may be lost.\textsuperscript{267}

C. Decedent's Estates

A landlord having a claim for distrainable rent against a deceased tenant has, of course, no problem if there are sufficient assets in the estate. However, if the assets are insufficient, the landlord's rights are not too clearly defined.

Claim in Orphans Court. Under the Code the landlord may file claim in the Orphans Court.

"If the claim be for rent there shall be produced the lease itself, or the deposition of some credible witness or witnesses, or an acknowledgment in writing of the deceased, establishing the contract, and the time which hath elapsed during which rent was chargeable, and a statement of the sum due for such rent, with an oath of the creditor endorsed thereon, 'that no part of the sum due for said rent, or any security or satisfaction for the same hath been received, except what (if any) is credited', and if the creditor be an assignee, there shall be such oath of the original creditor with respect to the time of the assignment."\textsuperscript{268}

If his claim is to be a preferred claim, then:

"The proof of a claim for rent in arrear, so as to render the same a preferred claim, shall be the proofs and vouchers for rent aforesaid; and proof that the claim is such that a distress therefor might be levied

\textsuperscript{266} 4 Md. Code (1959), Art. 47, § 16.

\textsuperscript{267} A discussion of the rights of conflicting rights and claims when there is insufficient money to pay claims will be found in Easter v. Tatelbaum, 198 Md. 636, 84 A. 2d 914 (1951). The Statute of 8 Anne, Ch. 14, 2 Alex., n. 1, 680, is not superseded or abrogated by this Act; In re Seward, 8 F. Supp. 865 (D.C. Md. 1934).

\textsuperscript{268} 8 Md. Code (1859), Art. 93, § 97.
on said deceased's goods and chattels in the hands of the administrator; but the preference given for rent is not to impair the landlord's right of distress if he should think it proper to exercise it."

In the settlement of a decedent's estate, after taxes due and in arrear, claims for rent in arrear against the decedent for which a distress might be levied by law are preferred debts, it is essential that a proper voucher be filed or the claim will not be given a preferred status. Attention is particularly called to the provisions of Article 93, Section 6, subsection (a), which apparently limits a landlord's preferred claim to rent for a period not more than three months. Assuming the proper form of claim is filed, then the claim for distrainable rent is payable as a preferred claim immediately after payment of taxes due and in arrear. It appears that a number of expense categories are paid before rent, or, for that matter, taxes. Article 93, Section 6, dealing with the order of priority of disbursements (as distinguished from debts) treats a number of items, including funeral expenses, as having priority over all debts, including a landlord's preferred claim. Another guide to the legislative intent to protect funeral expenses may be found in Article 81, Section 202 (c), which gives taxes priority over all debts excepting necessary funeral expenses.

Distress. Article 93, Section 98, provides that "preference given for rent is not to impair the landlord's right of distress if he should think it proper to exercise it". A landlord may distrain during the term, after the death of the tenant and before administration granted, for rent due and in arrear. While the case of Longwell v. Ridinger, deals with the preferred status of the landlord's claim for distrainable rent in the Orphans Court, there is obiter dicta in this case that a landlord may distrain after letters of administration have issued on the estate of the deceased tenant.

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269 Ibid., § 98.
271 Maynadier v. Armstrong, 98 Md. 175, 56 A. 357 (1903).
273 8 Md. Code (1957), Art. 93, § 130.
278 1 Gill 57 (Md. 1843).
The liability of a landlord in tort arises from a breach of a duty assumed by contract or imposed by law. As an example of the latter, when there is more than a single tenant the landlord is responsible for the condition of hallways and other rooms used in common and is liable for damages caused by his failure to remedy defects in the appliances or parts of the building over which he retains control. When in a multiple unit dwelling inadequate precautions by the landlord cause rat infestation in the portions over which the landlord retains control, resulting in a tenant being infected with typhus, the landlord may be held liable for the damage resulting to tenant or his family. A landlord may be liable to third parties if premises are unsafe when leased and property is of a public character. As regards hazards in a recreation room maintained by a landlord in a multiple dwelling for the convenience of the tenants (thus not necessary for use in connection with portions of the building leased by them), there is no duty owed by the landlord to a person not a tenant injured in such a room while using it without the knowledge of the landlord. The injured person, being a trespasser or bare licensee, has no claim for injury against the landlord despite being of tender years.

The question of negligence in maintaining a dangerous place depends upon whether such place of danger is in the natural order of things or whether it is unusual in the experience of reasonably prudent persons. Where a tenant slipped and fell on linoleum-treaded outside steps during a snowstorm, plaintiff was denied recovery because it was not shown such use of linoleum was unusual or out of common experience.

A landlord may be liable to guests or customers of his lessee only to the same extent that he is liable to the tenant himself. However, where the premises are to be used for public or quasi-public purposes, the landlord must use ordi-

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270 Whitcomb v. Mason, 102 Md. 275, 62 A. 749 (1905). Landay v. Cohn, 220 Md. 24, 150 A. 2d 739 (1959), points out that the use must be within the confines of the invitation.


282 Smith v. Walsh, 92 Md. 518, 48 A. 92 (1901).


nary diligence to see that the property leased is in a reasonably safe condition at the time of the lease. Thus, when a patron of a tavern is injured when falling down a flight of steps, if there is evidence that the stairway was unsafe or potentially dangerous at the time of letting, the landlord may be held liable to the injured person. A person is a "patron" if his visit promises actual or potential financial benefit to the occupant in connection with the business conducted on the premises, so that the patron may be a solicitor of new accounts for a bank as well as a customer who wants to buy a bottle of beer.

A landlord is not liable for injuries caused by defects existing at the time of the lease except as he may have failed to inform the lessee of defects known to him and not apparent to the lessee. It is necessary to distinguish between actual knowledge by the landlord of the dangerous condition, or whether he has information to reasonably support a conclusion of the existence of danger. Maryland has adopted the rule of liability upon the landlord if "he had reason to know" of the danger, as distinguished from "should have known" of the danger. A lessor who conceals or fails to disclose to his lessee any natural or artificial condition involving unreasonable risk of bodily harm to persons upon the land is subject to liability. However, a landlord is not an insurer of the safety of the premises or the appliances supplied by him. In Maryland the common law rule that there is no obligation upon the landlord to repair or rebuild prevails, and in the absence of agreement the tenant must guard against apparent dangers. Here continues the philosophy that the liability of a landlord to a tenant rests upon violation of duty. Unless the particular condition which causes the injury has been made known to the landlord a reasonable time before the accident, giving him time to make correction, there is no liability on the landlord unless the landlord has exclusive control of the apparatus whose failure causes injury. Thus, in the case of an unexplained explosion of a gas heater the doctrine of res ipsa loquitur did not apply, and the landlord was not liable when it was shown that he merely retained the right and duty to adjust and repair, since there was no notice to the landlord nor opportunity to find and correct the condition causing the

286 State v. Feldstein, 207 Md. 20, 113 A. 2d 100 (1955).
288 Ibid.
However, it has been held that when a landlord makes available a laundry room for the use of all of his tenants, he is under a duty to keep it and the appliances therein in a reasonably safe condition. In 2310 Madison Avenue v. Allied Bedding Mfg. Co., the landlord was held liable for damage to goods of a first floor tenant caused by water coming from second floor due to a clogged drain pipe, when there was an agreement by landlord to make repairs and when he was notified three weeks earlier of a water leak, and failed to discover the cause of the leak. The landlord may not escape responsibility for an obligation to make repairs to appliances or equipment under his control by delegating the making of such repairs to an independent contractor.

Liability may result from an obligation assumed by the landlord's contract. The promise of landlord to repair must be supported by consideration, such as inducing the tenant to remain for a longer term; if the landlord's promise is made after the tenancy begins and the tenant is not induced to do anything but what he has already contracted to do, the promise of landlord is without consideration. When a landlord agrees to make repairs and does not do so, then the tenant or a member of his family has an action for any personal injuries sustained, provided there is some clear act of negligence beyond the breach of contract. However, a tenant has no action for personal injuries resulting from the mere breach of a contract to repair, since to be actionable such breach must be a negligent one. When a landlord makes repairs, whether or not bound by a covenant to repair, he must exercise reasonable care in making the repairs or improvements and is liable for any injuries sustained by the tenant, just as he would be if he were obligated by a covenant in the lease to do the work. When an obligation is on the landlord to repair, he is not responsible for injuries caused by hidden defects in the premises unknown to him, and a casual expression of

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290 See note, 25 A.L.R. 2d 565, dealing with a landlord's liability for personal injury or death due to defects in appliances supplied for use of different tenants.
291 209 Md. 399, 121 A. 2d 203 (1956).
 opinion as to the safety of premises will not support an action for negligent misrepresentation.\textsuperscript{297} The careful practitioner will keep in mind that the foundation of a landlord's tort liability lies in negligence, regardless of the origin of his duty, whether in contract, or imposed upon him by his status or the ownership of the property.\textsuperscript{298}

**Nuisance.** The distinction between nuisance and negligence lies in definition of a private nuisance as "a violation of an absolute duty so that it does not rest on the degree of care used but rather on the degree of danger existing with the best of care".\textsuperscript{299} When property leased is not a nuisance at the time but becomes a nuisance only by the act of the tenant while the latter is in possession, the owner is not liable to third parties for the consequences of the nuisance.\textsuperscript{300}

A distinguishing point seems to be whether the nature of the tenancy detracted from the owner-landlord's control. Here the duration of the tenancy seems to be of moment; a short-term tenancy, such as from month to month, creates the thought of the privilege of the landlord to regain control of the premises. Consequently, liability in the landlord may exist on the ground of reasonable opportunity in him to abate the nuisance created by the tenant.\textsuperscript{301}

When the premises are a nuisance at the time of the letting, then the owner is liable whether in or out of possession.\textsuperscript{302} Both the landlord and the tenant may be liable to a third person damaged by the defective condition of leased premises, notwithstanding the provisions of the lease, when the premises contain a nuisance at the time of the demise which becomes active by ordinary use of the premises by the tenant.\textsuperscript{303} In this connection see *Sherwood Brothers, Inc. v. Eckard*,\textsuperscript{304} in which it was held that the landlord is liable for injuries to persons on leased premises, such as customers of the lessee, only to the same extent as he is to the tenant himself; accordingly, the landlord is

\begin{footnotes}
\footnotetext[297]{\textsuperscript{297} Holt v. Kolker, 189 Md. 636, 57 A. 2d 287 (1948).}
\footnotetext[298]{\textsuperscript{298} For a review of the authorities dealing with the liability of a landlord for his failure to make repairs, see Richardson v. Katzoff, Ct. of Com. Plead, O'Dunne, J.; Daily Record, April 1, 1939.}
\footnotetext[299]{\textsuperscript{299} State v. Feldstein, 207 Md. 20, 34, 113 A. 2d 100 (1955).}
\footnotetext[300]{\textsuperscript{300} Marshall v. Price, 162 Md. 687, 161 A. 172 (1932). In this connection see note in 39 A.L.R. 2d 973, dealing with the liability of the owner or landlord for injuries to a third party resulting from a nuisance created by a tenant.}
\footnotetext[301]{\textsuperscript{301} 39 A.L.R. 2d 973.}
\footnotetext[303]{\textsuperscript{303} Beck v. Hanline, 122 Md. 68, 89 A. 377 (1913).}
\footnotetext[304]{\textsuperscript{304} 204 Md. 485, 105 A. 2d 207 (1954).}
\end{footnotes}
not liable for injuries caused by defects existing at the time of the lease except as he may have failed to inform the lessee of defects known to him and not apparent to the lessee. When large numbers of patrons may be expected to visit the leased premises, the landlord is obliged to see to it that the leased premises are in a reasonably safe condition at the time of letting. In Austin v. Buettner, the Court of Appeals reaffirmed the principle that the landlord may be liable to a patron of his lessee if the property leased is not in a reasonably safe condition at the time of the lease. Also, in this case the Court indicated that it was not committed to the principle that the landlord may be liable to a patron of his lessee if the property leased is not in a reasonably safe condition at the time of the lease. Also, in this case the Court indicated that it was not committed to the principle that the landlord's liability would be affected by the number of patrons. The reason for the presence of the injured person on the premises is of importance. The nature of liability of both landlord and tenant is affected by whether the injured person is an invitee, a business visitor or one with no existing potential business relationship. However, this liability exists only when injury occurs in a portion of the premises to which patrons are invited.

Contributory negligence. A tenant is not guilty of contributory negligence unless the defect is so obviously dangerous that no person of ordinary prudence would be willing to use it. That a tenant knows of a defective condition and complains to the landlord does not necessarily mean that the tenant was aware of the full extent of the danger, and contributory negligence in such instance is a jury question. A tenant of a portion of an entire building is not contributorily negligent if he fails to anticipate a negligent lack of care on the part of other tenants of the building, and if at the time of renting the building was unsafe and unheated, the landlord is liable to a tenant injured by the bursting of a water pipe when the landlord took no precautions against such a happening.

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305 Restatement, Torts (1934) § 359.
306 211 Md. 61, 124 A. 2d 793 (1956).
307 Sherwood Brothers v. Eckard, supra, n. 304.
XIX. Remedies of Landlord

A. At Law.

Most written leases contain covenants on the part of the tenant relating to the use to be made of the demised premises. The rights reserved to the landlord in most instruments of lease fall into one or more of three categories.

Reentry. The usual provision gives the landlord the right to reenter upon the termination of the term or for breach of covenant by the tenant. In practice a landlord rarely avails himself of such right. It has been held at nisi prius that when a landlord attempts to exercise a right of reentry given him by the lease and is foiled by the tenant's threats, equity has jurisdiction to enjoin the tenant from resisting the entry. However, in Redwood Hotel, Inc. v. Korbien, the Court of Appeals denied equitable relief to a landlord because the principal relief sought was ejectment of the tenant. By analogy, see Glorius v. Watkins, in which the Court of Appeals denied equity jurisdiction in a case brought by a vendor of real estate against the vendee under an installment sale contract, the purpose being to clear a cloud on title, the court saying that to grant the relief would in effect give a chancery suit the effect of an action of ejectment.

Tenancy determined by breach. Provisions in a lease for determination of the tenancy for breach of covenant by the tenant do not render the lease void upon such breach, but voidable at the option of the landlord. For breach of a covenant in a lease the landlord has the right to relief in equity by injunction or at law by an action in ejectment. When a lease contains provisions that it shall be void for a breach of covenant, such as payment of rent, then upon a breach a court of law must hold the estate divested. However, equity will permit a forfeiture only when it is the result of culpable neglect on the part of the tenant but not when the omission is caused by accident. When rent is mailed in time to reach the lessor in the ordinary course of mail there is no forfeiture

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312 179 Md. 117, 17 A. 2d 130 (1941).
313 120 Md. 546, 102 A. 2d 274 (1954).
315 Live Stock Co. v. Rendering Co., 179 Md. 117, 17 A. 2d 130 (1941).
316 Schlerf v. Bond, 139 Md. 10, 114 A. 739 (1921); 2 Foz, n. 1, § 482.
318 Wylie v. Kirby, 115 Md. 282, 80 A. 962 (1911).
for tardy payment if the letter is miscarried or delayed in the post office.\textsuperscript{319} When forfeiture is merely security for the payment of money, equity will treat it as in the nature of a penalty and in a proper case will grant relief.\textsuperscript{320} However, when a lease has been declared forfeited by a landlord for default in rent payments and tenant is insolvent, equity will not strike down the forfeiture, even though all arrears of rent are tendered by officers of the corporate lessee. This is on the theory that the promise of the tenant to pay later rent is manifestly worthless, as solvency is necessary to the performance of future rent obligations. Only when a substantial compliance with the covenant to pay future rent to the landlord is assured will equity deny forfeiture.\textsuperscript{321}

**Conversion of tenancy.** Some leases for years provide that upon breach by the tenant of a covenant, the letting is converted into one from month to month. If such a provision is effective, then, upon giving the notice of termination, the landlord would be entitled to the summary remedy against the lessee as a tenant holding over, and, in such case, the landlord would not be limited to ejectment against the lessee in a court of record. While obiter dicta, a nisi prius court did not criticize a provision in a lease that a violation of a covenant by the tenant would result in a conversion of the tenancy from one for years to one from month to month.\textsuperscript{322} The question has not been decided by the Court of Appeals. However, some analogy may be made to the cases involving the contract provisions in Installment Land Contracts prior to Chapter 596, of the Acts of 1951,\textsuperscript{323} under which the Court of Appeals has given effect to provisions converting a vendor-purchaser relationship into a landlord-tenant relationship upon breach by the purchaser.

**B. Equity.**

If a landower (by agreement, or by his failure to act to terminate a tenancy) permits a negligent or insolvent tenant to remain on his land, he cannot invoke the aid of equity except to prevent waste or irreparable injury.\textsuperscript{324} An


\textsuperscript{320} Carpenter v. Wilson, 100 Md. 13, 59 A. 186 (1904).

\textsuperscript{321} Evergreen Corp. v. Pacheo, 218 Md. 230, 145 A. 2d 774 (1958).

\textsuperscript{322} Caroletta Apartment Corp. v. Burns; Sup. Ct. of Baltimore City, Mason, J.; Daily Record, March 3, 1950.

\textsuperscript{323} Now 2 Md. Corp. (1957), Art. 21, §§ 110-116.

\textsuperscript{324} Blain v. Everitt, 36 Md. 73 (1872).
injunction will not lie to oust a tenant on the ground that he is a bad tenant and worries the landlord; that his rent is in arrears; that he is disagreeable; that he will not give up possession of the premises upon demand of the landlord; or that he is insolvent. Even though it is contended that an equity action will avoid a multiplicity of suits, this apparently is not an independent ground of equitable jurisdiction.\textsuperscript{325}

\textit{Fraud in inception.} A landlord induced to enter into a lease by fraudulent concealment or misrepresentation by the tenant has a remedy in equity, the relationship having a fiduciary character.\textsuperscript{326}

\textit{Waste.} By injunction, a landlord may prevent his lessee, or those claiming or holding under the lessee, from converting the demised premises to uses inconsistent with the terms of the contract of lease, and from making material alterations for such purposes, as well as committing other kinds of waste. If the acts constituting waste are those of a sub-lessee, the original lessee is not a necessary party.\textsuperscript{327} However, the prevention of waste is not an adequate basis for a suit in equity, in the absence of circumstances specifically alleged and proved, to show irreparable damage.\textsuperscript{328}

XX. \textbf{DEFENSES AVAILABLE TO TENANT}

While a tenant will not be permitted to dispute his landlord's title, particularly when he has entered by virtue of his tenancy,\textsuperscript{329} he may show that his landlord's title has expired, been transferred or defeated,\textsuperscript{330} or that landlord himself admits a condition of the title which precludes the relationship of landlord and tenant.\textsuperscript{331} Deficiencies in premises ascertainable by the tenant before he enters into a lease will not serve as defenses to a suit for rent.\textsuperscript{332} A lessor cannot claim rent falling due after eviction of the tenant by title paramount, as the enjoyment of the land is the consideration for the rent.\textsuperscript{333}

\begin{thebibliography}{999}
\bibitem{redwood_korblen} Redwood Hotel v. Korblen, 195 Md. 402, 73 A. 468 (1950).
\bibitem{gale_mccullough} Gale v. McCullough, 118 Md. 287, 84 A. 469 (1912).
\bibitem{maddox_white} Maddox v. White, 4 Md. 72 (1853).
\bibitem{funk_kinceid} Funk v. Kinceid, 5 Md. 464 (1854); Cook v. Creswell, 44 Md. 581 (1876).
\bibitem{giles_ebsworth} Giles v. Ebsworth, 10 Md. 333 (1856); Maulsby v. Scarborough, 179 Md. 67, 16 A. 2d 897 (1940).
\bibitem{tizer_tizer} Tizer v. Tizer, 162 Md. 489, 160 A. 163, 161 A. 510 (1932).
\bibitem{lewis_clark} Lewis v. Clark, 86 Md. 327, 37 A. 1035 (1897).
\bibitem{martin_martin} Martin v. Martin, 7 Md. 368 (1855).
\end{thebibliography}
A. Waiver and Estoppel.

To waive forfeiture, an act of the landlord must amount to an affirmance of the tenancy or a recognition of its continuance, such as distraining for rent accruing after the right of forfeiture arises. The receipt of rent after a breach of covenant does not of itself operate as a waiver, unless the rent accrued subsequently to the act which works the forfeiture. Acceptance of rent accruing after a breach is a waiver of the forfeiture.

As forfeitures for breach of covenant are not favored, any slight acquiescence in a breach will be construed as a waiver. When a landlord fails to exact prompt payment of rent he may be estopped from claiming a forfeiture for tardy payment of a later installment.

The weight of authority seems to be that a mere demand by the landlord for rent after the term is not a binding election. Normally, when rent is paid by the occupier to the owner of land, the inference is that they intended to create a tenancy; but when a landlord has judgment of restitution, acceptance of rent by him during the period an appeal is pending does not estop him from enforcing his judgment when the judgment is affirmed on the appeal.

Renewal. Even though the lease provides for written notice by tenant for its renewal, this may be waived by the landlord; and if he waives in fact, this will be binding upon the landlord's successor in title who has no actual knowledge thereof.

Assignment. When a lease contains a covenant against assignment, and the landlord permits an assignee to remain in possession for a number of years, permitting him to make improvements, the landlord has waived his rights and is estopped from asserting them. Similarly, if lessor in a lease containing such a covenant by the lessee against assignment, consents to an assignment without restriction as to future assignments, the condition is waived by the landlord, and lessee may thereafter assign the term without lessor's consent.

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In re Hook, 25 F. 2d 498 (D.C. Md. 1928).
Morrison v. Smith, 90 Md. 76, 44 A. 1031 (1899).
109 A.L.R. 1269.
Live Stock Co. v. Rendering Co., 179 Md. 117, 17 A. 2d 130 (1941).
Hopkins v. Holland, 84 Md. 34, 35 A. 11 (1896); 109 A.L.R. 1281.
Reid v. Wiessner Brewing Co., 88 Md. 234, 40 A. 877 (1898).
The Review is pleased to welcome back Allan W. Rhynhart, Chief Judge of the People’s Court of Baltimore City, the author of this issue’s lead article, Notes on the Law of Landlord and Tenant. Judge Rhynhart’s previous articles in the Review, Distress, 13 Maryland Law Review 185; Execution and Fi Fa in the People’s Court of Baltimore City, 14 Maryland Law Review 203; Attachment in the People’s Court of Baltimore City, 14 Maryland Law Review 235, and the present article are chapters of Judge Rhynhart’s forthcoming manual dealing with practice and procedure in the People’s Court. In the instant article, Judge Rhynhart again contributes a highly practical work to the Maryland Bar, covering all aspects of the Maryland law on the subject.

Our readers will be interested to know that the Commissioner of Internal Revenue has adopted a formula for the determination of ground rent income that was first developed by Ronald Smullian in a casenote written in the Maryland Law Review, Maryland Ground Rents not Realized Income on Sale of Leasehold, 17 Maryland Law Review 241. The note, written while Mr. Smullian was still a student, is the subject of a Rewrite Bulletin at ¶ 8776 of C.C.H. Standard Federal Tax Reports. We are especially pleased when one of our undergraduate authors gains national recognition for work first published in the Review.
Best Evidence Rule — Unsigned Carbon Copy Of Letter As Duplicate Original

_Parr Construction Co. v. Pomer_

The plaintiff Construction Company brought suit against the defendant Construction Company and its president to recover the balance due under an oral contract to perform certain excavation work at a price of thirty-five cents per cubic yard, being unable to agree as to the actual quantity which plaintiff had excavated. The defendant engineer estimated 12,673 cubic yards, whereas the plaintiff estimated 18,000 cubic yards. The plaintiff agreed with the defendant to refer the dispute to one Matz as an impartial arbitrator.

The issue here in question concerns the admissibility in behalf of the plaintiff of an unsigned carbon copy of a letter from Matz to the defendant giving Matz's estimate of the quantity of earth excavated as 14,340 cubic yards. After a previous effort to introduce the copy into evidence, the plaintiff called the defendant's president as a witness and had him identify the carbon copy as a copy of the letter received by him. The defendant objected to the admission of the copy on two grounds: first, that it violated the best evidence rule; and second, because the arbitrator was not present to testify as a witness and explain the method used in making his calculation. The trial court overruled the defendant's objections and admitted the letter into evidence. The Court of Appeals, in affirming the trial court said:

"The objection based on the best evidence rule is without merit. (Defendant's president) was called as a witness by (the plaintiff) and identified the unsigned carbon copy as a copy of the original letter received by him. * * * A carbon copy of a letter is considered to be a duplicate original; and, as such, it constitutes primary rather than secondary evidence."

The court appears to have based its holding upon two alternative grounds: (1) that the unsigned carbon copy

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1 217 Md. 539, 144 A. 2d 69 (1958).
2 Only the first objection, in regard to the best evidence rule, falls within the scope of this note.
3 *Supra*, n. 1, 542.
was admissible as a duplicate original; and (2) that the defendant's president had admitted that the carbon copy was accurate and authentic.

In general terms, the Best Evidence Rule is one requiring the production of the best evidence obtainable in accordance with the nature of the case. As it exists today, the rule applies only where writings are offered in evidence, and so McCormick states the rule to be that:

"[I]n proving the terms of a writing, where such terms are material, the original writing must be produced, unless it is shown to be unavailable for some reason other than the serious fault of the proponent."

Following the view expressed by this rule, the original document or writing is admitted as primary evidence of the terms contained therein, and any other evidence, unless given the status of a duplicate original, is considered to be secondary evidence. The instant case appears to expand the duplicate original rule to include unsigned carbon copies.

At the inception of the original document rule, the most reliable method of reproduction was hand copying. Therefore, all copies were susceptible to the possibility of human error and production of the original document was strictly required. However, with the advent of modern machine reproduction methods, the courts have been faced with the problem of determining what methods of reproduction will create documents that can be considered duplicate originals.

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Footnotes:

4 THAYER, PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW, 489 (1898); 3 BLACKSTONE, COMMENTARIES, (1765) 368; McCORMICK, EVIDENCE, (1954), 408, § 195.

5 McCORMICK, op. cit., ibid., 409.

6 Ibid.

7 Primary evidence is the best evidence obtainable and secondary evidence is that which may be admitted in the absence of the best evidence only when a satisfactory excuse for such absence has been given. Anglo-American Packing and Provision Co. v. Cannon, 31 F. 313 (C.C.A. Ga., 1887); U.S. v. Reyburn, 31 U.S. 352 (1832). It is noted that in most American jurisdictions there exist certain preferences in secondary evidence where such is admissible. The problem of preference among various kinds of secondary evidence is outside the scope of this note. It is involved in Robinson v. Singerly Pulp Co., 110 Md. 382, 72 A. 828 (1909). For a more complete discussion see 4 WIGMORE, EVIDENCE (3rd ed. 1940) §§ 1265-1280; 2 JONES, EVIDENCE, §§ 859-862 (2d ed. rev. 1928); McCORMICK, EVIDENCE (1954), 421, § 207; Note, Degrees of Secondary Evidence, 38 Mich. L. Rev. 864 (1940).

8 For detailed historical development see 4 WIGMORE, EVIDENCE (3rd ed. 1940) §§ 1177-1179, 1 JONES, EVIDENCE (4th ed. 1938) § 209.

9 A party claiming a right resting upon a document was required to produce the document or lose his claim. Thomas of Utreth v. Anon, Y.B. 24 ed. III, fol. 24, Pl. 1 (1350).
and be admissible as primary evidence. Due to their varying degrees of reliability, letterpress copies and photographic copies have been generally held to be secondary evidence and inadmissible without accounting for the original, whereas printing press copies are uniformly held to be duplicate originals, and, as such, primary evidence if printed from the same type at the same time.

The holdings are not so well-defined in the case of carbon copies. It is generally stated that for such a copy to be given the status of a duplicate original, the writer must have so intended. As a corollary, it has often been indicated that such intent cannot be found unless the copy is signed as well as the original.

Recognizing these views, McCORMICK, in discussing the use of carbon copies, says:

"... Here the copy is made by the same stroke of the pen or pencil as the original, and there is an analogy to the practice of signing counterparts where each copy was intended to be an equal embodiment of the contract or other transaction. Indeed, today counterparts usually consist of an original and one or more carbon copies, all duly signed in multiplicate. What makes them counterparts is the signing with intent to make them equal."

However, it cannot be said that the majority of courts require that the copies be counterparts in the manner indicated by McCORMICK, since many courts have admitted copies without making any mention as to whether they are signed or not. It may well be that they were, but none-

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10 Marsh v. Hand, 35 Md. 123, 127 (1871); Spottiswood v. Weir, 66 Cal. 525, 6 Pac. 381 (1885); Chesapeake and Ohio Ry. Co. v. F. W. Stock and Sons, 104 Va. 97, 51 S.E. 161 (1906); Westinghouse Co. v. Tilden, 56 Neb. 129, 76 N.W. 416 (1898). Cf. McAuley v. Siscoe, 110 Kan. 304, 205 P. 346, 347 (1922), which appears to express a more liberal view.


15 McCORMICK, supra, n. 4, 419-420.

16 Massachusetts Bonding & Ins. Co. v. State, 82 Ind. App. 377, 149 N.E. 377, 384 (1925); Gust Dattilo Fruit Co. v. Louisville & N. R. Co., 238 Ky. 322, 37 S.W. 2d 856 (1931); Carter v. Carl Mervedt & Son, 183 Okla. 152, 80 P. 2d 274 (1938); Totten v. Bucy, 57 Md. 446 (1882); Goodman v. Sapirstein, 115 Md. 678, 81 A. 695 (1911); See also 65 A.L.R. 2d 342, 355 (1959).
theless the courts have not all drawn the distinction; some seem only to require that the copies be created simultaneously.\textsuperscript{17} The Maryland court has unquestionably given the carbon copies which have come before it the status of duplicate originals.\textsuperscript{18} The leading Maryland case on point, \textit{Goodman v. Saperstein},\textsuperscript{19} disposed of the question by stating:

"Proof was given by the witness . . . of the mailing of the originals . . . and carbon copies of such letters when their custody is properly proven are regarded as duplicate originals."\textsuperscript{20}

It is noted that in so holding the court made no mention as to whether the copies were signed or not, which might indicate that the court did not feel that the question of signing was important. In support of its holding, the court cited \textit{International Harvester Co. v. Elfstrom}\textsuperscript{21} where the duplicate copy was signed, the signature being reproduced by the carbon process. In the \textit{Harvester} case the document in question was a contract executed in duplicate by means of carbon paper. In holding the carbon copy to be primary evidence, the Court said:

"If the reproduction is complete there is no practical reason why all the products of the single act of writing a contract and affixing a signature thereto should not be regarded as of equal and equivalent value. In this instance the same stroke of the pen produced both signatures."\textsuperscript{22}

Furthermore, in \textit{Totten v. Bucy},\textsuperscript{23} which was decided prior to the \textit{Goodman} case, the duplicate had been expressly designated as a "duplicate", and in the more recent case of \textit{Morrow v. State}\textsuperscript{24} the duplicate was signed. Although prior to the instant case the Maryland court had not expressly made a distinction between signed or copies otherwise indicating that they were intended to be duplicate

\textsuperscript{18} Morrow v. State, 190 Md. 559, 59 A. 2d 325 (1948); Totten v. Bucy, 57 Md. 446 (1882); Goodman v. Saperstein, 115 Md. 678, 81 A. 695 (1911); Parr Construction Co. v. Pomer, 217 Md. 539, 144 A. 2d 69 (1958); 65 A.L.R. 2d 342, 356 (1959).
\textsuperscript{19} Supra, n. 18.
\textsuperscript{20} Ibid., 683.
\textsuperscript{21} 101 Minn. 263, 112 N.W. 252 (1907).
\textsuperscript{22} Ibid., 264.
\textsuperscript{23} Supra, n. 18.
\textsuperscript{24} Supra, n. 18.
originals and unsigned copies or mere file copies, the conclusion could have been drawn that the copies had to show the writer's intent that they be treated as duplicate originals. However, the court in the principal case indicated that an unsigned carbon copy constitutes a duplicate original. It cannot be said that such was the clear holding of the court, since an alternative ground for admitting the letter from the arbitrator was also indicated, and no clear statement was made as to which ground was actually the basis for the opinion.

As an alternative to admitting the letter as a duplicate original, the court indicated that the policy of the best evidence rule was satisfied by the defendant's president admitting on the witness stand that the paper offered was a copy of the original, without suggesting that it was inaccurate in any way. In such circumstances the policy of the best evidence rule is satisfied.

The leading case on this point is Slatterie v. Pooley where it is stated:

"If such evidence were inadmissible, the difficulties thrown in the way of almost every trial would be insuperable. The reason why such parole statements are admissible . . . is that they are not open to the same objection which belongs to parole evidence from other sources where the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth arising from the very nature of the case where better evidence is withheld; whereas what a party himself admits to be true may reasonably be presumed to be so."

It is noted that this case involved an out of court admission, but that the Maryland Court of Appeals has expressly adopted the rule of the case in regard to admissions made both in and out of court. Although the majority of jurisdictions have fully adopted the rule, there are numerous holdings in which the principle had been repudiated, but usually only in respect to oral admissions made out of court. While it is true that there may be valid objections

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26 Ibid., 664.
27 Marine Bank v. Stirling, 115 Md. 90, 80 A. 736 (1911).
29 Plunkett v. Dillon, 4 Del. Ch. 198 (1871); Halliburton v. Fletcher, 22 Ark. 453 (1861); Swing v. Cloquet Lumber Co., 121 Minn. 221, 141 N.W. 117 (1913).
to dispensing with production in cases where the admission has been made out of court, there seems to be no logical basis for requiring production when the admission of the party or his authorized agent is made from the witness stand.

In *Maurice v. Worden* the action was for libel, the statements in question being endorsed upon a written resignation submitted by the plaintiff to the defendant as Commandant of the United States Naval Academy. It was necessary to prove this libelous endorsement made by the defendant in order to sustain the action. The original document was not available and the plaintiff offered to prove the endorsement by an oral admission which had been made by the defendant to the wife of the plaintiff. The lower court refused to admit the testimony of the wife to this effect. The Court of Appeals, in reversing the decision, said:

"This evidence is not secondary but comes within the class of primary evidence. The admissions of a party freely and voluntarily made, are always evidence, which may be introduced by the opposite party."

This holding was followed in *Marine Bank v. Stirling*. In this case the admission was made from the witness stand. The plaintiff attempted to introduce a newspaper containing a published report of the condition of the defendant bank. The president of the bank testified that he did not have the original report, but identified the newspaper as a copy of the report. The court disposed of the defendant's contention that the report was inadmissible as a copy, stating:

"... it would be difficult to prove the authenticity of a statement so published in a more definite way than was done in this case — being proved by the president who attested it. It cannot be said that such a publication is a copy in the sense that there is an original which must be produced instead of the copy. ..."

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54 Md. 233, 258 (1880).


"A party's own statements and admissions are in all cases admissible in evidence against him, though such statements and admissions may involve what must necessarily be contained in some writing, deed, or record."

*Supra*, n. 27.

The rule is apparently well settled in Maryland that such an admission to the content of a writing will serve to dispense with the production of the original. In the case at hand the president of the defendant corporation apparently identified the carbon copy as an accurate reproduction of the letter received by him. On this ground alone, under the rule of Slatterie v. Pooley, as adopted by the Maryland Court, the copy was clearly admissible. There is a third line of reasoning which might have been applied to the facts of the subject case. The fundamental purpose of the best evidence rule has confined its application to the proof of the terms of a writing when the dispute is about what those terms are. Some courts have held that the rule does not operate to bar evidence of a transaction merely because a written memorandum exists, unless that memorandum, as opposed to the transaction, is the thing which itself is to be proved.

The leading case illustrating this distinction is Herzig v. Swift and Co. In this case action was brought under the Florida wrongful death statute by the administratrix of a deceased partner for a partnership accounting. In proving damages the plaintiff offered the testimony of one of the surviving partners as to the amount of partnership earnings. This testimony was rejected by the trial court on the basis of the best evidence rule, the books of the firm being thought to be the best evidence of its earnings.

This ruling was reversed on appeal. The court, citing numerous authorities in support of its holding, stated:

"Here there was no attempt to prove the contents of a writing; the issue was the earnings of the partnership, which for convenience were recorded in the books of account after the relevant facts occurred. Generally this differentiation has been adopted by the courts. The federal courts have generally adopted the rationale limiting the 'best evidence rule' to cases where the contents of the writing are to be proved."

The distinction has been recognized by the Maryland Court of Appeals in several instances. Perhaps the strongest case on the point is Cramer v. Shriner. Here the
plaintiff offered to prove solely by testimony that a settle-
ment of all accounts between defendant and himself had
taken place on a certain day in the presence of the witness.
The witness testified that the settlement was based on
figures contained in a memorandum which was in posses-
sion of the plaintiff at the time of settlement. Although the
witness saw the memo he had no knowledge of its contents
and his testimony was based entirely upon the declarations
of the parties made to each other in his presence. Defen-
dant objected to any parole evidence of the amounts and
items of settlement contained in the memo without pro-
duction of the memo or proof of its loss. The trial judge
admitted the testimony over defendant's objection. This
ruling was affirmed on appeal. The Court citing Glenn v.
Rogers, stated:

"According to our construction of this exception, it
presents the single question, whether it was competent
for the witness, Titlow, to testify as to the settlement
made between the parties, without the production of
the memorandum used by them in the course of the
settlement. . . . The testimony was not offered to prove
the contents of the memorandum, but to prove a settle-
ment for the wheat included in defendants receipts,
and it does not seem to be objectionable, on the ground
that it tended to prove the contents of the memorandum
as material to the plaintiff's case.

"It is difficult to see how the non-production of the
memorandum, at the trial could render the testimony
of Titlow, as to the settlement and its subject matter,
derived from the declarations and admissions of the
parties to each other, inadmissible. * * * Facts are
sometimes proved by parole of which there is evidence
in writing."**

In Grey v. State oral testimony of a confession which
had been reduced to writing and signed by the defendant
was rejected by the Court of Appeals on the basis of the
best evidence rule. Such a decision might appear to in-
volve a repudiation of the prior rule, but it is believed
that there are grounds for special treatment of confessions.
In a sense, a confession reduced to writing may be com-
pared to a written integrated contract; the oral proceed-

** Supra, n. 38.
* Supra, n. 39, 146, 147.
** 181 Md. 439, 30 A. 2d 744 (1943).
ing may be regarded as preliminary matter superseded by the writing. We want to show the contents of the writing for its own sake. We are dealing with an original which is a writing. The desire for precision in what may be a matter of great length, and of great importance, and the suspicion which arises when the prosecution in a criminal case does not produce such a writing may also explain the decision in the Grey case.\(^4\)

The distinction between evidence of the contents of a writing and evidence of other facts which happen to have been written down, has thus been recognized by the Maryland Courts as well as other reliable authorities.\(^4\) This ground alone would have provided sufficient basis for the admission of the unsigned carbon in the instant case without resort to the duplicate original doctrine. Although not admissible to prove the contents of the original letter the copy could certainly be admitted as other evidence of the facts in issue, i.e. the findings of the arbitrator. The fact that the arbitrator had written down these findings in the original letter should not bar any other evidence of the arbitration agreement or its result.\(^5\)

It is difficult to say whether the instant case constitutes authority for the future admission in evidence of unsigned carbon copies where there is no admission of their accuracy. The opinion of the court, when read along with the cases it cites, seems to adopt alternative grounds for admitting the letter. It would have been clearer if the court had merely adopted the second alternative, or have admitted it as additional evidence of the terms of the arbitration agreement.

ROBERT E. POWELL
J. WILLIAM SCHNEIDER, JR.


\(^6\) If the decision of the arbitrator, and not his letter reporting that decision, is the original, however, the court could not have avoided a hearsay problem. Any letter would then be admissible only to prove the truth of its contents — that the arbitrator had decided that the quantity was 14,340 tons. Since Matz was not produced for cross-examination, the letter is hearsay. If the letter itself is regarded as the decision, there is no hearsay problem in proving what the decision was, if the letter or a "duplicate original" is produced. However, it is probably unrealistic to regard the letter as the decision of the arbitrator in the sense that a court judgment "is" the decision of the court. It does not appear to be something which itself creates a legal relationship and thus escapes the hearsay rule as an operative fact. See McCORMICK, op. cit., supra, n. 7, § 228.
Grade Or Class Provision As A Basis For Disqualification For Unemployment Compensation

Bethlehem Steel Co. v. Board

The claimants, employees of Bethlehem Steel Company, worked in the latter stages of a continuous production line, their jobs consisting of finishing, shipping, and warehousing tin plate which was produced in earlier stages of the assembly line. The workers in two of the earlier stages were more skilled and received higher pay, although all of the workers were members of the same union and under the same union contract with the company. Some of the workers in the earlier stages who had become dissatisfied with the incentive pay provisions of the contract, began a deliberate slowdown of production and as a result, less work became available in the sections in which the claimants worked. The claimants, who were the most recently hired employees, were laid off in accordance with the contract which provided that those with the least amount of continuous service would be laid off first. None of the claimants worked in the stages engaged in the slowdown, nor were concerned with the incentive pay provisions as they were paid at a fixed hourly rate. The findings indicated that the claimants had not participated in, had not financed, or had not been directly interested in the dispute. They sought unemployment compensation, and the Superior Court of Baltimore City affirmed a decision of the Board of Appeals granting compensation. The Court of Appeals, in reversing the decision of the lower court, held that where the claimants belonged to the same union, the same collective bargaining unit, and were under the same employment contract as those engaged in the deliberate slowdown, and whose duties were part of a continuous integrated production line, they were in the same grade or class as those engaged in the slowdown and therefore were disqualified from receiving benefits under Sec. 6 (e) (2) of the Maryland Unemployment Compensation Act.

The appropriate part of the statute, Sec. 6 (e) (2), provides that a claimant shall not be disqualified from re-

1 219 Md. 146, 148 A. 2d 403 (1959).
2 8 Md. Code (1957), Art. 95A, § 6, provides:
   "Disqualification for benefits. An individual shall be disqualified for benefits —
   (e) Stoppage of work because of labor disputes. — For any week with respect to which the Executive Director finds that his unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or
ceiving unemployment benefits, where his unemployment is due to a labor dispute, unless he belongs to a grade or class of workers engaged in the dispute.

Although the Court of Appeals has construed other parts of Sec. 6 (e), the Court was afforded its first opportunity to interpret Sec. 6 (e) (2) in relation to the issue of whether the claimants were of the same grade or class of workers as those participating in the slowdown.

The Court, in holding the claimants to be of the same grade or class, relied mainly on Brown Shoe Co. v. Gordon, an Illinois case involving a deliberate slowdown on the assembly line in a shoe factory. There the employees belonged to the same union, had the same employment contract, and worked in the same continuous production line. The claimants, who were laid off as a result of the slowdown, were paid at a different rate than that paid to those instigating the slowdown, and had no interest in the outcome of the particular wage rate dispute. Nevertheless, they were denied compensation on the basis of the Illinois grade or class provision, which was substantially the same as that presently in force in Maryland. The Maryland Court, after weighing the factors in the instant case, com-

other premises at which he is or was last employed, provided that this subsection shall not apply if it is shown to the satisfaction of the Executive Director that —

(1) He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and

(2) He does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute; provided, that if in any case separate branches of work which are commonly conducted as separate businesses in separate premises are conducted in separate departments of the same premises, each such department shall, for the purposes of this subsection, be deemed to be a separate factory, establishment, or other premises."

In Mitchell, Inc. v. Md. Emp. Sec. Bd., 209 Md. 237, 121 A. 2d 198 (1956), the Court interpreting § 5(e)(1) of the 1951 Code, supra, n. 2, upheld claimants' disqualification for refusal to cross picket lines, this constituting a participation in a labor dispute. See also Brown v. Md. Unemp. Comp. Board, 189 Md. 233, 55 A. 2d 696 (1947). In Tucker v. American S. & Ref. Co., 189 Md. 250, 55 A. 2d 692 (1947), the Court in construing Sec. 5(d) of the 1943 Code Supplement, the equivalent of Sec. 6(e) of the 1957 Code, supra, n. 2, determined that a Utah copper smelter plant which supplied copper to a Baltimore refinery owned by the same company did not constitute one establishment so as to disqualify claimants for benefits.

405 Ill. 384, 91 N.E. 2d 381 (1950).

4 ILL. REV. STAT. (1947), Ch. 48, ¶ 223.
pared them with those in the Brown case. Then, faced with the language of the provision, undefined by the legislature, as opposed to the potential harshness on the individual claimant, the Court reached its result in stressing the factor of the continuous production line.

In view of the broad purpose of unemployment compensation to protect involuntary unemployment, it is hard to rationalize the diversity of decisions which deal with the grade or class provisions which appear in the Unemployment Acts of all but two states. Some courts base their determinations on membership in a union, on the similarity of the work performed, or on the entire plant or establishment, while many courts, basing each case solely on its own merits, consider a variety of factors, such as single or separate labor agreements, skills, and pay rates, in conjunction with those enumerated above. The Court in the instant case indicates however, that the cases involving a continuous production line, where the later stages are dependent on the earlier, seem to hold uniformly that all the employees are in the same grade or class.

The reasoning behind the grade or class provisions is three-fold: First, and foremost, use of the provision prevents a situation where a few key workers in key positions could by striking curtail production and cause a work stoppage, and fellow workers laid off as a result could conceivably augment the workers' fighting fund with their unemployment benefits. Second, use of the provision prevents the unemployment compensation system from being used as an inducement to those who might defect from a

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* Supra, n. 4.
* Only Vermont, 21 V.S.A. (1959), § 1344, and Louisiana, 23 L.S.A. — R.S. 1601 (1950), have no comparable grade or class provision.
* Copen v. Hix, 150 W. Va. 345, 43 S.E. 2d 382 (1947); In Queener v. Magnet Mills, 179 Tenn. 416, 167 S.W. 2d 1, 4 (1945), the court said: "We think that 'grade or class', as used, in the statute, means a group more or less organized. Not necessarily a local CIO or AFL branch, nor a company union, but at least a cohesive group acting in concert. . . ."
* In re Deep River Timber Co.'s Employees, 8 Wash. 2d 179, 111 P. 2d 575 (1941).
union which calls a strike by a promise of benefits to those who take no part in the dispute.\textsuperscript{14} Third, use of the provision facilitates the administration of the system by classifying claims on a broad basis.\textsuperscript{15}

The Court points out in the instant case:

"... we think it is clear that the present statutory provision was deliberately aimed at discouraging 'key' workers in 'key' positions along a continuous production line from effectively tying up (sic) the operations of a whole plant."\textsuperscript{16}

The law writers have been critical of the grade or class provision and have called it the "vicarious guilt provision",\textsuperscript{17} the "dragnet provision",\textsuperscript{18} "guilt by association",\textsuperscript{19} and "vicarious disqualification".\textsuperscript{20} Generally, they have urged its abrogation for the reason that it actually thwarts the basic purpose of the law, that of giving benefits to those involuntarily unemployed. Thousands of workers throughout the country have been disqualified from receiving benefits without having the slightest connection with a dispute.

Perhaps the broadest criticism of the provision is that it doesn't effectively distinguish between voluntary and involuntary unemployment. The instant case exemplifies this. As was said in Saunders v. Unemp. Comp. Board,\textsuperscript{21} "the purpose of the statute was to alleviate the consequences of involuntary unemployment." The grade or class provision cuts sharply into this purpose.

It would seem that the direct interest provision,\textsuperscript{22} which provides that a claimant shall be disqualified unless he is not participating in or financing or directly interested in the dispute, in itself is an adequate web for disqualification and would eliminate to a great extent the reason for a grade or class provision. The more narrowly the courts construe grade or class, the more it tends to equate the worker under this provision with the worker who is directly interested. Such a construction, in effect, virtually elimi-
nates the grade or class provision. This, however, should be the function of the legislature, as the Court in the instant case indicates:

"Understandably, the claimants argue that to deny them benefits makes them victims of a labor dispute in which they had no interest. On the other hand, if such argument was accepted by us, it would have the effect of equating the provisions of sec. 6 (e) (2) . . . with those of sec. 6(e)(1) . . . thereby virtually eliminating sec. 6(e)(2) from the statute."

It must be kept in mind that the grade or class provision is an exception to disqualification. The statute says in effect that a claimant shall be disqualified, but if he does not belong to a grade or class of workers engaged in the dispute, he will be entitled to benefits. Being an exception, it should not be construed so broadly as the courts tend to do. Thus, we can see that if the provision is construed broadly, it frustrates the purpose of the Act, and if it is interpreted narrowly, it virtually eliminates the utility of it.

Under the provision, even claimants otherwise eligible for benefits will be disqualified if one fellow employee of their grade or class is himself disqualified by participating, financing, or being directly interested in the dispute.

The irrationality and arbitrariness of the application of the provision is perhaps most clearly shown in a Pennsylvania case where a claimant received benefits under a statute with no grade or class provision, but when the statute was amended to include the provision, the claimant was held to be disqualified.

It is not clear what the approach of the Maryland Court will be to a case lacking the element of a continuous integrated production process analogous to that of an assembly line. It is clear, however, that until the grade or

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25 Sec. 6(e), supra, n. 21.
27 In Re Persons Employed at St. Paul & Tacoma L. Co., 7 Wash. 2d 580, 110 P. 2d 877 (1941). A picket line was set up and ten claimants were told not to return to work until called by the company. Eight others were told to report but refused to do so because of the picket line. By refusing to pass through the picket line, these eight became participants and were therefore disqualified. The other ten, being engaged in the same work as the eight who refused to pass through the lines, were disqualified because they were of the same grade or class as those participating; see also the illustration in 8 Vand. L. Rev. 338, 351 (1955).
class provision is abolished, the Court will dutifully adhere to it:

"It may be that the statute should be amended, but whether the strikers, under circumstances similar to those present here, would be acting solely for themselves or would also be acting directly or indirectly for the claimants, is a decision the lawmakers must make."

The most logical approach would be to eliminate the grade or class provision altogether. This would further the ultimate purpose of the statute, which seemingly should outweigh the more narrow justification for keeping the provision, that of preventing the key-man work stoppage.

FRANK J. VECELLA

Estate Tax Deduction For An Entire Trust Containing Charitable Bequest With A Possible Diversion Of Trust Income

Mercantile-Safe Deposit & Trust Co. v. U.S.¹

This was an action by the testator's executor to recover estate taxes alleged to have been erroneously and illegally collected. The testator, Dr. Raymond D. Havens, was a resident of Baltimore City. After a number of specific bequests, he willed the residue of his estate as follows:

"Eighth: All the rest, residue and remainder of my estate, both real and personal and wheresoever situated, I give to my Trustee . . . to hold, manage, invest, and reinvest the same and pay to my sister, Ruth Mack Havens so much of the net income as in its sole discretion it deems necessary and proper for her reasonable living expenses, comfort, maintenance, and general welfare. My Trustee in exercising this discretion shall, however, take into consideration all assets owned by her and any income received from any other source of which my Trustee may have knowledge. It is my desire that the discretionary power given to my Trus-

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tee be liberally construed. Any net income not so required shall be accumulated and added to the principal of the trust from time to time. Upon the death of my sister, or upon my death if she shall not survive me, I give the principal of said trust to the Johns Hopkins University of the City of Baltimore, Maryland for its library."

At the death of the testator the life tenant, Ruth Mack Havens, was sixty-five years old and living in a nursing home because of advanced senility. She was a woman of considerable wealth, having an income of over $10,000 per year from a pension and various trusts and the right to use some $135,000 of capital. It was stated by the trustee's vice president in charge of Dr. Havens' trust that the sister's income greatly exceeded her expenses, and that, therefore no part of the trust income would be used for her support.

The government conceded that the value of the charitable remainder was deductible from the estate in the computation of the estate tax, but it contended that the value of the life estate was not deductible. The executor contended that under the terms of the will and the circumstances existing at the time of the testator's death, it was apparent that none of the trust, including the income therefrom, would be paid to or used for the benefit of the life tenant but would immediately pass to the University on the death of the life tenant. The executor therefore claimed that the entire residuary estate was deductible.

Chief Judge Thomsen of the District Court held that, in computing the estate tax, the executor was entitled to deduct the value of the entire trust, since the possibility that the charitable remainderman would not take the entire trust was so remote as to be negligible.

An unusual feature of this case is that the non-charitable beneficiary's interest was in the income from the testamentary trust, not in a right to invade corpus. The typical conditional charitable bequest involves a remainder interest in the charity that is subject to possible diversion of corpus. The court applied the rules used in such typical cases, without mentioning any possible distinction between

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1939 IRC Sec. 812(d) (now 1954 IRC Sec. 2055) provides that in determining the value of the net estate of the deceased, any bequests to a corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes where no part of the net earnings of the charitable organization inures to the benefit of any private shareholder or individual may be deducted from the value of the gross estate.
the two situations.\textsuperscript{3} This point was touched upon, however, in \textit{Gilfillan v. Kelm},\textsuperscript{4} where the wording of the trust disposition was similar to that in the recent case and the tax issue identical. In that case, the court remarked:

"While counsel suggests that this case may be unique as involving the invasion of income rather than of principal, the rules involving the invasion of principal would seem applicable."

The test deductibility which the court applied in this case, the one developed for conditional charitable bequests where diversions of trust corpus are possible, is a two-fold one. First, there must be a definite ascertainable standard controlling the life tenant's rights of invasion. The leading case in this area is \textit{Ithaca Trust Co. v. U.S.},\textsuperscript{6} where the court allowed the value of the charitable remainder to be deducted from an estate giving the life tenant the power to invade the corpus of the trust if it were necessary to do so, in order to maintain her station in life. This standard is generally regarded as being sufficiently definite and ascertainable.\textsuperscript{7} "The standard must be fixed in fact and capable of being stated in definite terms of money."\textsuperscript{10} The invasion of the corpus can not be at the pleasure, happiness, or whim of the life tenant.\textsuperscript{9}

The second requirement which must be satisfied before a deduction for a conditional charitable bequest is granted is that "the possibility that the charity will not take the remainder interest must be so remote as to be negligible."\textsuperscript{10}

\textsuperscript{3} The court did point out that there were no Maryland cases defining the nature and scope of a beneficiary's interest in trust income in the case of need, and considered of some relevance the Maryland cases dealing with rights to corpus conditioned upon need.
\textsuperscript{5} \textit{Ibid.}, 293.
\textsuperscript{6} 279 U.S. 151 (1929), noted 9 Boston Univ. L. Rev. 288 (1929).
\textsuperscript{7} Mercantile-Safe Deposit, etc. Co. v. U.S., 141 F. Supp. 546 (D. Md. 1956) hereinafter referred to as the Weglein case.
\textsuperscript{8} \textit{Supra}, n. 6, 154.
\textsuperscript{10} Regs. 105, § 81.46 which implemented 1939 IRC sec. 812(d).
\textit{Sec. 81.46. Conditional Bequests.}
(a) If as of the date of decedent's death the transfer to charity is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that charity will not take is so remote as to be negligible. If an estate or interest has passed to or is vested in charity at the time of the decedent's death and such right or interest would be defeated by the performance of some act or the happening of some event which appeared to have been highly improbable at the time of decedent's death, the deduction is allowable."
The court in *Ithaca Trust Co. v. U.S.* remarked that “there must be no uncertainty appreciably greater than the general uncertainty that attends human affairs.” If the transfer to charity is dependent upon the performance of some act which might or might not happen, then the charitable bequest is not deductible. Thus, where, the charity would only take if the life tenant died without issue or the designated remaindermen predeceased the life tenant, no deduction would be allowed. On the other hand, if the transfer to charity is dependent upon some act or event which is highly improbable, then the charitable bequest is deductible. In *U.S. v. Provident Trust Co.* the court granted a deduction where the charity was to take under the residuary clause if the life tenant died without leaving issue. At the time of the testator's death, the life tenant was fifty years old and had been rendered incapable of having children by an operation removing her uterus, Fallopian tubes, and both ovaries.

In the principal case, Chief Judge Thomsen reaffirmed his position, previously stated in the *Weglein* case, that before a deduction is allowed, it must be shown that the possibility that the charity will not take is so remote as to be negligible. In *Moffett v. Commissioner,* the Fourth Circuit (Judge Thomsen writing the opinion) held that a 29% chance that the residuary charity would not take was not a possibility so remote as to be called negligible. In this case the Fourth Circuit quoted with approval the following from *U.S. v. Dean:* 

“The line between those chances which are so remote as to be negligible and those which are not lies somewhere between these extremes. We can not say exactly where. We can only decide specific cases as they arise using the best judgment we have in placing them on one side or the other of the line. And there is no standard to guide us except our estimate of the extent of the encouragement tax-wise which Congress wished to give testators to make gifts to charity. Our judgment being largely subjective, about all we can say is that we do not think one chance in eleven (in

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11 Supra, n. 6, 154.
12 Supra, n. 10.
13 Farrington v. Commissioner, 30 F. 2d 915 (1st Cir. 1929).
14 U.S. v. Dean, 224 F. 2d 28 (1st Cir. 1955).
15 Supra, n. 10.
17 Supra, n. 7.
18 269 F. 2d 738 (4th Cir. 1959).
19 Supra, n. 14.
this case the odds are approximately three chances in ten) can be considered so remote a chance as to be negligible, that is, a chance which persons generally would disregard as so highly improbable that it might be ignored with reasonable safety in undertaking a serious business transaction.  

Though the conclusion of the court in the principal case, that the chance of any diversion of income to Miss Havens was so remote as to be negligible, was supportable, this test is often a difficult one to apply. This test, as promulgated in Regs. 105 Sec. 81.46, was presumably designed for charitable bequests contingent upon the happening of a single event. Later when the courts were faced with the problem of granting tax deductions to charitable bequests subject to possible invasions by non-charitable beneficiaries, they continued to apply the same test, combined with the requirement of a definite and ascertainable standard controlling the life tenant’s right of invasion. Perhaps these diversion type cases should be handled through a partial disallowance of the charitable deduction rather than as granting either a deduction of the entire bequest to a charity or no deduction at all. Where the chance of diversion of corpus to non-charitable beneficiaries has not been so remote as to be negligible but has been limited to a maximum dollar amount per year, a partial deduction of the trust has been allowed, the maximum possible diversion being subtracted from the value of the trust. Where the rights of invasion are subject to a definite standard, even though the chances of invasion

20 Ibid., 29.
21 In applying these tests to the principal case, Judge Thomsen found as a fact that “at the time of the death of Dr. Havens the possibility that his sister’s income and principal would not be sufficient to care for her for the balance of her life was so remote as to be negligible”. He tried to evaluate the extent of the interest which the beneficiary had where she could obtain income only in case of need and upon the exercise of a trustee’s discretion. No Maryland case directly in point, however, could be found. The court then turned to the testimony of the vice president of the trustee, the one handling the trust estate, who had said that his understanding of the intention of the testator and the Maryland law was that Miss Havens would have to exhaust her own assets before any income from the trust could be paid to her. At least technically, the trustee’s own interpretation of the trust instrument and the applicable law would not seem relevant. A danger in giving weight to his opinion on these matters is that nothing prevents him from changing his interpretation in the future. It should be pointed out, in this connection, that the testimony of the trustee had been admitted without objection, and the court presumably would have reached the same result, even had the trustee’s testimony been completely disregarded.
22 Estate of B. F. Sternheim, 2 T.C.M. 311 (1943), reversed on other grounds, 145 F. 2d 132 (9th Cir. 1944).
are more than negligible, it would seem sound to treat the situation this same way; that is, to compute the deduction for the bequests to charity on the basis of what would be the maximum possible diversion under the standard used in the trust and the particular circumstances of the case. Under such an approach, some deduction could be allowed without straining the “so remote as to be negligible” criterion, and still the government would be adequately protected.

JULIAN I. JACOBS

Continuing Corporate Liability For Federal Crime After State Dissolution Of Corporation

Melrose Distillers, Inc. v. United States

Three corporate defendants — Melrose Distillers, Inc., CVA Corporation, and Dant Distillery and Distributing Corporation — all wholly owned subsidiaries of Schenley Industries, were indicted for alleged violations of Sections 1 and 2 of the Sherman Act. Shortly after the indictment against them was returned, they were dissolved under their respective state statutes, (Maryland and Delaware) and were recreated as divisions of the parent firm. Their motion for a dismissal of the indictment under the claim that their dissolution abated the proceedings was denied by the United States District Court for Maryland, which, upon the subsequent plea of nolo contendere, levied fines against them. The Court of Appeals for the Fourth Circuit affirmed. On writ of certiorari, the Supreme Court, in turn, affirmed, stating that the three corporations retained sufficient life under state law to allow these criminal proceedings to continue, without finding any need to resolve the exact interpretation of provisions of the state abatement statutes. The Court reasoned: (1) that the Sherman Act, §8, “defines ‘person’ to include corporations ‘existing’ under the laws of any State”, and (2) regardless of how Maryland and/or Delaware construe their respective statutes allowing dissolved corporations to continue in existence for “proceedings” already begun (narrowly, so as to preclude subsequent state criminal prosecutions, or

broadly, so as to include them), the corporation was "an 'existing' enterprise for the purposes of §8". The Supreme Court as a policy matter concluded:

"Petitioners were wholly owned subsidiaries of Schenley Industries, Inc. After dissolution they simply became divisions of a new corporation under the same ultimate ownership. In this situation there is no more reason for allowing them to escape criminal penalties than damages in civil suits. As the Court of Appeals noted, a corporation cannot be sent to jail. The discharge of its liabilities whether criminal or civil can be effected only by the payment of money."

A basic question presented by the case was whether an analogy exists between the death of a natural person and the dissolution of a corporation; and, if so, whether the legal consequences and ramifications are identical. The Supreme Court itself, in three prior decisions ranging from 1927 to 1949 had taken the position that, at common law, dissolution and death are analogous as to the abatement of liability. In each of these three cases, as well as three others decided in the lower Federal courts, the principle that only a statute enacted in the state of incorporation can sustain sufficient life in a dissolved corporation to render it liable in its transformed state, had been followed without exception. Chief Justice Taft expressed this majority rule quite clearly in stating:

"It is well settled that at common law and in the Federal jurisdiction a corporation which has been dissolved is as if it did not exist, and the result of its dissolution cannot be distinguished from the death of a natural person in its effect."

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5 Ibid., 274.
8 Oklahoma Natural Gas Co v. State of Oklahoma, supra, n. 6, 259. The existence of contrary holdings is admitted by the Court in a later case, in which, though siding with the majority, the Court stated that the analogy has "not been the subject of universal admiration . . . and is by no means exact". Defense Supplies Corp. v. Lawrence Warehouse Co., supra, n. 6, 634. The Appellate Division of the New York Court has adopted this minority view. Wilson v. Brown, 175 N.Y.S. 688, 692 (1919).
Proceeding from this principle, there is virtual unanimity in looking to the state statutes for changes in the common law rule. The states, however, are far from uniform in their statutory treatment of the problem; for, not only do the provisions themselves vary, but, in some cases, the same thought is expressed in different ways, leading to divergent interpretations. Under the Delaware statute, for example, a dissolved corporation continues in existence for a period of three years from its official expiration for the purpose of prosecuting or defending "suits, actions and proceedings" to which it is a litigant. The statute prolongs the life of such a corporation until judgment or decree is granted in cases where certain types of litigation were commenced by or against the firm either prior to or within the three year period.9

In Maryland, the effect of dissolution was expressed quite clearly in Section 78 (a) of the 1951 Code, which stated that dissolution shall not abate "any pending suit or proceeding by or against the corporation, and all such suits may be continued with such substitution of parties, if any, as the Court directs."10 In addition to the aforementioned section, the Court in the instant case cited Section 72 (b) of the 1951 Code, which provides that, although the dissolution of a corporation is effective when the articles of dissolution are accepted for record by the State Tax Commission, the firm nevertheless remains in existence for the purposes of "paying, satisfying, and discharging any existing debts and obligations ... and doing all other acts required to liquidate and wind up its business and affairs."11

As to Section 78 (a), since the clarity and directness of the statute's wording left little doubt as to its intent, the Court concerned itself only with the interpretation as to what forms of litigation were to be included under it, the problem being centered on the construction of the words "suit" and "proceeding." The question on point was whether these words have sufficient latitude to encompass criminal prosecution.

There has been little doubt but that civil litigation does not abate under the statutes, both in the Federal and State Courts. Only six days prior to the Melrose decision, the Maryland Court of Appeals, in Baltimore County v. Glenendale Corporation, wherein a suit for specific performance of certain contracts was brought, stated unequivocally that

9 8 Del. Code (1935) § 42.
11 Md. Code (1951), Art. 23, § 72(b); (1957), Art. 23, § 76(b).
the mere fact of dissolution would not affect the civil liability of the defendant corporation.\textsuperscript{12}

As to whether the words include criminal prosecution, a marked conflict exists among the courts. Taking the words "suit," "proceeding," and "action" together in a series, as they appear in the Delaware Code, the Circuit Court for the Tenth Circuit decided, in an oft-cited opinion, that they include only civil litigation, reasoning that criminal prosecution, being different in nature and not being specifically mentioned, was not intended to be included in the exceptions to the common law.\textsuperscript{13} Although abating the cause before it, the Court was faced with a case similar to Baltimore County \textit{v.} Glendale,\textsuperscript{14} in that the action was not actually pending at the time of the defendant's dissolution; and its decision may be distinguished from those contrary to it in that respect.

The Circuit Court of Appeals for the Sixth Circuit reached the same conclusion, however, finding that, although "action" and "proceeding" may explain "suit" they do not expand its meaning sufficiently to warrant continuation of criminal prosecutions.\textsuperscript{15}

The Court of Appeals for the Seventh Circuit took issue with this reasoning, stating:

"We agree that the word 'suit' or the word 'action' standing alone might reasonably be held as not including a criminal prosecution, but when the word 'proceeding' is added we think a combination is presented which is well near inclusive of all forms of litigation."

In documenting its interpretation, the Court referred to the Federal Rules of Criminal Procedure, in which the term "criminal proceeding" is used.\textsuperscript{17} Also cited by the Court is an opinion of the Court of Appeals for the Fourth Circuit which, in construing the more controversial Delaware law, agreed that the word "proceeding" is broader than "action" or "suit," and, to fulfill the \textit{raison d'être} of the statute, must be given full latitude.\textsuperscript{18}

\textsuperscript{12} 219 Md. 465, 150 A. 2d 433 (1959).
\textsuperscript{13} U.S. \textit{v.} Safeway Stores, 140 F. 2d 834 (10th Cir. 1944).
\textsuperscript{14} \textit{Supra}, n. 12.
\textsuperscript{15} U.S. \textit{v.} Line Material Co., 202 F. 2d 929 (6th Cir. 1953).
\textsuperscript{16} U.S. \textit{v.} P. F. Collier and Son Corp., 208 F. 2d 936, 939, 40 A.L.R. 2d 1389 (Cir. 1953).
\textsuperscript{17} 18 U.S.C.A. (1948), Rule 2.
\textsuperscript{18} Bahen and Wright, Inc. \textit{v.} Commissioner of Internal Revenue, 176 F. 2d 538, 539 (4th Cir. 1949).
In the instant case below, the Court of Appeals for the Fourth Circuit felt that the words of the statutes of both Maryland and Delaware, for purposes of survival of criminal suits, should include criminal as well as Civil proceedings, and adopting the same policy approach as the Supreme Court in the language quoted above said that to exempt the survival of criminal actions "would offend our sense of justice, pervert the obvious policy of the state in enacting these survival statutes, and provide an easy avenue of escape by corporations from the consequences of their criminal acts by the easy process of dissolution."

The controversy concerning this technical interpretation of the three words, in so far as a federal criminal proceedings involving Maryland or Delaware corporations are concerned, was, apparently ended when the Supreme Court decided in the Melrose case that, "under both the Maryland and Delaware law the lives of these corporations were not cut short, as is sometimes done on dissolution . . . but were sufficiently continued so that this proceeding did not abate."

However, it should be observed that a question is necessarily raised as to whether the interpretation of the Maryland law by the Court of Appeals (the Supreme Court, as indicated above did not rest on the interpretation below) in this decision would still be applicable; for, though too late to affect this case, the State Legislature has repealed Section 78 (a), apparently intending it to be replaced by Rule 222 of the Maryland Rules of Procedure.

While the Reporter's note to Rule 222 indicates that no change in meaning from Section 78 (a) was intended, a problem arises because the Rule omits the words "suit" and "proceeding", which had been used in the statute, and merely states that an "action" shall not abate by reason of dissolution. In Rule 5 (a), stating definitions applicable throughout the Maryland Rules "action" is defined as not including a criminal proceeding. Thus, whereas Section 78 (a) prevented abatement of "any pending suit or proceeding", which was susceptible of construction to include criminal proceedings, as accepted by the United States Court of Appeals below in the instant case, Rule 222 applies by definition only to civil litigation.

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258 F. 2d 726, 728 (4th Cir. 1958).
Ibid., Rule 5(a).
Supra, circa n. 4.
Unless this situation is corrected, by re-enacting the repealed portion of Section 78 (a), preferably with an amendment to specifically include criminal proceedings, or perhaps by adoption of a rule specifically related to abatement of proceedings against corporations as part of the new criminal rules, the effect of dissolution of a Maryland corporation on abatement of state criminal proceedings would seem to become once again an unresolved problem, and also to suggest the possibility of further dispute in federal prosecutions.

From the strong expressions of policy quoted above from the Supreme Court and the United States Court of Appeals below in the instant case, it would seem probable that the federal courts, even without further change in the Maryland statutes or rules, would take the liberal policy approach which the Supreme Court took in construing the Sherman Act in the instant case.

However, there can be little doubt that some clarification of the state situation in the manner suggested above, whether by statutes or rule, would be desirable. Possibly, consideration should be given also to the desirability of a provision for survival of corporations for purposes of any criminal liability for the period of limitations specified for any particular crime, whether or not proceedings had been started before dissolution.

ALAN M. WILNER

The Effect Of The Interrogatory Form On The Sufficiency Of The Answer

Britt v. Snyder

The plaintiffs in this case are the widower and the two infant children of a patient who died as a result of an operation performed at the South Baltimore General Hospital. In a suit to recover damages for alleged malpractice against two physicians — a surgeon and an anaesthetist — and the hospital, the plaintiff submitted the following interrogatory to each of the defendants individually: "Give a concise statement of the facts upon which you base your

1Daily Record, July 23, 1959 (Md. 1959).
defense to this suit that you were not negligent as alleged in the plaintiff's declaration."\(^2\)

The defendant surgeon merely answered that the operation was carefully and prudently performed by him "without any negligence on his part."\(^3\) The anaesthetist, in addition to asserting that he "exercised ordinary care, skill, and judgment," denied the truth of the plaintiff's allegations of fact.\(^4\) The hospital's supplementary answer set out the principal steps taken by the hospital as shown by its records.\(^5\)

The plaintiff excepted to these answers\(^6\) on the grounds that the answers (a) were tantamount to the general issue plea of the defendants; (b) gave no affirmative statements of facts upon which the defense was based; and (c) that the plaintiffs were entitled to receive, in answer to their

\(^2\) Ibid.

\(^3\) The answer filed on behalf of Dr. Snyder is as follows:

"For answer to Interrogatory No. 4, the defendant states that the operation performed by the defendant in this case was carefully and prudently performed by the defendant without any negligence on the part of the defendant, and that the subsequent death of Sylvia Brit was not in any way caused by any act or acts of the defendant."

\(^4\) The answer filed on behalf of Dr. Wieciech is as follows:

"A concise statement of facts upon which this defendant will base his defense that he was not negligent as alleged in plaintiffs' declaration is that such allegations of negligence are not true and are denied; that this defendant exercised ordinary care, skill and judgment in the performance of what he did as an anaesthetist and that the death of the patient was not the result of any negligence or want of ordinary care, skill or judgment on his part."

\(^5\) The supplementary answer filed by the hospital listed the following steps: furnishing all drugs ordered by the physicians in attendance, furnishing all the equipment ordered by the physicians in attendance, furnishing all the qualified nursing and lay personnel required to facilitate the orders of the physicians in attendance, and employed and furnished all the house doctors necessary to carry out the orders of the physicians in attendance. The answer listed the names of the doctors and also the various drugs and equipment which were furnished by the hospital in response to the orders of the physicians.

Originally the hospital filed the following answer:

"That there was nothing that the defendant did, or should have done but did not do, which caused or hastened the death of Mrs. Sylvia Brit, there was no indication that Mrs. Brit was in any danger until after the operation, and as soon as it became evident that she was not reacting properly, all possible steps were taken to revive her. The steps that were taken are too numerous to list in a concise statement but, as far as known to this defendant, they are set out in detail in the copy of the record of the South Baltimore General Hospital which has been furnished to the plaintiff."

\(^6\) MARYLAND RULE 417c, Exceptions, does not set out a specific procedure for filing an exception to an interrogatory, but Chief Judge Niles in Mazoz v. Plein, DAILY RECORD, July 21, 1958 (Md. 1958), has stated that except under special circumstances, the Court will require, with respect to Exceptions hereafter filed, that as to each Exception the following be set forth in full: (1) The Interrogatory excepted to, in full; (2) The answer, if any, filed thereto, in full; (3) The reason for the exception. See also Wolf v. Heilman, DAILY RECORD, Dec. 28, 1956 (Md. 1956).
interrogatory, specific factual information in response to each charge in the declaration alleging negligence on the part of each defendant.

The only issue before the court in the instant case was the sufficiency of the respective answers. In overruling the objection to the answers to the interrogatories, the court held that a broad and generalized interrogatory does not require a specific answer. It cited a similar case\(^7\) in which the court had found that an interrogatory requesting a concise statement of the facts supporting an adversary's position was proper. There, the court pointed out that an interrogatory based on conciseness and simplicity would not take the place of specific inquiries as to specific facts.

It is important to remember when framing an interrogatory that the function of the discovery procedure is to obtain from one's opponent exact information as to the true ground of attack or defense by discovering specific facts on which the opponent relies.\(^8\) In this case the defendants relied on a negative defense rather than an affirmative one — they denied that the operation was negligently and unskillfully performed. Therefore, their answers to the interrogatory sufficiently apprised the plaintiff of the nature of the defense.

There are two aspects of this case which warrant consideration — the form of the interrogatory and the sufficiency of the answer.\(^9\) According to Chief Judge Niles, interrogatories should be directed to specific facts relevant to the case as distinguished from blanket inquiries, the answers to which might be either useless or impossible to frame conscientiously.\(^10\) Interrogatories which are directed to such facts as the operation and speed of vehicles, the maintenance and repair of vehicles, the position and operation of traffic lights, the nature and extent of injuries, and the calculation of damages, are proper.\(^11\)

In several federal cases, based on the Federal Rules of Civil Procedure which closely parallel those of Maryland, the same principle has been followed. The United States

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\(^8\) Supra, n. 6. See also Barnett v. Middleton, Daily Record, April 2, 1955 (Md. 1955).

\(^9\) For a more complete discussion of the Maryland deposition and discovery process see Pike and Willis, The New Maryland Deposition and Discovery Procedure, 6 Md. L. Rev. 4 (1941), and Foreman, Depositions and Discovery — Digest of Maryland Decisions, 18 Md. L. Rev. 1 (1958).


District Court for the District of New Jersey has ruled that an interrogatory which is too general and all inclusive need not be answered. In *May v. Baltimore and Ohio Railroad Company*, the court disallowed the following interrogatory: "State in detail the alleged negligence on the part of the plaintiff contributing to the occurrence of the accident, etc.?", on the ground that it went too far in asking for information in detail. The court suggested that the plaintiff serve this interrogatory in its place: "What are the facts upon which the defendant bases its allegation that the plaintiff was guilty of negligence contributing to the occurrence of the accident?"

Numerous controversies have arisen over the form of interrogatories which are an outgrowth of Federal Rule 26 (b) and Maryland Rule 410 (a) (3). This portion of the rule permits inquiry as to "the identity and location of persons having knowledge of relevant facts." However, interrogatories seeking this particular kind of information that are framed in general terms rather than particular ones, have been found to be too broad; they should be directed toward identifying persons having knowledge as to specific facts or classes of facts. The more particular the request, the better reception it will probably receive from the court in case of objection. Thus, for example, a request for names and addresses of all eye-witnesses to an accident would probably be held proper. However, an interrogatory requiring the names of "all persons who have any knowledge" about material facts of an accident or the instrumentality involved is too general when it is filed in addition to proper interrogatories asking the names of persons who were at the scene and who actually witnessed the accident. To allow such a broad question would lead to confusion rather than to order and precision in the preparation of the case. The United States District Court for the District of Maryland has ruled that a party is not

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3. *Maryland Rule* 410a (3) provides:
   "Unless otherwise ordered by the court, a deponent may be examined . . . regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . (3) including any information of the witness or party, however obtained, as to the identity and location of persons having knowledge of relevant facts . . ."
5. See 6 Md. L. Rev., *supra*, n. 9, 29.
7. 6 Md. L. Rev., *supra*, n. 9, 29.
8. *Currier v. States Marine Corp.*, DAILY RECORD, March 16, 1956 (Md. 1956). In this case Chief Judge Niles gives an illustration of the kind of question which is impossible to answer, which would lead only to recrimi-
required to furnish his adversary with the names of witnesses on whose testimony he intends to rely; however, the party may be required to furnish names of persons known to him to have a specified connection with the controversy. Similarly, the United States District Court for the Southern District of New York has held that an interrogatory demanding the names of officers knowing anything about a particular accident was too broad.

The emphasis on specificity has even been extended to the requests for the submission of documents for inspection. According to one court, these requests should be in the form of a definite statement directed to a party for such things as may be in his possession, custody, or control, specifically designating them. An interrogatory or request for "all", with reference to evidence, is improper. Thus, a motion for production of documents requesting "all written reports, memoranda, or other records of conferences of officers or members of the technical staff of the defendants" in which certain manufacturing processes were discussed, was too general and comprehensive.

Just as important as the form of the interrogatory is the sufficiency of the answer. In the instant case, the court decided that the answer to the defendants' request for a concise statement of the defense was sufficient because of the form of the question. In may cases, however, the court has found it necessary to sustain an exception to the answer. For example, the court has ruled that an answer, "See Declaration," was an insufficient response to an interrogatory requesting the defendant's own version of the incident described in the declaration. Since the object of an interrogatory is to obtain a simple answer to a simple question, the court did not think it should be necessary for a pleader to attempt to distill the essential facts upon

nation and confusion, and which produces no effective result in the conduct of the case:

"Does the defendant, his agent, attorney, or insurer have any information which could be used for the purposes of surprise or impeachment of the plaintiff at the time of the trial of this case? If the answer to this Interrogatory is 'yes', then state in full detail all such information."

MARYLAND RULE 419a.
Ibid.
Ibid.
which his opponent relies from a technical and legally-drawn declaration. The interrogatory demanding or requiring a concise account of the happening should be answered concisely and simply in order to clarify, rather than obscure the issues involved. Such an approach will further the purposes of discovery by enabling a party to acquire accurate and useful information with respect to testimony which is likely to be presented by an opponent and to obtain information which appears reasonably calculated to lead to the discovery of admissible evidence. In a case in which the interrogatory demanded an accounting of the plaintiff's medical expenses, the answer, "Hospital bill not received," was found to be insufficient under normal circumstances. As the court pointed out, both parties have a duty to obtain all reasonable information relative to the facts when the information is under their control, especially when the information sought normally must be obtained prior to trial. Similarly, an answer that the "information has not been received," or that the "information will be furnished later" is normally insufficient. In still another case, the court has ruled that the defendant may require definite answers as to the nature, extent, and permanence of injuries claimed in a personal injury suit. The answer, "See attached medical report," referring to certain reports of doctors which differ in scope and detail was found to be too indefinite.

In conclusion, the effectiveness of the discovery procedure will be determined to a great extent by the form of the interrogatory and the sufficiency of the answer. As indicated in the principal case, an interrogatory itself must be specific in nature.

Herbert J. Belgrad

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\(^{27}\) Supra, n. 9.
Attachment — Government Levy On State Employee’s Earnings. Sims v. U.S., 359 U.S. 108 (1959). Levies were served on the petitioner, State Auditor of West Virginia, seizing the accrued salaries of three employees of the state government. Petitioner refused to recognize the levies and paid the accrued salaries to the delinquent taxpayers. The District Court held him personally liable for the amount paid. The Court of Appeals for the Fourth Circuit affirmed, and the Supreme Court, relying on Secs. 6331 and 6332 of the 1954 Internal Revenue Code, in turn affirmed, pointing out that Sec. 6331 was passed to make levies available against the unpaid salaries of federal employees as well as other taxpayers, including state employees. The Court also referred to Sec. 301.6331-1(a) (4) (ii) of the Treasury Regulations, which declares Sec. 6331 authorizes levies on accrued salaries of employees of a state in order to enforce collection of any federal tax. By a West Virginia statute, the state auditor is empowered and obligated to deduct withholding tax as required by the government. Another statute allows garnishments to be served upon him to sequester salaries of state employees. In that such act empowered the Auditor to control the disposition of funds and since his acts defeated the government’s valid levy, the Court reasoned that he was a person “obligated with respect to” the salaries under Sec. 6332(a) and thus could be held personally liable.

Annotated Code of Maryland (1957), Art. 9, Sec. 10 states, “Any kind of property or credits belonging to the defendant, in the plaintiff’s own hands, or in the hands of anyone else, may be attached; . . .” (Emphasis supplied.) Notwithstanding this broad provision it has been consistently held that funds in the hands of a public officer, governmental or municipal corporation cannot be attached, the predominant reason being the great public inconvenience which would result in taking officials from their duties to entertain such actions. See Hughes v. Svoboda, 168 Md. 440, 178 A. 108 (1935), and Attachment — Public Institutions as Garnishee, 1 Md. L. Rev. 172 (1937). In view of the Sims case, however, it would seem that the federal government can levy on the salaries of Maryland’s state, county, and municipal employees under Sec. 6332 of the Internal Revenue Code. As to state employees, the State
Comptroller would seem to be the person who could be held responsible for compliance with such levy. See Maryland Constitution, Art. VI, and 2 Md. Code (1957), Art. 19.

**Constitutional Law — Bible Reading And Prayer Recital In Public Schools.** *Engel v. Vitale*, 191 N.Y.S. 2d 453 (1959). In a lengthy and exhaustive opinion which treated the constitutions of both New York and United States, New York State Judge Meyer held that a school board resolution which directed the recital of the following prayer during morning exercises was invalid: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.” The Court concluded that while the Board could authorize, it could not require, the saying of the prayer in question. Moreover, if it does authorize such a prayer, “it must bring the authorization to the attention of the parents of children in the schools, establish a procedure for excusing non-participants not only from saying the prayer but from the room, if they so elect, and take affirmative steps to protect the religious freedom of both non-participants and participants”.

Approximately one month later, United States Circuit Judge Biggs for a 3-judge federal District Court in Philadelphia, *Schempp v. School Dist. of Abington Township, Pa.*, 177 F. Supp. 398 (D.C. Pa. 1959), held unconstitutional a Pennsylvania statute which provided for the reading, at the opening of each school day, of at least ten verses from the Holy Bible without comment, accompanied by an established practice of reciting the Lord’s Prayer, in conjunction with the Bible reading. The Court, in enjoining enforcement of the statute stated that it violated the proscription of the First Amendment as applied to the states through the Fourteenth Amendment, in that it both provided for an establishment of religion and interfered with the free exercise of religion, reasoning: (1) that the Holy Bible was a Christian document and therefore the daily reading of it, operating upon the receptive minds of children, aided and preferred the Christian religion and consequently interfered with the free exercise of religion; (2) that teachers could be discharged for failure to conduct the ceremonies in their class; (3) that school attendance was mandatory upon children, and accordingly that participation in this religious ceremony was compulsory even though not, as such, required by statute.
An effort to have the issue resolved by the Supreme Court on facts closely related to those of the Schempp case failed in Doremus v. Board of Education, 342 U.S. 429 (1952), for want of sufficient interest of the complaining party when suit was brought by a parent, as such, and as a taxpayer. The Court ruled that, as a parent, his standing ceased when his child graduated from the school in question, and that as a taxpayer he had not sufficiently shown the directness of interest required to litigate a constitutional issue.

No dispute of this nature has reached the Maryland Court of Appeals. The State Board of Education has promulgated no rules concerning morning exercises, but it appears that in a number of Maryland classrooms, morning exercises involving the reading of passages from the Holy Bible and/or recital of the Lord's Prayer or others of a like nature are conducted. It would seem that generally, the participation or attendance is voluntary, at least in the sense of being left to the decision of the children involved or their parents if objection to participation is raised.

**Corporations — Dissenting Stockholder's Right To "The Fair Value" Of His Stock.** Warren v. Baltimore Transit Co., 220 Md. 478, 154 A. 2d 796 (1959). Appellant, a preferred shareholder, objected to the recapitalization of the Baltimore Transit Company in 1953, and sought to recover the "fair market value" of his stock under 2 Md. Code (1957), Art. 23, Sec. 73. The lower court affirmed the report of appraisers, which set a value of $32.50 a share on the appellant's stock in the Baltimore Transit Company. The appraisers had valued the stock as a proportionate interest in a going concern, considering such factors as market value and prospective earnings as well as asset values. Appellant stockholder contended for a valuation of around $85 a share on the theory that the law required the appraisers to postulate a liquidation of the corporation and to determine what the net asset value of the stock would be on such a liquidation. Appellant relied heavily upon American General Corporation v. Camp, 171 Md. 629, 637, 190 A. 225 (1936), wherein the Court of Appeals refused to establish a uniform rule for all "fair value" controversies, but in that instance recognized that "... it is logical and consistent to infer that the fair value of such stock to a dissenting owner is its intrinsic value on a liquidation..." The Court of Appeals, affirmed the American General case, holding that "fair value" of the appellant's
stock was to be "... valued as an interest in a continuing enterprise with whatever benefits and liabilities as to value its preferred status affords it. ..." In so holding the Court joined Maryland with New York, Delaware, Ohio and the general weight of authority. In addition, whether consciously or not, this decision effectively quieted the fears expressed by an early Maryland Law Review author who commented on the American General case in 1937 saying, "If the Court of Appeals has laid down for the future the rule that asset value in liquidation is controlling, it seems to run contra to the better reasoned text writers and authorities * * * * Viewed in its long-range aspects, the decision (American General) will be unfortunate only if commissioners appointed in future cases regard the opinion as laying down an instruction that 'asset value in liquidation' is a conclusive minimum ...", Note — Appraisal of Shares of Dissenting Stockholders in Consolidation — American General Corporation v. Camp, et al., 1 Md. L. Rev. 338, 346 (1937). See also Fletcher, Cyclopaedia of Corporations (1943), Vol. 13, Sec. 5899, Ballantine on Corporations (1946), Sec. 299, and Brune, Maryland Corporate Law and Practice (1953), Sec. 317.

Evidence — Improper Denial By The Trial Court Of A Witness' Claim Of Privilege Cannot Be Taken Advantage Of By A Party. Butz v. State, 221 Md. 68, 156 A. 2d 423 (1959). At defendant's burglary trial, a witness was advised by the defendant's counsel that any further testimony on her part might tend to incriminate her. The witness thereafter claimed the privilege against self-incrimination, but when the State, with concurrence of the trial judge, granted the witness immunity, the trial judge informed her that she must testify. The witness complied, without objection, and the defendant was subsequently convicted. The defendant appealed, relying chiefly on Chesapeake Club v. State, 63 Md. 446 (1885), and a footnote to that case in McCormick, Evidence (1954), Sec. 73, n. 8, indicating that Maryland follows the minority view that a defendant in a criminal case is entitled to a new trial whenever material evidence of a witness is admitted in violation of a privilege of the witness.

The Court of Appeals affirmed, stating that the trial judge was in error in granting immunity to the witness, but holding that since the privilege belongs to the witness and not the defendant, material testimony given by the
witness, even though his claim of privilege has been improperly denied, was admissible against the defendant and the error in denying the privilege was not a valid ground of appeal by the defendant. The Court declined to follow the *Chesapeake Club* case and aligned Maryland with the great weight of authority, with only Massachusetts apparently *contra* (*Com. v. Kimball*, 24 Pick. 366 (1827)). See generally, *Wigmore, Evidence* (3rd ed. 1940), Sec. 2270; *Mc Cormick, Evidence* (1954), Sec. 73; and *Selected Writings on Evidence and Trial* (1957), 190.


After the National Labor Relations Board declined jurisdiction, presumably for budgetary reasons, of employer's representative proceedings for injunction of, and damages arising from, union's peaceful picketing, the California Supreme Court awarded damages and granted the injunction on the theory that the picketing constituted a tort under state law [45 Cal. 2d 657, 291 P. 2d 1 (1955)]. The Supreme Court set aside the injunction, 353 U.S. 26 and when, on remand, the California Court sustained the award for damages [42 Cal. 2d 595, 320 P. 2d 473 (1958)]. The Supreme Court again granted certiorari to consider the damage award. Stating that when activities are either protected or prohibited by the Taft-Hartley Act, the states are deprived of jurisdiction, the Court in this instance *held* that the state court lacked jurisdiction to award the employer damages for peaceful picketing by the union, as such activity, even if not clearly protected or prohibited, was arguably within the scope of the Taft-Hartley Act and therefore pre-empted by Federal Authority. The decision is a specific application of the ruling in *Guss v. Utah Labor Relations Board*, 353 U.S. 1 (1957), noted, 18Md. L. Rev. 50 (decided simultaneously with the first Garmon decision), where the Supreme Court, faced with a question of state action in a labor dispute where the N.L.R.B. declined jurisdiction for policy reasons, *held* that the failure of the N.L.R.B. to assume jurisdiction did not give the States power over activities that they would otherwise be pre-empted from regulating.

The Court stressed specifically the danger of state interference with national policy and federal uniformity, but pointed out that when a state's interest is so urgent to re-
quire action in situations marked by violence and intimidation, the state courts are not asked to yield to federal authority, *International Union, United Automobile Workers v. Russell*, 356 U.S. 634 (1958); *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 (1954). A concurring opinion by four members of the Court urged that if past nonviolent tortious conduct was "clearly" unprotected by Taft-Hartley, the *Laburnum* and *Russell* decisions should allow state courts to award damages, and should not be construed solely as cases of violence allowing state action. See Note, *Pre-emption and Non-regulation — The No Man's Land of Labor Relations*, 18 Md. L. Rev. 50 (1958).

It should be observed that Section 701 of the recently adopted Labor-Management Reform Act, (86 Congress S. 1555, Pub. L. 86-257), amends N.L.R. Sec. 14, by adding sub-paragraph (c)(2), 29 U.S.C.A. § 164, so as to indicate that nothing in the Act shall preclude States from assuming jurisdiction over labor disputes over which N.L.R.B. declines to exercise jurisdiction, which would seem to open the door to State action that was closed by the *Guss* and companion cases, 353 U.S. 1 (1957).

**Libel And Slander — No Recovery Where Plaintiff Unable To Prove Application Of Defamatory Words To Himself.** *Cohn v. Brecher*, 192 N.Y.S. 2d 877 (1959). Plaintiff and two other employees, being confronted by their employer, were told that they would be fired if some missing money was not returned. Looking directly at plaintiff, defendant said, "One of you is a crook". The N.Y. Supreme Court held, in dismissing plaintiff's complaint, that where defamatory language is directed to a small group, indefinitely or impersonally referring to only one of the group, one can only recover if he can prove the application of the language to himself. The fact that defendant looked at plaintiff when he spoke was too speculative a basis to permit the conclusion that the words were directed to the latter.

The principal case can be supported by dictum in *Shutter Bar Co. v. Zimmerman*, 110 Md. 313, 318, 73 A. 19 (1909), where the Court of Appeals said:

"In order to maintain an action for libel or slander it must appear that the defamatory words refer to some ascertained or ascertainable person, and that person must be the plaintiff."
On the other hand, plaintiff may be able to recover if the facts and circumstances unequivocally show that he was the object of the defamatory language, despite the absence of a specific reference to his name. Harmon v. Liss, 116 A. 2d 693, 695 (D.C. Mun. App. 1955). For a further digest of related material, see annotation in 91 A.L.R. 1161, or 33 Am. Jur., Libel & Slander, Sec. 89; Restatement of Torts, Sec. 564.

Workmen's Compensation — Mental Disability Unaccompanied By Physical Injury Not Compensable. Chernin v. Progress Service Co., 192 N.Y.S. 2d 758 (1959). A taxi driver struck a pedestrian who had darted in front of his cab. Although he sustained no physical injuries, the taxi driver became quite excited and abusive after police questioning.Claimant taxi driver continued working for a month after the accident, but was subsequently admitted to Bellevue Hospital suffering from a severe emotional strain.

The N.Y. Supreme Court, Appellate Division, held that claimant could not recover compensation for his mental disability, unaccompanied by physical injury, which followed but did not result from the accident. The accident, at most, had aggravated a dormant repressed schizophrenia.

In Bramble v. Shields, 146 Md. 494, 127 A. 44 (1925), the only Maryland compensation case dealing with mental disability, the Court of Appeals allowed recovery to an employee who was suffering from a neurosis that resulted from a physical injury, on the grounds that the ultimate mental disability was directly attributable to the accidental injury that arose out of and in the course of employment. In view of Maryland's "accidental means" requirement (Kelly-Springfield Co. v. Daniels, 199 Md. 156, 85 A. 2d 795 (1951)), such a disease apparently would not be compensable under the present statute, 8 Md. Code (1957), Art. 101, Sec. 67.6, if unaccompanied by a physical injury.

Book Reviews


To those of the non-legal world, the spectre of the lawyer's memoirs may be difficult to explain. The author of the present book, a Georgia judge, has come close to explaining the trial which seems to impel almost every successful attorney to set down his own triumphs and more instructive failures — the lawyer, to be successful before a jury, must be a good story teller.

"To fashion a trial lawyer, the great Personality Designer must rise to the acme of his art. He may not use the pattern for any other type, but he must borrow from all. He will need a bit of the actor for dramatic flair. The propensities of the humorist he must use to lighten situations, and those of the satirist to punish with ridicule. And there must be a part of the mathematician for exactness, and some of the logician for reasoning. There must be a bit of the vocalist for gracious voice. A dash of the Pied Piper must go in, to lead and to charm. This personality creation must shift back and forth from the tenderness of the shepherd to the ferocity of the mandarin. The stern bearing of the deacon and the levity of the clown are needed too. And the story teller — since he must convince, and to convince the more easily he must entertain. All of these and more, for persons and situations are as unlike as fingerprints, and the trial lawyer must, at every trial, direct a new unrehearsed show. He may choose neither the theme nor the actors. His players, be they parties or witnesses, range from rogues to saints." [Frontis piece].

Encompassed within its all too brief pages, Judge Henson, drawing on history, his broad knowledge of people and on cases through-out his career, weaves a loose fabric designed to show the importance of each of these elements he believes the trial lawyer should possess, and how they may best be used. Commencing with a sketch of the history of the county within which he, and generations of his ancestors before him, lived, he tells of his own early days at the bar, before World War I, riding circuit with the experienced practitioners in the "Big Court". His tales of the justice courts and the 'Squires both amuse and in-
struct. In explaining his early entrance into politics, he
tells of convention trickery and of the Frank case, the
political implications of which remained a viable force in
Georgia politics for over twelve years.

In successive chapters Judge Henson tells what he has
learned about judges and juries. Since many of the cases
recounted were attended by much publicity in the press
the methods of obtaining the proper atmosphere in the
courtroom, — one of sympathy usually —, as well as direct
methods for winning acceptance by the press, were of
often paramount importance, and may prove suggestive to
the advocate in every jurisdiction. It is apparently the
judge's view that trial judges are reached by the tenor of
the court room spectators as by a personal appeal. It is a
common place that this is also true of a jury. On the latter
subject, Judge Henson includes chapters on the selection,
amazement, and amusement of juries.

For the pragmatists of the profession, this book has
little new to offer; but for those who enjoy reading a
literate and intelligent man's observations on the law in
action, with time along the way to listen to local history,
anecdotes with meaning, and an inquiry into the causes of
man's conduct, this book should definitely be considered.
It is far above the usual for its genre, and merits attention.

NELSON REED KERR, JR.
The Apportionment of Stock Distributions
In Trust Accounting Practice

ARTHUR W. MACHEN, JR.*

This inquiry deals with the question, "What is income?" — a question inherent in the terms "life estates" and "future interests." It is a question which will be raised in one form or another so long as transfers are made for the immediate benefit of one person and the ultimate benefit of another.

The purpose of this study is to analyze how the courts, and particularly the courts of Maryland, have answered this question in respect of corporate distributions received on securities held by trust estates. This study will be divided into six subsections to be considered in the following order:

I — Definition of Terms
II — The Law as to Pre-1929 Trusts
III — The Law as to Trusts Created between 1929 and 1939
IV — The Law as to Post-1939 Trusts Governed by the Uniform Principal and Income Act ¹
V — The Donaldson and Apponyi Cases
VI — The Problem Restated

I — Definition of Terms

For present purposes, the following definitions are adopted:

(1) A "dividend" is a distribution of corporate assets by a corporation to its stockholders. Its essential characteristic is a severance of corporate property, followed by a distribution of that property to the stockholders of the corporation.

(2) A "cash dividend" is a dividend paid in cash.

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¹ 7 MD. CODE (1957) Art. 75B.
(3) An "ordinary cash dividend" is a cash dividend paid at regular intervals, representing a periodic division of corporate profits.

(4) An "extraordinary cash dividend" is a cash dividend paid at irregular intervals, and is usually motivated by some object other than the division of corporate profits.

(5) A "stock dividend" is a distribution by a corporation of its stock pro rata to its stockholders, intended as a substitute for or an increment to an ordinary cash dividend. It is usually a small distribution in relation to the stock previously outstanding—generally not over 25%—and it has no appreciable effect on the market value of the stock in public trading.² The term is a misnomer in its use of the word "dividend" since no "severance" of corporate assets is involved, and the proportional interest of each stockholder in the capital and surplus of the company will be the same after the distribution as it was before.³ Accumulated earnings are transferred from surplus to capital stock account but are not, as in the case of a cash dividend, distributed to the stockholders. To be sure, a stockholder receives something of value which he can convert into cash if he wants to, and to this extent the distribution may seem superficially to resemble a cash dividend. It should be remembered, however, that if a stockholder spends his cash dividends, his equity interest in the corporation remains unchanged. But if he sells a stock dividend and spends the proceeds, he reduces his proportional interest in the corporation.

(6) A "true stock split" is a distribution by a corporation to its stockholders of stock of a different par or stated value in exchange for the stock previously outstanding, resulting in a larger number of shares at a correspondingly lower par or stated value but with no change in the com-

²Rule of the New York Stock Exchange entitled "Statement on Stock Dividends" dated July 21, 1955. This Rule establishes that stock distributions representing less than 25% of the shares previously outstanding are stock dividends and must be capitalized by a charge to earned surplus equal to the current fair value, i.e., the current market value adjusted for the effect of the distribution itself. A distribution representing 100% or more of the stock previously outstanding is a "split", and only the par value need be capitalized. See also: Accounting Research Bulletin No. 11 issued on November 15, 1952, by the Committee on Accounting Procedure of the American Institute of Accountants, advocating substantially the same rules.

³Some courts have so held. See, for example, Stipe v. First National Bank, 208 Or. 551, 301 P. 2d 175, 186 (1956) holding that a stock dividend is not a "dividend" at all, but is "nothing more than in incident or process in corporate bookkeeping." And see: PATON, ADVANCED ACCOUNTING, (1947) 587, commenting on "the questionable use of the term 'dividend' in describing the phenomenon."
pany’s total capital outstanding. Since both the corporation and the stockholders thus remain in exactly the same equity position after the split as they were before, its principal results are the reduction of the market price of the stock and the stimulation of its marketability. These results are not usually accomplished by the stock dividend.

(7) A "modern stock split" (admittedly a term coined for purposes of this discussion) is a distribution by a corporation to its stockholders of a sufficient number of new shares of stock, usually at least equivalent to 100% of the stock previously outstanding, to reduce the market value of the stock to levels attractive to the average investor of 100-share lots, thereby broadening the base of stockholder ownership. The manner in which the split is accomplished on the corporate books is of no particular significance. It may, like a "true stock split", be supported entirely by a reduction in par value, and in such a case the two terms may be considered synonymous. Or, unlike the "true stock split," it may be accompanied by no change at all in the par value or even by an increase in par. Sometimes a modern stock split is supported by a charge to capital surplus or paid-in surplus; or, it may be supported by a charge in part to capital surplus, in part to paid-in surplus, or, in whole or in part, to earned surplus. Even,

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5 For a clear statement of the difference between a stock dividend and a stock split, see the remarks of Leland I. Doan, President of Dow Chemical Co., at the annual stockholders' meeting of September 12, 1956. Among other things, he observed:

"... If you declare a stock dividend of 25 or 50 or 100%, it in no way reflects your earnings performance and really amounts to a stock split rather than a dividend because the market value of the shares is usually reduced proportionately . . . ."

6 The Rules of the New York Stock Exchange cited above in footnote 2 provide that distributions of between 25% and 100% of the stock previously outstanding are presumptively splits, but that each distribution falling in this category must be independently analyzed to determine its proper status.

7 As, for example, the 1953 stock split of American Gas & Electric Company, supported entirely by a reduction in par from $10 to $5 per share. This distribution was referred to in Donaldson v. Mercantile-Safe Deposit & Trust Co., 214 Md. 421, 425, 135 A. 2d 433 (1957).

8 As, for example, the two Texas Company splits discussed in the Donaldson case, ibid.

9 As, for example, the 1956 split of American Gas & Electric Co., also discussed in the Donaldson case, supra, n. 7, where par value was increased from $5 to $10 per share.

10 In the Donaldson case, 214 Md. 421, 426, 135 A. 2d 433 (1957), the court considered the 1951 split of American Gas & Electric Company which was partly supported by a charge to capital surplus and to earned surplus. The General Electric split of 1954, considered in the Apponyi
however, where some or all of the par value of the new stock is supported by a capitalization of earned surplus, the distribution is not a "dividend." It does not represent a "severance" of corporate assets in any sense of the word. It differs essentially from a "stock dividend" in that it does not represent a substitute for or an increment to an ordinary cash dividend. To the extent that earnings are capitalized, it may, to be sure, resemble a large or hybrid stock dividend. But corporate acts are to be judged in terms of their cause, their effect and their outward appearance. One who equates a modern stock split with a stock dividend does so because of some of their similarities in effect and in outward appearance but despite their fundamental differences in motivating cause.

II — The Law as to Pre-1929 Trusts

In the case of Thomas v. Gregg, decided in 1894, the Court of Appeals was asked to determine how a 20% stock dividend declared and paid by the Baltimore & Ohio Railroad in 1892 should be treated for trust accounting purposes. The question was one of first impression in this State, and the court found itself "not helped, but rather embarrassed" by the large number of relevant and conflicting decisions in other States.

The court first reviewed the cases decided in Massachusetts, the decisions now forming the basis of the so-called "Massachusetts Rule." Its basic principle is that "ordinarily a dividend declared in stock is to be deemed capital, and a dividend in money is to be deemed income. . . ." Although easy to apply, the rule seemed...
STOCK DISTRIBUTIONS

arbitrary and uncomprising. Then the court went on to consider the Pennsylvania Rule emanating from the early leading case, Earp's Appeal.\textsuperscript{15} This case required the apportionment of a stock dividend between principal and income in proportion to the corporate earnings accumulated prior to the testator's death and those accumulated after his death. This rule is difficult to apply but represents an attempt to balance the equities between two classes of trust beneficiaries.

Faced with this sharp cleavage between the Massachusetts and the Pennsylvania Rules, our Court of Appeals in Thomas v. Gregg adopted the rule which seemed at the time to bring the fairest result in the case at bar. The directors of the Baltimore & Ohio Railroad had, in this instance, made it plain that the 20% stock dividend was justified as a matter of business policy because it was fully supported by current earnings. A clearer example could scarcely be found, therefore, to illustrate a stock dividend as above defined — a distribution paid in stock as a substitute for a cash dividend. It seemed unfair to the life tenant to invoke the Massachusetts Rule, and thereby to assign the entire dividend to principal, thus denying the life tenant the right to share in a distribution of corporate earnings which was clearly labeled as such by the paying corporation. Influenced largely by these equitable considerations, the Court of Appeals adopted the Pennsylvania Rule in Thomas v. Gregg, and directed an apportionment of the 20% stock dividend which the trustee in that case had received.

The next case in this series is Quinn v. Safe Deposit & Trust Co.\textsuperscript{16} Here, a testamentary trustee, holding shares of stock in the Canton Company, received from that corporation an extraordinary cash dividend of $4,000. Canton had maintained a sinking fund for the payment of certain bonds of the Union Railroad, but this fund was later freed of the obligation when Northern Central Railway Company, for valuable consideration, agreed to pay all subsequent installments of interest and also the principal on maturity. The cash and ground rents in the sinking fund thus having been released, the directors of Canton decided to keep the ground rents and to distribute most of the cash to the stockholders. Out of the $4,000 received by the trustee from this distribution, $3,814 had been earned prior to the testator's death, and the balance of $186 had been

\textsuperscript{15} 28 Pa. 368 (1857).
\textsuperscript{16} 33 Md. 285, 48 A. 835 (1901).
earned since the inception of the trust. The lower court, relying on Thomas v. Gregg, decreed an apportionment between principal and income in the same ratio.

The Court of Appeals reversed. Distinguishing Thomas v. Gregg in that it had involved a 20% stock dividend, not an extraordinary cash dividend, and that what was here distributed "had not been capitalized", the court held the entire $4,000 to be income distributable to the life tenants. Even though more than 90% of the cash distributed had been earned prior to the inception of the trust, the remaindermen were not allowed to share in the distribution at all.

The decision is patently inconsistent with Thomas v. Gregg. In the earlier case, the dividend was held apportionable in respect of earnings realized before and after the inception of the trust. In the later case, 100% of the distribution — and an extraordinary cash dividend at that — was awarded to the life tenants even though more than 90% of the dividend had been earned before their right to share in the income had begun.\(^{17}\)

In the earlier case, the court held that as to earnings accumulated "before the life estate commenced, it is but just and in accordance with the intention of the testator, so far as it is shown, that such earnings be treated as capital."\(^{18}\) In the Quinn case, this theory of fairness was ignored, and most of the earnings which had accrued "before the life estate commenced" were nonetheless ordered paid to the life tenant.

One of the arguments in support of the adoption of the Pennsylvania Rule in Thomas v. Gregg is that the 20% stock dividend there involved was the equivalent of an extraordinary cash dividend which the directors of the paying corporation elected to pay in stock. To apply the Massachusetts Rule to these facts would cause the distribution to be paid entirely to the life tenants if paid in cash, but entirely to the remaindermen if paid in stock. The inconsistency of this result (which is more apparent than

\(^{17}\) When the distribution is capitalized, as it was in Thomas v. Gregg, supra, n. 12, both life tenant and remainderman share in its benefits without an apportionment. The new stock will ultimately be paid to the remainderman, and meanwhile the life tenant receives the income therefrom. The effect of apportionment is to give the life tenant a larger and more immediate benefit, but the remainderman still shares in the distribution. In the Quinn case, supra, n. 16, however, where the dividend "had not been capitalized", the payment to the life tenant in its entirety deprived the remainderman of any share at all in the distribution. A fortiori, therefore, should there not be an apportionment where earnings made before the inception of the trust are distributed without capitalization?

\(^{18}\) Supra, n. 12, 560.
real) seemed to justify the invocation of the Pennsylvania Rule of apportionment, so that both classes of trust beneficiaries might be permitted to share in a distribution of income covering their respective interests in the estate — and regardless of whether the directors of the paying corporation elected to make the distribution in stock or in cash.\(^1\)

If this is the rationale of *Thomas v. Gregg*, it was certainly disregarded in *Quinn v. Safe Deposit & Trust Co.* And it is not without interest that the *Quinn* case relies for its authority primarily on Massachusetts cases and the decisions of other states following the Massachusetts Rule,\(^2\) even though the State of Maryland had by that time been committed to the Pennsylvania Rule by the decision in *Thomas v. Gregg*. Surprisingly enough, the *Quinn* case is frequently cited as a decision under the Pennsylvania Rule.\(^3\)

This brings us to the next case dealing with an extraordinary cash dividend — *Foard v. Safe Deposit & Trust Co.*\(^4\)

In this case, a corporation sold certain stock which it had purchased with earnings accumulated prior to the testator's death. Out of the proceeds of sale, the corporation paid a 100% cash dividend labeled as a "special distribution" to its stockholders, of whom one was the trustee in the case at bar. The Court of Appeals held "this unusual dividend" traceable to the sale of assets "which had been bought with earnings of the company prior to Mr. Foard's death, and prior even to the making of his will."\(^5\) Consequently, the entire $50,000 received by the trustee was held to be principal, and no part thereof became payable to the life tenant.

Obviously, this result is inconsistent with the holding in the *Quinn* case. There, the dividend was made possible by the liquidation of a sinking fund. Here, the dividend

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\(^1\) See particularly the reasoning of the court, 78 Md. 545, 557, and the rhetorical question and answer:

"... Are they [the life tenants] to be deprived of all interest in the dividend simply because it was made payable 'in common stock of the company'? We think not."

\(^2\) Some commentators writing contemporaneously with the *Quinn* decision were even led to believe that the case "closely limits if it does not virtually overrule" *Thomas v. Gregg*. See, for example: 2 Machen, Corporations (1908) 1150, § 1389.

\(^3\) Atlantic Coast Line Dividend Cases, 102 Md. 73, 79, 61 A. 295 (1906); Northern Central Dividend Cases, 126 Md. 16, 28, 29, 94 A. 338 (1915); Krug v. Mercantile T. & D. Co., 133 Md. 110, 114, 104 A. 414 (1918).

\(^4\) 122 Md. 476, 89 A. 724 (1914).

\(^5\) Ibid., 481.
was made possible by the liquidation of certain stocks held by the paying corporation. In the *Quinn* case, the court emphasized the fact that the paying corporation had decided to keep the ground rents which it had received from the sinking fund, and to distribute to the stockholders the cash received from the same source. This suggested that what was kept was "capital" and what was distributed was "income." In the *Foard* case, however, the whole amount distributed was held to be capital.

Finally, it is of interest that in the *Foard* case the entire distribution was supported by earnings accumulated prior to the inception of the trust, and in the *Quinn* case substantially all of the distribution also represented earnings for this same period. Yet in the *Foard* case the whole distribution was held to be principal, and in the *Quinn* case the whole distribution was held to be income.\(^2\)

We now turn to the pre-1929 cases dealing with stock distributions.

In the *Atlantic Coast Line Dividend Cases\(^2\)\(^5\) decided in 1905, the court held a 20% stock dividend and an extra 5% dividend payable in certificates of indebtedness, both of which had been charged to "surplus net earnings", were apportionable dividends under the Pennsylvania Rule. Since they were supported entirely by earnings accumulated since the death of the testator, they were payable entirely to the life tenant. This case is a straightforward reaffirmation of the Pennsylvania Rule as stated in *Thomas v. Gregg*, supra.

The next case in the series is *Coudon v. Updegraff*,\(^2\)\(^6\) in which the trustees had received a 100% "stock dividend" from the Whitaker Iron Company. This case is far more significant because of its facts than for any particular contribution to the law. In the latter respect, the case merely reaffirms once more the Pennsylvania Rule, relying especially on *The Atlantic Coast Line Dividend Cases*. The facts presented in *Coudon v. Updegraff* seem of special interest, however, first, because the distribution was equal to 100% of the stock previously outstanding, and, secondly,

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\(^{2}\) The inconsistency between the Quinn and Foard cases has elsewhere been noted. See 4 BOGERT, TRUSTS (1948) 337 (§ 845), n. 34, indicating that although the Maryland court in the Foard case "purports to follow the Pennsylvania Rule," the Quinn case seems "to the opposite effect." In *Lindau v. Community Fund of Baltimore*, 188 Md. 474, 479, 53 A. 2d 409 (1947), the court quoted with approval a statement from Matter of *Osborne*, 209 N.Y. 450, 103 N.E. 723 (1913), indicating that extraordinary cash dividends are apportionable. *Query:* What is the law today as to extraordinary cash dividends in pre-1929 estates?

\(^{25}\) 102 Md. 73, 61 A. 295 (1905).

\(^{26}\) 117 Md. 71, 88 A. 145 (1911).
because the distribution was not accompanied by any change in par value. This distribution thus becomes almost indistinguishable from the "modern stock split", as hereinabove defined. This point will prove of special interest later when we consider the Donaldson and Apponyi cases.

The next significant decision is entitled Northern Central Dividend Cases, an opinion dealing with several trust estates which had received a 40% stock distribution from the Northern Central Railroad. The distribution was brought about by a dispute between the minority stockholders of Northern Central and the Pennsylvania Railroad, the majority stockholder. The minority had charged that Northern Central had unreasonably accumulated its profits without any dividends, all to the benefit of Pennsylvania and to the detriment of the minority interests. As part of the settlement of this dispute, Northern Central declared and paid a 40% stock dividend. The court held the distribution to be apportionable under the Pennsylvania Rule.

In the resolution of Northern Central's stockholders approving an increase in authorized capital sufficient to cover the stock dividend, it was declared that the distribution was to be taken—

"... as and for a stock dividend upon the company's present outstanding capital stock, representative of and based on expenditures for additions and betterments of the company's property made from time to time out of its surplus earnings to a larger amount in the aggregate, and which might otherwise have been available for and distributable as dividends among its stockholders, if the Directors had so determined. . . ."

In holding the distribution apportionable, the Court of Appeals decided

"... to follow the precedent established in Quinn v. The Safe Deposit and Trust Company, and in the Atlantic Coast Line Dividend Cases, and hold the declarations of the company and its stockholders that the dividend represents earnings or income binding upon all parties to these appeals."

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27 126 Md. 16, 94 A. 338 (1915).
28 Ibid., 21. (Emphasis added.)
29 Supra, ns. 27, 28. Some courts would hold that the corporate act of dedicating earnings to capital creates an inequity which can only be rectified by apportionment, but only to the extent that future dividends
In defense of the decision in the *Northern Central* case, one can argue that the stock distribution was really a three-step transaction telescoped into one—i.e. the corporation could have used its earnings to pay a cash dividend, which, in turn, the stockholders might then have reinvested in the company through a subscription to new stock. Then the company could have used the proceeds of the stock subscription for "additions and betterments of the company's property." This three-stage transaction, sometimes referred to as a "compulsory investment," would have left the stockholders in exactly the same situation in which they found themselves after the 40% stock dividend. Therefore, it can be argued, the stock dividend should be treated as an apportionable distribution of income.

The fallacy in this argument lies in its major premise. The corporation did *not in fact* distribute cash as *income*, nor indeed was there any reinvestment by the shareholders in new stock in the same company. Instead, the corporation had previously elected to capitalize its earnings by spending them on capital improvements. Then, under a good deal of pressure, it agreed to distribute to its stockholders shares of stock representing this additional capital. The earnings, however, remained in the corporate till. Manifestly, therefore, what the corporation did in fact was quite different in form and substance from what in theory it "could have done."

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`Admittedly, the expense and trouble of a public offering of securities under modern federal regulation may have combined with tax considerations to stimulate the use of the modern stock split as a means of accomplishing the permanent conversion of accumulated earnings into working capital. Whatever the validity of this reasoning today, it can have little application to the distribution of the Northern Central case in 1915.`
The next case on the list is Miller v. Safe Deposit & Trust Co., also involving the same Northern Central dividend discussed above. This opinion adds nothing new to the story of the Pennsylvania Rule in Maryland, but it does emphasize that the date of the creation of the trust is the significant date for purposes of applying the rules of apportionment to original investments, and the acquisition date in the case of subsequently acquired investments. Under the authority of this case, it would seem that the death of an intervening life tenant after the testator's death has no effect at all in applying the rules of apportionment. In other words, after a particular distribution has been characterized as apportionable, then the portion allocable to income is payable to the party who is currently entitled to the income from the trust. The Pennsylvania Rule as applied in Maryland does not require apportionment of income between successive life tenants.

The Miller case was followed by the decision in Baldwin v. Baldwin, an opinion which explains the "intact value test" as part of the rules of apportionment in this State. It holds that the "actual" or "intact" value of the stock in the hands of the trustee at the inception of the trust, determined with relation to the corporate books and not to market value, must be maintained for the benefit of the remaindermen, and to the extent that any apportionable stock dividend would impair that book value, the application of the Pennsylvania Rule must be modified.

The Baldwin case is also of interest because, like Coudon v. Updegraff, it involved a 100% distribution of stock, supported entirely by earnings accumulated since the inception of the trust. On the surface, therefore, both cases dealt with stock distributions which meet our defini-

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Footnotes:

31 127 Md. 610, 96 A. 766 (1916).
32 In the Miller case, 127 Md. 610, 615, 96 A. 766 (1916), the court indicated that the determination of the beneficiary entitled to the income is to be made as of the declaration date of the dividend. Presumably, this means in the absence of a specified record date. Compare: 2 Md. Code (1957) Art. 23, § 40(c)(2); 2 Scott, Trusts (1956) 1809, § 236.2.
33 159 Md. 175, 150 A. 282 (1930).
34 The same rule obtains in Pennsylvania. In re King's Estate, 361 Pa. 629, 66 A. 2d 68 (1949); In re Stokes' Estate, 240 Pa. 277, 87 A. 971 (1913); Smith's Estate, 140 Pa. 344, 21 A. 438 (1891); Biddle's Appeal, 99 Pa. 278 (1882); Moss' Appeal, 83 Pa. 264 (1877). In Arrott's Estate, 388 Pa. 228, 118 A. 2d 187 (1965), however, the Pennsylvania court held that as to securities purchased by the trust (as distinguished from those originally acquired) the market value at the time of the purchase is the intact value to be preserved. The Maryland courts have not followed this sensible refinement. Query: What better method could be found to measure the corpus to be preserved "intact" than the dollar amount of cash corpus which was used to buy the investment?
tion of a "modern stock split." Again, this point will prove of interest later when we take up the Donaldson case.

The latest stock distribution case in the series is Lindau v. Community Fund of Baltimore.35 Although the case was decided after the adoption of the Uniform Principal and Income Act, it was not governed by the Act because the trust estate was created prior to June 1, 1939.36 Even apart from this fact, however, the Act would not in any event have controlled because the trust instrument contained the following provisions dealing with principal and income:

"... all stock dividends to the extent that they are paid out of current earnings for the current fiscal or preceding year shall likewise be treated as income as of the date of their payment; but all other stock dividends shall be treated as corpus of the trust estate."37

In the light of this mandate in the controlling instrument, the court ruled that a 20% stock dividend was apportionable. The case is of special interest today because it shows how the discredited Pennsylvania Rule can be invoked as to post-1939 transfers when the will or deed of trust contains a provision similar to that quoted above.38

Although the Lindau case marks the last in the series of decision dealing with distributions of stock of the distributing company and their apportionment under the Pennsylvania Rule (except for the Donaldson and Apponyi cases to be considered separately hereinbelow), the picture would not be complete without a brief discussion of several other decisions involving questions of principal and income and hence directly or indirectly related to the Pennsylvania Rule.

(1) In Smith v. Hooper, the court held that profits realized by a trustee on the sale of capital assets (i.e. profits which are customarily referred to these days as "capital gains") do not constitute income which must be distributed to the life tenant. Accordingly, there was no need for applying the Pennsylvania Rule of Apportionment.40

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35 188 Md. 474, 53 A. 2d 409 (1947).
36 The effective date of the Uniform Principal and Income Act, 7 Md. Code (1957) Art. 75B.
37 Supra, n. 35, 477.
38 7 Md. Code (1957) Art. 75B, § 2, permits the testator or settlor to "direct the manner of ascertainment of income and principal and the apportionment of receipts and expenses ..."
39 95 Md. 16, 54 A. 95 (1902).
40 The rule is apparently otherwise in Pennsylvania. McKeown's Estate, 263 Pa. 78, 106 A. 189 (1919).
(2) In *Safe Deposit v. Bowen,*\(^{41}\) the court followed the decision in *Smith v. Hooper,* and held that there was no problem of apportionment where a trustee surrendered preferred stock with unpaid accumulated dividends in exchange for cash, new preferred stock, debenture notes, and common stock. This reorganization was likened to a sale, and the new securities were held to belong to corpus "in their entirety."\(^{42}\)

(3) In *Girdwood v. Safe Deposit & Trust Co.,*\(^{43}\) the court held that rights to subscribe to new stock, when exercised by the trustee, constituted corpus of the estate, and, accordingly, no problem of apportionment under the Pennsylvania Rule was raised.

(4) In *Ex Parte Humbird,*\(^{44}\) the court ruled that the trustee's profit realized on the sale of its timber lands and cash dividends paid to a trustee by a lumber company out of the proceeds of sale of the company's timber lands, were, in both cases, corpus. The profits on the sale of trust assets were clearly governed by *Smith v. Hooper.* The cash dividend, however, was more troublesome because of the argument that it should be distributed *in toto* to the life tenants as an extraordinary cash dividend under the authority of *Quinn v. Safe Deposit & Trust Co.* The court of Appeals ruled, however, that the source of the dividend controlled—in this case the liquidation of the corporation's timber land—that this dividend does not represent income earned in the ordinary course of the company's business, and that it must therefore, be treated in its entirety as non-distributable corpus.

(5) In *Washington County Hospital v. Hagerstown Trust Co.,*\(^{45}\) the court relied on the distinction that the profits there distributed were made in the ordinary course of business.

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\(^{41}\) 188 Md. 482, 53 A. 2d 413 (1947).

\(^{42}\) A recent case in Pennsylvania came to the opposite conclusion, applying the Pennsylvania Rule in a trust estate created before the adoption of the Uniform Principal and Income Act in that state in 1945. In re King's Estate, 361 Pa. 629, 66 A. 2d 68 (1949). There, the new stock received in exchange for the accumulated arrearages in dividends on the old preferred was held distributable as income after the intact value of the old stock had been preserved.

\(^{43}\) 143 Md. 245, 122 A. 132 (1923); the rule is apparently otherwise in Pennsylvania, Jones v. Integrity Trust Co., 292 Pa. 149, 140 A. 862 (1928), although the prior cases were in some conflict. Nirdlinger's Estate, 200 Pa. 457, 139 A. 200 (1927); Eisner's Estate, 175 Pa. 143, 34 A. 577 (1896); Wiltbank's Appeal, 64 Pa. 256 (1870). The Jones case held that stocks purchased through the exercise of rights are to be treated as an apportionable stock dividend, but in the later case of Waterhouse's Estate, 308 Pa. 422, 162 A. 295 (1932), it was held that the proceeds from the sale of rights are presumptively principal.

\(^{44}\) 114 Md. 627, 80 A. 209 (1911).

\(^{45}\) 124 Md. 1, 91 A. 787 (1914).
of the distributing corporation's business, and not, as in the Humbird case, from "economic laws operating independently of the corporate agency or existence." This suggests that profits derived from the sale of land will be treated as income where the corporation actively contributes to its enhancement in value and where such a sale is a regular part of the corporation's business. On the other hand, if similar real estate is owned by another corporation which indolently relies on "economic laws" to raise the value of its property, then the profits on the sale will be treated as principal. The distinction seems somewhat nebulous.

(6) In Spedden v. Norton, the court ruled that "liquidating dividends" payable in cash by a real estate development company should be treated as corpus in the hands of the trustee until the intact value of the stock at the time of the inception of the trust has been recouped. Thereafter, presumably, these dividends would represent a division of profits and hence distributable as income.

In this respect, it is interesting to note this flat statement by the court:

"... An extraordinary dividend declared after the testator's death from earnings realized before that event, would be allocated to the corpus of the trust under his will."

In support of this proposition, the court cited eight cases, including Quinn v. Safe Deposit & Trust Co. As hereinbefore noted, the Quinn case held just the reverse. An extraordinary cash dividend declared and paid after the testator's death derived to the extent of about 90% from earnings realized before that event, was in that case held to be not principal but income in its entirety and payable 100% to the life tenant.

(7) The next case in this group is Krug v. Mercantile Trust and Deposit Co., where a stock dividend payable in stock of another corporation was held to be income. This distributing corporation was held to be in the business of buying and selling securities, so that in a very real sense the profits distributed were earnings realized in the regular course of its business. The distribution would have

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46 Supra, n. 44, 640.
48 Ibid., 105.
49 133 Md. 110, 104 A. 414 (1918).
been treated as income even under the Principal and Income Act.\textsuperscript{50}

(8) In Rosenberg v. Lombardi,\textsuperscript{50a} the Court of Appeals held that capital gains dividends of regulated investment companies are to be treated as income of pre-1939 trust estates. Since the investment company's securities profits are earned in the ordinary course of its business, this holding is consistent with the principles laid down in the Krug case, \textit{supra}, and with the weight of authority in other jurisdictions.\textsuperscript{50b}

III — THE LAW AS TO TRUSTS CREATED BETWEEN 1929 AND 1939

In 1929 the State of Maryland made its first attempt to solve this problem by statute. It was not a signal success. The statute provided as follows:

"All rents, annuities, dividends and periodical payments in the nature of income, payable under the provisions of any will, deed or other instrument executed after the first day of July, 1929 shall like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly, unless otherwise expressly stated by the instrument under which they are payable; but no ac-

\textsuperscript{50} 7 MD. CODE (1957) Art. 75B, § 5(1). The Act follows the Massachusetts Rule in holding that dividends paid in securities of companies other than the paying corporation are to be treated as income. Courts of other jurisdictions have held that, even under the Pennsylvania Rule, stock dividends payable in securities of corporations other than the paying corporation, when charged to earned surplus on the books of the paying corporation, are income. See, for example, the New York cases dealing with the Standard Oil distributions, collected in Note, 130 A.L.R. 492, 591.

\textsuperscript{50a} Decided May 12, 1960; opinion not yet reported. (Case No. 163, September Term, 1959.)

\textsuperscript{50b} The out-of-state court decisions have generally held such capital gains dividends to be income. See: In re Byrne's Estate, 81 N.Y.S. 2d 23 (1948); In re Bruce's Trust, 81 N.Y.S. 2d 25 (1948); In re Hurd's Will, 120 N.Y.S. 2d 103 (1953); In re Appleby's Estate, 175 N.Y.S. 2d 176 (1958); In re Rosenthal's Estate, 110 N.Y.S. 2d 483 (1951); Coates v. Coates, 304 S.W. 2d 874 (Mo. 1957); Lovett Estate (No. 2), 73 D. & C. Rep. 21 (Orphans Court of Luzerne Co., Pa., 1951). However, these cases have met with strong criticism from some learned commentators and strong support from others. See, Shattuck, \textit{Capital Gains Distributions — Principal or Income}, 88 Trusts & Estates 160, 429 (1949); Young, \textit{A Dissent on Capital Gains Distributions}, 88 Trusts & Estates 280 (1949); Rogers, \textit{Capital Gains Distributions}, 90 Trusts & Estates 300 (1951); Rogers, \textit{Capital Gains Dividends — A Suggestion for Draftsmen}, 20 Fordham L. Rev. 79 (1951); Anderson, \textit{Should Capital Gains Distributions Be Principal or Income?}, 90 Trusts & Estates 331 (1951); Putney, \textit{Capital Gains Dividends}, 96 Trusts & Estates 22 (1956); Cohan and Dean, \textit{Apporportionment of Stock Proceeds}, 106 U. Pa. L. Rev. 157, 181 (1957); 3 Scott, \textit{Trusts} (1956) 1844, § 236.14.
tion shall be brought therefor until the expiration of
the period for which the apportionment is made.\(^{61}\)

The application of this statute to the problem of apportionment in Maryland was first considered by the Court of Appeals in *Zell v. Safe Deposit & Trust Co.*,\(^{62}\) decided in 1938. There, it was held that the statute above quoted had no application to an ordinary cash dividend paid by a company with an irregular dividend-paying record because the dividend was not paid with reference to any fixed period of time. The English authorities so holding seemed especially persuasive, since the Maryland Act followed closely the language of the English Act on Apportionments.\(^{63}\)

Although the *Zell* case illustrates the ineffectiveness of the 1929 Act, it is difficult to find fault with the reasoning of the court as applied to the facts there presented. The case does show, however, how unwise it is to extend the concept of apportionment to all corporate distributions. The apportionment of dividends between successive beneficiaries may be appealing to one's sense of fair play, but experience has shown that the only forms of income which lend themselves to this treatment are those in which the factor of time is an inherent characteristic. Thus, we have heard little or no criticism of the use of daily accrual tables for apportioning such fixed periodic payments as rent, annuities, interest on loans, etc. But when we apply these same rules to other forms of income which are not pegged to the passage of time, we become engulfed in a maze of troubles—troubles which are graphically illustrated by the Maryland decisions dealing with the Pennsylvania Rule and the 1929 Act.

No better illustration of this point could be found than in the strange case of *Heyn v. Fidelity Trust Company*,\(^{64}\) decided by the Court of Appeals in February 1938, only a few weeks after the *Zell* case. An eight-page majority opinion by Judge Sheehan, the author of the *Zell* decision, was modified after reargument by a seventeen-page majority opinion written by Judge Offutt. Judge Parke registered a vigorous twenty-five page dissent.

\(^{62}\) 173 Md. 518, 196 A. 298 (1938).
\(^{63}\) *In re Jowitt* (1922) L. R., 2 Ch. Div. 442; *In re Mulrhead* (1916) L. R. 2 Ch. 181; *In re Wakely* (1920) 2 Ch. 205; *In re Sale* (1913) 2 Ch. 697; *Carr v. Griffith* (1879) 12 Ch. D. 655; *In re Taylor's Trusts* (1905), 1 Ch. 734; *In re Armitage* (1898) 3 Ch. 337; *Marjoribanks v. Dansey* (1923) 2 Ch. 307; *In re Sandbach* (1933) Ch. D. 505.
\(^{64}\) 174 Md. 639, 197 A. 292 (1938).
The case dealt with several different classes of dividends, but for present purposes the most interesting facet is the holding that a payment on account of arrearages in dividends on cumulative preferred stock is an extraordinary distribution not governed by any fixed period of time and, hence, not controlled by the 1929 Act. Having come to this conclusion, the majority of the court then fell back on the Pennsylvania Rule to find the distribution entirely income paid out of earnings accumulated after the inception of the trust, and, hence, payable to the life tenant. This overruled Judge Sheehan’s previous conclusion that this same distribution was in the nature of a liquidating dividend, and was to be treated entirely as corpus.

As a result of the Heyn decision, it would seem that the 1929 Act has no force at all today except as to the apportionment of regular cash dividends, interest, rent, etc. on a daily accrual basis, in trusts created in the 1929-1939 period.

The major contribution of the Heyn case may be found in Judge Parke’s brilliant dissent. After reviewing the earlier Maryland cases on apportionment, he urged the adoption of a “simple, arbitrary, universal rule” which like the Massachusetts Rule, would make in most cases for substantial justice.

Any hope that the 1929 Act might bring this result had been surely and swiftly killed by the decisions in the Zell and Heyn cases, but the Legislature was quick to respond to Judge Parke’s suggestion. In 1939 Maryland became one of the first states to enact the Uniform Principal and Income Act.

IV — THE LAW AS TO POST-1939 TRUSTS GOVERNED BY THE UNIFORM PRINCIPAL AND INCOME ACT.

The Principal and Income Act is one of the most successful products of the National Conference on Uniform State Laws. There is perhaps no better test of a statute’s true merit than its effect on litigation, and on this score the Principal and Income Act passes with flying colors. Since

Note the seeming inconsistency between this result and that in Safe Deposit v. Bowen, 188 Md. 482, 53 A. 2d 413 (1947), discussed in text, supra, p. 101.

Only five states had adopted the Act prior to 1939 — namely Florida, Louisiana, North Carolina, Oregon and Virginia. Three other states besides Maryland joined the group in 1939: Alabama, Connecticut and Utah. To date, 21 states have adopted the Act, including Pennsylvania, the home state of the Pennsylvania Rule (1945).
its adoption in Maryland in 1939, now over twenty years ago, not one single case has reached the Court of Appeals for a construction of its terms. In other states, the record is almost as good. The statute is clear in its language, simple in its application and uniform in its result.

For all practical purposes, the Principal and Income Act adopts the Massachusetts Rule. All distributions in stock of the paying corporation, whether in the form of stock dividends or stock splits, are treated as principal, and all distributions in cash are treated as income. When the trustee has the option of receiving a distribution in cash or in stock of the paying corporation, it is treated as the equivalent of a cash dividend and, therefore, income, regardless of the election made by the trustee. Distributions payable in securities or obligations of other corporations are treated as income. Rights to subscribe to securities of the distributing corporation and the proceeds of sale thereof are deemed to be principal, but rights to subscribe to securities in other corporations, and the proceeds of sale thereof, are treated as income. The Act contains special rules governing liquidations, mergers, consolidations and reorganizations.

As noted in the Lindau case, the Principal and Income Act permits the testator to prescribe some other method for the "ascertainment of income and principal and the apportionment of receipts and expenses." Sometimes it is necessary to resort to this privilege to satisfy the wishes of the creator of the trust, and some testators will want to leave the matter to the discretion of the trustee. But all too often, it seems, the draftsmen of modern wills are prone to copy one of several forms dealing with principal and income, forms which were in vogue during the hey-day of the Pennsylvania Rule. Generally speaking, these clauses contribute nothing but confusion when used in present-day trust instruments. The subject has been adroitly covered

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See the publication of the Act in Uniform Laws Annotated with annotations.


Ibid.

Ibid. Cf. n. 50, supra.


188 Md. 474, 477, 53 A. 2d 409 (1947). This deed of trust contained a clause reading:

"All stock dividends to the extent they are paid out of current earnings for the current fiscal or preceding year shall likewise be treated as income as of the date of their payment; but all other stock dividends shall be treated as corpus..."

Query: In the clause used in the Lindau trust and quoted in the previous note, what is a "stock dividend?" Does the term include a
by the Statute, and most attempts to deal with it in the controlling instrument accomplish nothing except to bring the case back within the discredited and discarded Pennsylvania Rule.

V. — THE DONALDSON AND APPONYI CASES

The Donaldson case\(^6\) presented the following facts: In 1957 the life tenant of a testamentary trust created by a testator who died in 1908 brought a bill in equity to compel an apportionment of three "modern stock splits," i.e. those of The Texas Company in 1951 and 1955 and of American Gas & Electric Co. in 1956. The Texas Company distributions were each 2-for-1, and the American Gas & Electric Co. distribution was 1½-for-1. Neither distribution of The Texas Company was supported by any reduction in par value, and the American Gas & Electric Co. distribution even involved an increase in par from $5.00 to $10.00 per share. None of the three distributions, therefore, qualified as a "true stock split" which traditionally results only in a reduction in par value and a corresponding increase in the number of shares outstanding.

The trustee argued that the "modern stock split" was a different genre from the "true stock split", and that the discredited Pennsylvania Rule should not be extended to cover this new phenomenon of corporate finance.\(^6\) In support of this contention, the trustee pointed to the resolutions of the corporate directors establishing as a motive for each distribution the reduction of market value of the stock to levels more attractive to the average investor.

The trustee also stressed the Rules of the New York Stock Exchange requiring the capitalization of market value of the new shares in the case of stock dividends representing 25% or less of the stock previously outstanding.\(^1\) This contention was supported by the holding of the Surrogate's Court of Monroe County, N.Y., In re Lindsay's Will, 11 Misc. 2d 374, 109 N.Y.S. 2d 600 (1952), but this decision was patently inconsistent with other New York cases, such as In re Lissberger's Estate, 271 App. Div. 804, 64 N.Y.S. 2d 370 (1946); In re Strong's Will, 198 Misc. 7, 96 N.Y.S. 2d 75 (1950); and In re Davis' Estate, 11 Misc. 2d 372, 128 N.Y.S. 2d 152 (1953), the last named case involving the same 1951 Texas Company split which was presented in Donaldson.

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\(^1\) This contention was supported by the holding of the Surrogate's Court of Monroe County, N.Y., In re Lindsay's Will, 11 Misc. 2d 374, 109 N.Y.S. 2d 600 (1952), but this decision was patently inconsistent with other New York cases, such as In re Lissberger's Estate, 271 App. Div. 804, 64 N.Y.S. 2d 370 (1946); In re Strong's Will, 198 Misc. 7, 96 N.Y.S. 2d 75 (1950); and In re Davis' Estate, 11 Misc. 2d 372, 128 N.Y.S. 2d 152 (1953), the last named case involving the same 1951 Texas Company split which was presented in Donaldson.
Distributions of 100% or more of the stock previously outstanding are, however, treated as splits, and only the par value need be capitalized. Distributions between 25% and 100% are presumptively splits, but must be individually judged on their own facts. These rules, so argued the trustee, show that in modern financial and accounting practice there is a very real distinction between a small distribution of stock representing a division of earnings and a large one representing a split-up of the corporate equity into smaller lots at more attractive prices for the average investor. The sharp increase in the number of these splits in the post-war period suggests further that they are a by-product of the contemporary period of inflation.

These arguments are persuasive but run afoul of the principle of stare decisis. As we have already noted above, both Coudon v. Updegraff and Baldwin v. Baldwin involved the application of the Pennsylvania Rule of Apportionment to 100% "stock dividends"—distributions which differ from our definition of "modern stock splits" only in that they were not modern. This poses an interesting question for the student of jurisprudence: At what point must the principle of stare decisis yield to changing social and economic concepts? In his decision in the Circuit Court in the Donaldson case Judge Reuben Oppenheimer answered this question by saying: "Legal questions arising out of corporate actions are no more to be decided in a vacuum drained of the social and economic context of the times in which we live than are questions of civil liberties and due process of law."

The Court of Appeals reversed. Holding itself bound by stare decisis, the court ordered an apportionment of the three stock distributions received by the Donaldson trustee. Unless one is willing to accept Judge Oppenheimer's jurisprudential approach, it is difficult to criticize the decision of the Court of Appeals.

In further defense of Donaldson, one may wonder what formula the court could have devised to restrict the application of the Pennsylvania Rule to "modern stock splits" and yet preserve its application to "stock dividends." The Rules of the New York Stock Exchange might suffice for distributions under its jurisdiction, but what about stocks

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67 Discussed supra, n. 2. In this context, the term "market value" is used in the sense of "current value adjusted for the effect of this distribution."

68 117 Md. 71, 83 A. 145 (1912).

69 150 Md. 175, 150 A. 282 (1930).
not listed on this exchange? And what if these rules should change? Would it be fair to resolve a question of trust accounting in terms of such variable rules or even in terms of a fixed listing agreement between the distributing corporation and a stock exchange? Could it not be argued that the decision of the lower court in the Donaldson case would have created as many problems as it would solve?

As a result of the long line of Maryland decisions culminating in the Donaldson case, the Pennsylvania Rule in this state may be said to involve the independent application of three tests, and the life tenant receives the least number of shares resulting from each of them. These three tests are as follows:

1. The life tenant may receive no more than those shares which represent the proportion of earnings capitalized. Thus, if a 2-for-1 stock distribution of 100 shares were received by the trustee, equivalent to one share for each of the 100 shares originally owned by the trust, and if the distribution were supported 80% by a charge to earned surplus and 20% to capital surplus, no more than 80 new shares could be apportioned to income. The remaining 20 new shares, plus the 100 old ones, or 120 in all, would stay in principal.

2. The life tenant may receive no more than those shares which represent earnings capitalized and earned during the holding period of the stock by the trustee. Thus, in the example given above, if the 80% charge to earned surplus exceeded the earnings realized by the paying corporation during the period that the stock was held by the trustee, so that, let us say, only 70% of the total distribution represented the capitalization of such earnings, then the life tenant could receive no more than 70 shares out of the 100 new shares paid to the trustee. The remaining 30 new shares, or 130 in all, would stay in principal. Manifestly, the application of this test introduces a factor of approximation, if not guess-work, into the calculation, since

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70 In the case of In re Terhune, 50 N.J. Super. 414, 142 A. 2d 684 (1958), the New Jersey court refused to be bound by the listing agreement between Socony Mobil Oil Co. and the New York Stock Exchange under which earnings which are capitalized to support a stock dividend can no longer be used to pay dividends even if credited to capital surplus rather than capital stock account. Instead, the court insisted on looking to controlling corporation law in applying the New Jersey Rule which limits the apportionment to that portion of the capitalized earnings which are credited to an account from which future cash dividends cannot be paid.

70a For a recent criticism of a stock exchange rule from a trust accounting point of view, see McCaffrey, Stock Dividend or Split, 99 Trusts & Estates 366 (April 1960).
precise earnings figures are rarely available for any given holding period.

(3) The life tenant may receive no more than those shares which would leave intact the book value of the investment in the hands of the trustee reckoned as of its acquisition date. Thus, in the example given above, if the book value of the investment at the time of its acquisition were, let us say, $10.00 per share, or a total of $1,000 for the 100 shares originally owned by the trustee, and if, after the stock distribution, the book value of the paying corporation's stock were $6.00 per share, then it would take a total of 166⅔ shares at $6.00 each to maintain in principal the original book value of $1,000. Hence, to avoid an impairment of book value, only 33⅓ shares of new stock could be paid to the life tenant, and the remaining 66⅔ shares would have to stay in principal. Since the book value test, or Test No. 3, thus results in the least number of shares to be apportioned to income from the application of all three tests, it is the one which would be applied in the hypothetical case presented. It would be noted, however, that the application of this test, like Test No. 2, introduces even more approximation and guess-work into the calculation, since precise book value figures are also rarely available for the two measuring dates. Moreover, book values are even less indicative of intrinsic worth than published earnings figures because a corporation's various capital and surplus accounts may be affected by corporate accounting practices which are wholly unrelated to its business record.7

After the decision in the Donaldson case, there came the case of Mercantile-Safe Deposit & Trust Company v. Apponyi,72 a consolidated test case instituted to clarify the application of the above stated rules to the seven million dollars worth of stock held by one trust company and subject to the Donaldson case. In this latest, if not the last word on the subject, the Court of Appeals reaffirmed the Donaldson rule even where it required the distribution, as income to a life tenant, of $137,000 worth of stock in a

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7 See: PATON, ADVANCED ACCOUNTING (1947) 347, commenting on the widespread depression practice of writing down the value of assets in plant account and charging the write-down to a capital reduction surplus. One large company is reported thus to have written off $50,000,000 in plant account at one fell swoop. If this company had later made a stock distribution subject to apportionment under the Donaldson case, the "book value test" would have been something like an elastic yardstick. The day before the write-down, the test would have given one result, and on the day after, a very different one.

72 220 Md. 275, 152 A. 2d 184 (1959).
trust estate of about $450,000. The court rejected the trustee's contention that, in applying the book value test, adjustments should be made for changes in the purchasing power of the dollar, and ruled that the modern stock split as hereinabove defined is to be treated as an apportionable "stock dividend" to the extent that earnings are capitalized. Hereafter, it would seem immaterial that the paying corporation may have labeled the distribution as a "split", a "split-up" or words to that effect. To the extent that the three tests of the Pennsylvania Rule are satisfied, the distribution is apportionable regardless of its label.

The law is "settled," said the court, "and we shall not unsettle it." In other words, the Pennsylvania Rule is here to stay as to pre-1939 trusts not governed by the Uniform Act.

Eventually, the problem will solve itself by the passage of time, but, meanwhile, and possibly for another seventy-five or hundred years, the trustees of this State will have to struggle with the application of the Rule to an ever increasing number of new situations — regular stock dividends designed to effect distribution of a company's entire net annual income, stock dividends and splits issued in

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73 The distributions involved in the consolidated cases were the General Electric split of 1954, the American Cyanamid split of 1957, as well as the same Texas Co. and American Gas & Electric Co. splits which were presented in Donaldson. Of these, and by far the largest was the General Electric split of 1954 which the New York courts had held apportionable under the Pennsylvania Rule. In re Fosdick's Trust, 4 N.Y. 2d 646, 152 N.E. 2d 228 (1958). The Supreme Court of Pennsylvania held otherwise in In re Cunningham's Estate, 395 Pa. 1, 149 A. 2d 72 (1959). For a discussion of the recent Pennsylvania cases, see Cohan, Pandora's Box Revisited, 98 Trusts & Estates 655 (1959), and Niles, Fosdick, Cunningham and Chaos, 98 Trusts & Estates 924 (1959).

74 This proposed "refinement" of the Rule was suggestive of the recent Pennsylvania case. In re Harvey's Estate, 395 Pa. 62, 149 A. 2d 104 (1959), which permitted the book value of the investment in stock of an insurance company to be adjusted to reflect changes in the market value of the insurance company's invested portfolio.

75 See: In re Tealdi's Trust, 16 Misc. 2d 685, 182 N.Y.S. 2d 68 (1958), dealing specifically with the problem of nomenclature and holding that Standard Oil and Proctor & Gamble distributions, both labeled as "stock splits" or "split-ups", are to be treated as "stock dividends" to the extent that earnings are capitalized.

76 Although the trustee's contentions in the Apponyi case met with scant favor in the Court of Appeals, they were given a gracious nod of approval in a recent case note in the University of Pennsylvania Law Review, 108 Pa. L. Rev. 147 (1959). The Note concludes with the statement: "The argument made by the trustee in the present case offers a reasonable solution to the problems of fulfilling the settlor's intent, compensates for inflation and coincides with more recent views on the nature of corporate stock distributions."

77 See: for example, the unusual announcement of Commonwealth Edison Co. of September 2, 1958, that henceforward it expects to pay a base quarterly cash dividend and also an annual "supplementary stock dividend" substantially equivalent to the balance of the company's net annual earnings.
connection with the consolidation of two or more companies,78 death sentence spin-offs in compliance with orders under federal regulatory statutes,79 and a host of other hybrid corporate transactions on a scale which was never dreamed of when Thomas v. Gregg was decided in 1894.80

The application of the Pennsylvania Rule to modern corporate distributions also causes serious inconveniences in trust administration. The calculation of the American Gas & Electric Co. apportionment in Donaldson required the determination of corporate earnings and book values for five different acquisition dates and their application to eleven different sets of mathematical computations stretching out over three folded printed pages in the record extract. The court referred casually to "these complicated calculations", but anyone who has shared the experience of studying them cannot but be appalled at their complexity. "These complicated calculations" conjure up the vision of a conscientious lawyer or trust officer trying in vain to comply with the law against insuperable odds. The late Judge Parke, himself a distinguished country lawyer, visualized this same picture when he extolled the simplicity of the Massachusetts Rule and urged in his dissent in the Heyn case that the 1929 Act be construed so

78 As, for example, the 1958 stock distributions of Springfield Fire & Marine Co. in connection with the acquisition of Monarch Life Insurance Co.
79 For example, the stock divestiture provisions of the federal court decree which were upheld by the Supreme Court in United States v. Crescent Amusement Co., 323 U. S. 173, 189 (1944), a leading anti-trust case.
80 Another serious complication develops from the application of principles of conflict of laws to the apportionment problem. Query: If the Apponyi trust had been created by a Massachusetts domiciliary under a will made and probated in that state but naming a Maryland trust company as trustee, would the Massachusetts Rule or the Pennsylvania Rule have been applied? Or, suppose the situation were reversed and a Massachusetts trust company were named as trustee in a pre-1939 will of a Maryland domiciliary? Is the question one of "construction" to be determined by the law of domicile, or is it one of "administration?" See: Bank of New York v. Shillito, 14 N.Y.S. 2d 458 (Sup. Ct. Westchester Co., 1939), holding that the question is one of construction and applying the law of the testator's domicile to the hypothetical question above stated. Compare: Fell v. McReady, 236 App. Div. 390, 259 N.Y.S. 512, 522, aff'd. 263 N.Y. 602, 109 N.E. 718 (1933); Cadbury v. Parrish, 89 N.H. 464, 200 A. 791 (1938); Selleck v. Hawley, 331 Mo. 1058, 56 S.W. 2d 387 (1933); Land, Trusts in the Conflicts of Laws, 14 (1940) 178-179. Restatement, Conflict of Laws (1934), §§ 277-299, inclusive, suggests that the question may be one of administration to be decided, in some cases, by the law of situs of the trust rather than of the state of the testator's domicile. Although the question does not seem to have been squarely raised in the Maryland cases, the decisions in Smith v. Mercantile Trust Co., 159 Md. 264, 86 A. 2d 504 (1932), Staley v. Safe Deposit and Trust Company, 189 Md. 447, 56 A. 2d 144 (1947) and Prince de Bearn v. Wlnaus, 111 Md. 434, 74 A. 626 (1909) suggest that the Shillito holding might meet with favor in the Maryland courts.
as to bring about the same result. He said in this connection:

"... it [the Massachusetts Rule] relieves the fiduciary of many heavy responsibilities, such as ascertaining the intact or original dollar value of the trust corpus; or whether the dividend is declared from surplus which was earned before or after, or partly before or after the operative date of the instrument creating the successive rights; and, if accumulated partly before and after either the operative date of the instrument or the termination, during the period of the operation of the instrument, of a successive right of income, what are the relative amounts of the income which had accumulated before and after such points of division. The discharge of such duties would oblige the fiduciary to obtain information from the corporation, which he may act upon and so run the risk of its accuracy. If he should desire to go back of such information and assure himself of the true condition of the corporation, he would require expert aid, and, the greater the length of time included by his inquiry, the more costly it would become, especially if the corporation is of foreign origin or location. Not every fiduciary would be competent nor possess the facilities to fulfill these obligations, nor is every trust or fund possessed of the financial resources to acquire the necessary information. So a fiduciary would be frequently compelled to choose among expensive investigation, litigation, or the assumption of a risk which he ought not to bear. These considerations argue for the reasonableness of the construction of the statute here maintained."

VI — THE PROBLEM RESTATED

It is too late to construe the 1929 Act as the equivalent of the Massachusetts Rule — as Judge Parke has recommended. And in the light of the Apponyi decision, it is certainly too late to ask the court to abrogate the rule by judicial decision, as was done in New Hampshire. However, there are several ways in which the apportionment

174 Md. 639, dis. op. 684-685.
problem may be controlled, and perhaps even solved, in the years that lie ahead:

(1) Now that the law is settled as to the "modern stock split", a trustee may, in appropriate cases and with the consent of the life tenants, have to consider whether the application of the Pennsylvania Rule should be obviated by selling a particular stock after an announcement of the split but before the stock of record date arrives. The proceeds of sale will, under Smith v. Hooper, be principal, and after the split has been effected, the trustee can, if desired, buy back the same investment in the larger number of shares resulting from the split, or, of course, he can buy some other investment. This will usually entail a capital gains tax and some risk of market fluctuations, but the principal of the trust will, it is believed, be better off to pay this tax and take the risk of an increase in the price of the stock in the intervening period than to submit to the depleting effect of the Pennsylvania Rule.

In many cases the trustee may be able to secure the advance consent of the life tenants to such a sale and repurchase. Frequently, the life tenants do not, or should not want the stock distributable to them under the Donaldson rule since such receipts can cause serious federal estate tax complications. It is believed that more often than not such a sale and repurchase might be welcomed by the life tenants and that the resulting capital gains tax would be a small price to pay for the saving to be realized in federal estate taxes. If, however, the life tenants object, such a sale and repurchase cannot be recommended.

8 For a discussion of the date as of which the identity of the income beneficiary is to be determined see supra, n. 32. Obviously, any sale to obviate the application of the Pennsylvania Rule would have to be made before the record date to avoid receipt of the new stock by the trustee and a corresponding change in the market value of the old stock.

9 Md. 16, 54 A. 95 (1902).

5 See: Dunham, Trustee's Dilemma As To Principal-Income, 98 Trusts & Estates 932 (1959), and authorities therein cited. As the author observes, a trustee's duty of impartiality is put to a severe test if he sells in anticipation of a stock distribution.

6 As a result of the Apponyl decision, for example, an elderly life tenant was given outright, as income, about $137,000 worth of stock which, if kept in the corpus of the estate, would have passed tax-free at her death. Although the record shows that this life tenant very much wanted to receive this distribution, other life tenants who feel differently may encounter gift tax problems if they refuse to accept their apportionments.

7 Such a sale and repurchase might be challenged on the authority of the second Bowen case. [Bowen v. Safe Deposit & Trust Co., 188 Md. 490, 53 A. 2d 416 (1957)], involving a sale by a trustee of defaulted bonds after a plan of reorganization has been announced. There, the Court of Appeals held that the proceeds of sale should be apportioned between income and
Draftsmen of wills and deeds of trust should be warned to refrain from writing clauses which will only perpetuate the Pennsylvania Rule as to post-1939 estates. It would seem that in general the best procedure to follow is to omit all provisions dealing with principal and income, and to let the statute take care of the matter. In some cases, to be sure, the Pennsylvania Rule may bring the result desired by the creator of the trust, and in others the testator may want to leave the matter to the discretion of the trustee. In every such case, however, the consequences of such clauses should be thoroughly understood by the draftsman and explained to the testator.

The General Assembly should be urged to enact a statute amending the Principal and Income Act to extend its application to all corporate stock distributions made after the effective date of the amendment, regardless of the date of the creation of a particular trust estate. Although the courts of Pennsylvania and New Jersey have regarded such legislation as "retroactive" and hence inapplicable to existing trusts, there is respectable authority to the contrary. The Supreme Court of Wisconsin has recently upheld the application of the Wisconsin Act to all pre-existing estates, on the rationale that trust beneficiaries have no vested constitutional rights in future earnings of companies in which the trust has invested securities; and that although the income beneficiaries are entitled to receive "income", this right does not carry with it the right to freeze for all time the concept of what is

principal in the ratio that the accrued but unpaid interest bore to the unpaid principal. The court emphasized that these bonds, unlike stocks, carried fixed obligations as to both interest and principal, and that for trust accounting purposes, therefore, it was only equitable that the proceeds of sale should be apportioned between the life tenants entitled to the income and the remainderman entitled to the principal. Because of this distinction, it is not believed that the second Bowen case would bar the suggested sale and repurchase of stocks subject to modern stock splits especially since the Court of Appeals in the first Bowen case, in re Crawford's Estate, 362 Pa. 458, 67 A. 2d 124 (1949); in re Pew's Estate, 362 Pa. 468, 67 A. 2d 129 (1949); in re Steele's Estate, 377 Pa. 250, 103 A. 2d 459 (1954); in re Warden's Trust, 382 Pa. 458, 67 A. 2d 124 (1955); in re Fera, 26 N.J. 131, 139 A. 2d 23 (1958); in re Wehrmane's Estate, 41 N.J. Sup. 156, 124 A. 2d 334 (1956 Ch. Div.), aff'd. 23 N.J. 205, 128 A. 2d 651 (1957). Unlike the first Pennsylvania Principal and Income Act, the New Jersey Act did not purport to apply to existing trust estates, and the comments in point which are made in the above cited cases are dicta.
After all, many trust concepts are subject to change over the years, and some of them have a direct bearing on the amount of income which the life tenants receive—as, for example, the rate of the trustee's commissions which is not considered frozen at the percentages in effect when the trust was created unless the trust instrument expressly so provides.

The commentators have been eloquent in urge statutory relief for the dilemma caused by the recent apportionment cases in Pennsylvania and New York. See, for example, a recent comment concluding that "a retroactive statute relating to stock dividends would be sustained in most states—especially if the statute were restricted to hybrid dividends . . . ." Although the Maryland Court of Appeals has been traditionally hostile to all forms of "retroactive legislation" in the fields of testamentary and trust law, a persuasive argument could be made that the legislation here proposed is not "retroactive" at all in the constitutional sense. Manifestly, the statutory solution is the only truly effective method of controlling the apportionment chaos, and it seems to this writer well worth the effort.

(4) And, finally, as new and different situations come before the courts for interpretation and the application of the Pennsylvania Rule, the nature of the problem should be laid before the bench in terms which clearly explain it in its historical perspective. In this regard, if this study has clarified in some small measure some of the many inconsistencies of the Pennsylvania Rule as applied in this State since 1894, it will have fulfilled its purpose.

80 In re Allis' Will, 6 Wis. 2d 1, 94 N.W. 2d 226 (1959), noted with approval in 73 Harv. L. Rev. 605 (1960).
81 Russell D. Niles, Fosdick, Cunningham & Chaos, 98 Trusts & Estates 924 (1959). And see also a recent casenote in 73 Harv. L. Rev. 605, 606, suggesting that the validity of a retroactive application of such a statute should turn on three factors: (1) the nature of the public interest in the legislation, (2) the extent to which preenactment rights are affected and (3) the nature of those rights.
THE PRODUCTION AND ADMISSIBILITY OF
GOVERNMENT RECORDS IN FEDERAL
TORT CLAIMS CASES†

By GOODLOE E. BYRON*

The twelve year history of the Federal Tort Claims Act1 since its enactment in 1946 as a part of the Legislative Reorganization Bill of the Seventy-ninth Congress, has been marked by procedural disputes in litigation brought under the Act. Since Congress had as its main purpose in enacting the Federal Tort Claims legislation the substitution of the Federal Courts as a proper forum for adjudicating civil actions against the United States in place of the cumbersome private bill legislative method,2 it was anticipated that the new procedure would not only remove this burden from the Congressional deliberations, but also that it would prevent many of the injustices which had been done in the past to the claims of private citizens against the sovereign. There was a natural inclination behind its passage for the Government to assume the obligation to pay damages for the misfeasance of employees in carrying out its work and this Act was therefore Congress' solution, affording easy and simple access to the Federal Courts for torts within its scope.3 Consequently, most of the Circuit Courts and some of the District Courts which have considered the question have held that the Act should receive a liberal construction in view of its purpose.4 And in connection with a liberal construction, the United States was considered to be on a par with private litigants in litigation properly brought under the Federal Tort Claims Act.5

In spite of this benevolent purpose and liberal construction, Federal Tort Claims litigation has become a fertile area for the growth of procedural and evidential

† A seminar paper prepared for the Graduate Course in Evidence and Trials, George Washington Law School, in 1958.
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2 By 1944 the 78th Congress was obliged to review 1,644 bills for private relief, of which 549 were approved for a total of $1,355,767.12. H. R. Report No. 1287, 79th Congress, 1st Session, p. 2.
4 United States v. Campbell, 172 F. 2d 500 (5th Cir. 1949); Panella v. United States, 216 F. 2d 622 (2nd Cir. 1954); Jones v. United States, 126 F. Supp. 10 (D.C. D.C. 1954).
disputes, especially in connection with problems involving the production and admissibility of Government records and reports. Although it shortly became well established that the Federal Rules of Civil Procedure were applicable to Federal Tort Claims litigation, the many interpretations given in such cases to the rules, and particularly the discovery rules, have caused numerous procedural headaches. Moreover, the problem of admissibility of evidence once obtained by discovery, while not as significant, has also created much concern in Tort Claims cases.

Federal Government activities in gigantic proportions and increased complexity in the already complex governmental operations are responsible for thousands of accidents involving damages or loss of property and personal injury or death. Accidents involving military aircraft, post office vehicles, federal doctors and hospitals, nuclear tests and experimental activities conducted by the Atomic Energy Commission, National Park Service Activities, and activities on United States owned property have been common sources of Tort Claims' litigation. Government regulations provide for extensive investigations and complete reports as an immediate aftermath of even the smallest accident involving a governmental operation. This is particularly true in the armed services where for example an airplane crash may be investigated in painstaking detail by highly trained investigators not only for the purpose of improving future flight safety, but also for the preparation for future claims and litigation. Many of the records and reports filed as an adjunct to such investigations are classified as confidential or secret by government regulations.

On the other hand, plaintiffs in such cases involving alleged government negligence are often unable to make a satisfactory investigation due to factors of time, inaccessibility, and expense, not to mention unfamiliarity with the technicalities of the investigative procedures, and must therefore turn to the Government's records and reports in their quest for information in order to prepare

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7 There were over 392 U. S. Hospitals treating approximately 1,461,289 patients in the year 1953. AMA Journal May 15, 1954, Vol. 155, No. 3, Hospital Service in the United States.
8 A rather bizarre case involved a suit by Yellowstone National park campers, whose camping ground was raided by bears after the plaintiffs had been informed by park rangers that there was no danger from bears. Claypool v. United States, 98 F. Supp. 702 (S.D. Cal. 1951).
their cases. Obviously, plaintiffs must then resort to the discovery rules and in particular to Rule 34 which provides in part for the production of documents, records, etc., and in many instances the Government’s refusal to produce because of lack of good cause or privilege or other reason then creates the issue. In the event plaintiffs succeed in obtaining the requested records and reports from the Government, there may be an additional question as to whether or not such evidence is admissible during the trial. Ordinarily, however, since the court tries claims under the Tort Claims Act without a jury, questions regarding the admission or exclusion of evidence are not so important as in jury trials and it is therefore to the problem of obtaining evidence that primary consideration should be given.

**Production of Government Records and Reports**

Although the Federal Rules of Civil Procedure provide various discovery weapons such as depositions under Rule 26, written interrogatories under Rule 33, and production of documents under Rule 34, the most effective and most used method in the more complex Federal Tort Claims litigation has been Rule 34. There is a good reason for this and again the airplane crash situation provides the best example. In the typical military plane crash case involving injuries or death to private persons, the instrumentality involved is usually within the exclusive possession and control of the United States and it is virtually impossible for the plaintiffs to make an independent investigation of the cause of the accident. Even if detailed interrogatories are submitted to the Government requesting the names of witnesses who gave testimony at the accident investigation board hearing held immediately after the crash, it may often be exceedingly difficult for technically-unskilled plaintiffs to obtain adequate information by depositions of such witnesses. Such difficulties were encountered by plaintiffs in the case of Reynolds v.

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11 Rule 34 Fed. R. Civ. P. provides in part:

"Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody or control . . . ."
United States,\textsuperscript{12} and the District Court, in rejecting the Government's contention that plaintiffs could take the depositions of the Government's witnesses stated:

"The plaintiffs have no knowledge of why the accident happened. So far as such knowledge is obtainable, the defendant has it. When the airplane crashed, it was wrecked and much of the evidence of what occurred was destroyed. Only persons with long experience in investigating airplane disasters could hope to get at the real cause of the accident under such circumstances. The Air Force appointed a board of investigators immediately after the accident and examined the surviving witnesses while their recollections were fresh. With their statements as a starting point the board was able to make an extensive investigation of the accident. These statements and the report of the board's investigation undoubtedly contain facts, information, and clues which it might be extremely difficult, if not impossible, for the plaintiffs with their lack of technical resources to obtain merely by taking the depositions of the survivors . . .

"Beside all this, the accident happened more than 18 months ago and what the crew would remember now might well differ in important matters from what they told their officers when the event was fresh in their minds. Even in simple accident cases requiring no technical knowledge to prepare for trial, the fact that a long period of time has elapsed between the accident and the taking of the deposition of a witness gives a certain unique value to a statement given by him immediately after the accident when the whole thing was fresh — particularly when given to an employer before any damage suit involving negligence has begun."

Thus it is apparent that Federal Tort Claims plaintiffs when faced with the task of obtaining information for preparation for trial will make every effort to require production of government records, and most frequently they will then encounter the Rule 34 requirement of showing good cause and the Government's refusal to produce because of privilege.

Generally in determining what amounts to good cause under Rule 34 the trial court has a wide discretion. To keep the Federal discovery procedure flexible there has been no attempt to establish rigid rules and the problems of each particular case have been considered uniquely.13 In all of the reported Federal Tort Claims cases in which plaintiffs have resorted to the production power of Rule 34 and in which the Government has raised the question of "good cause" the courts have almost uniformly treated the issue separately and have been liberal in their requirements as to what constitutes "good cause." Thus in Evans v. United States14 involving a Federal Tort Claims action to recover for the alleged negligently caused death of a certain cotton picker who was killed when an Army Air Force plane crashed into a field in which deceased was working, plaintiffs filed a motion under Rule 34 for the production of the official Air Force accident investigation report and copies of signed statements given by eyewitnesses. The United States in resisting the motion alleged in part that good cause had not been shown. The District Court granted the motion and stated:

"In view of the allegations of the complaint and the motion to produce to the effect that all of the sources of information, documents, and witnesses with respect to what caused the accident are in the possession of and under the control of the government such as the officers, enlisted men, employees and records of the Army Air Base at Barksdale Field, who refuse complainants request to see them, and the latter have no other source from which the information sought can be had, it is the view of this court that the same constitutes good cause sufficiently within the meaning of the rule justifying the granting of the motion to produce."

And in Bentley v. United States,15 a Tort Claims action by the widow of a deceased Air Force sergeant who was found beside the tracks of the Santa Fe Railroad after he had been permitted to board the train allegedly through the defendants' negligence, despite a recent attack of insanity, plaintiff moved for the production of the Army-Air Force investigation report (the so-called "line-of-duty determination") into the cause of the death of deceased. The

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13 Ibid, 470.
Maryland Law Review

United States Attorney, without formally answering the motion to produce, insisted on oral argument that the plaintiff be held to the requirement of "good cause." The Court in rejecting the lack of good cause argument noted:

"The magnanimity of the sovereign in laying aside its immunity from suit to the extent expressed in the Federal Tort Claims Act must be paralleled by a fairly liberal interpretation of procedural provisions to the end that, in the case of a tragedy under such unusual circumstances as these, the facts may be known by the next of kin."

A similar ruling was announced by the Delaware District Court in *Eastern Air Lines v. United States*, when the defendant United States sought to prevent the production of a confidential investigation file made by the Air Force Inspector General, by claiming that plaintiff, which had suffered extensive property damage to an airliner in a collision with an Army bomber whose pilot was practicing military maneuvers, had not shown good cause. The Federal Tort Claims case of *Synder v. United States* is a rather noteworthy exception to the liberality given the good cause requirement in the previous cases. In proceedings on plaintiff's motion to strike out the Governments' answer and for incidental relief upon the ground that the hearing records of the aircraft accident board and records of repairs, inspections, and for maintenance of the airplane alleged to have caused the damage, the Court announced that under all of the circumstances, plaintiff had not established good cause for invading the privacy of his adversary's preparation for trial. The unusual reasoning then given was that the hearing records constituted the so-called "work product" of an attorney and that it was contrary to public policy to require a lawyer to furnish his adversary with his work product. Here the rule against the compulsory disclosure to an adversary of the "work product" of an attorney was applied to statements obtained by others for the use of counsel as well as to statements taken personally by counsel, and the court indicated that the fact that statements of witnesses had been obtained by government investigators for use in connection with claims or suits against it would not deprive the Government of the benefit of the rule against com-

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16 110 F. Supp. 491 (D.C. Del. 1953). It is interesting to note that the question of confidential privilege was not raised by the United States in this case although it arose after the Supreme Court decision in United States v. Reynolds, supra, n. 12.

pulsory disclosure, where such statements had been channeled to the United States Attorney who was charged with defending a suit against the Government arising out of accidents. Even though it was announced that the point involving the sanctity of the so-called "work product" was based on public policy as established in Hickman v. Taylor,18 and as modified by Alltmont v. United States,19 the Court further stated that production might be justified where the witnesses are no longer available or can be reached only with difficulty. It would seem, therefore, when adequate consideration is given to the liberal treatment of good cause in the other Tort Claims cases, that even in the event the witnesses, whose statements are sought to be made available, are within easy reach for deposition purposes, where the subject involves non-privileged technical matter requiring for its discovery especially trained investigators, production under Rule 34 should be required in spite of the work product rule. This in effect was recognized by the District Court in the Reynolds case20 in ruling that plaintiffs had shown good cause.

While there has been some difficulty with the good cause requirement of Rule 34 in Tort Claims' litigation, there has also been considerable confusion caused by the production of material not privileged aspect of the rule. Although the courts universally recognize the common law privilege against revealing state secrets of a diplomatic or military nature,21 a less clearly defined privilege against disclosure of confidential communications and official information of other kind (i.e., information obtained in the so-called governmental "house-keeping" investigations) has caused doubt on several occasions.22 The additional dilemma raised by the Government's refusal on a claim of privilege to submit the material in question to the court

18 320 U. S. 495 (1947).
19 116 F. Supp. 54 (E.D. Pa. 1953). Here on motion for production of written statements of certain witnesses in a libel in admiralty the discovery was denied as to those witnesses whose depositions libelant had made no effort to obtain and who were within easy reach. Although the court modified the work product rule by extending it to cover statements obtained by others for the attorney in connection with his preparation for trial, it touched the heart of the problem by distinguishing the situation involving technical matters which counsel, without the experience and knowledge necessary, might not be able to elicit upon depositions and which might have been disclosed in the witnesses' original statements given to technically trained investigating officers.
20 Supra, n. 12.
21 32 A.L.R. 2d 391.
for an "in camera" inspection for the purpose of considering the claim has been no less of a problem. These issues involving the question of privilege and its determination have been considered in several military plane crash cases. The plaintiffs, in each case, brought a claim under the Federal Tort Claims Act for wrongful death and in the course of the proceedings moved under Rule 34 for a copy of the official investigation report of the crash.

The case of Cresmer v. United States, involved a Federal Tort Claims action for the death of plaintiff's intestate who was killed by the crash of a naval aircraft into his home at Bayside, Long Island. Plaintiff, pursuant to Rule 34 moved for the production for inspection and copying of the report of the Navy Board of Inquiry. The Government opposed the motion on the ground that the report was privileged. To make certain that the report contained no military secrets the Court requested Government counsel to produce the report for examination, and after reading it and ascertaining that no such secrets were contained therein, granted the motion. Since the very nature of the defense made necessary an inspection of the data which plaintiff required in order to sustain his case, in the absence of a showing that a war secret or any secret appliance used by the armed forces was involved, it was considered to be unseemly for the Government to thwart the efforts of plaintiffs to learn as much as possible concerning the cause of the disaster. In Evans v. United States as previously mentioned, a Rule 34 motion for production of certain reports was resisted in part by the defendant for the alleged reason that the documents were confidential. In allowing the motion the Court stated:

"... It is not the exclusive right of any such agency of the Government to decide for itself the privileged nature of any such documents, but the court is the one to judge of this when such contention is made. This can be done by presenting to the judge, without disclosure in the first instance to the other side whatever is claimed to have that status. The court then decides whether it is privileged or not. This would seem to be the inevitable consequence of the Government's submitting itself either as a plaintiff or defendant to litigation with private persons. ..."
Reynolds v. United States brought a change of direction from that of the previous two cases and somewhat modified the "in camera" technique of inspection by the court where the Government asserts privilege. Here the widows of three deceased civilian observers brought consolidated suits against the United States under the Tort Claims Act alleging that their deaths had occurred as a result of negligence in the crash of a B-29 aircraft which was testing secret electronic equipment. In pre-trial procedure plaintiffs moved under Rule 34 for production of the Air Forces official accident investigation report and after the Government moved to deny access to its files on the basis in part that privilege applied under Air Force Regulations, the claim of privilege was rejected for the reason that the United States in such cases waived any privilege based upon executive control over government documents. After the District Court's decision, the Secretary of the Air Force, in a letter to the court, indicated that it had been determined that it would not be in the public interest to furnish the reports in question since the aircraft, together with its personnel, had been engaged in a highly secret mission for the Air Force. A formal claim of privilege was then filed along with an affidavit by the Judge Advocate General of the Air Force, asserting that national security would be impaired by the production of the demanded material and offering to produce the witnesses and to allow them to testify as to all matters except those of a classified nature. The District Court then ordered the Government to produce the documents in order that the Court might determine whether they contained privileged matter and when the Government declined, an order was entered under Rule 37(b)(2) that the issue of negligence be decided in plaintiffs' favor. The Court of Appeals affirmed as to both the showing of good cause and the ultimate disposition of the case as a consequence of the Government's refusal to produce the documents. The case was then reviewed by the Supreme Court, which held through the majority opinion of Mr. Chief Justice Vinson that there was a valid claim of privilege under Rule 34 and that the judgment entered after application of Rule 37 subjected the

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"Reports of boards of officers, special accident reports or extracts therefrom will not be furnished or made available to persons outside the authorized chain of command without the specific approval of the Secretary of the Air Force."
29 345 U. S. 1 (1953).
United States to liability on terms to which Congress did not consent by the Tort Claims Act. The Court decided further that where, as in the instant case, the Government asserts a formal claim of privilege based on military secrets lodged by the head of the department which has control over the matter after actual personal consideration by that officer, the claim should prevail and the Court should rely upon the executive determination without forcing a disclosure of the very thing the privilege is designed to protect. As noted in the opinion, matters of current importance involving preparation for national defense and the reasonable certainty that the accident investigation report would contain references to secret electronic equipment along with the opportunity provided plaintiffs to interview the witnesses certainly influenced the majority of the Court. A standard of necessity was established by the Court wherein in each case the showing of necessity should determine how far the Court should probe in satisfying itself that the Government’s claim of privilege should prevail, and stated:

"...where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake. A fortiori, where necessity is dubious, a formal claim of privilege, made under the circumstances of this case, will have to prevail..."

Thus the Supreme Court established a difficult test for future cases and it left unexplained how a court is to determine, except in the most obvious cases of military privilege, the validity of a claim of privilege without an examination of the questioned documents. Apparently a court must take an executive officer’s word that the report contains military information, without inspecting the report, thus abdicating judicial control over the evidence in a case to the caprice of executive officers. The earlier procedure, wherein if the court was in doubt as to the validity of the Government’s claim of privilege it would request that the information be submitted to it for an “in camera” inspection and if the Government refused (as it might) it would have to suffer the procedural consequences, seems to be more equitable to both parties. Since the Reynolds case the scope of the “in camera” practice has been limited,

80 Ibid, 7.
certainly on similar facts; however, the judge still has the ultimate power to determine whether the military secrets exist, although he must make the determination without examining the alleged secret documents and reports.31

It would seem therefore that although Reynolds would be applicable where privilege based on pure military or state secrecy is raised by the Government, the less-clearly defined executive privilege against disclosure of official information should not apply in Federal Tort Claims cases where the Government is liable in the same manner as a private individual. The latter concept was considered in Wunderly v. United States,32 involving Tort Claims litigation to recover from the United States for damages resulting from a collision between plaintiffs' automobile and an army jeep. The Government refused to furnish a copy of a statement made by the jeep driver's superior officer on the basis that official correspondence of the United States Army was privileged. The Court, in considering plaintiff's motion under Rule 37, refused to recog-

31 In this connection, dictum in Synder v. United States, supra, circa n. 17, 9, decided three years after Reynolds, is directly to the contrary when it is stated that:

"As to item No. 1 relating to military secrets, the Government should realize that at such time as it comes before a court of law, it is subject to and bound by the rules of law and may not, without regard to the law, arbitrarily decline to produce information upon the claim of a self-imposed restriction that it is classified information or that its disclosure would injure national security. As stated in the aforesaid earlier decision herein, if an adversary party in a pending action properly requests the information and the Government declines to respond because of alleged military secrecy, then it is obligated to submit the information or records to the court for its determination as to whether the claim of privilege is well-founded. The point is that when the matter is in litigation the court and not a government agency must ultimately adjudicate the question of privileges." [Emphasis supplied].

Furthermore, there are convincing arguments against the limitation imposed on the "in camera" practice by the Reynolds case and they are aptly stated in United States v. Certain Parcels of Land, 15 F.R.D. 224, 232 (S.D. Cal. 1953):

"Even in a case where the matter sought to be discovered from the Government is an object of rarest secrecy it is a high probability that duplicates have been made by subordinates in the department. Thus the secret is known to one or more stenographers or file clerks or photographers or other craftsmen, and likely as not to others including the United States Attorney, as well as his deputy who stands at the bar asserting the Government's privilege."

32 In Wigmore (3d Ed.) 779, § 2379, it is said:

"... It would rather seem that the simple and natural process of determination was precisely such a private perusal by the Judge. Is it to be said that even this much of disclosure cannot be trusted? Shall every subordinate in the department have access to the secret, and not the presiding officer of justice? Cannot the constitutionally coordinate body of government share the confidence?... "

nize the claim of privilege to protect documents in the files of the Department of Justice and indicated that where, as here, no contention is made that any military secrets possibly protected by the scope of the common law privilege are involved, the Government should produce the protected materials, or alternatively, face the procedural consequences of Rule 37.

The dilemma of the Tort Claims plaintiff, when faced with the problem of failure of proof to sustain his case because of the bar of military secrecy, could be resolved under some situations by a resort to the doctrine of res ipsa loquitur, although on at least one occasion reliance on res ipsa was to no avail. In *Williams v. United States* plaintiffs relied upon res ipsa loquitur to sustain their burden of showing negligence on the part of the Government and introduced limited evidence showing only that an accident had occurred due to the falling of flaming fuel from an exploded jet plane. Government counsel stated that because the national security might be imperiled thereby, no witnesses would be called on behalf of the Government. The Florida District Court decided in favor of the Government apparently on the theory that, since Section 421(a) of the Federal Tort Claims Act provides that the sections of the Act granting jurisdiction to the United States District Courts and establishing the general liability of the Government "shall not apply" where injury is the result of the exercise of a discretionary function, the plaintiff has a duty of negativing this exception before he can properly qualify as a Tort Claims' plaintiff. Translated into the proceedings of the instant case, this would indicate that the plaintiff had failed to show that the jet plane was not on an experimental flight (discretionary function) and thus had not established that the explosion was probably the result of operational negligence. On the other hand, the Tort Claims case of *O'Connor v. United States* brought a different result where the Government's motion to dismiss the complaint was denied. Plaintiff's husband had been killed in a plane crash while aboard a B-36 in Oklahoma on a training mission as a civilian employee of the Sperry Gyroscope Company and plaintiff, having been denied access to the Air Force Investigation Board hearing reports, relied upon

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34 218 F. 2d 473 (5th Cir. 1955).
36 251 F. 2d 939 (2d Cir. 1958).
res ipsa loquitur to establish her case. Here the court made no mention of plaintiff's failure to prove that her case did not fall within the discretionary function aspect of the Tort Claims Act, but indicated that the reasons underlying the theory of res ipsa are particularly applicable where, as here, plaintiffs are refused access to government records and reports. This would appear to be the more equitable approach, accepting the Government's dilemma of being forced to deny access to secret information, "as a risk necessarily concomitant to allowing suits against itself."  

**Admissibility of Government Records and Reports**

Having once obtained evidence from the Government in Federal Tort Claims litigation, the plaintiff is still confronted with the problem of presenting it to the court in order to sustain his burden of proof. Thus the all-important investigation report may contain information of a most compelling nature in favor of plaintiff's case and yet may be of little or no probative value and consequently inadmissible in evidence, and, as already seen, this can have disastrous effects on plaintiff's case, especially where there is material testimony in the report given by witnesses who are no longer available. Furthermore, in cases involving matters of a highly technical and complicated nature it may be most important for the court to have available not only the evidence contained in the report, but also the findings of fact and conclusions of the investigating board. In *Chapman v. United States* plaintiffs sued the Government to recover for the death of their son who died in a military plane crash and after obtaining the investigation report which contained the Board's conclusion that the crash resulted from the exercise of poor judgment on the part of the pilot, offered the entire report into evidence. The District Court sustained defendants' objection to the admissibility of the report and found no negligence. This was affirmed by the Fifth Circuit, indicating that the exclusion of the report, if error, was harmless, but that there was no error in its exclusion.

On the other hand, in cases of a less sophisticated nature, the results are more frequently different. Hence, an employer's treatment record from the Medical Depart-

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* 194 F. 2d 974 (5th Cir. 1952).
ment of plaintiff's employer was admitted under the Federal Shop Book Rule over defendant's objection, after the doctor in charge of the traumatic section of the company's hospital not only testified to his own treatment of the plaintiff, but also identified the record as one made in the regular cause of business of his department. And, an investigation report made by the clinical director of a United States Marine Hospital into the attendant circumstances of plaintiff's treatment while a patient in the hospital was held to be admissible as a whole in an action for personal injuries sustained by plaintiff after jumping out of a fourth floor window in the hospital, as the aftermath of an alcoholic binge while out of the hospital on a three-day pass. Photostatic copies of letters from the Bureau of Employees Compensation and the War Shipping Administration have been admitted for the purpose of determining whether plaintiff was an employee of the United States and therefore not entitled to recover under the Federal Tort Claims Act. Even the summarized record of an Army Special Court martial at which the private, whose vehicle struck the plaintiff's, pleaded guilty to a charge of wrongfully appropriating the Army vehicle, was considered to be appropriate to prove that the defendant's employee was outside the scope of his employment.

Perhaps the liberal approach to admissibility of Government records in Tort Claims cases would be more desirable since the cases are tried by the court without a jury and the court is less likely to be influenced by extraneous matter. This view was taken in Eastern Air Lines v. United States during determination of the admissibility of the so-called "Booth Letter". General Booth, an executive in the office of the Under Secretary of War, had written to Associated Aviation Underwriters admitting contributory negligence on the part of the Government with respect to the collision in question. The Court admitted the letter but indicated that the statements with reference to contributory negligence could have no probative value unless it was shown that the General had authority to make such admissions.

Landon v. United States, 197 F. 2d 128 (2d Cir. 1952). Here the entire record was admitted in spite of the fact that it contained the diagnosis of another doctor identified by the testifying doctor, who did not himself make the diagnosis.
CONCLUSIONS

Apparently the courts in most instances have applied a liberal treatment to questions of discovery and admissibility of Government evidence (generally records and reports) in Federal Tort Claims litigation. Certainly as to most issues of good cause under Rule 34 in the production of such Government records plaintiffs have received ample leeway in establishing their own inability to obtain substitute sources of information. Equally favorable treatment has been received in connection with the Government’s refusal to produce because of confidential privilege or privilege as defined by Executive Regulations. Although the well-established rule protecting state secrets of a military or diplomatic nature has been recognized without question, the problems created by the Reynolds decision continue to plague the courts. Especially troublesome is the question of how a court can adequately decide whether or not military secrets are involved without examining the records and reports alleged to contain such secrets. Reynolds clearly establishes the rule for future Federal Tort Claims cases that even in the event of the most compelling necessity (i.e., where there is no other evidence except that contained in the Government’s file) the Government through the Executive Department Head may refuse to make its file available to the court for inspection. Although it would then be entirely possible for the court to decide, without examination, that no secrets were involved and to subject the Government to liability under Rule 37(b), this result would be most unlikely without some indication in the Federal Tort Claims Act suggesting it as an alternative.

Perhaps then the logical solution to this dilemma would be by Congressional expression of intent on the subject. Congress in establishing the basis and procedure for Federal Tort Claims litigation was apparently aware of the difficulties involved in suing the Government. It

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46 WRIGHT, THE FEDERAL TORT CLAIMS ACT (1967) 141, says:

"The Government is represented in the defense of its cases by able attorneys. The injured plaintiff needs someone to protect his interests who is on a par with the lawyers employed by the Government and should be permitted to pay him a reasonable fee for his services. To assist the United States Attorney who will defend the case, there is a corps of lawyers in the Justice Department in Washington with all of the law at their finger tips, gathered from the hundreds of cases defended by the Department. The attorney for the plaintiff usually has to start from scratch in an unusual case.

"In a serious personal injury case, the plaintiff is generally in no position physically even to think intelligently for some time after
would seem that a procedure which would satisfy the otherwise meritorious claim of the Tort Claims plaintiff who is denied access to Government reports and records, and at the same time preserve the sanctity of the secret matter contained therein, would not be unattainable and would make continued reliance on the rather vague procedures established by Reynolds completely unnecessary.

the accident. But during this period, one or more investigators for the Government are busy in securing any and all evidence that might later prove useful in the defense. On the happening of an accident in which it is likely that a claim may be filed against the United States, the investigating agencies of the Government immediately spring into action. If the injury is caused by an employee of the Post Office Department, the Post Office inspectors will commence an investigation, interviewing witnesses and securing their version of the accident. The Federal Bureau of Investigation is charged with the investigation of many accidents. Many government agencies make their own investigations, which are often thorough. Plaintiff's attorney must make his own investigation, sometimes not being employed to do so until witnesses are scattered or their memories are dimmed. As a consequence, the plaintiff's lawyer is generally placed at a disadvantage from the minute he accepts the case."

47 Supra, n. 45.
Lord Baltimore and the Maryland County Courts

AUBREY C. LAND*

Anyone who leafs through that curious collection of death warrants, ship registries, and like miscellanea known as the Commission Records cannot fail to be struck by the unusual appearance of the twenty-third folio. Here, on 4 August 1733, a clerk entered in the usual way a new commission of the peace for Talbot County. But the entry itself is not at all ordinary. The striking feature of the page is a dramatic bracket that encloses the quorum of the court, no less than seventeen persons in all, headed by "The Honble Charles Calvert." Altogether the commission names the extraordinary number of twenty-two persons as justices of the Talbot County court.

Now everyone familiar with the county court sessions of the eighteenth century knows perfectly well that no instance can be cited from the records of twenty-two judges, or for that matter of even two-thirds that number, sitting at a meeting of the court. To our surprise, then, we add a puzzle. Nor is the puzzle made clearer when we scrutinize the quorum, for here we find that the first eleven members of this panel were also members of Lord Baltimore's Council of State and that they are set down in the commission in exactly the order of their rank as councillors. This unexpected result suggests no solution to our mystery, unless perhaps that a clerical error has occurred. But this easy answer is ruled out by the succeeding folios. One by one for each county of the province a new commission of the peace is recorded, every one beginning with the oversize quorum, each quorum containing all and several the members of the right honorable, his Lordship's Council of State.¹

These are the facts. Taken with the obvious inferences, they add up to a statement of the case about like this: At some time before 4 August 1733 the Lord Proprietor and his advisers had decided to make all the councillors ex officio members of all twelve county courts. Between 4 August and 28 August his governor, Samuel Ogle, issued new commissions for the counties to implement this policy decision. But still we have been told nothing we really

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want to know about this extraordinary procedure. Did Baltimore expect his councillors—the gravest and weightiest persons in the province—to do regular judicial duty on the county benches? If he did, what was his object? Did his plan, whatever it was, work at all and if so, what were the results? How long did this arrangement continue? And finally why have we not heard of it before?

Only the last three of these questions can with any certainty be answered from evidence now before us. The addition of the Council to the quorums of the county courts lasted until the province overthrew the proprietary establishment at the time of the Revolution. This was, then, a permanent alteration in the constitution of the Maryland judiciary. The discernable results of this reconstitution of the judiciary were, as we shall see, quite negligible. Partly because the arrangement was barren of results it has not figured in general works of history. But more lamentably we are not informed on this, and many similar matters of interest, because the legal and judicial history of colonial Maryland has not yet been written. To the other questions—Lord Baltimore's purpose and expectations—only partial and not altogether satisfactory answers can be given at this time.

In the lack of direct information on the origin and object of this scheme there are some bits of evidence that may be admitted to this hearing, evidence that is, I think, sufficiently material to create a strong supposition that Lord Baltimore had devised what was essentially a court-packing scheme. The earliest shreds that we can pick up come from the day of Governor John Seymour nearly a generation before, back in the days of royal rule.

John Seymour (1704-1709) may not have been the first governor of Maryland to clash with the county courts, but he was the first to formulate a definite plan for taming them. In his eyes the administration of justice was shot through with favoritism and, even worse, with indifference to the Queen's peace and good government. He found the judges deaf to his exhortations to mend their ways and

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*Talbot County Civil Judgments, 1770-1773, MHRecs., March Court, 1773.

*Judge Carroll T. Bond's admirable introduction to the first volume of the American Legal Records comes nearest to providing an overall view. BOND, PROCEEDINGS OF THE MARYLAND COURT OF APPEALS, 1695-1729 (1933). Limited periods and special aspects are treated in SAMS AND RILEY, THE BENCH AND BAR OF MARYLAND (1901), SEMMES, CRIME AND PUNISHMENT IN EARLY MARYLAND (1938), and in the introductions to court series in the ARCHIVES OF MARYLAND (vols. IV, X, XLI, XLIX, LI, LIII, LIV) (hereinafter cited ARCHIVES).*
powerful in their resistance to his efforts to purify the judicial branch. His letters to the Board of Trade at Westminster, filled with denunciations of "country borne" justices and their obstructionist ways, disclose an ingenious plan to clip the wings of the justices of the peace. Very simply Seymour proposed for each Shore a circuit court composed of learned, tough-minded judges selected by the governor to hold assizes in the counties for hearing the more important cases that ordinarily would have been decided at the quarterly session of the county court. These hand-picked itinerant judges, Seymour predicted, would allow no nonsense in their courts. They would give "handsome, and regular charges to the Grand Jurys of Inquest" and generally teach the commonalty "their Duty to the Queens Matye."\footnote{Seymour to the Board of Trade, 10 March 1709, Archives, XXV, 266-270. See also same to same, 10 June 1707, ibid., 263.}

Seymour's reading is understandable. As governor he represented the crown and thought in terms of royal authority exercised for the welfare and good order of society. From this point of view his solution to the problem of the administration of justice was by no means unsuitable. But there were other views, the conceptions provincials held of their own welfare. And these Seymour either ignored or failed to see.

Whatever limitations his position and outlook imposed on his vision, Seymour did clearly perceive the importance of the county courts in the Maryland scheme of things. Not only were the county courts closest to the everyday life of provincials, they were also vested with functions and duties that made them the focus of local government. Beside hearing several dozen civil and criminal cases the court did an astounding amount of other business, so much in fact that we are mystified to discover how it was all discharged in a three- or four-day session. During the session the justices appointed constables of the hundreds and overseers of thoroughfares, committed the poor and orphans to responsible citizens, examined and paid bounty claims for destruction of wolves, squirrels, and crows, determined the county levy, fixed prices of accommodations at public houses, gave necessary orders of keeping the records — especially the vital land records — in its custody, and over the years assumed the authority of licensing taverns and ferries. It is possible that the justices often lacked formal training, as Seymour charged, but that they were ignorant or without ability we can hardly believe.
Nor were they inconsiderable persons in either property or prestige. Indeed, if we rule out a dozen or so higher officials in the great offices of state and a handful of wealthy Roman Catholics ineligible for public service, the justices of the county courts were the substantial planters of their neighborhoods. Very frequently their neighbors elected them to the parish vestries and chose them as delegates to the lower house of the Maryland assembly, adding to their prestige and power. Altogether the justices of the peace were personages in the eyes of the citizenry that converged on the county seats for court sessions and made court days the busiest, most colorful of the year prosecuting suits, selling crops, trading land, talking politics, gossiping, drinking, and—occasionally—fighting. This was the life of tidewater Maryland in Seymour's day and, whether the governor liked it or not, the inferior court judges were articulated to it and expressed its imperatives.

Seymour got his plan in operation. The assemblymen did not approve of itinerant justices, at least for the end the governor intended them to serve, but Seymour ignored their objections and established the new courts by prerogative action. Their life proved short, however. The assizes did not long survive the founder, who died in 1709. They had never been popular with the country justices and few other provincials mourned their disappearance, certainly not the planters whose representatives within a few years were acting in such concert in the elective house of the assembly that they earned the name "country party."

In the decade 1720-1730, the country party stood Seymour on his head. Led by a small band of expert attorneys, the country party developed its own program for supervising the courts, not in the interests of English authority but of the country. The crown had in the meantime restored the province of Maryland to the Lords Baltimore, who now bore the full brunt of country party attacks. Smarting under a severe depression in the tobacco trade, militant representatives of Maryland planters assaulted the palatine authority of the Lord Proprietor for ten years. They threatened to reduce the fees which provided all proprietary officers their income. They denied his Lordship's right to collect certain export duties on tobacco. Finally

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6 Seymour's speech opening the spring session of 1707, Archives, XXVII, 4-5.
7 Several features of the Seymour assizes deserve elaboration. This instructive episode will be given fuller treatment in a forthcoming article.
they even questioned Baltimore's authority to veto acts passed by the assembly. The more aggressive spokesmen of the country party demanded the introduction of English statute law into Maryland and preached political solutions to their economic ills—crop quotas, paper money, and the like. And they continually eyed the Maryland courts. Scarcely a year passed without a demonstration of country party determination to divorce the courts from proprietary control. At session after session delegates to the assembly formulated oaths binding Maryland judges to disregard instructions from higher authority in the administration of justice and to follow the law. The noise they created emphasized the importance of the "court question" in these years when major constitutional problems were debated. The echoes in England focused official attention on the battle between Lord Baltimore and his faithful tenants in Maryland. Baltimore's secretary feared that the ministry might even go to the length of taking the province back under crown control.

In the end Charles, Lord Baltimore, made a personal visit to Maryland to settle the constitution on the spot and thus to end the noisy debate. Whatever the citizenry thought of the Lord Proprietor's actions in 1732-33 while he was in the province, Baltimore himself was surely entitled to regard his accomplishments with satisfaction. First of all he removed from debate in the assembly most of the negotiable issues. He established by proclamation tables of fees for payment of chief officers in the proprietary government. He ordered the collection of export duties which the assembly claimed unauthorized. He reorganized the system of collecting his quit-rents. All these actions were naked exercise of the prerogative. In the second place Baltimore projected a renovation of the proprietary staff in Maryland. Many of the recruits who shortly afterward took office proved to be the ablest lieutenants ever to serve the Lords Baltimore in the century and a half of Maryland colonial history.

Charles, Lord Baltimore, was never one to make records of his doings, let alone give reasons for them. Even for the most important matters historians must depend on his actions as reported by contemporaries to tell nearly the whole story. For the rest inference must suffice.

1 This constitutional struggle is discussed at length in Land, Dulany's of Maryland (1955), 62-85, and Barker, Background of the Revolution in Maryland (1940), 117-139.

8 Baltimore's visit is also discussed at greater length in Land, Dulany's of Maryland (1955), 125-132, and Barker, Background (1940), 134-139.
Undoubtedly the court question came up for discussion within the inner circle of proprietary advisers. The question was of first importance and had been debated between proprietor and province in the bitterest verbal battle of the century. Consequently, it was not one to meddle with unwarily or lightly. The presumption is strong that Baltimore, after deliberating with his advisers, determined to add the whole membership of his Council of State to each of the county benches. Actual performance of this task he left to his viceregent, Governor Samuel Ogle, a staunch supporter of the proprietary prerogative. In early August, 1733, Ogle began issuing the commissions.

Again we are left to conjecture when we inquire into the motives for this alteration of lower court panels. Did Baltimore expect that the councillors would regularly take their places as senior justices — and, of course, as prerogative men — at county court sessions? Or did he regard this “court packing” merely as a reserve weapon, a threat to any intransigent county bench that the local justices would be outvoted unless they mended their independent ways? Or did he perhaps hope that occasionally a councillor would attend the court sessions in his home county and thus bring along a breath of that superior learning, as well as the sense of duty to authority, that Seymour had once found conspicuously lacking among the inferior judiciary?

Unfortunately the record tells us little, for the results of this unusual proceeding were all but negligible. In the first trial of strength between the agents of the new proprietary dispensation and the county courts the courts packing machinery, if court packing was intended, failed to operate. Late in 1733 Daniel Dulany, newly appointed Agent and Receiver General, began a campaign to recover all and sundry the rights and prerogatives of Lord Baltimore usurped by the country courts. At the November court in Baltimore County Dulany served notice on the justices that his Lordship had decided to resume his “ancient and undoubted” right of issuing all ferry licenses in the county and warned them against granting licenses as they had customarily done there several years past. A court properly packed with councillors should have returned a submissive and entirely satisfactory answer. At the session that took Dulany’s letter under consideration not a single councillor appeared on the panel of justices.

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9Court Proceedings of Baltimore County, Liber H W S No. 9, folios 126-127.
And the court behaved most intractably. Not only did the justices deny Baltimore’s claim to sole authority over ferry licenses but vigorously asserted “the undoubted right of this court” to license all such public necessities. Moreover in framing their reply they ignored Dulany, the Agent and Receiver General, entirely and sent the minute of their action directly to the governor.10

There are excellent reasons why Lord Baltimore should never have expected his councillors to add attendance at the county courts to their schedules. Besides their legislative duties as members of the upper house during assembly time and as the governor’s advisers when called together as the Council of State at other times, all of them were men of large affairs—planters, merchants, land speculators, entrepreneurs. Regular court duty would have made almost intolerable demands on their leisure. At any rate they were conspicuously absent, at least as justices, from sessions of the county courts. The practice of adding the councillors to the county benches in the commissions continued, but the records themselves suggest that the practice shortly became a mere formality. After 1735 the commissions of the peace were directed “To all the members of his Lordship’s council” and to specified local justices—the only persons actually named—who would actually preside.11

The date is significant. By 1735 the constitutional crisis that had brought Baltimore from the pleasures of London to the capital of his palatinate had passed. Resistance and criticism were never entirely suppressed. But until the years immediately before the Revolution the proprietary regime did not face dire threats to its existence. Evidently the Maryland establishment had not seen fit to employ the weapon provided by the new commissions of the peace on such side issues as the licensing of ferries. After 1735 no emergency sufficiently ominous arose to call the councillors out to the county seats.

Now if it is asked whether any councillor ever sat as county justice, the answer must be yes. A single instance redeems the record from blankness.12 In 1748 at the first meeting of the court in newly-organized Frederick County

10 Ibid. The Lord Proprietor never succeeded in making good his claim in the face of provincial determination expressed by the courts and in the assembly. Gould, Money and Transportation in Maryland, 1720-1765, Johns Hopkins University Studies in Historical and Political Science, XXXIII, 139-142.

11 Commission Records, 1726-1786, passim.

12 If there are other instances I have not found them while turning the pages of these stately old libers.
Daniel Dulany the Elder attended the session. By virtue of his rank as councillor he took precedence over the other judges present and sat at this and several subsequent sessions as Chief Justice. His long experience as judge in admiralty and in the testamentary court enabled him to expedite organization of the new county court and to get the judicial business at Frederick Town well started. It is only fair to add that Dulany had private motives, only remotely connected with the Lord Proprietor's welfare, for going to Frederick County as a judge.¹⁰ Even so, this unique instance rescues the curious judicial arrangement of Charles, Lord Baltimore, from barren results.

¹⁰ Land, The Dulany's of Maryland (1955), 195-197.
The EDITOR'S PAGE


Mr. Machen's article, written on a highly complicated area of the law, thoroughly analyzes all of the Maryland cases and the statutes that have affected the Court of Appeals decisions, and his conclusion indicates that legislation is needed to completely abrogate the much-maligned "Pennsylvania Rule." The Review trusts that this article will help clarify a difficult problem.

Ever since the landmark Reynolds case, the problem of when a claimant under the Federal Tort Claims Act has a right to compel production of government records has become increasingly more important. Mr. Byron's article presents the case for each side of the controversy in a manner that should prove helpful to all practitioners in this area.

Professor Land, Head of the History Department at College Park, is beginning a series of studies on Early Maryland History of which his article is an early sample.
Effect Of Power Of Revocation Vesting Subsequent To Execution Of Deed Of Trust On Measuring Period of Perpetuities

ROBERT E. POWELL

Fitzpatrick v. Mercantile Safe Deposit and Trust Co.¹

In 1876, H and W executed a deed of trust covering certain real and personal property to T in trust for W for life, with full power to appoint by will to or for the benefit of her children or her descendants, in such a manner as she should see fit. She also had the power to appoint any of the property she should wish to her present or any future husband, or if she should have no children or descendants living at her death, to appoint the property to whomever she desired. In default of appointment, it was provided that the property was to pass in trust for the benefit of her children, if any, per capita and the issue of any deceased child, per stirpes. Furthermore, in the event that the trustee, T, should die during the life of W, she was to have the power to appoint a new trustee or to revoke the trust and stand seized of all the property.

On July 24, 1895, T, died and thereafter, in accordance with her power, W appointed a new trustee, R, by a deed dated August 6, 1895. W died in 1924, leaving a will in which she, by reference to her power, in her residuary clause, appointed the trust property to R in trust to divide the income into four parts, one of which was to be paid to each of her four children respectively for life. Upon the death of her children, the trust, in respect to each child's portion, was to continue for twenty years at which time the corpus was to be distributed among her grandchildren. One of her children was en ventre sa mere at the time the original deed of trust was perfected; the remaining three were born after the execution of that deed but prior to the appointment of the second trustee in 1895. After the death of one of W's children, the appellee, as trustee under W's will, instituted suit for construction of the deed of trust.

¹ 220 Md. 534, 155 A. 2d 702 (1959).
The lower court determined that the secondary limitations were valid under the rule against perpetuities, the chancellor concluding that the period of perpetuities was measurable from the date of execution of the second deed. In affirming, the Court of Appeals reasoned that, since W had originally possessed a contingent right of revocation which became vested for a period of time, and the rule against perpetuities has no application to a trust which is subject to a power of revocation, the period of perpetuities had to be measured from the date of the second deed. Therefore, the conclusion was reached that, since the secondary limitations had to vest within a life in being (the children of W constituting measuring lives) and twenty-one years, they did not violate the rule against perpetuities.

The instant case raises for the first time in Maryland or any other jurisdiction, so far as this writer has been able to find, the issue as to whether the period of perpetuities, with respect to the provisions of an inter vivos trust and an appointment made in accordance with a testamentary power granted by the deed of trust, should be measured from the date of expiration of a power, given to the initial life tenant, to either appoint a new trustee or to revoke the trust on the happening of a contingency, which occurred. In order to resolve this issue, it is necessary to discuss certain collateral questions: (1) what is the nature and purpose of the rule against perpetuities; (2) what is the legal effect of the rule upon powers of appointment; (3) from what point of time does the law require that an appointment made under a testamentary power of appointment be measured; and (4) is the rule with respect to ascertaining the point of commencement of the period of perpetuities any different when the power of appointment is granted by a revocable deed of trust?

The rule against perpetuities, as stated by Professor Gray, is that: "No interest is good unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest." To this period

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2 Judge Henderson filed a dissent in which he agreed with the findings of Court except on the primary issue as to whether the fact that W possessed a power of revocation for a short period of time caused the date from which the period of perpetuities was to be measured to be the date of the second deed. See infra, circa, n. 39.

GRAY, THE RULE AGAINST PERPETUITIES (4th ed. 1942) § 201. (Italics added.) This general definition of the rule was cited by the Maryland Court of Appeals in Vickery v. Maryland Trust Co., 188 Md. 178, 52 A. 2d 100 (1947); Fitzpatrick v. Mercantile-Safe Deposit and Trust Co., supra, n. 1.
the courts have added actual periods of gestation.\(^4\) Thus, the permissible period of perpetuities may extend to an outside limit of twenty-one years plus actual periods of gestation beyond some life in being at the creation of the interest.

The rule is one of law and not one of construction, and applies equally to contingent legal and equitable future interests in both real and personal property.\(^5\) Thus the rule is directed solely at interests which might vest too remotely, if at all, as distinguished from interests which have a long duration.\(^6\) This point was stressed by the Court in *Safe Dep. & Tr. Co. v. Sheehan*,\(^7\) wherein it said:

"The object of the rule is to prevent the limitation of estates for future vesting upon contingencies which are not certain to happen within the period [of perpetuities]. * * * It relates to the commencement of future interests, and not to their duration, and it is therefore immaterial whether the estate limited is in fee, for life or for years, provided the event upon which the limitation depends is certain to occur within the period which the rule defines."

The rule was developed for the purpose of preserving free alienation of property; basically it prevents property from being held *extra commodium* for lengthy periods of time.\(^8\) In view of the purpose of the rule, it was held in

\(^4\)Perkins v. Iglehart, 183 Md. 520, 39 A. 2d 672 (1944); Ryan v. Ward, 192 Md. 342, 348, 44 A. 2d 258 (1949); Thellusson v. Woodford, 32 Eng. Rep. 1030 (1805). It is noted that the Court of Appeals has also referred to the additional period covering periods of gestation as "a fraction of a year", Barnum v. Barnum, 26 Md. 119, 169-172 (1867); Safe Dep. & Tr. Co. v. Sheehan, 109 Md. 93, 179 A. 536 (1935); and as "ten months", Ortman v. Dugan, 150 Md. 121, 100 A. 82 (1917); Hawkins v. Ghent, 154 Md. 261, 140 A. 212 (1928). Nonetheless, it is believed that the rule, as properly stated in Maryland includes only actual periods of gestation.


\(^7\)169 Md. 93, 179 A. 536 (1935).

\(^8\)Ibid., 106.

\(^*\)Hollander v. Central Metal Co., 109 Md. 131, 71 A. 442 (1906); Ryan v. Ward, 192 Md. 342, 64 A. 2d 258 (1949); Safe Dep. & Tr. Co. v.
Hollander v. Central Metal Co.\(^\text{10}\) that a covenant by the lessor, his heirs or assigns for the redemption of a ground rent under a 99 year lease was not open to any of the objections against perpetuities, even though it might not be exercised within the period set out by the rule. In so holding, the Court said:

"Property is not thereby placed extra commercium. On the contrary, these leasehold interests devolve upon the personal representatives of the owner, are in terms made assignable, and they, as well as the ownerships in fee under the denomination of 'ground rents', are subjects of daily transfer, and are constantly sought for a safe investment of capital."

In applying the rule against perpetuities to powers of appointment, two basic problems arise: first, it must be ascertained whether the power itself is valid; and second, whether the exercise of the power is valid. In order to properly analyze these problems it is necessary to distinguish between general and special powers. A power is said to be general when there are no restrictions placed upon its exercise, nor as to the persons in whose favor the power is to be exercised.\(^\text{12}\) Under the view taken by most courts, the donee of a general power is entitled to appoint the property to anyone including himself and his creditors. In Maryland, however, a general power is restricted in that the donee is not permitted to appoint to himself or his creditors, unless expressly given such power by the donor.\(^\text{13}\) On the other hand, a special power is a power which is restricted as to the person or persons to whom an appointment can be made.\(^\text{14}\) Thus, if the donee is

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Sheehan, supra, n. 7; Gray, op. cit. supra, n. 2, §§ 2, 2.1; Simes and Smith, Future Interests (2d ed. 1956) § 1222; Jones, The Rule Against Perpetuities As Applied To Powers Of Appointments In Maryland, 18 Md. L. Rev. 93, 108 (1958).

\(^\text{10}\) 109 Md. 131, 71 A. 442 (1908).

\(^\text{11}\) Ibid., 159, quoting from Banks v. Haskie, 45 Md. 207 (1876).

\(^\text{12}\) See discussion in O'Hara v. O'Hara, 184 Md. 321, 44 A. 2d 813, 163 A.L.R. 1444 (1946); Fitzpatrick v. Mercantile-Safe Deposit and Trust Co., 1960
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restricted in making his appointment to a limited group of persons, not including himself, the power is special. Therefore, in the principal case, W had both a special and a general power, since she had the power to appoint only to her children and her present or any future husband, and in addition, in the event that she had no children or descendants to anyone whomever. The first power was clearly special, but the latter, although contingent upon a failure of issue, was general. It is also important, at this point, to make a distinction between testamentary powers and powers presently exercisable. A power is testamentary if it can be exercised only by will. On the other hand, if it can be exercised by deed it is a power presently exercisable. Both general and special powers may be either testamentary or presently exercisable. In the present case both of W's powers of appointment were testamentary.

Regardless of whether the power be general or special it must vest in the donee within the period of perpetuities. If it does not, it is void. As long as a general power presently exercisable vests in the donee within the period, it is valid. However, a special power or a testamentary power (whether general or special) must not only vest but must also be exercised within the period. Thus, a testa-

15 SIMES AND SMITH, op. cit. supra, n. 9, § 874; 3 RESTATEMENT, PROPERTY (1940) § 321; JONES, op. cit. supra, n. 9, 95.

16 Ibid.

17 LEVETENsoN v. MANLY, 119 Md. 517, 87 A. 261 (1913); SIMES AND SMITH, op. cit. supra, n. 9, § 1272; 4 RESTATEMENT, PROPERTY (1944) § 390; Leach, Perpetuities in a Nutshell, 51 HARV. L. REV. 638, 651-653 (1938); Jones, op. cit. supra, n. 9, 96; Fitzpatrick v. Mercantile-Safe Deposit and Trust Co., supra, n. 14, 706, "... if a power can be exercised at a time beyond the limit of the rule it is bad..."; Burlington County Trust Co. v. Di Castelcica, 2 N.J. 214, 66 A. 2d 164 (1949).

18 Mifflin's Appeal, 121 Pa. St. 205, 15 A. 525 (1888); cf. Ortman v. Dugan 130 Md. 121, 100 A. 82 (1917); SIMES AND SMITH, op. cit. supra, n. 9, § 1273; 4 RESTATEMENT, PROPERTY (1944) § 390(1); Jones, The Rule Against Perpetuities As Applied To Powers Of Appointment in Maryland, 18 Md. L. REV. 93, 97 (1958); Leach, op. cit. supra, n. 17, 653.

19 Lamkin v. Safe Deposit & Trust Co., supra, n. 12; SIMES AND SMITH, op. cit. supra, n. 9, § 1273; 4 RESTATEMENT, PROPERTY (1944) § 390 (2); Jones, loc. cit. supra, n. 18; Leach, op. cit. supra, n. 17, 652. It is noted that there can be no objection to a power granted to a donee who is in esse at the creation of the power. See: Collins and Bernard v. Foley, 63 Md. 158 (1884).
mentary power granted to a person not in esse when the power was created is necessarily void. In the principal case the testamentary power given to W was valid, since she was in esse when the deed granting her the power was executed and it could only be exercised in her lifetime.

The second question, whether the exercise of the power was valid, is more difficult to answer. At the outset, one must understand the underlying legal theories with relation to the exercise of a power. Under the law the property, over which one has been given a power of appointment, is considered to be that of the donor, or of his estate, until the power is exercised; and the exercise of the power is held to pass the property directly from the donor to the appointee. Conversely, the appointment is considered to relate back to the donor, and as a result is to be read into the instrument creating the power. What might be considered an exception relates to general powers presently exercisable. The courts have expressed the view that, since a donee of such a power has virtually as much control over the property as he has over his own and can appoint to himself or his creditors, for the purpose of the rule against perpetuities, the exercise of the power is not to be read back into the instrument creating the power. Essentially the concept is that the property is readily transferable by the donee at all times either by making a direct appointment or by appointing to himself and thereafter alienating it for his own benefit. Therefore, it is not held extra commercium, and is not subject to the rule against perpetuities. On the other hand, property subject to special power or a testamentary power (whether general or special) is held extra commercium. The limitations placed on a special

22 SIMES AND SMITH, ibid., § 1274; 4 RESTATEMENT, Property (1944) § 381; Gray, op. cit. supra, n. 21, § 524; Jones, loc. cit. supra, n. 18. It is noted that in Maryland the donee of a general power is incapable of appo.1.1}
power prevent the property from being freely alienable, while property subject to a testamentary power is completely withdrawn from commerce during the life of the donee, since the law forbids an inter vivos execution or contract for later execution of such a power. Therefore, the rule that an appointment is to be read back into the instrument creating the power is applicable to special or testamentary powers. Following this concept, the courts have universally held that the period of perpetuities with relation to a special or testamentary power is to be measured from the date of execution of the instrument creating the power. Thus, if there were no additional factors in the present case, the appointment made by W in her will would have been void with respect to the secondary limitations. Her provisions, for the property to be held in trust for the benefit of her children for life and thereafter for the trust to continue for twenty years after which time the corpus was to be distributed among her grandchildren or their descendants, would have to be added to the life estate given to her under the deed of trust. Since her children, with the exception of one which was en ventre sa mere, were not in being when the original deed of trust was executed, her life would be taken as the measuring life, and the secondary limitations would not necessarily vest within twenty-one years after her death. Therefore, those limitations would be void.

The question then arises whether the fact that W, for a period of time, had an absolute power to revoke the trust, affects the validity of the secondary limitations. The rule against perpetuities applies to contingent beneficial interests in a trust as well as to contingent legal interests. Therefore, the beneficial interests or gift over following

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23 Wilks v. Burns, 60 Md. 64, 73 (1883); O'Hara v. O'Hara, 185 Md. 321, 324, 44 A. 2d 813 (1945); Palmer v. Loche, L.R. 15 Ch. D. 294 (Eng. 1880); Farmer's Loan & Trust Co. v. Mortimer, 219 N.Y. 200, 114 N.E. 389, 390 (1916); 4 RESTATEMENT, PROPERTY (1944) §§ 339, 340. See Lamkin v. Safe Deposit & Trust Co., 192 Md. 472, 479, 64 A. 2d 704 (1949)

24 See Turner v. Safe Dep. & Trust Co., 148 Md. 371; 129 A. 294 (1925). For the purposes of this comment consideration will only be given to the law in relation to the limitations following the life estates in the children born after that deed.

a trust must vest within the period of perpetuities. Generally this period is measured by looking forward from the date of the instrument creating the trust. Thus, under a trust created by deed the measuring period, for the purposes of the rule, runs from the date of execution of the deed, while under a trust created by the settlor's will, the measuring period is limited from the date of his death. Similarly, where one has a testamentary power to appoint the corpus of the trust or beneficial interests thereunder, such appointment is to be read back into the instrument creating the trust.

Where the settlor of a trust retains the power to revoke it, or gives such power to the person who, for the time being, is entitled to the property, the courts have generally held that the measuring period for purposes of the rule against perpetuities is to be determined from the date when such power expires, which is usually the death of the person having such power. It is simply a question of whether the trust is destructible; if so, the property is not actually extra commercium. In other words, so long as the trust under which the property is held is revocable at will, it is not within the purview of the rule. The Court in Graham v. Whitridge recognized this when they defined a perpetuity as being:

"A future limitation whether executory or by way of remainder and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests, and which is not destructible by the person for the time being entitled to the property"


30 99 Md. 248, 57 A. 609 (1904).
subject to future limitations except with the concurrence of the individual interested under that limitation."³¹

In *Ryan v. Ward*³² the court, measuring from the date of an inter vivos deed of trust, struck down certain end limitations which gave the corpus of the trust to the children of the settlor's son or their descendants following successive life estates in the settlor and his son, although the settlor had retained the right to withdraw portions of the corpus so long as such withdrawals did not surpass a certain figure each year. In so holding the Court cited the Restatement of Property which provides:

"The period of time during which an interest is destructible pursuant to the uncontrolled volition and for the exclusive personal benefit of the person having such a power of destruction is not included in determining whether the limitation is invalid under the rule against perpetuities."³³

Recognition was given to the fact that "it was the indestructibility . . . of future interests which forced upon the judges the rule against perpetuities . . .," but the court could not find that the trust in the *Ryan* case was destructible. It was reasoned that at the creation of the trust it was foreseeable that the settlor could over the course of years withdraw the entire corpus of the trust, but at no one particular time could he exercise an uncontrolled volition and revoke the entire trust. Therefore, it was concluded that the trust was not destructible and its provisions would have to be tested with respect to the rule against perpetuities by measuring from the date the deed became operative.

The Court in the *Ryan* case, as in the principal case, relied in part upon two analogies. First, that the situation presented by limitations created under a destructible trust, or a power of appointment given under such a trust, is analogous to limitations following an estate tail, in which case the period of perpetuities is computed from the termination of the estate tail.³⁴ Second, that the situation is similar to that of gifts in default of general powers exercisable by either deed or will, in which case the period

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³¹ *Ibid.*, 274 (emphasis added.)
³² 192 Md. 342, 64 A. 2d 258 (1949).
³³ 4 *Restatement, Property* (1944) § 373.
³⁴ *Ibid.*, comment b. See also, Leach, *op. cit. supra*, n. 29, 663.
is measured from the date of expiration of the power. In each of these cases the analogy exists because the limitations may themselves be destroyed by the exercise of some power which prevents them from taking effect. If an estate tail is disentailed, the limitations following it are ineffective; and if the donee of a power exercises his power, the takers in default are cut off, unless the appointment is to them. Likewise, if a power of revocation over a trust is exercised and the donee thereby stands seized of the property in his own right, he holds the property absolutely and may freely alienate it. The analogy is especially strong with relation to limitations following estates tail, since such estates by statute were made freely alienable and the act of alienation in and of itself acted to disentail the estate. Alienation of property held under a revocable trust only requires one additional step, and hence, it can be said that such property is freely alienable. In neither of these cases can the property be considered as being held extra commercium, and therefore, the rule against perpetuities does not apply.

An analogy also exists between a general power presently exercisable and a power to revoke a trust. Under the former the donee can appoint to anyone including himself (except in Maryland). He has, in fact, as much control over the property as an actual owner would have. It only takes one act to make the property his own so as to be able to alienate it for his own benefit, and even if he does not take that measure he can appoint it at will and readily transfer it to whomever he pleases. For this reason limitations created under such powers are not considered by the law to be invalid as long as they must vest within the period set by the rule measuring from the death of the donee. There is no logical reason why the same result should not be reached with respect to revocable trusts, since the donee can as easily perfect title in himself and thereafter alienate the property at will. In fact, there is more reason for holding the rule against perpetuities to be inapplicable to recovable trusts in Maryland than to general powers presently exercisable, since by revocation of the

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16 Leach, loc. cit. supra, n. 29; see discussion in Jones, op. cit. supra, n. 29, 106.

26 See 2 Md. Comp. (1957) Art. 21, § 22. This analogy is weakened somewhat due to the fact that it is merely historical, since under the cited statute a fee tail has been held to constitute a fee simple absolute. See Thomas v. Higgins, 47 Md. 439 (1878).

trust the donee of the power of revocation can become absolutely seized of the property, whereas the donee of a general power can only transfer to another and can never appoint to himself or to someone in a manner that the benefit would actually be cast on himself, unless the donor explicitly gave him such power.

Thus, it is clear under the law that if a power to revoke a trust and thereby become the sole owner of the trust property is certain to be exercised, if at all, within a life in being and twenty-one years, as in the present case, then the power to revoke is itself not too remote, and limitations created by the exercise of a testamentary power are to be measured for purposes of the rule from the date of termination of the power to revoke. However, should the result be any different, if the power to revoke is itself contingent? In regard to situations of this nature it has been stated that:

"The destructibility prerequisite for an application of the rule . . . exists only when some person possesses a complete power of disposition over the subject matter of the future interests which have been limited and can exercise this power of disposition for his own exclusive benefit. * * * The destructibility prerequisite for an application of the rule . . . can exist when the power of disposition (or of revocation) is not presently exercisable at the time of its creation, provided that the period, during which the exercise of such power is postponed, does not invalidate all interests created by the exercise of such power, and thus, in effect invalidate the power itself."38

Thus, the contingent power of revocation given to W by the deed of trust was subject to the rule. However, there is no question but that it was valid. Viewing it from its creation it is clear that it not only had to vest, but had to be exercised within her lifetime; and since she was one of the settlors of the trust, she was clearly a life in being.

38 4 Restatement, Property (1944) § 373 comment d (emphasis added.) See also Simes & Smith, op. cit. supra, n. 29, § 1272. Judge Henderson, in dissenting, could not agree that this section of the Restatement supported the position taken by the Court and advocated herein. He laid emphasis upon the second clause of the omitted sentence which states:

"Similarly it [the destructibility prerequisite] does not exist when the power of revocation is exercisable only with the concurrence of one or more persons other than the settlor, or is otherwise subject to any conditions precedent." (Emphasis added.) It cannot logically be said that the latter clause supports the position taken by the dissent, when read in context with the whole sentence and comment.
at the creation of the power. It, therefore, becomes clear
that the destructibility prerequisite was present, at last
during the period of time which elapsed between the death
of the original trustee, on July 24, 1895, and the appoint-
ment of a new trustee by the second deed which was exe-
cuted by W on August 6, 1895. At any time during that
period W, acting on her sole volition, could have revoked
the trust and stood seized of the property. Since the trust
was destructible, the property was not held extra com-
mercium and hence was not subject to the rule against
perpetuities. Therefore, the rule could not logically be
held to be operative with regard to this trust and the limi-
tations created under the testamentary power, until W's
power to revoke was extinguished in August of 1895.

In measuring the end limitations in the instant case,
some reference must be made to the so-called "second look"
doctrine. Although the general rule provides that, if, in
viewing the circumstances as they might occur from the
ascertained date for commencing the period of perpetuities,
it is possible that a limitation will not vest within the
period, it is void, the courts, for the purpose of testing
limitations created under powers of appointment, have
adopted a slightly different rule. The "second look" doctrine
takes cognizance of the facts which were known to the
donee of a power when such power was exercised, but
which were not certain when the original instrument was
executed. The result has been stated to be that:

"... in determining the validity of the interests
created by the donee in the exercise of the power, the
facts existing at the time he exercises the power may
be considered although the time period is computed
from the date the donor created the power."

In the instant case, if the limitations made by W in her
will were strictly read back into the trust deed, they would
have been invalid, since that deed gave her power to appoint
to her "children", which she did, but without the knowledge
that all of the children she would have were in esse when
the 1895 deed of trust was executed, it would have to be
recognized that one, if not all, of her children could have
been born after the execution of the original deed, and
hence, the limitations over to their children 20 years after

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39 Gray, op. cit. supra, n. 37, § 523.5; Simes & Smith, op. cit. supra, n. 29, § 1274; 4 Restatement, Property (1944) § 392; Jones, op. cit. supra, n. 29, 102.

40 Jones, loc. cit. supra, n. 39.
their death would be too remote. However, by applying the "second look" doctrine, although the Court did not refer to it specifically, recognition was taken of the fact that W knew that her "children" were in esse when the deed of trust was executed. Therefore, their lives could be used as lives in being, and the limitations over to her grandchildren, twenty years following the deaths of her children, were not too remote.

In conclusion, it is clear that the Court reached the proper result in the instant case. Under the original deed of trust, W was given a contingent power to revoke the trust or appoint a new trustee, if the trustee died during her lifetime. This power was not void for remoteness, and in 1895 the specified event happened causing an absolute power of revocation to become vested in W. Since the law provides that the rule against perpetuities is not applicable to the provisions of a revocable trust, and that limitations created under a testamentary power of appointment are to be read back into the instrument creating the trust, thereby becoming provisions of such instrument, the provisions of the trust in the instant case, including the limitations created under W's power of appointment, were not subject to the rule during the period in which she possessed her right of revocation. Furthermore, since the law specifies that the rule is to be applied from the date of termination of the power to revoke, logically it could only be applied from the date of execution of the second deed of trust.

Criticism cannot be leveled at the Court for looking at the facts as W had known them to be when she exercised her testamentary power of appointment, and recognizing that she knew that her children were all in esse when she executed the second deed of trust. In so doing, the Court clearly applied the so-called "second look" doctrine, although not specifically referring to it. It would have been desirable if the Court had made specific reference to that doctrine, and thus, cleared up what little doubt remains as to whether it has been recognized in Maryland.
Right Of Owner Of Personal Property
To Challenge Assessments
Of Real Property

National Can Company v. State Tax Commission

The taxpayer, National, appealed from the assessment for the year 1957 of its tangible personal property, levied by the Maryland State Tax Commission pursuant to the Maryland Code, Article 81, Sections 6, 14, and 15, as amended by Chapter 73 of the Maryland Laws of 1958. The appeal was taken to test the validity of the provisions of Chapter 73 separately classifying real and personal property, and the right of National to challenge the inflation factor provided for in Chapter 73 with respect to the valuation of real property. The lower court upheld the Commission's assessment. In affirming, the Court of Appeals found that amendments introduced by Chapter 73 were valid and constitutional under both the Maryland Constitution and the Federal Constitution, and that National was not permitted to challenge the inflation factor.

The Court of Appeals noted that this case was a sequel to the case of Sears, Roebuck v. State Tax Commission, in which it held that the assessment practice of the State

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2 The aggregate assessed value of the taxpayer's property exceeded $5,200,000, some $3,737,000 being placed on manufactured products and raw material and $1,432,000 on tools and machinery used for manufacturing.
3 Md. Cong (1957). Chapter 73 was approved April 4, 1958, and the order of the lower court in the present case (Circuit Court No. 2 of Baltimore City, Joseph L. Carter, J.) was given April 8, 1958. The appeal to the Court of Appeals was decided July 9, 1959.
4 § 14 of Md. Code (1957), Art. 81, as amended by Md. Laws 1958, Ch. 73, effective January 1, 1957, and reads as follows:
Sec. 14. (a) (Classification) Real and personal property shall be separately classified, and personal property separately sub-classified for assessment purposes. The following shall be separately sub-classified for purposes of personal property assessment:
(b) (Method of Assessment) Except as hereinafter provided:
(1) all real property directed in this Article to be assessed, shall be assessed at the full cash value thereof on the date of finality. The term full cash value as used in this subsection shall mean current value less an allowance for inflation, if in fact inflation exists.
(2) All personal property directed in this Article to be assessed, shall be assessed at the full cash value thereof on the date of finality. The term full cash value as used in this subsection shall mean current value without any allowance for inflation.

The "date of finality" mentioned in subsection (b), as defined by Art. 81, § 31(c) and as applicable to National's assessment for the year 1957, was January 1, 1957.

4 244 Md. 550, 196 A. 2d 567 (1957); noted 18 Md. L. Rev. 66 (1958).
Tax Commission of making a deduction from the "full cash value" of real property for inflation, but denying a comparable deduction from the value of personal property was a discrimination not authorized by the then existing law\(^5\) and that an owner of personal property was entitled to relief by having his assessment lowered. As a result of the *Sears* decision of November 22, 1957,\(^6\) the legislature enacted Chapter 73.

In the present case, the Court stressed that in the *Sears* case\(^7\) it based its decision not upon Article 15 of the Maryland Declaration of Rights,\(^8\) but rather upon the pertinent Maryland statute. The *Sears* decision, in requiring the Tax Commission to lower Sears' assessment to that percentage of value applied to real property, relied on the "equal protection clause" of the Fourteenth Amendment to the Federal Constitution ("... No State shall ... deny to any person within its jurisdiction the equal protection of the laws.") The Court of Appeals in the *Sears* case followed the decisions of *Sioux City Bridge v. Dakota County*\(^9\) and *Hillsborough v. Cromwell*,\(^10\) which interpreted the equal protection clause as requiring that discriminatory treatment of a taxpayer be remedied either by increasing the same taxes of other members of the same class or by reducing the tax against the complainant; and, moreover, that the State itself must remove the discrimination and

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\(^5\) Md. Code (1951), Art. 81, § 13(a):
"Except as hereinafter provided, all property directed in this article to be assessed, shall be assessed at the full cash value thereof on the date of finality ..."

This may be compared with the excerpt from Art. 81 as amended by Ch. 73, *supra*, n. 3.

\(^6\) *Supra*, n. 4.

\(^7\) *Supra*, n. 4.

\(^8\) Art. 15 does in fact permit separate assessment of real and personal property:
"... [T]he General Assembly shall ... provide for separate assessment of land and classification and sub-classification of improvements on land and personal property, as may be proper; and all taxes thereafter provided to be levied by the State for the support of the general State Government, and by the counties and by the City of Baltimore for their respective purposes, shall be uniform as to land within the taxing district, and uniform within the class or subclass of improvements on land or personal property which the respective taxing powers may have directed to be subjected to the tax levy; ..."

The above section of Art. 15 was substituted in 1915 for the following provision:
"... [B]ut every other person in the State, or person holding property therein, ought to contribute his proportion of public taxes, for the support of government, according to his actual worth in real or personal property; ..."

\(^9\) 260 U. S. 441 (1923).

\(^10\) 326 U. S. 620 (1946).
may not place on the taxpayer the burden of seeking upward revision of the taxes of other members of the same class.

In the present case, the Court of Appeals ruled that separate classification, for purposes of taxation, of real and personal property is permissible under Article 15 of the Maryland Declaration of Rights and under the equal protection clause of the Fourteenth Amendment to the Federal Constitution so long as such classification is reasonable, and found that the classification in the amended statute was reasonable. The opinion continued that, even if it were assumed that the provision for an inflation factor is invalid, the provision for taxation of personal property at full cash value would remain in full force. Therefore the Court indicated that the appellant, since it had not demonstrated that the statute discriminated unreasonably against personal property, was in no position to challenge the provision allowing an inflation factor in assessment of real property. The majority opinion found the situation in this case to be clearly distinguished from that in the *Sears* case, where the inflation factor was applied to real property without benefit of a statute separately classifying real and personal property.

The Court, referring to the preamble to Chapter 73, pointed quite clearly to the principle which was determinative of the instant case:

"The preamble of the Act (Par. (5)) speaks of the inherent differences between real and personal property and the peculiarities of certain classes of personal property (first) as requiring and justifying separate classification and sub-classification for assessment purposes and (second) as requiring and justifying the making of an allowance for inflation with respect to real estate but not personal property. Other recitals

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11 *Supra*, n. 4.

12 The appellant, National, in addition to its argument that the separate classification of real and personal property was discriminatory, had urged that the attempt to make the statute retroactive to January 1, 1967 was invalid without regard to its other provisions. The majority opinion concluded with a thorough consideration of the provisions of Chapter 73 as to retroactivity and found them valid.

13 The fifth paragraph of the preamble is as follows:

"Whereas, it is the belief of the General Assembly that the natural and inherent differences between real and personal property, and the peculiarities of certain classes of personal property require and justify separate classification and sub-classification for assessment purposes as aforesaid, and require and justify the making of an allowance for inflation in respect to real estate assessments but not in respect to personal property assessments;".
show, we think, that inflation at least prompted the adoption of the statute. ... [W]e cannot say that the legislative classification based upon the finding stated in preamble clause (5), _supra_ is unsustainable. There is a strong presumption in favor of the validity of a legislative finding."\textsuperscript{14}

In dissent, Judge Henderson strongly criticizes the majority interpretation of the separability provision of Chapter 73. His opinion does not argue that Article 15 of the Declaration of Rights requires uniformity of tax rates or assessments between real and personal property; however, he questions the arguments of the majority that the Legislature was, independent of the provision in Chapter 73 for the inflation factor, exercising its power to classify. Judge Henderson argues that, on the contrary, the declared reason for the enactment of Chapter 73 was to continue legally the disparity which the _Sears_ case\textsuperscript{16} had found to be illegal. Since he finds the only purpose of the classification required by Chapter 73 to be the perpetuation of the disparity in assessments, he maintains that National may properly attack the vagueness of the provision for an inflation factor, that provision being the means of discrimination. As a consequence, the State could reasonably be required, under the precedent of _Hillsborough v. Cromwell_\textsuperscript{16} which was followed in the _Sears_ case, to remove the discrimination if the provision sustaining it were shown by the appellant to be invalid.

Judge Henderson proceeds to consider the appellant's charge of vagueness and improper delegation of the taxing power, and finds subsection 14(b) (1), as enacted by Chapter 73, to be a hopelessly inadequate guide for assessment. The provision for valuation of real property suggests no previous price level by which inflation is to be measured, nor any other objective standard for defining inflation.\textsuperscript{17} Judge Henderson further disputes the argument

\textsuperscript{14} 220 Md. 418, 432, 153 A. 2d 287 (1959). The Court continues with a quotation from Dundalk Liquor Co. v. Tawes, 210 Md. 58, 62, 92 A. 2d 560 (1952):

"'An invalid act cannot be made valid by a "preface of generalities" in the form of a legislative declaration of purpose. _Schechter v. United States_, 295 U. S. 495, 55 S. Ct. 837 ... But if a legislative declaration is not demonstrably untrue or meaningless, and if true, would support the validity of the act, the courts must accept the judgment of the legislature and cannot substitute a contrary judgment of their own.'"

\textsuperscript{15} 214 Md. 550, 136 A. 2d 567 (1957), noted 18 Md. L. Rev. 66 (1958).

\textsuperscript{16} _Supra_, n. 10.

\textsuperscript{17} The dissenting opinion, 220 Md. 418, 445, 153 A. 2d 287 (1959), states:

"[T]he amount to be allowed would depend in each case upon the
of the Commission that the term "full cash value" is equally vague; that term, he says, has come to have a definite, objective meaning, whereas "inflation" has not. 18

It seems thoroughly established that the equal protection clause of the Fourteenth Amendment permits different classes of property to be taxed at different rates, provided the classification is reasonable. 19 Neither the majority nor the dissent of this case questions this. The Court is at pains to show that the classification provided by Chapter 73 is a reasonable one, citing what it feels are very pertinent differences between real and personal property. 20 The majority does not feel that, in view of these differences and of the provision in Article 15 of the Maryland Constitution permitting separate classification, it would be warranted in declaring Chapter 73 invalid. It would be difficult to deny the right of the Court to thus avoid encroachment upon legislative prerogative, or the propriety of the restraint with which it reviews Chapter 73.

It is not so difficult, however, to question the wisdom of the Legislature in enacting Chapter 73. The criticism of the meaning of "full cash value" is could be disputed; see Tax Assessments of Real Property: A Proposal for Legislative Reform, 68 Yale L. J. 335, 344 (1958). There is little doubt that "inflation" under Maryland assessment practices is a term of uncertain and unpredictable meaning. While unchallenged testimony in the present case would seem to imply that the usual deduction for inflation by the State Tax Commission is about 40 percent, it was indicated in the Sears decision that deductions ranged from 40 to 75 percent.

How definite the meaning of "full cash value" is could be disputed; see Tax Assessments of Real Property: A Proposal for Legislative Reform, 68 Yale L. J. 335, 344 (1958). There is little doubt that "inflation" under Maryland assessment practices is a term of uncertain and unpredictable meaning. While unchallenged testimony in the present case would seem to imply that the usual deduction for inflation by the State Tax Commission is about 40 percent, it was indicated in the Sears decision that deductions ranged from 40 to 75 percent.

"Intentional and systematic undervaluation by State officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property (Sunday Lake Iron Co. v. Wakefield Twp., 247 U. S. 350 (1918); Raymond v. Chicago Union Traction Co., 207 U. S. 20, 35, 37 (1907)) . . . Differences in the basis of assessment are not invalid where the person or property affected might properly be placed in a separate class for purposes of taxation. (Charleston Assn. v. Alderson, 324 U. S. 182 (1945); Nashville, C. & St. L. Ry. v. Browning, 310 U. S. 582 (1940)). An owner aggrieved by discrimination is entitled to have his assessment reduced to the common level." The same principle was reaffirmed very recently in Allied Stores of Ohio v. Bowers, 358 U. S. 522, 526, 527, 528 (1959).
in the dissenting opinion of the vague mandate to assess with an allowance for inflation, now embodied in subsection 14(b) (1) of Article 81, should be viewed against the background of assessment practices both in Maryland and in other States. The Maryland statute is apparently unique, among State constitutional and statutory provisions governing assessment, in its express reference to inflation.21 However, the same consideration appears less explicitly in many other jurisdictions where assessors have hesitated to raise assessments of real property from pre-World War II levels.22 It is generally accepted that assessment of property should be as objective as possible and — at least within particular classes — uniform. In many jurisdictions, if not most, the reality must fall far short of this ideal; nor is the situation necessarily better even if a State constitution, as Maryland's before 1915,23 or statute (as Article 81 before enactment of Chapter 73) apparently requires complete equality without regard to classes. Facts brought out in the Sears case indicated that deductions for inflation in Maryland assessments had ranged from 40 to 75 per cent.24 Somewhat similar situations have lately cropped up in two nearby States. In New Jersey, shockingly discrepant variations between counties in percentage of assessments used for taxation have been found and have been overthrown by the courts.25 In Connecticut a recent decision found certain assessments void for lack of uniformity.26 The Maryland Legislature and the State Tax Commission have attempted to insure some uniformity and objectivity in assessment throughout this State. Over a period of years commencing in 1935 a system of rotating

22 Ibid., 355:
"Even after the economic tide had turned and inflationary pressures increased the revenue demands of municipalities, 'normal market' concepts remained in vogue. Nor have they been abandoned despite continued pressures for the release of additional taxing, borrowing, and spending power. The judiciary has evidently recognized the inequity of abandoning the normal-market standard before taxpayers could recoup their overpayments in depression years. In any event, courts have not overruled the assessors' adherence to that standard. Thus, taxpayers have benefited from the implicit extension of judicial language about inherent value to cover an area — valuations in inflationary periods — almost completely free of legislative guideposts. Today, assessments are made and reviewed in terms of a normal period, usually one somewhere around 1940."
23 Supra, circa n. 7, 8.
24 Supra, n. 14.
reassessments was authorized, in order that all taxable property in each county and Baltimore City might be periodically reassessed. It is difficult to believe that Chapter 73 represents a further step forward. If an owner of real property believes that his assessment is too high, relative to other owners, the burden of showing this undoubtedly rests on him. Where real estate has been generally underassessed, proof of discrimination may be difficult to obtain under any circumstances. In view of the enactment of Chapter 73 and of the present decision, it is apparent that such an aggrieved owner of real property will be forced to contend with a mysterious variable of inflation which seems to be for the first time, firmly established in Maryland law. However, some question arises as to whether the inflation factor attacked by National in the present case on the ground of vagueness would be sustained if attacked by an owner of real property.

JAMES P. LEWIS

Insurance — Right Of Insurer To Subrogate
To Collateral Contract Rights
Of The Insured

In The Matter Of Future Manufacturing Cooperative, Inc.¹

Future Manufacturing purchased certain refrigeration equipment from the Scatena York Company under a conditional sales contract which among other things provided that the vendee was to have the equipment insured against fire for the benefit of the vendor and that the vendee would remain liable for the purchase price should the property be destroyed before such price was fully paid. Future failed to have the equipment insured, but Scatena York, on its own initiative, procured the desired coverage. Subsequently the equipment was destroyed by fire while $17,654.88 of the purchase price remained unpaid. Scatena

² Rogan v. Commrs. of Calvert County, 194 Md. 289, 71 A. 2d 47 (1950), discusses these efforts. See also Lewis, The Tax Articles of the Maryland Declaration of Rights, 13 Md. L. Rev. 83 (1953).

²² "When general undervaluation exists, the taxpayer may have to prove not only the proper tax value of his realty but also, through an independent appraisal of similar property, that his realty is assessed above the general level." Tax Assessments of Real Property: A Proposal for Legislative Reform, 68 Yale L. J., 335, 348 (1958). Tax Comm. v. Brandt Cabinet Works, 202 Md. 533, 97 A. 2d 260 (1953), is illustrative of the difficulty of challenging an assessment where the inflation factor has been employed.

recovered $13,244.20 from the insurer and, in addition, realized $810.00 in salvage from the sale of the damaged equipment. Shortly thereafter, Future was adjudged bankrupt, and Scatena asserted a claim in the bankruptcy proceedings for $16,844.88, representing the unpaid portion of the purchase price less the salvage recovery. The referee allowed Scatena's claim to the extent of $3,600.88 (the value of the unpaid purchase price less the recovery under the insurance policy and the recovery by way of salvage). An additional amount equal to the value of the premiums paid for the insurance was also allowed Scatena. The referee found that the insurer could not assert a claim against the bankrupt by way of subrogation to the vendor's rights under the conditional sales contract, despite the fact that the insurance policy expressly granted the insurer the right to subrogate to any claims the vendor had against the vendee under the sales contract. The District Court affirmed, giving the vendee the benefit of the vendor's insurance.

In discussing the possible remedies which could be afforded under the circumstances of the instant case, the court suggested three ways in which the rights of the interested parties might be resolved: (1) to allow the vendor to recover the full contract price and the insurance (which in effect would allow a double recovery); (2) to allow the insurance proceeds to affect the unpaid portion of the purchase price to the extent of such proceeds, thereby giving the vendee the benefit of the vendor's insurance; or (3) to allow the insurer to subrogate to the vendor's contract rights for the unpaid purchase price.

The Court was of the opinion that the first approach would contravene public policy, by increasing the moral hazard of the insurer by making the property more valuable after its destruction than before, and in actually allowing a double recovery by the insured vendor. Courts, in general, are in accord with this view. The Court of Appeals of

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2 The policy provision as to subrogation read:
   "In the event of any payment under the policy the Company shall be subrogated to all the assured's rights of recovery therefor against any person or organization and the assured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights." Ibid., 112.

3 Ibid., 113.

Maryland, in *Washington Fire Insurance Co. v. Kelly*, rejected the suggestion of a possible double recovery under similar circumstances, saying:

"... the contract of insurance is strictly a contract of indemnity, and the mortgagee is not entitled to recover from the insurer the value of the property lost, and his whole debt besides, from the mortgagor."

Since the courts are almost uniformly opposed to allowing a double recovery by the insured vendor, the basic problem in the instant case becomes one of determining whether to allow the vendee to benefit from the vendor's insurance, although he failed to fulfill his obligation under the contract of sale by not obtaining the insurance himself, or to allow the insurer to minimize his loss by subrogating him to the contract rights of the vendor. Before dealing directly with this problem, it is desirable to briefly inquire into the nature of the doctrine of subrogation and determine if and when it is applicable to collateral contract rights.

Generally it is recognized that subrogation is an equitable right taken from the civil law, and is considered to be legal when it arises by operation of law, as in most cases, or conventional when it arises by express provisions in a contract. The basis of the doctrine seems to be analogous to the theory of suretyship. Thus, a tortfeasor is considered to be the party primarily liable, and the insurer secondly liable, producing the result that the insurer is entitled to proceed against the party primarily liable when he is caused to indemnify the insured. Likewise, in the vendor-vendee situation, such as is present in the instant case, the debtor vendee is considered to be primarily liable while the insurer is only secondarily liable, since in effect he is merely insuring the vendor's security.

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6 22 Md. 421 (1870).
7 Ibid., 442. It is noted that the Washington case involved a mortgage situation rather than a conditional sale.
9 The word "legal" is not used in contradistinction to "equitable".
10 Mullen, *The Equitable Doctrine of Subrogation*, 3 Md. L. Rev. 201 (1899). In addition it is noted that in Maryland 8 Md. Code (1957), Art. 101, § 58, grants an employer the right of subrogation where the employee recovers from him for an injury sustained because of the acts of a third person, and by 1 Md. Code (1957) Art. 8, § 3, the right of subrogation is given to a surety in a bond or other obligation.
for the debt. Essentially subrogation is an equitable right which places the burden of loss upon the person primarily responsible for it and the insurer’s right of subrogation arises out of the nature of the contract — as a contract of indemnity.

In mortgage cases, where the mortgagee obtains insurance for his own benefit, the insurer has been allowed to subrogate to the mortgagee’s right to recover payment of the debt from the mortgagor. The reasoning behind the rule seems to be that the mortgagor takes the risk of loss, and consequently, the insurer is actually insuring the property which represents the security for the debt. In such cases the theory of suretyship applies. Conversely, where the mortgagee and the mortgagor are both insured under the same policy, there can be no right of subrogation, unless the policy is somehow voided as to the mortgagor.

Similarly, where a shipper procures insurance on his goods which are then entrusted to a common carrier, the shipper’s insurer is allowed to subrogate to the shipper’s rights on the coverage contract. The reasoning in such cases appears to be based on the fact that almost absolute liability is imposed upon the carrier by law. Since the carrier is legally responsible for the goods, and can escape liability only by proving an act of God or similar occur-

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13 First National Bank of Elk City v. Springfield Fire and Marine Ins. Co., 104 Kan. 278, 178 P. 413 (1919); Tarrant Land Co. v. Palmetto Fire Ins. Co., 220 Ala. 423, 125 So. 807 (1930); Union Assurance Society v. Equitable Trust Co., 127 Tex. 618, 84 S.W. 2d 1151 (1936); Combs v. American Insurance Co., 286 Ky. 535, 177 S.W. 2d 881 (1944); Pacific National Fire Ins. Co. v. Watts, 266 Ala. 606, 97 So. 2d 791 (1957); Leyden v. Lawrence, 79 N.J. Eq. 113, 51 A. 121 (1911); Milwaukee Mechanics Ins. Co. v. Ramsey, 76 Or. 579, 149 P. 542 (1915). The only jurisdiction consistently in disagreement with the rule is Massachusetts, e.g., International Trust Co. v. Boardman, 149 Mass. 158, 21 N.E. 239 (1881) which reasons that the mortgage contract is wholly collateral to the insurance and therefore not available to the insurer. In Maryland see Washington Fire Insurance Co. v. Kelly, 32 Md. 421 (1870); Grangers Mutual Fire Ins. Co. v. Farmers National Bank, 164 Md. 441, 165 A. 479 (1933); Mutual Fire Insurance Co. v. Dilworth, 167 Md. 222, 173 A. 22 (1934) and Frontier Mortgage Corp. v. Heft, 146 Md. 1, 125 A. 809 (1924) where the court remarked:

"The mortgagor derives no benefit from a policy covering the interest of the mortgagee alone, but is bound to pay the mortgage debt to the insurers when they become his substituted creditors."


rence, he is, in effect, an insurer of the goods and is the primary obligor, and again the theory of suretyship will apply. It is general practice today for carriers to provide in their bills of lading that any insurance on the goods will inure to their benefit. Such a provision has been held to vitiate the right of the insurer to subrogate to the insured shipper's right against the carrier. On the other hand, the insurance companies have adopted a policy provision which acts to avoid the contract insurance where the insured agrees that the benefits received through the insurance are to inure to the carrier's benefit. This type of policy provision has also been sustained by the courts, on the theory that the parties are free to contract as they desire.

The greatest divergence of opinion is found in the cases involving contracts for the sale of realty or personalty, such as the one currently under discussion. Some jurisdictions have maintained that the situation is closely analogous to the mortgage situation mentioned above, and have applied the same rules. In Home Insurance Co. v. Bishop, the Maine court found that an insurer is entitled to subrogate the rights of a conditional vendor against the vendee for the balance due on the purchase price, where the vendee intentionally destroyed the goods. Likewise, where the insurance originally covering both vendor and vendee is cancelled as to the vendee for failure to pay premiums or for similar reasons, the insurer is subrogated; however, this rule only applies where the policy contains a loss-payable clause, thereby making the right of subrogation contractual or conventional and not a legal application of the equitable doctrine.

The general view in cases of this nature seems to be that expressed in Leavitt v. Canadian Pac. Ry. Co., where the court said:

21 Ibid.
22 Ibid.
24 Fields v. Western Millers, 290 N.Y. 209, 48 N.E. 2d 489 (1943). The court pointed out that the insurer collected the premiums for a risk and could not in good conscience keep its premiums and be made whole too.
25 Supra, n. 18.
"... an insurer who has paid a loss for which another is responsible, either by statute or at common law, is subrogated to any claim that the insured had against the person whose tortious act caused the injury; or who, for any other reason, is liable to the owner therefor."23

In each of the above cases the conclusions seem to be justified that the vendee, by his acts (while either amounted to malfeasance or non-malfeasance), should not be entitled to any equitable relief and what equities are present favor the insurer.

However, this doctrine has been applied in less compelling circumstances. In Interstate Ice & Power Corp. v. United States Fire Ins. Co.,24 the Court of Appeals of New York held that the insurer was entitled to subrogate to the insured vendor's rights where the goods were destroyed during a period of negotiation between vendor and vendee — after the latter had been in default and the former had caused the goods to be attached and seized by the sheriff. Likewise, in McCoy v. Continental Ins. Co.,25 the Michigan Court allowed the insurer to subrogate to the insured vendor's rights where the insurer was caused to indemnify the vendor for loss by fire, but in this instance the policy contained a subrogation clause and in addition had been procured by the vendor on his own initiative.

The Court in the instant case, recognizing the holdings of the above cases, said:

"... an insurer upon indemnifying an insured mortgagor for the loss of his interest in destroyed mortgaged property is entitled to be subrogated to the mortgagor's debt."26

However, the Court refused to apply this principle of the mortgage cases as it did not feel the analogy compelling, but rather gave the benefit of the vendor's insurance to the vendee. In so doing, the Court, after voicing its opinion that authority in support of either view was almost equal, said:

"But when an insured vendor has been indemnified by his insurer for the loss of property subject to a

23 Ibid., 888.
24 Supra, n. 18.
sales contract, the tendency has been to give the vendee the benefit of the vendor’s insurance rather than to subrogate the insurer to the vendor’s right to recover the purchase price from the vendee.”

This theory, which has been accepted by a number of jurisdictions is based upon the idea that the vendee is the equitable owner of the property he buys from the time the contract of sale is made and, as a result, is entitled to any benefit that may inure to the estate in the interim, and that the vendor retains an insurable interest in the property in the form of a lien upon the property until he is fully paid. Thus, if the property is destroyed between the time of the contract and the payment of the purchase price, the vendee is considered to be entitled to the benefit from the vendor’s insurance which itself is looked upon as a benefit accruing to the insured property.

In Gilbert & Ives v. Port, the court said:

“The vendee, because he is the equitable owner, and, as such, is compelled to sustain the loss, occurring after the sale and before the conveyance, is entitled to any benefit that may accrue to the estate.”

Following this theory, the courts have given the vendee the benefit of the vendor’s insurance; where the vendor, before being paid by the vendee, reconveyed the property to another, and the other in turn conveyed the property to a fourth person who had it insured; where the vendee actually contracted to bear the loss of damage due to fire and to purchase insurance on the property, but failed to do so; where the vendor had purchased insurance on his own and in his own name; where the insurer required the vendor to assign to it the vendor’s rights to the purchase price; and where the sales contract actually con-

27 Ibid., 114.
28 Kaufman v. All Persons, 16 Cal. App. 388, 117 P. 586 (1911); Gilbert and Ives v. Port, 28 Ohio St. 276 (1876); Skinner & Sons’ Co. v. Houghton, 92 Md. 68, 85, 48 A. 85 (1800).
29 White v. Gilman et al, 138 Cal. 375, 71 P. 436 (1903); Skinner & Sons’ Co. v. Houghton, 92 Md. 68, 85, 48 A. 85 (1900); McRae v. McRae, 78 Md. 70, 27 A. 1038 (1893).
30 Supra, n. 28.
31 Ibid., 293.
33 Automatic Sprinkler Corp. v. Robinson-Slagle L. Co., 147 So. 542 (La. 1933).
35 Godfrey v. Alcorn, 215 Ky. 465, 284 S.W. 1094 (1926)
tained a subrogation clause. The doctrine has been applied where the vendor was required to obtain the insurance, but failed to do so.

The fact that the vendee in the instant case failed to obtain insurance on the property, as he was contractually bound to do, made little difference, since it is well established that where the vendor obtains insurance, despite the vendee's contractual duty, it is unnecessary for the latter to perform his obligation, and he is, nonetheless, entitled to the benefit.

This view clearly prevails in Maryland. In Skinner & Sons' Co. v. Houghton, the Court of Appeals held that the assignee of the vendee was entitled to the benefit of the insurance despite the fact that the vendors had obtained it prior to the contract of sale and had not surrendered title or possession at the time the property was destroyed by fire. In reaching its decision the Court said:

"It is true that she [the vendor] had an insurable interest in the property until the purchase money was paid. . . . Under a contract of this kind, in equity, the vendee is in fact considered as the owner of the land, and although the vendor may still retain the title, he holds it as a trustee for the vendee, to whom all the beneficial interest has passed, with a lien on the estate [or property] as security for any unpaid portion of the purchase money. . . . Thus, if property is destroyed between the time of effecting the contract for the sale and delivery of the deed, the proceeds of an insurance policy upon such property belongs to the vendor between him and the (insurer), but the former is held to act as trustee for the vendee and must therefore account to his cestui trust in equity.""
In making a thorough examination of the problem, the court in the *Skinner* case adopted the view of *Hall v. Jones*\(^{42}\) that, where the sale concerns real property, after a contract of sale is made the vendor's interest is not real estate but personal property,\(^{43}\) the interest being in the security for the debt. The court further recognized the view of *Heller v. Marine Bank*\(^{44}\) that an insurance policy is only a contract for personal indemnity, but that indemnity is against a possible loss on account of the interest of the insured in the thing mentioned in the policy and when the vendee fully pays the vendor that interest is at an end and likewise the indemnity no longer exists.

It would appear that the decisions which adopt this view, giving the vendee the benefit of the vendor's insurance, violate the concept of an insurance policy being a personal contract, but this violation is excusable on the theory that the vendee could have taken an assignment of the policy if he had so desired. Nonetheless, it is clear that where the risk of loss remains on the vendor under the contract of sale, the vendee obtains no benefit from the insurance because he can suffer no loss in the event of damage to or destruction of the property.\(^{45}\) Thus the doctrine is limited to those situations where the risk of loss is upon the vendee. Furthermore, at least in Maryland, the doctrine will only apply where the vendor-vendee relationship exists and not in the analogous situation between mortgagor and mortgagee.\(^{46}\)

In conclusion, it appears that the court in the instant case, in denying the insurer the right of subrogation and instead granting the vendee the benefit of the vendor's insurance, adopted the more equitable approach since the insurer did contract to indemnify the vendor and did, in fact, accept the risk of loss. Furthermore, the equities clearly favor the vendee as he was not responsible for the loss, and should not be called upon to suffer such loss when another actually obligated itself to take the risk of loss.

**DONALD C. ALLEN**

**ROBERT E. POWELL**

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\(^{42}\) 21 Md. 439 (1863).

\(^{43}\) Ibid., 447, citing Smith & Gage, 41 Barbour 60 N.Y.S. Ct. (1863).

\(^{44}\) 80 Md. 602, 43 A. 800 (1899).

\(^{45}\) It follows as a natural result of the principle laid down in the cited cases that if the vendee is to gain the benefit of the vendor's insurance where the risk of loss is upon him, he should not be entitled to so benefit if the risk of loss remains on the vendor, as the vendee cannot be held to be the equitable owner.

\(^{46}\) Mullan v. Beldin, 130 Md. 313, 322, 100 A. 384 (1917).
Time Limitations On Actions Against Administrators Or Executors

Chandlee v. Shockley

The appellant, Clara Chandlee, was injured by an auto negligently driven by Homer Shockley, who died on October 8, 1956, from injuries sustained in the accident. Appellee, who qualified as decedent’s administratrix on October 18, 1956, admitted liability to appellant but requested her to refrain from filing suit, explaining that once the extent of her injuries was ascertained, a settlement could be reached. No settlement having been offered, appellant filed suit against appellee on June 25, 1957, by virtue of Article 93, Section 112 of the Code. Appellee demurred on the grounds that the suit had not been filed within the time limitation of the statute requiring such claims to be filed within six months from the date of the qualification of the administratrix. The trial court sustained the demurrer. In reversing the judgment of the lower court by a 3 to 2 decision, the Court of Appeals held that if the fraudulent statements of the administratrix had delayed earlier prosecution of appellant’s claim, she was estopped from asserting the statutory time limitation, and the appellant had the right to have the case heard on its merits.

In dissenting, Judges Henderson and Horney felt that a statutory time limitation, contained in a statute creating the right to sue, constituted a condition precedent to the plaintiff’s right of action, and noncompliance with the limitation destroyed all rights that the statute could confer.

The earliest time limitations on actions were found in Roman law which limited the right to recover property. Under the common law, the Act of 21 Jac. 1, c. 16, enacted in 1623 “. . . was the first comprehensive statute to adopt the modern method of arithmetical computation, instead of the earlier method of referring to certain well-known historical events.” This Act was the forerunner of present day Statutes of Limitation which “. . . are such legislative

2 8 Md. Code (1957) Art. 93, § 112 provides:
“Executors and administrators . . . shall be liable to be sued in any court of law or equity, in any action (except slander) which might have been maintained against the deceased . . . provided, however, that any such action for injuries to the person to be maintainable against an executor or administrator must be commenced within six calendar months after the date of the qualification of the executor or administrator of the testator or intestate.”
3 Developments — Statutes of Limitations, 63 Harv. L. Rev. 1177 (1950).
enactments as prescribe the periods within which actions may be brought upon certain claims or within which certain rights may be enforced. . . ." Their purpose is to encourage prompt ascertainment of legal rights and the suppression of fraud which may be the outgrowth of stale claims. Courts have adopted the principle that, since the purpose of the Statute of Limitation is to suppress fraud, they will not allow the Statute to become a means for perpetrating fraud. Therefore, fraud will toll the running of the Statute in common law actions against one who has committed the fraud, yet asserts the Statute as a bar to the innocent party’s claim.

Paralleling the growth of modern Statutes of Limitations was the emergence of many remedies unknown in the common law. The accuracy of Lord Mansfield’s maxim actio personalis moritur cum persona was challenged by statutes creating remedies for wrongful death and rights of actions against decedents’ estates. These statutes, creating new remedies, also created their own time limitations. Writers and courts interpreted these limitations as conditions precedent, and noncompliance with the limitation resulted in the loss of the entire right. The leading case is

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8 1 Wood, Limitations of Action (4th ed.) 1, 2.
9 Osbourne v. U. S., 164 F. 2d 767, 769 (2d Cir. 1947).
10 "All Statutes of Limitations are based on the assumption that one with a good cause of action will not delay in bringing it for an unreasonable period of time. . . ."
11 First Massachusetts Turnpike v. Field, 3 Mass. 201, 206 (1807):
12 "If this knowledge is fraudulently concealed from [the plaintiff] by the defendant, we should violate a sound rule of law, if we permitted the defendant to avail himself of his own fraud."
13 Sherwood v. Sutton, 5 Mason 143, 154 (1st Cir. 1828):
14 "Every statute is to be expounded reasonably, so as to surpress, and not to extend, the mischiefs, it was designed to cure. The statute of limitations was mainly intended to surpress fraud, by preventing fraudulent and unjust claims from starting up at great distances of time, when the evidence might no longer be within the reach of the other party, by which they could be repelled. It ought not, then, to be so construed, as to become an instrument to encourage fraud, if it admits of any other reasonable interpretation, and cases of fraud, therefore, form an implied exception. . . ."
15 34 Am. Jur. 16, Limitation of Actions, § 7:
16 "A statute of limitations should be differentiated from conditions which are annexed to a right of action created by statute. A statute, which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitation. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensible condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right."
17 See also State v. Parks, 148 Md. 477, 482, 129 A. 793, 797 (1925); Dunigan v. Cobourn, 171 Md. 23, 26, 187 A. 881, 883 (1936).
The Harrisonburg, in which suit was brought for a wrongful death after a twelve month statutory time limitation had expired. The Supreme Court, in reversing the Circuit Court's allowance of the claim, held:

"... The statutes create a new legal liability with a right to a suit for its enforcement, provided suit is brought within twelve months and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. ... Time has been made an essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statute, and the limitations of the remedy are therefore to be treated as limitations of the right." 

As a result of decisions following this statutory construction propounded in The Harrisonburg case, many statutes expressly include provisions stating that fraud is to toll the running of statutory time limitation. The Maryland Workmen's Compensation statute provides:

"Filing after fraud or estoppel — When it shall be established that failure to file claim by an injured employee or his dependents was induced or occasioned by fraud, or by facts and circumstances amounting to an estoppel, claim shall be filed within one year from the time of the discovery of the fraud or within one year from the time when the facts and circumstances amounting to an estoppel cease to operate and not afterwards."

Also courts have created implied exceptions for enemy aliens during time of war, and for American citizens who were prisoners of the enemy. These cases were the basis for the opinion of the court in Scarborough v. Atlantic Coast Line Railway Co. This case is heavily relied upon by the
majority opinion in the principal case. In that case, a seventeen year old boy was injured by the defendant and the defendant's agent induced the boy to wait until he reached the age of twenty-one to bring his claim in order that his injuries might be more accurately ascertained. When suit was brought, defendant claimed plaintiff was barred because the Federal Employers' Liability Act contained a three year limitation. The defense contended this constituted a condition precedent to plaintiff's suit as the Federal Employers' Liability Act created a right unknown in the common law. The court rejected this defense and held that the defendant's fraud estopped him from asserting the statutory time limitation. This view was upheld by the Supreme Court in Glus v. Brooklyn Eastern District Terminal, decided shortly after the decision in the principal case was rendered. In holding that fraud by the defendant stopped the running of a statutory time limitation, the Supreme Court added: "... we need look no further than the maxim that no man may take advantage of his own wrong."

The Maryland Court of Appeals has also distinguished procedural and substantive remedies and has held that non-compliance with a statutory time limitation on a remedy created by the legislature results in the destruction of the entire right. But closer in point to the principal case is Bogart v. Willis, in which the plaintiff brought his claim after the statutory limitation had elapsed. There the Court held a letter from the administrator of the estate, admitting the claim, before the period had elapsed tolled the statute.

"Any other construction would permit a defendant to play fast and loose, and claim the benefits of the statute while at the same time leading the plaintiff to believe that he proposed to pay the claim."

The dissent in the principal case is based upon the grounds that the Court cannot "properly write in exceptions to the condition imposed by the Legislature, on general

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16 45 U.S.C.A. (1954) § 56, provides:
   "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued."
18 Ibid., 232.
19 State v. Parks and Dunnigan v. Cobourn, supra, n. 9.
20 158 Md. 393, 148 A. 585 (1930).
21 Ibid., 407.
equitable grounds. The cases cited in the dissent refer to an excerpt from Chief Judge Marshall's opinion in *McIver v. Ragan*:

"Wherever the situation of a party was such as, in the opinion of the legislature, to furnish a motive for excepting him from the operation of the law, the legislature has made the exception. It would be going far, for this court to add to those exceptions. . . . If this difficulty be produced by the legislative power, the same power might provide a remedy; but courts cannot, on that account, insert in the statute of limitations, an exception which the statute does not contain."

The dissent distinguishes the *Osborne* and *Hanger* cases as being decided on the principle of international law that during war, "no court was available to which jurisdiction could be ascribed."

The reasoning of *Bogart v. Willis* and *Scarborough v. Atlantic Coast Line* seems more compelling and more in point as to the effect of fraud. While an express exception concerning fraud would have made the Court's decision easier, the writer believes that the Court has properly decided the principal case. The decision seems in accord with the modern trend of decisions, which give no effect, insofar as the question of fraud waiving the time limitation, to the distinction between common law Statutes of Limitation and time limitations on statutory remedies unknown to the common law. Statutory rights and limitations must be considered in the light of the body of the law of which they are to become a part. As common law time limitations are tolled by fraud, no adequate reason can be presented for applying a different interpretation as to statutory time limitations.

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23 2 Wheat. 25 (U. S. 1816).
24 Ibid., 29, 30.
25 *Osborne v. United States*, 164 F. 2d 767, 769 (2d Cir. 1947), see *supra*, n. 6.
27 *Supra*, n. 22, 505.
28 *Supra*, n. 20.
Automobile Driver Cannot Be Held To A Normal Degree Of Care Under Extraordinary Circumstances

Robinson v. Walls

The defendant, after leaving his employer's restaurant, was held up by a former employee, forced to turn over all the cash in his possession, and told to get into his car and drive as directed, with the robber taking a position directly behind the driver. After riding for more than ten minutes, the defendant felt there was little hope for his survival, and decided to take a calculated risk. With the car in motion, and after seeing that there were no pedestrians or moving cars in the vicinity, he jumped from his car and ran. The robber, while attempting to control the car, struck the parked unoccupied cars of the plaintiffs, causing damage to each. The plaintiffs brought this suit asserting that the defendant was negligent in abandoning his car while in motion, and that this negligence resulted in the damage to their cars.

The court held that the circumstances under which the defendant acted constituted an emergency situation, and that under the doctrine of emergency he could not be held liable for the resulting damage to the plaintiff's automobiles. In so holding, the court indicated that the defendant acted not only prudently, but more intelligently than most people under such circumstances.

To determine the issue of defendant's liability, two basic questions must be answered: first, did the defendant act as a reasonable and prudent man by exercising the proper degree of care in this particular situation; and second, assuming the defendant was negligent in his actions, were such actions the proximate cause of the resulting damage?

It has long been established that one is not negligent if he has used the same quantum of care as would have been exercised by a reasonable man under like circumstances. That degree of care has been described as that which experience has found necessary to prevent injury to others in like cases.\(^1\) The circumstances of each particular case must be taken into consideration to determine the proper degree of care that one owes in respect to another's person.

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\(^1\) People's Court of Baltimore City (No. 25189-58), reported in the Daily Record, August 22, 1959 (Md. 1959).

or property. The doctrine of emergency, which holds the actor not liable for taking a course of action which results in disaster if such action was taken in a situation which arose suddenly and unexpectedly, would operate to lower the required level of care, so as to find an act done, without opportunity for deliberation, not negligent.\footnote{PROSSER, TORTS (2d ed. 1955) 137, § 32.}

In \textit{Burhans v. Burhans},\footnote{159 Md. 370, 150 A. 795 (1930).} it was held that the driver was not negligent when, in swerving to avoid a dog, she overturned the car, injuring the occupants. The court said, in this opinion:

"Because of the peril of the position in which she \[the driver\] was placed \ldots and the possible consequences resulting from a collision \ldots she is not held to the same accuracy of judgment as is required of her under ordinary circumstances. And though a course of action other than that which she pursued might have been more judicious, she is not to be held liable for her error of judgment in pursuing the course she did, if, in doing so, she acted with such care and caution as \textit{ordinarily} prudent persons would have exercised under the stress of like circumstances."\footnote{1PROSSER, loc. cit., supra, n. 4. "Sudden and unexpected" restriction applied in Hercules Power Co. v. Crawford, 163 F. 2d 968 (8th Cir. 1947); Kaestner v. Milwaukee Automobile Ins. Co., 254 Wis. 12, 35 N.W. 2d 190 (1948); Horton Motor Lines v. Currie, 92 F. 2d 164 (4th Cir. 1937); Henderson v. Land, 42 Wyo. 369, 295 P. 271 (1931).}

In applying the doctrine to the facts of the instant case, there is difficulty in meeting the requirement that to be an emergency, there must be a sudden and unexpected situation, such as to deprive the actor of all opportunity for deliberation." In the case of the automobile driver, it is held that the emergency doctrine cannot be applied where a driver has had an opportunity to exercise his deliberate judgment between alternative courses of action.\footnote{60 C.J.S., § 257. "Sudden and unexpected" restriction applied in Horton Motor Lines v. Currie, 92 F. 2d 164 (4th Cir. 1937); Poneilbowksi v. Harres, 200 Wis. 504, 226 N.W. 126 (1929); Bloxom v. McCoy, 178 Va. 343, 17 S.E. 2d 401 (1941). Similar restrictions are found in \textit{1 CYCLOPEDIA OF AUTOMOBILE LAW} (1948), Part 2, § 668. Recent Maryland cases in point are: Lehmann v. Johnson, 218 Md. 343, 146 A. 2d 886 (1958) and Warnke v. Essex, 217 Md. 188, 141 A. 2d 728 (1958).}
The defendant had been in the perilous situation of being forced to drive at gunpoint for more than ten minutes. He testified that he took a calculated risk when he decided to jump from his automobile, which apparently involved a decision between two alternatives: (1) Remain in his automobile and take his chances with this "desperate criminal", or (2) Jump from the car, causing possible injury to himself as well as to other persons and their property. The first alternative was obviously rejected, and the second chosen only after ascertaining that there were no pedestrians or moving cars nearby. It is clear that the defendant made a definite, deliberate decision in his taking this calculated risk and that his abandoning the car was no mere impulse; and therefore, the situation does not actually fall within the strict definition of an emergency.

In Lange v. Affleck, the driver of an automobile had ample opportunity, although less actual time than in the instant case, to observe the approaching danger of an oncoming automobile pulling into the wrong lane preparatory to making a left turn, yet he made no decision as to a course of action which would avoid an accident until the last moment, so that the accident occurred anyhow. Here, the court, disallowed any claim of emergency because the necessary elements of suddenness, unexpectedness and lack of time for deliberation were missing. However, compare Cordas v. Peerless Transportation Co., in which it was held that an emergency was present, where a fleeing criminal jumped into the defendant's cab and ordered the operator to drive away. The driver leapt from the moving cab within seconds when he realized the nature of his passenger, giving the element of suddenness and unexpectedness, thereby distinguishing it from the Walls case.

Assuming that the defendant's act of abandoning his moving automobile was negligent, however, it becomes necessary to determine if the negligent act was the proximate cause of the damage. Where a chain of events has been started due to the alleged negligence of the driver of an automobile, he may be held liable for all mishaps which are properly the proximate results of the improper conduct.

The principal means of attacking this doctrine of proximate cause is to show an intervening cause in the chain of

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* 169 Md. 695, 155 A. 150 (1931).
* 27 N.Y.S. 2d 198 (1941).
* 60 C.J.S., § 255.
events that was sufficient to supersede the driver's original negligence. In Bloom v. Good Humor Ice Cream Co. of Baltimore, the doctrine of superseding intervening cause was held to relieve the defendant ice cream truck driver of negligence, if any, in his inviting a child to a place of danger by having him cross the street to make a purchase, because the acts of the child and the approach of the car which struck him were intervening causes superseding the defendant's act of negligence. So it may reasonably be argued that in the present case the criminal's attempts to steer the car after the defendant had jumped were the intervening causes, and would thus relieve the defendant of liability by superseding his act of jumping.

However, the mere fact that another cause has intervened between the defendant's negligence and damage for which recovery is sought, is not of itself sufficient in law to relieve the defendant of liability; and if the damage is the natural and probable consequence of the original act, or is such as might reasonably have been foreseen as probable, the original wrongdoer is liable notwithstanding the intervening act or event. Also, an intervening act of a person which is the normal response to the stimulus of a situation created by the actor's negligent conduct is not a superseding cause. And in addition, if the occurrence of the intervening cause might have reasonably been anticipated by the wrongdoer as a probable consequence of his own negligence, such intervening cause will not interrupt the connection between the original cause and the damage.

These restrictions would most likely operate to defeat any contention that the criminal's attempts at steering the abandoned automobile were an intervening cause. It is obvious that damage to property would be a reasonably foreseeable consequence of abandoning a moving car. Likewise, the fact that where the driver of a moving car had abandoned it the normal response of a passenger would be to try to control it, would prevent such conduct from being an intervening superseding cause. And finally, such attempts at controlling the moving car should have been reasonably foreseeable, and the defendant should have ex-

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18 This doctrine is set out in 65 C.J.S., 685, § 111 and upheld in Garbes v. Apatoff, 192 Md. 12, 63 A. 2d 307 (1940).
19 179 Md. 384, 18 A. 2d 592 (1941).
21 2 Restatement, Torts (1934) § 443. Also 65 C.J.S., 695-696, § 111.
pected such to happen when he chose to abandon the automobile.

It would seem therefore, that not only is the defendant unable to avail himself of the emergency doctrine as a means of finding his act to be non-negligent, but that the doctrine of superseding cause cannot be invoked to release the defendant from liability for the damage resulting from his act.

Yet how does the law expect a reasonable man to act in such a situation? Although the principle that a person is to be held responsible for any injury he causes is the foundation of all tort law, the theory that “One assaulted and in peril of his life may run through the close of another to escape from his assailant,”\(^7\) has a definite place in the development of tort law to its present state. In *Ploof v. Putnam*,\(^8\) a well known case that did much to promote this theory, the court held that “One may sacrifice the personal property of another to save his life or the lives of his fellows.”\(^9\) This theory has become known as the doctrine of necessity; and, although it does not abolish liability for actual damage done, it could certainly operate to lower the level of care required of the defendant in the instant case and prevent the recovery of any punitive damages.

A person being forced to drive with a gun in his back has every reason to believe that his life is in danger. The concept of self preservation cannot be so disregarded as to consider a person guilty of a negligent act in attempting to save his life; and, even though his actions resulted in certain property damage, it cannot be said that the defendant acted without reason because of the necessity of the situation.

To summarize the effect of the decision in this case, it can be said that a reasonable decision made by someone in a perilous situation to save his own life by taking a course of action which results in certain damage, is not to be considered a negligent act because the normal degree of care required of a driver cannot be required of a person in such a perilous situation. The instant case thereby demonstrates a tendency to expand upon the limitations of the doctrine of emergency.

**Harry E. Silverwood, Jr.**

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\(^{7}\) 37 Hen. VII, pl. 26.
\(^{8}\) 81 Vt. 471, 71 A. 188 (1908).
\(^{9}\) Ibid., 189.
Recent Decisions

Criminal Law — Circumstantial Evidence Of Corpus Delicti Held Sufficient For Murder Conviction. *People v. Scott*, 1 Cal. Repr. 600 (1959). The California District Court of Appeal, in affirming a first degree murder conviction, held that, despite the lack of a corpse or any part thereof, the circumstantial evidence introduced in the trial was sufficient to supply proof of guilt so convincing as to preclude every reasonable hypothesis of innocence. This is apparently the first United States decision where a murder conviction has been upheld without a body, or any part thereof, having been found. The defendant, by his behavior following the disappearance of his wife, indicated that her absence had not been voluntary and that he had knowledge of her death after her disappearance. The Court noted that murder convictions, under similar circumstances, have been upheld in the English cases of *The King v. Horry*, [1952] N.Z.L.R. 111, 68 L.Q. Rev. 391 (1952), and *The King v. Onufrejczk*, 1 Q.B. 388, 33 Can. B. Rev. 603 (1955).

In order to sustain a murder conviction, there must be proof of the corpus delicti of the crime, which includes proof that a human life has been taken. This is usually satisfied by direct evidence of the fact of death, but there is no bar in theory to circumstantial proof. Such proof is in fact sometimes the only kind likely to be available. See *St. Clair v. United States*, 154 U. S. 134 (1894) (Throwing victim overboard on the high seas), and 159 A.L.R. 524 (Infanticide). See also 26 Am. Jur. 475, Sec. 461, for general discussion of necessity of proof of corpus delicti. The circumstantial evidence of death must, of course, be clear and satisfactory.

Maryland courts have never been confronted with the problem. In *Watson v. State*, 208 Md. 210, 177 A. 2d 549 (1955), and *Jones v. State*, 188 Md. 263, 52 A. 2d 484 (1946), the Court of Appeals indicated that proof of corpus delicti is sufficient if it is established that the person for whose death the prosecution was instituted is dead, and that the death occurred under circumstances which would indicate that it was caused criminally. However, both of these cases involved the identity of the corpse rather than the lack of one.

Evidence — Admissibility, In A Rape Trial, Of Testimony Of Defendant’s Prior Rape Victims. *State v. Finley*, 85 Ariz. 327, 338 P. 2d 790 (1959). Based on admission of testimony of a 17-year-old girl that the defendant had
raped her five days before raping the prosecutrix, the defendant was convicted of raping the 44-year-old prosecutrix, where in both instances the defendant had bluntly declared his intentions, proceeded to accomplish same with brute force in parked automobiles at night and had exhibited a personality transformation of the "Dr. Jekyll-Mr. Hyde" variety. The Supreme Court of Arizona in a 3-2 decision affirmed the conviction, finding the facts sufficient to establish a scheme or design and in addition, reinforced their holding by indicating that rape is the type of sexual offense where, for the purpose of showing "criminal desires" and "lustful propensities", evidence of prior rapes may be admissible. The dissent, relying heavily on *Lovely v. United States*, 169 F. 2d 386 (4th Cir., 1948), refused to include rape among the sex offenses where greater liberality is exercised, and required that for the "common scheme" exception to apply, evidence of the prior offense must establish a preconceived plan which resulted in the commission of that crime, reasoning that a prior rape merely having certain elements in common with the rape for which the accused was on trial has no tendency to establish a plan or design such as would render the evidence admissible.

Although Maryland has no decision on this precise point, dictum in *Wentz v. State*, 159 Md. 161, 164, 150 A. 278 (1930), indicates that in "sexual offenses", especially adultery, bigamy, criminal conversation, sodomy, indecent liberties, and incest there is a well recognized exception to the general rule, but limits this exception to prior offenses against prosecutrix. In the *Wentz* case since the previous incestuous act was against the prosecutrix's sister, such testimony was excluded. In *Berger v. State*, 179 Md. 410, 20 A. 2d 146 (1941) evidence of a prior act of sodomy, and in *Blake v. State*, 210 Md. 459, 124 A. 2d 273 (1956) testimony of previous unnatural sex acts were excluded because they were committed against persons other than the prosecutrix. See also, 2 *Wigmore on Evidence* (3rd ed. 1940), § 357; 167 A.L.R. 594; *McCormick, Evidence* (1954), § 157.

**Maryland Industrial Finance Law — What Constitutes Error Of Computation.** *Fisher v. Bethesda Discount Corporation*, 221 Md. 271, 157 A. 2d 265 (1960). Plaintiff's loan payment became due on Friday, but was not paid until the following Wednesday. Defendant loan company, unaware of the Time Statute, 7 Md. CODE (1957) Art. 94, § 2, which excludes Sunday in computing a period of seven days or
less, collected a $2.68 delinquency charge from plaintiff. Collection of a delinquency charge is authorized by the Maryland Industrial Finance Law, 1 Md. Code (1957) Art. 11, § 196 (A) (3), for any default continuing for five or more days. The defendant contended that the collection of the delinquency charge, while admittedly erroneous, was done as "the result of an accidental or bona fide error of computation." Unless the defendant's error met this test, the defendant would lose his right to collect the entire loan under Sec. 196(c) of the Finance Law. In reversing the lower court's judgment for the defendant, the Court of Appeals held that the collection of the overcharge was not an "error of computation" and consequently the entire loan of $800 was void and uncollectible. The Court pointed out that the Finance Law plainly excuses errors as to the honest miscalculation of interest, as the result of a computation, but does not excuse a mistake of law as to what, legally, may be collected. Although the Court felt that the situation at hand did not, technically, involve usury, it nevertheless applied usury principles in arriving at its final decision.

The authorities on the subject indicate that where there is an exaction of more than legal interest resulting from an honest mistake of fact, there is no usury; but that a mistake as to the law will not ordinarily relieve a transaction from being usurious, 55 Am. Jur. 349, 350, Usury, Sec. 35; 6 Williston, Contracts (Rev. ed. 1938) § 1698. It appears harsh to hold, on the one hand that a mistake of fact, such as an error in the calculation of interest or a clerical error, does not constitute usury, and on the other, that a similar error, as in this instance a mistake of law, though admittedly an "honest error" is in effect usurious. For a comprehensive historical sketch of usury and the problems involved, see Plitt v. Kaufman, 188 Md. 606, 53 A. 2d 673 (1946), and Finance Company, Inc. v. Catterton, 161 Md. 650, 653, 158 A. 17 (1931).

Negligence — Assumption Of Risk By Golf Course Employee. Meding v. Robinson, 157 A. 2d 254 (Del. 1959). Plaintiff, a greenskeeper who was standing on the edge of the green approximately seven feet from the pin, was injured when defendant's approach shot from ninety yards out hit him. The Court, finding that defendant did not give the normal admonitory warning held that a greenskeeper did not assume the risk of the golfer's act. A golfer has the duty of giving timely and adequate warning to those in the general intended line of play.
Because of the known dangers incident to the game of golf, players, spectators and employees assume the risk of injury due to accident or inadvertence, unaccompanied by negligence, *Benjamin v. Nernberg*, 102 Pa. Super. 471, 157 A. 10 (1931). However, before driving, a player must warn persons who are in the general line of play and who are unaware of his intention to play. The word "fore" is recognized by golfers the world over as the appropriate and adequate warning cry, *Alexander v. Wren*, 158 Va. 486, 164 S.E. 715 (1932). But such a warning need not be made if the subsequent injured party was in a safe place or knew of the intended play, *Boynton v. Ryan*, 257 F. 2d 70 (3rd Cir., 1958), *Walsh v. Machlin*, 128 Conn. 412, 23 A. 2d 156, 138 A.L.R. 538 (1941).

The Maryland Court of Appeals apparently has not been presented with any similar type situations. For a thorough review of decisions from other jurisdictions, see 138 A.L.R. 541, 7 A.L.R. 2d 704.

**Practice — Length Of Time During Which Jury Is Kept Together Is Within The Discretion Of The Trial Judge.** *Commonwealth v. Moore*, 157 A. 2d 65 (Pa. 1959). Defendant, appealing from a conviction of voluntary manslaughter, bases her appeal on the grounds that the decision of the jury reached under undue strain and duress imposed upon the jurors by the failure of the trial judge to make provisions for them to rest and sleep during an extensive deliberation period. After having received instructions, the jury retired at 7:08 P.M. During the next eleven hours they recessed from deliberating only twice, the first time at 11:15 when they asked for and received further instructions from the judge, and the second at 5:00 A.M. in the morning when the judge called them back into the court room for the purpose of answering any questions which the jurors might have so as to enable them to reach a verdict. The forelady at this time expressed the opinion that the jury was deadlocked, but the judge sent the jurors back into deliberation and urged them to make every effort to reach a unanimous decision. At 6:08 A.M., a little more than an hour later, the jury returned with the verdict. In affirming the conviction the Supreme Court of Pennsylvania held the extent of time during which a jury shall be kept together is entirely within the sound discretion of the trial judge, and his action will be reversed only for an abuse of discretion. In light of the facts stated above and due to the fact that the jury at no time made any requests for the suspension of the
deliberations, the Court felt that there was no abuse of judiciary discretion in this case.

Maryland, in addition to many other states, is in accord with the rule laid down by the Pennsylvania Court. In *Brigmon v. Warden*, 213 Md. 628, 131 A. 2d 245 (1957), the Court of Appeals, in denying an application for a writ of habeas corpus stated that the length of time that a jury should be required to deliberate upon a defendant's guilt or innocence lies within the sound discretion of the trial court.

For an interesting annotation on this point, see 8 A.L.R. 1420 et seq.

**Real Property — Taking Of Air Easements By Landings And Take-Offs Of Aircraft.** *Ackerman v. Port of Seattle*, 348 P. 2d 664 (Wash. 1960). In an action by landowners adjacent to a large commercial airport to recover for diminution in market value of their land due to repeated low flights of aircraft in take-offs and landings, the Supreme Court of Washington held that such flights were not within public domain of navigable airspace as set out by Congress in Civil Air Regulations, and thus amounted to a taking of air easements, for which landowners are compensable.

The Court relied on *United States v. Causby*, 328 U. S. 256 (1946), in differentiating between the police power of the government and the right of eminent domain. Both Courts said that state governments cannot simply arbitrarily declare that all airspace over a private land is public domain, and thereby avoid paying damages to property owners for use of such airspace by the state. Only air above minimum navigable airspace altitudes is part of the public domain, and repeated invasions of airspace below this minimum is a “taking” of an air easement, compensable under the Washington State Constitution as the taking of private property for public use under the power of eminent domain.

Maryland has followed this rule in *Mutual Chemical Co. v. Mayor and City Council of Baltimore*, Circuit Court of Baltimore City, Daily Record, Jan. 27, 1939, the only case of this type in this state to date. In this case, a prior Maryland statute was held invalid. In 1949, a new statute was enacted (1 Md. Code (1957) Art. 1A, Sec. 13(d)) requiring air rights necessary for a public airport to be acquired by condemnation proceedings under the right of eminent domain. For a further analysis of this area, see *Aviators Right in Airspace*, 8 Md. L. Rev. 300 (1944).
Book Reviews


Perhaps no other test of a book is so all-conclusive as pitting it against its avowed objectives. Does it meet, in satisfactory manner, those objectives? Mr. Davis states that he is writing "... exclusively for law students... not for practitioners, not for judges, not for administrators, and not for legal scholars." Being, by choice, a teacher of law students, Mr. Davis feels qualified to set forth those items which he believes they want in a text, namely:

"... significant problems to be opened up for them. They want informational background, and they want reasons, pro and con. They want to know the general drift of the authorities and they want spirited criticism of the authorities. They want ideas to spark their own imagination in trying to solve problems. They want the foundations for formulating their own opinions on major issues. They want illustrations and concreteness, not abstraction."

Measured against even this formidable array, it can quite fairly be said that Mr. Davis's book answers such needs most adequately.

His approach to the shibboleth of "separation of powers" is at once frank and refreshing. He takes little time and less space to demolish this erstwhile bastion of administrative law as it was viewed and taught even as recently as this reviewer's law school days, using as his wrecking tool Mr. Justice Jackson's dissenting statement that in describing administrative agencies as "... quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution," the courts have implicitly confessed "... that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed." In seeking to direct the student's approach to this matter, Mr. Davis lays

\(^1\) Davis, IX.
\(^2\) Ibid.
down the view that the principal guide is that of check, not separation, of powers; for "... tyranny or injustice lurks in unchecked power, not in blended power." Concomitantly, he points out that in the federal courts, the doctrine of nondelegation of power has been so far watered down as to be of relatively small importance while also making it clear that the same doctrine has found favor in many state court decisions. Having disposed of these matters, Mr. Davis plunges exuberantly into the work of dissecting and analyzing the many other facets of his chosen field.

While recognizing full well that oft-times one may become impatient and irritated in his contacts with some of the individuals who collectively make up the vast agglomeration of boards and commissions on both state and federal levels, it is nonetheless regrettable that at times Mr. Davis allows his feelings to discolor an otherwise dispassionate treatment of his subject. His repetitive use of the term "petty," carrying with it a sense of small-mindedness or unyielding rigidity of position, to denote those agency officials or employees who carry out the lesser functions of such bodies, detracts from his work and, so far as this reviewer's experience is concerned, is largely without warrant. But of more importance, this attitude, manifested by one of the real authorities in administrative law, may bias students against such persons before they appear or practice before one or more of these many agencies.

That Mr. Davis has not merely produced a work of great scholarship, but has at the same time demonstrated a very practical working knowledge of the various administrative agencies themselves was forcefully brought home to the reviewer by the coincidental reading of Mr. Davis's chapter entitled "Supervising, Prosecuting, Advising, Declaring and Informally Adjudicating," and Mr. Louis Loss's Foreword to the October, 1959, issue of the Virginia Law Review, devoted in its entirety to "Contemporary Problems in Securities Regulation." Mr. Davis, in critically pointing out the virtual unreviewability of the Securities and Exchange Commission's exercise of its supervisory powers, they being neither adjudicatory or legislative, went on to illustrate their awesome coerciveness so far as registrants under the federal securities acts

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4 Davis, 30
5 69 § 4.01.
are concerned. It was, therefore, noted with a great deal of interest that Mr. Loss, who has written the landmark

*To the reviewer, whose administrative agency experience has been gained primarily in the field of securities regulation, it seems that Mr. Davis, steeped as he is in his subject, assumes for the student a knowledge of this specialized field of corporate finance which few, if any, students possess, and by so doing loses some of the force of his illustration of the Securities and Exchange Commission's coercive powers over registrants, after the deficiency letters have been compiled with and the final price amendment has been filed, *via* the granting or withholding of acceleration when he summarily says that at this point in the issuer's registration process, "[business reasons usually make acceleration of amendments so compelling that the registrant is willing to yield to onerous conditions". (70). To assign "business reasons," rather than explaining that it is the fear of the collapsing of the underwriting contract which is the force involved, seems oversimplification. In practically every large public offering of securities, the issuer (a) in the case of a negotiated sale of bonds or equity securities not having preemptive rights, executes a purchase contract with an investment banking house in which it is agreed that the investment banker will purchase all of the offered securities at a certain price, or (b) in the case of a negotiated underwriting of equity securities with preemptive rights, executes an underwriting contract which provides that for a fee, plus not infrequently certain profit sharing possibilities and additional fees for shares "laid-off," the underwriter will purchase at a certain price all of the offered securities which are not subscribed for by the issuer's stockholders under their preemptive rights within a stated number of days (usually about two weeks) after the initial public offering. This latter firm-commitment type of underwriting contract is the issuer's assurance that it will receive at least the agreed-upon price for its securities even if it cannot sell any of them to such stockholders. The underwriter's fee to the issuer for underwriting the sale of the preemptive securities is based, of course, on several factors such as the past performance of the issuer in earnings, its standing in the industry, and the current state of the market generally in the type of securities being issued. Overriding all of this, however, is the fact that, in the case of bonds the nonpreemptive equity securities, the purchase price is predicated upon the registration statement becoming effective promptly after the underwriting agreement is signed, and, in the case of a preemptive offering of securities, the underwriter's fee is predicated on this same factor. Under the Federal Securities Laws, the underwriter is unable, until the registration statement becomes effective, to "lay-off" or spread (through sales) the risk of having to take up and pay for the unsubscribed securities. Since securities markets fluctuate, often with great rapidity, the price which the underwriter agrees to pay for the securities is based on his judgment of the market at the moment. However, without substantially increasing his fee to protect himself against possible declines in the market, no underwriter is willing to remain solely liable for the securities at a set price without being able to sell for a period of *twenty days* after the making of the underwriting contract. It is customary, therefore, for the underwriter and the issuer to conclude that the underwriter's fee and the price which he agrees to pay for the securities will be based upon the registration statement promptly becoming effective. To this end the underwriting contract contains a more-or-less standardized paragraph which provides:

"The obligations of the Underwriter to purchase and pay for the [Securities offered under the registration statement] will be subject to... the following conditions:

(a) The Registration Statement shall have become effective not later than [a stated hour] — *Standard Time*, on the second business day following the date of this Agreement..."

Here the SEC's power to grant or withhold acceleration following the filing of any amendment to the registration statement comes into proper
work in the securities field,⁷ should be making the same point in his Foreword when he wrote:⁸

"Still another matter which cannot be reiterated too frequently is the largely theoretical nature of judicial review in great areas of the Commission's work. In the case of Securities Act registration especially, there is no need to belabor the point that the Commission — if not a Branch Chief or Assistant Director of Corporation Finance — is the Supreme Court of the United States to all intents and purposes." (Emphasis added.)

This is corroborative evidence, if indeed such were needed, of Mr. Davis's keen insight into a very technical and detailed segment of administrative law.

In only two instances involving substantive analysis of decisions of the Supreme Court did this reviewer find Mr. Davis's delineations somewhat hard to follow. First, in his chapter on Bias,⁹ Mr. Davis, after noting that "[bias] in the scene of crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification," reviews the minority position as expressed

focus. The student must visualize the registration statement relating to the security as filed with the SEC containing almost all of the necessary statements and disclosures with respect to the issuer and the security save for the price at which the security is to be sold. This price is not fixed until a day or two before the contemplated offering and is then negotiated between the issuer and the underwriter in the execution of the underwriting agreement. The issuer then files its price amendment to the registration statement and requests acceleration of the newly begun 20-day waiting period which, as Mr. Davis explains, was activated by the filing of such amendment. The grant of acceleration then becomes vital in the face of the above-quoted provision in the underwriting contract and this is the compelling "business reason" to which Mr. Davis refers. Unless acceleration is granted, the underwriter folds its tent and slips away, while the registrant solaces itself by gnashing its corporate molars.

Finally, Mr. Davis did not make it clear that no such "acceleration" problems exist in the case of a registration statement covering securities to be offered at competitive bidding. Rule 415 of the SEC requires the issuer to include in such registration statement an undertaking "to file an amendment to the registration statement reflecting the results of the bidding, the terms of the reoffering and related matters . . ." and provides that the order declaring such a registration statement effective for bidding, "shall be deemed to declare . . . [the price] amendment thereto . . . effective at the time such [price] amendment is filed" unless a stop-order proceeding has been previously instituted. This effectively removes the necessity for requests for acceleration upon the filing of the price amendment to such registration statements.

⁷Loss, Securities Regulation (1951) supplemented (1955). Mr. Loss, in 1951 Associate General Counsel for the SEC, is presently Professor of Law at Harvard University.


⁹Davis, 215, Chapter 12.
by the British Committee on Ministers' Powers\textsuperscript{10} (quoted with approval by the Administrative Law Committee of the American Bar Association\textsuperscript{11} that "[b]ias from strong and sincere conviction as to public policy may operate as a more serious disqualification than pecuniary interest."

In commenting on the view of the British Committee, Mr. Davis refers to the case of \textit{F.T.C. v. Cement Institute}.\textsuperscript{12} In his description of the factual background, he states:\textsuperscript{13}

"The Commission had issued a cease and desist order against use of a multiple basing-point system in the selling of cement. The Commission before instituting the proceeding had made reports to Congress and to the President expressing the opinion that the multiple basing-point system was a violation of the Sherman Act. The companies contended that the Commission had expressed a 'prejudgment of the issues' and that it was 'prejudiced and biased.' The Court specifically said that it was deciding 'on the assumption that such an opinion had been formed by the entire membership of the Commission as a result of its prior official investigations.' Then the Court held that the Commission's previously formed opinion 'did not disqualify the Commission.'"

Without reference to the Supreme Court's opinion here, one would be entitled (aside from the extremely oblique reference to the Commission's "prior official investigation") to assume from Mr. Davis's text that the Federal Trade Commission had of its own initiative and without directive or other sanction from Congress, begun a study of the multiple basing-point system and filed its conclusion with respect thereto with Congress and the President in an effort (a) to secure legislative action with respect to such system, or (b) to have the President direct the Attorney General to institute proceedings against the cement companies under the Sherman Act, all in addition to the action which the Federal Trade Commission planned under the Federal Trade Commission Act. If this had been the fact, then the Supreme Court's refusal to hold the Commission disqualified for bias would have been quite extreme. Upon reading the full opinion, however, one finds very sound grounds upon which the court could and did

\textsuperscript{10}Report of Committee on Ministers' Powers (1932) 78.
\textsuperscript{11}61 A.B.A. Rep. 734 (1936).
\textsuperscript{12}333 U. S. 683 (1948).
\textsuperscript{13}Da\textit{vis}, 216.
reach its conclusion. It pointed out that one of the cement companies: 14

"[I]ntroduced numerous exhibits intended to support its charges [that the Federal Trade Commission had previously prejudged the issues and was prejudiced and biased against the cement industry]. In the main these exhibits were copies of the Commission's reports made to Congress or to the President, as required by § 6 of the Federal Trade Commission Act. 15 U.S.C.A. § 46. [This section of the act states in part that "The Commission shall have power . . . (d) upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violation of the antitrust acts by any corporation.] These reports, as well as the testimony given by members of the Commission before congressional committees, make it clear that long before the filing of this complaint the members of the Commission at that time, or at least some of them, were of the opinion that the operation of the multiple basing point system as they had studied it was the equivalent of a price fixing restraint of trade in violation of the Sherman Act." (Emphasis added.)

The court went on to state that the fact that the Commission had entertained such views as a result of its prior investigations did not mean that the minds of the members were closed on the subject of the defendant's basing point practices for here the industry participated in the hearings and produced some 49,000 pages of testimony on the matter. It concluded:

"[The argument that because the Commission had previously concluded that the operation of multiple basing point system was a violation of the Sherman Act] . . . if sustained, would to a large extent defeat the congressional purposes which prompted passage of the Trade Commission Act. Had the entire membership of the Commission disqualified in the proceedings against these respondents, this complaint could not have been acted upon by the Commission or by any other government agency. Congress has provided for no such contingency. It has not directed that the Commission disqualified itself under any circumstances, has not provided for substitute commissioners should

14 Supra, n. 12, 700 et seq.
any of its members disqualify, and has not authorized any other government agency to hold hearings, make findings, and issue cease and desist orders in proceedings against unfair trade practices. Yet if [the complainants are] right, the Commission by making studies and filing reports in obedience to congressional command, completely immunized the practices investigated, even though they are 'unfair,' from any cease and desist order by the Commission or any other governmental agency.

"There is no warrant in the act for reaching a conclusion which would thus frustrate its purposes. If the Commission's opinions expressed in congressionally required reports would bar its members from acting in unfair trade proceedings, it would appear that opinions expressed in the first basing point unfair trade proceeding would similarly disqualify them from ever passing on another.... Thus experience acquired from their work as commissioners would be a handicap instead of an advantage. *

"Neither the Tumey decision [holding it a violation of procedural due process for a judge who had a direct personal pecuniary interest in convicting the defendant, to try, convict, and commit him to jail] nor any other decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues every time, although these issues involve questions of both law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court."

While this case does reject the view of the British committee, it would certainly seem that the student would be more likely to understand the basis for such rejection had Mr. Davis placed this case under his discussion of "The Rule of Necessity."\footnote{\textit{Davis, 221, § 12.04}} In that section, he quite well points up [though for some reason without using this case as an illustration] the principle that "many cases recognize a clear reason for disqualification, but, nevertheless, hold on the basis of the rule of necessity that the tribunal
should act" for without such action persons might enjoy immunity from violations of the law.16

The second of these matters arises in what is probably his most scintillating and instructive chapter—Official Notice.17 Having there stated the proposition that:18

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16 See Timbers and Garfinkel, Examination of the Commission's Adjudicatory Process: Some Suggestions, 45 Va. L. Rev. 817 (1959), which brings this matter down to date in discussing the case of Gilligan, Will & Co. v. SEC, 267 F. 2d 461 (2d Cir., 1959), cert. den. U. S., 4 L. ed. 2d 152, 80 S. Ct. 200 (1960). There a broker-dealer involved in the distribution of securities in the Crowell-Collier case was, on August 9, 1957, named in an order of the SEC which commenced administrative proceedings against the broker-dealer and others. On August 12, 1957, and before the briefing and argument of the case before the Commission (hearing and recommended decision by hearing examiner having been waived by stipulation), the Commission issued a press release (Securities Act Release No. 3825) in which it indicated that Gilligan, Will & Co., along with others, had violated Section 5 of the Securities Act of 1933 by its distribution of unregistered securities of Crowell-Collier. Thereafter, following briefs and argument, the Commission found a violation of such act by the defendant (Securities Act Release No. 5689, May 7, 1958) and suspended it from membership in the National Association of Security Dealers, Inc., for five days.

The broker-dealer appealed to the Second Circuit, contending among other things that the Commission, by its press release of August 12, 1957, had prejudged the matter. The Second Circuit dismissed this contention on the ground that the broker-dealer's failure to raise such issue before the Commission was a waiver of such objection on appeal. Nonetheless, referring to the bias, or prejudgment, issue the court cited Commissioner Sargent's statement (unreported but set out in Appellant's Brief) of his reason for not participating in the hearing "because I reached a definite conclusion of law upon findings of fact on August 12, 1957," and said (267 F. 2d 461, 468-469):

"While we of course express no opinion on the correctness of Commissioner Sargent's assertion that §5 of the Administrative Procedure Act does not permit such participation as occurred here by the Commission itself in both the release and subsequent proceedings, we think it appropriate to express our doubts whether such participation was either necessary or desirable."

"... the Commission's reputation for objectivity and impartiality is opened to challenge by the adoption of a procedure from which a disinterested observer may conclude that it has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."

Here is the critical reaction of the Second Circuit that denouncement, ahead of the hearing, of the acts of the defendant by the agency prosecuting the defendant was neither "necessary or desirable."

In the Cement Institute case, 333 U. S. 683 (1948) such action, as noted above, was required by Section 6 of the Federal Trade Commission Act, and a denouncement by the F.T.C. without such responsibility imposed by statute could well have fatal results so far as a later hearing is concerned.

17 Davis, 267, Chapter 15, which begins with the statement that "[n]o other major problem of administrative law surpasses in practical importance the problem of use of extra record information in an adjudication."

18 Ibid., 269, § 15.02.
“Whatever the proper limits on official notice may be, those limits apply only to proceedings in which a trial type of hearing is required. Far more difficult is the determination of what fact finding is subject to the limits when it is clear that a trial type of hearing is required. Two Supreme Court cases give rise to the question whether a tribunal may use extra-record information as it chooses, without giving parties a chance to meet the information, when the information bears upon devising a remedy or imposing a penalty.”

After having considered one administrative agency case, he discusses a criminal case in the final development of this theme. Recognizing the difficulty involved in using a criminal case to illustrate his point, Mr. Davis notes that the Williams case, which “...may have unduly broadened the principle” [that a tribunal may use extra-record facts bearing on a remedy or penalty], did “not involve administrative action, but the basic problem of fairness — of due process — is the same in all types of adjudications.” He then proceeds to consider that case, wherein the Supreme Court affirmed the action of the New York Court of Appeals which had affirmed a conviction of murder and the imposition of the death sentence by the trial judge despite the jury’s recommendation of a life sentence. The trial judge had decided on the death sentence for the defendant after receipt of a pre-sentence probation report which covered some thirty other burglaries by the defendant in the same area where the murder was committed, and which pointed up other distasteful propensities of the defendant. Having set out these facts, Mr. Davis follows with the Supreme Court’s flat holding that:

“In determining whether a defendant shall receive a one-year minimum or a twenty-year maximum sentence, we do not think the Federal Constitution restricts the view of the sentencing judge to the information received in open court. The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. * * * * We cannot say that the due process clause renders a sentence void merely because a judge

20 Davis, 270.
22 Supra, n. 19, 251-252.
gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence."

He states that the court reached this result by reasoning that a trial judge has to rely on extra-record probation reports because the modern probation report draws on information concerning every aspect of a defendant's life. The type and extent of this information make totally impractical if not impossible open-court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues." From this, Mr. Davis concludes that this is the Supreme Court's guide to administrative agencies in their own use of extra-record facts. Certainly, this seems an unwarranted conclusion when the adjudicative process (if one may so divide a criminal case) was fully completed when the defendant had been convicted by a jury on record facts so that the only use of extra-record facts was not to determine adjudicative facts at all, but merely to assist in sentencing the defendant.

Although one might wish at times (for who among us has not done the same thing?) that Mr. Davis would not conclude that on a particular point the better reasoned opinions support his views, whilst aligning with any dissent from such conclusions the less well-thought-out decisions; or that he would pontificate less dogmatically upon what the Supreme Court will or will not do in the future on various issues, it would certainly be unfair to hold out that such matters detract seriously from a most effective and erudite work. This text serves a very definite need and is a fine distillation of the disciplines which abound in this field of law.

Bird H. Bishop*

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23 Ibid., 250.
25 Ibid., 294, § 16.04, "The Supreme Court since the Panama case [293 U.S. 388, (1935)] has not again assigned constitutional reasons for the findings requirement, and it is unlikely to do so."
26 *A.B. 1942, Johns Hopkins University; LL.B. 1950, University of Maryland School of Law.
The Subchapter S Corporation, a creature of interest to the owners of small businesses and their lawyers, was born in 1958 with the enactment of the Technical Amendments Act of 1958, which added Subchapter S to the Internal Revenue Code. The technical aspects of these new provisions of the Code are complicated; to acquire a workable understanding of their operation demands considerable effort. Final Regulations have recently been issued under these provisions and a number of comprehensive articles have been published that would be helpful to those seeking a technical mastery of the area.

It is not the purpose of this article to replow this ground. Rather, the objective is to help the general practitioner faced with making a decision on the advisability of his client’s electing Subchapter S tax treatment. At this juncture, the lawyer especially needs help (1) in spotting those situations where the use of Subchapter S would be appropriate, and (2) in...
planning and drafting arrangements among the owners of a business desiring to operate through a Subchapter S corporation that will tend to minimize potential friction between the various shareholders that might otherwise develop as a consequence of Subchapter S tax treatment of the business income.

**USES**

When to use a Subchapter S corporation should not be treated as an isolated problem, for it is one aspect of a broader problem — determining the best type of business organization to use in various business situations. Weighing the tax and non-tax considerations involved in the choice of a form of business organization has long been one of the most difficult tasks that lawyers have to handle. Congress, in enacting Subchapter S, sought to simplify this task by reducing the importance of the tax factors involved, through allowing a business in corporate form to elect approximately the same tax treatment it would have received had it been organized as a partnership. The enactment of Subchapter S was desirable, according to the Senate Committee Report on the bill, "... because it permits businesses to select the form of business organization desired, without the necessity of taking into account major differences in tax consequences". This statement has been called "... almost incredibly naive ...", for, now, more than ever, it is necessary to consider tax factors. Before Subchapter S, the usual choice was between corporation and partnership. Instead of making corporation and partnership equivalent tax-wise, Subchapter S has added a third alternative, the Subchapter S corporation. Thus, the task of the lawyer and business advisor has become considerably more complex.

According to a 1959 report, 62,000 businesses have already elected Subchapter S tax treatment. Despite this evidence of an initial favorable reaction to Subchapter S, it would seem unwise to assume that Subchapter S will be

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"... In this respect, a provision to tax the income at the shareholder, rather than the corporate, level will complement the provision enacted in 1954 permitting proprietorships and partnerships to be taxed like corporations. Also, permitting shareholders to report their proportionate share of the corporate income, in lieu of a corporate tax, will be a substantial aid to small business.”


7Moore & Sorlien, supra, n. 4, 457.

81959 P-H Federal Taxes, ¶ 32,621.
used on a grand scale. Certainly, the enactment of Sub-
chapter S does not mean that every business that previ-
ously selected partnership for tax reasons will now incor-
porate and elect Subchapter S tax treatment. Nor does it
mean that small corporations will jump at the chance to
elect Subchapter S tax treatment merely because the tax
structure otherwise imposes a "double tax" on corporate
earnings, once at the corporate tax rate, and then again at
the individual rates of the shareholders when such earnings
are distributed as dividends. Subchapter S will have no
appeal for those owners of small businesses who are suc-
cessfully using the corporate form so as to have the busi-
ess earnings taxed at the corporate tax rate in lieu of any
individual tax on the owners, as, for example, where the
corporate earnings are retained in the corporation and used
to finance the growth of the business. In such situations,
the owners will not want to substitute individual tax rates
for the corporate tax rate — the chief effect of a Sub-
chapter S election. Subchapter S should not be sold in
wholesale lots; rather, the choice between partnership,
corporation, and this new alternative, a Subchapter S cor-
poration, turns on the proper assessment of each individual
business situation.

At the outset, the particular business situation must
be examined to determine whether the Code's qualifications
for electing Subchapter S tax treatment can be met. To
govern this question of eligibility, the Code sets out an
elaborate definition of a "small business corporation". To
be so classified, a business must be a domestic corporation
that does not: (1) own more than 80% of the stock of an-
other corporation, (2) have more than ten shareholders,
(3) have a shareholder (other than an estate) who is not
an individual, (4) have a shareholder who is a non-resi-
dent alien, or (5) have more than one class of stock.
Moreover, to retain such classification, a Subchapter S cor-
poration must stay within certain limitations on the type
and source of its income. Not more than 80% of its gross
receipts can be derived from foreign sources nor can more
than 20% of its gross receipts be derived from royalties,
rents, dividends, interest, annuities, and gains from the sale
of securities.

* I.R.C. § 1371(a).
10 This negative characteristic results from the rule that a small business
corporation cannot be a member of an affiliated group (as defined in
I.R.C. § 1504).
11 See Reg. 1.1371-1(e).
12 See Reg. 1.1371-1(g).
13 I.R.C. § 1372(e)(4) and (5).
Even though a business can meet these requirements, once met they cannot be forgotten, for the business will not be able to keep its Subchapter S tax treatment if, at some future time, it violates these restrictions. A Subchapter S election entails serious disadvantages because of the restrictions that these "qualification" rules impose with respect to the tax and estate planning of the individual owners and with respect to the operations and investments of the business itself.

The loss of freedom in estate planning is especially significant. Testamentary trusts cannot be used by the shareholders since a trust cannot be a shareholder of a Subchapter S corporation. Distribution of stock among the members of a shareholder's family, by will or gift, is hampered because of the rule that there can not be more than ten shareholders. Some estate plans require an issue of preferred stock for eventual distribution to non-active members of a shareholder's family. The Subchapter S corporation, however, can have only common stock. Also, the voting trust device cannot be used with a Subchapter S corporation.\textsuperscript{14}

A business may find it difficult to keep its dividend, interest, and rent income, plus its gains from security sales, at less than 20% of its gross receipts. At the least, keeping constant check on the business operations to make sure that this limit is not exceeded adds a bothersome detail to the duties of corporate management. Also, a Subchapter S corporation is precluded from having any subsidiary, by reason of the rule that a Subchapter S corporation cannot be a member of an "affiliated group" as defined in I.R.C. § 1504.\textsuperscript{15} A corporation with a large amount of debt in relation to the amount of its stock capital may run afoul of the rule that a Subchapter S corporation can have only one class of stock.\textsuperscript{16}

The complicated rules governing the tax treatment of business income under the Subchapter S election create various difficulties that should be considered additional disadvantages of a Subchapter S corporation. For instance, every adjustment in the Subchapter S tax return for the corporation, such as a change in its depreciation deduction,\textsuperscript{17}

\footnotesize{\textsuperscript{14} A choice between freedom in estate planning and Subchapter S tax treatment need not be made until a conflict between the two actually develops. As the business prospers and estate planning becomes a serious problem, it is likely that the owners (now in higher tax brackets) will want to terminate the Subchapter S election anyway.}

\footnotesize{\textsuperscript{15} See Reg. 1.1371-1(c).}

\footnotesize{\textsuperscript{16} See Reg. 1.1371-1(g); Caplin, \textit{Subchapter S and its Effect on the Capitalization of Corporations}, 13 Vand. L. Rev. 185 (1959).}
requires a corresponding adjustment in the tax returns of each individual owner. A partnership has the same problem, but the inter-relationship between the return of a Subchapter S corporation and its shareholders is at a higher level of complexity than that between the returns of a partnership and its partners. The additional accounting expense a Subchapter S election entails may be a significant item to a small business.

The rule that a shareholder of a Subchapter S corporation must report as income his share of the corporation's undistributed taxable income existing on the last day of the corporation's taxable year presents difficulties in the case of sales of stock during the year, and inequities when a shareholder dies during the year. The buyer of stock must report as his income the whole year's "constructive dividend" no matter how late in the year he made the purchase. It may be possible to adjust the purchase price of the stock to compensate the buyer for this extra tax burden, but this adjustment may be awkward at the least. Similarly, even though a shareholder dies toward the end of the corporation's taxable year, his estate must include its proportion of the entire year's earnings in the estate's income tax return.

The Subchapter S corporation, since its distinctive features have their origin in the federal law, is unfavorably treated under most state income tax laws. The Code encourages the actual distribution of a Subchapter S corporation's earnings to its shareholders since no additional tax results therefrom. Yet dividend distributions will mean extra taxes under many state income tax laws. For example, corporate earnings paid out as salaries to shareholder-employees are taxed at 3% under the Maryland income tax, while the same earnings distributed as a dividend would be subject, first, to the 5% Maryland corporate income tax, and, second, to a 5% Maryland individual income tax.

\[\text{References:}\]

17 It is also important to withdraw earnings on which the seller has already paid income taxes, since the right to receive such earnings out of the corporation without further tax can not be transferred to the buyer. If a cash shortage makes this unfeasible, the seller might return the amounts involved to the corporation as a loan.

18 Apparently I.R.C. § 691 (Income in Respect of Decedents) does not apply to such income items; therefore, the estate does not get any deduction for estate tax paid on such amounts under I.R.C. § 691(c). See Anthoine, *Federal Tax Legislation of 1958: The Corporate Election and Collapsible Amendment*, 58 Colum. L. Rev. 1146, 1169 (1958).

19 Stine, *Subchapter S election may increase state income tax on corporation or stockholders*, 10 J. Taxation 91 (1959).
In considering the general disadvantages of electing Subchapter S tax treatment, the fact that the election can be abruptly terminated by acts of a single shareholder creates a sense of uncertainty in the tax picture of all shareholders. Although such terminations can be guarded against by proper planning,\(^2^0\) such plans mean restraints on shareholders' rights, as well as additional lawyer's fees. The least tangible, but for many perhaps the most significant, consideration against making the election lies in a general fear of the new and unknown, particularly justifiable here in view of the chance that, sooner or later, Subchapter S will be repealed.\(^2^1\)

If a small business can meet the Code's qualifications for Subchapter S election and the general disadvantages of such an election, already mentioned, have been considered and found not too serious, the next step for the tax planner is to examine the chief features of Subchapter S tax treatment as they apply to his particular situation. The Senate Finance Committee Report on Subchapter S indicated three types of business situations in which the use of a Subchapter S corporation could be desirable:

"It will be primarily beneficial to those individuals who have marginal tax rates below the 52-percent corporate rate (or 30-percent rate in the case of the smaller corporations) where the earnings are left in the business. Where the earnings are distributed (and are in excess of what may properly be classified as salary payments), the benefit will extend to individuals with somewhat higher rates since in this case a 'double' tax is removed. The provision will also be of substantial benefit to small corporations realizing losses for a period of years where there is no way of offsetting these losses against taxable income at the corporate level, but the shareholders involved have other income which can be offset against these losses."\(^2^2\)

The suggestions of the Committee assume the existence of a corporation, the question of choice being merely whether or not to make the election. The possibility of operating

\(^2^0\) See text, infra, p. 209 et seq.; Moore & Sorlien, Adventures in Subchapter S and Section 1244, 14 Tax L. Rev. 453, 489 (1959), observe that such shareholder arrangements "When drawn for all possible protection... become something of a monstrosity" and that the difficulties involved may constitute a decisive factor against making the election in some situations.

\(^2^1\) Note, Practitioners' experiences with Subchapter S reveal many doubts, fears: use is limited, 10 J. Taxation 130 (1959); Hoffman, Let's Go Slow With Tax Option Corporations, 37 Taxes 21, 28 (1959).

the business as a partnership is assumed unavailable as an alternative. This, of course, will be the case where the business is already in existence in corporate form or where there are compelling non-tax reasons for using a corporation. In examining the Committee's suggestions, let us make the same assumption, for eliminating the partnership alternative simplifies the problem.

As the Committee indicated, the first thing to do is to make a comparison between the corporate tax rate and the rates of the individual shareholders. The corporate rate starts out at 30%, and moves up to 52% for corporate incomes over $25,000. This means the average corporate rate for an annual income of $25,000 or less is 30%; for $50,000, an average rate of 40%, and for $100,000 an average rate of 46%. An individual will not reach a tax rate over 30% till his taxable income exceeds $8,000 ($16,000 if he is married and files a joint return). Perhaps more relevant, the individual's average tax rate does not exceed 30% till he reaches roughly $14,000 ($28,000 if a joint return). To take a concrete example, if A and B own a corporate business making $20,000 a year, and A and B's only income is the $10,000 each receives out of the business, a Subchapter S election would seem desirable.

But more is involved than merely comparing the corporate rate and the individual rates. The amounts that shareholders can withdraw from the business in the form of salary is an important factor. If all the shareholders are employees of the business and all the corporate earnings can be taken out as salary, there is no need for a Subchapter S election since the only tax on the business earnings would be the individual income tax — roughly the same result as is achieved by an election. In fact, there are some definite advantages in using the salary route rather than Subchapter S. The chief advantage of the salary route is that it provides a more flexible tax planning arrangement. The salary route permits the owners to split the corporate earnings so that a part is taxed at the corporate rate and the balance (that part withdrawn as salary) is taxed at the individual rates. Especially as the individual owners reach the higher tax brackets, a combination each year of the corporate rate and the individual rates often provides the optimum over-all tax result.\(^2\)

\(^2\)The salary route has other advantages, available whether or not a Subchapter S election is made: (1) Under the Maryland state income tax there is a 7% differential in favor of withdrawals as salary as compared with withdrawals as dividends. (2) Withdrawals as salary provide a higher base for contributions to a qualified pension or profit-sharing plan.
On the other hand, even though all the shareholders are employees, if they want to retain some of the business earnings in the corporation and are in low individual brackets, a Subchapter S election may be indicated. Referring back to our example of A and B owning a business with $20,000 annual earnings, if A and B wanted to leave $10,000 each year in the business and take out as salary only $5,000 apiece, a Subchapter S election would result in a total immediate annual saving of $800 in federal income taxes (assuming both A and B are married and file joint returns).

Regardless of the relative rates of the corporation and its shareholders, if the shareholders are not employees and an appreciable part of the corporate earnings are distributed as dividends, a Subchapter S election will reduce federal taxes. For example, a widow, inheriting her husband's interest in a close corporation, will usually favor a Subchapter S election. That is to say, where corporate earnings are subject to "double" taxes because distributed as dividends, the election, by eliminating the corporate tax, will result in tax savings.

If a business is losing money in its operations, a Subchapter S election will be advantageous. Here, the higher the individual rates in comparison to the corporate rate, the greater the advantage of an election will be. Once such losses exhaust a shareholder's basis for his stock and his loans to the corporation, however, the election becomes disadvantageous.

For the successful small business that is growing steadily and needs to retain its earnings, Subchapter S has no appeal, at least where the individual rates approximate the corporate rate. Such shareholders hope to take out the corporate earnings at capital gain rates through eventual liquidation of the business or sale of their stock, or perhaps hope to avoid even the capital gains tax by waiting until

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On the other hand, an advantage of the salary route combined with a Subchapter S election is that the danger of controversy with the Internal Revenue Service as to the "reasonableness" of salaries will be greatly reduced; but see Hoffman, supra, n. 21, 25.

The Subchapter S election would eliminate a $3,000 (30% times $10,000) corporate tax at the expense of $2,200 in individual taxes (roughly a 22% tax bracket for A and B).

Once the shareholder's basis is exhausted, any additional losses are neither deductible currently nor usable in any later year. Reg. 1.1374-1(b) (4). It should also be noted that an existing corporation with a large net operating loss carryover would be unwise to elect Subchapter S tax treatment in view of Reg. 1.1374-1(a). See Note, 72 Harv. L. Rev. 710, 715 (1959).
their deaths step up the basis for the stock to its fair market value.\(^2\)

Where it is possible to operate the business as a partnership, there are additional factors to consider and weigh before deciding to use a Subchapter S corporation. Whenever a new business is started (assuming that non-tax considerations do not demand the use of a corporation\(^2\)), or where an existing business is being conducted as a partnership, a tax comparison between partnership and Subchapter S corporation should be made. When a business is started, some lawyers use an old tax rule of thumb—begin as a partnership and change to a corporation when the business becomes successful. This general rule may have some validity still, despite the enactment of Subchapter S. That is, it would be dangerous to incorporate all new businesses on the theory that should partnership tax treatment turn out to be preferable a Subchapter S election could then be made; for there are some important differences tax-wise between partnerships and Subchapter S corporations. Partnership may still be the best form to use in many situations. And it must be kept in mind that the shift from a partnership to a normal corporation or a Subchapter S corporation may be made without tax consequences, while a shift in the opposite direction can be costly tax-wise.\(^2\)

Let us first examine the tax advantages of a Subchapter S corporation over a partnership. The chief advantage is that a Subchapter S corporation can confer on shareholder-employees a number of so-called fringe benefits that are not available to partners since partners are not considered employees of the business for tax purposes.\(^2\) The most valuable of these fringe benefits is a qualified pension or profit-sharing plan. Such plans have four tax virtues: (1) The corporation gets an immediate tax deduction for amounts it puts into the plan. (2) The employee is not taxed until he receives the benefits. (3) If the employee withdraws his benefits in a lump sum he can get capital gain treatment.

\(^2\) See Note, 72 Harv. L. Rev. 710, 720 (1959).
\(^2\) The chief non-tax advantages of a corporation are usually listed as (1) limited liability, (2) transferability of shares, and (3) continuity of existence despite the death of an owner. The answers of partnership partisans to these alleged advantages are: (1) serious liability risks can be insured against, (2) stock in a small business from a practical viewpoint is not readily transferable, at least to outsiders, and (3) by skillful drafting, the partnership agreement can adequately handle the problems posed by a partner’s death.

\(^2\) The shift to a corporation is “tax-free” under I.R.C. § 351, while the shift to a partnership from a corporation may involve a heavy capital gains tax under I.R.C. § 331.

\(^2\) Note, Fringe benefits important factor in considering Subchapter S election not to be taxed, 9 J. Taxation 376 (1958).
(4) The pension, or profit-sharing, fund, itself, can accumulate its earnings free of tax. In addition, a shareholder-employee of a Subchapter S corporation can get the tax benefits of an accident and health plan, which means that the medical bills of both the employee and his family can be paid by the business without any tax to the employee. Similarly, tax-free "sick-pay" (I.R.C. § 105(d)) and meals and lodgings in kind (I.R.C. § 119) are available to the shareholder-employee of a Subchapter S corporation. I.R.C. § 101(b), excluding from income death benefits paid by an employer to the deceased employee's family up to $5,000, can also be exploited by the Subchapter S corporation. There are signs that these advantages of a Subchapter S corporation over a partnership may be too good to last. In September, 1959, Chairman Mills of the House Ways and Means Committee introduced a bill that would prevent the use of all these fringe benefits by Subchapter S corporations. If these fringe benefits are taken away, it is hard to conceive of any situation where Subchapter S tax treatment would be better than that accorded a partnership.

A less significant advantage of the Subchapter S corporation lies in its ability to adopt as its taxable year a different period than the taxable years of its shareholders. Because "constructive dividends" of Subchapter S corporations are deemed received by shareholders at the end of the corporation's taxable year, if the shareholders' taxable years end just before that of the corporation, they can postpone paying any tax on the initial earnings of the business for a period up to 23 months. Moreover, different taxable years allow shareholders to control, to some extent, the year in which the business earnings will be reportable by them, since, by actually paying out a dividend, the shareholders can report the earnings on their tax returns a year earlier than such earnings otherwise would be reportable.

On the other hand, a partnership has some definite tax advantages over a Subchapter S corporation. Under partnership tax treatment, income and deduction items have the

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30 Ibid.
31 Mickey & Wallick, Tax saving plans under Subchapter S now more reliable as a result of new regulations, 10 J. Taxation 268, 271 (1959).
32 H. R. 9003, § 2, introduced September 1, 1959, and still in the House Committee on Ways and Means. H. R. 10, passed by the House, and in the Senate, also should be watched, since it would extend the advantages of pension plans to partners and self-employed individuals.
33 Wright & Libin, Impact of Recent Tax Stimulants on Modest Enterprises, 57 Mich. L. Rev. 1131, 1145 (1959); Note, 10 J. Taxation 130, 133 (1959). § 5 of H. R. 9003 (supra, n. 32), if enacted, would block the use of different fiscal years in most situations.
34 Mickey & Wallick, supra, n. 31, 289.
same tax character in the partners' tax returns at they had in the partnership return. With Subchapter S corporations, however, the conduit idea has a much more limited application. Only long-term capital gains and net operating losses pass through the Subchapter S corporation without losing their advantageous tax character. Tax-exempt interest and life insurance proceeds passing to partners from a partnership retain their tax-exempt quality in the partners' hands, but such items become taxable in the hands of a Subchapter S corporation's shareholders.  

Partners are also treated more favorably under state income tax laws. For instance, under the Maryland income tax law, a Subchapter S corporation is not specially treated, and thus must pay a 5% tax on its earnings. When these earnings are passed on to its shareholders as dividends, the shareholders must pay a second 5% tax. In contrast, partners receiving business income pay a single 3% tax. This 7% differential constitutes a significant factor in favor of partnership over the Subchapter S corporation. Also, under Maryland law, operating losses of the business are deductible by partners, but they can not be exploited at all by shareholders of a Subchapter S corporation. As to Social Security taxes, partners have to pay only three-quarters as much as do shareholder-employees of a Subchapter S corporation.  

Where several individuals want to start a business and make their capital contributions in the form of property, it is possible under a partnership agreement to do equity between the owners and adjust for the differences between the basis of the property contributed and its current market value. Such adjustments are not feasible if the business is organized as a Subchapter S corporation. There are a number of other minor advantages of the partnership over the Subchapter S corporation that may be significant in particular situations.

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85 Reg. 1.1377-2(b).

86 For 1960, a partner's self-employment tax rate is 4 1/2%, while the combined rate of a corporate-employer and shareholder-employee is 6%. Similarly, Maryland and Federal Unemployment Compensation Taxes and workmen's compensation premiums must be paid with respect to shareholder-employees by a corporation while with a partnership such costs are avoided.

87 See Reg. 1.704-1(c); Willis, A Lure to Incorporate Proprietorships and Partnerships, 6 U.C.L.A. L. Rev. 505, 507 (1959).

88 Partnerships have various technical advantages over Subchapter S corporations: (1) as to Additional First Year Depreciation (I.R.C. § 179); (2) as to long-term compensation averaging (I.R.C. § 1301); (3) as to the use of losses in excess of the owner's basis for his interest (cf. I.R.C. § 704(d) and § 1374(c)); and (4) as to the pass through of long-term capital gain despite the existence of operating loss for the year (see Note, 72 Harv. L. Rev. 710, 719 (1959)). As to the comparison of partnerships
One conclusion from this detailed comparison of the partnership, the corporation, and the Subchapter S corporation is inescapable: the enactment of Subchapter S has not made the job of selecting the best form of doing business any easier. Another conclusion is that business situations in which the Subchapter S corporation clearly should be used will be comparatively rare.

**Abuses**

Although there may be only sporadic use of Subchapter S corporations as a result of weighing the factors already suggested, commentators have pointed out numerous opportunities for abuse of Subchapter S, using "abuse" in the sense of a use advantageous tax-wise that seems to be contrary to the spirit and purpose of the Subchapter as envisioned by Congress in enacting it. It is not unlikely that these abuses, or "gimmick" uses, will result in repeal of the whole Subchapter. 60 Distinguishing between the legitimate and the illegitimate in tax planning is often difficult. 40 The newness of this legislation makes it particularly difficult to draw the line. In any event, for a full picture of Subchapter S, the lawyer should be aware of the nature and variety of these potential abuses.

The most frequently mentioned abuse is the so-called "one-shot election"; that is, electing Subchapter S tax treatment for one or two years and then deliberately revoking or terminating the election. Such one-shot election may be advantageous where the business has an usually large capital gain in prospect. 41 Suppose a mercantile business owns a building that has greatly appreciated in value. Under normal corporate taxation, on selling the building the corporation would have to pay a 25% capital gain tax and then, on distribution of the cash proceeds to its shareholders, the shareholders would pay an individual tax on the dividend received. If, however, a Subchapter S elections is made for the year in which the sale is to occur, at the most a 25%

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and Subchapter S corporations in general, see Willis, supra, n. 37, 510; Caplin, Subchapter S vs. Partnership: A Proposed Legislative Program, 46 Va. L. Rev. 61 (1960).


40 The problem may not involve ethics so much as the exercise of sound judgment (reaching a decision that will prove wise in the long-run). See generally Paul, The Lawyer as a Tax Advisor, 25 Rocky Mountain L. Rev. 412 (1953); and Ethical Problems of Tax Practitioners, 8 Tax L. Rev. 1 (1952).

tax is levied; for the long-term capital gain would not be subject to tax in the corporation and would be taxed at only capital gain rates on distribution of the cash to the shareholders.42 Another one-shot election possibility exists where a loss year is anticipated; the Subchapter S election is made for that year so that the shareholders can exploit the operating loss on their individual returns, and then the election is terminated the following year. It has also been suggested that the Subchapter S election can be used (1) to avoid in certain situations the effect of the "collapsible corporation" provision,43 and (2) on liquidation of the business as a substitute for Section 337.44

Subchapter S may be exploited by a one-man business in questionable ways. For example, a manufacturer's agent, or a public relations consultant, may decide to do business as a corporation in order to get the advantages that corporate employers can give to their employees, particularly pension and profit-sharing plans.45 Also, the Subchapter S election may be used to get cash out of a one-man corporation with accumulated earnings and profits, without payment of an individual tax, by paying a high enough salary to the owner-employee so as to cause the corporation an operating loss for the year. Since the Subchapter S shareholder can deduct the loss from his salary income, he is only taxed on the difference between the salary and the loss; thereby getting cash out of the corporation without tax to the extent of this manufactured loss.46 The Subchapter S provisions may enable an individual to avoid the

42 If the capital gain on the sale of the building (plus the corporation's other "investment" income) exceeds 20% of its gross receipts for the year, the corporation will forfeit its right to Subchapter S tax treatment; see I.R.C. § 1372(e) (5). § 4 of H.R. 9003, supra, n. 32, if enacted, would severely limit the "usefulness" of this maneuver.

43 Anthoine, supra, n. 39, 1171. § 4 of H.R. 9003, supra, n. 32, if enacted, would eliminate this "gimmick" use of Subchapter S.

44 Anthoine, supra, n. 39, 1173; Note, Unforeseen effects of Subchapter S are big help in liquidations, other tax planning, 10 J. Taxation 223, 224 (1959).

45 Anthoine, supra, n. 39, 1166; Note; Fringe benefits important factor in considering Subchapter S election not to be taxed, 9 J. Taxation 376 (1958); but see Rev-Rul. 57-163, Part 4(a), 57-1 C.B. 128, 139.

46 The salary must still be "reasonable", see Reg. 1.162-7 and Reg. 1.1372-1(c) (1); if the salary deduction is disallowed, there will be no net operating loss. See Note, How to use election under new law to save taxes on small corporations, owners, 9 J. Taxation 263, 264 (1958). It has also been suggested that a sole proprietor over 65 years old may incorporate and exploit the Subchapter S election to avoid the Social Security rule against working beneficiaries earning over $1,200 a year. See Wright & Libin, Impact of Recent Tax Stimulants on Modest Enterprises, 57 Mich. L. Rev. 1131, 1163 (1959); but see OASI Bureau Letter, 3/6/59, 1A CCH Unemployment Insurance Reporter, p. 4185.
so-called "hobby loss" provision\(^7\) by setting up his hobby business in a corporate shell, and electing Subchapter S.\(^8\) Sometimes where a closely held business has been split up among several corporations, it may be possible to make the election for those corporations likely to suffer losses, and not elect for those corporations whose stock is appreciating in value. The resulting combination of gains at capital gain rates and losses offsetting ordinary income may be particularly attractive to high bracket shareholders.\(^9\)

It has been suggested that a Subchapter S corporation can be profitably used to shift income within a family group so as to minimize the total family tax bill.\(^5\) To illustrate, if a father and two sons owned a corporation, the father, if in higher tax brackets than his sons, would find it advantageous to take a low salary from the corporation and thereby increase the amount of corporate earnings flowing to his sons by way of dividends. I.R.C. § 1375(c) would appear to block such misuse of a Subchapter S corporation. This section, however, is limited to readjusting the amounts taxable to the various shareholder-members of the family group where artificially low salaries are paid to shareholder-employees. Suppose the father gave all his stock to his sons (perhaps retaining control through an irrevocable proxy to vote the shares)\(^1\) and the father continues to perform substantial services for the corporation at a low salary. The diversion of the father's compensation income to the sons that occurs in this situation is not covered by I.R.C. § 1375(c).\(^2\) A limited shift of income to the sons can be achieved by giving the sons stock just before the end of the corporation's taxable year, for then the stock's pro rata share of the corporation's earnings for the whole year is taxable to the sons rather than to the father.\(^3\)

Combining the Subchapter S election with distributions of dividends in kind may enable shareholders to realize gains and get cash out of the corporation without any tax at all. This "gimmick" is rather involved, and may best be

\(^7\) I.R.C. § 270.
\(^8\) Note, 10 J. Taxation 133 (1959); but see Reg. 1.1374-2.
\(^9\) See Note, 72 Harv. L. Rev. 710, 715 (1959); Anthoine, supra, n. 39, 1162.
\(^5\) Anthoine, supra, n. 39, 1167.
\(^2\) Note, 9 J. Taxation 263 (1958); Meyer, Subchapter S Corporations, 36 Taxes 919, 924 (1958). The Commissioner might successfully tax the father, however, on the theory that assignments of compensation will not be recognized tax-wise, Helvering v. Enbank, 311 U.S. 122 (1940); Rev-Rul. 55-3, 1955-1 C.B. 211.
\(^3\) Reg. 1.1373-1(a).
explained through using a hypothetical situation. Assume T sets up a Subchapter S corporation with a $50,000 capital contribution, assume that the business earns $10,000 a year, and that it invests $20,000 in stock that pays low dividends but has high growth potential. Assume further that in a few years the stock purchased by the corporation appreciates in value to $40,000. If this stock is then distributed to T as a dividend in kind, the only tax consequence to T is that the basis of his stock in the Subchapter S corporation is reduced by $32,000. Moreover, T now has a $40,000 basis for the stock distributed to him and thus he can sell it for $40,000 and will have no gain on the sale. To escape the individual dividend tax in this situation, the Subchapter S corporation must have no accumulated earnings and profits; and a business that starts as a Subchapter S corporation will not usually have any appreciable earnings and profits because its income is taxed currently to the shareholders. Thus, the enactment of Subchapter S may breed new interest and activity in the dividend in kind area.

Subchapter S does not seem to be sound legislation. It may be abused more than it is used; if so, it probably will not endure as a permanent part of the federal tax structure. But while it lasts, it is a tool to be used with restraint, and only after thoughtful consideration of its risks and disadvantages and after a careful weighing of the available alternatives.

**SOME PITFALLS TO AVOID IN SETTING-UP A SUBCHAPTER S CORPORATION.**

Once the decision has been made to elect Subchapter S tax treatment, the lawyer's job has barely begun, for there remain some pitfalls that should be guarded against through planning and action at the time of election. The problems arise mainly because there are numerous acts and events listed in the Code that will cause abrupt termination

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54 See Reg. 1.1373-1(g) (Example (3)). One-fifth (10,000/50,000) of the property distribution (1/5 times $40,000 = $8,000) is treated as a distribution of current earnings, which would be taxed to T anyway under I.R.C. § 1373 as a constructive distribution. The balance ($40,000 minus $8,000 = $32,000) is treated as a reduction in the basis of T's stock in his Subchapter S corporation under I.R.C. § 301(c)(2). Moreover, if the S corporation sold this stock itself, rather than distributing it as a dividend in kind, it would be likely to lose its Subchapter S tax status in view of I.R.C. § 1372(e)(5). See Wright & Libin, supra, n. 46, 1160.

of the Subchapter S election. Some of these acts are within the unfettered control of a single shareholder, such as the transfer of stock owned by him to a trust, partnership, or corporation, or to an individual who refuses to consent to Subchapter S tax treatment. A disgruntled minority shareholder can, by causing the termination of the election, seriously prejudice the tax situations of the other shareholders. On such a termination, not only will the majority lose the tax treatment of the business income that they prefer, but a termination has a retroactive effect that can cause considerable loss to the other shareholders. For instance, the shareholders may lose their chance to withdraw as a return of capital previous years’ earnings on which individual taxes have already been paid. Moreover, when dividends have been paid over early in the year on the assumption that Subchapter S treatment will apply to the year, the unexpected termination of the election will result in the imposition of a corporation tax in addition to the individual tax on the business earnings distributed during the year. There are also numerous ways in which the management of the corporation can cause the termination of the election, providing a fertile source of controversy between majority and minority interests.

Before detailed planning to meet these problems can begin, a fundamental policy decision must be made. Are changes in Subchapter S status to be determined by a majority of the shareholders, or is unanimous approval of the shareholders to be required? It is almost axiomatic that rule by a majority, in most business situations, is the only practical way to govern corporate affairs. Subchapter S status, however, is not an issue that affects the well-being of the corporate entity as such, but it is a question that directly affects the well-being of each individual shareholder and the attitude of each shareholder as to Subchapter S status is likely to be determined chiefly by the individual’s income tax bracket. It is unlikely, however, that the majority shareholders, as the controlling group, will want Subchapter S decisions to require either unanimous shareholder consent, on the one hand, or to be left to the whim of a single shareholder, on the other. In most business situations, the majority probably will have enough power and influence, either formal or informal, to force the minority shareholders to accept majority rule for Subchapter S questions as well as for ordinary business de-

56 I.R.C. § 1372(e).
57 Note, Practitioners’ experiences with Subchapter S reveal many doubts, fears; use is limited, 10 J. Taxation 130, 133 (1959).
cisions. Certainly a majority would be wise to try to achieve such an arrangement.

There are some businesses, however, that must be organized, or already have been established, on the basis of unanimous consent of the shareholders for all important decisions, the so-called “incorporated partnership”. In such cases, it is likely that the only feasible way to handle Subchapter S questions will be on the same basis. Also, there may be situations where a majority-run corporation can obtain the consent of all to a Subchapter S election only by agreeing to a rule of unanimity for Subchapter S questions.

If no control arrangements as to Subchapter S questions are worked out at the time of elections, the control situation will vary depending on what Subchapter S question is in issue; a rule of unanimity will apply to election and formal revocation while termination of the election will be within the power of the corporate management and also within the power of each individual shareholder. Thus, the tax law breeds a control situation that is not only unsound in theory but likely to be chaotic in operation. The differing tax brackets of the shareholders of a Subchapter S corporation will often lead them to antagonistic positions on Subchapter S questions. Therefore, unless a Subchapter S corporation is so closely held that it is safe to assume that antagonistic positions among the shareholders will not develop in the future, it is important not to leave the control situation unresolved, but to adopt some definite control arrangement for Subchapter S questions.

So that the difficulties involved in devising control arrangements can be appreciated, the various ways in which the Subchapter S election can be terminated will be set out in some detail. There are a number of events causing termination that are within the absolute control of a single shareholder. Perhaps the simplest device of all is for a shareholder to transfer stock to a trust; such a trust may be a short-term revocable trust that, in reality, may be little more than a sham. Transfer of some stock to a partnership, or to another corporation, or to an individual who would constitute the eleventh shareholder of the Subchapter S corporation would also terminate the election. A method of termination often available involves the transfer of some shares to an individual that the transferor has ascertained in advance would refuse to consent to a continuance of the election. The most painful termination method available to an individual shareholder is to move

\footnote{See Reg. 1.1371-1(e) and Reg. 1.1372-4.}
his residence to a foreign country and renounce U. S. citizenship.\textsuperscript{59}

In those instances where an act of the individual shareholder was deliberately done to destroy the Subchapter S election, the question arises whether the courts will disregard such deliberate act as one made “in bad faith”, or without proper “business purpose”, and therefore rule that the attempted termination of the election was ineffective. The decision may turn on whether the deliberate act was the sole idea of a single shareholder against the wishes of the majority, or whether the act was instigated by the majority. It seems probable, though, that in either case such acts will be effective to terminate the election, for the Code, itself, spells out the “penalty” for termination,\textsuperscript{60} i.e., the corporation loses its right to Subchapter S treatment for five years. Moreover, in the Regulations, both types of termination are covered; the distinction is made between terminations caused by an individual maverick shareholder and terminations instigated by shareholders having a substantial interest. In the latter situation the five year penalty is imposed while in the former the Commissioner can shorten the five year penalty period.\textsuperscript{61} Since the problem of deliberate termination is covered so explicitly by statute, legislative history, and regulations, it is unlikely that a court would nullify a termination on the general theory of improper tax motive. After all, Subchapter S is an optional tax treatment. It seems odd to look on a return to normal tax treatment as improper tax avoidance. The Government would seem on firmer ground in attacking an initial election as beyond the purpose and intent of the Subchapter than in attacking merely the termination of an election on such grounds.\textsuperscript{62}

In addition to the various deliberate acts of termination, an individual shareholder can involuntarily cause termination by dying, followed by the failure of his executor or administrator to consent to Subchapter S treatment within 30 days after such representative has been appointed.\textsuperscript{53} This termination possibility presents serious difficulties for the planner seeking to guard against its occurrence. These difficulties stem from the fact that normally it will be

\textsuperscript{59} A “non-resident alien” shareholder would disqualify the corporation; I.R.C. § 1371(a).
\textsuperscript{60} I.R.C. § 1372(f).
\textsuperscript{61} Reg. 1.1372-5(a).
\textsuperscript{62} Note, 33 St. John’s L. Rev. 187, 207 (1958).
\textsuperscript{53} Moreover, the consent can not be filed later than 30 days following the close of the corporation’s taxable year in which the estate became a shareholder, Reg. 1.1372-3(b).
against the interest of the estate and its legal representative to consent to a continuance of the election, since, under Subchapter S rules, the estate will have to include its share of the whole year's income of the corporation as a "constructive dividend" even though the estate has owned the stock for only a part of the year. A particularly troublesome problem arises if a shareholder dies just before the end of the corporation's taxable year and no legal representative is appointed within the period of 30 days following the end of the corporation's taxable year.

The corporate management has even more ways to terminate the Subchapter S election than does the individual shareholder. One comparatively simple method is for corporate management to so conduct the corporation's business that more than 20% of the gross receipts of the business constitute personal holding company type income, as defined in the Code and regulations. Rents, dividends, interest and gains from stock sales are the principal types of income so classified. Similarly, termination ensues if more than 80% of the corporation's gross receipts are derived from sources outside the United States. Under a 1959 amendment of the Code, the acquisition of 80% or more of the stock of another corporation will result in termination of the election. Also, termination results if the corporation issues a second class of stock.

In addition to the four methods just described, the corporate management has most of the methods available to the individual shareholder; that is, it can issue stock or sell treasury stock to the persons prohibited from owning

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An executor may feel obligated to refuse consent, unless he gets court approval for such consent (there may not be time for this), or unless the shareholder in his will has explicitly authorized him to consent, or unless a shareholders' agreement has imposed on the estate a duty to consent (see, e.g., the draft agreement, infra, p. 221). Anthoine, Federal Tax Legislation of 1958: The Corporate Election and Collapsible Amendment, 58 Colum. L. Rev. 1146, 1169 (1958); Hoffman, Let's Go Slow With Tax Option Corporations, 37 Taxes 21, 22 (1959).

As a last resort, the person likely to be executor should file a consent within the time limit in the hope that his subsequent appointment will retroactively validate his action. Also, under Reg. 1.1372-4(b)(iii), the district director may excuse the failure to file a timely consent. See also, Comment, 7 Univ. of Kan. L. Rev. 523, 528 (1959). If heirs of a deceased shareholder deliberately refuse to take out administration in order to force the termination of the election in disregard of a contractual obligation to consent, other shareholders may be able to take out administration and consent for the estate; see S Mo. Code (1957), Art. 53, §§ 34 and 67.

I.R.C. § 1372(e)(5) and Reg. 1.1372-4(b)(5).

I.R.C. § 1372(e)(4).

I.R.C. § 1371(a) and § 1372(e)(8) in combination with the amendment to § 1504 enacted by P.L. 86-376, § 2(c), effective September 24, 1959.

I.R.C. § 1371(a) and § 1372(e)(8).
Subchapter S corporation stock, or to an individual who refuses to consent to a continuance of the election.

With the numerous ways a Subchapter S election can be terminated in mind, we can turn to the problems involved in devising control arrangements for determining Subchapter S questions. As has been indicated, a control arrangement based on majority rule is the desirable one for most business situations. At the outset, we run into the difficulty that a majority control arrangement seems to run counter to the policy of Subchapter S, in view of its requirement of unanimous consent of the shareholders for both election and formal revocation. What was the purpose behind these Code requirements? At first blush, it may appear that Congress was concerned with constitutional difficulties in imposing on individual shareholders taxes on undistributed corporate business income without their consent. In this connection, it is interesting to note that the Subchapter S regulations indicate certain shareholders will be subject to Subchapter S without any consent on their part to the election and thus provide some indication that constitutional worries were not the reason for the unanimous consent requirement. The requirement of unanimous consent may have been used to facilitate tax administration. Requiring the signature of each shareholder to the election would avoid the contention by a shareholder that he was unaware of the election and did not, therefore, realize his duty to report his share of the corporate business income on his individual return. On the other hand, Congress may have felt that the minority shareholders needed the protection given by this requirement of unanimous consent to prevent imposition upon them by the majority shareholders. But, even assuming that the Code’s provisions were designed in some part to protect minority shareholders, it now seems generally accepted by most courts, at least in corporation law, that an individual can waive statutory provisions enacted for his benefit, unless such waiver itself would violate public policy. Therefore, although in all dealings with

70 Reg. 1.1372-1(b) (2) (N.B. the final sentence of this subsection).
71 An individual tax on undistributed corporate profits would seem constitutional under Collector v. Hubbard, 12 Wallace (79 U.S.) 1, 18 (1870), where the court held that it is “... as competent for Congress to tax annual gains and profits before they are divided among the holders of the stock as afterwards...” See also I.R.C. § 551(a) where the undistributed income of a foreign personal holding corporation is taxed directly to United States shareholders, without any consent on their part.
72 See O’Neal, CLOSE CORPORATIONS: LAW AND PRACTICE (1958), §§ 5.06 and 5.07. In Benintendi v. Kenton Hotel, 294 N.Y. 112, 60 N.E. 2d 829, 837, 159 A.L.R. 250 (1945) Conway, J. (dissenting), said: “[shareholders] ... may by agreement waive or relinquish as between themselves statutory
the Internal Revenue Service there must be "formal" unanimity to elect and to revoke Subchapter S tax treatment, there is legal precedent to sustain contractual arrangements between the shareholders binding themselves to act with respect to Subchapter S questions in accordance with the will of the majority.

In designing such a control arrangement predicated on majority rule, there are two sources of trouble the majority will want to neutralize: (1) the power of each individual shareholder to sabotage the majority's plan to continue the Subchapter S election, and (2) the potential liability of the majority for action on Subchapter S questions contrary to the best interests of the minority shareholders. Unless the power of the individual shareholder to terminate the election is checked, a disgruntled minority shareholder will have a cudgel that can do considerable damage to the other shareholders and that can be a means of obtaining from the majority unwarranted favors.

The potential liability of the corporate management (or the majority shareholders) for causing termination of the Subchapter S election presents particularly difficult problems. In the first place, this is a new area and what the attitude of the courts will be is unknown. To illustrate some of the difficulties, it is convenient to use a hypothetical situation: A, B, and C incorporate a business, each taking a third of the stock and, as employees, withdrawing most of the profits in the form of salary. Then C dies leaving his shares to his widow. In order to pay over business profits to the widow without having to pay a "double" tax on the dividend distributions, Subchapter S tax treatment is elected. The business prospers and the tax brackets of A and B exceed the corporate tax rate. Moreover, A and B want to expand the business operations and want to build up cash resources within the corporation by retaining most of the business profits. Now, they feel it would be advantageous to terminate the Subchapter S election. The widow of C disagrees; her individual tax rates are lower than A's and B's. In addition, the Subchapter S election tends to result in the distribution of more money as dividends than otherwise would be true, since the business profits are taxed whether distributed or not and the shareholders need cash to pay their individual taxes. Without Subchapter S, the widow, as a minority shareholder, would have difficulty in getting dividends out of the corporation. At this point, rights where such waiver or abandonment is not contrary to the public interest." In accord, Clark v. Dodge, 269 N.Y. 410, 199 N.E. 641 (1936).
A and B decide to cause termination of the election, without the widow's consent, by having the corporation's rent income exceed 20% of its gross receipts, by issuing a second class of stock, or by any of the numerous other ways the election can be terminated by corporate action. On such facts, can the widow successfully maintain an action against A and B for manipulating corporate action for their advantage and to the widow's detriment? In the accumulated earnings tax area, we have a closely analogous situation. There have been indications that the corporate management will be liable to the corporate entity for causing the corporation to incur the I.R.C. § 531 penalty tax, at least where the corporate management has deliberately caused the corporation to incur this penalty tax and the corporate management has been controlled by shareholders who have preferred the penalty tax to individual taxes at high rates on dividend distributions while the minority have preferred dividend distributions to the penalty tax. Similarly, in our hypothetical situation, the widow may assert that A and B should be held liable to the corporation for the amount of corporate tax that had to be paid as a result of A and B's deliberate termination of the Subchapter S election. Certainly the full corporate tax would be an unrealistic measure of damages. Termination of the election has a double aspect; though the corporation incurs the corporate tax, the shareholders are relieved of an individual tax on undistributed business earnings. Thus, a damage computation, to be fair, must involve offsetting the decreased individual taxes against the increase in corporate taxes. Developing a sensible measure of damages, or even a sound theory of liability, in such situations is a hard task. For our present purposes, all that is important is that suits by minority shareholders against the majority for either negligent or deliberate termination of the Sub-

81 See Note, Derivative actions arising from payment of penalty taxes under Section 102, 49 Colum. L. Rev. 394 (1949), and Note, Corporations — Duties of Directors — Personal Liability of Shareholder-Directors for Accumulating Earnings Which Led to Subjection of the Corporation to Section 102 Taxes, 61 Harv. L. Rev. 1058 (1948).

71 Treating this problem as one calling for a derivative suit runs into both theoretical and practical difficulties. Although the injury arises out of improper corporation action, it is not realistic to look upon the injury as involving harm to the corporate entity. Only the minority is actually harmed; moreover, the injury varies as to each minority shareholder depending on his individual tax bracket. Therefore, an individual action by the minority shareholder (or a class action by the minority shareholders) against the majority shareholders would seem a more appropriate remedy than a derivative suit, where the damages are awarded to the corporate entity. See Zahn v. Transamerica Corp., 162 F. 2d 36 (Cir. 1947); see generally, BALLANTINE ON CORPORATIONS (1946), § 143.
chapter S election are dangers that the majority should not lightly dismiss.

Protection against these various dangers can be obtained, most effectively, through use of a shareholders' agreement. An important part of such an agreement involves restricting the transfer of the corporation's shares.\textsuperscript{75} Thereby, the majority can obtain protection against the minority shareholder who seeks to cause termination of the election by the sale or transfer of his stock. That is, the restrictions would be used as a means of policing all proposed transfers. Under a first option type of restriction, the corporation would exercise its option to buy the shares, unless it was satisfied that the transfer would not cause termination. If the proposed transfer involved a sale or gift to a new shareholder, necessitating consent by such new shareholder to avoid termination, the corporate management would insist on getting the consent of the new shareholder in advance before permitting the transfer to take place.

Unless the term "shareholder" under the relevant Subchapter S provisions\textsuperscript{76} means "shareholder of record", restrictions on transfer, alone, may not be completely effective as a means of preventing termination of the election by individual shareholders. If an individual becomes a "new shareholder" within the provisions of Subchapter S the day he receives a certificate of stock duly indorsed, it would seem possible for a determined minority shareholder to terminate the election despite the agreement's restrictions on transfer. True, he would thereby violate the restrictions, and equity would come to the aid of the majority and require a rescission of the transaction, or a transfer to the corporation under the option provision, but the damage may already have been done. Before the majority may be aware of the actual transfer of the stock certificate, or, perhaps, before remedial action could be taken, the 30 day period in which the new shareholder must consent may have run and the election terminated. Although the Committee Reports on Subchapter S refer at one point to shareholders "of record",\textsuperscript{77} it seems likely that the courts will...
hold that the actual transfer of the stock certificate, rather than the recording of the transfer on the corporate books, is the crucial event. On the assumption that the actual transfer of the certificate is controlling, the effectiveness of the restrictions on transfer may still be preserved by requiring all shareholders to deposit their stock certificates with an escrow agent. If held in escrow, the certificates could not be transferred in violation of the provisions of the shareholders' agreement.

The time a person becomes a shareholder within the meaning of Subchapter S may even antedate the transfer of the stock certificate in some situations where equitable interests are created. In establishing revocable trusts, for example, it is frequently provided that the grantor may retain the stock certificates in his own name instead of making a formal transfer to himself as trustee. If such a disposition of stock is deemed sufficient to create a new shareholder or shareholders for purposes of Subchapter S, then stock restrictions, even when coupled with an escrow arrangement, may prove inadequate. Perhaps a clause in the shareholders' agreement dating the beneficial interest of the corporation under its option from the time of any such trust disposition would successfully meet this problem. If all the above techniques are used, then there is some assurance that the majority will be protected from termination of the election by an individual shareholder, no matter how the term "shareholder" is finally defined.

The Senate Committee Report did not use the term "shareholder of record" in discussing termination of the election, ibid, 5006; nor does the applicable regulation, Reg. 1.1372-4(b)(1). Moreover, Reg. 1.1371-1(d) defines shareholder as follows: "Ordinarily, the persons who would have to include in gross income dividends distributed with respect to the stock of the corporation are considered to be the shareholders of the corporation." Even though a corporation may properly pay a dividend to a stockholder of record despite the fact his certificate of stock has been transferred to another, as between transferor and transferee the transferee would be the one beneficially entitled to the dividend and consequently the one required to report the dividend for tax purposes (see BALLANTINE ON CORPORATIONS (1946), § 240). Policy considerations lead to the same conclusion. Unless the actual beneficial owner of stock, as distinguished from the stockholder of record, is deemed the "shareholder" for purposes of Subchapter S, the rules against corporations, partnerships or trusts being shareholders of Subchapter S corporations could be circumvented merely by neglecting to have stock transferred on the books of the corporation.

The escrow agent should not be a trustee, or even loosely called one, in view of the prohibition against a trust's owning shares of a Subchapter S corporation, Reg. 1.1371-1(e).

See generally SCOTT, THE LAW OF TRUSTS (2nd Ed. 1956), § 32. SHATTUCK and FARR, AN ESTATE PLANNER'S HANDBOOK (1953) 445, refers to the "... somewhat common custom of executing the trust and then waiting until sometime later to round up the property..."
A shareholders' agreement also can establish majority rule for revocation and re-election of Subchapter S tax treatment in place of the rule of unanimity set out in the Code.\textsuperscript{81} Such arrangements do not attempt to alter the formal requirements of Subchapter S; they merely add a contractual duty on the part of all the shareholders to comply with these formal requirements whenever the majority determines that revocation or re-election is desirable.

The risk that the majority may be held liable to the minority as a result of corporate action instigated by the majority resulting in Subchapter S termination can be minimized by a provision in the shareholders' agreement specifically releasing the majority from such potential liability. This is, however, a rather delicate matter. As previously pointed out, the majority's liability, if any, would be based on a violation of fiduciary duty. Exculpatory clauses relieving fiduciaries from their normal liabilities are looked upon with disfavor by the courts.\textsuperscript{82} This attitude stems from the fact that the exculpatory clause is usually too broad and, if upheld, would provide a shield for the fiduciary with respect to acts that never were contemplated by the parties when they created the fiduciary relationship. It does not seem too dangerous from a public policy standpoint to give the majority absolute power, as long as such power is confined to making decisions on Subchapter S questions. The shareholders in a closely held corporation should be able, by contract, to make their own rules as to their mutual rights and duties, at least in dealing with this Subchapter S area.\textsuperscript{83}

To indicate the form that a shareholders' agreement covering the above points might take, a draft of such an agreement is presented below: \textsuperscript{84}

**AGREEMENT** made this ............ day of ....................... , 1960, between Arthur Able, Brian Baker, and Charles Carr (hereinafter referred to as the Stockholders), and Green, Inc., a Maryland corporation (hereinafter referred to as the Corporation).

**WHEREAS** the Corporation has elected and the Stockholders have consented under Section 1372(a) of the

\textsuperscript{81} I.R.C. § 1372(c) (2) and § 1372(f).

\textsuperscript{82} Scott, op. cit. supra, n. 80, § 222.

\textsuperscript{83} See O'Neal, Close Corporations: Law and Practice (1958), § 3.66.

\textsuperscript{84} This draft is presented as an aid and not as the answer. Not only will each situation require its own modifications (integration with existing agreements will often be necessary) but this Subchapter S area is so new and many of its problems so novel that one hesitates to suggest that any specific solution, or draft of an agreement, will work out satisfactorily.
Internal Revenue Code of 1954 to tax treatment under the provisions of Subchapter S of the Internal Revenue Code of 1954 (hereinafter referred to as Subchapter S); and

WHEREAS the Stockholders desire that the will of holders of a majority of the shares of the Corporation's stock outstanding from time to time should control matters related to the continuance, termination, revocation, and re-election of Subchapter S tax treatment;

Now THEREFORE, it is mutually agreed as follows:

1. Simultaneously with the execution of this agreement, all the certificates of the Corporation's stock owned by the Stockholders shall be deposited with the Treasurer of the Corporation, as Escrow Agent. Said Treasurer (and his successors in said office) shall hold the certificates in accordance with the terms of this agreement and for the purpose of assuring that this agreement is performed by all parties hereto. Any certificates of the Corporation's stock hereafter acquired by parties to this agreement shall be deposited forthwith with said Treasurer to be held by him as aforesaid.

2. In the event that any party hereto desires to sell, transfer, or encumber any part or all of his shares of the Corporation's stock (including any disposition of stock, or of an interest in stock, that could cause the termination of Subchapter S tax treatment),\textsuperscript{85} he shall first offer such shares of stock for purchase by the Corporation at the book value\textsuperscript{86} of such shares as of the close of the month next preceding such offer, said book value to be determined by the Board of Directors of the Corporation. Such determination, including the method thereof and the matters considered therein, shall be final and conclusive. If said offer is not accepted by the Corporation within thirty days of the

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\textsuperscript{85} The parenthetical phrase, supplemented by the last sentence of this section, is designed to protect against termination of the election as a result of a shareholder's creation of a revocable trust without any actual transfer of the stock certificates. See \textit{supra}, n. 80.

\textsuperscript{86} Generally, the use of "book value" to determine the option price is one of the worst methods of valuation; see O'Neal, \textit{supra}, n. 83, § 7.24. The use of "book value" will tend to increase the deterrent effect of the agreement, since "book value" is usually less than "fair value". Thus, the use of "book value" may be justified where the primary purpose of the agreement is to prevent termination of the election.
receipt thereof, said offeror shall be free to dispose of said shares of the Corporation's stock as he may desire. Should any shares be disposed of in violation of this provision, the equitable interest of the Corporation under this provision in such shares shall date from the date of such disposition.\textsuperscript{87}

3. In the event of the death of any party hereto, the executor or administrator of such party shall execute a consent to Subchapter S tax treatment in accordance with and within the time limits provided for in Subchapter S and the regulations thereunder, and shall take such further action and execute such other documents as may be necessary to effectuate the purposes of this agreement.\textsuperscript{88}

4. In the event that holders of a majority of the shares of the Corporation's stock then outstanding file a written notice with the Treasurer of the Corporation that they desire to revoke Subchapter S tax treatment pursuant to Section 1372(e)(2) of the Internal Revenue Code of 1954, each party hereto shall execute such consents to such revocation and take such further action and execute such other documents as may be necessary to effectuate such revocation.

5. In the event that Subchapter S tax treatment has been revoked or terminated, and in the further event that holders of a majority of the shares of the Corporation's stock then outstanding file a written notice with the Treasurer of the Corporation that they desire to re-elect Subchapter S tax treatment, each party hereto shall execute such consents to such re-election and take such further action and execute such other documents as may be necessary to effectuate such re-election.

6. No party hereto, no director, and no officer of the Corporation shall be liable in damages or otherwise, or in any other way be held responsible, for the termination of Subchapter S tax treatment where such termination results from action taken (or by reason of failure to act) by the Corporation and where such ac-

\textsuperscript{87} This section does not prevent a shareholder from terminating the election by becoming a non-resident alien. Normally this possibility can be safely ignored. It would seem wise to include these restrictions also in the charter of the corporation; O'Neal, supra, n. 83, §§ 3.79 and 7.14; see also 2 Md. Corp. (1967), Art. 23, § 4(b)(7).

\textsuperscript{88} This section should avoid the difficulties discussed, supra, n. 64.
tion, or non-action, as the case may be, has the approval of the Board of Directors of the Corporation.

7. At any time, by the filing of a written notice signed by the holders of a majority of the shares of the Corporation's stock then outstanding with the Treasurer of the Corporation, this agreement may be terminated, or any provision of this agreement may be waived.

8. This agreement shall be binding upon the heirs, executors, administrators, successors, and assigns of all parties to this agreement, and the terms "party" or "parties", as used in this agreement shall include the heirs, executors, administrators, successors, and assigns of the named parties and the heirs, executors, and administrators of assigns of such named parties. All parties bound by this agreement shall execute and deliver any and all documents necessary to carry out the purposes of this agreement.89

IN WITNESS WHEREOF, we, the undersigned, have executed and sealed this agreement.

Accepted:

..........................................................

Treasurer of Green, Inc.,
as Escrow Agent.

As an alternative to a shareholders' agreement, a charter provision for the redemption of stock may sometimes be used as a means of discouraging minority shareholders from terminating the Subchapter S election. Under such a redemption provision the corporation would be given a right to redeem shares whenever a transfer of such shares has caused the termination of the Subchapter S election. Although a disgruntled shareholder can still terminate the election, such a provision enables the majority to cause the immediate redemption of the shares he has transferred, and thereby puts the majority in a good position to re-elect the Subchapter S tax treatment for the next year.90 With-

89 Adequate reference to this agreement should be made on the stock certificates to make sure that any transferee will be bound by it; see O'Neal, supra, n. 83, § 7.16, and 2 Md. Code (1957), Art. 23, § 114. Before allowing any transfer under § 2 of the agreement, the corporation should require the written consent of the prospective transferee to the Subchapter S election.
90 Under Reg. 1.1372-5(a), the Commissioner will probably be lenient in allowing a re-election for the next year where a disgruntled minority shareholder has caused termination of the election.
out such a redemption clause, the disgruntled shareholder (or his transferee) can permanently block any attempt by the majority to re-elect Subchapter S treatment. Moreover, if the redemption price set in the charter is less than the current fair value of the shares (which will often be true if "book value" is used as the redemption price), the redemption provision will tend to deter minority shareholders from acts causing termination of the election.

The chief advantage of such a redemption provision over a shareholders' agreement is that it would be less cumbersome to establish and operate. Also, it might be convenient to use where a buy-and-sell agreement between the shareholders has already been established, since the addition of a charter redemption provision may avoid elaborate revision of existing agreements. On the other hand, such a redemption provision provides for a less comprehensive treatment of the problems involved; specifically, it would not establish "majority rule" as to formal revocation and re-election, nor would it explicitly relieve the majority from potential liability for corporate acts causing termination of the election. This redemption provision technique would seem most suitable for use where, because of the particular circumstances, the majority does not consider the risks of revolt by individual shareholders serious, and, thus, are content with half-way measures.

Such a redemption provision can only be used in states permitting redeemable common stock. In a number of states, this point is as yet unsettled.\(^1\) As far as Maryland is concerned, the statute itself explicitly permits redemption provisions as to common stock.\(^2\) Of course, it is still too early to be confident that a redemption provision of the type described (and with such a purpose) will withstand attack in the courts. Not only is redeemable common somewhat novel in itself, but to use a right of redemption to provide majority rule for Subchapter S questions is to take an excursion even further into the unknown. As long as all shareholders consent to a charter amendment creating such a redemption provision, and the local corporation law is not adverse, the chances of judicial approval seem good.\(^3\)

To illustrate such a redemption provision, a tentative draft is presented below:

\(^1\) O'Neal, supra, n. 83, § 7.11.
\(^2\) 2 Md. Code (1957), Art. 23, § 18(a) (5) and § 32.
Redemption of Common Stock.

In the event that any shares are transferred to a person who fails to consent to tax treatment under Subchapter S of the Internal Revenue Code of 1954 (hereinafter referred to as Subchapter S) in accordance with and within the time limits provided for in Subchapter S and the regulations thereunder; or, with respect to shares owned by the estate of any deceased shareholder, in the event that Subchapter S tax treatment is not consented to by an executor or administrator of such estate in accordance with and within the time limits provided for in Subchapter S and the regulations thereunder; or, in the event that any shares are transferred or any interest in shares is disposed of in such a way as to cause the termination of Subchapter S tax treatment; then, any or all of such shares referred to above as may be designated by the Board of Directors may be called by the Board of Directors in such manner as they determine at their book value, as determined by the Board of Directors as of the close of the month next preceding such call. Such determination of book value, including the method thereof and the matters considered therein, shall be final and conclusive.

Could a redemption provision be used, also, as a means of forcing recalcitrant shareholders to consent to the original election of Subchapter S tax treatment? This is an intriguing possibility, for, otherwise, there seems no way to elect Subchapter S treatment over the objection of even a single shareholder. A corporate charter is usually amendable by two-thirds of the shareholders. If such two-thirds could amend the charter to include a redemption provision permitting redemption of the stock of anyone who refused to consent to a Subchapter S election, there would be a method to force the election on the minority. What can be accomplished through charter amendment varies from state to state. The Maryland law gives a virtually unlimited power of amendment to the shareholders. But

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94 The shares owned by the estate would be subject to redemption where no executor or administrator has been appointed in time as well as where an executor or administrator refuses to consent.
95 Cf. draft set out in O'Neal, supra, n. 83, § 10.14 (2).
96 2 Md. Code (1957), Art. 23, § 11(c) (3).
97 The redemption clause draft, supra, would have to be modified to make refusal to consent to the election an additional ground for redemption.
98 2 Md. Code (1957), Art. 23, § 10. See Brune, Maryland Corporation Law and Practice (1953), §§ 115 and 122.
even though such a charter provision were technically permissible under the statute, there is always the risk that such action would run afoul of equitable limitations on changes that can be imposed by the shareholders in control through charter amendment.10

Having considered majority control arrangements for Subchapter S questions, let us turn briefly to the problems involved in establishing a rule of unanimity for such questions. As has been pointed out, a rule of unanimity in this area will usually be impractical and unsatisfactory. Yet there may be situations where an arrangement based on unanimous consent of the shareholders is the only one feasible. For instance, the corporation may have been originally organized on the understanding that all corporate action would require unanimous consent. Or, some shareholders may condition their original consent to the Subchapter S election on the adoption of a rule of unanimity for all subsequent Subchapter S decisions.

Designing an arrangement based on a rule of unanimity, as compared with a majority control arrangement, involves some new problems, while others remain the same, and still others are eliminated. Since Subchapter S itself requires formal consent by all shareholders to both election and revocation, a rule of unanimity is already established; but contractual arrangements are still needed to protect against termination of the election by individual shareholder action as well as by corporate action. Protection from individual shareholder action can be obtained by the same means used in majority control arrangements; that is, through imposing restrictions on the transfer of shares. Establishing a rule of unanimity, however, also requires giving protection to the minority shareholders from termination of the election by the corporate management. In theory, at least, equitable relief may be available to the minority shareholders where the corporate management has caused the termination of the election and it can be

10 See generally LATTIN, THE LAW OF CORPORATIONS (1959), 507-515. Using a fairer pricing formula under the redemption provision than “book value” would improve the chances of the charter amendment withstanding attack in a court of equity. In view of 2 Md. Code (1957), Art. 23, § 10, the argument can be made that as long as a minority can get “fair value” for its stock, the minority should not be able successfully to challenge on equitable grounds any charter amendment adopted by the majority. Against the validity of a redemption provision so used, it may be argued that it violates the “policy” of Subchapter S itself with its requirement of unanimous consent to a Subchapter S election (see text, supra, n. 72), and that such an unusual amendment should not be sustained without the unanimous consent of the shareholders (see O'NEAL, supra, n. 83, § 3.77).

shown that they did so in flagrant disregard of the interests of the minority. But the use of such a remedy is fraught with difficulties.\textsuperscript{101}

One relatively simple way to protect the minority from the majority is to give each shareholder a veto power as a part of the corporate structure itself. This can be achieved by having the charter require unanimous consent for both shareholder action and director action (each shareholder would also be a director).\textsuperscript{102} A less severe approach would be to require unanimity only with respect to actions that could result in termination of the election. This would entail requiring unanimity as to issues of stock, transfers of treasury stock, waiver of stock restrictions, and charter amendment, combined with charter restrictions as to the type of business activity so as to prevent termination because the gross receipts of the business are of an improper type or source.\textsuperscript{103} Either of these approaches, however, involves putting a straight-jacket on the majority shareholders and the corporate management that would usually cost more in loss of operating efficiency than the protection given to the minority would be worth.

A more feasible way, perhaps, to guard against action causing termination of the election instigated by the majority either as corporate managers or as individuals is through use of a liquidated damage provision. Even though a shareholders' agreement prohibited all the acts that would cause termination of the election, still the equitable remedies of specific performance and injunction would not be effective, because there would be no way for the equity court to nullify retroactively an act that caused the termination. Moreover, damages for breach of such a shareholders' agreement would be virtually impossible to compute. For example, suppose a minority shareholder were in a 20% federal income tax bracket and the corporation would have to pay a 52% corporate tax in the event of termination of the election. Certainly termination in such a situation significantly increases the tax burden on the minority shareholder's share of the business profits. But this example over-simplifies the problems involved in measuring the injury to the minority shareholder. An accurate measure of damages would involve not only the current year but the indefinite future; and a number of factors would be involved, all highly speculative, including the

\textsuperscript{101} See text, supra, p. 216.
\textsuperscript{102} See Roland Park Shopping Center, Inc. v. Hendler, 206 Md. 10, 14, 109 A. 2d 753 (1954).
\textsuperscript{103} See supra, n. 13.
future incomes of the shareholder and the corporation, changes in the salary and distribution practices of the corporation, and changes in the tax law itself. In view of the difficulty of ascertaining damages, it would seem that a liquidated damage provision that sought to make a reasonable estimate of the damages would be sustained by the courts, and not held to be a penalty.\footnote{See Restatement of Contracts (1932), § 339; McCormick, Handbook on the Law of Damages (1935), Ch. 24.} Of course, the parties would use such a provision in a shareholders' agreement not in the expectation that it would have to be invoked, but in the hope that it would be a deterrent to acts terminating the election. With these thoughts in mind, a draft of a shareholders' agreement to establish a rule of unanimity for Subchapter S questions is presented below.\footnote{See supra, n. 84.}

AGREEMENT made this ........ day of ......................, 1960, between Daniel Doe, Edward Engle, and Fred Frame (hereinafter referred to as the Stockholders), and Green, Inc., a Maryland corporation (hereinafter referred to as the Corporation).

WHEREAS the Corporation has elected and the Stockholders have consented under Section 1372(a) of the Internal Revenue Code of 1954 to tax treatment under the provisions of Subchapter S of the Internal Revenue Code of 1954 (hereinafter referred to as Subchapter S); and

WHEREAS the Stockholders desire that Subchapter S tax treatment should not be terminated except with the unanimous consent of the stockholders of the Corporation;

Now THEREFORE, it is mutually agreed as follows:

1. (Same as section 1 of agreement on page 220)

2. (Same as section 2 of agreement on page 220)

3. (Same as section 3 of agreement on page 221)

4. No party hereto, either in his individual capacity, or as director, officer, or employee of the Corporation, shall do, vote for, or assent to any act causing the termination of Subchapter S tax treatment, unless there is unanimous stockholder approval of such act and termination. The failure to take action, reasonable in the circumstances, that would have prevented a
termination of Subchapter S tax treatment shall be deemed assent to an act causing termination within the meaning of the preceding sentence.\textsuperscript{106}

5. Inasmuch as the remedy at law would be inadequate and inasmuch as it would be extremely difficult to determine the actual damages resulting to parties hereto should Subchapter S tax treatment be terminated without unanimous consent of the stockholders, any party hereto who fails to comply with the terms of this agreement where such failure results in termination of Subchapter S tax treatment hereby agrees to pay to each of those stockholders of the Corporation who are not in default under this agreement (hereinafter referred to as complying stockholders) as liquidated damages ten dollars ($10) times the number of shares then owned by each such complying stockholder. If more than one party hereto fails to comply with the terms of this agreement and thereby contributes to the improper termination of Subchapter S tax treatment, all such defaulting parties shall be jointly and severally liable for the amount of liquidated damages above specified. As between themselves, such defaulting parties shall contribute to the satisfaction of such liability in proportion to the maximum number of shares owned by each during the six months period preceding the default.\textsuperscript{107}

\textsuperscript{106} Under this clause breach of the agreement results from acts of a party taken in a corporate capacity as well as in an individual capacity, and also from a failure to act to prevent termination in either capacities. Thus, assenting to a failure of the corporation to exercise its option to purchase stock when a transfer would result in termination, or negligently allowing the corporation to exceed the 20\% limit on personal holding company type income would be conduct constituting a breach of the agreement.

\textsuperscript{107} As an illustration of how this clause is meant to operate, assume A, B, C, and D own 100 shares each in a Subchapter S corporation. B transfers his 100 shares to E, and E fails to consent to the election. A and B are directors and they fail to cause the corporation to exercise its right to purchase B's shares. A, B, and E would be "defaulting parties" under this clause, while C and D would be "complying stockholders". C and D would be entitled to liquidated damages of $1,000 each. A, B, and E would each be liable for the full $2,000 in damages, and would each contribute $666.67 to the satisfaction of the liability. The $2,000 damage figure is, admittedly, only a rough attempt to compensate the complying stockholders for their loss resulting from termination of the election. In working out a proper measure of damages, the chief factor is the difference between a stockholder's individual tax rate and the corporate tax rate. But even this is just a beginning, for many imponderables are involved, such as the length of time the corporation will be foreclosed from re-electing Subchapter S tax treatment, the future changes in both the corporate and individual tax rates, the future dividend policy of the corporation, and the possibility of eventual liquidation. The formula used makes no attempt to relate the amount of damages due each complying stockholder to his individual tax situation, for the complexities are too formidable. One way to arrive at a
6. (Same as section 8 of agreement on page 222)

In WITNESS WHEREOF, we, the undersigned, have executed and sealed this agreement.

CONCLUSION

The enactment of Subchapter S, presumably with the best of intentions to aid small businesses with their tax problems, has, it is true, given the tax planner a helpful new tool to use in certain relatively rare situations. But it has also created a myriad of opportunities for abuse and a host of difficult problems for the lawyer who seeks to mold the relationships of the business owners so that they can live peaceably within the framework of this new creature, the Subchapter S corporation.

dollar amount per share to be used in the formula is to ascertain the difference between the average tax bracket of stockholders and the average tax bracket of the corporation, and then multiply this difference (expressed in terms of percentage) by the dollar value of a share of stock. For example, if the average individual tax bracket were 30% and the average corporate tax bracket were 50%, the corporate business income would be worth 20% less to the average stockholder after termination of the election than before; consequently his damage is roughly 20% of the value of his stock. If, in this instance, the stock was worth $50 a share on the eve of the execution of the agreement, liquidated damages of 20% times 50, i.e., $10 per share, would be a suitable measure of damages to use. This liquidated damage clause is, admittedly, a monstrosity, but at least it indicates one possible approach to a very difficult problem.
THE MARYLAND LAW OF STRIKES, BOYCOTTS, AND PICKETING

By Leonard E. Cohen*

Maryland labor lawyers are sometimes faced with the situation in which a relatively small business is being struck, boycotted, or picketed by a labor union, or is threatened with such measures. The question immediately arises whether such activity is permissible. If the business is engaged in or affects interstate commerce, then there is a large body of federal labor law which is applicable. The National Labor Relations Act1 (hereinafter called "NLRA"), provides that some types of strikes, boycotts, and picketing are unfair labor practices and, therefore, illegal. For example, the NLRA prohibits picketing which has as its object the forcing of an employer to recognize a union as the representative of his employees when another union has been certified by the National Labor Relations Board (hereinafter called "NLRB") as the representative of such employees.2 The problems existing under federal labor law have been thoroughly discussed by other writers, and it is not the intention of this article to repeat such discussions. Rather, the purpose of this article is to consider the legality of strikes, boycotts, and picketing in situations where federal labor law does not apply. Such a situation would occur if the business involved did not engage in or affect interstate commerce. Also, under a recent amendment to the NLRA, it seems that federal labor law would not apply when the business affected interstate commerce to such a small extent that the NLRB refused to take jurisdiction over it.3 In either situation, the question would be primarily one of state law, and this article will attempt to describe the rather skimpy Maryland law which does exist in this area.

As an illustration of the type of problem which will be discussed, assume that a tavern located within Baltimore City employs three bartenders. Everything sold in the tavern is purchased from distributors which are themselves

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3 See discussion, infra, circa, n. 14.
located within Baltimore City. The tavern makes no purchases or sales directly outside of Maryland. A union claims to represent all of the employees of the tavern, but the union refuses to submit proof of its authority. When the owner of the tavern refuses to recognize the union, a picket line appears in front of his establishment. As another illustration, assume that a trucking company serves small retail stores within Baltimore City. The company employs five truck drivers, who are not members of any union. In an attempt to organize the employees of the company, a union calls a strike of its members who are employed at several of the retail stores served by the company. In both of the above illustrations, it is reasonable to assume that only intrastate commerce is involved, or that the NLRB would refuse to take jurisdiction. Thus, the question would be whether the employer in such cases is entitled to relief under Maryland law.

Before the relevant Maryland law in this area can be discussed, it will be necessary to mention very briefly two issues which could determine whether Maryland law would even apply. These two issues are whether federal law has preempted the area, and whether there is a constitutional right to picket which could not be abridged by the state.

**Preemption of State's Labor Jurisdiction by NLRA**

In a series of decisions the Supreme Court of the United States has indicated that when federal labor law controls a situation, the states have no authority to act in the matter. The typical case involved an attempt by an employer to obtain relief from a state court or board against union activity which violated the NLRA and thus was subject to the jurisdiction of the NLRB. In such a situation, the Court ruled that the federal law had preempted the field, and that the employer's only recourse would be the NLRB.

Until recently it was believed that states might have greater authority to award damages than to grant injunctions in this area. This belief was fostered by several cases which contained language supporting such a conclusion. However, in *San Diego Unions v. Garmon*, the Supreme

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Maryland Law Review

Court recently held that such is not the case, that a state court cannot award damages in a situation where it could not grant an injunction. The Court distinguished the earlier cases, which had permitted state courts to award damages, on the ground that those cases involved violence and imminent threats to the public order, which were legitimate matters of state concern.

In discussing whether strikes, boycotts, and picketing are controlled by federal law, it is necessary to distinguish between three types of activity: (1) that which is protected by federal law; (2) that which is prohibited by federal law; and (3) that which is neither protected nor prohibited by federal law. For example, Section 7 of the NLRA provides that "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."7 It is clear, therefore, that strikes, boycotts, and picketing are protected by federal law to some extent. For example, if an employer engaged in interstate commerce refused to grant a wage increase during negotiations with a union, and the union subsequently called a strike and peacefully picketed the employer, such activity would clearly be protected by federal law.

On the other hand, the NLRA prohibits various types of union activity. For example, Section 8(b)(4)(B) of the Act makes it an unfair labor practice for a union to induce employees of any employer to engage in a strike where an object thereof is "forcing or requiring any person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person . . . ."8 Thus, if in the above-described situation, the picketing was extended to companies dealing with the company with which the union had the dispute, with the purpose of causing strikes at such companies, such picketing would be a violation of the NLRA.

Suppose, however, that the union put pressure on the company by calling intermittent and unannounced work stoppages. In such a case, the activity would not be a violation of the NLRA. On the other hand, such tactics are considered improper and therefore not within the protec-
tion of federal law. Thus, the activity would be neither protected nor prohibited by federal law.

The Supreme Court decisions state rather clearly that when activity is either protected or prohibited by federal law, the states cannot regulate it. San Diego Unions v. Garmon also states that when the NLRB has not determined the legality of conduct under federal law, and the conduct arguably falls within the compass of federal law, the states may not regulate the conduct. But, if it appears that the activity is neither protected nor prohibited by federal law, it is not clear whether the states may regulate it. One Supreme Court case suggests that they may. However, the following quotation from the Garmon case shows that the issue is not yet settled:

"If the Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7, or prohibited by § 8, then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States. * * *"

In the above discussion, it has been assumed that when the NLRA governs a situation, the NLRB, which enforces that law, will take jurisdiction over the matter. However, such an assumption is not always correct. The NLRB has formulated standards to govern its jurisdiction, and such standards fall short of encompassing all of the businesses which engage in or affect interstate commerce. This situation results from the NLRB's belief that its budget does not enable it to handle all of the cases which fall within its jurisdiction under the NLRA, and that therefore it must refuse to exercise jurisdiction over businesses which have only a slight effect on interstate commerce. Thus, there arose what was known as a "no-man's land" in which the states did not have jurisdiction and in which the NLRB refused to take jurisdiction. This phenomenon resulted from the decision in Guss v. Utah Labor Board. A union

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9 Supra, n. 6.
10 Auto Workers v. Wis. Board, Supra, n. 8a.
11 Supra, n. 6, 245. In this case, at p. 245, n. 4, the Court also stated that Auto Workers v. Wis. Board, 336 U.S. 245 (1949), "has not been followed in later decisions, and is no longer of general application."
charged a small Utah company with engaging in activities that were unfair labor practices under both the NLRA and the Utah Labor Relations Act. The company's dealings outside of the state were very limited; and under its jurisdictional standards effective at that time, the NLRB refused to take jurisdiction over the company. When the NLRB refused to act upon the union's charges, the union filed the same charges with the Utah Labor Relations Board. The Utah Board found that it had jurisdiction and concluded on the merits that the company had engaged in unfair labor practices under the Utah Act. The Supreme Court of the United States held that the Utah Board did not have jurisdiction in the case since the company was engaged in interstate commerce to some extent. The Court felt that federal law had completely preempted the field even though the NLRB refused to exercise its jurisdiction.

The Guss case produced a paradoxical situation — whereas some types of activity were prohibited by both federal and state law, the NLRB would not, and the states could not, enforce the prohibitions. This situation has been remedied in two ways. First, in 1958 the NLRB revised its jurisdictional standards drastically to include many more businesses. Also, a recent amendment to the NLRA permits the states to exercise jurisdiction in cases where the NLRB has jurisdiction but declines to exercise it. Although the recent statute is not absolutely clear, its legislative history seems to indicate that the states may apply their own law, and need not follow federal law in such cases. Apparently, when the NLRB refuses to take jurisdiction over a business, the business is treated as if it did not engage in or affect interstate commerce. It is conceivable that this amendment could be interpreted to mean that states may take jurisdiction over such cases but that the applicable law is to be federal; however, such an interpretation seems unlikely.

In all of its preemption decisions the Supreme Court has recognized the right of the states to regulate violence

\[\text{supra, n. 12.}\]


\[\text{105 Cong. Rec. 14206, 14214, 14221. Such a conclusion is also supported by the fact that the Senate bill provided that state agencies could exercise jurisdiction over companies when the NLRB refused to exercise its jurisdiction, providing that such agencies applied federal law. This provision was eliminated by the conference committee. Conference Rep. 1147, U.S.C. Cong. & Ad. News (1959) 2503, 2509. See also, Cox, The Landrum-Griffin Amendments to the National Labor Relations Act, 44 Minn. L. Rev. 257, 261-262 (1959).}\]
and threats of violence. Thus, there is no question that the states can enjoin fights, destruction of property, and other conduct of this type under the police powers of the state. It often becomes difficult, nevertheless, to decide whether a state may also prohibit peaceful activity which seems to be governed by federal law, when such activity has resulted in instances of violence. This problem usually arises in connection with picketing, where strikers and non-strikers often meet face to face and tempers grow short.

A recent Supreme Court case, *Youngdahl v. Rainfair, Inc.*, presents a good illustration of this problem. A company in a small community had just over a hundred employees, about one-third of whom engaged in a strike and picketing to compel the company to recognize a union. Various acts of violence and threats of violence resulted, such as puncturing automobile tires, threatening the plant manager, name-calling as the non-striking employees came to and left work, and breaking a window in the plant. The Court held that the state court could enjoin future violence or threats of violence, but that it could not prohibit picketing *per se* since the pattern of violence was not so connected with the picketing that an injunction against violence would be ineffective if the picketing were permitted to continue.

In reaching this decision, the Court expressly distinguished an earlier case in which it had permitted a state court to enjoin all picketing because of the threat of violence. In *Drivers Union v. Meadowmoor Co.*, a labor dispute resulted in picketing accompanied by various forms of violence, such as smashing windows, exploding bombs in plants, wrecking trucks, and beatings. The state court reasoned, and the Supreme Court agreed, that the unusual amount of violence had created an atmosphere of fear and intimidation, and that further picketing, even though peaceful, would perpetuate this atmosphere. The Supreme Court did not frame the issue in the *Meadowmoor* case as being whether federal law had preempted state law; rather, it asked whether the United States Constitution prevented a state court from enjoining picketing (a problem which is discussed below). Nevertheless, the issues in the *Youngdahl* and *Meadowmoor* cases are similar, and a comparison

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17 355 U.S. 131 (1957).

18 312 U.S. 287 (1941).

19 See infra, circa, ps. 236-238.
of the two cases is very helpful in understanding the Supreme Court view in this area.

In summary, the doctrine of preemption at the present time seems to have the following effect on the applicability of Maryland labor law to Maryland businesses: If a business does not engage in or affect interstate commerce, Maryland has jurisdiction over union activity concerning the business and may apply Maryland law. If the NLRB refuses to take jurisdiction over a business, Maryland has jurisdiction and probably may apply Maryland law. If the NLRB takes jurisdiction over a business, and the union activity is either prohibited or protected by federal law (or if the NLRB has not determined the status of the activity under federal law but it arguably is prohibited or protected), Maryland has no jurisdiction over such activity. If the NLRB takes jurisdiction over a business, and the union activity is neither prohibited nor protected by federal law, it is not settled whether Maryland has jurisdiction. In any situation involving violence or public disorder, Maryland may act to regulate such breaches of the peace.

PICKETING AS A CONSTITUTIONAL RIGHT

It is settled law that picketing is to some extent a means of expression and as such is protected by the free speech guarantee of the First Amendment as incorporated into the Fourteenth Amendment of the United States Constitution. It is also recognized that picketing is a form of coercion and thus is in a different category from other means of expression. The problem of reconciling the free speech aspect with the coercion aspect of picketing has proved very difficult. There is no question that violent types of picketing, such as mass picketing which blocks ingress and egress, or picketing accompanied by harm to persons or property, is not protected by the Constitution and may be regulated by the states.20 As discussed above, in some instances violence becomes so closely connected with picketing that even the peaceful aspects of the picketing may be prohibited.21 A problem also arises when picketing is conducted peacefully but the object of the picketing seems to conflict with the public policy of a state, so that the picketing appears to be a means of coercion for an illegal end. It can be argued that such picketing is no more protected

20 See Hotel Employees' Local v. Wis. Board, 315 U.S. 437 (1942); Drivers Union v. Meadowmoor Co., supra, n. 18.
21 See supra, ps. 234-236.
than verbal threats for the purpose of extortion. The main problem has been how far the states can go in enforcing their public policy as a means of regulating picketing.

Two of the early leading cases in this area are *Thornhill v. Alabama*\(^{22}\) and *A.F. of L. v. Swing*\(^{23}\). The *Thornhill* case settles beyond doubt that peaceful picketing enjoys some constitutional protection. In this case the Supreme Court of the United States held unconstitutional an Alabama statute which prohibited all picketing for the purpose of inducing persons not to trade or deal with a business. The statute as interpreted was not limited to picketing with an unlawful object or conducted in an unlawful manner. In the *Swing* case the Court went farther than in the *Thornhill* case by holding that a state court could not enjoin peaceful organizational picketing. A union had tried to organize the employees of a beauty parlor, and when its efforts failed, the union picketed the shop. The Supreme Court of Illinois had held that such picketing might be enjoined since it was a violation of the common law policy of the state for a union to picket when there was no dispute between the company and its employees.

In a series of subsequent cases the United States Supreme Court has withdrawn from the position enunciated in the *Thornhill* and *Swing* cases, and apparently has overruled the *Swing* case *sub silentio*. In *Giboney v. Empire Storage Co.*,\(^{24}\) the Court held that a Missouri court could enjoin a union, which was attempting to organize peddlers, from picketing a wholesale dealer to force him to agree to stop dealing with non-union peddlers. Under the law of Missouri, such an agreement would have constituted a conspiracy in restraint of trade in violation of the state anti-trust laws. In *Building Service Union v. Gazzam*,\(^{25}\) a union unsuccessfully attempted to organize a small hotel, and the owner refused to sign a contract with the union as the bargaining agent for his employees. When the union began to picket the hotel in an attempt to gain recognition, a state court enjoined the picketing on the ground that the object of the picketing was in violation of the state statute prohibiting employer coercion of employees in their choice of a bargaining representative. The Supreme Court held that the injunction was valid.\(^{26}\)

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\(^{22}\) 310 U.S. 88 (1940).

\(^{23}\) 312 U.S. 321 (1941).

\(^{24}\) 336 U.S. 490 (1949).


\(^{26}\) See also Hughes v. Superior Court, 339 U.S. 460 (1950); Teamsters Union v. Hanke, 339 U.S. 470 (1950).
In a recent case, Teamsters Union v. Vogt., Inc., a union unsuccessfully sought to organize the employees of a company operating a gravel pit in Wisconsin. The union began to picket the entrance of the company's place of business with signs reading that the men on the job were not affiliated with the A. F. of L. Drivers of several trucking companies refused to deliver to the company and thereby caused substantial damage to the company. The Wisconsin Supreme Court held that the picketing could be enjoined on the ground that the objective of the picketing was to coerce the employer to interfere with the right of its employees to join or refuse to join the union, which action by the employer would have been in violation of a Wisconsin statute. The United States Supreme Court held that the picketing could be enjoined without violating the Fourteenth Amendment. The opinion of the Court by Mr. Justice Frankfurter examines the history of the picketing cases and demonstrates that the Court has changed its viewpoint greatly since the earlier cases. While the Court did not overrule A. F. of L. v. Swing, the facts of the Vogt and Swing cases are substantially identical, and it would be difficult to discover a meaningful distinction between them.

The decisions regarding the constitutional right to picket have followed a serpentine course, and it is difficult to predict with certainty what the future holds. The present law seems to be that the Constitution prevents a state from prohibiting peaceful picketing per se, but does not prevent a state from prohibiting picketing for an objective which violates state policy even though such picketing is entirely peaceful.

MARYLAND LABOR LEGISLATION

The public policy of Maryland in regard to strikes, boycotts, and picketing is almost entirely a creation of the Maryland judiciary. While some of the other states have detailed labor legislation, the Maryland statutes regulating labor relations are very few and of limited importance. Many states have labor boards which exercise functions similar to those of the NLRB in the federal sphere. Although Maryland has a Commissioner of Labor, his authority is very limited. In general, his chief func-


The Supreme Court recently relied solely on the Thornhill case in reversing per curiam a Kansas decision; Chauffeurs Local Union 795 v. Newell, 356 U.S. 341 (1958).
tions are to seek mediation and arbitration of labor disputes which may result in strikes or lockouts, to investigate and publish a report on disputes when he has failed to secure mediation or arbitration, and to conduct elections for the selection of labor representatives when the parties consent to such an election. The only sanction available to him is to publish in newspapers his findings in labor disputes, which findings may designate the party at fault.  

Such adverse publicity may be harmful to many businesses, but in general this sanction seems to have little effect. Thus, the Commissioner provides services when the parties desire them, but he has almost no authority to regulate labor disputes when the parties elect self-help.

The Maryland statute of most importance in this area is the Anti-Injunction Act, which is patterned after the federal Norris-La Guardia Act. This statute declares the policy of Maryland to be that employees should have full freedom to organize and to negotiate the terms and condition of their employment through representatives of their own choosing. The purpose of the act is to place restrictions upon the power of courts of equity to grant injunctions in labor disputes. This purpose reflects the feeling in this country during the 1930's that courts of equity were unduly hampering the labor movement by enjoining necessary and proper union activities, especially by means of ex parte injunctions.

The act implements its purpose in two ways. First, it prevents a court from prohibiting, by means of a restraining order or a temporary or permanent injunction, inter alia, the following types of activity:

1. Ceasing or refusing to perform any work or to remain in any relation of employment regardless of any promise or agreement to the contrary.
2. Becoming or remaining a member of any labor organization regardless of any promise to the contrary.
3. Giving publicity to the existence of, or the facts involved in, a labor dispute, whether by advertising, speaking, or picketing, so long as such activity is not coercive, violent, or otherwise unlawful.
4. Ceasing to patronize or employ any person.

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31 MD. CODE (1957) Art. 100, §§ 63-75.
32 MD. CODE (1957) Art. 100, § 63.
(5) Assembling peaceably to do or to organize any of the above acts.

(6) Advising any person of the intention to do any of the above acts.

(7) Agreeing with other persons to do any of the above acts.

(8) Advising, urging or inducing without fraud, violence, or threat thereof, others to do the above acts.

(9) Doing in concert any or all of the above acts on the ground that the persons engaged therein constitute an unlawful combination or conspiracy.\(^\text{34}\)

Second, the act sets forth specific procedural requirements which must be met before a court may issue a temporary or permanent injunction in a labor dispute. Preliminarily to the granting of an injunction, the court must hear the testimony of witnesses opposing the injunction, and make the following findings:

(1) That unlawful acts have been threatened or committed and will be executed or continued unless restrained.

(2) That substantial and irreparable injury will follow.

(3) That greater injury will result from the denial of an injunction than will be inflicted by the granting of an injunction.

(4) That the activity in question is not protected from an injunction by another provision of the act.

(5) That the complainant has no adequate remedy at law.

(6) That the police have failed or are unable to furnish adequate protection to the complainant's property.\(^\text{35}\)

However, the statute provides that a court may issue a temporary restraining order before a hearing is held if the complainant alleges that substantial and irreparable injury will be unavoidable. A court may issue such a restraining order only upon testimony or, in the discretion of the court, upon affidavits which would support a temporary injunction if a hearing were held. Before granting such a restraining order, the court must allow a reasonable time, but not less than forty-eight hours, for the parties sought to be restrained to show cause why the restraining order should not issue. Generally, the restraining order is effective for only five days. There is the further provision that no restraining order or injunction may issue unless the complainant has made every reasonable effort to settle the dispute either by negotiation or with the aid of any

\(^{34}\) S Md. Code (1957) Art. 100, § 65.

\(^{35}\) S Md. Code (1957) Art. 100, § 68.
available method of mediation or arbitration, unless delay would cause irreparable injury.\textsuperscript{36}

As shown by the above description, one part of the Anti-Injunction Act protects certain types of union activity from a court injunction, while another part of the act sets forth the procedure which must be followed before a court may issue a labor injunction. Although these two parts do not fit together as nicely as possible, the intent seems to be that activities described in the first part of the act may never be enjoined and that other activities resulting from labor disputes may be enjoined, if at all, only after the statutory procedures have been followed. In general, it seems that the first part of the act is concerned with peaceful conduct while the second part presupposes the existence of violence.

The Anti-Injunction Act applies only to cases involving "labor disputes," and its definition of such cases seems to include almost every conceivable labor dispute:

\( (a) \) \textit{What constitutes labor dispute.} — A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in a single industry, trade or craft, or occupation; or who are employees of one employer . . . or when the case involves any conflicting or competing interest in a 'labor dispute' \(* \* \*)

\( (c) \) \textit{Labor dispute defined.} — The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representations of persons [sic] in negotiation, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or concerning employment relations or any other controversy arising out of the respective interests of employer or employee, regardless of whether or not the stand disputants in the proximate relation of employer or employee."\textsuperscript{37}

Nevertheless, the Maryland courts have held that the act was not intended to apply in many situations apparently covered by its language. The cases raising this question are discussed below.\textsuperscript{38}

The following Maryland statute provides that not all union activity is to be considered a criminal conspiracy:

\textsuperscript{36} S Md. Code (1957) Art. 100, § 60.
\textsuperscript{37} S Md. Code (1957) Art. 100, § 74.
\textsuperscript{38} See infra, circa, ps. 250-258.
"An agreement or combination by two or more persons to do or procure to be done an act in contemplation or furtherance of a trade dispute between employers and workmen, shall not be indictable as a conspiracy, if such act, committed by one person, would not be punishable as an offense; nothing in this section shall affect the law relating to riot, unlawful assembly, breach of the peace, or any offense against any person or against property."39

However, this statute, which originated in 1884, has not been relied on as an analogy in civil litigation and therefore seems of minor importance to our problem.

Another Maryland statute sets forth the usual prohibition of sit-down strikes. Violation thereof, by either the employees involved or by any union directing their actions, constitutes a criminal offense.40

**EARLY LABOR PROBLEMS IN THE COURTS**

Since the labor law of Maryland is largely a result of judicial decisions, it seems appropriate to provide a brief background of the judicial approach to labor law in this country.41 When unionism was in its infancy, and employers challenged the right of unions to cause injury to businesses by means of strikes, boycotts, and picketing, the courts turned to the law of conspiracy, which seemed to apply to the collective harm involved. That law prohibited persons from acting in concert for an illegal or perhaps immoral aim. It also prohibited persons from using unlawful means to achieve a legitimate aim. From this background, the courts generally applied two tests in determining the legality of union activity: (1) Were the objectives lawful? (2) Were the means lawful?42 However, it was often difficult to apply such general tests to the variety of situations which developed. Violence was clearly unlawful, but what about peaceful picketing which had the effect of ruining a valuable business? Was it

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40 3 Md. Code (1957) Art. 27, § 552. At one time there was a Maryland statute regulating labor disputes involving public utilities; however, the statute expired by its own terms in 1957 and was not re-enacted. 8 Md. Code (1957) Art. 89, §§ 14-24.
41 For an excellent discussion of this subject, with special emphasis on Maryland law, see Lauchheimer, The Labor Law of Maryland (1919) 19-45.
42 See e.g., Hopkins v. Oxley Stave Co., 83 F. 912 (8th Cir. 1897); Central Metal Products Corporation v. O'Brien, 278 F. 827 (N.D. Ohio 1922); Plant v. Woods, 176 Mass. 492, 57 N.E. 1011 (1900); and Vegelahn v. Gunther, 167 Mass. 92, 44 N.E. 1077 (1896).
lawful to strike Employer A, with whom the union had no dispute, to cause him to stop dealing with Employer B, with whom the union had a dispute, in an attempt to put pressure on Employer B?

Questions of this type — the ones posed represent only a few of the problems which arose — are not always susceptible of clear and obvious answers. For example, one question which arose early, and which sometimes still creates uncertainty today, is whether it is against public policy for a union to try to force employees of a company to join the union against their will by picketing the company, secondary pressure on the customers of the company, appeals to the public not to patronize the company, and the like. At first glance such an objective seems against the American tradition of freedom of choice, and many states, including Maryland, today condemn tactics with such a purpose. However, unions which were struggling for a foothold in American industry claimed that it should be permissible for them to force unionization of a company. They argued that if Employer A was unionized, and Employer B, his direct competitor, was not, it would be impossible for the union employees of Employer A to enjoy wages and benefits much in excess of those given by Employer B. Employer A would not be able to afford labor costs much greater than those paid by his competitor, and in effect Employer B would be governing to a great extent the wages and benefits of the employees of Employer A. Therefore, they argued, a union should be permitted to force the employees of Employer B to join the union to protect the union members. The success of labor's position on this issue is shown by the fact that the NLRA, as interpreted by the NLRB and the courts, has never forbidden per se picketing with such an object.

With this brief background of the history of labor relations, we now turn to the Maryland judicial decisions. In discussing them, it seems practical to divide the cases

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4 For an illustration of the problem of organizational picketing in recent years, see the discussion in Drivers, Chauffeurs, and Helpers Local 639, 119 N.L.R.B. 232, 239 (1957) (the Curtis Brothers case).


4 See infra, pp. 250-253, passim.

4 See the discussion in Drivers, Chauffeurs, and Helpers Local 639, 119 N.L.R.B. 232, 239 (1957) (the Curtis Brothers case). For the most recent congressional view on this subject, see § 8(b) (7) of the NLRA, added by Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C.A. (Cum. Supp. 1959) § 158(b) (7).
into two classes — decisions of the Court of Appeals, and decisions of the circuit courts. Only the first class of decisions are controlling throughout the state, and since the circuit court cases often concern issues not yet determined by the decisions of the Court of Appeals, it will be helpful to have clearly in mind which court rendered the decision under discussion.

**DECISIONS OF THE MARYLAND COURT OF APPEALS**

The first important Court of Appeals case was *Lucke v. Clothing C’rs’ Assembly*. An employee was discharged by his employer at the insistence of a union because the employee was not a member of the union. The union had implied that it would induce members of the union to withhold their patronage, and possibly call a strike, if the employee was not discharged. The employee had applied for membership in the union, but had been rejected. The Court held that the employee had the right to sue the union for damages. It stated that although the union had the right to seek favorable conditions for its members, it did not have the right to interfere with the rights and privileges of non-union labor. The Court noticed the fact that the union had denied membership to the employee but said that this point was not crucial to its decision.

The age of the *Lucke* case — it was decided in 1893 — causes doubt as to whether the case still represents the public policy of Maryland. If it does, then any labor agreement which makes union membership a condition of employment may violate Maryland law, although such agreements are very common today. Perhaps the *Lucke* case may be interpreted to mean that a union may not force an employer to discharge a non-union employee, but that an employer may voluntarily agree to a contractual provision which would require such action. However, such a distinction would often be dubious, since the threat of economic force on the part of a union, either expressed or assumed, usually underlies such a provision.

The *Lucke* case was decided at a time when courts often held that while it was lawful for a union to use economic force to achieve immediate advantages for its members, such as a wage increase, it was unlawful for a union to use such force to achieve conditions which would only benefit the members indirectly, such as the complete

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*77 Md. 396, 26 A. 505 (1893).*
unionization of an industry. This view probably affected the Court's decision to some extent.

It is also possible to explain the case on the ground that the union's rejection of the employee's application for membership was a vital factor in the case even though the Court stated that it was not. Other states have held that it is contrary to their public policy for a union to demand the discharge of an employee, to whom it has denied membership, because he is not a union member. This view stems from the belief that it is unfair for a union to put an employee in such a helpless position.

A very important Court of Appeals case is *My Maryland Lodge v. Adt.* The company was engaged in the manufacture of machinery, especially machinery used by the brewing companies of Baltimore. The union demanded that the company grant to its employees a wage increase of ten percent. When the company refused, but offered to grant an increase of three percent, the union called a strike of the company's machinists. The union also told the company that if the demands of the employees were not met, the company would be placed on the union's unfair list, and the union would prevent any person from accepting employment with the company. Later the union attempted to force the company to meet its demand by establishing a boycott of the company's products, and by threatening to boycott any business which used the machinery of the company. Several customers which continued to use the company's machinery were also placed on the unfair list and made a part of the boycott. The company alleged that its business had dwindled from $18,000 a year to less than $3,500 as a consequence of the acts of the union.

The Court of Appeals held that it was proper to issue an injunction enjoining the union from continuing its boycott activities. In reaching this decision, the Court attempted to formulate a basic theory of lawful and unlawful union activity. It stated that the company was engaged in a lawful business and that the law protects the right of an employer to employ whom he pleases at prices which he and his employees can agree upon. Also, an employer has the further right to discharge his employees at the expiration of their term of service, or for violation of their contract. On the other hand, the employees have

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48 100 Md. 238, 59 A. 721 (1905).
a legal right to fix a price for their labor, and to refuse to work unless that price is obtained. They have that right both as individuals and in combination, and they may organize to improve their conditions and to secure better wages. They may even use persuasion to have others join their organization and may present their cause to the public in newspapers or circulars in a peaceful way, but with no attempt at coercion. If ruin to the employer results from their peaceful assertion of these rights, it is damage without a remedy; but the law does not permit either employer or employee to use or threaten to use force, violence, or coercive tactics.

Although it is clear that the Court of Appeals in the Adt case thought that the union activity as a whole amounted to unlawful coercion, it is uncertain whether the Court would not have condoned some of the activity standing by itself. The Court stated that the union had the right to present its cause to the public even though such action was intended to induce the public to cease using the products of the company and thus to exert economic pressure on the company. However, the Court also said that the union could not use coercion, which statement seems contrary to its prior assertion. This possible contradiction can probably be explained by the fact that the case involved economic pressure on neutral companies which were customers of the company involved in the dispute. Thus, the Court was probably condemning the boycott of the customers — a secondary boycott — and not the boycott of the company itself — a primary boycott. Such a position would be in accord with the general view of lawful and unlawful boycotts. A later Court of Appeals case confirms this conclusion by stating that the Court held in the Adt case that it was illegal for a union to boycott the customers of a company in order to put pressure on the company.51

In Pocketbook Workers v. Orlove,52 the Court of Appeals held that peaceful picketing for a lawful object was permissible, but that violent and coercive picketing was unlawful regardless of its purpose. Two companies had open shops and employed workers without regard to their membership in a union. A union, which was attempting to organize the employees of the firms, called a strike because of dissatisfaction over wages and working conditions and because of the refusal of the firms to deal with the

52 158 Md. 496, 148 A. 826 (1930).
union. The employees who refused to work tried to persuade other employees not to report for work, and pickets wearing placards announcing the strike walked on the sidewalk in front of the shops. There was a dispute as to whether employees who refused to strike were threatened and whether there were other forms of violence. The Court of Appeals held that the strike and picketing were not enjoinable except insofar as there was violence. It reasoned that the employees had the right to organize a union, to quit work and strike, and to persuade others to join them. Such persuasion, so long as it was peaceful, could be carried on by pickets outside the places of employment. However, the Court also recognized that it was often difficult to draw a line between coercion and mere persuasion. It stated that many pickets might just by their numbers and crowding give occasion to some coercion.

In a series of three cases the Court of Appeals discussed the problem of the secondary strike — a strike or a threat to strike Employer A in an attempt to exert pressure on Employer B. In the first case, Blandford v. Duthie, a union had attempted in vain for many years to get a company which did roofing work of various kinds for general contractors, to employ only union men. In order to injure the company economically, the union threatened to strike general contractors who used the company and, in fact, did strike one general contractor, who after a few weeks was forced to rescind its contract with the company. The Court upheld an injunction enjoining such conduct by the union. It stated that this case was not simply one of union men exercising their right to refuse to work on a job on which non-union men were employed. Nothing showed that the employees of the struck general contractor objected to working on the job; rather, the union called the strike itself. Such action was unlawful because there was no dispute between the general contractor and its employees, and thus no justification for interference with the contract between the general contractor and the company. It is interesting to note that the Court expressly recognized the right of the union men to refuse to work with non-union men of their own volition, but condemned the union’s part in instigating the strike. Such a view accords with the policy of the NLRA which makes

\[\footnotesize{\text{\textsuperscript{53}}\text{ In the language of labor law this type of activity is usually referred to as a secondary boycott even though there is no \textit{boycott} in the normal sense. However, for purposes of clarity of thinking this article will use the term \textit{“secondary strike”} to describe such activity.}}\]

\[\footnotesize{\text{\textsuperscript{54}}\text{ Supra, n. 51.}}\]
it an unfair labor practice for a union to induce employees to strike in various situations, but which does not prohibit employees from stopping work on their own initiative.\(^5\)

The rationale of the *Blandford* case was followed in *Bricklayers' Etc. Union v. Ruff*.\(^6\) A company engaged in the business of stonemasonry entered into a written contract with a general contractor to do all of the stonemasonry work connected with the erection of a church. The company began the work and employed only union labor; however, the general contractor employed non-union labor, and the union ordered all of the union men working for the company to quit work so long as the general contractor continued to employ non-union men. When the company was unable to finish the work, the general contractor cancelled the contract and employed others to finish the work at the risk and expense of the company. The Court of Appeals held that the union was liable to the company for causing a breach of the contract with the general contractor which resulted in substantial damages. The Court stated that if the non-union men had been working for the company, it would have been proper for the union men to refuse to work on the same job with the non-union men, and thus force the company to grant all work to union men. In such case, the dispute would have been directly with the party against whom the strike was ordered. But here, injury was inflicted upon an innocent party in order to compel it to coerce the general contractor. The company had no power to coerce the general contractor into employing only union men, and even if it had such power, it had the undoubted right to elect not to do so. Organized labor's right of coercion and compulsion was thus judicially limited to strikes against those employers directly involved in a trade dispute.

A later decision involving the same parties as the last case confused this area considerably. *Ruff & Sons v. Bricklayers' Union*\(^7\) arose out of the union's maneuver to avoid the effect of the earlier decision against it. It changed its constitution to provide that no member of the union could work for a subcontractor who took a contract from a general contractor employing non-union labor. The union then advised the company that no members of the union would work for the company if it continued to enter into contracts with non-union general contractors. The Court of Appeals held that the action of the union was not enjoin-

\(^5\) See, *e.g.*, United Steelworkers of America, 123 N.L.R.B. 20 (1959).
\(^6\) 160 Md. 483, 154 A. 52 (1931).
\(^7\) 163 Md. 687, 194 A. 752 (1933).
able, since the facts in this case were different from those in the earlier Ruff case. In the former case, a strike was called not to discipline the company with whom there was no controversy, but to induce a breach of the contract between the company and a general contractor in an effort to compel the latter to discontinue the employment of non-union labor. In this case, there was no existing contract, so the company would not be injured by the refusal of its employees to work. Nor was there a third party involved in the controversy, which involved only the company and the union.

The reasoning of the Court in this case seems contrary to its position in the earlier secondary-strike cases, and the attempt to distinguish the earlier cases is perplexing. It seems to be mere verbiage to say that in the earlier Ruff case the controversy was with the general contractor but that in the present case the controversy was with the company itself. The facts in the two cases are identical in substance. In both cases the union would not allow union men employed by the company to work with non-union men employed by the general contractor. In both cases the only purpose of the union action was to force the general contractor to use union labor — the company was already using union labor and its employment practices apparently were acceptable to the union. The Court also mentioned the fact that in the earlier Ruff case there was a contract in existence while in the later case there was not. However, it is not clear why this difference should be important. By analogy to tort law, it may be a tort to force a person to breach his contract with another; but it also may be a tort to interfere with an advantageous relationship not yet consummated by a contract. As far as the harm to a company is concerned, it may be far more harmful to be threatened with loss of all future contracts with non-union companies than to be faced with the breach of one contract already in existence.

A possible way to support the Court’s distinction in these cases is to say that the earlier cases involved actual strikes while the later case involved only a threat to strike. The Court might have believed that a court of equity should not intervene until something more than mere threats has occurred. In Lucke v. Clothing C’t’rs’ Assembly, the union had also merely threatened to strike or boycott the employer, but the employer had taken the

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58 See Restatement, Torts (1939) 49, § 766.
59 77 Md. 396, 26 A. 505 (1893). See supra, ps. 244-245.
further step of discharging the employee who was the object of the union's attack. Therefore, the harm intended by the union's threats actually occurred, and perhaps this distinction explains why the Court allowed damages in the *Lucke* case but refused an injunction in the second *Ruff* case. On the other hand, courts of equity have often enjoined threatened harm, and on final analysis it seems that these cases are fundamentally irreconcilable.

**DECISIONS OF THE MARYLAND CIRCUIT COURTS**

Several reported Maryland circuit court decisions in this area date from after the passage of the Maryland Anti-Injunction Act and therefore are affected by the Act. As discussed more fully above, this act completely prevents Maryland courts from enjoining some types of union activity and requires detailed procedural steps before any union activity may be enjoined. However, the act applies only to cases involving labor disputes, and the chief issue in these circuit court cases was whether they involved a labor dispute as defined in the statute. If they did not, then the statutory restrictions on the equity power of the courts would not apply, and the courts could deal with the union activity involved on general equitable principles.

In deciding whether a labor dispute was involved, the Maryland circuit courts, like many other state courts interpreting similar anti-injunction acts of their respective states, used the means and objectives test which had existed prior to the passage of the act. If the type of union activity in question, or the objective of such activity, was prohibited by prior judicial decisions or by the public policy of the state, then no labor dispute was involved and the statute did not apply. By adopting such a flexible view, the Maryland courts were able to remove many cases from the seemingly broad statutory definition of a labor dispute when the courts believed that such cases were not intended to fall under the act.

*Wischhusen v. Griffin* involved a tavern which had several coin-operated machines. The owner of a music machine employed two non-union employees to service this

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60 See, e.g., Clark v. Todd, 192 Md. 487, 64 A. 2d 547 (1949).
62 See supra, ps. 239-241.
64 See supra, ps. 242-243.
machine and other machines owned by him. The owner of two pinball machines personally serviced these machines and other machines owned by him. A union was attempting to organize the owners and operators of coin machines and their employees in Maryland and the District of Columbia. The union attempted to get the owner of the pinball machines to sign a contract governing his services, and it tried to get the owner of the music machine to sign a contract governing the services of his employees, as well as himself, even though the employees had specifically stated that they did not want to be represented by the union. When both men refused to sign the contracts, or to join the union, the union started to picket the tavern with signs asking patrons not to use the machines because they were not serviced by members of the union. Most of the patrons belonged to some union, and as a result of the picketing, some patrons refused to enter the tavern, although the exact loss of business could not be ascertained. The court held that the picketing was enjoinable on several grounds. First, the picketing was an attempt to bring pressure upon the owners of the machines by forcing the tavern owner to stop dealing with them and therefore constituted an unlawful secondary boycott. It was also held to be unlawful as an attempt to bring pressure upon a self-employer to force him to join a union. Further, picketing to compel an employer to force his employees to be represented by a union against the employees' will violated the Maryland Anti-Injunction Act in that the union was attempting to deny the employees involved the right to be represented by representatives of their own choice. Thus, there was no legitimate labor dispute and the provisions of the Anti-Injunction Act did not apply.

The first point mentioned by the court was clearly supported by the Court of Appeals decisions discussed above which prohibit secondary pressure.\[6\] The second point — that it was unlawful to force a self-employer to join a union — is not directly supported by any decision of the Court of Appeals. However, it seems basic to the general view of labor relations in this country that unions, which serve to represent employees in their relations with employers, have no right to represent employers against their will. Since 1947 it has been an unfair labor practice under the NLRA for a union to induce a strike to force an employer or a self-employed person to join any labor or-

\[6\] See supra, ps. 247-248, passim.
In 1959 the act was amended to prohibit a union from threatening, coercing, or restraining any person to achieve such an objective. Thus the amendment seems to make unlawful in the federal sphere the kind of activity involved in the Wischhusen case. The third point — that it was unlawful to force an employer to interfere with his employees' choice of a bargaining representative — also has no support in a Court of Appeals decision, but seems to accord with Maryland policy as set forth in the Anti-Injunction Act. The act declares the policy of the state to be that:

"... it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing ... and that he shall be free from interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization. . .."

It would be clearly violative of this policy for an employer, on his own initiative, to interfere with his employees' selection of a bargaining representative, and it seems equally violative for a union to force an employer to do so.

The third principle of the Wischhusen case — that it is unlawful for a union to seek to represent employees against their will — was followed in a later case which also was decided in Baltimore. In Goldstein v. Bartenders Union, Local No. 36, five of the eighteen or nineteen employees of a tavern joined a union. Representatives of the union told the owner of the tavern that the union represented a majority of his employees. The owner asked to see the names of the members and stated that if the union did represent a majority, he would negotiate a contract with it. The union refused on the ground that the owner might discriminate against the union members and started to picket in front of and in the rear of the tavern. Several days later, five employees who had joined the union returned to work and stated that they did not want the union to represent them. However, the picket line continued. After finding that the business did not so affect interstate commerce as to fall under the NLRA, the court held that an injunction should issue. It stated that the

70 33 CCH Labor Cases ¶ 71,020 (Cir. Ct. No. 2 of Baltimore, 1957).
Maryland Anti-Injunction Act applies only if there is a labor dispute, and that under the facts of the case, there was no labor dispute since the purpose of the picketing—to require the employer to recognize the union although the union did not represent his employees—violated the public policy of the state.

It is important to note that the two cases just discussed both represented situations in which a union sought recognition as the bargaining representative of employees who had renounced the union. In Cox Distributing Co. v. Highway Truck Drivers, Local 107, the position of the union was stronger. Eight of the nine truck drivers of a company became members of the union, which requested the company to recognize it as the bargaining representative of the drivers. The company refused, and the eight union drivers went on strike. They also picketed the company with the help of two union organizers and other unidentified persons. The company replaced the eight drivers and leased two tractor-trailer units to deliver its products to its customers. During the strike and picketing, various acts of violence were performed by unknown persons. The court held that the peaceful union activity could not be enjoined. It stated that a strike and picketing for recognition was clearly a labor dispute within the meaning of the Maryland Anti-Injunction Act and that therefore no injunction could issue unless the court found that the police had failed or were unable to furnish adequate protection, and that notice of hearing had been given to all known persons against whom relief was sought. In the instant case, failure of police protection was not alleged and notice of hearing was not given. Because of such procedural defects, an injunction would have been improper. The court also discussed the rule set forth in the Supreme Court cases, that while a state court is not preempted from enjoining violence connected with picketing, it may not enjoin peaceful picketing itself unless the picketing is so enmeshed with the violence and the threat of violence that the two activities are inseparable. It held that in this case the violence was separable from the peaceful picketing and thus that all picketing could not be enjoined.

Although there are only a few reported Maryland cases dealing with recognitional picketing, the three cases just discussed, and Pocketbook Workers v. Orlove in the Court of Appeals, present a pattern, although a sketchy one. The
Wischhusen and Goldstein cases hold that it is against the public policy of Maryland for a union to force a company to recognize it as the representative of the company's employees when all of the employees have rejected the union. On the other hand, the Cox case holds that it is not against the policy of the state for a union which represents a majority of a company's employees to picket for recognition. Thus far the Maryland decisions accord with the principles of the NLRA, which basically provide for a system of majority rule in representation cases. In the Orlove case the Court of Appeals condoned picketing for recognition by a union which represented some of the employees of a company without questioning whether the union represented a majority of the employees. Thus, while the Court necessarily held that recognitional picketing was not unlawful per se, it did not consider the question whether a union engaging in such picketing must have the support of a majority of the employees whom the union seeks to represent. In fact, there does not seem to be any Maryland case which decides the legality of recognitional picketing by a union which has the support of some, but not a majority, of the employees of a company. In deciding such a question, a court may reach different results depending upon whether the union wants to represent all of the employees of the company, the employees of certain departments, or only those employees who support the union. In any event, this problem, which has proved very troublesome in federal law, remains open in Maryland law.

One other Maryland case should be mentioned, even though the opinion was apparently given orally and contains no citation of authority. In Standard Wholesale Phosphate and Acid Works v. CIO, the company refused to sign a contract containing a closed-shop provision. The union called a strike, in which only a small part of the employees participated, and established a picket line at the entrance to the company. Another company, a neutral party, suffered because it shared the same entrance, and union men, such as truck drivers, often would not cross the picket line to reach the company. Also, a ship which unloaded behind the picket line was struck by another union, apparently in sympathy for the strikers. The court held that the picketing was lawful since it was peaceful and that the sympathetic strike was also lawful since it was...

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74b See, e.g., Labor Board v. Drivers Local Union, 362 U.S. 274 (1960).
75 Daily Record, Dec. 1, 1939 (Cir. Ct. No. 2 of Baltimore, 1939).
only an application of the principle that union men will not work behind a picket line. This case is interesting because it raises difficult problems regarding the legality of two different types of union pressure on neutral employers. First, the refusal of union men to cross the picket line affected two companies at the same location, one involved in the labor dispute and the other neutral. To the lawyer practicing federal labor law such a situation raises familiar, although difficult, questions of common situs picketing. Such picketing must meet very specific standards to be legal under federal law—such as clear indication of the company involved in the dispute and minimization of the effects of the picketing on other companies. This case, however, appears to permit such picketing without restriction. Second, the sympathetic strike brings to mind the secondary strike cases in the Court of Appeals. This case differs from those cases in that here two unions were involved, whereas in the Court of Appeals cases the union which called the strike at the neutral company was also the union involved at the primary company. It is not clear whether this difference should be important. However, the court assumed that the sympathetic strike was proper without discussion of the Court of Appeals cases.

Unionization of Government Agencies in Maryland

Thus far the cases discussed have dealt with union activity directed against private employers. One series of Maryland cases, which may have far-reaching consequences in the future, deals with the attempt of a union to organize and bargain for the employees of a government agency.

During the early 1940's there was a history of labor troubles among the street-cleaning and trash-and-garbage collection employees of the Department of Public Works of Baltimore City. Frequent work stoppages, which threatened to paralyze the important services of the Department, resulted from the attempt of a union to gain recognition as the representative of these employees. Finally the Department recognized the union and signed several collective bargaining agreements with it. The cases now under discussion dealt with the legality of these agreements.

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56 See, e.g., Piezonki v. National Labor Relations Board, 219 F. 2d 879 (4th Cir. 1955); Sailors' Union of the Pacific (the Moore Dry Dock case), 92 N.L.R.B. 547 (1950).
57 See supra, ps. 247-250, passim.
Mugford v. Mayor and City Council of Baltimore involved a taxpayer's suit that was filed to enjoin the enforcement of one of these contracts, which provided for union recognition, hours of work, rates of pay, overtime and holiday pay, vacations, sick pay, seniority rules, a grievance procedure, and arbitration. The contract expressly provided that there would be no strike under any circumstances. In holding that the contract was illegal, the court distinguished between public and private employment on the ground that public officers, who are not governed by a profit motive, do not have the same incentive to exploit employees. It also stated that public officers do not have the same freedom of action which private employers enjoy, since their authority derives from public law and may not be delegated to others. Governmental authority may not discriminate in favor of union labor, and the right to hire non-union labor, to fire union members, and to hear and consider the grievances of all employees must be preserved. Also, there must be no strikes against the government. On the other hand, the court said that every agreement between a labor union and municipal officers is not unlawful since no law forbids city employees to join an association, nor denies to such an association the privilege of fair hearing in the matter of working conditions and terms of employment.

Having decided that the agreement was illegal, the court next had to decide whether it had the power to grant an injunction in face of the Maryland Anti-Injunction Act. It held that it did have such power since the act was not intended to apply to public officials.

While this case was pending, the city and the union entered into a new agreement, which was similarly attacked in a taxpayer's suit as being unlawful. The new case was also entitled Mugford v. Mayor and City Council of Baltimore. The agreement provided that the Department of Public Works recognized the union as the bargaining representative for the employees of the Department and that the Department would not recognize or deal with any other union as regards such employees. The court held that this provision was unlawful in that it established the union in a preferential position expressly denied to any other organization, and that such preferences are forbidden in the public service. It said that the contract would not have been objectionable if it merely had given

78 8 CCH Labor Cases ¶ 62,137 (Cir. Ct. No. 2 of Baltimore, 1944).
79 9 CCH Labor Cases ¶ 62,424 (Cir. Ct. No. 2 of Baltimore, 1944).
the union the right to act as bargaining representative for its members employed in the Department, saving to the other employees of the Department the right to deal with the Department on their own behalf either singly or collectively. The court also stated, however, that the provisions for holidays, vacations, sick leave, overtime pay, and the deduction of union dues on a voluntary basis were lawful.

In its decree the court enjoined the city from carrying out the agreement and from collecting union dues unless the collection and remittance of such dues was on a purely voluntary basis terminable by any employee at any time. Neither the city nor the union appealed from this decree; however, the taxpayer appealed on the ground that the part of the injunction permitting voluntary deduction of dues was unlawful. The Court of Appeals held\textsuperscript{80} that if the city made dues deductions at the request of the union, even though the deductions were terminable by the employees, the arrangement would be objectionable as a delegation of governmental power and as a preference to the union. However, if a city employee voluntarily requested the deduction of union dues, reserving to himself the right to discontinue such payments in the future, such an arrangement would be lawful if the city consented to it, but it could not be imposed without the city's consent.

Although the Court of Appeals was not asked to review the remainder of the decree, it nevertheless did so to some extent. It stated that insofar as matters such as hours, wages, or working conditions of city employees are covered by the provisions of the City Charter, those provisions are controlling. To the extent that they are left to the discretion of any city agency, the city authorities cannot delegate or abdicate their continuing discretion. However, employees may designate a representative or spokesman to present grievances. The court also mentioned that a municipality cannot discriminate in favor of members of a labor union, and that a citizen who is not a member of a union cannot, by that fact alone, be barred from a position in the public service.

At first glance the series of \textit{Mugford} cases does not seem too important since it is a fairly well-established principle in this country that union activity directed against government agencies should be restricted in some

\textsuperscript{80} Mugford v. City of Baltimore, 185 Md. 266, 44 A. 2d 745 (1945).
However, these cases may have an influence outside of the area of government agencies. First, the Court of Appeals apparently concurred in the view of the lower court that the Anti-Injunction Act did not apply to public bodies, and that therefore an injunction was permissible. Otherwise the Court would not have taken the trouble to define the scope of the injunction in regard to the deduction of union dues. Thus the Court of Appeals seems to recognize that the broad statutory definition of a case involving a labor dispute is subject to exceptions when required by the public policy of the state. Such a principle would be relevant in any labor injunction case, not only in those involving government agencies.

Second, it is arguable that these cases stand for the proposition that it is against the public policy of Maryland for a union to attempt to force its wishes on employers who have some of the characteristics of a public body. The scope of the "public body" concept may possibly be extended to include organizations which are not strictly government agencies but which perform governmental functions, such as hospitals which include among their patients indigent persons referred by the state or one of its subdivisions. Also, as regards non-profit hospitals serving the general public, it would seem that such institutions serve the general welfare without regard to profit in a manner akin to a government agency, and that therefore the rationale of the Mugford cases may apply equally to them. At the present time, however, it is impossible to predict with any certainty how the Maryland law will develop in this area.

PICKETING IN A SHOPPING CENTER

In recent years the growth of shopping centers has created difficult questions regarding the right of a union to picket. The basic problem has been whether the owners of shopping centers may lawfully prohibit picketing on their private property. There is very little authority on this
point at the present time, and one of the few reported cases was decided in 1959 by the Criminal Court of Baltimore City. In State v. Williams, a union business agent was charged with criminal trespass for picketing on the walkways of a Baltimore shopping center outside of a store with which the union had a dispute. Although the picketing was peaceful and did not interfere with customers in the shopping center, it was conducted in disregard of a posted sign prohibiting any type of solicitation, including picketing. The business agent was convicted before a police magistrate but was found not guilty on appeal to the Criminal Court.

The court based its decision generally on two grounds: (1) Because the shopping center had been opened to the public, the constitutional and statutory right to picket took precedence over the normal rights of the owners of private property; (2) Federal law regarding picketing had preempted the jurisdiction of the state court. On the first point, the court recognized the constitutional right to picket and cited Thornhill v. Alabama, discussed above. It next cited federal cases which contained language to the effect that in some instances the rights of an employer as to his property must yield to the rights of employees under federal statutes. The court stated that the controlling case was Marsh v. Alabama, where the United States Supreme Court held that it was unconstitutional for a state to convict a person for distributing religious literature on the streets and sidewalks of a town in which all of the property, including the streets and sidewalks, was owned by a private corporation. The court emphasized the

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84 See Nahas v. Local 905, Retail Clerks, 144 Cal. App. 2d 808, 301 P. 2d 932, rehearing den. 144 Cal. App. 2d 820, 302 P. 2d 829 (2d Dist. 1956) (decided on the ground that the picketing was not a trespass as regarded the plaintiff, who was only a lessee); People v. Mazo, 38 CCH Labor Cases ¶ 65,835 (Cir. Ct. III., 1959); Hearn Dept. Stores v. Livingston, 25 CCH Labor Cases ¶ 67,654 (N.Y. Sup. Ct., 1953) (picketing by employees who had an easement to use a private street); People v. Barisi, 15 CCH Labor Cases ¶ 64,890 (N.Y.C. Mag. Ct., 1948); Freeman v. Retail Clerks Union Local No. 1207, 38 CCH Labor Cases ¶ 66,087 (Sup. Ct. Wash., 1959). But cf. Spohrer v. Cohen, 3 Misc. 2d 248, 149 N.Y.S. 2d 493 (Sup. Ct. 1956) (involving a farmers market). See also, Note, Shopping Centers and Labor Relations Law, 10 Stan. L. Rev. 694 (1958).
86 See supra, circa, ps. 237-228.
88 See supra, circa, ps. 237-228.
Supreme Court's language in the *Marsh* case that "the more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." The purpose of this language in the *Marsh* case was to show that the company town was in effect indistinguishable from a municipal corporation and consequently was bound by the restrictions of the Fourteenth Amendment regarding freedom of religion and speech. Thus it is possible to distinguish a shopping center case from the *Marsh* case on the ground that a shopping center is not comparable to a municipal corporation and is therefore not as limited in its actions. On the other hand, the *Marsh* case does support to some extent the court's view that when property is opened to the public, the property rights of the owner are more limited than in the usual case.

On the second point, the court noted the line of Supreme Court cases, discussed above, holding that a state court may not regulate union activity which is either protected or prohibited by federal law unless violence is involved. The court pointed out that one case indicates that a union may have a federal right to picket in a shopping center. In *Marshall Field & Co. v. National Labor Relations Bd.*, the Seventh Circuit held that under the NLRA a company could not prohibit solicitation by non-employee union organizers on a private street which was owned by the company and which bisected the main store of the company at street level. It is possible to distinguish this case from a case involving a shopping center. In the *Williams* case it was argued to the court that since the union's dispute was not with the owner of the shopping center but with one of the lessees, the owner had no duty under federal law to permit union activity on its property. However, the court stated that such a view would nullify the union's federal rights and added that the owner might be found to have been acting as an agent of the lessee. The agency question is certainly a difficult one, especially in view of the close economic relationship which exists between lessor and lessee in a shopping center as a result of the prevalence of percentage leases. The *Marshall Field* case is also distinguishable on the ground that picketing in a shopping center

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91 See *supra*, ps. 231-236.
92 200 F. 2d 375 (7th Cir. 1952).
is far more disruptive of business than is solicitation of individual employees on a private street.

The court, however, concluded that it did not have to decide whether the picketing actually enjoyed federal protection, for under the recent Supreme Court decision in *San Diego Unions v. Garmon*, discussed above, a state court is preempted whenever it is doubtful whether activity is so protected and the NLRB has not passed on the issue. Although the ramifications of the *Garmon* case are not yet completely clear, the court's cautious attitude is understandable considering the tenor of the *Garmon* opinion.

As shown by the previous discussion, the issues raised by picketing in a shopping center are extremely close. Several other courts have decided cases similar to the *Williams* case in the same manner as the Maryland court. Nevertheless, until these issues are determined by the Maryland Court of Appeals, or at least until the federal law questions are determined by the NLRB or the federal courts, the legality of picketing in a shopping center will remain an open question.

**CONCLUSION**

As shown by the cases discussed above, the Maryland judicial decisions provide only the outlines of a law of strikes, boycotts, and picketing. Combined with the sparsity of state legislation in this area, this situation poses a difficult problem for the Maryland labor lawyer. The problem is made even more complicated by the fact that the latest Court of Appeals decision concerning private employers dates from 1933. It is difficult to predict whether the Court of Appeals would follow these decisions today since labor law in general has undergone various changes in policy through the years in accordance with the changes in the labor movement. The infant raised by Samuel Gompers and Eugene V. Debs has grown into the giant guided by George Meany, Walter Reuther, and many others.

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*359 U.S. 226 (1959).*

*See supra, pp. 231-233.*

*People v. Mazo, 38 CCH Labor Cases ¶ 65,835 (Cir. Ct. of Ill., 1959); People v. Barisi, 15 CCH Labor Cases ¶ 64,890 (N.Y.C. Mag. Ct. 1948); Freeman v. Retail Clerks Union Local No. 1207, 38 CCH Labor Cases ¶ 66,037 (Super. Ct. of Wash., 1959).*

*The issues considered by the court in the Williams case, although difficult enough in themselves, do not exhaust the questions involved in this area. One obvious problem which arises whenever there is picketing in a shopping center is whether such activity violates the secondary boycott restrictions of the NLRA.*
The Court of Appeals itself recognized that the judicial view of union activity may vary according to the times, when it stated:

"The main question, heretofore stated, requires a decision as to the powers of organized labor to compel or coerce action for the benefit of its members. Courts, in deciding cases involving this question, recognizing the possible far-reaching effect of any rule or principle enunciated, should and do approach the question with caution, and have generally refrained from doing more than deciding the case upon its peculiar facts, leaving each succeeding case to be determined in like manner, and giving effect to the development of the law as illustrated by the decisions, and also permitting the court to take cognizance of general conditions as they may exist at the time of the decision; thus enabling the courts to maintain an even balance between the rights of workmen, either individually or in combination, and equal rights guaranteed to all individuals under the law. The line of demarcation where one man's rights, natural or legal, may end, because in conflict with the exercise of some right by others, is shadowy, and is not the subject of definition by any general rule."

Taking the course of the federal labor law as an illustration of the change in labor law over the years, the federal courts during the early part of this century were very restrictive of the rights of labor, and even questioned its right to form unions in face of the Sherman Anti-Trust Act.97 The Clayton Anti-Trust Act of 191498 ended this specific problem by expressly sanctioning the right of labor to organize. Nevertheless, the courts continued to hamper the activities of unions by means of injunctions issued under a strict view of the means and objectives test. Again in 1933 Congress limited the power of the judiciary by enacting the Norris-La Guardia Act,100 which greatly restricted the jurisdiction of the federal courts to grant labor injunctions. In 1935 the NLRA gave employees the

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98 See e.g., United States v. Debs, 64 F. 724 (C.C.N.D. Ill., 1894), aff'd, on other grounds, 158 U.S. 564 (1895).
right to organize, to bargain collectively, and to act in concert for their welfare; at the same time, Congress made it an unfair labor practice for an employer to interfere with this right. The effect of this series of statutes was to give the labor movement federal encouragement. However, labor became guilty of various excesses as it became more powerful, and in 1947 the Taft-Hartley Act made many union practices unlawful. The most recent federal legislation has again restricted the actions of unions in regard to both union members and employers.

This brief description of the course of federal labor law shows that because of the various changes in national sentiment toward labor through the years, the Court of Appeals will probably have to re-examine its former labor decisions when and if the occasion arises. It may take a more restrictive view of union activity, a less restrictive view, or it may decide to affirm its former view. In any event, the Maryland labor lawyer will be forced to cope with the uncertainty of the state's labor law until the legislature or the Court of Appeals provides some clarification.

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THE EDITOR'S PAGE

The Review is proud to present two timely and interesting articles in its Summer Issue: Professor William P. Cunningham's "Subchapter S Corporations: Uses, Abuses and Some Pitfalls" and Mr. Leonard E. Cohen's "The Maryland Law of Strikes, Boycotts, and Picketing." Professor Cunningham, who teaches Corporations, Taxation, and conducts a Taxation Seminar at the University of Maryland School of Law, and who has previously contributed to the Review, acutely analyzes the advantages and disadvantages of the relatively new tax device of Subchapter S. His article should prove to be extremely valuable to those attorneys engaged in corporate practice and should be of considerable interest and great assistance to those not specializing in this field. Mr. Cohen is a newcomer to our pages, being a recent graduate of the Harvard Law School, where he was a member of the HARVARD LAW REVIEW. His article
points out "the uncertainty of the state's labor law," especially in regard to two areas of increasing importance, unionization of governmental employees and picketing in shopping centers.

At this time, the Editor is pleased to announce the Editors for 1960-61, who have, as has been customary, been largely responsible for the Summer Issue: Editor, Robert J. Carson; Casenote Editor, Howard S. Chasanow; Recent Decisions Editor, Frank J. Vecella; and Assistant Editors, Herbert J. Belgrad, William G. Kolodner, and Joseph A. Matera.
The Maryland tax treatment of liquidating dividends has furnished grist for discussion and debate ever since the Maryland Income Tax was enacted in 1937. A 1959 ruling by the Maryland Attorney General has generated new interest in this area of our tax law.

Certain stockholders had purchased shares in a corporation for $30.00 a share. Several years later the corporation sold all its assets and made a final liquidating distribution to its shareholders in the amount of $22.00 per share. The corporation apparently had an original paid-in capital of $1.00 per share. The Attorney General ruled that $21.00 out of the $22.00 received in redemption of each share were taxable under the Maryland Income Tax as a "dividend," even though it was perfectly clear that the stockholders in question had suffered a net loss of $8.00 per share from their investment. It is our purpose to scrutinize this result in the light of the relevant sections of the Maryland Tax Law with particular regard to a determination of its validity when subjected to attack on constitutional grounds under our State and Federal Constitutions.

I.

A brief general look at the relevant statutory sections and the various opinions of the Attorney General will be useful in setting up the background for our consideration of this problem.

The taxable status of liquidating dividends is controlled by a combination of several sections of Article 81 of the Maryland Code. Section 288 imposes a tax on the taxable net income of individuals or corporations. Section 285 specifies that "taxable net income" is the gross income of the taxpayer less certain deductions and exemptions.

* A.B. 1952, Princeton University, LL.B. 1957, University of Maryland Law School; Member of the Baltimore City Bar.

1 Daily Record, April 7, 1959.

2 All section references to the Maryland Code will be to the 1957 Edition, unless otherwise indicated.
"Gross income" is defined in Section 280 to include dividends. And Section 279(j) defines "dividend" as follows:

"'Dividend' means any distribution made by a corporation (domestic or foreign) out of its net profits, whenever earned, to its stockholders or members, whether such distribution be made in cash or other property, except stock of the same class in the corporation. Amounts paid in liquidation or dissolution of a corporation shall be treated as dividends to the extent that they represent earnings of the corporation." (Emphasis added).

In 28 Opinions 254 (1943), the Attorney General of Maryland had occasion to analyze the nature of the "earnings" of a corporation out of which a distribution must be made in order to be taxable as a "dividend". In the case before him, liquidating distributions had been made by a corporation of the proceeds realized by the corporation from the sale of certain of its capital assets. The taxpayers argued that since under the Maryland Income Tax no taxable income results from the realization of capital gains, the corporation had realized no "earnings" from the sale of its capital assets, and hence the distributions to the stockholders necessarily were not out of its "earnings". The Attorney General ruled that for this purpose, the earnings of a corporation include profits from the sale of capital assets, even though such profits are not taxable to the corporation. He concluded, therefore, that the distributions to the stockholders were taxable as dividends to them, having been made out of the corporation's earnings.

"The fact that the corporation is excused from paying income tax on it does not prevent accretion to net worth resulting from realized appreciation of assets from being net profits or earnings to the corpo-

8 "Gross income' means income from whatever source derived, including salaries, wages or compensation for personal services of whatever kind and in whatever form paid; alimony received, interest, dividends, rents, royalties and annuity income; and gains, profits and income derived from professions, vocations, trades, business and commerce." [Emphasis added].

9 The italicized last sentence was inserted by Md. Laws 1939, Ch. 277, § 12. Prior to that time, the following sentence had served in its place: — "It (dividend) includes such portion of the assets of a corporation distributed at the time of dissolution as are in effect a distribution of earnings." Md. Laws 1937 (Spec. Sess.) Ch. 11, § 8(1).

5 Art. 81, § 280(a).
ration, so as to make taxable dividends paid from that source.”

A subsequent ruling held that distributions of property that was either contributed as original capital or was purchased by the corporation out of its original capital funds and which had appreciated considerably prior to the distribution could not be taxed as a dividend to the distributee shareholders because the appreciation in value did not result in income to the corporation and hence the distribution was not out of earnings but out of capital. The Attorney General reasoned that the corporation had never realized income from this property because it had never sold it. The additional value which had attached to the property had never been converted into income to the corporation. No mention was made in this opinion of the presence or absence of an earned surplus derived independently of the distributed property. It might be inferred that the taxable status of a distribution was to be determined by referring to the actual property distributed in order to ascertain whether it constituted a part of the capital of the corporation as distinguished from corporate property that was purchased out of the corporate earnings.

However, a 1956 ruling indicated that all distributions, including property that was part of the original corporate capital, will be considered as taxable dividends to the stockholders so long as, after the distribution the corporation still retains assets “properly valued at the amount of its paid-in capital.” The opinion states that “[a]ll

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9 Such a determination could involve formidable problems of “tracing” to discover whether the distributed property was a part of or was acquired out of corporate capital or, on the other hand, was purchased with corporate earnings. Under the federal tax scheme, reference to the corporate source of the distribution is not necessary, since all distributions (no matter of what property) are considered to be out of earnings to the extent that an earned surplus exists, or to the extent the corporation has earnings in the year of distribution. Internal Revenue Code 1954, § 316.


11 Some cases refer to the possibility that property originally attributable to earned surplus may be subsequently “dedicated” to capital uses so as to thenceforth be considered as corporate capital for purposes of determining whether dividend distributions are out of corporate capital or earnings. See e.g. Boston Safe Deposit & Trust Co. v. Commissioner, 262 Mass. 1, 159 N.E. 536 (1928) and Moore v. Tax Commissioner, 237 Mass. 574, 130 N.E. 59 (1921).
distributions are presumed to be from earnings and profits as such existed (on the date of distribution)."

The statutory definition of a dividend makes it clear that the entire earned surplus at the time of distribution (whether or not part or all of this surplus was accumulated prior to the passage of the Income Tax Act of 1937) is to be taken into account in ascertaining whether the distribution is out of "earnings".

II.

It has been suggested occasionally that despite the statutory definition of a dividend, the intent of the legislature was to tax distributions as dividends only to the extent that they result in "income" to the shareholder, and that

\[\text{It should be noted that it is possible that after a distribution of property having a fair market value less than the corporate earned surplus there would remain in the corporation's hands property worth less than its paid in capital, although carried on the books at higher figures. In such a case, not all of the distributed property would constitute a dividend, if by the phrase "properly valued" the Attorney General was referring to fair market value. If this interpretation is correct, it is theoretically possible that a distribution worth less than accumulated earned surplus would be taxed only in part as a dividend with the remaining portion being regarded as a payment out of corporate capital. The Attorney General concluded that if capital was "unimpaired" immediately after the distribution, it should be regarded as a taxable dividend in its entirety. In analyzing the remaining corporate assets to discover whether capital is "unimpaired", the ruling is silent as to whether book values or market values should be used.}

\[\text{See the definition of a dividend contained in Art. 81, § 279(j), supra. The key phrase whenever earned was added by Md. Laws 1939, Ch. 277, § 12. The constitutionality of taxing, as income to shareholders, ordinary dividend distributions made out of surplus accumulated before the passage of the Federal Income Tax Act of 1913 was sustained in Lynch v. Hornby, 247 U.S. 339 (1918). However, in Lynch v. Turrish, 247 U.S. 221 (1918), a companion case involving the same Income Tax Act, it was held that liquidating proceeds paid out of earned surplus resulting from the pre-1913 appreciation of corporate assets which were sold immediately before the liquidation in 1914 could not be taxed as dividends to the stockholders. The distributee shareholders had held their stock prior to the passage of the 1913 Tax Law. The Court decided that this distribution simply was not "income". The two decisions, both handed down on the same day, are difficult to reconcile. One might argue that the Turrish case casts a cloud on the constitutional capacity of the State of Maryland to tax liquidation proceeds as income to the extent they represent earned surplus accumulated before 1937, the year the Maryland Income Tax was enacted, but it appears that decision was based principally on a construction of the relevant language of the taxing act. Moreover, liquidating distributions out of earned surplus accumulated before the enactment of the controlling taxing act have been taxed elsewhere as dividends. See, e.g., Follett v. Commissioner, 267 Mass. 115, 166 N.E. 575 (1929); Moore v. Commissioner, 237 Mass. 574, 130 N.E. 59 (1921); Reeves v. Turner, 289 Ky. 426, 158 S.W. 2d 978 (1942). See also Boston Safe Deposit & Trust Co. v. Commissioner, 262 Mass. 1, 159 N.E. 536 (1928); Trefry v. Putman, 227 Mass. 522, 116 N.E. 904 (1917).}]}
in order for "income" to be realized to the stockholder, the liquidating proceeds must be in excess of the cost basis of his shares. All proceeds received which do not exceed this cost basis are not "income," but simply a return of capital not intended to be subjected to tax. This theory has on its face a certain degree of plausibility. And were it now being advanced for the first time, it would appear to hold considerable merit. Such, however, is not the case.

When the Maryland Income Tax was enacted in 1937, the provisions governing the treatment of liquidating dividends were adopted in substantially the same form in which they persist to the present day. And at the date of enactment these provisions, though new in Maryland, had already experienced an extensive history elsewhere, particularly in the early Federal Income Tax Laws, which established a statutory framework for taxing dividends very similar to Maryland's. Income was defined broadly to include dividends, and a dividend was described as any

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14 Proceeds of life insurance contracts received other than by reason of death are treated in this manner. Only that sum which exceeds the amount of the total premiums paid is taxed as income to the taxpayer who turns in his policy for its cash surrender value. This treatment, however, is specially prescribed by Art. 81, § 280(c), which excludes an amount equal to the total premiums paid from "gross income". An intent to tax the entire proceeds as income might be inferred in the absence of this provision. See Tawes v. Strouse, 182 Md. 508, 512, 35 A. 2d 233 (1943), where the Court said:

"It is thus clear that the [entire] proceeds of the surrendered life policy involved in the instant case is included within gross income. . . . The next question for determination is to what extent the proceeds are exempted from taxation by the subsequent provisions [of the Code].

"The Maryland Legislature has seen fit to exempt from gross income only a sum 'equal to the total amount of the premiums paid therefor.'"

15 Md. Laws 1937 (Spec. Sess.), Ch. 11, § 8.

16 § 11 of the Act of 1913, Subsection B, 38 Stat. 167, defined as not income subject to tax "gains profit and income derived from . . . dividends . . ." but did not contain any definition of "dividend". The Act of 1916, § 2(a), 39 Stat. 757 went on to define a dividend in the following manner:

". . . any distribution made or ordered to be made by a corporation, joint stock company, association, or insurance company, out of its earnings or profits accrued since March first, nineteen hundred and thirteen, and payable to its shareholders. . . ."

The Act of 1917, § 1211, 40 Stat. 337, 338 contained this same definition of a dividend. The Act of 1918, § 201, 40 Stat. 1069 defined a dividend in the same manner but added a provision stating that liquidation proceeds were to be treated as payments in exchange for the stock. The Act of 1921, § 201, 42 Stat. 225, dropped this provision to return to the same status as under the 1916 and 1917 Acts. Finally in 1924, Congress reverted back to the treatment of liquidation proceeds as receipts from the sale of stock. Acts of 1924, § 201(c), 43 Stat. 255. This theory has remained intact since then in the Federal Tax Law. It is presently embodied in I.R.C. 1954, § 331. But cf. the present § 333 which allows a stockholder to elect to be taxed as under the 1916 and 1917 Acts with certain limitations and conditions.
distribution out of corporate earnings and profits. It was quite clear that liquidating distributions were intended to be included in the general statutory definition of a dividend, and the courts consistently sustained the taxation of liquidation proceeds under these early laws. Often, the taxpayer realized income and loss from the same liquidating distribution. Income resulted from that portion of the proceeds which did not exceed the earned surplus of the corporation; a capital loss resulted to the extent the taxpayer's cost basis for the shares exceeded that part of the liquidation distribution not taxed as a dividend, i.e., that part of the proceeds which was regarded as a return of capital. The income tax cases dealing with liquidating dividends under the early federal tax law are particularly significant in view of Maryland's express statutory direction that the Comptroller "shall apply as far as practicable the administrative and judicial interpretations of the federal income tax law." Tax statutes similar to Maryland's have been construed in other states to require that all liquidating proceeds not in excess of the corporation's earned surplus be subjected to tax as dividend distributions. The great weight of authority makes it clear that in determining whether a liquidating distribution is a return of "capital" to the stockholder, reference must be made to the corporation's affairs, not the stockholder's. "Capital" means corporate capital. The price at which the shareholder purchased his stock is irrelevant as is the fact that this purchase price was partly attributable to earnings accumulated at that time.


19 In Boston Safe Deposit & Trust Co. v. Commissioner, 262 Mass. 1, 159 N.E. 536, 538 (1928), the Court said:
There is, however, one Iowa decision holding that liquidation proceeds did not constitute dividends but were instead the proceeds of a sale or exchange of the stock and were exempt under a provision of the Iowa law excluding capital gains from income. The Court reached this conclusion in spite of the statutory definition of a dividend as any distribution made by a corporation out of its earnings as profits. The case seems patently unsound.

In view of the cases interpreting the early Federal tax laws, and those out of state decisions construing statutes very similar to Maryland's and of the Maryland Attorney General's opinion already discussed, it is very difficult to escape the conclusion that the Maryland Legislature intended by its statutory definition of "dividend" to tax as income liquidation proceeds to the extent they represent earned surplus, without regard to the cost basis of the shares in the hands of the distributee shareholder. Let us turn now to the constitutionality of this result.

III.

The only constitutional challenges possible under the Maryland Constitution would appear to emanate from Articles 15 and 23 of the Declaration of Rights. The first establishes a requirement of uniformity with respect to the levy of property taxes. The latter is our so-called "due process" article. It is settled that the Maryland Income Tax is not a property tax and therefore is without the scope of Article 15. Since the rights protected by Article
23 of the Maryland Declaration of Rights have been construed to be identical with those embodied in the "due process of law" clause in the 14th Amendment of the United States Constitution, and we will at this point direct our attention to the 14th Amendment. Whatever conclusions we are able to reach will be applicable equally to Maryland's Article 23.

Is it violative of due process to tax as income to a shareholder those liquidation proceeds which are attributable to earned surplus accumulated by the corporation prior to the date the shareholder purchased his shares? In such a case, is not the tax unlawfully measured and imposed on income which is attributable to predecessor shareholders, and which, if taxed at all, should have been taxed to them? Is it within the bounds of due process to tax as income liquidation proceeds receipt of which results in no gain or profit to the shareholder on his original investment? Can one have income without gain consistently with due process?

The case which sheds most light on these questions is United States v. Phellis, decided by the Supreme Court in 1921. In 1915, a New Jersey corporation underwent a reorganization pursuant to which most of its properties were transferred to a newly formed Delaware corporation, in return for which stock and securities of the new corporation were issued to the old corporation. This stock in turn was passed on to the stockholders of the New Jersey corporation which continued in existence. The government taxed the entire value of the stock distributed to the New Jersey corporation shareholders as a dividend to them under the Federal Income Tax Act of 1913. It was conceded that the accumulated surplus of the New Jersey corporation exceeded the value of the new Delaware stock distributed. The taxpayers' brief contained the following argument:

"As an illustration: An investor bought on September 25, 1915, one share of the New Jersey company for $795.00, its then alleged market value. This stockholder's income from other sources was such that if the present law had then been in effect he would have

Maryland Income Tax Law, 2 Md. L. Rev. 1 (1937); Lewis, Tax Articles of the Maryland Declaration of Rights, 13 Md. L. Rev. 83 (1953).


257 U. S. 156 (1921).
been required to pay fifty per cent of the income received as a tax. On October 1, 1915, there were issued to him two shares of the Delaware company worth at the time $347.50 per share, and he still held his one share in the New Jersey company of the par and market value of $100.00; the result of which was that he had three certificates representing his investment worth exactly the same amount as he had paid for the one certificate in the New Jersey company. The Government's contention now is that both shares of the Delaware company are income, and that one share must be sold and the $347.50 realized therein must be paid to the Government as income tax, and then the stockholder would have left one share of the New Jersey company worth $100.00, and one of the Delaware company worth $347.50, a total of $447.50, in place of the $795.00, which he had paid for the share of the New Jersey company. Yet the Government urges that this stockholder has received in the calendar year by this transaction a gain or profit on his investment.\(^2\)\(^5\)

Despite the common-sense appeal of this argument, the Court held in favor of the Government. The opinion (Justice Pitney) stated:

"The possibility of occasional instances of apparent hardship in the incidence of the tax may be conceded. Where, as in this case, the dividend constitutes a distribution of profits accumulated during an extended period and bears a large proportion to the par value of the stock, if an investor happened to buy stock shortly before the dividend, paying a price enhanced by an estimate of the capital plus the surplus of the company, and after distribution of the surplus, with corresponding reduction in the intrinsic and market value of the shares, he were called upon to pay tax upon the dividend, it might look in his case like a tax upon his capital. But it is only apparently so. In buying at a price that reflected the accumulated profits, he of course acquired as a part of the valuable rights purchased the prospect of a dividend from the accumulations;—brought 'dividend on' as the phrase goes—and necessarily took subject to the burden of the income tax properly to be assessed against him by reason of the dividend if and when made. He simply

\(^{25}\) Ibid, 103, 164.
stepped into the shoes, in this as in other respects, of the stockholder whose shares he acquired, and presumably the prospect of a dividend influenced the price paid, and was discounted by the prospect of an income tax to be paid thereon. In short, the question whether a dividend made out of company profits constitutes income of the stockholder is not affected by antecedent transfers of the stock from hand to hand.\textsuperscript{26}

The constitutionality of the requirement that a succeeding owner of stock be compelled to assume the place occupied by his predecessor for purposes of taxation was reaffirmed in \textit{Taft v. Bower},\textsuperscript{27} which sustained a federal statute assigning to the donee of certain shares their basis in the hands of the donor, for purposes of computing the gain to be taxed to the donee upon the sale by him of the shares. Other cases have affirmed the application of the income tax transactions which have produced "income" without gain.\textsuperscript{28}

It would appear that the 14th Amendment imposes no bar to the taxation of liquidation proceeds as dividends to the extent attributable to corporate earned surplus,—without regard to the cost basis of the redeemed shares in the hands of the distributee stockholders; but however justifiable this result may be from a constitutional point of view, it is indefensible from the standpoint of sound tax policy. To require a taxpayer to return as income upon liquidation sums which are in excess of the actual gain realized by him on his stock investment is patently unfair and inequitable. It cannot fail to produce the conviction in the taxpayer that he has been wronged. It breeds disrespect (and, perhaps, disregard) for the Tax Law in its entirety. It should be changed.\textsuperscript{29}

\textsuperscript{26}Ibid, 171, 172. This case has aptly been referred to as "the miracle of income without gain". Powell, \textit{Income from Corporate Dividends}, 35 Harv. L. Rev. 363, 370 (1922).

\textsuperscript{27}278 U. S. 470 (1929).


\textsuperscript{29}Probably the simplest change would be to amend Art. 81, § 279(j) to read somewhat as follows:

"Amount paid in liquidation or dissolution of a corporation shall be treated as dividends only to the extent that they represent earnings of the corporation and are in excess of the stockholder's basis for the shares with respect to which the dissolution is being made. For purposes of this subsection, the stockholder's basis for
Inheritance By And From Illegitimates Under Maryland Intestacy Law

*Penman v. Ayers*

The appellee, who was a legitimate brother of the intestate claimed an exclusive right to inherit the real and personal estate of his intestate brother. The only other survivor was the appellant, whose claim was predicated on his status as the illegitimate half-brother of the intestate with the common ancestor being their mother. In affirming the lower court's decision in favor of the appellee, the Court of Appeals held that under Maryland intestacy statutes, an illegitimate brother cannot inherit real and personal property from his legitimate half brother who had died intestate.

The Civil Law recognized the concubine, and its laws were much more indulgent to bastard children than the English Common Law, which was strongly in favor of marriage. Under the English system the bastard was considered the son of nobody, *nullius filius*. This complete bar to inheritance was ingrafted into the Common Law of every American jurisdiction except Connecticut. Hence, in England, if there were no legitimate heirs, the land escheated to the crown instead of passing to the illegitimates. Likewise, they could have no heirs but those of their own bodies. Collateral heirs were derived from a common ancestor, and since at Common Law an illegitimate had no legal ancestors, he could have no collateral kindred. Hence, if he died without issue and intestate, any land of which he was seized escheated to the lord of the fee.

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1. 221 Md. 154, 156 A. 2d 638 (1959).
The only significant relief from the rigors and harshness of the Common Law doctrine of *nulius filius* has been the result of remedial legislation. While there are certain basic similarities in the statutes, there is no uniform scheme in the removal of the Common Law disabilities in the American states. Under present Maryland legislation, illegitimates can inherit from their mother, each other, and the descendants of each other; and they are placed in the bloodstream of their natural parents for purposes of inheritance if the father subsequently marries and acknowledges the child as his.

In view of such remedial legislation, the Court of Appeals has been faced with the problem of determining whether the Legislature intended to include illegitimate children within the definitions of "children" or its equivalent as the word appears in various other statutes in the Annotated Code of Maryland. In Article 93, Section 329, it is provided that, if the surviving spouse of a testator elects to renounce the provisions made for his benefit by the will, he shall take dower in the lands plus one-half of the personal estate, so long as the testator has not left other descendants surviving. However, he only takes dower plus one-third if the deceased is survived by other descendants. The testatrix's husband in *Rowe v. Cullen* renounced the will and elected to take, in lieu thereof, his legal share in the wife's estate. His contention that the wife's illegitimate son was not a "descendant" within the meaning of the above statute was rejected by the Court. In referring to the statute, the Court indicated the intent of the legislature was unmistakable and it refused to give the word "descendant" a forced and unnatural meaning in order to gratify a harsh common law policy that has been repudiated for more than a century. Following the same general concept, the Court of Appeals in *Reese v. Starner* held that the mother of an illegitimate child was a "parent" within the meaning of Article 93, Section 135, and she was therefore entitled to share equally with the widow in the estate of her illegitimate son.

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9177 Md. 357, 9 A. 2d 586 (1939).
10106 Md. 50, 66 A. 443 (1907).
11Md. Code (1957) Art. 93, § 135, provides that if the intestate leaves surviving a husband or widow, no child, parent, grandchild, brother, or sister of the intestate, the surviving husband or widow, as the case may be, shall be entitled to the whole.
While there are reasons for not allowing an adulterous or unwed parent to inherit from an illegitimate child, there seems to be no logical reason for not allowing the illegitimate to share in his natural parent’s estate. In the *Rowe* case the Court indicated that the:

“...trend of the law has been to give illegitimate children the status and privileges of legitimate children, except where that policy would affect the permanence and dignity of the institution of marriage, or the traditional rights and privileges of children born in lawful wedlock.”

In 1919, an illegitimate dependent child was denied the right to recover under the Workmen’s Compensation Act for the accidental death of her father. The Court in so holding reasoned that if the Legislature had intended illegitimate children to receive the benefit of the statute, it would have included them in the definition of “child” inasmuch as it was careful to define the word to include posthumous and adopted children. Apparently as a result of this case, the Legislature, in 1920, enacted an amendment to the Workmen’s Compensation Act to permit an award for the benefit of an illegitimate child under similar circumstances. An illegitimate daughter of the deceased was not allowed to maintain an action under the Wrongful Death Statute in *W. B. & A. R. Co. v. State*. The Court indicated therein that:

“It is a rule of construction that prima facie the word ‘child’ or ‘children’ when used in a statute, will or deed means legitimate child or children. In other words bastards are not within the term ‘child’ or ‘children’.”

In the same manner as with the Workmen’s Compensation Act, the Wrongful Death Statute was amended, in 1937, to permit an illegitimate child to recover for the wrongful death of the mother and vice versa, but significantly, no mention was made as to recovery for the death of a father of an illegitimate child.

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12 Supra, n. 9.
13 Ibid., 362.
17 136 Md. 103, 111 A. 164 (1920).
18 Ibid., 119.
19 Supra, n. 10, 160.
As an indication of its policy on the definition of the word "child," the General Assembly of the Maryland Legislature in 1937 provided that:

"The word child or its equivalent shall be construed to include any illegitimate child, except in matters of inheritance, descent or distribution of real and personal property, unless such a construction would be unreasonable."

The specific exception in matters of inheritance, descent or distribution seems to preclude the courts from expanding the definition of "child" to include illegitimate children in such statutes, even though there seemed to be no tendency on the part of the Court of Appeals to do so prior to the legislative clarification.

An illegitimate child can become legitimate only if the father subsequently marries the mother and acknowledges the child as his own. He is thereby made capable of inheriting and transmitting inheritance as if born in lawful wedlock. If for any reason the parents never marry, the child remains illegitimate and has no right to inherit from his father or other paternal relatives. This conclusion is non sequitur when viewed in relation to the reasons advanced for the position. The first reason, i.e., the uncertainty of paternity and resultant fear of fraudulent claims, seems illogical since paternity involves nothing more than a question of proof. Besides, disinheritance by will can be resorted to in all jurisdictions except Louisiana. The second reason, i.e., inflicting a penalty for the wrong done, the indulgence in illicit sexual intercourse, has the effect of punishing the innocent child, but not the erring parents. The father and paternal relatives cannot inherit from an illegitimate as he is the "son of nobody."
The Maryland Legislature has gone much further in relaxing the Common Law disabilities of inheritance by and from the mother and maternal relatives of the illegitimate. The Legislature in 1825\textsuperscript{27} provided for inheritance of both real and personal property by illegitimate children and their descendants from their mother, or from each other, or from the descendants of each other, as the case may be, in like manner as if born in lawful wedlock. The Court was presented in Miller et al. v. Stewart et al.\textsuperscript{28} with the converse of the situation provided for by this statute. In deciding that the surviving mother and her three legitimate children could not inherit from an illegitimate son who died intestate and without issue, the Court indicated that the Act of 1845, Chapter 120, only removed the disqualification so as to enable an illegitimate to inherit from the mother and from other illegitimate brothers and sisters. There was no reciprocity intended between the legitimate and illegitimate, and the Act recognized no relationship between them as brother and sister. The illegitimate was still in contemplation of the statute nullius filius except as to those situations specifically set forth therein. The Court referred in its opinion to the unreported case of Medcalf v. Daley and Jones,\textsuperscript{29} which proved to be a direct precedent for the holding in the principal case, i.e., that an illegitimate child cannot inherit from a legitimate brother.

However, in Barron v. Zimmerman,\textsuperscript{30} the Court allowed an illegitimate child to inherit by representation from his deceased mother's sister, reasoning that:

"...one who is in the position of a lawful begotten child for the purpose of inheriting from his mother should be regarded as a 'child' of the mother, within the intent of the law, for the purpose of succeeding to the estate which she would have inherited if she would have survived."

When a party takes by representation, the size of the share alone is determined by what the deceased parent's share would have been had he survived, but the right to inherit vests directly in the claimant; who in effect is taking in place of the deceased parent and not through him. It

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\textsuperscript{27}Md. Laws (1825), Ch. 156; Penman v. Ayers, 221 Md. 154, 156, 156 A. 2d 638 (1959).

\textsuperscript{28}8 Gill 129 (Md. 1849).

\textsuperscript{29}Ibid., 133.

\textsuperscript{30}117 Md. 296, 83 A. 258 (1912).

\textsuperscript{31}Ibid., 300.
would therefore seem that the Court intended to place the illegitimate child in the bloodstream of his mother for purposes of inheritance even though the taking was by representation and not in his own right.

As pointed out earlier, the Act of 1825, Chapter 156 provided for inheritance of both real and personal property by illegitimate children and their descendants from their mother, or from each other, or from the descendants of each other, as the case may be, in like manner as if born in lawful wedlock. In 1868, the phrase "as if born in lawful wedlock" was deleted and it was further provided that if the illegitimate die without descendants, brothers, or sisters, or their descendants, his mother, if living, and her heirs at law, if she be dead, should inherit from the illegitimate in the same manner as if such illegitimate child had been born in lawful wedlock. The appellant in the principle case contended that, since the above statute allowed the legitimate to inherit from the illegitimate, by reciprocity the illegitimate child should be allowed to inherit from his legitimate half-brother. The Court was quick to point out that the legislature had not undertaken a wholesale removal of the Common Law obstacles to inheritance. The Court of Appeals has adopted and continues to adhere to strict rules of statutory construction to the effect that Common Law disabilities of illeguitimates are to be removed only to the extent that the legislature has seen fit. It, therefore, seems clear that if any further relaxation is to come about in Maryland, it will have to be the result of remedial legislation. However, a contrary position is taken by the courts in a majority of the American states. Those states generally apply liberal rules of construction reasoning that the preferable rule of construction is that the statute be construed as broadly as possible in order to remedy a gross and manifest injustice of the Common Law.

In summation, Maryland allows the illegitimate to inherit from (1) his mother, her other illegitimate children,
and their descendants; (2) his lineal and collateral maternal relatives by representation; and (3) his natural parents and everyone in their bloodstream on the contingency that the father subsequently marries and acknowledges the illegitimate as his own. The following parties are allowed to inherit from the illegitimate: (1) his mother or her heirs at law, including legitimate children, if she be dead, providing the illegitimate has died without issue or collateral heirs, i.e., other illegitimates and their descendants; (2) other illegitimates of the same mother and their descendants.

The real question is how far the legislature in each particular jurisdiction should go in the removal of the Common Law disabilities on inheritance by and from bastards? There seems no valid reason for cutting off his rights of inheritance at the mother, or maternal relatives, or at the father if he subsequently marries the child's mother and acknowledges the child as his own. This writer recommends that they be completely removed and the illegitimate child, for purposes of inheritance, be placed in the bloodstream of his natural parents. All recent legislation tends in this direction, but few states have been willing to go this far. The erring parents could still protect their estates since in all jurisdictions but Louisiana they possess a complete right to disinherit even legitimate children by testamentary disposition.

The real evil is the illicit intercourse of the parents, not the birth of the bastard. The doctrine of nullius filius punishes the only innocent party to the whole affair, and the placing of a stigma on him has certainly had small deterrent effect on illegitimacy. Any punitive measures should in fairness fall upon the wrongdoing parents, not the illegitimate.

DANIEL W. MOYLAN

Sufficiency Of Description In A Chattel Mortgage

*Phillips v. J. F. Johnson Lumber Company*¹

In August 1955, one Glover executed and recorded a chattel mortgage to the appellee, Johnson, covering several passenger motor vehicles and motor trucks, as well as sundry equipment, including the subject of the present suit, "1-Terratrac Bulldozer loader — Model 30", the only such piece of equipment which Glover owned. All of the

¹ 218 Md. 531, 147 A. 2d 843 (1959).
vehicles except the loader were described by year and serial number, as well as by make and type. In May, 1956, Glover bought an International Crawler Tractor under a conditional sales contract and gave Edward P. Phillips, the vendor, his Terratrac loader, Model 30, in part payment. Phillips made no examination of the chattel records to determine whether there was a lien upon the loader. Johnson Lumber Company sued the appellants, trading as Phillips Machinery and Tractor Company, for conversion of the loader in the Circuit Court for Anne Arundel County and obtained a verdict and judgment of $1,200.00. Upon stipulation by the parties, the sole question to be decided was whether the loader was sufficiently identified by the description in the recorded chattel mortgage to charge a subsequent bona fide purchaser for value with constructive notice of the mortgagee's lien.

Phillips contended that the description of a piece of mass-produced machinery must contain the serial number. The Court of Appeals, in affirming the lower court, held that the description as given was sufficient to enable a third party to identify the loader, where it was the only one of its kind owned by the mortgagor.

The pertinent sections of the Annotated Code of Maryland are not particularly helpful in dealing with the problem of sufficiency of description. Under Article 21, Section 46 thereof, a mortgage of personal property shall be executed in the same manner as bills of sale; and under Section 42 "any bill of sale of personal property shall be sufficient in form if it contains the names of the parties, the consideration, a description of the property conveyed, and be signed and sealed by the vendor and dated." A somewhat more explicit Code section is Article 21, Section 5 dealing with requirements of a valid deed conveying real estate, one of which is that it should contain "a description of the real estate sufficient to identify the same with reasonable certainty." The most detailed description required, however, is to be found in a statute (not a recording statute), which requires the serial number of a motor vehicle to be stated in an application for a certificate of title thereon or for registration thereof.

Ibid. § 42.  
* This section does not appear applicable to the kind of equipment here involved. See Art. 66½, §§ 2(55) and 23. Perhaps the reason for the more detailed description of motor vehicles than of the bulldozer in
The prevalent rule as to sufficiency of description laid down by text writers, and apparently by judicial authority, is that a mortgage conveying chattels, when recorded, in constructive notice of a lien to third persons if the description in the instrument is such as will enable them to identify the property together with inquiries which the mortgage itself suggests and directs. A less certain description would appear adequate as between the mortgagor and mortgagee, alone.\footnote{First National Bank v. Maxwell, 200 N.W. 401, 198 Iowa 813 (1924); United States v. Christensen, 50 F. Supp. 30 (D.C. Ill., 1943); Security State Bank v. Jones, 247 P. 562, 121 Kan. 396 (1926); In re Oliver C. Putney Granite Corp., 14 F. Supp. 31 (D.C. Md. 1936); Salabes v. Castelberg, 98 Md. 645, 57 A. 20 (1904); U. S. Fire Insurance Co. v. Merrick, 171 Md. 476, 190 A. 355 (1937); Jackson City Bank and Trust Co. v. N.W. 2d 401, 332 Mich. 399, 32 A.L.R. 2d 920 (1932); Tilton v. Wade, 2 F. 2d 358 (4th Cir. 1924); Elgin v. Dehart, 144 Va. 311, 132 S.E. 323 (1926); 10 Am. Jur., Chattel Mortgages, §§ 55; JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES, (1933 ed. and 1956 Supplement) §§ 54, 55.}

The description should be certain enough that the chattel can be distinguished from other like property. In short, as the legal maxim advises: "That is certain, which is capable of being made certain."\footnote{14 C.J.S. 57, Chattel Mortgages. See also 10 Am. Jur., Chattel Mortgages, §§ 53, 55; Farmers and Merchants National Bank of Kaufman v. Howell, 268 S.W. 776 (Tex. Civ. App. 1925).} If the description is made specific by extrinsic facts, it will be satisfactory to give notice.

In State for Use of Horsey v. Maryland Casualty Company it was held that a description of sundry chattels\footnote{164 Md. 69, 163 A. 856 (1933).} in a bill of sale was insufficient as to pass title even between the immediate parties thereto because it was general in nature. The Maryland Court held in Fersner v. Bradley\footnote{151 Md. 488, 10 A. 58 (1898).} a bill of sale conveying a “one-half interest in 8 horses, one-half interest in five single buggies, one-half interest in six double rigs, one-half interest in 3 sets double harness. . .”\footnote{Ibid., 75-76.} was insufficient to pass title against a judgment creditor of the vendor, noting that no description was given which would enable other interested persons to form an

\footnote{87 Md. 488, 40 A. 58 (1898).}
idea as to what particular vehicles were intended to be included.

The scarcity or plentitude of chattels of a similar kind is important to consider. The non-existence of other property to which the terms of the mortgage could apply frequently renders valid a description in a mortgage which otherwise would be too indefinite. In a number of cases the fact that an implement or vehicle was the only one of its kind owned by the mortgagor has been held to support the sufficiency of a description, even though clarification of the description was partly dependent upon extrinsic evidence.\(^{13}\)

A poignant example is *U.S. v. Christensen*\(^{14}\) in which a chattel mortgage describing the property as “one tractor, Moline, 10-20 Farmall, condition good, year of manufacture 1937” was held by the Illinois district court to be adequate to put third parties on inquiry where the tractor was the only implement of its kind owned by the mortgagor.\(^{15}\) However, in *Hayes v. Wilcox*,\(^{16}\) an earlier Iowa case, the court held the description in a chattel mortgage “one Oscillation thresher, size 6, 30 inch cylinder, and also one Chicago Pitts ten-horse power” to be too indefinite to be sustained.

Another factor of importance is the location of the mortgaged chattels. The rule here set out is basic and comprehensive:

“A statement of the exact situs of mortgaged property is of great service in identifying it, and it is enough that the location of the property may be determined by fair inferences drawn from the entire instrument. Although it is generally not a sufficient location to say that chattels are in a certain county, or in a certain city or town, with nothing more, in agricultural communities a statement that the mortgaged property is in the mortgagor’s possession in a certain county seems to be sufficient.”\(^{17}\)

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\(^{13}\) See 14 C.J.S. Chattel Mortgages, § 59, and cases cited.

\(^{14}\) 50 F. Supp. 30 (D.C. Ill. 1943).

\(^{15}\) Note the similarity of the description and result in the Christensen case and the principal case. Also see Jackson City Bank and Trust Co. v. Blair, 53 N.W. 2d 498, 338 Mich. 398, 32 A.L.R. 2d 920 (1962), and Osborne v. McAllister, 19 N.W. 510, 15 Neb. 428 (1884) in which like descriptions were upheld.

\(^{16}\) 17 N.W. 110, 61 Iowa 732 (1883). See also Plano Mfg. Co. v. Griffith, 39 N.W. 213, 75 Iowa 102 (1888) in which a description: “one six ½ foot cut Plano harvester and binder” was held too indefinite.

\(^{17}\) 6 Cyclopedia of Law and Procedure (1903 ed.) 1024, 1025.
In *In re Oliver C. Putney Granite Corporation* Judge Chesnut relied heavily upon the fact that the location of certain mortgaged chattels was set out; and was able to distinguish this case from the *Horsey case*, wherein the location of the chattels was not specifically stated.

In general, although chattels should be specifically described, something less than the best possible description may be sufficient. The Court of Appeals held in *Salabes v. J. Castelberg and Sons*, that a description which referred to a diamond ring by the name of the jeweler and the number of carats was sufficient. In so holding the court said:

"... in this case, as the only description that could reasonably be expected was given, and that was ample to put persons dealing with the ring on inquiry, the mortgagees should not be made to suffer."

It seems fair to say that although a description may be meager, if it gives a fair clue to the identity of the property so that a third person by reasonable investigation may ascertain the property which the parties intended to include in the mortgage, the instrument may be regarded as creating a valid lien.

Donald Needle

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18 14 F. Supp. 31 (D.C. Md. 1936).
19 The description in the chattel mortgage read:
".. all the tools, machinery, appliances[,] and other personal property now used by the mortgagor in the operation of its stone-cutting plant located upon the real estate heretofore described, including specifically one Electric Crane[, one Electrically driven Compressor[,] one Gang Saw[,] Carborundum Saw[,] Polishing Mill[,] Surfacing machine and Pneumatic tools."
Ibid., p. 33.
20 164 Md. 69, 163 A. 856 (1933).
21 14 F. Supp. 31, 34 (D.C. Md., 1936). See also Bowman-Boyer Co. v. Burgett, 192 N.W. 786, 195 Iowa 674 (1923) in which a description of a chattel was upheld where the mortgage not only gave the township and county and state where the property was situated, but also the location of the farm on which the property was kept. See Elgin v. Dehart, 144 Va. 311, 132 S.E. 323 (1933).
23 98 Md. 645, 57 A. 20, (1904).
Scope Of The President's Power To Secure 80-Day Injunction Against Continuation of Steel Strike Under Labor Management Relations Act, Section 208

United Steelworkers of America v. United States

After a strike of more than three months by the United Steelworkers of America (hereafter called the Union), affecting plants representing 85% of the nation's basic steel production capability, the President appointed a board of inquiry to report to him on the state of negotiations between the Union and the steel industry. The Board's subsequent report stated that no early settlement of the strike could be foreseen. Thereupon, the President ordered the Attorney General to seek an 80-day injunction against the Union's continuance of the strike, pursuant to Section 208 of the Labor Management Relations Act, which gives a district court "jurisdiction to enjoin any ... strike or lock-out" in interstate commerce which "affects an entire industry or a substantial part thereof" and "if permitted ... to continue, will imperil the national health or safety."

The District Court for the Western District of Pennsylvania granted the injunction upon fact-findings that the strike would produce an irreparable time-lag in the nation's military and research programs, and upon a further fact-finding that the strike would adversely affect the nation's economic health because of the large number of layoffs which would occur in related industries due to disappearing steel reserves. The Court of Appeals affirmed, Judge Hastie dissenting, and the Supreme Court granted certiorari.

In a per curiam opinion the Supreme Court affirmed the judgments of the lower federal courts, Mr. Justice Douglas dissenting. Mr. Justice Frankfurter and Mr. Justice

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4 Ibid., 299.
9 Supra, n. 1.
Harlan later filed a concurring opinion. The Court found that the District Court's findings that the strike affected 85% of the nation's basic steel production capability and imperiled four military or quasi-military programs, fulfilled the statutory requirements for the injunction. Thus it was unnecessary to decide whether the "national health" included the nation's economic health as well as the physical health of the citizenry. The Court further determined that the statute conferred a judicial task of finding whether the conditions required for granting an injunction were present, and not a legislative or executive one, since Congress had predetermined what the injunctive conditions were to be.

Judge Hastie's dissent in the Court of Appeals had been predicated upon the view that an injunction should not issue unless the government made a positive showing that the injunction would facilitate a settlement of the dispute. The Supreme Court denied the validity of this reasoning, emphatically stating that the "basic purpose" of Section 208 was "to see that vital production should be resumed or continued for a time while further efforts were made to settle the dispute." The Court further stated that Congress did not intend the issuance of a Section 208 injunction to depend upon inquiries into such matters as the availability of other remedies, the effect of an injunction on the collective bargaining process, the merits of the parties' positions, or the conduct of the parties in their negotiations. It would seem that the removal of the above-mentioned factors for equitable consideration has severely modified or entirely eliminated any equitable discretion with respect to the propriety of granting an injunction, once the statutory bases for the injunction have been found. Hence, by inference from the majority opinion and as clearly stated by the concurring opinion, Congress has

11 Supra, n. 7, 960.
13 Supra, n. 10. The opinion states, at p. 183:
"* * * We conclude that under the national emergency provisions of the Labor Management Relations Act it is not for the judiciary to exercise conventional 'discretion' to withhold an 'eighty-day' injunction upon a balancing of conveniences.
"*Discretionary* jurisdiction is exercised when a given injunctive remedy is not commanded as a matter of policy by Congress, but is, as a presupposition of judge-made law, left to judicial discretion. Such is not the case under this statute. The purpose of Congress expressed by the scheme of this statute precludes ordinary equitable discretion, * * *"
made it mandatory that an injunction be granted after the requisite fact-findings are made.

Section 208 says, that if the district court finds the statutory requisites, "it shall have jurisdiction to enjoin such strikes. . . ." It does not say, "it shall enjoin such strikes. . . ." This language of the Act could reasonably be construed as permissive rather than mandatory. If Congress had meant to deviate from the traditional principle regarding equity, that the chancellor has discretion to act rather than an absolute duty to act, it seems appropriate that it would have used words expressly conferring such a duty. 14

It is submitted that perhaps Congress did intend to give the district court only a narrow discretion to decline to grant the injunction if the statutory bases for it were present, but did not intend to completely abolish the court's equitable discretion. 15 This contention stems from the fact that Section 208 was intended, when the Act was passed, to apply mainly to the bituminous coal industry rather than to the basic steel industry. 16 Indeed, the first use of the Section 208 injunction was against the International Union, United Mine Workers. 17 Strikes in the bituminous coal industry had long threatened the physical

14 Cf. Hecht Co. v. Bowles, 321 U.S. 321 (1944), which was distinguished from the noted case in the concurring opinion, supra, n. 10, 184-185. See also Alabama v. United States, 279 U.S. 229 (1929), where the Supreme Court held an act of Congress requiring the consideration of applications for interlocutory injunctions in certain cases by three judges and allowing appeal to the Supreme Court, had in no way modified the well-established doctrine that such applications are addressed to the sound discretion of the trial court. The Court reasoned, 230, that traditional equitable principles were applicable since "there was nothing in the legislation to suggest that in the exercise of judicial power in respect of such writs pertinent principles of equity as heretofore understood, are to be disregarded or modified." Beach, Extent of Discretion Exercised by District Courts in Issuing Temporary Injunctions Against Alleged Unfair Labor Practices, 56 Mich. L. Rev. 102 (1958), provides an excellent comment on the same problem within a labor area closely related to the Sec. 208 injunction.

15 Equity courts often narrow their discretion where a public interest is involved. See Virginian Ry. v. System Federation, 300 U.S. 515, 552 (1937), where the Supreme Court said, "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to do when only private interests are involved."


health of a large segment of the nation's citizenry; but as
dangerous as these strike conditions were, the remedy
necessary to abate them would not seem to require the
same degree of emergency as the remedy required to main-
tain defense production essential to the country's survival
in today's rocket age. But, although historically the above
approach may be correct, it could very plausibly be argued
that the Supreme Court has ruled otherwise — and an
injunction will accordingly issue henceforth whenever the
statutory requisites are met, without regard for the effect
such an injunction will have on the collective bargaining
between the union and industry involved.

Justice Douglas' dissent was founded on the ground that
less than 1% of the nation's steel production was needed
for defense; therefore a selective reopening of the plants
might be had upon remand to the District Court.\(^8\) Such
a result would have avoided sending the entire Union back
to work and would in part have retained the efficacious-
ness of the strike as a coercive weapon against the basic
steel industry. The majority opinion looked upon Section
208, however, as "a public remedy in times of emergency"
and refused to find any Congressional intent for "reor-
ganization of the affected industry" in such times.\(^9\)

As of today, it is entirely foreseeable that the factual
situation present in the instant case, or an equivalent
factual situation, will also occur in any future steel strike,
due to the Cold War and the nation's attendant demand
upon the steel industry for defense production. Therefore,
the practical effect of the dominant opinion, although not
mentioned by the Court, will be to give the President the
power to use the Section 208 injunction shortly after the
onset of any steel strike, if not before its inception.

Those companies in the basic steel industry either hav-
ing defense contracts or supplying steel to related indus-
tries with defense contracts, could avoid the Section 208
injunction for a time at least by stockpiling large steel re-
serves so that defense production would not be immedi-
ately curtailed by a strike. This seems unlikely. In the
first place, the related industries are the more logical
choice to stockpile steel rather than the steel producers
themselves. Secondly, the creation of such reserves in
either the basic steel industry or related industries would
seem prohibitive from an economic standpoint because of
the large storage cost of the reserves and the taxation

\(^8\) United Steelworkers of America v. United States, 361 U.S. 39, 80

\(^9\) Ibid., 3.
which would be levied upon them in many cases. Finally, so far as the Union is concerned, an injunctive delay caused by stockpiling is fortuitous since it depends upon the act of management; and it is the Union, not industry, which is really harmed by the injunction.

One of the principal criticisms of the Section 208 injunction is that it forces the Union involved back to work under pre-strike conditions. President Harry S. Truman, in his message to Congress vetoing the Labor Management Relations Act, stated:

"Furthermore, a fundamental inequity runs through these provisions. The bill provides for injunctions to prohibit workers from striking, even against terms dictated by employers after contracts have expired. There is no provision assuring the protection of the rights of the employees during the period they are deprived of the right to protect themselves by economic action."

The injunction, being against the Union, also tends to throw public opinion toward industry and away from the Union. Moreover, Section 209 of the Act expresses the undesirable Congressional recognition of a dichotomy between the Union leadership and the striking workers by providing the workers with an opportunity to vote against a strike's inception or continuance, as the case may be, before the end of the injunctive period. The threat of such a vote is quite likely to make the Union leadership more amenable to settlement: a result adverse to their strike order could mean the virtual end of power for the leadership, and for the Union itself.

The writers believe that the inequities of the Section 208 injunction could be substantially decreased by the adoption of flexible federal controls, as opposed to the

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Notes:

20 United States. Congress. Senate. Committee on Labor and Public Welfare. "The Labor Management Relations Act and the Revival of the Labor Injunction, 48 Col. L. Rev. 759, 772 (1948), says, "... as in the case of injunctions generally, the labor injunction tends to throw public opinion on the side of management, the strikers being regarded as law breakers."


23 U.S. v. United States Steel. 61 Stat. 155, Ch. 120, § 209 (1947), 29 U.S.C.A. 179, states: "... the National Labor Relations Board, within the succeeding fifteen days [after the injunction has been in effect 60 days], shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter."

24 See law review articles, supra, n. 16.
single remedy of injunction. Federal seizure of the affected industry seems a proper alternative to the injunction, seizure being somewhat detrimental to industry just as the injunction is somewhat detrimental to labor, in so far as ultimate settlement is concerned as well as the conditions of the temporary strike cessation. Changes in wages and working conditions of the workers could, if appropriate, be effected through seizure. More importantly, the choice of alternative remedies in the President's power would evoke an apprehension in both parties to the dispute, rather than in the Union alone, as to the remedy which would be used, and would therefore tend to encourage an early settlement on fair terms.

ROBERT J. CARSON

HOWARD S. CHASANOW

Governmental Records Of Investigatory Nature
Not Open To Public Inspection

*Whittle v. Munshower*¹

Petitioner's decedent had been employed at an aircraft factory in Baltimore County for about three months prior to his death on July 7, 1942. Although the cause of death was officially listed as accidental drowning by the Maryland State Police, petitioner alleged that fellow employees at the aircraft factory had conspired against the deceased by claiming he "made a defective piece of material," thereby causing false charges of sabotage to be filed by the FBI and Army Intelligence Personnel, and that such charges "led to" the death of the deceased. In a writ of mandamus filed against the Maryland State Police, the petitioner alleged that the state police possessed information showing that the deceased had been officially charged with making this "material"; but that, in addition, they possessed information which tended to clear the deceased of this charge. Petitioner, therefore, sought the release of all such information.

The lower court sustained a demurrer to the petition without leave to amend. On appeal, the Court of Appeals held that, since the record showed no entry of a final judgment, the appeal must be dismissed as being premature, but took occasion, nevertheless, to express an opinion on

¹ 221 Md. 258, 155 A. 2d 670 (1959).
the merits, and in so doing, indicated that the demurrer to the petition was properly sustained, since in the absence of statutory requirements police records are confidential and not a proper subject of inspection.

The right to inspect public records, or the certain classes of records kept by a public official as a necessary part of his duties, has been held a right guaranteed at common law, the common law principle being that any public record was open to an unqualified inspection. Mandamus is considered to be an appropriate course of action to enforce the production of public records for inspection, and private persons may avail themselves of this power without the need for intervention by a government law officer.

The question of an individual's right to inspect governmental records depends upon two basic requirements: first, that the individual have a sufficient interest in the records or information; and second, that the records not be of such a nature that disclosure might violate the law or public policy.

A person applying for a writ of mandamus must show a clear legal right in himself as well as a corresponding duty on the part of the defendant. The requirement of showing a clear legal right, or some sort of special interest, has been upheld in numerous decisions as a necessary limitation that must be imposed upon the original common law principle of unqualified right of inspection. In a situation where the party seeking the writ is a litigant in a matter to which the records sought could be considered relevant, the requirement of special interest to show a clear legal right would be satisfied. In many instances, however, it appears that practically any interest the petitioner

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5 Following the rule of Penny v. Department of Maryland State Police, 186 Md. 10, 45 A. 2d 741 (1946); and Walter v. Board of County Commissioners of Montgomery County, 179 Md. 665, 22 A. 2d 472 (1941).
5 Pressman v. Elgin, supra, n. 4; Buchholtz v. Hill, 178 Md. 250, 13 A. 2d 348 (1940); Jones v. House of Reformation, 176 Md. 43, 3 A. 2d 728 (1939).
might be able to show above a mere idle curiosity would be held sufficient to constitute a legal right.\footnote{9}

The principal difficulty in obtaining records in the possession of the government for inspection lies not in the status of the person seeking such right, but in the nature of the records themselves, and the discretion allowed the official charged with their care and safekeeping. The general records kept by a city, state or the federal government are for the most part considered public records and are, therefore, open to public inspection.\footnote{10} But records and reports made in connection with or as a result of investigation by a governmental agency or official, such as police or FBI reports, grand jury records, and records of penal institutions, are generally considered to be of a confidential nature, either by law or by reason of public policy.\footnote{11}

Because of the likelihood that the release of such confidential information to the general public would produce results which would be detrimental to the interests of the public, any request to a court for access to or inspection of such records is either automatically denied,\footnote{12} or left to the discretion of the agency or officer charged with the keeping of such records.\footnote{13} The theory that public policy demands that certain types of information possessed by the government be kept secret has been adopted by state courts throughout the country as a basis for holding investigatory records confidential.\footnote{14} In \textit{Runyon v. Board of Prison Terms \& Paroles},\footnote{15} the District Court of Appeals of California demonstrated this underlying policy concept in the following manner:

\begin{itemize}
\item \footnote{9} It has been held that there is no right of inspection of a public record when the inspection is sought to satisfy a mere whim or fancy; there must be a legitimate interest. \textit{State v. Harrison}, \textit{supra}, n. 7; however, in \textit{Appeal of Simon}, 333 Pa. 514, 46 A. 2d 243 (1946), it was held “Any Citizen” may inspect such records as have been made public records by law. In \textit{State v. McGrath}, 104 Mont. 490, 67 P. 2d 838 (1937), it is pointed out that the requirement to show interest cannot be imposed arbitrarily.
\item \footnote{10} \textit{Supra}, n. 3.
\item \footnote{13} Chytracek \textit{v. United States}, 60 F. 2d 325 (D.C. Minn. 1932); Laydon \textit{v. Maltbie}, 76 N.Y.S. 2d 368 (1940); \textit{Hale v. City of New York}, 251 App. Div. 826, 296 N.Y.S. 443 (1937).
\item \footnote{15} \textit{Supra}, n. 14.
\end{itemize}
"[P]ublic policy demands that certain communications and documents shall be treated as confidential and therefore are not open to indiscriminate inspection, notwithstanding that they are in the custody of a public officer... Included in this class are... the files in the offices of those charged with the execution of the laws relating to the apprehension, prosecution, and punishment of criminals."\(^{16}\)

Federal criminal investigatory records are likewise considered inaccessible because of the great harm that could result to our national security as well as to any persons involved with the records, should these records reach the wrong hands.\(^{17}\) Only by means of the Jencks Act\(^{18}\) can an individual, as a defendant under a criminal prosecution, gain access to such records, should the government decide to allow the requested inspection in order to maintain its criminal action against that individual.\(^{19}\) In addition the trial court must find such requested records to be relevant to the particular case.\(^{20}\) However, in matters where the government is not a party, requests to inspect federal records are not enforceable against the government by law as in criminal cases, but rather the matter is left to the discretion of the department head, who by law is "authorized to prescribe regulations... for the custody, use, and preservation of records [and] papers..."\(^{21}\) The right of the department heads to so regulate the production of records has been upheld in numerous cases.\(^{22}\)

The possibility of obtaining the release of such confidential information, where such has been left to the discretion of an official charged with their keeping, would appear slight, since a person applying for a writ of mandamus must show a clear legal duty on the part of the official, and should such duty be merely discretionary, the writ will not be granted.\(^{23}\) As in the instant case, the courts of this country have denied granting writs to examine governmental papers and records unless they are

\(^{16}\) Ibid., 101.
\(^{17}\) Palermo v. United States, 360 U.S. 343 (1959).
\(^{23}\) Upshur v. Baltimore City, 94 Md. 743, 51 A. 953 (1902).
clearly of a public nature. It is noted that the policy behind the refusal to release investigatory records has caused several states to enact statutes expressly forbidding the release of any such investigatory records for public inspection, with numerous decisions upholding the laws involved.

Grand jury records and minutes are generally considered similar in nature to investigatory records for the purpose of holding them confidential. Federal grand jury records are covered under the Federal Rules of Criminal Procedure where it is provided that disclosure of grand jury proceedings may be made only to government attorneys, or where directed by the court, if the defendant can show that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

Maryland grand jury records are likewise not subject to inspection by individuals, in that by statute the disclosure of such records is forbidden to anyone but the State's Attorney unless disclosure is made in compliance with an order of a court. A recent decision by the Criminal Court of Baltimore City held that a defendant in a criminal action had no right to inspect grand jury records prior to trial, but that the trial court in the exercise of its discretion, apart from any statute or rule on the matter, could grant such a right in the interests of justice. The element of necessity, therefore, is a basic requirement for the release of any grand jury records for inspection on the federal as well as the state level, as compared to a requirement of mere relevancy for other investigatory records.

In a criminal proceeding, a defendant may avail himself of Maryland Rule 728, which allows pre-trial discovery and inspection of records and evidence upon a showing that the items sought may be material to the

24 Clay v. Wickins, 7 Misc. 2d 84, 166 N.Y.S. 2d 534 (1957); People v. Prendergast, 89 Misc. 554, 153 N.Y.S. 699 (1915).
27 Pittsburgh Plate Glass Co. v. U.S., supra, n. 20.
30 State v. Forrester, Criminal Court of Baltimore City, Daily Record, March 20, 1958 (Md. 1958).
preparation of a defense, in order to gain access to investigatory records.\(^3\) However, this rule is considered an exception to the general rule throughout the country,\(^3\) and it should be kept in mind that the matter of inspection being left to the discretion of the trial court prevents such inspection from being a matter of right. It appears, therefore, that Maryland follows the federal rule in allowing a defendant in a criminal action access to investigatory records only under the discretion of the trial court in that the records must prove to be relevant to the case.

Since the instant case did not involve a criminal proceeding, nor was the State a party to any proceedings for which the records were sought, the State was under no express obligation to disclose investigatory records as might have been imposed otherwise. Thus the decision that police records are confidential in nature by reason of public policy, and therefore not open to inspection, has placed Maryland among the great majority of states holding that investigatory reports do not fall within the general class of those open to public inspection. This does not automatically bar all types of police records from inspection, in that the Maryland Code provides that accident reports made by the Maryland State Police are available for public inspection.\(^3\) In addition, accident reports filed with the Department of Motor Vehicles, by the motorists involved, are likewise subject to inspection by interested parties.\(^4\) However, because of a desire to keep certain investigatory records from inspection by the general public in that such an inspection could have results more detrimental than beneficial, with respect to the interests of the public as a whole, the Court of Appeals has properly held that such police records are not a proper subject of inspection in absence of statutory authority.

\[\text{HARRY E. SILVERWOOD, JR.}\]

\(^{31}\) Md. Rule 728.


Recent Decisions

Bankruptcy Act — Creditor Can Obtain Review Of Referee's Decision On Trustee's Objection Where Trustee Fails To Seek Review. In re Madway, 179 F. Supp. 400 (D.C. Pa. 1959). The Federal District Court, in affirming the referee's decision to discharge bankrupt, approved an individual creditor's right to have the referee's decision reviewed when the trustee failed to appeal. The referee had discharged the voluntary bankrupts from their debts and the trustee filed objections on the grounds that the bankrupts had failed to explain satisfactorily their loss of assets, 11 U.S.C.A. (1953) Sec. 32 (c) (7). A hearing was held and the referee affirmed the discharge. A Certificate of Review was taken by a creditor to the District Court, seeking reversal of the referee's decision. The Court held that although the Bankruptcy Act authorizes a trustee to object, 11 U.S.C.A. (1953) Sec. 32 (b), this does not take away the right of an individual creditor independently to oppose the discharge before the referee or to obtain a Certificate of Review. Although there has been no case specifically granting review to a creditor where only the trustee had protested originally and failed to appeal, this Court construed the trustee's power of objection as not intending to limit the jurisdiction of the District Court, but rather to provide a means for speedy review in addition to the creditor's right.

In similar circumstances the Courts have reviewed charges of fraud made by a petitioning creditor. In In re Fergus Falls Woolen Mills Co., 41 F. Supp. 355, 359 (D.C. Minn., 1941), the Court said:

"Where the trustee fails to contest doubtful claims, or apparently invalid claims, the creditors are not compelled to sit idly by and do nothing about it. It is the privilege and right of creditors who have filed claims in the proceeding to petition the Court for a review of a referee's order, where it is apparent that there is grave question as to the validity of such order, and the creditors may do this, even though no request has been made upon the trustee to do so."

2 COLLIER ON BANKRUPTCY (14th Ed., 1959 Supp.) Sec. 39.19 cites the Fergus Falls case, and maintains that it is contra better authority.
Conflict Of Laws — Effect Of Foreign Ex Parte Divorce On Prior Maryland Separation Alimony Decree. Gregg v. Gregg, 220 Md. 578, 155 A. 2d 500 (1959). Wife obtained a judicial separation in Maryland in 1951, and husband was ordered to pay $38 per month permanent alimony. In wife's instant suit to recover accrued alimony, husband contended he was under no duty to pay until a divorce ex parte obtained by him in Nevada in 1953 was declared invalid. The Maryland Court of Appeals, after finding the Nevada divorce decree invalid due to the lack of jurisdiction over husband, held that defendant was liable for past alimony and declared him to be in contempt of the 1951 alimony order.

In Brewster v. Brewster, 207 Md. 193, 114 A. 2d 53 (1954), the Maryland Court of Appeals allowed a wife to recover for past due alimony after finding an Arkansas a vinculo divorce decree obtained ex parte by husband to be invalid due to lack of jurisdiction of the Arkansas court. The Court stated that a Maryland court may inquire into the question of domicile where the recognition of a foreign divorce, obtained without personal appearance of the adverse party, is involved. Maryland courts will recognize ex parte divorces obtained in foreign courts where the plaintiff's spouse has complied with the domicile requirements of the other state, but such foreign decree will be subject to collateral attack in Maryland if the former court lacked jurisdiction over plaintiff.

It would appear from the language of the Court that if the Nevada decree had been valid, the husband would not have been in contempt of the Maryland alimony decree. In Johnson v. Johnson, 202 Md. 547, 97 A. 2d 330 (1952), certiorari denied 346 U. S. 874 (1952), a divorce a vinculo obtained by the husband in Florida, in which wife appeared, ended husband's duty to pay alimony under a Maryland decree a mensa granted to wife prior to the Florida divorce. For further discussion, see Note, And Now That You Have Your Divorce, Where Do You Stand? 10 Md. L. Rev. 256 (1949).

the conviction, held that defendant's racing was the proximate cause of decedent's death despite the absence of contact between the defendant's car and either of the colliding vehicles. Regardless of decedent's own recklessness, if the defendant's act was one of the substantial causes of decedent's death the defendant would be guilty.

In State v. Fair, 209 S.C. 439, 40 S.E. 2d 634, 636 (1946) in circumstances similar to the principal case, the Court held that if the defendant and another motorist were racing, "the act of each . . . is, in legal contemplation, the act of both" so as to warrant the defendant's conviction of manslaughter. Although no Maryland case in point has been found, the Maryland Court of Appeals in Duren v. State, 203 Md. 584, 102 A. 2d 277 (1954), indicated that speed and lack of control are sufficient grounds to sustain the proximate cause requirement for the defendant's conviction of involuntary manslaughter by automobile even if the victim's negligence is a concurrent cause. But Maryland has not resolved the question whether one driver's speed can be the proximate cause of another driver's death where there is no contact between them.

See 99 A.L.R. 756; 8 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE (Perm. ed. 1951), Sec. 5351. Also Note, Manslaughter by Automobile, 18 Md. L. Rev. 144 (1958).

Estoppel — Corporate Officer Estopped From Claiming Ownership Of Property In Himself When By His Conduct He Has Represented It As Corporate Property. Solomon's Marina Inc., et al v. Rogers, 221 Md. 194, 156 A. 2d 432 (1959). The defendant, a major stockholder, director, and officer of the plaintiff corporation, sold the corporation a boat on credit, with no date set for payment of the purchase price. Four years later, the purchase price being still unpaid, the defendant repossessed the boat. Thereupon the corporation brought an action of replevin to recover the boat from the defendant. By authorization of the defendant and the other directors the boat had been listed as an asset and the unpaid purchase price as a liability on the corporation's balance sheets which were made part of circulars offering common stock and convertible debentures for sale to the public, the corporation realizing approximately $400,000 from these sales. In reversing the trial court's decision that passage of title was conditioned upon payment of the purchase price, the Court of Appeals held that one who has induced another to deal with a corpora-
tion of which he is a stockholder, director and officer by representing that the corporation is the owner of certain property, is precluded from denying the truth of the representation and from setting up ownership in himself when the other has relied on this inducement to his detriment. Where purchasers of stock and debentures of the corporation relied on the representation they were entitled to have the boat be part of the corporate assets.

The Court, in so holding, followed a long line of Maryland decisions, beginning with Rodgers v. John, 131 Md. 455, 105 A. 549 (1917), which have applied the doctrine of equitable estoppel. For recent cases following this doctrine, see Fitch v. Double "U" Sales Corp., 212 Md. 324, 128 A. 2d 427 (1957), Johnson Lumber Co. v. Magruder, 220 Md. 440, 147 A. 2d 208 (1958), and Liberty Mutual Insurance Co. v. American Automobile Insurance Co., 220 Md. 497, 154 A. 2d 826 (1959). See generally 3 FLETCHER, PRIVATE CORPORATIONS (5th Ed.) Sec. 854, and 3 POMEROY, EQUITY JURISPRUDENCE (5th Ed.) Sec. 804.

Evidence — A Wife’s Statement To Fellow Conspirator Is Admissible At Trial Of Conspirator-Husband. Commonwealth v. Garrison, 157 A. 2d 75 (Pa. 1959). Defendant, his wife and three others joined in a burglary conspiracy which resulted in the death of the burglary victim. At defendant’s trial one of the conspirators was allowed to testify that defendant’s wife had suggested to him that the victim’s house was a good place for a burglary. Defendant contended on appeal that this testimony violated the Pennsylvania statute:

"Nor shall husband and wife be competent or permitted to testify against each other. . . ." 28 PURDON’S PENNA. STAT. ANNOTATED § 317.

The Supreme Court of Pennsylvania held (5-2), that the testimony was properly admitted, in spite of the statute, since the wife did not testify and the information she gave the testifying conspirator did not refer to the husband. A dissent claimed the majority allowed the very thing the statute prohibited because the statutory prohibition extends beyond testimony in court to extra-judicial admissions “from the mouth of the wife” (79).

Wigmore is in accord with the dissent:

“. . . it would seem that the hearsay declarations by the wife or husband, such as would be receivable under
some exception to the Hearsay Rule, should be excluded when offered against the other spouse.” 8 Wigmore, Evidence (3rd ed. 1940) Sec. 2233.

Cases in accord with the dissent are, Taylor v. State, 220 Ark. 953, 251 S.W. 2d 588 (1952) and Seymour v. State, 210 Ga. 21, 77 S.E. 2d 519 (1953).

Allied with the majority is United States v. Winfree, 170 F. Supp. 659 (D.C. 1959), where extra-judicial statements made to Internal Revenue officers by defendant's wife were admissible even though the wife would not have been allowed to testify in court against the husband.

A witness-spouse is competent to testify in Maryland, 4 Md. Code (1957) Art. 35, Sec. 4, but the statute contains no words of compulsion and the power to compel a spouse to testify is open to question. See Moser, Compellability of One Spouse to Testify Against the Other In Criminal Cases, 15 Md. L. Rev. 16 (1955).

Evidence — Maryland Statute On Admissibility Of Criminal Conviction Limited In Scope. Gray v. State, 221 Md. 286, 157 A. 2d 261 (1960). Defendant and two others were convicted of armed robbery. Defendant alone appealed and upon his conviction being reversed, a new trial was granted. In the second trial, the State produced testimony to the effect that one of defendant's co-indictees was sentenced to confinement for ten years for the armed robbery. The lower court, in convicting defendant, allowed this testimony on the basis of 4 Md. Code (1957) Art. 35, Sec. 11, which states: “If any person . . . charged with committing any crime is found guilty thereof, such fact shall be admissible . . . in any proceeding . . . in which another person . . . shall be charged with committing the same crime. . . .” The Court of Appeals, in reversing the lower court, held the admission of this evidence was improper since the statute was intended to apply only where a person is convicted of a crime which is predicated on the act of a single person, and subsequently another person is charged with the same crime. The purpose of such a statute is to prevent the possibility of two persons being convicted for a crime that only one could have committed. In the instant case, however, the crime was predicated on an offense by joint actors, and the disputed evidence tended to establish defendant's guilt on the basis of his co-indictee's conviction.

The instant case is the first construction of this unique Maryland statute. No other jurisdiction appears to have a
similar one. The Court recognized the general rule that where two or more persons are jointly indicted for the same crime and are tried separately, the conviction or acquittal of one is inadmissible against the other. 2 WHARTON, CRIMINAL EVIDENCE (12th Ed.) § 439; Hunter v. State, 193 Md. 596, 603, 69 A. 2d 505 (1949). The Court then applied the reasoning in Rogan v. B. & O. R.R. Co., 188 Md. 44, 53, 52 A. 2d 261 (1947), "... if the language of a statute is open to either of two constructions, the court should adopt that construction which will best tend to make the statute effectual and produce the most beneficial results."

See 48 A.L.R. 2d 1016 and 1 WIGMORE, EVIDENCE (3rd Ed.), Sec. 142.

Mechanic’s Lien — Notice To Resident Agent Of Corporation Effective. Jakenjo, Inc. v. Blizzard, 221 Md. 46, 155 A. 2d 661 (1959). Where a mechanics’ lien claimant mailed a registered letter to the corporation containing notice of intention to claim a lien, the letter being returned unclaimed, and subsequently he mailed a registered letter containing the same notice to the resident agent of the corporation, the Court of Appeals held that the notice to the resident agent was effective.

The defendant corporation contended that the only authority of a resident agent is to accept service of process. The court disagreed, relying on 2 Md. Code (1957) Art. 23, Sec. 99, which provides in part: “Any notice required by law to be served upon any corporation ... by personal service upon a resident agent or other agent or officer of such corporation, may be served upon such corporation in the manner provided in § 97 of this article ...” Sec. 97 provides for substituted service upon the State Department of Assessments and Taxation (successor of the State Tax Commission). The Court drew the implication from Sec. 99 that under Maryland law a resident agent has authority to receive statutory notices as well as legal process.

Taxation — A Church Parking Lot Is Not Exempt. Second Church of Christ Scien. v. City of Philadelphia, 157 A. 2d 54 (Pa. 1959). City real estate taxes were levied on parking lots of two churches, contiguous to the church buildings, and used by the congregations attending services. Claiming that a parking lot is necessary in this modern age for the fulfillment of the church’s purpose as a place of worship, the churches sought relief under the
Pennsylvania tax exemption to churches and the grounds “thereto annexed for the occupancy and enjoyment of the same.” In denying relief the Pennsylvania Supreme Court held that the exemption extends only to the actual place of worship and the grounds required for ingress, egress, light and air, and that parking is an adjunctive use of the grounds having no actual connection with the worship.

Although demanding that the exemptions be strictly construed, Maryland grants tax immunity to places of public worship, parsonages, and “the grounds appurtenant” thereto and “necessary for the respective uses thereof.” 7 Md. Code (1957) Art. 81, Sec. 9(4). The Maryland Court of Appeals, while stressing the “necessary” proviso, has granted immunity to thirty-five acres on which a tabernacle, parsonage, and living facilities for communicants were constructed to sustain an annual ten-week summer religious program. Morning Cheer v. Co. Com'rs., 194 Md. 441, 71 A. 2d 255 (1950). In contrast, a similar Pennsylvania case exempted only the chapel and other sites consecrated to worship. Layman’s Week-End Retreat League v. Butler, 83 Pa. Super. Ct. 1, 134 A.L.R. 1185 (1924).

While noting that Maryland gives a less stringent interpretation to its exemption statute than Pennsylvania, and recognizing that some courts frown upon the strict interpretation clauses of tax exemption statutes favoring religious and charitable groups, Kemp v. Pillar of Fire, 94 Colo. 41, 27 P. 2d 1036, 1037 (1933); Trustees of Phillips Exeter Academy v. Exeter, 90 N.H. 472, 27 A. 2d 569 (1940), apparently a distinction is properly drawn between what is convenient for the congregation and what is necessary for religious worship. See Congregational Union of Cleveland v. Zangerle, 138 Ohio St. 246, 34 N.E. 2d 201, 202 (1941). A church parking lot is immune where the statute exempts property required for “convenient” use. Immanuel Presbyterian Church v. Payne, 90 Cal. App. 176, 265 P. 547 (1928). The cases are collected in 168 A.L.R. 1222, 1253.
Book Reviews


"In a small quarter of the Western World, in the year 1630, a small Puritan community was established along the shores and tidewater in the general vicinity of what is today Boston Harbor. This was the colony of Massachusetts Bay, which within a short time became one of the most renowned of the British settlements in North America. Founded by men dedicated to ideals as exalted as any that have ever inspired those of the Christian faith, the colony began a record of accomplishments which the passing of time has never obliterated. Few others equaled its contributions to theology, letters, and education; none paralleled its early achievements in government and law. Building upon and purifying its English heritage, the colony constructed within less than two decades a commonwealth in which the religious and social goals that had inspired its founding were achieved. * * *71

With this volume Professor Haskins, of the University of Pennsylvania, has attempted to begin a new approach to American legal history. His purpose is to relate legal growth to the social and economic conditions within which that development had evolved. To make such an investigation meaningful it must be limited in scope, and accordingly the present volume is modestly described as an introduction to the history of Massachusetts' law in the colonial period. In explaining why his analysis is restricted to the twenty year period from 1630 to 1650, the author explains that it is during this short period of time that the structure of the civil government was completed and the laws of the colony were shaped and compiled into the Code of 1648 which was to become the basis of all subsequent seventeenth century legislation. After this period the economic structure of the colony changed, and the political-legal problems shifted from the resolution of problems by legislation to enforcement of the laws embodied in the Code through court decision.

1 Ch. 1, "Their Highest Inheritance" p. 1.
As is to be expected in any study of Massachusetts, Mr. Haskins first explains the religious and social ethics of the Puritans and Winthrop's view of the "social compact" as a covenant by which men renounce their absolute liberty and bind themselves not to do anything but that which had been agreed to, and that this duty obtained not only in the field of moral law but was also the basis of the political authority in the state. It was this thesis that served as the foundation upon which the paternalistic government of the colonial magistrates was built.

He relates the means by which traditional English political ideas continued to be important in the emerging government, showing how the treatment afforded Roger Williams and Anne Hutchinson was no more harsh than would have been afforded them in England. The development of township government is shown to be the logical consequence of geography, the land allotment system, and the memory of the English parish and the manors. The townships were sustained by the cohesiveness of the family for the promotion of which the colony's leader was particularly solicitous; numerous laws governed the relationships among the members of the family, those of primary importance relating to husband and wife, children, and servants and apprentices. Even these laws, however were only modifications of those of England.

The relationship of the church to the government is particularly important to an intelligent understanding of the Massachusetts colony and this important subject is comprehensively treated.

Having prepared the reader by a full study of the religious and social theories underlying the colony, and the extent to which English opinions were altered by them, he is well prepared to follow the path of the legal evolution. The remainder of the book is devoted to an exposition of particular laws regulating the important aspects of colonial life.

The most important compilation of laws was issued in 1648. Taken out of context many of these laws have seemed medieval and crude, but when read as the culmination of eighteen years of colonial experience, and as statutory embodiments of Biblical precepts, the Code of 1648 is seen to be an extremely important historical document. Far from being the mere compilation of English common-law or unthinking enactment of Old Testament customs as it so often has been painted by less thoughtful or accurate authors, it was a new and carefully prepared attempt to
establish principles suitable to the conditions of a new civilization. It mirrors clearly those problems which the colonists believed solvable through legal rules, defining not only civil liberties but civil responsibilities as well. The Puritan's belief that man's conduct could be persuaded or enjoined in accordance with exacting moral and ethical standards is discernable throughout. It was the desire to reform — not merely church doctrine, but every human activity — which is so clearly manifested in the Code. The idealistic element in the colonial law is shown, with examples, and explanations, in the number of enactments the aim of which was to give positive guidance rather than the English methods of prohibition and punishment.

This is a rewarding, readable book, which should be of interest to legal historians, lawyers, and anyone wishing to know more facts about the beginning of American law. It is to be hoped that this type of broad analysis of the legal infancy of one of the colonies is only the first in a series of such works. The scholarly effort which made the problems of the Puritans come to life on these pages might well and profitably be devoted to each of the colonies; for, in each, the religious and social forces which shape and are reflected in statutory law differed. Each such study could make an equally fascinating book.

NELSON REED KERR, JR.


At first blush this seems scarcely an appropriate volume for review in the pages of a legal journal, and yet there is much within its pages to interest not only the high-fidelity enthusiast but the attorney as well.

This book is a comprehensive history of an industry, from its invention by Thomas A. Edison (accompanied by a copy of the Edison patent and some of his laboratory notebooks) to a description of the latest RCA Victor magazine-loading cartridge offering twin-trick stereo at 3 3/4 i.p.s. However, the book is not devoted solely to mechanical artistry, for however interesting that might be, four hundred pages would be rather tedious. This is a history of an industry in the fullest sense and the reader is led swiftly
through its pages by such interesting matters as the great patent litigation between Edison and Bell and Tainter (telling the tactics of opposing counsel and revealing errors on the part of the courts), of the local distributing companies and the mergers which led to the formation of the companies so well-known today. The reader will learn that the recent problems of compatibility (monaural-stereophonic) were encountered as long ago as 1908 (disc and cylinder records), of the development of the coin-operated phonograph, and a most interesting chapter is devoted to the post war competition in record speeds.

This is a book in which all interested in music, phonographs, industrial history and patent litigation will find something entertaining, something informing.

NELSON REED KERR, JR.
POST-MORTEM ESTATE PLANNING,
OR
THE MARYLAND EXECUTOR'S
EIGHT TAX RETURNS†

By G. Van Velsor Wolf*

In Maryland the executor (or administrator) of a decedent's estate normally has eight returns or reports which he must file relating to the tax responsibilities of the estate itself. This list includes the "inventory," which is technically not a tax return but amounts, in effect, to one of the more important tax reports since it is the basis of several tax calculations.

The preparation of these various documents requires of the executor a careful analysis not only of the obligations of the estate, but also of the charges against, and the expenses of, the administration. If this is done with a thorough understanding of the applicable income, estate, and inheritance tax principles involved, the net result will often produce a very substantial monetary savings to the members of the decedent's family.

WITHIN TWO MONTHS

The executor's first responsibility, tax-wise, comes two months after his qualification as executor. He must give

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† Table of Contents and Time Table:
   Within Two Months .................. 309
   Within Three Months ................ 310
   Within Six Months ................... 313
   At Usual Income Tax Time ............ 314
   From Four to Fifteen Months ......... 316
   At the Expiration of Fifteen Months . 321
   Thereafter ........................... 324
   Tax Traps ........................... 326
   Moral Responsibility and/or Personal Liability . 328
   Conclusion .......................... 336

† Actually there are two inventories which must be filed in the usual case, namely, the inventory of the personal or probate estate, and the inventory of the real property which does not pass through the executor's hands but as to which he must account tax-wise.
notice to the Commissioner of Internal Revenue that there is an estate, and that he is the executor. If the decedent was a citizen or resident of the United States, and if his estate appears to exceed $60,000, a "preliminary report" must be filed. If, on the other hand, the decedent was neither a citizen nor a resident of the United States, then the responsibility to file such a report exists if his assets in the United States exceed $2,000 in the aggregate.\(^2\) Although the report need not be filed until two months after the qualification of the executor or administrator, if no one qualifies as such within two months of the date of the decedent's death, a report must be filed within this period by "every person in actual or constructive possession of any property of the decedent at or after the time of the decedent's death."\(^3\)

It makes no difference whether the expected exemptions or deductions of the estate are great or small; the responsibility exists to file such a return if the gross estate itself, without consideration of exemptions or deductions, may exceed $60,000 or $2,000, as the case may be, as valued "at the date of death." If there is any question, the return should be filed to be on the safe side.

The return of a resident and domiciliary of the United States should be filed with the District Director of Internal Revenue in the District in which the decedent died domiciled. In other cases it is not quite so clear.\(^4\) However, it should be filed in some proper manner since failure to do so can subject the executor personally to a civil penalty of up to $500,\(^5\) and possibly even to a severe criminal penalty.\(^6\)

**Within Three Months**

Within three months of the date of the granting of his letters, the executor must make two returns to the State of

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\(^2\) Internal Revenue Code of 1954 (herein referred to as I.R.C.) secs. 6036 and 6071; Regs. \$ 20.6036-1 and \$ 20.6071-1; Form 704 for the estates of citizens or residents of the United States, and Form 705 for nonresidents not citizens.

\(^3\) Reg. \$ 20.6036-1 (b).

\(^4\) Reg. \$ 20.6091-1 provides that if the decedent was a "resident" then the notice must be filed where the decedent had his "domicile." If a nonresident, whether or not a citizen, the notice must be filed with the Director of International Operations in Washington or with such other office as the Commissioner may designate. If the decedent was a resident, but was domiciled outside any revenue district, perhaps the notice should be filed both in the district of residence and in Washington to be on the safe side.

\(^5\) I.R.C. sec. 7269.

\(^6\) I.R.C. sec. 7203. There does not seem to be any penalty which could be imposed on the decedent's estate for a delinquency or failure on the part of the executor to file, in spite of the implication in the "Instructions" on the form.
Maryland. First, he must file a report with the Register of Wills listing (1) the property, if any, in which the decedent had an interest as joint tenant at the time of his death; and (2) all transfers of "a material part" of his property given away by the decedent within two years prior to his death. In considering the latter part of this report, relating to gifts in contemplation of death, it should be noted that the Maryland law is the same as that which formerly applied for Federal tax purposes, namely, that if the gift was made within two years of death there is a presumption that it was made in contemplation of death, and if the gift was made earlier than two years prior to death it can still be held to have been made in contemplation of death if that fact is proved. This report, like the Federal preliminary report, is primarily only a general notice, having no tax or other estate obligation based on its specific figures. It usually contains only good guesses of assets and the values thereof. Nevertheless, it must be filed on time or the executor will be subject to having his administration revoked.

The executor's second responsibility within this three month interval is the filing of inventories of the decedent's entire estate, both real and personal, with the Register of Wills. By this time the executor must have obtained appraisals on all of the decedent's property, with certain minor exceptions. If this is not done his letters may be revoked, and he could be attached personally, with a fine of $30 assessed against him. Incidentally, the executor must also file an inventory of money and a list of debts, but these are, in practice, usually combined with the personal inventory.

With the filing of these inventories the first opportunity is presented for what is known as post-mortem estate planning, that is, the arranging or the handling of the

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4 8 Md. Code (1957) Art. 93, § 253. Note that the same appraisers "shall" be appointed to value the real estate as were appointed for the personal estate.
5 Not included, and therefore exempt from the Maryland taxes on inheritance and executors' commissions are "heirlooms and the ornaments and jewels of a widow proper to her station, and the clothing of the family," 8 Md. Code (1957) Art. 93, § 244. In addition, § 241 exempts "wearing apparel," and § 242 exempts provisions laid up for consumption by the family.
decedent's estate during administration in ways that will most benefit the decedent's surviving spouse, his children, and any other beneficiaries of the estate. One of the chief purposes of this planning is to reduce the tax burdens of all concerned. And it is the necessity of having to value all of the assets in the inventories which provides this first opportunity.

The valuation of such things as stocks and bonds quoted on national exchanges is nearly automatic. However, it is not infrequent to find fine jewelry, or a good painting, or perhaps real estate, in a decedent's estate. Before filing an inventory and committing all hands to the value thereof, it is important to stop and consider to what use any such property is to be put.

If a diamond ring, is it to be kept by the beneficiary, or will it be sold? Will the decedent's home, or some other piece of real estate, be used by the beneficiary, or be put up for sale? If either is to be kept, it might be better to use a figure on the low side of the reasonable valuation spread of such asset, since the inheritance tax would then be lower, as well as the Federal estate tax. On the other hand, if such property is to be sold, it might be more satisfactory to use a figure on the high side, so that the capital gain tax, which might in the end prove to be a greater burden than the inheritance and estate taxes combined, could be kept at as low a figure as possible.

The beneficiary of a painting might wish to keep it, or he might prefer to donate it to an art gallery. If it is to be kept, the lower valuation would be preferable. If, on the other hand, it is ultimately to be given to a charitable institution, the donor will undoubtedly wish to obtain as high an income tax deduction therefor as possible. Thus, for him at least, it would be preferable to have a high valuation recorded in the inventory.

Consider also the matter of depreciation on business real estate or equipment. The higher the valuation for inventory and estate tax purposes the higher the basis for depreciation. Very often the income tax benefit from these annual deductions is greater than the benefit that would be taken on the lower inventory and estate tax valuation.

Of course, valuations cannot be placed at high or low figures arbitrarily. But who knows the precise value of a diamond ring, or of an old master, or of a piece of real estate? Where there is no exact measure of worth there

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15 A widow's diamond ring would presumably not be subject to the inheritance tax, see supra, n. 11.
is necessarily a substantial area of latitude, of which good use can be made in careful post-mortem estate planning. And this is important, for when an income tax return is being audited the Federal Internal Revenue Agent will almost invariably check Orphans' Court records, as well as estate and gift tax returns. If the properly supporting figure does not appear on the inventory in the Orphans' Court appraisal, the tax benefit which the beneficiary had expected to obtain can well be seriously prejudiced.

**Within Six Months**

Six months after the date of the decedent's death an income tax return is due to the State of Maryland. This is the time to report the decedent's income during his last taxable year prior to the date of his death. Whether or not the decedent himself was on a cash or accrual basis, for this return his income is accrued to the date of death, and all deductions are similarly accrued. However, there is an interesting conflict here in two separate provisions of the Maryland income tax law.

At one place, as indicated above, it is stated that "the net income for the taxable period in which falls the date of" the decedent's death shall include "amounts accrued up to the date of his death." At another place it is stated that there shall be excluded from taxable income any amount "received by an executor . . . during the period of administration . . . which is subject to estate, inheritance or succession taxes payable to the State of Maryland." So, what happens to a dividend which is declared to stockholders as of a record date prior to decedent's death, but is not actually payable until after his death? It is an accrued amount which should, therefore, be included in the decedent's last return. However, it must also be included in the administration account; and an inheritance tax will be payable thereon. This writer has been advised by the Maryland taxing authorities that the conflict has been resolved in favor of the inheritance tax. If the accrued income is subject to that tax on distribution, it will not be required to be included as taxable income in the final return of the decedent.

Incidentally, an important thing to remember in connection with the filing of this Maryland income tax return

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17 *7 Md. Code (1957) Art. 81, § 284(b).*
19 *7 Md. Code (1957) Art. 81, § 280(1).*
is that the personal exemptions and dependency credits, to which the decedent would have been entitled had he survived, must be prorated to the date of death. Thus, if the decedent was on a calendar year basis and died on June 30, the executor would only be entitled to take one-half of the personal exemption, one-half of the over sixty-five additional exemption, and one-half of the dependency credit for providing for his needy aunt.

**AT USUAL INCOME TAX TIME**

The executor's fifth tax responsibility is the Federal income tax return, in which must be reported, for Federal purposes, the income received by the decedent during his last taxable year prior to his death. It is filed at the same time that the decedent would have filed it had he survived. There is no acceleration of the time requirement because of his death during the taxable year, and there is no proration of exemptions to the date of decedent's death as there is for the Maryland return. If the decedent was on the calendar year basis, the return would be filed on the 15th day of April in the year following the year of his death, even though this could amount to a delay of more than fifteen months. In addition, there is no responsibility on the executor for the making of payments of estimated tax after the decedent's death, although if the decedent had filed a joint estimated return with his wife, she will be personally liable for the payment of the remaining instalments unless she files an amended declaration setting forth her separate estimated tax.

Usually of considerable benefit in the way of tax savings is the fact that this return can be filed as a joint return with the surviving spouse unless she remARRies during the taxable year. Thus, in the return for the year in which the decedent's death occurs, the income received by him during the taxable year prior to his death, together with income received by the spouse during the entire year.

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7 Md. Code (1957) Art. 81, § 286(c). Of Interest here is the fact that the Maryland Comptroller, in a departmental memorandum (3/1/60), has ruled that for administration purposes a deceased spouse will be considered a deceased "dependent," if she had no taxable income in the taxable year. Thus, no matter when a spouse (without taxable income) dies, the surviving spouse (the taxpayer) can take a full exemption on his or her return, without proration. This is the converse of the situation discussed in the text, namely, the death of the taxpayer rather than the dependent.

Reg. § 1.6072-1 (b).

Reg. § 1.6015 (b)-1 (c) (2).

I.R.C. sec. 6018 (a) (2).
(including the period after the decedent's death until the close of the accounting year), can be reported together on a joint return for the two.

This return is signed by the surviving spouse and by the executor on behalf of the decedent. If no personal representative has been appointed for the decedent's estate by the time the surviving spouse must file a return on her own behalf, she can file a joint return with respect to both herself and the decedent. However, a personal representative subsequently appointed can disaffirm such act on behalf of the estate within one year after the last day for filing the return of the surviving spouse.24

Only the income that would actually have been reported by the decedent had his normal tax accounting period ended on the date of his death, together with the deductions for expenses on the same basis, are included as the decedent's income for this period prior to death. That is, there is no bunching of his income because of death. If the decedent was on a cash basis, only the income actually received by him prior to death and the expenses incurred by him and paid (with one exception) are reported on this return.

The income to which the decedent had become entitled prior to death, but to which he had not become entitled to be paid prior to his death, is no longer to be considered as his income prior to death. Such income is given special treatment under the Federal tax law and is known as "income in respect of a decedent." It must be valued and included for estate tax purposes. It must also be reported for income tax purposes. However, a credit is allowed against this income, the credit being based upon the estate tax to which such income was subjected when included in the taxable estate of the decedent.25

As indicated above, there is one place where income deductions can be taken on the last return of the decedent even though payments had not been made prior to his death. Medical expenses incurred by the decedent during his last taxable year, provided they are paid out of the estate within one year after his death, may be taken either as an income tax deduction on his last return or as an estate tax deduction, but not as both.26 It is up to the executor, in considering not only taxes but also the relative interests of the affected life tenant and remainder-

24 I.R.C. sec. 6013 (a) (3).
25 I.R.C. sec. 691 (c).
26 I.R.C. sec. 213 (d).
men, to determine whether or not it would be better to take such medical deductions as an income tax benefit rather than as an estate tax benefit.

In making these calculations it is important to remember that if the decedent had not attained the age of sixty-five years at the time of his death, then only the medical expenses in excess of 3% of his adjusted gross income will be deductible. Thus, although the higher income tax rates might indicate the taking of the deduction for income tax purposes, nevertheless the 3% rule could substantially reduce the amount actually available. Also, the use of medical expenses as an itemized deduction will eliminate the availability of the optional standard deduction, and perhaps, with all things considered, it might be preferable to take the optional standard deduction on the income tax return and leave the medical expenses to the estate tax return.

One procedural fact should be noticed here. In order to take such an income tax deduction it is necessary that there be filed with the Commissioner of Internal Revenue a statement and waiver in writing to the effect that the deduction has not been taken on the estate tax return and will not be. Once the statement and waiver are filed no change can be made. Yet it is often difficult to make any final decision on the subject by the time the income tax return must be filed. It is therefore suggested that the income tax deduction be taken, but that no waiver be filed at that time. Then, on audit, when the Agent requires that the statement and waiver be filed in order to permit the deduction, the decision can be made more intelligently.

FROM FOUR TO FIFTEEN MONTHS

The tax report in which there is, perhaps, the greatest comparative opportunity for tax money saving is the Federal income tax return for the estate (the executor does not ever file an income tax return to the State of Maryland for income which becomes payable during the period of administration).27 This Federal return must be filed annually, beginning some time within 15 months of the date of death (plus a few days if death occurred early in the month), but the executor has complete latitude within that period as to the actual date. He is not bound by the decedent's accounting period. Although the dece-

dent may have been on a calendar year basis, the executor can switch the estate to a fiscal year basis, ending on the last day of any month within one year of the date of death that he may feel most opportune. His only responsibility is that if he does use a fiscal period he must keep a set of books on the basis of such accounting period. They do not have to be elaborate, but they must show that the executor is in fact carrying his account on a fiscal year basis.

As an example of what benefit this can be, take the case of a decedent who dies on May 15. A considerable amount of income may be received during the next two and one-half months which actually accrued to the decedent prior to his death. It may be non-recurrent, and it may actually represent a very substantial part of the aggregate income which will eventually be received by the estate during the entire period of administration. Under the circumstances the executor might well file for the estate on the basis of a fiscal accounting period ending July 31, thereby placing this heavy income for the two and one-half months in the first accounting period by itself. If it should equal the amount of income which is received during the subsequent twelve month period, the tax rate would be held as low as possible on the entire income during the administration. At the same time, if there is no need to make any distribution until after the fifteen month period, when the estate might be closed, no beneficiary would have to pay any tax on any of the income during the entire period, since there would have been no distribution of anything that could be attributed to income until after the close of the second fiscal year. As there is no proration of exemptions, the estate would get the full $600 exemption during the short fiscal period just as if it had been a full year. If the decedent was engaged in several businesses, each business could have its own separate fiscal year.

Incidentally, the executor does not have to pay the Federal tax on the income of the decedent's estate all at once. He is entitled to make the payments over four equal instalments, the first being due on the date for the income tax return, with each of the other three following at three-month intervals.²⁸

However, the most important estate planning facet in this post-mortem area is the choice between the estate or the income tax deduction that is available insofar as administration expenses and casualty and theft losses are con-

²⁸ I.R.C. sec. 6152 (a) (2) and (b) (1).
cerned. For example, executors' commissions and attorneys' fees are administration expenses. Yet they can be taken as deductions either on the estate tax return or on the return reporting the income of the estate. This is true of all administration expenses, although not of funeral expenses.

Thus, it is important for the executor to determine whether it would be more beneficial to take these deductions on one return rather than on the other. Actually, if his calculations of comparative tax effects so indicate, he can take part on each. But, if any are used as an income tax deduction the same statement and waiver considered above would have to be filed. However, this latter problem could be handled in the same way, by taking the deduction on the income tax return and holding up on the statement and waiver until audit, when the final decision can be made.

It is interesting to note that there are a couple of rules of thumb which illustrate, in the normal case, when to take and when not to take these deductions for income tax purposes. For instance, in a situation where there is no marital deduction, where the estate does not exceed $100,000 and where there is adequate taxable income, it would always be preferable to take these items as income tax deductions, since the lowest income tax rate is 20% and the estate tax rate does not attain the 20% rate until the taxable estate exceeds $100,000. In larger estates, with no marital deduction, the reverse might be true.

More dramatic is the situation where the marital deduction is to be included in the determination. Here, if either of the usual marital deduction formula clauses (or something else which permits the maximum marital deduction to be taken) were used, it would still be more beneficial tax-wise in the normal situation to take such deductions on the income tax return, rather than on the estate tax return, even though the estate assets are valued as high as $1,250,000! This is because the top-bracket gross estate tax at that level amounts to 39%. And, since only one-half of any deduction on the estate tax return would enjoy any tax benefit under these circumstances, the ef-

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9 Each deduction reduces the adjusted gross estate. But, if the maximum marital deduction is taken (through the application of a formula) then, as the adjusted gross estate is reduced, one-half of each available deduction that comes off is automatically applied to the marital deduction portion (one-half of the adjusted gross estate, which is already exempt), and only the other one-half of such additional deduction will have any tax reduction effect.
fective estate tax rate on a $1,250,000 estate would obviously not amount to as much as 20%, the lowest income tax bracket.\(^3\)

As indicated, these conclusions depend upon the assumption that there is taxable income in the estate against which deductions can be taken. On the other hand, even if an estate has substantially more than $1,250,000 in principal, its income is probably so great that no matter how much principal there is, it would always be more beneficial — where the marital deduction is a factor — to take such deductions for income tax rather than for estate tax purposes.

But, if this is done, some thought should be given to making appropriate adjustments. If administration expenses, or casualty or theft losses, are paid out of the estate, and yet are taken as an income tax deduction, the benefit to the income legatee and the prejudice to the corpus remainderman can be very substantial. The payments would be made out of the principal, so the remainderman will ultimately receive that much less than he would have otherwise. At the same time the estate tax will be higher, without the benefit of these deductions, thereby causing an even greater loss to the remainderman; and, by the same token, those entitled to the income will be receiving a greater net amount than would normally be the case.

With the deductions being allowed for income tax purposes (although not paid from the income), the tax on the income would be thereby reduced and the net spendable balance would be greater.

The obvious unfairness of this situation has been recognized in the few states where the problem has been presented.\(^3\) In these cases the courts have required the income beneficiary, or any others benefiting from this election, to reimburse the principal of the estate to the extent that the estate taxes are increased by this maneuver. The balance of the benefit, which represents the reason why the deductions are taken for income tax purposes rather than for estate tax purposes, may be retained by the in-

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\(^3\) Actually, in this example, the effective estate tax rate is only 19%. The Maryland inheritance tax of 1% is allowable as a credit against the Federal tax. Since it is payable anyway the Federal tax itself thus really only amounts to 38%. Where the remaindermen are collaterals (7½% inheritance tax), the area in which the effective estate tax rate is still under 20% may be much higher.

\(^3\) In re Bixby's Estate, 140 Cal. App. 2d 236, 295 P. 2d 68, 75 (1956); In re Levy's Estate, 167 N.Y.S. 2d 16, 18 (1957); In re Warms' Estate, 140 N.Y.S. 2d 169 (1955).
come beneficiary. Therefore, some specific provision should be made in the will to avoid any contention in this area.\textsuperscript{32}

Would treating these expenses as income tax deductions have the effect of increasing the surviving spouse’s maximum allowable marital deduction? This deduction is limited by the statute to one-half of the “adjusted gross estate” which, in turn, is defined as the gross estate less the deductions “allowed by” sections 2053 and 2054.\textsuperscript{33} These are the sections which permit the very deductions for estate taxes that we are considering taking on the income tax return. So, if the administration expenses are not taken as a deduction in the estate tax return, is the adjusted gross estate thereby increased, and is a maximum marital deduction legacy to the surviving spouse thereby automatically increased in an amount equal to one-half of this difference?

The Treasury seems to have said “yes” to this proposition on at least two occasions — and very clearly “yes”.\textsuperscript{34} It has held that the words “allowed by” should be construed to mean “actually claimed” as estate tax deductions, and thus, by taking them as income tax deductions the wife’s marital gift is increased — and the overall tax burdens further decreased to the extent of this additional tax free gift. And one would think that would be the end of the case. But, in view of the Treasury’s position and the opinion of the Tax Court in a recent decision, there seems to have been thrown some doubt on this conclusion.\textsuperscript{35}

\textsuperscript{32} The following is a suggested will provision to resolve, at least in part, these possible areas of contention:

“My executors, in their sole and absolute discretion, shall have full power and authority, as well as the direct responsibility, to make such decisions during the administration of my estate as they may deem necessary, appropriate, or desirable in connection with the determination of (a) whether any alternate valuation date or dates shall be used for estate and/or inheritance tax purposes, (b) which of the assets constituting my residuary estate shall be allocated to the marital deduction gift to my wife, and (c) whether any deductions available for estate tax purposes shall be used instead as income tax deductions either on the last return filed on my behalf individually, or on any of the returns filed in respect of income reported by my estate. All such decisions shall be final and binding on all persons interested therein, and my executors shall have the power, but shall be under no duty, obligation, or requirement whatsoever, to make any adjustments among the interests of the various persons entitled to share in my residuary estate because any such decision may increase or reduce the amount of such interest.”

\textsuperscript{33} I.R.C. sec. 2056 (c) (1) and (2) (A).


\textsuperscript{35} Estate of Roney, 33 T.C. 801 (1960); Estate of Luehrmann, 33 T.C. 277 (1959).
Therefore, until the apparent confusion on this point has been cleared up, allowance should be made in the will to permit the executor to so increase these tax savings.\textsuperscript{36} The point is that if the surviving spouse has an interest only in the marital trust, and the remainder of the estate is left for the benefit of her step-children, or other inimical interests, there could indeed be a very severe difference of opinion as to how these deductions should be handled. The legatees of the residue might well object to increasing the wife’s share at their expense.

\textbf{AT THE EXPIRATION OF FIFTEEN MONTHS}

The last two returns to be made by the executor, namely, the Federal estate tax return and the Maryland estate tax return, must be submitted to the proper authorities within fifteen months of the date of the decedent’s death;\textsuperscript{37} but the executor has some more good post-mortem estate planning tax opportunities in their preparation.

Taking first the Federal estate tax return, the executor can elect whether to have the estate valued (1) as of the date of death, or (2) as of the date of disposition or one year after the date of death, whichever is earlier. That is, it is up to him to decide whether it would be more beneficial to take lower values because property will be kept, or obtain higher values in order to reduce the capital gain taxes in the event of sale. However, the election is only available when the value of the estate at the moment of the decedent’s death exceeds $60,000. Also, the election must be made within the time for filing the return; and thereafter no change will be permitted.\textsuperscript{8}

If the decedent owned at the time of his death an interest in one or more closely held businesses, there are two things which the executor should keep in mind, and perhaps take advantage of. The first is the privilege to sell to such a corporation its own stock without running any risk of having the proceeds considered as a dividend distribution. This rule provides that if the stock of any corporation represents more than 35\% of the decedent’s gross estate, or more than 50\% of his taxable estate, the

\begin{itemize}
\item See suggested draft, supra, n. 32.
\item Extensions of time for filing a Federal estate tax return will not be granted for more than six months in the aggregate under any circumstances, unless the executor is abroad. I.R.C. sec. 6081 (a). And failure to file on time, without reasonable cause, will subject the estate to a penalty of from 5 to 25\%. I.R.C. sec. 6651.
\item Reg. § 20.2032-1 (b).
\end{itemize}
corporation can redeem an amount of the stock equal in value to the sum of the estate and inheritance taxes paid by the estate plus the funeral and allowable administration expenses, without any income tax consequences. The same privilege is available if two or more corporations are involved, and if the decedent owned at least 75% in value of the outstanding stock of each of the corporations whose stock is added together to satisfy the 35 or 50% requirements.

The executor also has the right to pay at least a portion of the estate tax in instalments over a period of from two to ten years, with only a 4% interest charge. The "closely held business" to which this option applies is that which represents the same 35 or 50% of the estate, but either the decedent must have been one of no more than ten stockholders, or at least 20% of the voting stock must have been included in determining his gross estate. If more than one corporation is involved then the decedent must have owned more than 50% of the total value of each. However, if this privilege is to be availed of, the statutory provision should be carefully studied as there are some quite technical limitations and restrictions on the continuation or termination of the payments.

Another significant post-mortem estate planning opportunity arises from the preparation of the Federal estate tax return based, as it must be, on the administration account. It is then that the executor must allocate the various distributable assets between the marital share and the residue of the estate.

In this connection it should be stated that the estate tax is only paid upon the assets constituting the residuary share. And since these assets will not be taxable again in the surviving spouse's estate (if placed in an appropriate trust), it will make little difference how much larger the value of that share may become during the balance of the spouse's lifetime. On the other hand, the marital deduction share, not having been taxed at the time of the decedent's death, will be taxed at the time of the surviving spouse's death to the extent of the assets constituting the same at the time of her death.

I.R.C. sec. 303.
I.R.C. secs. 6166 and 6601 (b).

And only the assets constituting the residuary share should be liable therefor. If the marital share must contribute thereto, the allowable marital deduction will be thereby decreased. I.R.C. sec. 2056 (b) (4). Thus, the draftsman should specifically provide in the will that Federal estate taxes are to be paid only from the balance of the estate after providing for the maximum exempt share to the surviving spouse.
Thus, if the estate is composed of two types of assets, one a good income producing asset whose market value varies little over the years, and the other an asset of considerable dynamic growth, it would normally be better to allocate the non-growing assets to the marital deduction share for taxation at a later period and to place the dynamic growing asset into the residuary share. Then, when the decedent's spouse dies, and these growth assets have indeed appreciated greatly in value, this appreciation will not be taxed.

The executor's eighth report is the Maryland estate tax return, likewise filed at the end of fifteen months. It simply picks up the difference between the amount of allowable credit for State taxes under the Federal estate tax and the actual amount paid for Maryland inheritance tax purposes.

In addition, there are two other points to remember as this fifteen month period draws to a close. First of all, it is the last chance for a reappraisal of the estate assets for Maryland tax purposes. Thus, if the estate has gone down considerably in value, and it is desired to have the inheritance taxes reduced, a reappraisal can be authorized at anytime up until the expiration of the fifteen month period. The inheritance tax will then be charged on the value as reappraised, rather than on the original appraisal. Secondly, the Maryland inheritance taxes must be paid prior to the expiration of fifteen months from the date of qualification of the executor. If this is not done the mandatory provisions of the Code are that the executor shall forfeit his commissions.

In connection with the Maryland inheritance tax responsibilities of the executor, it should be remembered that the duty is imposed upon every executor or other person "making distribution of any property passing sub-

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43 It must be remembered, however, that in order to qualify a gift for the marital deduction the surviving spouse must be entitled to receive the income or "beneficial enjoyment" of such property, or its equivalent, during her lifetime. Thus, care must be exercised to make sure that if unproductive (non-income producing) property, other than a home, can be allocated to the marital deduction share, the wife has an effective right to have such property made productive, or be converted. Reg. § 20.2056 (b)-5 (f) (4) and (5).

44 Actually there will probably be at least one more Federal fiduciary income tax return, but it would follow along in the usual way one year after the filing of the first income tax return for the estate, previously discussed.

47 7 Md. Code (1957) Art. 81, § 154. See also § 165 as to revocation of administration.
ject to" Maryland inheritance taxes to collect from each beneficiary the amount of such tax owed by him.\textsuperscript{47} The executor can deduct it first from what he is distributing,\textsuperscript{48} or he can sell the property to pay the tax.\textsuperscript{49} But apparently this liability does not extend to jointly owned property, joint bank accounts, "payable on death" Government bonds, or the like.

It should be noted that the time for collecting and paying the tax on real estate is less than for the personality — thirteen months. If a beneficiary does not pay up by the date designated by the statute, the executor must sell.\textsuperscript{50}

\textbf{Thereafter}

After all of the executor's responsibilities have been satisfied in the filing of the eight tax reports hereinabove discussed, the question remains as to when the estate should be distributed. Here, again, this is very often exclusively a matter of tax planning.

As far as the State of Maryland is concerned, we know that the State income tax on unearned income is 5\%. We also know that there is no Maryland income tax as far as the estate is concerned, and that any income received by the estate is simply taxable under the inheritance tax provisions.\textsuperscript{51} Thus, if the beneficiaries of the income under the will can escape the income tax and be subject only to the direct inheritance tax thereon, that is, if they are either parent, spouse, or descendants, their tax burden on such income will only be at the rate of 1\%, thereby saving 4\% as long as the estate is held open.\textsuperscript{52} Of course, the reverse is true where the beneficiaries are collaterals. Here the tax burden would be heavier the longer the estate is held open, since the collateral inheritance tax of 7\%\% would be payable instead of the income tax at the lesser 5\%.

Calculations should also be made as to the Federal income tax. If the estate is ultimately to be held for the benefit of the spouse alone, with her to receive all the income, it would normally be more beneficial tax-wise to have the estate file its own return on the estate income, and have the spouse file a separate return on whatever

\textsuperscript{47} 7 Md. Code (1957) Art. 81, § 152; and § 156 as to real estate.
\textsuperscript{48} Aged People's Home v. Hospital, 170 Md. 128, 183 A. 247 (1936).
\textsuperscript{49} 7 Md. Code (1957) Art. 81, § 153.
\textsuperscript{50} 7 Md. Code (1957) Art. 81, § 158.
\textsuperscript{51} 7 Md. Code (1957) Art. 81, § 280 (1).
\textsuperscript{52} This may not be applicable to beneficiaries who are non-residents of Maryland. In some states this income would be taxable as such to them when received, regardless of the Maryland inheritance tax payment.
other income she may have in addition. In this way a split tax arrangement is obtained, dividing the tax into two paying entities, with lower tax brackets as to each. This assumes, of course, that the income from the estate is to be accumulated, and not paid out to the wife during the taxable year. On the other hand, if there are to be several beneficiaries of the estate income, all of whom are in low income tax brackets, it might be preferable to terminate the estate as promptly as possible so that they would have this income split among them for a lower aggregate tax cost; although the same result could be accomplished, with the estate remaining undistributed, by simply paying out the income to these beneficiaries during the taxable year.

In either event, the important thing to remember is that the aggregate burden of the income tax can usually be reduced by splitting income among estate and beneficiaries. Thus, it is a good idea before the close of each taxable year to see whether such a benefit can be obtained by making at least some distribution from the estate to minimize this aggregate tax burden.

Finally, in this area, there is the question of what property to transfer, and what to hold, where the legatees are clamoring for at least some sort of a partial distribution of the estate, or where the executor has completed the administration but feels that he should nevertheless retain an adequate sum to cover any possible additional income or estate tax deficiencies which might subsequently be assessed on audit. For example, if there are in the estate tax-exempt municipal bonds (of the State of Maryland, any county, etc., or instrumentality thereof), national bank stocks, the stock of any bank incorporated in Maryland, or a Maryland utility stock such as the Baltimore Gas and Electric Company, all of which produce income that is wholly exempt from Maryland income tax in the hands of a Maryland resident, it would probably be preferable in the normal case to include these assets among those to be distributed. In this way the tax exemptions would not be wasted by keeping these securities in the estate where no income tax would be payable anyway, but would be made available to the distributees who would be in a position to use and enjoy them.\textsuperscript{53}

\textsuperscript{53} This tax benefit would also be applicable to the distribution, rather than the holding, by the executor of obligations of the United States. However, in most cases when he is simply holding back a sum to protect him in the event of a later assessed income or estate tax deficiency, the executor would normally invest, nevertheless, in U.S. Treasury Bills in order to have the money earning, safely, some income in the meantime, regardless of the tax aspects.
In discussing post-mortem estate tax planning it is necessary to give some attention to possible tax traps. Perhaps the first thing to remember is that the holding period for assets in the estate begins with the decedent's death. If there are to be sales made during the period of the administration, the profits therefrom will be taxable at ordinary income tax rates rather than as capital gains unless, at the time of sale, six months have expired since the death of the decedent.

Another, and very serious, tax trap relates to principal payments to legatees during administration. It is quite possible for the executor to make what he thinks are principal payments to beneficiaries, only to find later that these payments are subject to income taxes in the hands of the beneficiaries, at ordinary rates and to their full extent.

Under existing law a beneficiary of an estate must pay an income tax on all amounts (with two special exceptions) received by him which, under the will, must be distributed currently or which are in fact properly paid or credited during the taxable year.\textsuperscript{54} And, to be taxable, these payments do not necessarily have to be paid from income. As long as the estate had distributable net income, and a distribution is made, the recipient has taxable net income even though the payment is made from corpus. The two special exceptions to the foregoing rule are a gift or bequest of a specific sum of money and a gift or bequest of specific property, which in either case is paid or credited in not more than three instalments.\textsuperscript{55}

An illustration of this problem would be a will in which it is provided that everything is to go to A and B equally. Assume that the estate has $10,000 of distributable net income, that during the taxable year the executor distributes 500 shares of XYZ stock to each of the residuary legatees from the corpus of the estate, retaining all the cash income to pay bills, and that the stock had a value of $10 a share on the date of distribution. Although a corpus payment, the tax law would consider the stock distributions as payments of $5,000 of income to each of the beneficiaries, since there was that much distributable net income, and since payments in that amount had been made to legatees named in the will.

\textsuperscript{54} I.R.C. sec. 662.
\textsuperscript{55} I.R.C. sec. 663 (a) (1).
Suppose, instead, that the executor had divided the decedent’s furniture, jewelry and household effects between A and B in equal shares. These distributions would likewise be taxable to A and B at ordinary income tax rates since they were not specifically bequeathed. Thus, it is important to provide separately in a will for the distribution of tangible personal property, so that the beneficiaries can take immediate possession without running any risk of income tax liability. For the same reason it is often a good idea to provide in a will for a pecuniary legacy to the surviving spouse, in addition to the marital deduction formula interest. She can then receive this amount of cash during the administration without having to pay any income tax thereon.

A third trap to avoid is in the payment of pecuniary legacies in kind. If John Smith is left a legacy of $10,000 and the executor pays it by transferring to him XYZ stock having a value of $10,000 at the time of transfer, the executor would have a capital gain or loss problem to consider. This is true because he has satisfied an obligation of the estate in a fixed amount by the use of property having a cost basis to the executor probably quite different from its value when used to satisfy the pecuniary legacy.

This particular trap becomes even more important where there is a formula clause marital deduction provided in the will. Thus, if the testator leaves to his surviving spouse an amount equal to one-half of his adjusted gross estate — a pecuniary legacy — the payment thereof through the transfer of various assets constituting the decedent’s estate at the time of death presents to the executor a series of capital gain and loss calculations. It seems to be the generally accepted opinion, however, that this problem can be completely eliminated if there is a provision in the will stating that for all purposes the values of the various items of property constituting the decedent’s estate shall always be those finally accepted for Federal estate tax purposes, and that all divisions and distributions of the estate shall be made on that basis. With such a provision it would then be unnecessary to use the somewhat unpopular “fractional part of the residue” formula clause, which provides for the wife’s gift as a complicated fraction or percentage of the value of the residuary estate.

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56 Reg. § 1.663 (a)-1 (c) (1) (1).
58 A drafting suggestion as to how to provide for this might be as follows:

"If my wife survives me there shall be paid over to her a portion of my residuary estate equal in value to (a) one-half of the value..."
MORAL RESPONSIBILITY AND/OR PERSONAL LIABILITY

The responsibility of the executor to protect fully the estate and beneficiaries in the various areas of post-mortem estate planning discussed above has not yet been tested to any substantial degree in the courts. But if an executor is going to accept the appointment — and the sometimes substantial fees involved — it is quite possible that he will be expected to handle his job with the special competence demanded of a professional in any other field; and if he is not fully alert to the various possibilities, he may well be surcharged for his negligence, or lack of knowledge.

There are also two other questions in this field which should be discussed, namely: (1) What is the executor's responsibility to investigate the extent to which the decedent may have negligently or intentionally, even though innocently, understated or failed to report past income or gift tax liability, including gifts in contemplation of death? (2) Should an estate tax be paid on assets discovered, or learned of, by the executor long after the estate tax return has been filed, audited and approved, and the estate has been closed?

These are serious questions for, if there are assets on which the law requires the payment of a tax, and one is not paid, the Government will hold the executor to account therefor personally. If, on the other hand, the executor pays where he need not, such as waiving the defense of the statute of limitations where applicable, he may be surcharged, personally, with any loss thereby suffered by the beneficiaries. Thus, the problem is not really a moral issue as far as the executor is concerned. He is normally motivated entirely by the question of his personal liability to one side or the other.

The Internal Revenue Code states that the "tax imposed by this chapter shall be paid by the executor." But it is
improbable that this provision was intended to impose any personal liability on him. In its context it presumably means that the payment shall be made from the estate by the executor in his fiduciary capacity.

Actually, the only place that any personal liability of an executor appears to be mentioned in applicable federal legislation is in a Revised Statute adopted more than a century and a half ago. This law was originally designed primarily to protect the Treasury from distributions in certain insolvency situations, before there was a national bankruptcy law. Thus, it is not surprising that there are still substantially divergent views as to its application to an executor's personal responsibility under the modern estate tax law. But it seems to be all that the Commissioner needs in most cases.

This ancient Revised Statute provides, in substance, that taxes (including income, gift, and estate) due the United States shall have priority over all other debts of, or claims against, the estate, with minor exceptions, and that any executor who pays a debt or distributes the estate without first satisfying all such taxes, shall be held personally accountable, to the extent of such payment.

Recognizing, then, that the executor has a personal, as well as a fiduciary, liability, the next question is, How far must he go as a detective or super-sleuth in searching out and disclosing his decedent's frailties, or worse, for the purpose of protecting himself against personal liability for unpaid taxes? Although by no means thoroughly settled as a rule, it might be said generally that liability will not be imposed under the statute unless the executor was "chargeable with knowledge" of the existence of the particular unpaid tax obligation. That is, although he must bear the burden of proof, an executor will not be liable if he can show that he had "no notice which would put a reasonably prudent man upon inquiry." But there would be "enough" to sustain his personal liability if he were "in possession of such facts as that a faithful and fair discharge of his duty would put him on inquiry."

On the other hand, there is no reason for him to assume that the decedent was not thoroughly and completely honest. An executor certainly should not have to observe every past act of the deceased with suspicion. But, if he knows of a failure to report or pay a tax, or if the facts

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which have come to his attention pretty clearly indicate an omission somewhere, he must pursue the matter until reasonably satisfied.

Take, as an example, the oft-repeated situation where a prospective testator, in discussing his estate plans with an attorney or trust officer, will quite innocently relate facts clearly showing that he has failed to report taxable income in a transaction where he should have; or that he has placed a great deal of personal property in joint names without filing a gift tax return; or that he has transferred property to a trust, retaining in himself no right to receive income or principal, and on which he has paid a gift tax, but where he has not added the income of the trust to his own for income tax purposes since he had not realized that in retaining certain powers over the administration of the trust the annual income was taxable to him.⁶³

Of course, neither the attorney nor the trust officer would participate in any further current revision of his estate unless he brings his tax reporting picture up to date. But suppose the man dies and these same persons are his executors. Do they now have to make good these omissions? In such a case it would seem clear that they, as executors, would have to disclose the facts and pay on behalf of the estate whatever taxes, interest, and penalties there were which were not barred by lapse of time.

However, it must be remembered that the executor was selected because the decedent felt he would exert every effort to protect the estate, even against the ravages of the taxing statutes if necessary. So, perhaps the best thing for the executor to do would be to disclose what is known, inquire into what is evident or apparently obvious, resolve reasonable doubts in favor of the estate where nothing more than an undocumented suspicion exists, and seek what protections the law provides. The following procedure is suggested.

(1) *Protection from liability for current obligations.*

(a) The executor’s first act should probably be to give written notice to the District Director of his appointment, enclosing therewith a certified copy of his letters.⁶⁴ He will thereafter be treated as standing in the place of the decedent; and if the Commissioner has any deficiencies he wants to assert, or other problems he wants to discuss, notice will

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⁶³ See I.R.C. secs. 671 through 675, inclusive.
⁶⁴ I.R.C. sec. 6903, Reg. § 301.6903-1 (b).
go straight to the executor, and neither the estate nor the executor will be prejudiced because of any failure of proper communication.

(b) He should then request a prompt assessment by the Commissioner of all past income and gift tax liabilities of the decedent. In this way he will be apprised of any errors which are in the returns which could cause him trouble later, and the Commissioner has to give him an answer within the time allotted therefor. After the expiration of 18 months from the receipt by the District Director of such a request, if no assessment shall have been made, limitations will have run in favor of the estate. But, it should be remembered that such protection is not afforded when no return has been filed, or when the return was false or fraudulent with intent to evade tax. Also, for such a request to be effective, it must be sent to the District Director in a separate envelope, without any other document being included therein.

(c) The executor’s next step would be to make as thorough an investigation as the circumstances seem to indicate with regard to those activities of the decedent which might have involved him in unreported tax liability. Thus, the executor should review carefully the decedent’s last three income tax returns to see if they disclose any indications of unpaid taxes. Although this would not take care of fraud, or the decedent’s liability for having failed to file any return at all in a prior year, in the normal case it should be sufficient to satisfy the requirement of reasonable diligence. He should inquire of the surviving spouse and children about joint bank accounts, life insurance, jointly held property, and particularly gifts of any sort, so that he will be able to report accurately the decedent’s taxable estate, as well as learn of possible unpaid gift tax liabilities. He should then inquire of the bank where the decedent kept his account, as well as of the members of the family, about the existence of any trusts that the decedent may have created, and whether or not the decedent retained any right to income or principal, so that past income or gift tax liabilities in this area could be provided for without incurring additional penalties. The executor should also review all documents under which the decedent’s income tax returns indicate that he had an interest as a life beneficiary, or the like, to see if there was also a taxable power of appointment.

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\(^{65}\) I.R.C. sec. 6501 (d).

\(^{66}\) Reg. § 301.6501(d)-1 (b).
(d) Next, as he files income or other tax returns on behalf of the estate, the executor should request prompt assessments thereof, as he did for the decedent's returns discussed above. It should be remembered, however, that although such a request will relieve the estate of any further liability after the shortened time limit, any possible liability of the executor for such deficiency is not affected thereby; it will continue for the full period as discussed below.

(e) When he has filed the estate tax return the executor should request of the Commissioner a determination of the amount of the estate tax, and a discharge from personal liability therefor.\(^6\) And here the converse is true, namely, that although such a request will not reduce the time within which a deficiency assessment can be made against the estate, it will release the executor of any personal liability after the expiration of one year. It should also be noted here that although a request for early audit and discharge from estate tax liability, which can only be made in respect of the estate tax and not for either income or gift taxes, can be made before the estate tax return is actually filed, the one year period will not expire until one year after the receipt of the application, or the filing of the return, whichever is later; whereas the request for a prompt assessment of income or gift tax liability, which cannot be made in respect of estate tax liability, can only be made after the actual filing of the return in question.

(f) Unless the testator has otherwise directed in the will, the executor should collect whatever contributions there are to the Federal estate tax actually paid by him which should be made by life insurance beneficiaries and remaindermen of trusts over which the testator had a "general" power of appointment, as provided under the Federal statutes.\(^6\) He should also collect the contributions to such tax for which provision is made under the Maryland statute.\(^9\)

(g) Since an assessment could still be made against the executor personally for the decedent's unpaid income or gift taxes, and against the estate for unpaid estate taxes, the executor should retain, undistributed, a portion of the estate to satisfy any reasonably possible deficiencies which may be assessed in the future. And, the remaining ques-

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\(^6\) I.R.C. sec. 2204; Reg. § 20.2204-1.

tion would then be, How long should this reserve be held before it is distributed to the residuary legatees? The answer would normally be — until the estate tax and all other returns have been accepted in writing or all claimed deficiencies have been negotiated and paid as assessed, or upon the expiration of three years from the date for the filing of the estate tax return, whichever is later. The general rule is that limitations will run on any tax after the expiration of three years from the time for filing the return, or after the date of filing if filed late, unless items are omitted (and no reference is made thereto) which in the aggregate would exceed 25% of the gross amount reported in the return, and then the time would not expire for six years thereafter.

(2) Later discovery of estate assets.

Now, suppose that all of the foregoing problems have been settled, and that the estate has been audited and closed, when months or years later the executor first learns of some assets which belong in the estate but which were theretofore completely unknown to him. There would be three possible sources to which the Government would look for payment. And it would depend upon the circumstances as to which, if any, of the three would have any liability therefor.

(a) The estate, through the executor as its fiduciary, would be the first place to look. But if three years have expired since the filing of the return, and if the newly discovered assets do not exceed in value 25% of the gross estate stated in the return, as discussed above, it would be too late for the Government to proceed against the estate. And here, again, the lack of any moral issue becomes apparent. Since the statute of limitations has run, and since the beneficiaries are entitled to its protection, it is submitted that if the executor makes a "voluntary" payment of tax to the Government he may well subject himself to personal liability to the beneficiaries. Perhaps these assets should have been included in the return, and

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70 The District Director will acknowledge in writing when he has reviewed and accepted a return as filed.
71 I.R.C. sec. 6501(a) and (b); unless, of course, there is no return or it is false, id. (e).
72 I.R.C. sec. 6501(e)(1) and (2). And this extension of time for assessment would probably supersede the 18 month limitation under a prompt assessment. Id. (d).
73 Which means the last day permitted for filing, if filed early, I.R.C. sec. 6501(b)(1).
as such they should have been subjected to the tax. But as they were not, it would appear that the executor has no authority now to waive the protection of the statute of limitations. If he does so he might well be proceeding at considerable risk.74

(b) The personal liability of the executor for the tax would still be governed solely by the Revised Statute discussed above,75 and the procedure for collection would be similar to that which would be employed against the estate.76 The period for assessment against him, however, could be somewhat longer before limitations would be available to bar the claim since, in respect of a fiduciary, the assessment can be made at any time not later than the date for collection from the estate or "not later than 1 year after the liability arises," whichever is later.77 As liability under the Revised Statute does not arise until the executor has made a distribution of the estate without paying a tax that is due, it is true that if limitations have run as far as the estate is concerned he should be subject to no personal liability78 if he proceeds to make distribution of the new assets. But, if he distributes before limitations have run, his liability will continue for another year. And, note also that, if an assessment has been made against the estate within the period of limitations, the collection thereof may be commenced at any time within the next six years.79 Thus, if an assessment is made in time and the executor distributes in the sixth year thereafter, his personal liability could extend for a period of nearly ten years.

(c) The third source for the payment of the tax would be the beneficiary to whom distribution has been made,

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74 It is true that 8 Md. Code (1957) Art. 93, § 106 provides that it "shall not be considered the duty" of an executor to avail himself "of the act of limitations" if he deems a claim just. Thus, he can in such cases waive the statute of limitations without personal liability. But there is considerable doubt as to whether § 106 would apply to a claim of the United States. It is quite possible that the "act of limitations" mentioned in § 106 has reference only to the statutory limitations contained in Article 57 of 5 Md. Code (1957) which, in turn, have no application to claims of the United States, since "the United States is not bound by state statutes of limitation." United States v. Summerlin, 310 U.S. 414 (1939); United States v. Thompson, 98 U.S. 486 (1879); United States v. Schaefer, 33 F. Supp. 547 (Md. 1940). As the Maryland statutes probably have no effect on the enforcement of Federal claims, it might be presumed that a reference therein to "the act of limitations" would not contemplate the inclusion of any matter relating to Federal claims; and so an executor, perhaps, cannot waive any defense to a Federal tax claim and hope for protection under § 106 of Art. 93.

75 See supra, n. 61.
76 I.R.C. sec. 6901(a)(1)(B).
77 I.R.C. sec. 6901(c)(3).
78 As to criminal liability see the discussion in text, infra, n. 83.
79 I.R.C. sec. 6502 (a).
or his transferee. The period of limitations here would run as to the beneficiary one year after it does as to the estate, with one more year for his transferee.\textsuperscript{80}

Incidentally, and not to be forgotten if tax liability is assessed in any of these situations, is the fact that the tax should be paid only on the value of the assets on the valuation date.\textsuperscript{81} Thus, if the estate only had a claim to assets, either vested or contingent, which, as of the date of valuation, still had to be judicially determined, this factor should be taken into account.\textsuperscript{82}

This leaves for determination the following three situations: where the executor learns of the existence of the assets before the three year limitation period has run for the estate, but after he has obtained his personal release from liability on the basis of his application for determination within 1 year; where he has no release and learns of the assets before the expiration of the three year period, but then does not distribute the new assets until after the statute has run both against the estate and himself; and where he first learns of the assets after limitations have run in favor of the estate and himself, but if he distributes promptly the legatees would still be subject to transferee liability.

To disclose such assets in any of those situations might sound like a voluntary act, for which he would have no authority without the consent of competent legatees. But that is probably not true. One or more of the criminal provisions of the Code relating to attempts to evade or defeat a tax, failure to pay over a tax, and failure to file a return or supply information\textsuperscript{83} might well be applicable to the first two, if not all three, of those situations, and the resulting penalties up to a $10,000 fine and one year in prison for the executor, present a consideration to be conjured with.

Finally, as for the collection of the tax itself, it is provided that, with certain exceptions irrelevant to this discussion, the estate tax remains a lien on the decedent's

\textsuperscript{80} I.R.C. sec. 6901(c)(1) and (2). It is probable that a beneficiary would be an "Initial transferee," since the definition of transferee in paragraph (h) apparently does not include an executor, although it includes persons who hold or receive a part of the taxable estate outside the operation of the will. There is no definition of the term "transferor"; but it apparently includes an executor in his fiduciary, and not his personal, capacity.

\textsuperscript{81} I.R.C. sec. 2001 imposes the tax as determined under sec. 2051, which bases its calculation on the value of the gross estate, which in turn is defined in secs. 2031 and 2032 as the value of the estate at the time of death, or on the alternate valuation date, if elected.


\textsuperscript{83} I.R.C. secs. 7201, 7202, and 7203.
gross estate for 10 years; although the District Director can give a release from this lien for any part of the estate, if he is satisfied that what is retained has a value of at least double the amount of the unpaid tax. Also, any person holding or receiving property includable in the taxable estate, but not includable in the probate estate, can be held personally liable for the tax, and will be treated as a transferee for the purpose of determining when limitations will run.

In summary, then, it might be said that the executor has a responsibility to the decedent to keep the tax burden as low as possible. He also has a responsibility to the Federal and State governments to see that all proper taxes are paid. But there is also a third consideration — himself. To the extent that he errs in either of the first two, he may have to answer with his own personal assets.

CONCLUSION

The inescapable moral, if one can properly be drawn from the above, is that the job of executor is no sinecure. In anything but the simplest of estates it is difficult, tricky — and risky. For these serious responsibilities, which have been brought on in recent years more by the high tax rates than anything else, a professional is needed, a trained specialist in the field, be he a lawyer or trust officer, or perhaps both.

It is submitted that the time-honored custom of appointing a member of the family, or a friend, as a gesture of confidence or gratitude, could bring substantial evaporation in gross asset value through unknowing handling of the tax and administration problems, as well as unsuspected personal liability and loss for the executor himself. Skill should be the order of the day, not sentimentality. The executors' fees are no gift. If the right executor is selected they are well, albeit hard, earned.

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84 I.R.C. sec. 6324 (a) (1)
85 I.R.C. sec. 6325 (b) (1); Reg. § 301.6325-1(b).
86 I.R.C. sec. 6324 (a) (2).
87 I.R.C. sec. 6901 (h).
THE EDITOR'S PAGE

Our article for this issue, "Post-Mortem Estate Planning, or The Executor's Eight Tax Returns," by G. Van Velsor Wolf, Esq., delineates the complex of problems which the federal and Maryland tax law present to the Maryland executor or administrator, and suggests some timely and practical solutions. Mr. Wolf has been a past contributor to the REVIEW (14 Md. L. Rev. 3), and we welcome his return to our pages.

The School of Law is pleased to announce the appointment of two Assistant Professors, Mr. John W. Ester and Mr. Robert Whitman. Mr. Ester received his A.B. in 1956 from Pasadena College, his J.D. in 1959 from Willamette University, his LL.M. in 1960 from the University of Illinois, and was a Teaching Assistant at the University of Illinois College of Law in 1959-60. He will teach courses in Equity, Domestic Relations, Mortgages, Testamentary Law, and Trade Regulation. Mr. Whitman received his B.B.A. in 1956 from City College of New York, his LL.B. in 1959 from Columbia University (where he was a Harlan Fiske Stone Scholar and an Editor of the COLUMBIA LAW REVIEW), and was a Teaching Associate at the Columbia Law School in 1959-60. He will teach courses in Contracts and Negotiable Instruments, and will conduct the Legal Problems Seminar.

This fall the total enrollment of the School is 462, representing 136 colleges and universities; 183 students entered the first year classes.
Comments and Casenotes

Civilian Dependents And Employees At Overseas Bases Not Subject To Court Martial Jurisdiction

Kinsella v. United States
McElroy v. United States
Grisham v. Hagan

The instant cases involve an expansion of the principle enunciated earlier in the companion cases of Reid v. Covert and Kinsella v. Krueger. In those cases, the Supreme Court held that civilian dependents of servicemen stationed at overseas bases could not constitutionally be tried by courts-martial for capital offenses committed while overseas during peacetime. The majority of the Court in the Covert case intimated, however, that this should apply to any offense, regardless of its gravity. Mr. Justice Frankfurter and Mr. Justice Harlan, in separate concurring opinions, restricted their concurrences to the facts of the Covert case, namely capital offenses. Mr. Justice Clark and Mr. Justice Burton dissented. Because of those divergent viewpoints, and the factor of a possible shift in the balance of the Court due to the non-participation of Mr. Justice Whittaker in the Covert case, and the anticipated retirement of Mr. Justice Burton, there was some doubt as to how the court would treat extensions of court-martial jurisdiction to civilian dependents accompanying the armed forces overseas in cases involving noncapital offenses, or to civilian employees serving with the armed forces overseas.

The instant three cases, decided by opinions handed down on the same day, resolve these open questions. In the Kinsella case, the defendant, wife of a member of the United States Army stationed in Germany, was convicted in Germany by a court-martial of the noncapital offense of involuntary manslaughter of her one year old son. The jurisdiction of the court-martial was based on Article 2 (11) of the Uniform Code of Military Justice.
in conjunction with the NATO Status of Forces Agreement. The United States Court of Military Appeals upheld the conviction, and the defendant was returned to the United States to serve her sentence in the Federal Reformatory for Women. Petitioner, the mother of the defendant, contending that her daughter was deprived of the safeguards of Article III and the Fifth and Sixth Amendments to the Constitution, secured her discharge from custody by a petition for habeas corpus filed with the United States District Court for the Southern District of West Virginia. The Government appealed to the Supreme Court, which, in affirming the action of the District Court, held that the defendant as the wife of a soldier stationed overseas was not amenable to prosecution by a court-martial for a noncapital offense committed while overseas during peacetime.

In the McElroy case, the Court held that two civilian employees of overseas military forces were not amenable to prosecution by courts-martial for noncapital offenses. In the Grisham case, the Court held, a fortiori, that a civilian employee of an overseas military force was not amenable to prosecution by a court-martial for a capital offense.

Mr. Justice Clark, speaking for the majority in the instant cases analyzed them in two aspects: (1) in terms of Article I, section 8, clause 14 of the Constitution which gives Congress the power "to make Rules for the Government and Regulation of the land and naval Forces;" and (2) in terms of the "Necessary and Proper" Clause.

As to Article I, section 8, clause 14, the Court said the question is one of status, rather than one of offense, and consequently, civilian dependents and employees cannot be considered as falling within the term "land and naval persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following: that part of Alaska east of longitude 172 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands."
Forces." The Court alluded to the recognized textual authority on court-martial jurisdiction, which was later quoted from in the McElroy case:

"That a civilian, entitled as he is, by Art. VI of the Amendments to the Constitution, to trial by jury, cannot be made liable to the military law and jurisdiction, in time of peace, is a fundamental principle of our public law. . . ."

In fortification of the status approach, the Court discussed the landmark case of United States ex. rel. Toth v. Quarles, in which it was held that a soldier who had committed an offense while in the service could not be tried by a court-martial for this offense after his discharge from such service. In the instant case, the language of the Toth case was applied, namely, "... the power granted Congress 'to make Rules' to regulate 'the land and naval Forces' would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces." In the McElroy case, the Court said, "... as to all civilians serving with the armed forces today, we believe the Toth doctrine, . . . that we must limit the coverage of Clause 14 to 'the least possible power adequate to the end proposed,' . . . to be controlling."

As to the effect of the "Necessary and Proper" Clause, the Court stressed the propriety of limiting Article I, section 8, clause 14 by use of the "Necessary and Proper" Clause, rather than expanding clause 14, as the Government strongly urged. The Court, in echoing James Madison, said:

"That clause [Necessary and Proper Clause] is not itself a grant of power, but a caveat that the Congress possesses all of the means necessary to carry out the specifically granted 'foregoing' powers of sec. 8 'and all other Powers vested by this Constitution'."

Then the Court rationalized by saying that as the "Necessary and Proper" Clause did not expand clause 14 in the Covert case, it cannot expand it to include prosecution of

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14 Winthrop, Military Law and Precedents (2d ed. 1896).
15 Ibid., 143, cited in McElroy v. United States, supra, n. 2, 284.
17 Ibid., 15.
18 Supra, n. 2, 286.
19 Art. I, § 8, cl. 18.
civilian dependents for noncapital offenses. This idea was followed in the McElroy and Grisham cases.

Mr. Justice Harlan, joined by Mr. Justice Frankfurter, dissented in the Kinsella case and in the McElroy case, but concurred in the Grisham case. He attacked the status rationale of the majority, and emphasized that the distinction between capital and noncapital offenses should be maintained, in view of the awesomeness of the death penalty. In addition, he urged that the "Necessary and Proper" Clause should be applicable to allow the military to subject these noncapital offenders to court-martial jurisdiction.

Mr. Justice Whittaker, joined by Mr. Justice Stewart, concurred in the Kinsella case, but dissented in the McElroy and Grisham cases. He would draw no distinction between capital and noncapital offenses committed by civilian dependents, but he felt that the distinction between civilian dependents and civilian employees should be the criterion. This reasoning would subject all civilian employees to court-martial jurisdiction, regardless of the gravity of the offense.

This series of cases completes the orbit of adjudication in this area of court-martial jurisdiction over civilians accompanying or serving with the armed forces overseas in peacetime. Any previous doubts have been resolved in clear cut fashion. Now, no civilian, whether dependent or employee, accompanying or serving with the armed forces overseas in peacetime, may be deprived of his constitutional right to trial by jury by being subjected to trial by court-martial.

The conclusiveness of the instant cases is far less awesome than the problems which they create. The immediate reaction to these decisions is that unless Congress can operate quickly, perpetrators of these offenses will continue to go unpunished. Senator Hennings, Chairman of the Senate Constitutional Rights Subcommittee, has indicated several solutions:

"The United States has several alternatives: (1) Let foreign countries try these American civilians the way they would try any other American civilians under their local laws in their own courts; (2) bring the civilians back for trial in courts in the United States; (3) enact legislation placing such civilians in a military status so they could be covered by court-martial under the Uniform Code of Military Justice."221

The Court in the instant cases suggested various alternatives in dealing with these civilians. Of those alternatives, the following appear to be the most feasible:

First. Congress might provide for the replacement of civilian employees by servicemen currently in the specialist program of the Department of the Army. This has some merit, but has the obvious obstacle of shortage of manpower. It is conceivable, however, that these specialists could be used to fill at least a portion of the overseas jobs. Of course, such an alternative could not include civilian dependents.

Second. Congress might grant greater concessions to foreign governments to try these American civilians than those provided for in the existing Status of Forces Agreement. This is an undesirable approach from the standpoint of morale and international relations, and the great diversity among foreign judicial systems would undoubtedly produce conflicting standards of fairness. However, due to the vast difficulties in bringing civilians back to the United States for trial, greater resort to prosecution by foreign countries might be feasible.

Third. Congress might provide for the prosecution of these civilians in Federal District Courts in the United States. This appears to be a sound approach, although admittedly not devoid of complications. For one thing, foreign witnesses cannot be subpoenaed by the federal courts. There would also be much interference with service duties if military witnesses were shuttled back and forth. There is a possible conflict with the Sixth Amendment which commands that a trial shall take place in "the State and district" where the crime was committed. In addition, the apparent expense in transporting the neces-

22 The other alternatives suggested by the Court were: the institution of a procedure similar to that used by the Navy in regard to paymasters' clerks, who served aboard ship and whose trials were sanctioned in Ex parte Reed, 100 U.S. 13 (1879) and Johnson v. Sayre, 158 U.S. 109 (1895); the compulsory induction or voluntary enlistment into the armed forces of those civilian employees slated for overseas positions; the voluntary enlistment of specialists similar to the procedure used with the Seabees during World War II.

23 See Army Regulation 600-201, 20 June 1956, as changed 15 March 1957, and Army Regulation 624-200, 19 May 1958, as changed 1 July 1959.


25 The Court did not list this explicitly, but it may be inferred from the opinion.

26 However, Cook v. United States, 138 U.S. 157, 181-183 (1891) indicates that the sixth amendment has reference only to crimes committed within a state; see also United States v. Dawson, 15 How. 467, 487 (U.S. 1853).
sary persons back and forth might be imposing. These are only a few of the many obstacles.\(^{27}\)

It is beyond the scope of this note to discuss detailed proposals for such legislation, but this writer believes that suitable legislation should incorporate three broad ideas:

**First.** Congress should provide for the prosecution of these civilian dependents and employees in Federal District Courts sitting in the United States, accepting the Court’s earlier construction that Article III, Section 2 of the Constitution empowers Congress to provide for the place of trial for federal crimes occurring outside the boundaries of the States, and restricting the Sixth Amendment’s application to federal crimes committed within a State.\(^{28}\) A special federal court could be created with concurrent subject matter jurisdiction with courts-martial of violations of the Uniform Code of Military Justice, or the existing federal courts could be used, provided they were granted this concurrent jurisdiction. If the latter is adopted, the individual should be brought back to the United States and tried in the federal district in which the home port of his overseas unit is located. This would produce uniformity, leave little doubt as to venue, and facilitate the knotty problem of arranging for overseas witnesses. As to the establishment of roving Article III courts in foreign lands, it is extremely doubtful that any foreign country would acquiesce in such a proposal.\(^{29}\)

**Second.** Congress should implement the above suggested legislation with a provision for a *waiver of jury trial*, whereby a civilian accused of a crime could waive his constitutional right to be tried in an Article III court and thus voluntarily submit himself to court-martial jurisdiction.\(^{30}\) In criminal cases a defendant may waive a jury trial, so by analogy it would seem that he could waive his federal prosecution in the United States, assuming Congress authorized such prosecution: “As a practical matter, then, it seems that anyone overseas could, with the

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\(^{27}\) **Everett, Military Justice in the Armed Forces of the United States** (1st ed. 1956), Ch. III; for an exhaustive discussion, see Comment, *Criminal Jurisdiction Over Civilians Accompanying American Armed Forces Overseas*, 71 Harv. L. Rev. 712 (1958).

\(^{28}\) *Supra*, n. 26; and see 71 Harv. L. Rev., *ibid.*, 723.

\(^{29}\) See Comment, *Criminal Jurisdiction Over Civilians Accompanying American Armed Forces Overseas*, *supra*, n. 27.

\(^{30}\) This waiver would also extend to the constitutional guarantee of indictment by grand jury. See Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942); Patton v. United States, 281 U.S. 276 (1930); Barkman v. Sanford, 162 F. 2d 592 (5th Cir. 1947), *cert. den.* 332 U.S. 816 (1947); see also 71 Harv. L. Rev. 712 (1958); 107 U. of Pa. L. Rev. 270 (1958); 27 Geo. Wash. L. Rev. 245 (1958).
cooperation of military authorities, subject himself to their jurisdiction." This might appeal to the individual in many cases because of a desire to maintain anonymity, the impracticibility of retaining suitable counsel in the United States, or the firm belief that the military court will be more lenient than the federal court. There appears to be nothing in the instant cases which would prohibit the use of such a waiver provision.

Third. Congress should amend the jurisdictional provisions of the Status of Forces Agreement to allow the foreign countries greater primary concurrent jurisdiction than they have at present under the treaty. At the same time, there should be instituted a policy which would limit the number of demands made by the United States upon foreign countries to turn over American civilians held by foreign courts for violations of foreign law. Such a policy would allow cases with very serious charges to be sent to the United States, but for expediency would allow the less serious cases to be tried in foreign courts, as they would be if no Status of Forces Agreement existed.

Mr. Justice Clark, who criticized the majority in the Covert case for failing to provide any authoritative guidance as to what Congress might do by way of legislation, has supplied much of this needed guidance in the

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25 Ibid., 41. Everett has summed up Article VII of the Status of Forces Agreement, which deals with jurisdiction, in this manner:

"Under the Status of Forces Treaty, the United States reserves exclusive jurisdiction over persons subject to its military law with respect to offenses punishable under that law, but not under the law of the host country where the offense is committed. Conversely, as to crimes punishable under the law of the host country, but not under American law, that country reserves exclusive jurisdiction. This jurisdiction embraces American military personnel, their dependents, and civilians 'accompanying' an American armed force 'who are in the employ of an Armed Service of' the United States. . . . It is clear, however, that the most typical case will be one where the offense committed would be punishable under both American law and the foreign law concerned. Here there is concurrent jurisdiction. One nation, nevertheless, is considered to have primary jurisdiction; the other, only secondary jurisdiction. The United States would have primary jurisdiction of an offense solely against the security or property of the United States, or against the person or property of American personnel, as well as of offenses arising out of actions 'in the performance of official duty.' In other instances of concurrent jurisdiction, the host country has the primary right to exercise jurisdiction. It is agreed, however, that that country will give 'sympathetic consideration' to any request by the United States for waiver of jurisdiction if the United States thinks such waiver 'to be of particular importance.'"

35 U.S. 1 (1957), noted 17 Md. L. Rev. 335 (1957).
instant cases. The burden is now upon Congress. By effecting the three ideas of federal prosecutions in the United States, waiver of jury trial, and revampment of the jurisdictional provisions of the Status of Forces Agreement, the constitutional rights of the individual will be adequately safeguarded, and our relations with foreign countries should not be any more strained than they are at present.

FRANK J. VECELLA

Health Inspections Of Private Homes

*Frank v. Maryland*

Because of a large quantity of debris and rat droppings outside Frank's decaying house, a Baltimore health inspector searching for the source of a neighborhood rat infestation demanded to examine Frank's basement. Frank refused to admit the inspector until he obtained a search warrant. Subsequently Frank was tried and convicted before a Police Justice for violating Article 12, Section 120, of the Baltimore City Code, which imposes a fine on any homeowner who refuses to admit a health inspector having reason to suspect a nuisance exists in the house. Failing to gain acquittal on appeal to the Criminal Court of Baltimore and certiorari being denied by the Maryland Court of Appeals, Frank appealed his case to the Supreme Court. Since *Wolf v. Colorado* settled that the prohibition against unreasonable searches and seizures afforded by the Fourth Amendment to the Constitution of the United States ex-

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2 (Flack, 1950): "Whenever the Commissioner of Health shall have cause to suspect that a nuisance exists in any house, cellar or enclosure, he may demand entry therein in the day time, and if the owner or occupier shall refuse or delay to open the same and admit a free examination, he shall forfeit and pay for every such refusal the sum of Twenty Dollars."
4 "The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."
tends to the States through the due process clause of the Fourteenth Amendment, the precise issue presented to the Supreme Court was whether a State health inspection of a private home at a reasonable time without a search warrant constituted a prohibited search. The Court, in a five to four decision, held that it did not.

The Court, speaking through Mr. Justice Frankfurter, analyzed the background and implementation of the Fourth Amendment and concluded that the constitutional protection against unreasonable searches and seizures arose historically as a safeguard against the police search for evidence of crime; and, although it may be used to protect more broadly than its history indicates, it nevertheless does not pertain to health inspections made to protect the general welfare as distinguished from enforcing the criminal law, if the intrusion on privacy is slight and conducted within reasonable limits. Finally, the Court concluded that if search warrants were required for health inspections, the rigorous constitutional requirements for their issue would prevent the making of many needed inspections.

Mr. Justice Douglas, joined by the Chief Justice and Justices Black and Brennan, dissented on the ground that any search of a private home without a search warrant is unreasonable, absent exceptional circumstances such as fire, or police observation of the entry of a fugitive. The dissent also maintained that requiring search warrants for health inspections would not interfere with enforcement of modern health standards.

The question of the applicability of the Fourth Amendment to a health inspection of a private home by a Federal officer without a warrant was considered for the first time in 1949 by the Court of Appeals, District of Columbia Circuit, in District of Columbia v. Little. The Court held that...

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5 "No State shall . . . deprive any person of life, liberty, or property, without due process of law."
6 By holding that the protection against unreasonable searches and seizures does not extend to such health inspections, the Court did not have to decide whether an inspection is a search. District of Columbia v. Little, 178 F. 2d 13, 13 A.L.R. 2d 954 (D.C. Cir. 1949), noted 38 Geo. L.J. 139 (1949), held that it is. Contra, Sunderman v. Warnken, 251 Wis. 471, 29 N.W. 2d 496 (1947).
7 Mr. Justice Whittaker, one of the majority Justices, filed a separate one paragraph opinion stating that he concurred in the Court’s opinion with the understanding it held the Fourth Amendment prohibition against unreasonable searches applied to the States through the Fourteenth Amendment, but that in the instant case the search was reasonable.
the protection of the Fourth Amendment applies to health inspections made by Federal officers to protect the general welfare and, applying the exceptional circumstances test as a test of reasonableness, concluded that health inspections of private homes without a warrant were unreasonable.\(^9\)

In the *Frank* case, the first case construing the applicability of the due process clause of the Fourteenth Amendment to health inspections of private homes without a warrant, the Court refused to adopt the holding of the *Little* case. This refusal was based, in part, on a belief that the history behind the Fourth Amendment established that although it was intended both to protect privacy and afford self-protection, it was the self-protection, the right to be secure from searches for evidence to be used in criminal prosecutions, that inspired the struggles against unrestricted searches. The protection the Fourth Amendment gives to privacy was held to be outweighed by the need of the community for health inspections.

The Fourth Amendment protection against unreasonable searches can be traced back to the English case of *Entick v. Carrington*,\(^10\) on which the Court in the *Frank* case relied heavily. In that case, officers of the Crown broke into Entick's home under authority of a general executive warrant to search for evidence of utterance of libel, a criminal offense. The Court, in a landmark decision in English constitutional development, held the search unlawful. The precise holding of the *Entick* case was thus limited to criminal actions, but the basis for the decision was the common law right of a man to privacy in his home. That the Court would have been equally willing to apply its holding to searches for evidence to be used in civil actions is indicated by Lord Camden's opinion, for he stated that there was no way for the processes of a court to be used in civil cases to force evidence out of the owner's custody.\(^11\) Certainly if processes could not be used in a civil case to require the production of evidence known to be in a person's possession, a search of his home could not be based upon cause to believe that such evidence might be discovered. The truth of the matter is that Lord Camden apparently never contemplated the possibility

\(^9\)The decision was affirmed on other grounds, 339 U.S. 1 (1950).
\(^10\)19 Howell's State Trials, col. 1029 (1765).
\(^11\)"There is no process against papers in civil causes. It has often been tried, but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action." *Ibid.*, 1073.
that a search could be made other than for evidence for use in a criminal prosecution. Yet the principles and reasoning of the *Entick* case are applicable to all searches, no matter what the motive. It is a distortion of the *Entick* case to regard it, as did the Court, as authority for the proposition that special warrants for searches need not be required when the search is not for evidence to be used in a criminal prosecution.

Equal difficulties attend the Court's reliance on *Boyd v. United States*. The Court quoted an excerpt from the *Boyd* decision to the effect that the unreasonable searches against which the Fourth Amendment gives protection are almost always made in criminal cases. That factual statement made in 1886 reflected the situation theretofore prevailing and should not be regarded as an authoritative guide on the applicability of the Amendment to the vastly different and more complex situation existing today. Moreover, the qualification that the searches covered by the protection are "almost always" made in criminal cases is itself an explicit recognition that at least some other searches are also covered. Careful use of the *Boyd* case thus calls for an examination to determine whether the general statement or the exception is applicable. The *Boyd* case itself involved a civil action. The Court there held that compulsory production of papers under civil process to forfeit property is the equivalent of an unreasonable search and seizure. The opinion regarded the protection of the Fourth Amendment as extending primarily to criminal cases, but civil proceedings of a quasi-criminal nature were held to be within its ambit. It would have been consonant with such application to civil proceedings of a quasi-criminal nature to include inspections of private homes where refusal to admit an inspector or to abate a nuisance as directed by an inspector after admission constitutes a crime and can lead to a fine or imprisonment.

The Court cited no other cases in support of its conclusion that the Fourth Amendment does not apply to health inspections. The dissent cited the *Little* case and *Federal Trade Commission v. American Tobacco Co.* in support of the wide application of the Fourth Amendment to civil cases. In the *American Tobacco* case, the Court narrowly

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12 116 U.S. 616 (1886).
13 Ibid., 634.
construed the statutory powers of the Federal Trade Commission in order to avoid having to decide whether any of its powers conflicted with the Fourth Amendment. This avoidance of the constitutional issue is not authority for application of the Fourth Amendment to civil cases generally. Not only is it not authority, but there has been a long and extensive line of cases holding the Fourth Amendment not applicable to particular types of civil cases, such as the issue of warrants in certain revenue cases, attachments under the Food and Drug Act, and seizures under the Food, Drug, and Cosmetic Act, but none of these are comparable to a search of a private home. Reliance should be placed on interpretation of the intent behind the Amendment, not on cases. The Court chose to interpret the intent as conterminous with the evils prompting the Amendment, while the dissent chose to interpret the intent as the general one to protect privacy which motivated the fight leading to the constitutional protections. Historically and analytically, the position of the dissent that the protection of the Fourth Amendment should reach health inspections, even though made only to protect the general welfare, is sound.

Having concluded that the social need for health inspections had to be balanced only against a restricted right of privacy, the extent of the infringement of Frank's privacy was considered by the Court. Frank, of course, had asked only that the inspector return with a search warrant. The Court construed this request to be not "admissible self-protection" but a "denial of any official justification" for an inspection and an assertion of an "absolute right to refuse consent for an inspection." How a request that an inspector have a search warrant is a denial of "any official justification" for an inspection is difficult to see. A lesser claim to privacy would be hard to imagine. In effect the Court held that assertions of a right to privacy are unjustifiable in an area in which the community has an interest even though the right is constitutionally protected.

In upholding the reasonableness of health inspections made without a warrant, the Court also relied on the fact that Maryland has sanctioned such inspections for over 200 years. However, the early Maryland statutes authoriz-

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16 In re Meador, 16 Fed. Cas. 1294 (N.D. Ga. 1869).
17 United States v. Eighteen Cases of Tuna Fish, 5 F. 2d 979 (W.D. Va. 1925).
18 United States v. 62 Packages, Etc., 48 F. Supp. 878 (W.D. Wis. 1943), aff'd., 142 F. 2d 107 (7th Cir. 1944).
ing entry upon or inspection of ships, carriages, stores, etc. without a warrant are not in point. The Baltimore City Code provision under challenge itself derives from an 1801 ordinance. Thousands of inspections without warrants were made under this ordinance and its successors, most of them being after ratification of the Fourteenth Amendment. However, the Supreme Court in Murray's Lessee v. Hoboken Land and Improvement Co. called for repeated judicial acceptance before long practice would indicate compatibility with due process, and Maryland has no body of judicial opinion sanctioning health inspections of private homes without a warrant. Without judicial approval, Maryland's history may not indicate common acceptance or compatibility with due process.

Analysis of the Court's opinion indicates that the controlling factor was the imperative modern need for health inspections. With modern knowledge of how diseases and infections are spread, it is incontestable that adequate control is impossible if inspections are delayed until there are complaints or positive grounds for suspicion that a nuisance exists. We are not faced, though, as the Court seemed to feel, with the sole alternatives of allowing inspections without warrants or requiring warrants to issue in all cases where needed. As the dissent pointed out, the test of "probable cause" could even include the lapse of a set period without a premise being inspected. This would not, as the Court charged, represent use of "synthetic search warrants." The requirement for a search warrant in criminal cases is not designed to shield criminals or to protect illegal activities, but to interpose an objective mind between a possibly power-heavy official and individual privacy. That need would seem to exist as much in relation to health inspections as in detection of crime. A magistrate, for example, could ensure that health inspections were not used to harass or as a means for looking for evidence of crime without the need to meet the probable cause test for a search warrant. There is a vast difference

19 BALTIMORE ORDINANCES, 1801-1802, No. 23, § 6.
20 18 How. 272 (U.S. 1855).
21 For an excellent discussion of the issue, see Stahl and Kuhn, Inspections and the Fourth Amendment, 11 U. Pitts. L. Rev. 256 (1950).
23 See State v. Pettiford, Daily Record, December 16, 1959 (Md. 1959). A police officer assigned to make sanitation inspections gained entry to a private home under the guise of making a health inspection. His actual purpose was to look for evidence of a lottery violation without having to obtain a search warrant. Lottery slips were found and seized. Sub-
between broadening the grounds upon which a magistrate may find probable cause to issue a warrant and dispensing with a warrant altogether. Administrative agencies and officers are constantly playing a larger and larger role in our lives. It would appear sagacious not to unnecessarily loosen constitutional restrictions on them at this date when the full impact on our lives is yet to be seen.

Due to the reliance on Maryland history and to Mr. Justice Whittaker's concurrence on the basis that the instant search was reasonable, the *Frank* case does not clarify the position the Court may take in deciding where the Court will draw the line between allowed and prohibited inspections without a warrant in future cases. Indeed, just five weeks after the *Frank* decision, the Court by a four to four vote noted probable jurisdiction in *Ohio v. Price*²⁴ to review on the merits an Ohio case sustaining the constitutionality of health inspections of private homes without a warrant. Mr. Justice Stewart excused himself because his father had participated in the decision on the Ohio Supreme Court. Justices Frankfurter, Clark, Harlan, and Whittaker recorded their votes against noting jurisdiction to make clear that they thought the case was clearly controlled by the *Frank* case and that there was no retreat from the *Frank* decision. Mr. Justice Brennan noted his view that plenary consideration might disclose a fact situation so that the *Frank* case would not be controlling.

In the Ohio case, Taylor refused to admit housing inspectors to his home until they obtained a search warrant. Taylor was thereafter charged with violating Section 806-30(a) of the Dayton, Ohio, Code of General Ordinances and, in the absence of bail, held in jail awaiting trial. Section 806-30(a) authorizes health inspections without any requirement that the inspector even suspect the existence of a proscribed condition.²⁵ Acting on a subsequently the defendant was convicted of a lottery violation in a trial in which the lottery slips were introduced as evidence. The Supreme Bench granted a new trial on the grounds that a principal purpose of the entry of the health inspector was to search for evidence of a crime without obtaining a warrant and that health inspections were not to be used as a cover for such searches. A requirement of a warrant from a magistrate could have prevented this abuse of health inspections and, incidentally, saved the community from the expense of an invalid trial.

²⁵ "The Housing Inspector is hereby authorized and directed to make inspections to determine the condition of dwellings ... located within the City of Dayton in order that he may perform his duty of safeguarding the health and safety of the occupants of dwellings and of the general public. For the purpose of making such inspections and upon showing appropriate identification the Housing Inspector is
petition for habeas corpus filed on Taylor's behalf, the State Common Pleas Court found the ordinance unconstitutional. The Court of Appeals reversed, and this reversal was affirmed by the Ohio Supreme Court. Appeal was taken to the Supreme Court. The jurisdictional statement, filed in February, 1959, stated the case was similar to the *Frank* case and involved substantially the same problems. The case was therefore held awaiting the decision of the *Frank* case. Following that decision, jurisdiction was noted on June 8, 1959. Three memorandums were filed with the order noting probable jurisdiction, one in support of the order and two opposing the order. The supporting memorandum indicated the justices voting to note probable jurisdiction thought a factual situation might be involved that varied sufficiently from the situation in the *Frank* case as to make the latter inapplicable, while the opposing memorandums maintained that the court was being asked in effect to reconsider its decision in the *Frank* case. This unusual filing of memorandums in connection with an order setting an appeal for argument demonstrated the sharp and bitter division of the Court.

Subsequently, the decision of the Ohio Supreme Court was affirmed by an equally divided Court. Mr. Justice Brennan was joined by the Chief Justice and Justices Black and Douglas in a dissenting opinion which sought to distinguish the Ohio case on the facts. Specifically, the opinion pointed out that in the Ohio case there was no obvious unsanitary condition such as existed in the *Frank* case. There was no showing, either, of suspicion or of probable cause to believe a proscribed condition existed or of a desire by the inspectors to make either a spot check or a blanket check of homes in the vicinity. Thus it remains to be seen whether the *Frank* case marks out a new area in the interpretation of the Fourth Amendment or whether it will be distinguished and limited in application.

**John Michener**

hereby authorized to enter, examine and survey at any reasonable hour all dwellings . . . The owner or occupant of every dwelling . . . or the person in charge thereof, shall give the Housing Inspector free access to such dwelling . . . at any reasonable hour for the purpose of such inspection, examination and survey."  

Liability Of Municipal Corporations Under The State's Statutory Waiver Of Tort Immunity

_Schuster v. City of New York_ 1

Plaintiff's intestate supplied information to the Police Department which led to the arrest and imprisonment of a dangerous and notorious criminal. His part in the arrest was widely publicized, and he immediately received numerous anonymous threats to his life. The police were notified of the threats and for a short while provided for his protection. The protection was then withdrawn although plaintiff's intestate protested that the threats continued. Three weeks after the criminal's arrest, plaintiff's intestate was shot and killed on a street near his home. 2 In a suit to recover damages, the complaint alleged, _inter alia_, that the city negligently failed to protect plaintiff's intestate after it "required and exacted" his services as an informer and had "actual and constructive knowledge" that his life was endangered. 3

The trial court granted a motion by the city to dismiss the complaint as failing to state a cause of action. 4 The intermediate appellate court affirmed, 4-1. 5 The Court of Appeals divided 3-3 and, after appointing a justice to sit on the case, ordered reargument. The Court of Appeals then reversed the judgment of the lower court 4-3, holding that the complaint stated a cause of action based on the breach of duty by the municipality to exercise reasonable care for the protection of a person in decedent's position. 6

The _Schuster_ case presents the problem of a municipal corporation's liability for negligence under the statutory waiver of governmental immunity from tort liability in New York State. 7 After exhaustively examining the history and status of governmental immunity from tort lia-

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2 For details of the crime, see the N.Y. Times, March 9, 1953, p. 1, col. 8. The criminal in question was the celebrated Willie Sutton. Plaintiff's intestate was Arnold Schuster, of whom the Court, at page 268 said: "There is no suggestion that Schuster was an underworld character. On the contrary, he appears to have been a public spirited young man who had studied Sutton's picture on an FBI flyer that had been posted in his father's dry-goods store . . . ." Newsweek Magazine, Vol. 39:38, March 24, 1952, reported that the killing "aroused the most public feeling since the Lindberg kidnapping".
3 207 Misc. 1102, 121 N.Y.S. 2d 735 (1953). The complaint alleged that Sutton and his associates had "a special reputation for violence".
4 Ibid.
6 Supra, n. 1.
7 For an explanation and discussion of the statute, see infra, circa, n. 21.
bility, Professor Borchard, a most influential writer on the subject,8 concluded in 1924 that "... the law governing the redress of the individual against the public authorities, national, State, or municipal, for injuries sustained in the exercise of governmental powers, is in a state of incongruity and confusion unique in history."9 The issues in the Schuster case have their origin in this discord.

Governmental immunity from tort liability originated in the English common-law maxim that "the King can do no wrong". By way of "one of the mysteries of legal evolution",10 this doctrine took democratic roots in the theory that neither the United States nor one of the several States could be sued without its consent. While such consent has been given in varying forms in all jurisdictions, suit against the government for its torts has not generally been permitted.11

Much of the "incongruity and confusion" which has followed this retention of governmental immunity is found in the municipal area.12 The tort immunity of the States

9Borchard, op. cit., ibid, 34 Yale L.J. 1, 3.
10Ibid, 4.
12"It is quite obvious that the states ... do not even approach the position of the national government ..." — Leflar and Kantrowitz, Tort Liability of the States, 29 N.Y.U. L. Rev. 1363, 1407 (1954). The authors, at 1364, offer three reasons for the prevalence of immunity:

(1) an amorphous mass of cumbersome language about sovereignty and the nature of law which is usually contradictory within itself and is always contradicted by such modern legal facts as the Federal Tort Claims Act, the laws of most civilized nations other than our own, the New York law, and lesser reforms in most of the other American states;

(2) legislative and judicial inertia, which is probably the most potent single explanation that anyone can give as to why the American law is what it is; and

(3) financial fears, that the states and their sub-divisions actually cannot afford, in the face of other more urgent demands upon their treasuries, to pay out what they would be required to pay if tort liability were accepted."

See also Schumate, Tort Claims Against State Governments, 9 L. & C.P. 242 (1942).
13In Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 131, 60 A.L.R. 2d 1183 (Fla., 1957), the Court commented that "since 1900 well over two hundred law review articles have been written on the subject." See generally, Fuller and Casner, Municipal Tort Liability in Operation, 54
was extended to their sub-divisions upon the tenets of an early English case, Russell v. Devon.\textsuperscript{13} However, legal writers and the Maryland Court of Appeals\textsuperscript{14} have pointed out that the county in question in the English case, which was held non-liable for a breach of duty resulting in injury to a citizen, was unincorporated and without corporate funds, while municipalities and county commissioners in this country are, without exception, incorporated and possessed of corporate funds.

Nevertheless, municipal corporations, in the exercise of governmental duties, as distinguished from proprietary duties, enjoy tort immunity. The Maryland Court of Appeals has stated the general distinction: "Where the act... is solely for the public benefit, with no profit or emolument enuring to the municipality... and has in it no element of private interest, it is governmental in its nature."\textsuperscript{15} Conversely, where the act is for the private benefit of the municipality, the function is proprietary.\textsuperscript{16}

As a practical matter, however, this distinction has often been distorted by judicial efforts to effect a compromise between the rights of the injured individual and the financial risk to the municipality: "When one reads


\textsuperscript{14} County Commrs of A.A. Co. v. Duckett, 20 Md. 468, 479 (1864).
\textsuperscript{15} Baltimere v. State, 173 Md. 267, 276, 195 A. 571 (1937).

Mr. Clarke, infra, n. 19, examines with completeness and clarity the classification of functions in Maryland. Parks, schools, police and fire departments, and public buildings are the primary governmental functions; and markets, removal of ashes and household refuse, streets, highways, waterworks, and sewers are the predominant proprietary ones. Maryland law in this area represents the great weight of authority. See Doddridge, Distinction Between Governmental and Proprietary Functions of Municipal Corporations, 23 Mich. L. Rev. 325 (1925); and Seasongood, Municipal Corporations: Objections to the Governmental or Proprietary Test, 22 Va. L. Rev. 910 (1936).

Florida is the only state which has judicially toppled the governmental proprietary distinction. In Hargrove v. Cocoa Beach, supra, n. 12, the Court said, 133:

"The modern city is, in substantial measure a large business institution. While it enjoys many of the basic powers of government, it nonetheless is an incorporated organization which exercises those powers primarily for the benefit of the people within the municipal limits who enjoy the services rendered pursuant to the powers. To continue to endow this type of organization with sovereign divinity appears to us to predicate the law of the Twentieth Century upon an Eighteenth Century anachronism."
any opinion, it is usually appropriate to inquire whether the city is immune because the function is governmental or whether the function is governmental because the city should be immune." The inconsistent results of this process have been uniformly criticized as "absurd and unjust," and there has been a persistent outcry for remedial legislation. In *Municipal Responsibility in Tort in Maryland*, George L. Clarke, taking a "critical view" of that body of law, said that in this era of increasing social consciousness and governmental activity, municipal immunity is "somewhat startling" since "... [the government's] purpose is not achieved when an individual member of the community, himself without fault, is made to bear the entire cost of the injury done him by a servant of the community."

New York State took a singular step in 1929 when it passed the Court of Claims Act, Section 12a, waiving the State's immunity from liability and consenting to have the same "determined in accordance with the same rules of law as applied to actions in the Supreme Court against individuals and corporations". In *Bernardine v. City of New York*, this waiver was held to extend to municipal corporations, thereby eliminating the governmental-proprietary distinction. Under familiar tort principles, the city, like the individual and private corporation, would be liable for negligence wherever it owed a duty to the injured plaintiff.

Less than six months after the *Bernardine* case, in *Steitz v. City of Beacon*, the New York Court of Appeals,
in dismissing a complaint charging the city with negligently failing to keep in repair fire department water pipes, stated that:

"Such enactments [i.e. those in the city charter defining governmental powers] do not import intention to protect the interests of any individual except as they secure to all members of the community the enjoyment of rights and privileges to which they are entitled only as members of the public. Neglect in the performance of such requirements creates no civil liability to individuals. * * * There was indeed a public duty to maintain a fire department, but that was all, and there was no suggestion that for any omission . . . the people of the city could recover fire damages to their property."25

The Court reasoned that "[a]n intention to impose upon the city the crushing burden of such an obligation should not be imputed to the Legislature in the absence of language clearly designed to have that effect."26

In Murrain v. Wilson Line,27 where the police were charged with failing to provide adequate protection to people on a public pier, the Court, in dismissing the complaint, stated:

"The law is established that a municipality is answerable for the negligence of its agents in exercising a proprietary function, and at least for their negligence of commission in exercising a governmental function . . . but a municipality is not liable for its failure to exercise a governmental function such as to provide police or fire protection."28

Upon the distinctions drawn in the Steitz and Murrain cases, it was held that where a village omitted the posting of safeguards at the scene of an accident,29 and where the police refused protection to a woman whose husband previously made an attempt to take her life,30 there was

26 Supra, n. 24, 705.
28 Ibid., 753. Emphasis supplied.
no liability for injuries caused by the failure of police protection.

However, where the city omitted to enforce a statute prohibiting dangerous structures or public nuisances facing the highway, and where the state omitted to maintain traffic control lights upon the highway as it was bound by statute to do, there was liability for the omission of a governmental duty upon the determination of the court that the intent of the statutes involved was to create a governmental duty to the individual.

Where a policeman negligently shot an intoxicated tavern patron, where three policeman negligently placed an armed intoxicated fourth policeman into a taxi and the fourth policeman shot the taxi driver, where a policeman negligently injured the plaintiff with a shot aimed at a fleeing third person, and where the police negligently returned a pistol to a man who subsequently killed himself and injured his wife, the commission of a wrong (malfeasance) was the basis for liability.

In McCrink v. City of New York, liability was founded upon an allegation that the city “negligently failed to discharge” a chronically incompetent policeman who, while off-duty, shot plaintiff’s intestate with the police revolver he was required to carry with him at all times. However, the Court implied that there was the commission of a wrong in the “retention” of the policeman.

Manifestly, the effect of the Steitz and Murrain cases was to reimpose municipal immunity, notwithstanding the statutory waiver, where (1) the function was governmental, not proprietary; and (2) the duty was owing to the general public, not to the individual; and (3) the breach was one of omission, not commission. This tripartite test of the municipality’s liability was at the center of the dispute in the Schuster case.

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[Notes and References]

a Supra, n. 23.
g 296 N.Y. 90, 71 N.E. 2d 419 (1947).
The trial court, in dismissing the complaint, said that, at the most, there was an omission of police protection, for which no liability could lie. The intermediate appellate court affirmed on other grounds, but, by obiter dictum, said that if there was a duty to protect an informer, such a duty was court-created. Judge Beldock, in dissenting, found a duty to plaintiff's intestate based upon the foreseeability of injury.

The Court of Appeals, in reversing the judgment, advised that there could be no liability to the general public from the failure of police protection. But, the Court said, there is a "... special duty to use reasonable care for the protection of persons who have collaborated with it in the arrest or prosecution of criminals, once it reasonably appears that they are in danger due to their collaboration." The Court offered two bases for this "special duty". First, plaintiff's intestate's enforceable duty to aid in law enforcement, a duty "as old as history", created a reciprocal duty on the part of the city to reasonably protect one who had come to its assistance in this manner. Second, a "special duty" arose from the active use made of plaintiff's intestate by the city. The Court said that where the city has called upon and used the citizen in aiding law enforcement: "'If conduct has gone forward to such a stage that inaction [in furnishing police protection to such persons] would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward.'" In effect, having "gone forward", the city's subsequent omission to act becomes the commission of a wrong.

The dissenting judges maintained that an enforceable duty upon the individual to aid in law enforcement was without statutory or judicial precedent, and that, therefore, there could be no reciprocal duty on the part of the government. The "crushing" effects of the Court's holding were also feared. For example, Chief Justice Conway said that to entitle the informer to "special" police protection would subject the municipality to "an unreasonable

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207 Misc. 2d 1102, 121 N.Y.S. 2d 735 (1953).
Judge Beldock's opinion is discussed in detail, infra, circa n. 51.
180 N.Y.S. 2d 265, 5 N.Y. 2d 75, 154 N.E. 2d 534 (1958). Two opinions, concurred in by each of the four justices voting for reversal, were written. Each of the three dissenting justices wrote a separate opinion, concurred in by the others.
Ibid, 537.
Supra, n. 42, 538.
burden . . . which would incapacitate the entire police force and leave the general public without police protection”, and Justice Froessel said that “the cost . . . of such protection would be incalculable”.

In analyzing the effect of the holding in the Schuster case, the weakness of the rationale behind the governmental duty to protect informers becomes apparent. First, the legal structure of the reciprocal duty is unsound. While the early common law of England recognized the crime of misprision of felony, doubts have been expressed whether mere nondisclosure ever constituted an offense. In this country, with limited exception, misprision of felony has not been recognized as a common law offense.

The Supreme Court of the United States has said: “It may be the duty of a citizen to accuse every offender, and to proclaim every offence which comes to his knowledge; but the law which would punish him in every case, for not performing this duty, is too harsh for man.”

Second, no more persuasive is the Court’s holding that the city’s active use of the citizen creates a relationship whereby the omission in not affording police protection becomes the commission of a wrong. Elementary tort principles — and New York case law — include the outlines of the principle involved, but the ‘obvious elusiveness of [the] magic point’ at which an omission becomes a commission leaves its substance undefined and uncertain.

However, it is not suggested that the Court was unaware of the shakiness of its bases for liability. In fact, the Court restricted the existence of the duty to those situations where “it reasonably appears that they [the informers] are in danger due to their collaboration”. This qualification, in the light of the special facts in the Schuster case, clearly opens the way for future courts to distinguish the degree of danger to future informers and reintroduce non-liability. Plainly this was the intent of the Court —

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45 See Perkins, Criminal Law (1957), ch. 5, § 3, 440.
46 State v. Wilson, 80 Vt. 240, 67 A. 553 (1907).
47a Perkins, op. cit., supra, n. 45.
47 Marbury v. Brooks, 7 Wheat. 556, 575-6 (U.S. 1822). Although the United States Code (18 U.S.C.A. (1950) § 4) punishes whoever “conceals and does not . . . make known” the commission of a felony, affirmative concealment and suppression have been held to constitute the offense and not mere nondisclosure. See Neal v. United States, 102 F. 2d 643 (8th Cir. 1939) ; and Bratton v. United States, 73 F. 2d 795 (10th Cir. 1934).
49 Lloyd, supra, n. 93, 40.
50 Supra, n. 42, 537.
to find liability in the instant circumstances without surrendering the limitations on liability raised by the Steitz and Murrain cases. By contriving a "special duty" to informers, and then emasculating its future applicability, the Court managed its purpose. The broad extension of liability, envisioned in the dissents, would appear to be illusory. Judge Beldock, in his dissent in the intermediate appellate court, had similarly reasoned that:

"... the city's obligation to the intestate is not to be measured by the requirement of 'special' police protection. ... Rather, under the circumstances ... the city's obligation simply was to furnish the intestate with such protection as would be adequate in view of his known status as an informer upon a criminal who, as a matter of common knowledge was extremely dangerous. ** *61

"It is on this ground — the absence of knowledge of the risk or danger to any particular individual — that a municipality has been held not to be liable to a person who is damaged by its negligence in the discharge of a statutory duty owing to the general public. ..."**62

Where the municipality has injured an individual by its failure to perform a governmental function, Judge Beldock would find liability wherever the injury was foreseeable. The Court found liability where the injury was foreseeable and a "special duty" was owed the individual. In rejecting Judge Beldock's reasoning and substituting a "special duty", the Court, rather than engendering any substantive change in municipal liability, reaffirmed the Steitz and Murrain principles and brought into sharper focus the practice of the Court under the tri-partite test.

In principle, the Court's unequivocal position is that there can be no liability for the omission of a governmental duty owing to the general public. In practice, the Court has demonstrated that it is able and inclined to use the predicates of that position (i.e. the governmental-proprietary, general duty-individual duty, and omission-commission distinctions) as it used, prior to the Bernardine case,** the bare governmental-proprietary distinction. Where the facts allow any leeway, it appears that the

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* Ibid., 786. Steitz and Murrain cases cited.
Court will weigh the interests involved and then fit a finding of liability or non-liability into the tri-partite test.\(^4\)

The history of municipal tort liability suggests that, as a practical matter, the real dispute in the *Shuster* case was over the degree of financial risk to the defendant municipality. The Court was convinced that the injury to plaintiff's intestate, together with the public policy interest in encouraging the citizenry to aid in law enforcement, outweighed the financial risk to the city. To the dissenters, the scale was balanced in the opposite direction.

The writer believes that the *Schuster* case, in ultimately delineating the principles and practice of the Court in determining municipal liability, invites criticism. In the face of the unqualified legislative waiver of government tort immunity, the Court's tenacious limitations on liability appear unjustified. While the financial feasibility of complete liability is a cognizable and serious problem,\(^5\) the presumption here must be that the New York legislature appreciated and assumed the risks implicit in its waiver.\(^6\) The reappearance of an "artificial formula"\(^7\) (i.e. the tri-partite test) under which the Court will continue to juggle immunity and liability on a case by case basis is an additional objection to the Court's position.

In Maryland, the *Schuster* case and New York's experiences with a statutory waiver of governmental tort immunity are only of academic significance. Municipal

\(^4\) Lloyd, *supra*, n. 38, 50, describes the general duty-individual duty and omission-commission distinctions as "... two generalized solving formulae so indefinite and uncertain as to constitute fresh, untrammeled instruments of policy determination". The strate gems of the Court in the *Schuster* case, *viz.*, the individual or "special" duty to informers and the omission of protection becoming the commission of a wrong, seem to illustrate the point.


liability in Maryland follows a hardened path. In a recent case, *State v. Baltimore County*, where plaintiff's intestate was negligently killed by a policeman, the Court of Appeals, in upholding the conventional governmental-proprietary distinction, stated:

"... the point was settled in the case of *Wynkoop v. Hagerstown*, 159 Md. 594. * * * If, as the appellants argue, the rule ought to be changed so as to enlarge the liability of municipal corporations, it must be done by the Legislature and not by this Court."

If the Maryland Legislature should respond to a call for remedial legislation, the *Schuster* case and New York's experience with a statutory waiver of tort immunity will serve as a timely warning that the courts will look for a definite and clear statement of the extent of liability undertaken.

KALMAN R. HETTLEMAN

Unemployment Compensation — Recovery Of Benefits Paid

Waters v. State

Appellant, who was employed by a radiator company, was discharged on October 18, 1956, and promptly filed claim under the Unemployment Insurance Act. Subsequent to his receiving payments, an arbitrator, pursuant to a collective bargaining agreement between the employer and the union, directed that he be reinstated and "be made whole for the time lost by reason of his discharge." Pursuant to the order, appellant was reinstated and received $1,809.91 in back pay, no deduction being made for

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*See supra, n. 16. Statutory liability in Maryland is confined to three areas:
1) where employees of the government are injured while engaged in extra-hazardous work (Workmen's Compensation Act, 8 Md. Code (1957) Art. 101, § 33);
2) where police commandeer a motor vehicle (6 Md. Code (1957), Art. 66%, § 180a, b);
3) where there is destruction of property by riot or tumultuous assemblage (7 Md. Code (1957) Art. 82, §§ 1-4).


Ibid., 273.

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3 Supra, n. 1, 340.
unemployment benefits. Subsequently, the Unemployment Insurance Fund (hereinafter referred to as the Fund), having made a redetermination of the claim and having determined that the benefits paid appellant were an overpayment which should be recovered under Section 16(d) of the Act brought suit to recover these benefits. From a judgment adverse to the appellant in the Superior Court of Baltimore City, an appeal was taken.

The Court of Appeals, in holding that the Fund could not recover the benefits paid to the appellant under either Section 17(d) or a common law count for unjust enrichment, reasoned that: Appellant had been unemployed within the meaning of the Act during the period for which benefits were paid; the payments were not made as a result of any non-disclosure or misrepresentation of a material fact by the Appellant; the Appellant had, as a result, received benefits which were not actually due him, but Section 16(d) did not provide the necessary means by which the Fund could recoup itself and, since the statute set up a specific and exclusive remedy, there could be no other means of recoupment than as provided in the statute.

The Fund contended that, since the employee was wrongfully discharged, wages were “payable” to him throughout the period and that he was, therefore, not “unemployed” within the meaning of the Act. The Court felt, however, that Section 19(1) of the Act, defining wages, meant “wages currently payable” rather than “wages legally due and payable under a contingency.” It is quite evident that the General Assembly in drafting the Act meant it to mean such on looking at Sections 5(b) and

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4 Md. Code (1951) Art. 95A, § 16(d), now codified in 8 Md. Code (1957) Art. 95A, § 17(d), states:

"Any person who, by reason of the non-disclosure or misrepresentation by him or by another, of a material fact (irrespective of whether such non-disclosure or misrepresentation was known or fraudulent) has received any sum as benefits under this article while any conditions for receipt of benefits imposed by this article were not fulfilled in his case, or while he was disqualified from receiving benefits, shall, in the discretion of the Board either be liable to have such sum deducted from any future benefits payable to him under this article or shall be liable to repay to the Executive Director for the Unemployment Insurance Fund, a sum equal to the amount received by him, and such sum shall be collectible in the manner provided in sec. 15(f) of this article for the collection of past due contributions."


6 Supra, n. 1, 348.

5(c), which respectively disqualify an employee for benefits when he is discharged for wilful misconduct or as a disciplinary measure. No mention is made in the Act as to persons who are wrongfully discharged. It is true that subsequent to appellant's release an arbitration proceeding established that such discharge was wrongful, but it must be taken into account that throughout that period the employer was insisting that he was discharged for good cause. Waters was unemployed through no fault of his own, and the mere fact that the dismissal was wrongful does not alleviate his financial condition during the jobless period. Such circumstances, it seems, would come within the intent of the Act as expressed in two earlier cases, which point out the purpose of the Act as being to prevent economic insecurity and involuntary unemployment.

The next question to confront the Court was whether such payment by the Fund was induced by any non-disclosure or misrepresentation on the part of the appellant. As the facts disclosed, the Fund was as aware of the pending arbitration proceedings as the employee. Section 16(d) provides for recovery where there has been a non-disclosure or misrepresentation of a material fact, although innocent. In construing this section the Court felt the "material fact", referred to in the section, meant an existing fact and not merely a contingent event "which may or many not occur in the future." Such a construction follows the rule underlying recovery against fraud, that the misrepresentation must be of an existing fact and not of some future event or expression of opinion.

Similar results are to be found in other States. The Court called attention to Hill v. Review Board of Indiana

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11 *Supra*, n. 4.
12 *Supra*, n. 1, 349.
13 *Schnader v. Brooks*, 150 Md. 52, 132 A. 381 (1926); *Boulden v. Stillwell*, 100 Md. 543, 552, 60 A. 609 (1905).

Judge Prescott, in writing the dissent, felt that such a construction would preclude recoupment under all circumstances except as specified within the section prescribing penalties for "Unlawful Acts." He pointed out that if payments were made through some mistake of fact, as excessive benefits being paid to a jobless employee, no recovery would be forthcoming. This, in his opinion, would be very unfortunate.
Employment Security Division, where it was held, under a statute analogous to that of Maryland, that the fund could only recover benefits it had paid when there was a non-disclosure or misrepresentation on the part of the claimant. The dissent in the present case attempted to distinguish this case contending that the Indiana statute conferred jurisdiction on the Review Board to recoup and not on a court of general jurisdiction, and, therefore, was not relevant to the problem in point, i.e., whether recoupment can only be granted by a court of general jurisdiction when there is non-disclosure or misrepresentation. This distinction seems merely to be grasping at insignificant points which do not clearly differentiate the cases. Moreover, a holding similar to that reached in the Maryland and Indiana cases has been reached under a statute of like import in Idaho. Even though such results are viewed by the dissent as unfortunate, they are nevertheless the only possibility under our present law.

Admitting the recovery could not be had under Article 95A, the Fund finally maintained that it could be had, in the alternative, under a common law count for money had and received. The Court, in repudiating this contention, pointed out that the Unemployment Compensation Act is a remedial statute and has as its objective protecting those unemployed through no fault of their own. The Act plainly sets out the limits upon recovery or recoupment. The Court followed the phrase of expressio unius est exclusio alterius in determining that since the legislature specifically set forth one remedy under Section 17(d) it, by implication, excluded any other.

The dissent was unable to accept such a theory and instead cited State v. Rucker where recovery was allowed against the employer under a count for money had and received. The fact situation in that case was similar to the instant case in that the employee was discharged wrongfully, received unemployment compensation, and was subsequently reinstated with an award for back pay less income earned elsewhere (including Unemployment Compensation benefits). Then the employer withheld an amount equal to the Unemployment Compensation benefits

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15 Burns' Indiana Statutes (Supp. 1951) § 52-1537.
16 Claim of Sapp, 75 Idaho 65, 266 P. 2d 1027 (1954), which found that under the Idaho Statute recovery could be had only if there was a non-disclosure or misrepresentation (even if innocent).
17 Supra, n. 10.
but did not turn it over to the Fund. The Court allowed a judgment against the employer for the amount withheld on the theory of unjust enrichment. In its decision the Court pointed out:

"It is not necessary that we decide whether appellant can recover from Bethlehem (employer) under the provisions of that statute (Art. 95A, Sec. 17(d)). Even if we should assume without deciding, that recovery against the employee would not lie under the statute, we find nothing in the statute that would deny recovery against the employer or third party under common law principles."\(^{19}\)

The Rucker case is distinguishable on the grounds that the employer was the person who received the payment unjustly, whereas in the instant case it was the employee to whom the benefit accrued. Under the situation in the Rucker case a common count recovery will lie since the statute in no way expresses any intent to benefit employers or to set up exclusive remedies for recovery against them.

In reviewing the opinion of the Court one can discern two distinct theories as to the intent of the Unemployment Compensation Act, Section 16(d). The majority constantly strived for strict construction of the provision, whereas the dissent stressed the necessity for conjunctive application of common law principles. In that the Section is in derogation of the common law and provides for a separate and distinct remedy in the circumstance in which it may be used, the possibility of alternative common law recovery can not be realized. The result of the case appears to be unfortunate. Undoubtedly the dissent resorted to its various theories to make up for the deficiencies of the statute. The Act makes no provision for recovery from employees where benefits are, through subsequent events, found to amount to unjust enrichment. But the job of the Court is not to legislate; it can only interpret and apply existing law. Although a court may interpret a statute in different ways in various situations, it cannot change the obvious meaning and effect of a statute as the dissent desired to do in the instant case. The answer to the problem lies with the legislature, which alone possesses the power to amend existing law.

Steps were taken by the Indiana legislature after the result of the Hill case. The Indiana statute now allows for

\(^{19}\) Ibid., 157.
recovery from an employee of payment to which, through subsequent events, he is no longer entitled.\textsuperscript{20} To alleviate the situation in Maryland it is suggested that the present Section 17 of Article 95A be amended. The following provision is, therefore, submitted to broaden Section 17(d):

Any person who, because of the subsequent receipt of income deductible from benefits which is allocable to the time for which benefits were paid, becomes not entitled to such benefits under this act, shall be liable to repay such amount to the Executive Director for the Unemployment Insurance Fund.

\textbf{WILBERT H. SIROTA}

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**Extension Of Absolute Privilege To Executive Officers Of Government Agencies**

\textit{Barr v. Matteo}\textsuperscript{1}

Plaintiffs, employees of the Office of Rent Stabilization, had sponsored a terminal leave plan in 1950 which became the subject of congressional criticism in 1953. The defendant, acting director of the agency, had disapproved of the plan. Without defendant's knowledge, a letter promulgating the plan was drafted by one of the plaintiffs and set out over the defendant's name, which his secretary signed. The letter provoked criticism from the Senate which was reported in the press.\textsuperscript{2} As the acting director, the defendant received inquiries as to the agency's position on the matter. Consequently he issued a press release declaring his intention to suspend the plaintiffs and expressing the opinion that the plan was against government policy.\textsuperscript{3} Plaintiffs brought an action for libel, charging that the press release coupled with the contemporaneous news reports disclosing senatorial criticism of the plan defamed them and that the publication had been actuated by malice. The District Court overruled the defendant's plea that he was protected by either a qualified or absolute privilege. The Court of Appeals, in affirming the judgment of the District Court overruled the defendant's plea that he was protected by either a qualified or absolute privilege. The Court of Appeals, in affirming the judgment of the District Court overruled the defendant's plea that he was protected by either a qualified or absolute privilege.

\begin{footnotes}
\item[1] Burns' Indiana Statutes (Supp. 1959) § 53-1537(b).
\item[4] For text of the news release see Barr v. Matteo, supra, n. 1, 567-568, fn. 5.
\end{footnotes}
Court, held that the defendant was not entitled to an absolute privilege because his explanation to the press "went entirely outside his line of duty." The defendant had failed to include the defense of qualified privilege in his brief to the Court of Appeals, but on reconsideration urged the court to consider it. The court, however, treated the defense as having been waived by defendant's failure to raise it properly in his brief as required by the court's rules. On petition for certiorari on the denial of the defense of absolute privilege, the Supreme Court granted certiorari but, acting under its supervisory powers, remanded the case to the Court of Appeals with a direction to pass on the claim of qualified privilege. The reasoning of the Supreme Court was that it should not rule unnecessarily on the defense of absolute privilege, involving the conflict of private right and public duty, when the record revealed that the Court of Appeals might have disposed of the case on the narrower ground of qualified privilege.

On remand, the Court of Appeals held that there was a qualified privilege. Since there was evidence, however, from which a jury might conclude that the defendant (1) was motivated by malice or (2) lacked reasonable grounds for believing his statement, either of which would have defeated a defense of qualified privilege, the case was remanded to the District Court for retrial.

Defendant again sought and was granted certiorari to determine whether his defense of absolute privilege should have barred the suit despite the allegations of malice. The Supreme Court held that under the circumstances of this case the defendant, being the head of an administrative agency, was absolutely privileged in issuing the press release. Mr. Justice Harlan, writing for the majority, reasoned that the absence of absolute privilege might deter minor executive officials from the "unflinching discharge of their duties," and that the publicity and criticism surrounding the policy advocated by the plaintiffs entitled the

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4 Barr v. Matteo, 244 F. 2d 767, 768 (D.C. Cir. 1957).
5 355 U.S. 171 (1957). For a discussion of this point see Comment, Per Curiam Decisions of the Supreme Court: 1957 Term, 26 U. Chi. L. Rev. 279, 307 (1959); and Recent Case, Supreme Court Will Grant Certiorari To Remand Case For Determination Of An Issue Not Properly Raised In The Court Of Appeals, 106 U. Pa. L. Rev. 1066 (1958).
8 360 U.S. 564 (1959).
9 Ibid., 571. See Judge Learned Hand's opinion in Gregoire v. Biddle, 177 F. 2d 579 (2d Cir. 1949), cert. den. 339 U.S. 949 (1950), which is quoted at length in Mr. Justice Harlan's opinion.
defendant to make a public statement of his position as head of the agency.

Absolute privilege affords complete protection to a public official without regard to his motive or the reasonableness of his conduct, so long as the publication of the defamatory matter is in the course of his duties. On the other hand, a qualified privilege is conditioned upon publication in a reasonable manner and for a proper purpose. It may be defeated by a showing of either the presence of malice or a lack of reasonable grounds for believing the statement. The malice required to defeat a qualified privilege, however, must be that which is induced by improper motives and not merely such constructive malice as can be inferred from the simple fact of publication.

The history of absolute privilege for the executive branch is comparatively short when juxtaposed with its legislative and judicial antecedents. The absolute privilege granted an executive officer is based on public policy—that placing a government official's conduct before a jury would unduly hamper his performance of duties and would, therefore, be against the public interest.

The executive branch is numerically much larger than the other two branches of government, and the authority of its functionaries to frame policies and to hire and fire personnel is widely varied. As a result, it is more difficult to establish definite standards under which an executive employee knows when a statement made in the "line of duty" is absolutely privileged than it is to establish such clear standards for legislative and judicial officers.

The Court weighed two interests in the principal case: (1) The protection of the individual citizen against pe-

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10 See generally, Prosser, Torts (2d ed. 1955) 606-629 and cases cited therein.
11 See Harper and James, Torts (1956) § 5.27; and Restatement, Torts (1934) §§ 599-605.
15 See Chatterton v. Secretary of State for India, 2 Q.B. 189 (1895).
cuniary damage caused by oppressive or malicious action by a federal official; and (2) The public interest in shielding responsible government officers against vindictive or ill-founded damage suits. A third interest, not expressly set forth by the Court but implicit in the opinion, is that of public disclosure of matters of vital public interest. The latter interest, as the basis for granting absolute privilege to a cabinet officer, was propounded by the Court of Appeals for the District of Columbia in Mellon v. Brewer.17 The plaintiff in that case had been conducting an investigation of the Treasury Department for three years and had submitted unfavorable reports to the President and the Attorney General which were the basis for a Congressional investigation of the Department. The defendant, Secretary of the Treasury, issued a press release which revealed a report made by him to the President that impugned the good faith of the plaintiff. The Court of Appeals stressed that the subject of the report was of vital concern to the public and that the failure of the defendant to make such a report might have shaken public confidence in the Treasury Department.18

The leading case on the question of absolute privilege is Spalding v. Vilas,19 in which the Postmaster General was held absolutely privileged to issue circulars which called attention to legislation that worked injury to an attorney employed by claimants to present their claims against the Post Office. The circular informed the claimants that the legislation gave them the opportunity to evade payment of fees which they had agreed to allow the attorney. The rationale employed by the Court was that the effective operation of the executive branch would be hampered if the motives that control a cabinet officer's official conduct could be subject to a civil suit for damages.20

Following the concept of the Spalding case, the Court of Appeals for the District of Columbia held in Glass v. Ickes21 that the Secretary of the Interior acted within the scope of his duties and was entitled to the protection of an absolute privilege in issuing a press release warning all operators that the plaintiff had been barred from practice before agencies of that Department. The questions of excessive publication and the appropriateness of using the press
release as the instrumentality of communication for relaying facts which were important to persons dealing with the Department of the Interior were disregarded by the Court of Appeals, except for the oblique observation that there might be circumstances under which an official would exceed his prerogative in issuing a particular communication to the press. The questions of the necessity for the publication and the press release as a proper instrumentality of communication had been considered in the Mellon rationale in determining whether the press release was in the line of duty, and thus must be answered if this rationale is to be submitted as the basis for an absolute privilege. In the Glass case the failure to answer these two questions did not escape Chief Judge Groner, who in a concurring opinion expressed the fear that the privilege may have been extended beyond the reasons for its creation. One year later the same Court of Appeals refused an absolute privilege to a United States Marshal who made a public explanation of the discharge of deputies on the ground that the defendant had no duty to inform the public about the matter.

In the instant case Mr. Justice Harlan adopted both the rationale of the Spalding case and that of the Mellon case. After quoting from the former he concluded that in the final balance it would be better to deny relief to a defamed plaintiff than to subject government officials who do their duty to the threat of law suits which would consume time and energies which could otherwise be devoted to government service. And, although he did not quote from the Mellon case, he stated that the circumstances of the wide publicity and the correspondence sent out over the defendant’s signature, which could have been read as advocating a position opposite to that which he had actually taken, made appropriate a public statement by him as the agency head.

In a companion case, Howard v. Lyons, the Court, applying the same rationale as in the principal case, held that a commanding officer of a naval shipyard in Massachusetts was absolutely privileged to send members of that state’s delegation in Congress letters explaining his reasons for withdrawing recognition of a labor organiza-

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1 Supra, circa n. 17.
2 117 F. 2d 273, 281 (D.C. Cir. 1940).
3 Colpoys v. Gates, 118 F. 2d 16 (D.C. Cir. 1941).
4 161 U.S. 483 (1896).
5 18 F. 2d 168 (D.C. Cir. 1927).
6 360 U.S. 593 (1959).
tion as the bargaining representative of organized employees in the shipyard. Mr. Justice Stewart joined the majority in this case, whereas in the principal case he dissented on the ground that the press release was not a proper exercise of discretion in announcing public policy.

In the Barr case the Chief Justice, with whom Mr. Justice Douglas joined in dissent, found the interest of the individual to be paramount and also observed that the majority opinion established no standard to guide executive conduct. Mr. Justice Brennan, in a separate dissent, objected on the grounds that the majority dealt with concepts of public policy and purported to balance interests of society which could be more efficaciously determined by Congress.

Mr. Justice Harlan's opinion appears to be a logical extension and application of the rationales which traditionally have influenced the Court in this area. The case ostensibly extends absolute privilege to any executive official whose duties include the discretionary authority to issue a press release. Since the power to issue press releases is seldom expressly authorized by Congress, as pointed out by the Chief Justice, the Court must determine the perimeter of an official's line of duty and whether this perimeter encompasses the discretionary authority to issue a press release. As this area of the law evolves on a case by case basis, the critical question which will probably tip the balance between the interest of the individual and the interest of the government may be whether the subject matter is of sufficient public interest to justify the press release by the government official.

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2 The Court also rejected an attempt to hold the defendant liable under the libel law of Massachusetts and held that the absolute privilege must be judged by federal standards. Ibid., 597.
4 Ibid., 597.
5 Ibid., 578.
6 Ibid., 588.
7 Ibid., 578.
Recent Decisions

Administrative Law — "Equal Time Act" Does Not Apply To Regular Weathercasts By Political Candidate. Brigham v. F.C.C., 276 F. 2d 828 (5th Cir. 1960). Petitioner appealed from an F.C.C. ruling that the "equal time" clause of the Communications Act of 1934, 47 U.S.C.A. (Supp. 1959) § 315 (a), as amended by Pub. L. 86-274, § 1, 73 Stat. 557 (1959), did not apply to daily broadcasts by a radio-television station's regular weathercaster who was the political opponent of petitioner and who broadcast under the name "TX Weatherman". The Fifth Circuit Court of Appeals in affirming the F.C.C. ruling, held that the weathercaster's appearance was solely a bona fide effort to present the news and thus exempt from the "equal time" clause. The Court said that the weathercaster's employment was not something arising out of the election campaign, but rather, a regular job.

The instant case is the first appellate court decision under the "equal time" clause as amended. Prior to the 1959 amendment, § 315 (a) provided that a licensee who permitted a legally qualified candidate for any political office to "use" a broadcasting station must also afford "equal time" to all other such candidates for that office. After the F.C.C. ruling in the Lar Daly case, February 19, 1959, that the appearance of a candidate in filmed portions of a television news broadcast was within the purview of § 315 (a), Congress amended the section to exempt bona fide newscasts, news interviews, news documentaries, and on-the-spot coverage of news events. It thereby narrowed the scope of "use".

In the only previous appellate decision interpreting "use", the term had been construed to mean "use" by a candidate himself, and did not include "use" by those speaking in his behalf. Felix v. Westinghouse Radio Stations, 186 F. 2d 1 (3rd Cir. 1950), cert. den. 341 U.S. 909 (1951). The legislative history indicates that four different Senate bills proposing an amendment to § 315 (a) had contemplated the exempting of panel discussions, debates, and similar programs. At the core of the amended section is an attempt to preserve network discretion, but at the same time to eliminate favoritism and to require equal treatment of candidates. U.S. Code Cong. & Admin. News (1959), 86th Congress, 1st Session, p. 2564. See also 44 Am. Jur., Radio, § 1 et seq.; and 171 A.L.R. 765 (1947).
Conflict Of Laws — Alienation of Affections. Albert v. McGrath, 278 F. 2d 16 (D.C. Cir. 1960). Plaintiff brought suit in the District Court for the District of Columbia to recover for the alienation of her husband's affections, alleging that her husband and defendant engaged in actionable misconduct in the District of Columbia. Plaintiff and her husband were residents of Maryland. Since Maryland has abolished the action for alienation of affections, 7 Md. Code (1957) Art. 75C, § 1, recovery had to be in the District of Columbia where such an action still exists. Trenerry v. Fravel, 10 F. 2d 1011 (D.C. Cir. 1926). The District Court denied recovery, 165 F. Supp. 461 (D.C. D.C. 1958), discussed in 19 Md. L. Rev. 82 (1959), but the Court of Appeals for the District of Columbia reversed and held that the Maryland statute abolishing alienation of affections did not preclude a recovery where the defendant resided in the District of Columbia and where the place of the wrong was the said District. The Court noted that the Maryland statute had no extra-territorial effect since it is expressly limited to acts committed within Maryland. Moreover, the Court said that the Maryland statute did not preclude a remedy in as much as the consortium disturbed by the acts is not necessarily localized in the married couple's common bedroom. It thus rejected the lower court's rationale that the situs of the domicile is the only place where injury can be sustained and that the law of the marital domicile should therefore govern.


Constitutional Law — Maryland Statutes Requiring Segregation Of Races In State Training Schools For Juvenile Delinquents Declared Unconstitutional. Myers v. State Board of Public Welfare, et al., Daily Record, July 11, 1960 (Md. 1960). Plaintiff, a thirteen-year old Negro, upon being adjudged delinquent in the Circuit Court of Baltimore City, Division for Juvenile Causes, contended in a later proceeding before the same court that the Maryland statutes segregating the State Training Schools, 3
Md. Code (1957) Art. 27, §§ 657, 659-661, violated the Equal Protection and the Due Process Clauses of the Fourteenth Amendment. Although the parties agreed that the tangible facilities of these separate schools were equal, the Court held that such segregation violated the constitutional guarantees of equal protection and due process. The Court applied the rationale of Brown v. Board of Education, 347 U.S. 483 (1954), which held that segregation in public education violated the Equal Protection Clause of the Fourteenth Amendment. The Court said that the legislative intent in founding Maryland's Training Schools, combined with their present policies of administration, primarily geared the institutions toward educational objectives rather than toward custody and thus brought them within the scope of public education as set forth in the Brown case. It thus distinguished Nichols v. McGee, 169 F. Supp. 721 (D.C. Cal. 1959), appeal dismissed 361 U.S. 6 (1959), which ruled that the Brown case did not extend to state penal institutions.

In the instant case it was noted that fourteen southern states had segregated training schools while of the remaining thirty-six states, only four, including Maryland, still maintained segregated training schools. For further analysis of this area see 15 Md. L. Rev. 221 (1955); 103 A.L.R. 706 (1936); 38 A.L.R. 2d 1180 (1954).

Criminal Law — The Diminished Responsibility Doctrine. State v. Padilla, 66 N.M. 289, 347 P. 2d 312 (1960). Defendant, a mental defective, was convicted of first degree murder. This conviction was reversed on appeal, the Supreme Court of New Mexico holding that a disease of the mind, short of insanity, can legally prevent a person from being capable of that deliberation and premeditation necessary to constitute murder in the first degree. The court applied the much disputed partial or diminished responsibility doctrine, under which proof of mental disorder short of insanity is admissible to negative specific intent. Under this doctrine, although the homicide defendant is not classified insane, the offense is reduced from first to second degree murder.

A majority of states still rely solely upon the M'Naghten test under which a person is legally sane if at the time of the offense he had the capacity to distinguish between right and wrong, and understand the nature and consequences of his act. Maryland adopted this test in Spencer v. State, 69 Md. 28, 13 A. 809 (1888). States which support the
diminished responsibility doctrine contend that the M'Naghten test often renders mentally deranged persons subject to full punishment. The doctrine does not purport to abolish the recognized legal tests for insanity, but rather to supplement their application in cases involving a requirement of specific intent. There are two reasons commonly advanced in justification of the doctrine. First, it is considered unjust to spare the voluntary drunkard on the basis of incapacity to form a specific intent which is an element of the offense, as is done in most of the cases, see Hall, General Principles of Criminal Law (2d ed. 1960) 52-55, and yet to condemn the person suffering from a mental disorder having the same effect. Second, the doctrine keeps mentally disordered persons under guard of law where they might otherwise be turned loose in borderline cases. Twelve states, including New Mexico, have adopted the diminished responsibility doctrine, while a few others, although indicating possible adherence to it, have not taken a clear stand. Weihofen, Mental Disorder as a Criminal Defense (1954) 174-195. A.L.I., Model Penal Code, (Tent. Draft No. 4) § 402(1), adopts the rule. A related doctrine of diminished responsibility was adopted for England and Wales in 5 & 6 Eliz. 2, c. 38 (Homicide Act, 1957), s. 101.

Although there were indications in Spencer v. State, supra, that Maryland would not be adverse to adopting the diminished responsibility doctrine, later decisions reveal Maryland's reluctance to supplement the M'Naghten test. Cole v. State, 212 Md. 55, 128 A. 2d 437 (1957); Bryant v. State, 207 Md. 565, 115 A. 2d 502 (1955); Taylor v. State, 187 Md. 306, 49 A. 2d 787 (1946). For further discussion in this area see Weihofen, Partial Insanity and Criminal Intent, 24 Ill. L. Rev. 505 (1930); and 30 Harv. L. Rev. 535, 552-554 (1917). Generally, See Thomsen, Insanity as a Defense to Crime, 19 Md. L. Rev. 271 (1959); 17 Md. L. Rev. 178 (1957); 15 Md. L. Rev. 255 (1955); 15 Md. L. Rev. 44 (1955); 45 A.L.R. 2d 1447 (1956).

Damages — A Court Sitting Without A Jury May Choose Between Different Measures Of Ex Contractu Recovery Where Plaintiff Fails To Make Election. Petroopoulos v. Lubienski, 220 Md. 293, 152 A. 2d 801 (1959). Upon failure of the defendant-landowner to allow plaintiff-builder to complete work contracted for, defendant's refusal to pay for certain "extras", and defendant's rejection of arbitration award, plaintiff sought damages under
the theory of breach of contract as well as under claim of quantum meruit for value of services performed, outlays for materials furnished, and work done. At the completion of the testimony plaintiff made no election between his claims and the trial court, sitting without a jury, allowed recovery on the basis of quantum meruit. The Maryland Court of Appeals held, in light of plaintiff's failure to choose, that there was no reason why the trial court could not select the measure of damages to be applied to arrive at a judgment according to the evidence so long as only one measure of damages was used.

Although expressly stating that it was not deciding the point, the Court noted that the rule permitting joinder of causes of actions, Md. Rule 313a, apparently requires no election between theories at the close of all the evidence when the court is trier of the facts. The Court of Appeals spoke similarly in Kirchner v. Allied Contractors, 213 Md. 31, 131 A. 2d 251 (1957).

Under Fed. Rule 18a, upon which the Maryland joinder rule is patterned, a plaintiff having two consistent, concurrent, or cumulative theories which can be urged without prejudice to the defendant's ability to defend is not required to choose between the theories; "... relief must not be denied through the vehicle of forced election." Senter v. B. F. Goodrich Company, 127 F. Supp. 705, 708 (D.C. Colo. 1954). In accord, Griswold v. Dixie Foundry Co., 79 F. Supp. 79 (D.C. Tenn. 1948).

Domestic Relations — Presumption Against Awarding Custody Of Minor Child To Adulterous Parent Not Overcome. Parker v. Parker, 222 Md. 69, 158 A. 2d 607 (1960). The lower court granted an absolute divorce to the wife on the ground of three years' voluntary separation and awarded her custody of their eight year old son. The evidence showed that prior to this action the wife had lived in open adultery with her paramour for over a year. The chancellor felt, however, that the wife was sincerely repentant, that she would be a devoted mother, and that the welfare of the child would best be served by allowing her to retain custody. In reversing the ruling of the chancellor as to the custody award, the Court of Appeals held that the presumption against awarding custody to the wife, who had lived in open adultery while the child remained with her in the home, was not overcome by the evidence. The fact that the wife had married the paramour after
the divorce decree became final was said to be not controlling in deciding the right to custody of the child.

Whatever result is reached in such cases is at least purportedly based on the overriding consideration — the best interests of the child. The adultery of a parent seeking custody is merely one factor in determining such best interests. The question is whether the presence of such a factor in a particular case is to be taken as almost conclusively showing that it would not be in the child's best interest to live with the adulterous parent.

There is a strong tendency in Maryland to refuse to permit children to be awarded to or remain with a mother who has been guilty of adultery. *Swoyer v. Swoyer*, 157 Md. 18, 145 A. 190 (1929). Usually, the courts do not consider an adulterous mother to be a proper person to have custody, and a strong showing must be made to overcome the usual presumption against awarding custody to her. *Hild v. Hild*, 221 Md. 349, 157 A. 2d 442 (1960); 2 Nelson, Divorce and Annulment (2d ed. 1945) § 15:06. Maryland reached an unusual result in *Oliver v. Oliver*, 217 Md. 222, 140 A. 2d 908 (1958), noted in 19 Md. L. Rev. 61 (1959), where the Court of Appeals, in upholding an award of custody of a three year old daughter to the adulterous mother, decided that the mother had changed her previous way of living and repented her past indiscretions, and had thereby become a competent parent. See also *Trudeau v. Trudeau*, 204 Md. 214, 103 A. 2d 563 (1954).

In the instant case, the Court relied on the majority opinion in *Hild v. Hild*, supra, where on a similar set of facts it was held (3-2) that the presumption against awarding custody of a seven year old boy to his adulterous mother was not overcome. For a discussion of the Maryland cases in this area, see 19 Md. L. Rev. 61 (1959).

Motor Vehicles — Failure To Remove Ignition Key From Unattended Automobile. *Liberto v. Holfeldt*, 221 Md. 62, 155 A. 2d 698 (1959). In violation of 6 Md. Code (1957) Art. 66½, § 247, defendant left her car unattended, with the key in the ignition switch. The vehicle was stolen shortly thereafter. Five days later, and at a considerable distance across the city of Baltimore, the car was involved in an accident with plaintiff's car. The Court of Appeals, resolving the questions of proximate cause and independent intervening cause on the basis of proximity in time and space to the owner's negligent conduct, held, as a matter of law, that defendant's violation of the motor vehicle
statute was not the proximate cause of the accident, and that the subsequent negligence of the thief was an independent intervening cause precluding recovery against defendant. The Court pointed out that while the issues of foreseeability and proximate cause are normally for the jury, they may be resolved as a matter of law when reasonable minds could reach only one conclusion.

The case is one of first impression in Maryland. In Hochschild, Kohn & Co. v. Canoles, 193 Md. 276, 66 A. 2d 780 (1949), noted 11 Md. L. Rev. 51 (1950), defendant violated the second clause of Art. 66 ½, § 247, which requires setting of the brake and turning the front wheels to the curb whenever a vehicle is left standing on a perceptible grade. This was considered evidence of negligence rendering defendant liable in tort to the plaintiff, who was injured by defendant’s runaway truck. In Maryland, the violation of a statute normally creates a prima facie presumption of negligence and is not considered to be negligence per se. Kelly v. Huber Baking Co., 145 Md. 321, 125 A. 782 (1924).


Practice — Motion To Vacate Decree Does Not In Itself Toll The Thirty-Day Appeal Period. Monumental Engineering, Inc. v. Simon, 221 Md. 548, 158 A. 2d 471 (1960). The decree of the equity court was filed on September 25, 1959, and enrolled on October 25, 1959. On October 19, 1959, appellant filed a motion to vacate the decree and for a reconsideration thereof. No order to suspend the operation and effect of the decree was sought by appellant. The motion to vacate the decree was overruled on November 6, 1959, and this appeal was filed November 30, 1959. Appellant contended that its motion to vacate the decree tolled the running of the thirty-day appeal period fixed by Md. Rule 812a. The Court of Appeals rejected appellant's contention and held that a motion to vacate a decree does not in itself toll the running of the thirty-day appeal period. Since no special order had been passed by the lower court suspending the operation of the decree before it became enrolled, the thirty-day period had expired and the claim was dismissed.
Prior to Md. Rule 812a there were inconsistencies within the statutes and rules relating to the time for taking appeals. An interesting discussion may be found in Invernizzi and Kaiser, *A Study — Conflicts Between Statutes and Rules as to Time for Appeals*, 11 Md. L. Rev. 325 (1950). The purpose of Md. Rule 812a is to harmonize the rules and statutes and to eliminate the inconsistencies. The rule provides that whenever an appeal is permitted by law, the order for appeal shall be filed within thirty days from the date of the judgment. This makes the time for appeal uniform in all cases, except where it is from a court of law to which issues have been sent for trial from an equity or an Orphans' Court. In those instances, if a timely motion for a new trial is filed, the order for appeal shall be filed within thirty days from the date such motion is decided. Md. Rule 812b. It is to be noted, however, that in a case at law, a motion for a new trial must be made within three days of a verdict in a jury case, and in the case of a trial by the court or of a special verdict, within three days after the entry of a judgment nisi. Md. Rule 567a. If no such motion is made within the time prescribed, a final judgment is entered. Md. Rule 567e. The thirty-day appeal period commences to run only upon the entry of a final judgment.

Other Maryland cases indicating that a petition for rehearing or a motion to vacate a decree in an equity proceeding does not in itself toll the thirty-day appeal period and that a decree may be suspended only by a special order, include Hanley v. Stulman, 216 Md. 461, 141 A. 2d 167 (1958); Riviere v. Quinlan, 210 Md. 76, 122 A. 2d 332 (1956); Hancock v. Stull, 199 Md. 434, 86 A. 2d 734 (1952); Jacobs v. Bealmear, 41 Md. 484 (1874). See also M.L.E. Appeals §§ 182-184.
Book Reviews


The subtitle of this book is "Affecting Harbor Workers, Passengers and Visitors," a qualification which is extremely important to an understanding of its organization and content. In The Law of Seamen (2 vols. 1951), the same author discussed fully the legal rights of the seagoing man, both in contract and in tort. Recovery for personal injuries was covered in separate chapters on maintenance and cure, unseaworthiness, and the Jones Act. The present volume, a sequel to the earlier text, covers the maritime rights of the non-seagoing person (a somewhat incongruous statement, which nevertheless accurately reflects the law today).

Only forty pages of the present volume are devoted to "Passengers and Visitors," so for all practical purposes this is a treatise on harbor workers under the maritime law. By far the most prolific producer of waterfront litigation is the longshoreman. Numerically at least, shipyard workers comprise the next most important group, although the Supreme Court has imposed some limits upon their rights of recovery.\(^1\) Also included are ship ceilers, ship cleaners, and others who service vessels while in port.

Had it not been for Seas Shipping Co., Inc. v. Sieracki,\(^2\) this volume would never have been necessary. It seems incredible that in thirteen years one decision could have given rise to a 553-page book, but that is the fact. Sieracki held that a longshoreman was entitled to recover from a ship for unseaworthiness causing him injury, a species of liability without fault. Other categories of harbor workers (with some limitations as to shipyard workers) were blanketed-in later on the tenuous theory\(^3\) that they were all doing a seaman's work. Failing to recover, these workers can still get benefits under the Longshoremen's and Harbor Workers' Compensation Act. Consequently the shoreside worker now has more and greater rights than does the seaman, for whose protection this branch of the maritime

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\(^1\) West v. United States, 361 U.S. 118 (1959).
\(^2\) 328 U.S. 85 (1946).
law was developed. This is a topsy-turvy result, which might be described as "two if by land, one if by sea," except that the harbor worker actually has four separate and distinct remedies.  

Whether the harbor worker himself will benefit from Sieracki in the long run is problematical. The long delays, great expense, and lump-sum recoveries incident to this type of litigation are all antithetical to the carefully considered philosophy of the Longshoreman's Act. In addition Sieracki has promoted claim consciousness, unemployment pendente lite, and an appalling amount of perjury.

Whatever may be said for the client, Sieracki has been a bonanza for his attorney. Even counsel for underwriters (of whom this reviewer is one) have not been heard to complain about the large amount of business thus brought their way. Lawyers from both sides of the trial table who fifteen years ago did not know "port" from "starboard" now walk with a rolling gait and talk like characters out of Joseph Conrad.

From the standpoint of the text under the significance of this situation is that the book is badly needed in port cities by trial counsel in general practice as well as by proctors in admiralty. It is a unique contribution to this rapidly expanding field. By comparison, the most recent general treatise on admiralty (GILMOR AND BLACK, THE LAW OF ADMIRALTY (1957)), covers in 146 pages the rights of both seamen and harbor workers, a subject to which Norris has devoted three volumes.

Above all, the present treatise is an excellent review of all the leading Supreme Court cases, virtually all the pertinent decisions of the Courts of Appeals (particularly the Second, Third, Fourth, and Ninth Circuits), and many important District Court cases, including a number from the District of Maryland. As an encyclopedia of the law as it existed in early 1959 the book is defective only in having a rather mediocre index. However, there is a valuable bonus in the 54 page appendix classifying the cases according to the nature of the accident involved.

Despite the vast amount of recent case law in this field, numerous important facets of the subject have not as yet been fully developed by the courts. However, the author, taking the encyclopedic approach, makes little attempt to

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4 Judge Thomsen enumerated them in Blankenship v. Ellerman's Wilson Line, New York, Inc., 159 F. Supp. 479, 483 (D.C. Md. 1958), rev'd on other grounds, 265 F. 2d 455 (4th Cir. 1959), and added, "Longshoremen and harbor workers have already been given a greater variety of rights and choice of remedies than any other group of workers on land or sea."
fill in the interstices with original research, or discussion of how the law will or should develop. Gilmore and Black, and the older text by Robinson, (Handbook of Admiralty Law in the United States (1939)) are somewhat superior in this respect.

Consider an example. The almost uniform practice of ship owners who have been sued by harbor workers is to implead the plaintiff's employer under the 56th Admiralty Rule or Federal Rule 14, as the case may be. The owner thereby attempts to pass on to the employer any liability which he may have to the harbor worker. Of course, to the extent that he is successful in securing such indemnity, the provision of the Longshoremen's Act that the employer's liability thereunder shall be "exclusive" is circumvented. Nevertheless, this has received the blessing of the Supreme Court. 6

The Court has developed a theory that the indemnity claim is actually not a claim for tort but for breach of a contract by the employer company to perform its work satisfactorily. In many cases which are successfully prosecuted by harbor workers, there is some evidence of fault on the part of both owner and employer. This has given rise to a great deal of litigation involving the delineation of the circumstances under which the owner should be precluded by reason of his own fault from securing indemnity. The basic principle, as enunciated by the Supreme Court, 7 is simply that the ship owner may recover over, "absent conduct on its part sufficient to preclude recovery." The limits of this rule are anything but clear at the moment. Norris merely states the problem and reviews the cases. A somewhat better discussion of this particular subject is contained in Kolius and Cecil, Indemnity Suits by Vessel Owner Against Stevedoring Contractor: A Search For the Limits of The Ryan Doctrine, 27 Insurance Counsel Journal 282 (1960).

Take another example. The seaworthy ship or appliance which is warranted to the seaman and the harbor worker is a vessel which is "reasonably suitable for her intended service." 8 Once it is determined that reasonable fitness does not exist, the warranty is absolute. However, the injection of the element of reasonableness shows clearly that

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the owner is not a guarantor or insurer of the safety of those on board, a principle which has been recognized by the Supreme Court and other courts in general statements to the effect that the owner is not obligated to furnish "an accident-free ship." What, then, does "reasonably suitable" mean? The courts have had comparatively little to say on this fundamental question. Unfortunately the present volume does not develop the subject.

One of the possible lines in which this part of the law might develop was suggested by then United States District Judge Bailey Aldrich of Massachusetts in a humorous speech before the Maritime Law Association several years ago. Speaking on "The Training of an Admiralty Judge" he said in part:

"A Judge's job is even easier than that. All he has to learn, as you know, is to send every seaman's case to the jury; and in straight admiralty cases, when in doubt, to divide the damages, and probably neither side will be sore enough to appeal.

To digress for a moment, in connection with this matter of always sending a seaman's case to the jury, there was a time when I thought that somewhere there might be an exception. Suppose the plaintiff was so grossly contributorily negligent, and the ship so free of negligence, that it must be said that the injury was due solely to plaintiff's own fault. Naturally, I figured a majority of the Supreme Court would find an answer to this, but it troubled me for a while to think what it could be. The inspiration finally came, and I stated it in a footnote to an opinion last spring. If a seaman is as negligent as all that, manifestly it makes the ship unseaworthy to have him aboard. Nor, in this happy situation, would contributory negligence of the seaman reduce damages, for the greater his negligence, the more was the ship unseaworthy. It's very simple, once you think of it."

Well, stranger doctrines than this have found their way into the Supreme Court Reports. Take, for example, the post-Sieracki decision in Alaska Steamship Co., Inc., v. Petterson. There a longshoreman was permitted to recover from a shipowner for breach of the warranty of seaworthiness (without negligence) because of the failure of a block belonging to the stevedores, brought aboard by the


**347 U.S. 396 (1954).**
stevedores, and used exclusively in the stevedores' operations in a part of the ship over which the stevedores had exclusive control for cargo-handling purposes. It is not surprising that juries are sometimes incredulous when charged that this is the law.

The doctrines with which this book is concerned seem strange to this reviewer, not just because they are new, not just because they favor libellants rather than respondents, but because they are so far removed from the realities of maritime operations and so much at variance with traditional admiralty principles. The most confusing elements which have been injected into the general maritime law in the last forty years are the result not of having "liberal" judges or "conservative" judges on the Court, but of having judges unfamiliar with both maritime operations and admiralty principles. The present volume is an example of the large amount of ink which has been spilt as a consequence.

DAVID R. OWEN*


This is not just another book on negligence. It is a series of specialized studies, largely by law professors, on negligence in the "learned professions." It includes within its purview doctors, lawyers, pharmacists, architects and engineers, school teachers, abstracters, public accountants, and concludes with undertakers, insurance agents, and artisans and tradesmen. Approximately one-half of the book is devoted to medical malpractice.

The chapter on the care required of medical practitioners is a most rewarding and concise study of the subject. The author has reduced generalizations to a minimum, emphasizing specific problems such as the missing sponge, the alleged warranty of recovery (growing in vogue), the scope of res ipsa loquitur, the use of x-rays, admissibility of text books, expert testimony, operations beyond the scope of the original undertaking, experimental techniques, the obligation of the general practitioner to refer patients to the specialist, informed consent, and other problems, all covered with a wealth of citations. In fact, the chapter

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is also virtually an encyclopedia of innumerable articles in medical journals, law reviews, and textbooks.

This rather dour remark opens the chapter on the liability of hospitals:

"Throughout the common law world... our generation has been witness to an unmistakable... trend of increasingly disassociating the administration of accident law from the philosophy of individual fault in favor of the collectivist principle of loss distribution, as evidenced in the movement towards stricter liability in litigation areas with a background of liability insurance...

Generally, it has been well established that since staff members are not subject to detailed control in the conduct of their professional duties (as distinguished from their administrative duties) by the hospital, there exists no master-servant relationship between them; and therefore the hospital is not liable for the negligence of its staff in professional matters. This theory of non-liability is being supplanted by: (1) a disregard of the conventional approach that staff members must be subject to detailed control of the hospital, in favor of the approach that the staff is part of the hospital organization under the control of the hospital and the hospital is liable for its acts; (2) the concept that the hospital by receiving the patient for treatment undertakes a duty of care to the patient; and (3) a somewhat strained extension of administrative duties to include professional duties. All of which is a far cry from the old theory that hospitals were facilities where patients could meet professional men for the purposes of treatment.

Prepared by the Legal Division of the American Medical Association, the chapter on malpractice insurance might well become required reading by physicians. As there is little case law on the subject, the Legal Division prepared a questionnaire based upon actual claims. This questionnaire was forwarded to thirty-five insurance companies writing malpractice insurance, requesting an opinion whether or not these claims were within the coverage of the policies issued by the companies. The questionnaire was answered by twenty-two companies. The results disclosed that coverage may be denied in four general classes of cases: (1) operative procedures, such as abortions, which are criminal violations in the jurisdiction where performed; (2) undue familiarity during a physical ex-
amination; (3) warranties that an operation or procedure will be successful; and (4) technical assault, such as performance of an operation different from or beyond the scope of the original operation. In most of these cases, the majority of companies would defend under a reservation of right, reserving the right to refuse payment of a judgment. It is interesting to note that this survey showed that by and large the physicians of reputable standing in a community are the ones generally involved in malpractice actions. In conclusion, this cogent observation is made:

"The responses indicate that the malpractice insurance protection which the physician purchases is determined not only by the policy provisions but to a large extent by the underwriting philosophy of the company."

The chapter on modern trial techniques in malpractice suits, by eminent California counsel, may represent techniques in California, but not in Maryland. It advises "... that patient's counsel carefully and thoroughly condition the jurors' minds from the very onset to a psychological acceptance of this type of litigation ..." by "intensely" questioning the jurors on their *voir dire* "... so that eventually even the judge will join with you in questioning the jurors as to their state of mind upon these subjects, so that by the time your jury is empaneled, each and every one of them has been thoroughly indoctrinated with the truisms of which you speak. ..." It is believed that Maryland judges would take a rather dim view of this approach, while defense counsel would suffer contempt of court, apoplexy, or worse.

A study of the endless struggle to maintain discipline in school children provides the main substance for the chapter on the tort liability of teachers. At common law the right to discipline was derived from the fact that the teacher was in *loco parentis*; today it flows from the fact that the will of the parent cannot defeat the policy of the State in the maintenance of public schools. If the teacher is charged with the use of excessive force, the issue immediately arises whether or not the teacher has gone too far and abused the privilege. In this situation the teacher stands alone since the school authorities have the immunity of their sovereign body; this also occurs when a teacher is charged with negligence. In some states
these problems have been solved by insurance coverage or by private indemnity for loss incurred by a teacher. Significantly, the great majority of reported cases have come from those states carrying private insurance coverage.

The chapters on pharmacists and on architects and engineers follow each other and are in marked contrast. The pharmacist's duty runs for the benefit of third persons, while that of the architect or engineer does not, a lack of privity of contract between the third person and the architect or engineer being a defense. As a result, much of the chapter on architects and engineers is concerned with the problem of privity of contract. The chapter on pharmacists, by contrast, begins with a history of pharmacy when the pharmacist "... was both physician and pharmacist, just as the surgeon and the barber were still one." It reflects what is believed to be the Maryland law, citing cases long familiar to the Maryland lawyer.

While medical malpractice is at present the most flourishing source of malpractice litigation,¹ lawyers were among the first to be held liable for their negligence. Unlike medical malpractice litigation, legal malpractice litigation has decreased over the years. The attorney's liability for negligence arises out of the attorney-client relationship, which is created by contract; but the action against the attorney may be either ex delicto or ex contractu, there being an implied contractual duty on the part of the attorney to use due care. The chapter is well documented, with special reference to law review articles.

Where the injury is to persons, as distinguished from injury to property, the courts, following MacPherson v. Buick Motor Co.,² have granted a right of action to third persons injured by the negligence of another. But, in commercial transactions the courts have refused to follow MacPherson v. Buick Motor Co., and have denied a right of action to third persons who have suffered an economic injury because they have been unable to find any duty to a party not privy to the transaction. The doctrine of privity of contract has bedeviled diverse, and seemingly separate, fields of law, as evidenced by the various discussions in this volume; but in no field of law has it come under more serious attack and scrutiny than in the law of accountants. The strained and tortuous modifications of this doctrine in its application to accountants, from

¹ Estimated at 6000 cases in 1959.
² 217 N.Y. 382, 111 N.E. 1050 (1916).
Derry v. Peek\(^3\) through Glanzer v. Shepard,\(^4\) the famous Ultramares case,\(^5\) up to and including State St. Trust Co. v. Ernst,\(^6\) with shifting emphasis from fraud to gross negligence (or gross negligence amounting to fraud), is clearly and concisely set forth with voluminous reference to cases, annotations, and law review articles in the chapter on accountants.

The remaining chapters deal with the liability of abstracters, funeral directors (at times a gruesome subject), insurance agents, and artisans and tradesmen. They add little by way of informative discussion but contain an excellent collection of cases.

G. C. A. Anderson*  


The authors have apparently valid credentials for the treatment of their chosen subject. Each has an interest born of personal experience as a mobile home dweller and nurtured by years of professional planning. Mobile homes (the word "trailer" was long ago discarded by the industry as both inexact and odious) are an evident adornment on today's landscape. Their use is increasing, and the authors detail many factors in support of their view that this trend will continue. Planning and regulatory measures, in the opinion of the authors, have woefully failed to keep abreast of this trend; the mobile home resident and the community at large have been the victims of this failing. Planning and regulatory measures have been inadequate and frequently reflect community antipathy to the mobile home and its occupants. It is to the enlightened correction of these failures that the authors devote their work.

The subject is treated from its economic, social, political, and legal implications. The authors conclude that from all of these viewpoints, failures have been costly and unpleasant (a fact apparent to any observing traveler, in the opinion of this reviewer). An intelligent solution to the problems must begin with the planning phase and the

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* 14 A.C. 337, 58 L. J. Ch. 894 (1888).  
\(^4\) 233 N.Y. 236, 135 N.E. 275 (1922).  
\(^5\) 255 N.Y. 170, 174 N.E. 441 (1931).  
\(^6\) 278 N.Y. 104, 15 N.E. 2d 416 (1938).  
* Of the Baltimore City Bar; A.B. 1921, Princeton University; LL.B. 1924, Harvard University.
enactment of suitable regulatory measures including zoning, building codes, subdivision regulations, health and sanitation codes. The authors feel quite strongly that the problems must be resolved within the framework of existing regulatory measures and that treatment of the problem through separate regulatory measures would be a serious error. They suggest and discuss workable legislative provisions for dealing with the peculiar features of mobile home living which may be fitted into the framework of existing measures. The book contains many valuable references to sources for further study and the text is supplemented with a valuable model ordinance which may be adapted for local usage.

In the opinion of the authors, good planning in urban areas requires allowance for mobile home parks in areas zoned for multi-family residential use and similarly requires judicious placement of such parks within the zone. In this connection, local readers may be interested to consider the practice followed by the County Commissioners of Howard County, as reported in Costello v. Seiling.\textsuperscript{1} In urban areas, mobile homes should not be permitted outside of mobile home parks. In rural areas, on the other hand, the individual mobile home should be permitted, but on a basis which will insure its removal and relocation should the area be rezoned to residential. Numerous methods are reviewed for dealing with the existing substandard mobile homes and parks, and for insuring their improvement or eventual amortization. This the authors believe can be accomplished by applying existing and familiar regulatory measures relating to substandard housing.

The authors have treated this subject in an interesting and authoritative manner. No one can seriously doubt their conclusion that failure to deal intelligently with the mobile home and its location has created problems that communities can ill afford. Their facts, discussions, and suggestions can provide helpful insights in achieving solutions to these problems. While certainly of interest to the lawyer in general practice, the book will be of unquestionable value to professional planners and to drafters of regulatory measures.

C. STANLEY BLAIR\textsuperscript{*}

\textsuperscript{1} 223 Md. 24, 161 A. 2d 824 (1960).

\textsuperscript{*} Of the Harford County Bar; B.S. 1950, LL.B. 1953, University of Maryland.

Woodrow Wilson was insisting sixty years ago that "Burke was right" about the French revolution, and more recently Professor Talmon has demonstrated that the Jacobins were the first totalitarians (The Rise of Totalitarian Democracy (1952)). This makes Burke the first anti-totalitarian ideologue and polemicist, and he remains to this day incomparably the greatest. So it is natural that a world hastening to rehabilitate its moral (so much more vital than its military) defenses against the grimmest totalitarianism of all should turn again to the orator-statesman-philosopher who reflected on the French Revolution 200 years ago.

Former Congressman Sheehan has made this turn and like his fellow seekers has found a trove of political and social wisdom. In this book he offers a kind of concordance of Burke quotations running from "Absurdity," "Accidental Causes," "Accountant," and "Accusers," to "Words," "Worth," "Writers," and "Youth." In the somewhat haphazard and non-categorizing character of the head-words, however, the quality of the book is pretty clearly shown. In brief, if it is the love's labor of an amateur of Burke, it is also a somewhat amateurish job.

Mr. Sheehan gives his quotations without page references, so we cannot readily check context or wider relevance. He does not even tell us what edition of Burke he uses, whether the 8-volume Bohn or the 12-volume Little, Brown recommended for British and American readers, respectively, by the Burke scholars at the "Burke Factory" in Sheffield (England), who are bringing out the definite 10-volume edition of the Burke correspondence.

But it is somewhat pointless to criticize a man because he hasn't done something he never intended doing anyway. Within his own design for an unpretentious book of Burke maxims and aphorisms, Mr. Sheehan has done well for the general reader. And he provides at least a jumping-off place for some who may discover a desire to go into the large Burke literature in a more searching way.

C. P. Ives*

* A.B. 1925, Brown University; M.A. 1938, Yale University; member of the Editorial Staff of The Sun, Baltimore. Editorial Board, Burke Newsletter.
### AUTHOR INDEX TO LEADING ARTICLES, COMMENTS AND BOOK REVIEWS

<table>
<thead>
<tr>
<th>Author</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Anderson, G. C. A.</td>
<td>Review of Roady, Jr., and Anderson (Editors), Professional Negligence</td>
<td>386</td>
</tr>
<tr>
<td>Bishop, Bird H.</td>
<td>Review of David, Administrative Law Text</td>
<td>185</td>
</tr>
<tr>
<td>Blair, C. Stanley</td>
<td>Review of Bartley and Bair, Jr., Mobile Home Parks and Comprehensive Community Planning</td>
<td>390</td>
</tr>
<tr>
<td>Byron, Goodloe E.</td>
<td>The Production and Admissibility of Government Records in Federal Tort Claims Cases</td>
<td>117</td>
</tr>
<tr>
<td>Cromwell, P. McEvoy</td>
<td>Liquidating Dividends Under the Maryland Income Tax</td>
<td>266</td>
</tr>
<tr>
<td>Cunningham, William P.</td>
<td>Subchapter S Corporations: Uses, Abuses and Some Pitfalls</td>
<td>195</td>
</tr>
<tr>
<td>Ives, C. P.</td>
<td>Review of Sheehan, Reflections With Edmund Burke</td>
<td>392</td>
</tr>
<tr>
<td>Kerr, Nelson Reed, Jr.</td>
<td>Review of Lumpkin, Confessions of a Criminal Lawyer</td>
<td>87</td>
</tr>
<tr>
<td>Kerr, Nelson Reed, Jr.</td>
<td>Review of Haskins, Law and Authority in Early Massachusetts</td>
<td>305</td>
</tr>
<tr>
<td>Kerr, Nelson Reed, Jr.</td>
<td>Review of Read and Welch, From Tin Foil to Stereo: Evolution of the Phonograph</td>
<td>307</td>
</tr>
<tr>
<td>Land, Aubrey C.</td>
<td>Lord Baltimore and the Maryland County Courts</td>
<td>133</td>
</tr>
<tr>
<td>Machen, Arthur W., Jr.</td>
<td>The Apportionment of Stock Distributions in Trust Accounting Practice</td>
<td>89</td>
</tr>
<tr>
<td>Owen, David R.</td>
<td>Review of Norris, The Law of Maritime Personal Injuries</td>
<td>382</td>
</tr>
<tr>
<td>Rhynhart, Allan W.</td>
<td>Notes on the Law of Landlord and Tenant</td>
<td>1</td>
</tr>
<tr>
<td>Wolf, G. Van Velsor</td>
<td>Post-Mortem Estate Planning, or The Maryland Executor's Eight Tax Returns</td>
<td>309</td>
</tr>
</tbody>
</table>

### TITLE INDEX TO LEADING ARTICLES

<table>
<thead>
<tr>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Apportionment of Stock Distributions in Trust Accounting Practice, The, Arthur W. Machen, Jr.</td>
<td>89</td>
</tr>
<tr>
<td>Lord Baltimore and the Maryland County Courts, Aubrey C. Land</td>
<td>133</td>
</tr>
</tbody>
</table>
Notes on the Law of Landlord and Tenant, Allan W. Rhynhart ................................................................. 1
Post-Mortem Estate Planning, or The Maryland Executor's Eight Tax Returns, G. Van Velsor Wolf ........... 309
Production and Admissibility of Government Records in Federal Tort Claims Cases, The, Goodloe E. Byron 117
Subchapter S Corporations: Uses, Abuses and Some Pitfalls, William P. Cunningham .................................. 195

TITLE INDEX TO EDITORIAL SECTIONS
The Editor's Page ........................................................................ 49, 141, 264, 337

TITLE INDEX TO COMMENTS AND CASENOTES
Automobile Driver Cannot be Held to a Normal Degree of Care Under Extraordinary Circumstances .......... 175
Best Evidence Rule — Unsigned Carbon Copy of Letter as Duplicate Original .............................................. 50
Civilian Dependents and Employees at Overseas Bases Not Subject to Court Martial Jurisdiction ............. 338
Continuing Corporate Liability for Federal Crime After State Dissolution of Corporation ......................... 69
Effect of Power of Revocation Vesting Subsequent to Execution of Deed of Trust on Measuring Period of Perpetuities ...................................................... 142
Effect of the Interrogatory Form on the Sufficiency of the Answer, The .................................................. 74
Estate Tax Deduction for an Entire Trust Containing Charitable Bequest with a Possible Diversion of Trust Income ........................................................................................................ 64
Extension of Absolute Privilege to Executive Officers of Government Agencies ......................................... 368
Governmental Records of Investigatory Nature Not Open to Public Inspection ........................................... 292
Grade or Class Provision as a Basis for Disqualification for Unemployment Compensation ....................... 59
Health Inspections of Private Homes ............................................................................................................ 345
Inheritance by and From Illegitimates Under Maryland Intestacy Law ......................................................... 276
Insurance — Right of Insurer to Subrogate to Collateral Contract Rights of the Insured .............................. 161
Liability of Municipal Corporations Under the State's Statutory Waiver of Tort Immunity ....................... 353
Liquidating Dividends Under the Maryland Income Tax ...................................................................... 266
Right of Owner of Personal Property to Challenge Assessments of Real Property .................................. 155
Scope of the President’s Power to Secure 80-Day Injunction Against Continuation of Steel Strike Under Labor Management Relations Act, Section 208 .................. 287
Sufficiency of Description in a Chattel Mortgage .................... 282
Time Limitations on Actions Against Administrators or Executors ............................................................................................................... 170
Unemployment Compensation — Recovery of Benefits Paid .......................................................................................................................... 363

TITLE INDEX TO BOOK REVIEWS

Administrative Law Text (Davis) — Bird H. Bishop.............. 185
Confessions of a Criminal Lawyer (Lumpkin) — Nelson Reed Kerr, Jr.......................... 87
From Tin Foil to Stereo: Evolution of the Phonograph (Read and Welch) — Nelson Reed Kerr, Jr.......................................................... 307
Law and Authority in Early Massachusetts (Haskins) — Nelson Reed Kerr, Jr.......................... 305
Law of Maritime Personal Injuries, The (Norris) — David R. Owen.......................... 382
Mobile Home Parks and Comprehensive Community Planning (Bartley and Bair, Jr.) — C. Stanley Blair 390
Professional Negligence (Roady, Jr., and Anderson (Editors)) — G. C. A. Anderson.......................... 386
Reflections with Edmund Burke (Sheehan) — C. P. Ives 392

INDEX TO CASES NOTED

Barr v. Matteo ........................................................................................................... 368
Bethlehem Steel Co. v. Board ............................................................................... 59
Britt v. Snyder ......................................................................................................... 74
Chandlee v. Shockley ............................................................................................ 170
Fitzpatrick v. Mercantile-Safe Deposit and Trust Co............. 142
Frank v. Maryland .................................................................................................. 345
Future Manufacturing Cooperative, Inc., In the Matter of ................................................................................................................................. 161
Grisham v. Hagan ................................................................................................... 338
Kinsella v. United States ..................................................................................... 338
McElroy v. United States ..................................................................................... 338
Melrose Distillers, Inc. v. United States ................................................................ 69
Mercantile-Safe Deposit and Trust Co. v. United States 64
National Can Company v. State Tax Commission ............. 155
Parr Construction Co. v. Pomer .............................................................................. 50
Penman v. Ayers ................................................................................................... 276
Phillips v. J. F. Johnson Lumber Company .................................................. 282
INDEX TO RECENT DECISIONS

Ackerman v. Port of Seattle................................................................. 184
Albert v. McGrath................................................................................ 375
Brigham v. F.C.C.................................................................................. 374
Butz v. State......................................................................................... 83
Chernin v. Progress Service Co............................................................ 86
Cohn v. Brecher................................................................................... 85
Commonwealth v. Garrison................................................................. 301
Commonwealth v. Moore..................................................................... 183
Commonwealth v. Root....................................................................... 299
Engel v. Vitale....................................................................................... 81
Fisher v. Bethesda Discount Corporation........................................... 181
Gray v. State......................................................................................... 302
Gregg v. Gregg..................................................................................... 299
Jakenjo, Inc. v. Blizzard......................................................................... 303
Liberto v. Holfeldt................................................................................ 379
Madway, In re..................................................................................... 298
Meding v. Robinson.............................................................................. 182
Monumental Engineering, Inc. v. Simon........................................... 380
Myers v. State Board of Public Welfare............................................. 375
Parker v. Parker.................................................................................... 378
People v. Scott..................................................................................... 180
Petropoulos v. Lubienski.................................................................... 377
San Diego Building Trades Council v. Garmon................................. 84
Second Church of Christ Scien. v. Philadelphia, Pa........................... 303
Sims v. United States........................................................................... 80
Solomon's Marina, Inc. v. Rogers........................................................ 300
State v. Finley...................................................................................... 180
State v. Padilla..................................................................................... 376
Warren v. Baltimore Transit Co.......................................................... 82