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RECENT CASES

ADMINISTRATIVE LAW—FINANCIAL RESPONSIBILITY ACT—REVOCATION OF DRIVER'S LICENSE WITHOUT HEARING

Petitioner was involved in an automobile accident while driving within the state and was unable to meet the security requirements of the California vehicle responsibility law.[1] Pursuant thereto the Department of Motor Vehicles suspended his driver's license without a hearing. Petitioner sought a writ of mandamus to compel reinstatement of the license. He attacked the constitutionality of the act, alleging that by its application he was denied due process of law. *Held* (5-2), petition denied. Suspension of a driver's license without a preliminary hearing but subject to subsequent judicial review is not a denial of due process. In view of the substantial number of financially irresponsible drivers, a hearing prior to suspension would burden if not defeat operation of the law. *Escobedo v. State Department of Motor Vehicles,* 35 Cal. 2d 870, 222 P.2d 1 (1950).

The right of a state to regulate its highways is well established.[2] In exercising this right, all but three states have enacted some type of financial responsibility legislation[3] which has generally been upheld as a valid exercise of the police power.[4] In upholding the constitutionality of the act in the

1. This act provided that every operator involved in an automobile accident resulting in personal injury or death, or more than $100 damage to property, must report the matter in writing to the Department of Motor Vehicles within ten days. Within sixty days after filing the report, each operator involved must deposit security sufficient, in the opinion of the department, to satisfy any judgment which may be recovered against the operator or the owner as a result of the accident. No deposit is necessary if the operator's potential liability is covered by sufficient, approved insurance. Failure to comply with the provisions results in suspension of the operator's driver license until such requirements are met or one year has passed without an action being filed against him. There is no express requirement for a hearing prior to suspension. CAL. VEHICLE CODE §§ 419-420.9 (1949).

2. Hodge Co. v. Cincinnati, 284 U.S. 335, 52 Sup. Ct. 144, 76 L. Ed. 323 (1932); Kane v. New Jersey, 242 U.S. 160, 37 Sup. Ct. 30, 61 L. Ed. 222 (1916) (city ordinance); Hendrick v. Maryland, 235 U.S. 610, 35 Sup. Ct. 140, 59 L. Ed. 385 (1915).

3. See THE PRESIDENT'S HIGHWAY SAFETY CONFERENCE, COMMITTEE LAWS AND ORDINANCE REPORT (1949). For complete statutory citations as of 1950, see Grad, *Recent Developments in Automobile Accident Compensation,* 50 COL. L. REV. 300, 307 n.24 (1950). See also Braun, *The Financial Responsibility Law,* 3 LAW & CONTEMP. PROB. 505 (1936); Feinsinger, *The Operation of Financial Responsibility Laws,* 3 LAW & CONTEMP. PROB. 519 (1936). Financial responsibility legislation similar to the California Act has recently been enacted in Tennessee. Tenn. Pub. Acts 1951, c.206. The Commissioner of Safety is authorized to suspend the driver's license of an operator involved in an accident who fails to meet the security requirements. (§ 4). The suspension is to be effective until the operator shows financial responsibility for the damages arising out of the accident, a final judgment of nonliability, is rendered or until after one year no action has been filed against him. (§ 5g). Upon the request of any person aggrieved by orders or acts of the Commissioner, a hearing will be provided, if the request is made within thirty days after the order or act (§ 2a).

4. State *ex rel.* Sullivan v. Price, 49 Ariz. 19, 63 P.2d 653 (1937); Watson v. State Division of Motor Vehicles, 212 Cal. 279, 298 Pac. 481 (1931); *In re* Opinion

instant case, the court based its decision on the doctrine allowing the legislature to authorize summary action subject to later judicial review of its validity when such a course is justified by compelling public interest.[5] While there is ample authority for this proposition,[6] an analysis of the cases decided upon the principle indicates that two factors are necessary for its application: (1) a danger to the public, and (2) a need for immediate action.[7] If there is a correlation between a financially irresponsible driver and one who presents an immediate danger to the public, the essential elements of the doctrine would seem to be present in the instant case.[8]

Generally, in determining the constitutionality of legislation revoking or suspending a license, the courts distinguish between those which grant a property or contractual right and those which confer a mere privilege.[9] However, the court in the instant case, apparently of the opinion that the nature of the right was immaterial in light of the "compelling public interest" present, failed to determine whether there was a property right or a mere privilege involved. In the absence of any question of public interest, the cases agree that if a license grants a property or contractual right, all elements of due process must be present upon suspension or revocation.[10] If, on the other hand, the license confers a mere privilege, it is surrounded by few legal protections.[11] A license to operate an automobile is held not to fall within

of The Justices, 251 Mass. 617, 147 N.E. 680 (1925); Surtman v. Secretary of State, 309 Mich. 270, 15 N.W.2d 471 (1944); Rosenblum v. Griffin, 89 N.H. 314, 197 Atl. 701 (1938); Garford Trucking Inc. v. Hoffman, 114 N.J.L. 552, 177 Atl. 882 (Sup. Ct. 1935); Jones v. Harnett, 247 App. Div. 7, 286 N.Y. Supp. 220 (1st Dep't 1936), *aff'd*, 271 N.Y. 626, 3 N.E.2d 455 (1936); Nutler v. State Road Commission, 119 W. Va. 312, 193 S.E. 549 (1937).

5. Yakus v. United States, 321 U.S. 414, 442, 64 Sup. Ct. 660, 88 L. Ed. 834 (1944).

6. Yakus v. United States, 321 U.S. 414, 442, 443, 64 Sup. Ct. 660, 88 L. Ed. 834 (1944); Anderson National Bank v. Luckett, 321 U.S. 233, 64 Sup. Ct. 599, 88 L. Ed. 629 (1944); Phillips v. Commissioner, 283 U.S. 589, 595-97, 51 Sup. Ct. 608, 75 L. Ed. 1298 (1931); United States v. Pfitsch, 256 U.S. 547, 41 Sup. Ct. 569, 65 L. Ed. 1084 (1921); Adams v. Milwaukee, 228 U.S. 572, 584, 33 Sup. Ct. 610, 57 L. Ed. 971 (1913); North American Cold Storage Co. v. Chicago, 212 U.S. 306, 29 Sup. Ct. 101, 53 L. Ed. 195 (1908).

7. See note 6 *supra*.

8. "There is no issue of immediate danger to the public health involved. . . . *The sole need is that a private person shall have security for the payment of any damages caused to him by another individual.*" 222 P.2d at 8 (Justice Carter dissenting) (italics in original).

9. GELLHORN, ADMINISTRATIVE LAW: CASES AND COMMENTS 274 (2d ed. 1947).

10. Abrams v. Daugherty, 60 Cal. App. 297, 212 Pac. 942 (1922); Riley v. Wright, 151 Ga. 609, 107 S.E. 857 (1921); Flood v. Mayor and Aldermen of Savannah, 25 Ga. App. 455, 103 S.E. 720 (1920); Abrams v. Jones, 35 Idaho 532, 207 Pac. 724 (1922); Kalman v. Walsh, 355 Ill. 341, 189 N.E. 315 (1934); People v. McCoy, 125 Ill., 289, 17 N.E. 786 (1888); Miller v. Johnson, 110 Kan. 135, 202 Pac. 619 (1921); State *ex rel.* Sholund v. Mayor and Common Council of Duluth, 125 Minn. 425, 147 N.W. 820 (1914); State v. State Medical Examining Board, 32 Minn. 324, 20 N.W. 238 (1884); *Ex parte* Heyfron, 7 How. (8 Miss.) 127 (1843); Balling v. Board of Excise of Elizabeth, 79 N.J.L. 197, 74 Atl. 277 (Sup. Ct. 1909); State v. Schultz, 11 Mont. 429, 28 Pac. 643 (1892).

11. See State v. Cote, 122 Me. 450, 120 Atl. 538 (1923) (license to take lobsters); Commonwealth v. Kinsley, 133 Mass. 578 (1882) (pool room license); Wallace v.

the category of a contractual right, but is regarded as only a privilege.[12] In view of this principle, it has been held in cases previous to the instant case where the question has been the same that there is no right to such a hearing prior to suspension.[13] It is to be noted, however, that the majority of these cases fall into two categories: (1) where the license was to operate a vehicle engaged in some occupation peculiar to state or municipal regulation,[14] or (2) where the operator has been adjudged negligent and an unsatisfied judgment is outstanding against him.[15] The court in the principal case has apparently extended the doctrine to any insolvent driver involved in an accident, before a judicial determination of fault, and without regard to the nature of the occupation.

The ultimate objective of financial responsibility laws providing for summary revocation of the operator's license is to remove financially irresponsible drivers from the highways as quickly as possible.[16] While this may be harmonious with the Constitution, the expense and loss of time imposed upon the operator who is compelled to resort to litigation to rectify an erroneous suspension or revocation, and in the meantime is without his driving privileges, seems to be unduly burdensome. Protection of both the licensee and the public would be assured if the administrator of the act in each case gave notice to the involved operator of temporary suspension pending opportunity to be heard on the question whether such suspension should continue.[17]

Mayor, etc. of Reno, 27 Nev. 71, 73 Pac. 528 (1903) (liquor license); People *ex rel.* Ritter v. Wallace, 160 App. Div. 787, 145 N.Y. Supp. 1041 (Sup. Ct. 1914) (dance hall license); Mehlos v. Milwaukee, 156 Wis. 591, 146 N.W. 882 (1914) (dance hall license).

12. Ruggles v. State, 120 Md. 553, 87 Atl. 1080 (1913); People v. Stryker, 124 Misc. 1, 206 N.Y. Supp. 146 (Sup. Ct. 1924); Commonwealth v. Funk, 323 Pa. 390, 186 Atl. 65 (1936); La Plante v. State Board of Public Roads, 47 R.I. 258, 131 Atl. 641 (1926); 1 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 211 (1948); 1-2 HUDDY, CYCLOPEDIA OF AUTOMOBILE LAW § 248 (9th ed. 1932); *see* Sullins v. Butler, 175 Tenn. 468, 472, 135 S.W.2d 930, 933 (1940); Sleeper v. Woodmansee, 11 Cal. App. 2d 595, 54 P.2d 519, 521 (1936). *Contra:* State v. Kouni, 58 Idaho 493, 76 P.2d 917 (1938); Law v. Commonwealth, 171 Va. 449, 199 S.E. 516 (1938).

13. Burgess v. Mayor and Aldermen of Brockton, 235 Mass. 95, 126 N.E. 456 (1920); Romaner v. Williams, 270 App. Div. 948, 62 N.Y.S.2d 497 (2d Dep't 1946); Mahaney v. Cisco, 248 S.W. 420 (Tex. Civ. App. 1922); *see* Nutler v. State Road Commission, 119 W. Va. 312, 193 S.E. 549, 552 (1937). See also BABBITT, MOTOR VEHICLE LAW § 327 (4th ed. 1933); 1-2 HUDDY, *op. cit. supra* note 11, § 248.

14. See Burgess v. Mayor and Aldermen of Brockton, 235 Mass. 95, 126 N.E. 456 (1920) (bus); Romaner v. Williams, 270 App. Div. 948, 62 N.Y.S.2d (2d Dep't 1946) (taxi); Mahaney v. Cisco, 248 S.W. 420 (Tex. Civ. App. 1922) (bus).

15. See Nutler v. State Road Commission, 119 W. Va. 312, 193 S.E. 549 (1937). While the question of a preliminary hearing was not litigated in the majority of the cases in which financial responsibility laws were upheld, all involved an unsatisfied judgment against the operator as a result of his negligence. See, *e.g.* State v. Price, 49 Ariz. 19, 63 P.2d 653 (1937); Rosenblum v. Griffin, 89 N.H. 314, 197 Atl. 701 (1938); Sullins v. Butler, 175 Tenn. 468, 135 S.W.2d 930 (1940).

16. For an extended discussion of financial responsibility legislation, see Wagner, *Safety Responsibility Laws; A Review of Recent Developments,* 9 GA. B.J. 160 (1946); 4 MIAMI L.Q. 502 (1950); 1 STAN. L. REV. 263 (1949).

17. See GELLHORN, *op. cit. supra* note 9, at 279.

CONSTITUTIONAL LAW—ECONOMIC REGULATION—STATE COURT INTERPRETATIONS OF SUBSTANTIVE DUE PROCESS

Plaintiffs, owning a self-service gas station, brought suit challenging the validity of a New Jersey statute prohibiting this method of retailing gasoline. The lower court found the statute valid. *Held* (5-2), affirmed. The statute is a valid exercise of police power to protect the health and safety of the people and is not violative of due process. *Reingold v. Harper,* 6 N.J. 182, 78 A.2d 54 (1951).

A hairdressing school in Massachusetts charged its voluntary models for materials used but not for services rendered in hairdressing and manicuring. The trial court by a declaratory decree held that a statute prohibiting any charge for the materials was unconstitutional. *Held,* affirmed. The statute violates state and federal substantive due process; there is no rational connection with the promotion of public health. *Mansfield Beauty Academy, Inc. v. Board of Registration of Hairdressers,* 96 N.E.2d 145 (Mass. 1951).

The Commissioner of Education, under authority of a section of the New York Education Law requiring his approval of the tuition charged by trade schools, refused to issue a license to plaintiff beauty school, which brought this action to contest the validity of the statute. The lower court dismissed the proceedings. *Held* (3-2), reversed. Tuition in a trade school is not "affected with a public interest," and any attempt to fix such tuition by statute is a violation of substantive due process as an unwarranted interference with individual liberty. *Grow System School v. Board of Regents,* 277 App. Div. 122, 98 N.Y.S.2d 834 (3d Dep't 1950).

The due process clause of the Fourteenth Amendment has been applied by the courts as a limitation on both the substance of state legislation and the procedure by which it is enforced.[1] In a recent survey of the effect of federal interpretation of due process as a substantive limitation of the state police power, it was concluded that the Supreme Court is tending to restore the Fourteenth Amendment to the use originally intended,[2] which is taken to be something other than a restriction on state regulation of economic

1. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 Sup. Ct. 652, 94 L. Ed. 865 (1950); Truax v. Corrigan, 257 U.S. 312, 42 Sup. Ct. 124, 66 L. Ed. 254 (1921); Adams v. Tanner, 244 U.S. 590, 37 Sup. Ct. 662, 61 L. Ed. 1336 (1917); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 15 L. Ed. 372 (1856).

2. CORWIN, LIBERTY AGAINST GOVERNMENT (1948). See, for chronological surveys, MOTT, DUE PROCESS OF LAW 71-192, 300-28 (1926) (development in England and the colonies); Corwin, *The Doctrine of Due Process Before the Civil War,* 24 HARV. L. REV. 366 & 460 (1910); Corwin, *The Supreme Court and the Fourteenth Amendment,* 7 MICH. L. REV. 643 (1909) (contemporary interpretation); Brown, *Due Process of Law, Police Power, and the Supreme Court,* 40 HARV. L. REV. 943 (1927) (emphasizes 1919-27 period); Harris, *Due Process of Law,* 42 AM. POL. SCI. REV. 32 (1948) (traces the concept from 1933 to 1947); Frank, *The United States Supreme Court: 1949-50,* 18 U. OF CHI. L. REV. 1 (1950) (contemporary interpretation of the latest term).

matters.[3] Courts, state and federal, have always declared that there is a presumption of constitutionality of substantive regulation as against the restrictions of the due process clause.[4] Statements may be found in practically any opinion, involving the constitutionality of an economic regulation, to the effect that the wisdom, expediency or policy of a police regulation does not give rise to a justiciable question. The courts, however, have differed widely in their application of these statements; and within the same court, during different periods, various attitudes have prevailed.

The Supreme Court, from about 1906 to 1937, generally required the challenger to show that the means adopted were not reasonably related to the ends desired, in order to overcome the presumption of constitutionality. In the *Carolene Products* case,[5] decided in 1938, the Court declared that it would strike down an economic regulation only if no state of facts, either known or reasonably to be assumed, existed to support it. The present court has said that it will upset substantive regulation only if it is "unreasonable" or "arbitrary."[6] By imposing such standards the Court has effected a shift in emphasis from the substantive to the procedural due process requirement, retaining its power under this clause.[7]

Contemporary concern has been shown over the fact that some state courts have not adopted the present federal substantive due process concept

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3. See Brandeis, J., dissenting, in Truax v. Corrigan, 257 U.S. 312, 354, 42 Sup. Ct. 124, 137, 66 L. Ed. 254, 272 (1921).

4. Some writers have said that the presumption of validity meant nothing as a rule; that the courts cited the presumption to support a statute and hold it constitutional, or else they proceeded to recite facts which destroyed the validity of the legislation in question, without reference to the presumption. There is no doubt but that the same conclusion could be reached in analyzing these cases, but it seems logical to consider all the cases as treating the presumption with equal reverence. The real problem is what the courts require to overcome the presumption of the court and the verdict of the legislature that the statute is constitutional. Warsoff, *The Weight of the Presumption of Constitutionality Under the Fourteenth Amendment,* 18 B.U.L. REV. 319 (1938).

5. United States v. Carolene Products Co., 304 U.S. 144, 152, 154, 58 Sup. Ct. 778, 82 L. Ed. 1234 (1938).

6. See, *e.g.,* Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 71 Sup. Ct. 215, 95 L. Ed. 190 (1950); Daniel v. Family Security Life Ins. Co., 336 U.S. 220, 69 Sup. Ct. 550, 93 L. Ed. 632 (1949). See FREUND, ON UNDERSTANDING THE SUPREME COURT c.1 (1949); Stern, *The Problems of Yesteryear—Commerce and Due Process,* 4 VAND. L. REV. 446 (1951).

7. The due process clause still has a broad scope in protecting against state action certain "fundamental" personal rights. Niemotko v. Maryland, 340 U.S. 268, 71 Sup. Ct. 325, 95 L. Ed. 267 (1951); Feiner v. New York, 340 U.S. 315, 71 Sup. Ct. 303, 95 L. Ed. 295 (1951). See Freund, *The Supreme Court and Civil Liberties,* 4 VAND. L. REV. 533 (1951).

But the Court has not denied the basic natural-law—due-process formula. Compare, however, Polk Co. v. Glover, 305 U.S. 5, 10, 59 Sup. Ct. 15, 83 L. Ed. 6 (1938) (dissenting opinion); and Adamson v. California, 332 U.S. 46, 89, 67 Sup. Ct. 1682, 91 L. Ed. 1903 (1947) (dissenting opinion). Mr. Justice Black wants to abandon the natural-law—due-process formula. His attitude is that to reform economic legislation the appeal of the individual should be to the ballot-box, not to the court. He would substitute the specific rights spelled out in the first eight amendments for the natural law.

as applied to statutes regulating economic activity.[8] The economic, social and political beliefs of some individual judges have tended to cause an overemphasis of substantive due process in many jurisdictions, where use of the outmoded "rcasonably related" test continues.[9] There is also a trend in some states toward relying solely upon the state constitutions.[10]

The principal cases indicate the current views of three leading state courts on the problem. The New Jersey court decided that the prohibition of this retailing method in the gasoline industry has a rational basis of fact that reasonably could be conceived to sustain it,[11] thus indicating an acceptance of the present federal substantive due process concept. The Massachusetts court uses the rational-basis test of the *Carolene Products* case, but apparently without the present Supreme Court's mcaning for the words "unreasonable" and "arbitrary." There is dictum to the effect that Massachusetts will consider the reasons underlying the passage of the statute and whether or not the thing prohibited tends to be in the public interest.[12] Perhaps it has not given up the spirit of the older federal decisions.[13] In the New York case, the court, relying on previous New York opinions to determine the constitutionality of the statute involved, applied the "affected with a public interest" test as laid down by Chief Judge Pound in 1933.[14] This could indicate that the New York courts are falling in line with the trend toward relying solely upon their own state constitution in determining the effect of the due process clause.[15]

8. Paulsen, *The Persistence of Substantive Due Process in the States,* 34 MINN. L. REV. 91 (1950).

9. *E.g.,* Illinois, Indiana, Massachusetts, New Jersey, Ohio, New York, Pennsylvania and most of the Southern states have frankly cited outmoded cases. Typical are: New State Ice Co. v. Liebmann, 285 U.S. 262, 52 Sup. Ct. 371, 76 L. Ed. 747 (1932) (based on laissez-faire theory that the state cannot choose any economic policy it wishes to pursue); Adams v. Tanner, 244 U.S. 590, 37 Sup. Ct. 662, 61 L. Ed. 1336 (1917) (court second-guesses the legislature).

10. See, *e.g.,* Liquor Store v. Continental Distilling Corp., 40 So.2d 371, 375 (Fla. 1949); Boomer v. Olsen, 143 Neb. 579, 10 N.W.2d 507 (1943) (refusing to follow a federal decision applying due process to the same statute).

11. This rational basis is the theory that static electricity is capable of igniting a combustible mixture, and it is produced when gasoline is poured from one receptacle to another. To prevent this, the metal nozzle at the end of the gasoline hose should be held in contact with any metal receptacle which is being filled with gasoline. 74 A.2d at 59. It is very likely no station attendant serving gasoline is familiar with this theory. See also Mutual Loan Co. v. Martell, 222 U.S. 225, 223, 32 Sup. Ct. 74, 75, 56 L. Ed. 175, 179 (1911) "Legislation cannot be judged by theoretical standards. It must be tested by the concrete conditions which induced it. . .").

12. 96 N.E.2d at 146. See Hanft and Hamrick, *Haphazard Regimentation Under Licensing Statutes,* 17 N.C.L. REV. 1 (1938).

13. New State Ice Co. v. Liebmann, 285 U.S. 262, 52, Sup. Ct. 371, 76 L. Ed. 747 (1932); Adams v. Tanner, 244 U.S. 590, 37 Sup. Ct. 662, 61 L. Ed. 1336 (1917).

14. People v. Nebbia, 262 N. Y. 259, 264, 186 N.E. 694, 696 (1933); *cf.,* Nebbia v. New York, 291 U.S. 502, 54 Sup. Ct. 505, 78 L. Ed. 940 (1934) (opinion by Mr. Justice Roberts).

15. People v. Railway Express Agency, 188 Misc. 342, 67 N.Y.S.2d 732 (Ct. Sp. Sess. 1947), *aff'd mem.,* 297 N.Y. 703, 77 N.E.2d 13 (1947) (applied the outmoded "reasonably related" test). *But cf.* People v. Barber, 289 N.Y. 378, 46 N.E.2d 329 (1943).

CONSTITUTIONAL LAW—EMINENT DOMAIN FOR SLUM CLEARANCE —EFFECT OF SALE OR LEASE OF PROPERTY TO PRIVATE PERSONS FOR REDEVELOPMENT

A slum clearance statute[1] provided for the creation of public agencies in communities where needed to bring about the redevelopment of "blighted areas." The agencies were to formulate redevelopment plans to be approved by the municipalities, to acquire slum and other necessary areas, to clear them and construct streets and other site improvements, and were empowered to sell or lease land so acquired to other public agencies or private persons for use in accordance with the redevelopment plan. Pursuant to this statute the Nashville Housing Authority was duly incorporated. In a declaratory judgment action the statute was challenged by the Authority as conferring special benefits on individuals.[2] *Held,* the statute is constitutional. Slum clearance is a public use even though a transfer to private ownership may be involved in the process. *Nashville Housing Authority v. Nashville,* 237 S.W.2d 946 (Tenn. 1951).

A public use or purpose is necessary to the validity of eminent domain proceedings, an integral part of slum clearance statutes.[3] The exact meaning of these terms has been the subject of much controversy. Fundamentally there are three views. Some courts, interpreting the words strictly, require an actual public user or ability to use.[4] A more liberal approach construes public use as public benefit or advantage.[5] The third view, and that toward which courts lean today, is somewhere between the two.[6] Slum clearance as a public use has not been tested to any great extent under the strict rule[7] but is

1. TENN. CODE ANN. §§ 3647.52 *et seq.* (Williams 1934).

2. The statute was also challenged as an unconstitutional delegation of legislative authority and an unconstitutional expenditure of public funds for private purposes. The court upheld the statute against both of these allegations. See Notes, 130 A.L.R. 1082 (1941), 172 A.L.R. 972 (1948), for collections of cases on these questions.

3. *In re* United States, 28 F. Supp. 758 (W.D.N.Y. 1939); United States v. 458.95 Acres of Land, 22 F. Supp. 1017 (E.D. Pa. 1937); Lamb v. California Water & Telephone Co., 121 P.2d 852 (Cal. App. 1942); Marvin v. Housing Authority of Jacksonville, 133 Fla. 590, 183 So. 145 (1938); Carroll v. Cedar Falls, 221 Iowa 277, 261 N.W. 652 (1935); Natcher v. Bowling Green, 264 Ky. 584, 95 S.W.2d 255 (1936); Crichton v. Lee, 209 La. 561, 25 So.2d 229 (1946).

4. See, *e.g.,* Cloth v. Chicago, R.I. & P. Ry., 97 Ark. 86, 132 S.W. 1005 (1910); Gravelly Ford Canal Co. v. Pope & Talbot Land Co., 36 Cal. App. 556, 178 Pac. 150 (1918); Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N.E. 465, 50 A.L.R. 1518 (1927); Howard Mills Co. v. Schwartz Lumber Coal Co., 77 Kan. 599, 95 Pac. 559 (1908); Paine v. Savage, 126 Me. 121, 136 Atl. 664 (1927).

5. See, *e.g.,* Tanner v. Treasury Tunnel, Mining & Reduction Co., 35 Colo. 593, 83 Pac. 464 (1906); Spahn v. Stewart, 268 Ky. 97, 103 S.W.2d 651 (1937); New York City Housing Authority v. Muller, 270 N.Y. 333, 1 N.E.2d 153 (1936); Dornan v. Philadelphia Housing Authority, 331 Pa. 209, 200 Atl. 834 (1938); Tennessee Coal, Iron & R.R. Co. v. Paint Rock Flume & Transportation Co., 128 Tenn. 277, 160 S.W. 522 (1913).

6. See 2 NICHOLS, EMINENT DOMAIN § 7.2[3] (3d ed., Sackman and Van Brunt, 1950) and cases cited therein. It is difficult to state the actual position of this compromise view.

7. See *In re* Opinion of the Justices, 211 Mass. 624, 98 N.E. 611 (1912), holding a housing project unconstitutional under the strict rule.

generally held constitutional under the other approaches.[8] The theory justifying the latter holding is that a public benefit results from the elimination of crime, disease, and other products of slum areas.[9]

So long as the public purpose is the principal basis for eminent domain proceedings, the fact that a private purpose is incidentally served in the process does not render the condemnation invalid.[10] Should the private use become primary, however, an incidental public use will not be sufficient to establish the validity of the proceedings.[11] Disposal of the property taken, even though to a private person, is valid once the public purpose is completed and the property is no longer needed therefor.[12]

Putting the redevelopment of blighted areas into the hands of private enterprise is not a completely new step in the law. As early as 1942 New York passed a statute so providing.[13] Since then similar statutes have been enacted in other states,[14] thus indicating a definite trend in this direction. There has been no set formula for such provisions. New York, for instance, acting under a constitutional amendment, declared slum clearance a public purpose and created private redevelopment corporations with the power of eminent domain in the hands of the municipalities.[15] Pennsylvania, with a statute which appears to have influenced the passing of the statute in the instant case,[16] set up public housing authorities to acquire and clear

8. Marvin v. Housing Authority of Jacksonville, 133 Fla. 590, 183 So. 145 (1938); Williamson v. Housing Authority of Augusta, 186 Ga. 673, 199 S.E. 43 (1938); Krause v. Peoria Housing Authority, 370 Ill. 356, 19 N.E.2d 193 (1939); Spahn v. Stewart, 268 Ky. 97, 103 S.W.2d 651 (1937); State *ex rel.* Porterie v. Housing Authority of New Orleans, 190 La. 710, 182 So. 725 (1938); Rutherford v. Great Falls, 107 Mont. 512, 86 P.2d 656 (1939); New York City Housing Authority v. Muller, 270 N.Y. 333, 1 N.E.2d 153 (1936); Wells v. Housing Authority of Wilmington, 213 N.C. 744, 197 S.E. 693 (1938); Dornan v. Philadelphia Housing Authority, 331 Pa. 209, 200 Atl. 834 (1938); McNulty v. Owens, 188 S.C. 377, 199 S.E. 425 (1938); 36 MICH. L. REV. 275 (1937).

9. Spahn v. Stewart, 268 Ky. 97, 103 S.W.2d 651 (1937).

10. "If the use for which land is taken by eminent domain is public, the taking is not invalid merely because an incidental benefit will enure to private individuals." 2 NICHOLS, EMINENT DOMAIN 447 (3d ed., Sackman and Van Brunt, 1950).

11. ROTTSCHAEFFER, CONSTITUTIONAL LAW 701 (1939). See also MILLS, EMINENT DOMAIN § 13 (2d ed. 1888). But see RANDOLPH, THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 39 (1894).

12. *In re* City of Rochester, 137 N.Y. 243, 33 N.E. 320 (1893); 2 NICHOLS, EMINENT DOMAIN § 7.223 (3d ed., Sackman and Van Brunt, 1950).

13. N.Y. REDEVELOPMENT COMPANIES LAW §§ 3401 *et seq.*

14. See, *e.g.*, ALA. CODE ANN. tit. 25, §§ 96 *et seq.* (Supp. 1949), upheld in Opinion of the Justices, 254 Ala. 343, 48 So.2d 757 (1950); ILL. ANN. STAT. c.32, §§ 550.1 *et seq.* (Supp. 1950), upheld in Zurn v. Chicago, 389 Ill. 114, 59 N.E.2d 18 (1945); PA. STAT. ANN. tit. 18a, §§ 1701 *et seq.* (1945); R.I. PUB. LAWS 1946, c.1802, §§ 1 *et seq.*, upheld in Opinion to the Governor, 69 A.2d 531 (R.I. 1949). But see McCord v. Housing Authority of Dallas, 234 S.W.2d 108 (Tex. Civ. App. 1950), which declares a slum clearance statute putting redevelopment into the hands of private enterprise unconstitutional, partly as having two purposes. See, in general, Miner, *Some Constitutional Aspects of Housing Legislation*, 39 ILL. L. REV. 305 (1945).

15. N.Y. CONST. Art. XVIII, §§ 1, 2; N.Y. REDEVELOPMENT COMPANIES LAW §§ 3401 *et seq.*

16. The instant case points out this fact. 237 S.W.2d at 950.

property and then convey to private persons for use in accordance with a redevelopment plan, compliance to be assured by covenants running with the land.[17] Illinois has gone even further by placing the power of eminent domain in the private redevelopment corporation itself.[18]

Two questions arise. First, what, if any, restrictions are placed on private enterprise in such redevelopment? Second, what will be the effect of this trend on the public use doctrine?

So far, all of the states have placed some limitations on conveyances to private persons for redevelopment. In Tennessee, for example, the uses of the land by private persons must conform to the redevelopment plan. This plan in turn must be approved by the municipality, must show its relationship to local objectives such as public improvements, and must indicate proposed land uses and building requirements in the area.[19] Other states require the private persons to conform to varying requirements of housing or redevelopment commissions.[20] These limitations render it unlikely that the land will be used unreasonably. However, the use is not necessarily limited to housing alone. Parks, hospitals, recreation centers and even industrial projects are not expressly beyond the scope of the use if they can be shown to be within the scope of redevelopment plans.[21] The mere fact that the enjoyment of the actual fruits of the project may be confined to a limited number does not destroy the public character of the improvement.[22]

Redevelopment of slum areas by private enterprise does not constitute an extension of the public use doctrine. It has been reasoned that when the slums are cleared the public use is completed and the property may be disposed of as seems best.[23] But even without this argument the benefit accruing to the public from slum clearance and redevelopment is sufficiently important to uphold eminent domain proceedings as not conferring private, special benefits of a primary nature.

The Tennessee Supreme Court has long since indicated a readiness to expand the public use doctrine to achieve such results should it be necessary.[24] Entrusting these activities to private enterprise perhaps represents a most effective method of attacking the slum threat to population centers, and this case evidences Tennessee's intent to follow the trend in that direction.

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17. PA. STAT. ANN. tit. 18a, §§ 1701 *et seq.* (1945).
18. ILL. STAT. ANN. c. 32, §§ 550.1 *et seq.* (Supp. 1950).
19. TENN. CODE ANN. §§ 3647.55, 3647.56 (Williams 1934).
20. See notes 13, 14 *supra.*
21. People *ex rel.* Tuohy v. Chicago, 394 Ill. 477, 68 N.E.2d 761 (1946); Schenck v. Pittsburgh, 364 Pa. 31, 70 A.2d 612 (1950).
22. Knoxville Housing Authority v. Knoxville, 174 Tenn. 76, 123 S.W.2d 1085 (1939).
23. Belovsky v. Redevelopment Authority of Philadelphia, 357 Pa. 329, 54 A.2d 277 (1947).
24. Ryan v. Terminal Co., 102 Tenn. 111, 50 S.W. 744 (1899).

CONSTITUTIONAL LAW—INTERGOVERNMENTAL RELATIONS—STATE SALES TAX ON INDEPENDENT CONTRACTOR DEALING WITH FEDERAL AGENCY WHOSE "ACTIVITIES" ARE EXEMPTED

Two corporations and their vendors sued the Commissioner of Finance and Taxation to recover sales and use taxes paid under protest, the United States filing a petition of intervention. The corporations are cost-type contractors engaged in the operation of Government owned atomic production facilities at Oak Ridge, Tennessee. From a judgment in favor of the Commissioner the plaintiffs appealed. *Held,* reversed. The Atomic Energy Act of 1946,[1] exempting "activities" of the commission from state and local taxation, precludes a state tax on the purchase and use of materials by cost-type contractors. *Carbide & Carbon Chemicals Corp. v. Carson,* 239 S.W.2d 27 (Tenn. 1951).

The doctrine of implied immunity[2] exempts the Federal Government and its agencies and instrumentalities from the burden of state and local taxation. Originally the theory was that the existence of a power to tax at all would potentially destroy the Federal Government. The idea now is that it would at least burden, impede and retard the Government in its operation.[3] However, this broad doctrine has been so greatly modified by judicial decision that its precise limits are rather obscure.[4] The more recent trend has been toward the elimination of the large class of tax-exempt persons and things.[5]

In recent years there has been an increasing number of governmental activities, many of which are carried out by independent contractors retained by the Government on a cost-plus-fixed-fee basis. Many of these contractors have claimed exemption from state sales and use taxes on the basis of the

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1. 60 STAT. 765 (1946), 42 U.S.C.A. § 1809(b) (Supp. 1951).

2. The theory underlying this doctrine is that a state may not unduly burden or impair the effective functioning of the Federal Government or its instrumentalities. There is no express language of this character in the Constitution, but it has been judicially developed as an inference from the necessities of a dual system of government. BLACK, CONSTITUTIONAL LAW § 159 (3d ed. 1910); ROTTSCHAEFER, CONSTITUTIONAL LAW 96-110 (1939); Powell, *Indirect Encroachment on the Federal Authority by the Taxing Power of the States,* 31 HARV. L. REV. 321 (1918); Notes, 140 A.L.R. 621, 622 (1942), 22 B.U.L. REV. 120, 122 (1942).

3. BLACK, CONSTITUTIONAL LAW § 159 (3d ed. 1910); ROTTSCHAEFER, CONSTITUTIONAL LAW 109-10 (1939).

4. *See* Tirrell v. Johnston, 86 N.H. 530, 171 Atl. 641, 649 (1934). See also Powell, *Indirect Encroachment on Federal Authority by the Taxing Power of the States,* 31 HARV. L. REV. 321, 322 (1918); Note, 140 A.L.R. 621, 622 (1942).

5. See Notes, 140 A.L.R. 621 (1942), 22 B.U.L. REV. 120 (1942), 51 YALE L.J. 482 (1942). "[I]t is apparent that not every person who uses his property or derives a profit, in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of the government within the meaning of the rule." Metcalf & Eddy v. Mitchell, 269 U.S. 514, 522, 46 Sup. Ct. 172, 70 L. Ed. 384 (1925).

doctrine of implied immunity.[6] Their contention was that the "economic burden" of the tax ultimately fell on the Federal Government, and it was therefore in effect a tax on the Federal Government. The leading case is *Alabama v. King & Boozer*,[7] in which the Supreme Court rejected the "economic burden" test[8] and held that a sales tax on the contractor's vendor is a normal cost borne by the Government. The *King & Boozer* case and others deciding the same question[9] emphasize the absence of a specific congressional exemption with respect to a tax on "cost-plus" contractors for the construction of Government projects.[10]

The court in the instant case found that these contractors in their relationship with the Government were independent contractors and not agents.[11] Despite this finding the court distinguished the present problem from that in the *King & Boozer* case on the theory that the Atomic Energy Act,[12] exempting the "activities" of the commission, provides a specific legislative exemption to the contractors. It was reasoned that since there was no need to pass legislation exempting the commission and since there is a presumption that Congress does not pass useless legislation, it must

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6. See, *e.g.*, Alabama v. King & Boozer Co., 314 U.S. 1, 62 Sup. Ct. 43, 86 L. Ed. 3, 140 A.L.R. 615 (1941); Trinityfarm Construction Co. v. Grosjean, 291 U.S. 466, 54 Sup. Ct. 469, 78 L. Ed. 918 (1934); Standard Oil Co. v. Lee, 145 Fla. 385, 199 So. 325 (1940); Standard Oil Co. v. Fontenot, 198 La. 644, 4 So.2d 634 (1941).

7. 314 U.S. 1, 62 Sup. Ct. 43, 86 L. Ed. 3 (1941).

8. The "economic burden" test condemns a state tax when applied so that the incidence of its economic burden is upon the Federal Government. Other tests that have received consideration are: (1) the "degree" test, under which the court attempts to determine whether a state tax affects the operations of the Federal Government directly or remotely; (2) the "discrimination" test, whereby the validity of a state tax is judged according to whether it discriminates against the Federal Government; (3) the "legal incidence" test, in which the court looks to see whether the legal incidence of a state tax is upon the Federal Government; and (4) what may be called the "Federal or governmental status" test, under which the right to immunity from state taxation depends upon the federal or governmental status of particular entities and operations affected by the tax. Note, 140 A.L.R. 621, 622 (1942).

9. Currey v. United States, 314 U.S. 14, 62 Sup. Ct. 48, 86 L. Ed. 9 (1941), a companion case to Alabama v. King & Boozer Co., *supra*, decided the same question and applied the same reasoning to a state use tax as the King & Boozer case did to a state sales tax.

10. See Note, 140 A.L.R. 621, 635 (1942).

11. Where this relationship is found to exist the trend has been to impose the tax in the absence of a clear and specific exemption. See *e.g.*, Alabama v. King & Boozer Co., 314 U.S. 1, 62 Sup. Ct. 43, 86 L. Ed. 3, 140 A.L.R. 615 (1941); Silas Mason Co. v. Tax Comm'r of Washington, 302 U.S. 186, 58 Sup. Ct. 233, 82 L. Ed. 187 (1937); Trinityfarm Construction Co. v. Grosjean, 291 U.S. 466, 54 Sup. Ct. 469, 78 L. Ed. 918 (1934); Standard Oil Co. v. Lee, 145 Fla. 385, 199 So. 325 (1940); Boeing Airplane Co. v. State Comm'r of Rev. & Taxation, 153 Kan. 712, 113 P.2d 110 (1941); Standard Oil Co. v. Fontenot, 198 La. 644, 4 So.2d 634 (1941). *But cf.* Graves v. Texas Co., 298 U.S. 393, 56 Sup. Ct. 818, 80 L. Ed. 1236 (1936); Panhandle Oil Co. v. Mississippi, 277 U.S. 218, 48 Sup. Ct. 451, 72 L. Ed. 857 (1928).

12. ". . . The Commission and the property, activities and income of the commission, are hereby expressly exempted from taxation in any manner or form by any state, county, municipality, or any subdivision thereof." 60 STAT. 765 (1946), 42 U.S.C.A. § 1809(b) (Supp. 1951).

have meant by this provision to exempt the contractors.[13] The decision appears contrary to the modern trend towards the elimination of the large class of tax-exempt persons and things.

The general rule is that tax statutes will be construed strictly in favor of the taxpayer.[14] When a statute purports to grant an exemption from taxation, however, the normal rule of construction is to construe the exemption provision strictly against the one asserting the claim of exemption, in the absence of any expression of legislative intent to the contrary.[15] There is an exception to the latter rule as to public property. If a state purports to levy a tax on public property, the rule of construction is to construe the exemption liberally in favor of the one claiming the exemption.[16] However, an examination of the provisions of the contracts in the instant case indicates that the property purchased by these contractors was not public property. They provide that title to articles acquired under the contracts should pass to the Government at a point designated by the Government contracting officer.[17] The provisions of the contracts and the procedure for transferring the goods to the Government closely resemble those of the *King & Boozer* case, in which it was found that the vendor first transferred title to the contractors who later transferred title to the Government.[18]

Had Congress wished to exempt these contractors, it would have been a simple matter for it to have done so by using explicit language to that effect. In the absence of such language it is difficult to assume that Congress intended to depart from a well established policy.

CRIMINAL LAW—EFFECT OF PROOF OF COMPLETED CRIME ON CHARGE OF ATTEMPT—FATAL VARIANCE

Defendant was charged with the crime of attempting to procure an abortion. The prosecuting witness had slipped on a stairway but had not fallen. Undisputed testimony offered by the defendant indicated that the defendant's acts performed on the prosecutrix rather than her accident caused the miscarriage. Defendant was convicted for the attempt and appealed. *Held,* reversed. Under the Illinois statute, attempting to procure an abortion

13. 239 S.W.2d at 37. The dissent emphasized that it is only by implication that the majority of the court reached the conclusion that Congress intended to exempt these contractors. 239 S.W.2d at 39.

14. 2 COOLEY, TAXATION § 503 (4th ed. 1924).

15. *Id.* § 672; Baker, *Tax Exemption Statutes,* 7 TEXAS L. REV. 385, 388 (1929).

16. 2 COOLEY, TAXATION § 673 (4th ed. 1924); Baker, *Tax Exemption Statutes,* 7 TEXAS L. REV. 385 (1929).

17. 239 S.W.2d at 32.

18. Alabama v. King & Boozer Co., 314 U.S. 1, 9, 63 Sup. Ct. 43, 86 L. Ed. 3 (1941).

and causing an abortion are two distinct crimes. It is fatal variance to charge an attempt when the proof indicates that the crime was completed. *People v. Stanko,* 95 N.E.2d 861 (Ill. 1951).

An attempt at common law consisted of two elements: (1) intent to commit the crime; (2) an act looking towards and coming dangerously close to the completion of the crime. The act had to be ineffectual.[1] Thus it was generally held that where there was a charge of attempt and the proof established the completed crime, there had to be an acquittal.[2] The position of Professor Beale is indicative of the view stressing individual rights at the turn of the century. "If an attempt succeeds it cannot be punished as an attempt; for in the nature of things a mere attempt must be unsuccessful."[3] The rule seems to be based on pure logic.

Most states that have been confronted with this understandably infrequent situation have shown a strong tendency in the last 35 years to abandon the common law doctrine, either by statute or judicial decision.[4] In 1928 the Michigan Supreme Court expressly refuted the Illinois and common law rule, stating that it was not a general rule and would not be recognized in that jurisdiction.[5] The new Uniform Code of Military Justice, which became effective May 31, 1951, expresses the latest view. It provides, "An accused may be convicted on an attempt to commit an offense although it appears at the trial that the crime was consummated."[6] Both New York[7] and California[8] have statutes similar to the Uniform Code. The modern trend is based primarily upon the propositions that a defendant suffers no injury or prejudice by this result, and that the same evidence is involved in proving both the attempt and the completed crime.[9]

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1. United States v. Quincy, 6 Pet. 445 (U.S. 1832) (unlawful fitting out of an armed vessel); Kelsey v. State, 62 Ga. 558 (1879) (rape); People v. Lardner, 300 Ill. 264, 133 N.E. 375, 19 A.L.R. 721 (1921) (larceny); WHARTON, CRIMINAL LAW 279 (12th ed. 1932); 14 AM. JUR., *Criminal Law* § 65 (1938); CLARK AND MARSHALL, CRIMES 157 (4th ed. 1940).

2. People v. Lardner, 300 Ill. 264, 133 N.E. 375, 19 A.L.R. 721 (1921). See Beale, *Criminal Attempts,* 16 HARV. L. REV. 491 (1903).

3. Beale, *supra* note 2, at 507.

4. See notes 6, 7, 8, 11 *infra.*

5. People v. Baxter, 245 Mich. 229, 222 N.W. 149 (1928) (bribery); *see* People v. Bradovich, 305 Mich. 329, 9 N.W.2d 560, 561 (1943) (larceny). See MICH. STAT. ANN. § 28.984 (1938).

6. 64 STAT. 134 (1950), 50 U.S.C.A. § 674 (Supp. 1950). The broad authority on which this code is based is the Constitution and International Law.

7. N. Y. PEN. LAW § 260. See People v. Wasserbach, 184 Misc. 589, 54 N.Y.S2d 302 (Co. Ct. 1945), *rev'd on other grounds,* 271 App. Div. 756, 64 N.Y.S.2d 703 (2nd Dep't 1946). The court said this provision does not deprive the defendant of his right to dismiss the indictment before trial.

8. CAL. PEN. CODE § 663 (1949) (enacted 1872). *Cf.* People v. McConnell, 80 Cal. App. 789, 252 Pac. 1068 (1927) (burglary); People v. Vanderbilt, 199 Cal. 461, 249 Pac. 867 (1926) (sodomy); People v. Horn, 25 Cal. App. 583, 144 Pac. 641 (1914) (rape).

9. Note 18 *infra.*

It is the theory in most recent cases that an attempt is merged with the completed crime. The two are not so distinct as to be incapable of merger. What little primary authority there is in Tennessee indicates that the courts would probably include the attempt within the completed crime.[10] This same indication is evidenced in other states by decisions upholding convictions for attempt where the completed crime was charged.[11] The Federal Rules of Criminal Procedure provide that an attempt is part of the offense.[12]

The Illinois court interprets the abortion statute[13] in the instant case to mean that "causing an abortion and attempting to procure an abortion are separate and distinct offenses."[14] Three cases[15] are cited to support the holding. They all deal with the problem of indictment for the crime and conviction for the attempt. One of the cases cited[16] actually upheld the conviction, and the whole tenor of the opinion was against the reasoning in the present case. Other Illinois statutes have been interpreted by the court as merging the attempt in the crime.[17] Had the court in the instant case desired to follow the modern trend it could have found some support in its own decisions.

Difficulties in reasoning arise in trying to understand how the actual physical elements of attempt are not included in the completed crime. The

10. *See* Rice v. State, 166 Tenn. 571, 64 S.W.2d 19 (1933) (bank robbery).

11. See, *e.g.*, Blakeney v. State, 244 Ala. 262, 13 So.2d 430 (1943) (larceny); Rogers v. State, 22 Ala. App. 410, 117 So. 409 (1928) (illegal manufacture of whisky); Compton v. People, 84 Colo. 106, 268 Pac. 577 (1928) (aid in escaping prison); Foster v. State, 70 Ga. App. 305, 28 S.E.2d 81 (1943) (illegal sale of whisky); Acton v. State, 201 Ind. 686, 171 N.E. 197 (1930) (rape); State v. Allen, 163 Kan. 374, 183 P.2d 458 (1947) (rape); Nider v. Commonwealth, 140 Ky. 684, 131 S.W. 1024, Ann. Cas. 1913E 1246 (1910) (rape); Petition of Carson, 144 Me. 132, 39 A.2d 756, (indecent liberties with a female child) (1944); State v. Miller, 322 Mo. 1199, 18 S.W.2d 492 (1929) (felonious stealing); State v. Batson, 220 N.C. 411, 17 S.E.2d 511, 139 A.L.R. 614 (1941) (barratry); State v. Schwarzbach, 84 N.J.L. 268, 86 Atl. 423 (1913) (adultery); State v. Baltimore, 90 Ohio St. 196, 107 N.E. 334 (1914) (rape); State v. Prince, 75 Utah 205, 284 Pac. 108 (1930) (extortion); Lee v. Commonwealth, 144 Va. 594, 131 S.E. 212 (1926) (murder); State v. Collins, 108 W. Va. 98, 150 S.E. 369, (1929) (rape).

12. FED. R. CRIM. P. 31(c).

13. "Whoever, by means of an instrument, medicine, drug or other means whatever, causes any woman, pregnant with child to abort or miscarry, or attempts to procure or produce an abortion or miscarriage, unless the same were done as necessary for the preservation of the mother's life, shall be imprisoned in the penitentiary not less than one year nor more than ten years; or if the death of the mother results therefrom, the person causing the abortion or miscarriage shall be guilty of murder." ILL. ANN. STAT. c. 38, § 3 (1935).

14. 95 N.E.2d at 862.

15. People v. Hagenow, 334 Ill. 341, 166 N.E. 65 (1929) (murder by abortion); People v. Heisler, 300 Ill. 98, 132 N.E. 802 (1921) (murder by abortion); Clark v. People, 224 Ill. 554, 79 N.E. 941 (1906) (murder by abortion).

16. Clark v. People, *supra* note 15. Carter J. states: "It is evident that the information demanded by the indictment does not require it to be given with technical minuteness, but only with that reasonable accuracy and clearness that will apprise the defendant of what he is charged." 79 N.E. at 943.

17. See, *e.g.*, People v. Katz, 356 Ill. 440, 190 N.E. 913 (1934) (forgery).

absence of reality in such a proposition has been recognized in this country for many years,[18] and the scarcity of cases on this particular situation during the last two decades might indicate that in most jurisdictions attorneys no longer regard the common law rule as a defense. Why should the state be penalized and the defendant benefited when the latter happens to be successful in a criminal attempt, especially when, as in this case, the success or failure of the acts was determinable only at the trial by expert testimony? The state had no apparent means of knowng whether to charge the attempt or the crime. These instances might have afforded a basis for upholding the decision of the lower court here and for the abandonment of a precedent that increases the expense and time of litigation without a corresponding enhancement of criminal justice and efficiency.

FEDERAL JURISDICTION—FORUM NON CONVENIENS—STAY OF FEDERAL ACTION PENDING STATE DECISION

Duke Laboratories sued Beiersdorf in the state court of Connecticut asking for a declaratory judgment that certain trade-marks issued to Beiersdorf were the property of Duke and consequently could not have been infringed by it. Two months later Beiersdorf sued Duke in the Federal District Court for the Southern District of New York for infringement of trade-marks and unfair competition. Duke moved for a transfer to the Federal District Court of Connecticut or in the alternative for a stay of these proceedings in the federal court. Judge McGohey ordered a stay of the federal court action pending determination of the state court proceeding. Beiersdorf then petitioned the court of appeals for leave to file a petition for a writ of mandamus to compel Judge McGohey to vacate the stay order. *Held* (2-1),[1] petition for writ of mandamus denied. *P. Beiersdorf & Co., Inc., v. McGohey, Judge,* 187 F.2d 14 (2d Cir. 1951).

The majority opinion by Judge Jerome Frank in the instant case[2] is based on what he calls the "sweeping rationale" of the case of *Mottolese v. Kaufman,*[3] where he wrote a strong dissent. He does not in his present opinion further enlarge on the meaning of this "sweeping rationale."

18. See People v. Horn, 25 Cal. App. 583, 144 Pac. 641, 645 (1914), where Hart, J., states ". . . evidence of its perpetration necessarily involves evidence of an attempt to perpetrate it, for it is not conceivable that any crime can be committed in the absence of an attempt to commit it."

1. Opinion by Frank, J. (Chase, J. concurring); dissenting opinion by Clark, J.

2. Though he wrote the majority opinion, Judge Frank disagrees with the result, "hoping that the Supreme Court, recognizing an intra-circuit conflict, will grant review and reverse this decision. . . ." 187 F.2d at 15.

3. 176 F.2d 301 (2d Cir. 1949).

In the *Mottolese* case two stockholders' derivative suits in federal courts were stayed pending the determination by a state court of a consolidated action against the same defendants on behalf of the same corporation. The stay order was held on appeal to be a proper exercise of the federal court's discretion to stay. This discretion was based on the familiar doctrine of *forum non conveniens,*[4] whereby a court may refuse to exercise existing jurisdiction because it finds it more convenient or less expensive for the action to be tried elsewhere.[5] While a party urging the stay had to show "some positive reason" why the federal plaintiff's choice of a forum was not a good one, the fact that "equity has always interfered to prevent multiplicity of suits" is reason enough for the court to grant a stay in the absence of any showing by the plaintiff that the eventual decision could be reached faster in the federal court, or that the requirement that plaintiff sue in a state court would deprive him of procedural advantages.[6]

The instant case presents an opportunity to determine what effect the holding in the *Mottolese* case has outside of the particular fact situation there.[7] Particularly, the question is whether the court in the instant case should have considered itself completely bound by the *Mottolese* holding.[8] The particular application given to the doctrine of *forum non conveniens* by the court in the *Mottolese* case is rather broad and was vigorously criticized in the dissenting opinion.[9] The federal jurisdiction in *Mottolese* arose out of the diversity of citizenship provison in the Judicial Code.[10] However, this is quite another matter from a suit for trade-mark infringement and unfair

4. The court pointed out that Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 Sup. Ct. 839, 91 L. Ed. 1055 (1947); and Koster v. (American) Lumbermen's Mutual Casualty Co., 330 U.S. 518, 67 Sup. Ct. 828, 91 L. Ed. 1067 (1947), establish the doctrine of *forum non conveniens* insofar as one federal court may stay its own proceedings where the action could have been brought more conveniently in another federal court. This doctrine has now been codified, with provisions for transfer. 28 U.S.C.A. § 1404(a) (1950). These cases, then according to Judge Hand, are authority for the proposition ". . . that a federal action depending on diverse citizenship is always subject to the plea, *forum non conveniens;* and from these it follows that a federal suit, which has been brought after a state suit, may be stayed, for we can see no difference in kind between the inconveniences which may arise from compelling a defendant to stand trial at a distance from the place where the transactions have occurred, and compelling him to defend another action on the same claim." Mottolese v. Kaufman, 176 F.2d 301, 303 (2d Cir. 1949).

5. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 Sup. Ct. 839, 91 L. Ed. 1055 (1947); Koster v. (American) Lumbermen's Mutual Casualty Co., 330 U.S. 518, 67 Sup. Ct. 828, 91 L. Ed. 1067 (1947).

6. Mottolese v. Kaufman, 176 F.2d 301, 303 (2d Cir. 1949).

7. This question has been previously posed: 63 HARV. L. REV. 893 (1950); 25 IND. L.J. 365 (1950).

8. *But cf.* Judge Clark's dissent: ". . . I should regard it as a highly novel proposition that a minority of a large court, not sitting *en banc,* could bind all not merely on points actually decided, but upon possibilities not briefed or argued or carefully analyzed in any concrete setting." 187 F.2d at 17.

9. Mottolese v. Kaufman, 176 F.2d 301, 307 (2d Cir. 1949) (dissenting opinion by Judge Frank); 38 GEO. L.J. 303, 304-05 (1950).

10. 28 U.S.C.A. § 1332 (1949).

competition, based on the federal statute[11] where the jurisdiction of federal courts is exclusive of that of state courts.[12] This distinction between the two cases would furnish a basis for the court in the instant case to avoid the sweeping rationale of *Mottolese* as it pertains to the doctrine of *forum non conveniens*.

There does not seem to be any authority for the proposition that a federal action should be stayed pending a state action for the sole reason that this is in conformity with the policy against multiplicity of suits. It is true that oppressiveness and vexation to the defendant may be important considerations for the court in exercising its discretion,[13] but no such facts are asserted in either the *Mottolese* or the *Beiersdorf* cases. By way of analogy, the Supreme Court has stated with regard to a federal court's exercising its general equity powers that "Where the multiplicity of suits to be feared consists in repetitions of suits by the same person against the plaintiff for causes of action arising out of the same facts and legal principles, a court of equity ought not to interfere upon that ground unless it is clearly necessary to protect the plaintiff from continued and vexatious litigation."[14] Along this same line, it might be noted that the usual situation where vexatious litigation occurs is where the plaintiff, with one action pending, brings suit in another court on the same facts. In the instant case the plaintiff was being sued as a defendant in the state court.

The doctrine espoused by Judge Learned Hand in *Mottolese* was attacked in the dissenting opinion there on grounds that the defendant himself

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11. 28 U.S.C.A. § 1338 (1950).

12. 28 U.S.C.A. § 1338(a) (1950).

13. Koster v. (American) Lumbermen's Mutual Casualty Co., 330 U.S. 518, 67 Sup. Ct. 828, 91 L. Ed. 1067 (1947). Other facts may be shown to influence the court in its discretion. These facts may show advantages in one forum or the other to the court itself. Thus in Koster v. (American) Lumbermen's Mutual Casualty Co., *supra*, the court points out that a plaintiff's choice can be ". . . inappropriate because of considerations affecting the court's own administrative and legal problems." *Cf.* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-9, 67 Sup. Ct. 839, 91 L. Ed. 1055 (1947). More generally, however, the examination is made with regard to the comparative advantages to the parties themselves. In certain situations a design by one party merely to frustrate the other will be foiled. See Brendle v. Smith, 46 F. Supp. 522 (S.D.N.Y. 1942), 59 YALE L.J. 991 (1950). A considerable economic waste involved in two trials of the same cause of action will be considered. Butler v. Judge of U.S. District Court, 116 F.2d 1013, 1016 (9th Cir. 1941); P. Beiersdorf & Co. v. Duke Laboratories, Inc., 92 F. Supp. 287, 288 (S.D.N.Y. 1950); *cf.* Crosley Corp. v. Hazeltine Corp., 122 F.2d 925, 930 (3d Cir. 1941). And both substantive and procedural consequences to one or both parties may be considered. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 67 Sup. Ct. 839, 91 L. Ed. 1055 (1947) (procedural); Langnes v. Green, 282 U.S. 531, 51 Sup. Ct. 243, 75 L. Ed. 520 (1931) (substantive); Mottolese v. Kaufman, 176 F.2d 301 (2d Cir. 1949) (procedural); Brendle v. Smith, 46 F. Supp. 522 (S.D.N.Y. 1942) (substantive).

14. Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U.S. 276, 286, 29 Sup. Ct. 426, 53 L. Ed. 796 (1909). See also, DiGiovanni v. Camden Fire Insurance Ass'n, 296 U.S. 64, 70-72, 56 Sup. Ct. 1, 80 L. Ed. 47 (1935); Union Central Life Ins. Co. v. McAden, 21 F. Supp. 110, 112 (N.D. Tex. 1937).

was responsible for the failure to consolidate the two federal court actions.[15] However, the *Mottolese* case should be distinguished from *Beiersdorf* since in the latter there was only one other suit considered by the court in ordering its stay.[16] Judge Frank's refusal to distinguish *Mottolese* from *Beiersdorf* means that every case where a court would be asked to stay the action before it, pending the determination of a state suit, would necessarily involve multiplicity. This seems contrary to Judge Hand's intentions in *Mottolese,* where he contemplates that at least some federal actions would be allowed to continue.[17]

Furthermore, the interpretation of *Mottolese* urged by Judge Frank puts the burden of proving convenience upon the plaintiff, rather than putting the burden of proving inconvenience upon the defendant, as is urged by some very respectable authorities, including the United States Supreme Court.[18] There would seem, then, to be considerable ground for distinguishing the instant case from *Mottolese v. Kaufman,* both on the application of the doctrine of *forum non conveniens,* and on the use of "multiplicity of suits" as a criterion for determining whether a stay order was proper.

INSANE PERSONS—COMMITMENT PROCEEDINGS—REQUIREMENT OF REASONABLE NOTICE

Petitioner's family instituted proceedings to have him committed to the State Mental Hospital. Upon recommendation of his family, notice was not served upon him until two hours before the time set for the hearing. At the hearing, the court appointed an attorney to represent petitioner and upon the evidence he was adjudged violently insane and his commitment was ordered. Alleging a lack of proper notice, petitioner sought writ of habeas corpus. *Held,* the two-hours notice given to petitioner was reasonable under the circumstances. *Kleinschmidt v. Hoctor,* 233 S.W.2d 649 (Mo. 1950).

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15. See Mottolese v. Kaufman, 176 F.2d 301, 307 (2d Cir. 1949).

16. Actually there were two suits between the same parties in the instant case other than the suits heretofore concerned, one being to compel arbitration of a contract, P. Beiersdorf & Co. v. Duke Laboratories, Inc., 94 N.Y.S.2d 18 (Sup. Ct. 1949), *aff'd mem.,* 277 App. Div. 768, 97 N.Y.S.2d 538 (1950), *aff'd mem.,* 301 N.Y. 707, 95 N.E.2d 55 (1950); and another still in litigation in Connecticut against the officers of the Beiersdorf Company. Neither of these was apparently considered pertinent to the discussion by the writer of the majority opinion in the court of appeals or the opinion of the district court. Likewise, neither would be affected by the court's action in staying the proceeding in the federal district court.

17. Mottolese v. Kaufman, 176 F.2d 301, 302 (2d Cir. 1949).

18. Landis v. North Am. Co., 299 U.S. 248, 255-56. 57 Sup. Ct. 163, 81 L. Ed. 153 (1936); Koster v. (American) Lumbermen's Mutual Casualty Co., 330 U.S. 518, 524, 67 Sup. Ct. 828, 91 L. Ed. 1067 (1947); Ratner v. Paramount Pictures, Inc., 46 F. Supp. 339, 340 (S.D.N.Y. 1942); *cf.* Brillhart v. Excess Insurance Co., 316 U.S. 491, 500, 62 Sup. Ct. 1173, 86 L. Ed. 1620 (1942) (dissent by Justice Stone); Mottolese v. Kaufman, 176 F.2d 301, 306 (2d Cir. 1949) (dissent by Judge Frank).

The primary purpose of notice in a sanity hearing is to enable a person to be present at the hearing and to be prepared to protect his interests.[1] The requirement of notice in criminal proceedings where the accused's sanity is to be determined is definitely established. But in noncriminal proceedings for commitment of insane persons, the courts are not in agreement as to the necessity for notice.[2]

Until recently, the safeguards provided by law for the protection of the personal liberty of the alleged insane were few, and only in the last 25 years have the various state legislatures given the problem careful consideration.[3] Jury trial,[4] right to counsel[5] and due and reasonable notice to the accused[6] have been provided for by statute. These were claimed to be essential requirements of due process set forth by both state and federal constitutions. The need for reasonable notice, however, has seemed to provide the greatest impetus for legislation, and at the present time practically every state has considered the problem. An analysis of the legislation regarding notice before hearing to the alleged insane person reveals that a majority of the states provide for some form of notice,[7] while in a few none is required.[8] The statutes in these latter states generally have been upheld as constitutional.[9]

Where the statutory requirement is "reasonable notice," the courts are not in agreement as to what "reasonableness" satisfies due process.[10] The Supreme Court, along with various state courts, has said that it is largely

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1. See A REPORT TO THE GOVERNORS' CONFERENCE, THE MENTAL HEALTH PROGRAM OF THE FORTY-EIGHT STATES 61 (1950).

2. See Weihofen and Overholser, *Commitment of the Mentally Ill*, 24 TEXAS L. REV. 307 (1946).

3. See Note, 56 YALE L.J. 1197 (1947).

4. Johnson v. Nelms, 171 Tenn. 54, 100 S.W.2d 648 (1937).

5. TEX. REV. CIV. STAT. ANN. art. 5550 (1925).

6. See, *e.g.*, United States *ex rel.* Grove v. Jackson, 16 F. Supp. 126 (M.D. Pa. 1936); Rice v. Gray, 225 Mo. App. 890, 34 S.W.2d 567-71 (1931); Brewer v. Griggs, 10 Tenn. App. 378 (M.S. 1929).

7. See, *e.g.*, ARIZ. CODE ANN. § 8-301 (1939) (reasonable notice); CAL. PROB. CODE ANN. § 1461 (1949) (five days notice); MICH. STAT. ANN. § 14811 (Supp. 1947) (24 hours). Tennessee specifically provides for five days personal notice, informing the alleged incompetent of the time and place of hearing. TENN. CODE ANN. § 9626 (Michie 1938); Brewer v. Brewer, 19 Tenn. App. 209, 84 S.W.2d 1022 (M.S. 1933). See also, Brewer v. Griggs, 10 Tenn. App. 378 (M.S. 1929).

8. See *e.g.*, COLO. STAT. ANN. c.105, § 3 (1935); NEB. REV. STAT. § 83-325 (Supp. 1949); Corcoran v. Jerrel, 185 Iowa 532, 170 N.W. 776, 2 A.L.R. 1579 (1919); *cf.* State *ex rel.* Sathre v. Roberts, 67 N.D. 92, 269 N.W. 913, 919 (1936). See Note, 2 A.L.R. 1582 (1919).

9. Paul v. Longino, 197 Ga. 110, 28 S.E.2d 286 (1943). *Compare* Hiatt v. Souce, 240 Iowa 300, 36 N.W.2d 432 (1949), *with* Chavannes v. Priestly, 80 Iowa 316, 45 N.W. 766, 9 L.R.A. 193 (1890).

10. For a general discussion see Weihofen and Overholser, *Commitment of the Mentally Ill*, 24 TEXAS L. REV. 307, 319 (1946); Note, 3 STAN. L. REV. 109, 117 (1950).

a discretionary matter to be determined by the particular court on the facts of each case.[11] In several cases the courts have been inclined to construe the expression favorably to the person whose sanity is in question and to require strict compliance with the requirements.[12] Thus it has been held that notice is not legally served by the mere reading of it to the person by a nurse in the state mental hospital, when the statute required service by the sheriff;[13] and that where statutory service was not complied with, appearance of an attorney appointed by the court to represent the alleged insane person did not satisfy the requirement of notice.[14] In the few states prescribing a definite statutory period, the requirements vary from 24 hours to three days.[15]

When it is found as a fact, preliminary to the actual hearing, that the person to be committed is violently insane, the majority view allows immediate commitment without notice, pending a later judicial inquiry.[16] The commitment order, however, must show either that proper notice was given or that notice was properly dispensed with because of violent insanity.[17]

In the present case the evidence indicated that the petitioner was violently insane.[18] Despite this fact, the majority opinion reasoned that two hours was "reasonable notice" under the circumstances.[19] The dissent argues that a lax interpretation of the provision in the commitment statute requiring reasonable notice will enhance the possibility of "railroading" sane persons into mental institutions by families or relatives. The Missouri statutes[20] are broad enough to protect both the individual's right to personal liberty and the public safety. One statute requires "reasonable notice" to be given to one not believed violently insane.[21] A second one permits immediate commitment

11. See, *e.g.*, Simon v. Craft, 182 U.S. 427, 21 Sup. Ct. 836, 45 L. Ed. 1165 (1901); Hall v. Verdel, 40 F. Supp. 941 (W.D. Va. 1941); United States *ex rel.* Grove v. Jackson, 16 F. Supp. 126 (M.D. Pa. 1936); Shapley v. Cohoon, 258 Fed. 752 (D. Mass. 1918); *Ex parte* Allen, 82 Vt. 365, 73 Atl. 1078, 26 L.R.A. (N.S.) 232 (1909). *Contra: In re* Lambert, 134 Cal. 626, 66 Pac. 851, 55 L.R.A. 856, 86 Am. St. Rep. 296 (1901).

12. See, *e.g.*, Shields v. Shields, 26 F. Supp. 211 (W.D. Mo. 1939); Ruckert v. Moore, 217 Mo. 228, 295 S.W. 794 (1927).

13. Ussery v. Haynes, 344 Mo. 530, 127 S.W.2d 410 (1939); *accord*, Skelly v. The Maccabees, 217 Mo. App. 333, 272 S.W. 1089 (1927).

14. Skelly v. The Maccabees, 217 Mo. App. 333, 272 S.W. 1089 (1927).

15. See, *e.g.*, MICH. STAT. ANN. § 14811 (Supp. 1947) (24 hours); TEX. REV. CIV. STAT. ANN. art. 5561a (1925) (three days).

16. See, *e.g.*, *In re* Dowdell, 169 Mass. 387, 47 N.E. 1033, 61 Am. St. Rep. 290 (1897); *Ex parte* Dagley, 35 Okla. 180, 128 Pac. 699, 44 L.R.A. (N.S.) 389 (1912); *In re* Crosswell's Petition, 28 R.I. 137, 66 Atl. 55, 13 Ann. Cas. 874 (1907). See also note 9 *supra*.

17. Porter v. Ritch, 70 Conn. 235, 39 Atl. 169, 39 L.R.A. 353 (1898). This is true despite the fact that the person might have appeared personally. Albright v. Rader, 81 Tenn. 574 (1884).

18. 233 S.W.2d at 655.

19. See State *ex rel.* Terry v. Holtkamp, 330 Mo. 608, 51 S.W.2d 13 (1932) (notice served on the day of the hearing was not reasonable, but person was not violently insane).

20. MO. REV. STAT. ANN. §§ 449, 9336 (West 1950).

21. *Id.* § 449.

of a violently insane person, provided a hearing with notice is later given.[22] The court in this instance has combined the two statutes into a judicial hybrid. The result is that the "reasonable notice" statute is reduced to almost insignificance, and is then combined with the immediate commitment statute to provide the basis for the present decision.

RIGHT OF PRIVACY—PUBLICATION OF PICTURES AS OFFENSE TO "ORDINARY SENSIBILITIES"—QUESTION OF LAW OR FACT?

In its magazine, *Harper's Bazaar,* defendant publisher used a picture of plaintiffs, husband and wife, taken without their knowledge or consent and showing the husband with his arm around his wife. Defendant later authorized the *Ladies' Home Journal* to use the same picture to illustrate an article in the *Journal* on "love." The picture was used to illustrate the "wrong" kind of love, described as "100 per cent intense sex attraction." In a suit against the publisher of the *Journal* for invasion of the right of privacy, plaintiffs were successful.[1] In a similar suit against defendant, however, plaintiffs' complaint against defendant for its publication of the picture in *Harper's Bazaar* was dismissed because barred by the statute of limitations. Plaintiffs then amended their complaint, basing it solely upon the authorization given by defendant to the *Journal* publishers. Defendant's demurrer thereto was sustained and plaintiffs appealed. *Held* (2-1), affirmed. The picture, when taken by itself and apart from the verbal context, is not such as could have caused any disturbance of plaintiffs' minds and feelings for which an action may be had for invasion of the right of privacy. *Gill v. Hearst Pub. Co.,* 231 P. 2d 570 (Cal. App. 1951).

Most American jurisdictions which have considered the problem now recognize the right of privacy in one form or another.[2] At one time, the

22. *Id.* § 9336.

1. Gill v. Curtis Pub. Co., 231 P.2d 565 (Cal. App. 1951).

2. *E.g.,* Peay v. Curtis Pub. Co., 78 F. Supp. 305 (D.D.C. 1948); Smith v. Doss, 251 Ala. 250, 37 So.2d 118 (1948); Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P.2d 133 (1945); Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931); Cason v. Baskin, 155 Fla. 198, 20 So.2d 243, 168 A.L.R. 430 (1944); Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68, 69 L.R.A. 101, 2 Ann. Cas. 561 (1905); Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 S.W. 364, 34 L.R.A. (N.S.) 1137 (1909); Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942); Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938); Hinish v. Meier & Frank Co., 166 Ore. 482, 113 P.2d 438, 138 A.L.R. 1 (1941). For complete collection of cases, see Notes, 138 A.L.R. 22 (1942), 168 A.L.R. 446 (1947), 14 A.L.R.2d 750 (1950). See also Dickler, *The Right of Privacy, A Proposed Redefinition,* 70 U.S.L. REV. 435 (1936); Feinberg, *Recent Developments in the Law of Privacy,* 48 COL. L. REV. 713 (1948); Green, *The Right of Privacy,* 27 ILL. L. REV. 237 (1932); Kacedan, *The Right of Privacy,* 12 B.U.L. REV. 353, 600 (1932); Lisle, *The Right of Privacy (A Contra View),* 19 KY. L.J. 137 (1931); Ludwig, *"Peace of Mind" in 48 Pieces vs. Uniform Right of Privacy,* 32 MINN. L. REV. 734 (1948); Nizer, *The Right of Privacy, A Half Century's Developments,* 39 MICH. L. REV. 526 (1941); Ragland, *The Right of Privacy,* 17 KY. L.J. 85 (1929).

protection afforded to plaintiffs in fact situations of this type was almost entirely on the basis of property rights[3] or implied contractual rights.[4] The tendency of the vast majority of recent cases, however, is to predicate the right upon a separately existing interest in the personality itself—*i.e.*, the individual's own feelings with regard to his privacy.[5] Obviously, a great many cases, including the instant one, have a commercial aspect to them, which borders upon a property concept. This may be true whether the invasion complained of is clearly for the purpose of securing a commercial advantage, as where plaintiff's picture or name is used in an advertisement, or whether the commerciality is only secondary, as in the case of a newspaper story or a motion picture. Nevertheless, these cases have consistently emphasized the plaintiff's injured feelings rather than the defendant's profit.[6] This interest in the personality must also be distinguished from that which the individual has in his reputation, which is protected by the law of defamation. There should, therefore, be no doubt that a picture alone, accompanied by no comment, could constitute an actionable invasion,[7] since the courts are not concerned with the effect of defendant's tortious acts upon third persons, but only with their effect upon the plaintiff's own feelings.[8] The truth of the disclosure does not constitute a defense to an action for invasion of the right of privacy, as it does in actions for defamation.[9]

The instant case presents the problem of determining when publication of a picture has caused enough damage to plaintiffs' feelings to entitle them to maintain their action.[10] The theory upon which the majority proceeds is

3. Munden v. Harris, 153 Mo. App. 652, 134 S.W. 1076 (1911); Edison v. Edison Polyform Mfg. Co., 73 N.J. Eq. 136, 67 Atl. 392 (Ch. 1907).

4. Moore v. Rugg, 44 Minn. 28, 46 N.W. 141, 20 Am. St. Rep. 539 (1890).

5. This theory was first advanced in the well-known article by Brandeis and Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). *But cf.* Zimmermann v. Wilson, 81 F.2d 847 (3d Cir. 1936), 84 U. PA. L. REV. 789; Fitzsimmons v. Olinger Mortuary Ass'n, 91 Colo. 544, 17 P.2d 535 (1932).

6. A notable exception is the group of cases arising under the N.Y. CIVIL RIGHTS LAW § 51, which specifically requires that defendant have invaded plaintiff's privacy "for advertising purposes or for purposes of trade." New York also denies any common law right of privacy: Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442, 59 L.R.A. 478, 89 Am. St. Rep. 828 (1902).

7. Peay v. Curtis Pub. Co., 78 F. Supp. 305 (D.D.C. 1948); Marks v. Jaffa, 6 Misc. 290, 26 N.Y. Supp. 908 (Sup. Ct. 1893); *cf.* Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930); Douglas v. Stokes, 149 Ky. 506, 149 S.W. 849, 42 L.R.A. (N.S.) 386 (1912); Schulman v. Whitaker, 115 La. 628, 39 So. 737 (1905), *aff'd*, 117 La. 703, 42 So. 227, 7 L.R.A. (N.S.) 274 (1906); Itzkovitch v. Whitaker, 115 La. 479, 39 So. 499, 1 L.R.A. (N.S.) 1147 (1905); Clayman v. Bernstein, 38 Pa. D. & C. 543 (1940).

8. Brandeis and Warren, *supra* note 5, at 197. Prosser speaks of the right of privacy as being "only a phase" of the new tort of intentional causing of mental disturbances. PROSSER, TORTS 1053 (1941).

9. Brents v. Morgan, 221 Ky. 765, 299 S.W. 967, 55 A.L.R. 964 (1927); *cf.* Brandeis and Warren, *supra* note 5, at 218.

10. Two judges agreed that there was not sufficient damage 231 P.2d at 571. The dissenting judge argued that the degree of damage done plaintiffs should be a jury question. *Id.* at 572.

in accord with the weight of authority in that it limits recovery to those unreasonable interferences with privacy which are offensive to "ordinary sensibilities."[11] As stated in *Sidis v. F-R Publishing Corporation*,[12] the publication should transcend the "community's notions of decency" in order to be actionable. In that case, consideration was given to the well-known doctrine that privileged invasions may occur where the public is said to have a legitimate interest in the affairs of the individual, as where the individual is a celebrity or notorious figure.[13] The relationship between this privilege and the "ordinary sensibilities" test is obvious: the privilege ends where the individual's interest in privacy becomes superior to the public's interest in publication. But it is quite possible to apply the "ordinary sensibilities" test in an action for publishing a part of plaintiff's life history where there was no valid interest in the publication on the part of the public which could conflict with the plaintiff's interest in keeping his history private.[14]

Granting the validity of the "ordinary sensibilities" test there remains the question of whether the court itself can apply the test or whether, as the dissenting opinion argues,[15] the jury should be given that task. What authority there is seems to indicate that it is a matter of law,[16] and that juries should not be allowed to pass on a plaintiff's every contention that he has been injured. Perhaps the problem is analogous to the one in the law of defamation with regard to whether words are "reasonably susceptible" of a defamatory interpretation. The court in that situation is to determine whether the words

11. Davis v. General Finance & Thrift Corporation, 80 Ga. App. 708, 57 S.E.2d 225 (1950); Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942); Schuyler v. Curtis, 147 N.Y. 434, 42 N.E. 22, 49 Am. St. Rep. 671 (1895); *see* Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P.2d 133, 139 (1945); Kelley v. Post Pub. Co., 98 N.E.2d 286 (Mass. 1951); PROSSER, TORTS 54 (1941) (speaking generally of recovery for mental distress); WINFIELD, TEXT-BOOK OF THE LAW OF TORT 621 (3d ed. 1946); Feinberg, *supra* note 2 at 718-22; Pound, *Interests in Personality*, 28 HARV. L. REV. 343, 363, (1915); 41 AM. JUR., *Privacy* 934-35 (1942). The American Law Institute suggests that "liability exists only if the defendant's conduct was such that *he should have realized* that it would be offensive to persons of ordinary sensibilities." (Emphasis added.) RESTATEMENT, TORTS § 867 comment *d* (1939). Analogous to this is the provision that "A bodily contact is offensive if it offends a reasonable sense of personal dignity." *Id.* § 19.

12. 113 F.2d 806, 138 A.L.R. 15 (2d Cir. 1940).

13. *Id.* at 809. Brandeis and Warren, *supra* note 5, at 214-16, recognized this privilege and much has been made of it, so that it forms a rather large branch of the law of privacy—too large for consideration here. See Metter v. Los Angeles Examiner, 35 Cal. App. 2d 304, 95 P.2d 491 (1939).

14. Davis v. General Finance & Thrift Corporation, 80 Ga. App. 708, 57 S.E.2d 225 (1950) (Defendant falsely publicized by means of telegraph that plaintiff owed him money and that he intended to sue plaintiff, his purpose, assuming it not malicious, being only to force payment from plaintiff.) *Cf.* Brents v. Morgan, 221 Ky. 765, 299 S.W. 967, 55 A.L.R. 964 (1927).

15. 231 P.2d at 572.

16. Davis v. General Finance & Thrift Corporation, 80 Ga. App. 708, 57 S.E.2d 225 (1950); Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942); Hinish v. Meier & Frank Co., 166 Ore. 482, 113 P.2d 438, 138 A.L.R. 1 (1941); *see* Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P.2d 133, 139 (1945). *Contra:* Pallas v. Crowley, Milner & Co., 322 Mich. 411, 33 N.W.2d 911 (1948); *cf.* Cason v. Baskin, 155 Fla. 198, 20 So.2d 243, 246, 168 A.L.R. 430 (1944).

are "reasonably susceptible" of a particular interpretation, and the jury is to say whether they actually were so understood.[17] This court, therefore, could be said to hold that the publication of the picture could not be offensive to "ordinary sensibilities" and thus to have precluded the jury from deciding whether and to what extent the plaintiffs were injured in their feelings. On the other hand, if the court had held that the picture could be offensive to "ordinary sensibilities," the jury would then determine either that plaintiffs were damaged to a certain extent or that plaintiffs were in fact not hurt and should receive only nominal damages.[18]

In addition to its holding that, as a matter of law, the picture of the plaintiffs is not offensive to "ordinary sensibilities," the majority also indicates that a plaintiff could not be said to have suffered any detriment from the publication when "it does not show him in an uncomplimentary pose or tend to humiliate him or in any sense present him to his discredit or disadvantage."[19] This language sounds very much like the law of defamation and as such is definitely expressing a minority view. It was exactly such limitations upon recovery to injuries to the reputation only, as distinguished from injuries to the feelings, which led to the development of this new tort.[20]

TRUSTS—DUALITY OF INTEREST—MERGER OF TITLE IN BENEFICIARY

A, B, C and *D,* owners of certain land in fee, transferred it to themselves, as trustees, in trust for themselves. By authority of the trust agreement, plaintiffs, as trustees, leased the land to defendant and now, as beneficiaries, bring this action to set aside the conveyance on the ground that no trust existed. The lower court denied relief. *Held,* affirmed. The rule that a trust

17. NEWELL, SLANDER AND LIBEL § 254 (4th ed. 1924); ODGERS, LIBEL AND SLANDER 94 (6th ed. 1929), PROSSER, TORTS, 789 (1941).

18. Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938) (nominal damages awarded in absence of proof of actual damages); Hinish v. Meier & Frank Co., 166 Ore. 482, 113 P.2d 438, 448, 138 A.L.R. 1 (1941) (". . . plaintiff is entitled to recover nominal damages at least, and any additional damages for injury to his feelings that he may be able to prove, besides punitive damages if there was actual malice.").

19. 231 P.2d at 570.

20. Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938); Brandeis and Warren, *supra,* note 5 at 193-7. *But see* Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 S.W. 364, 366, 34 L.R.A. (N.S.) 1137 (1909). In two other California cases there is language similar to that employed by the court in the instant case. Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91, 93 (1931) (California Constitution, Art. I, § 1 guarantees the right of " 'pursuing and obtaining . . . happiness,' " which "by its very nature includes the right to live free from the unwarranted attack of others upon one's own liberty, property, and *reputation.*") (Emphasis added.) Kerby v. Hal Roach Studios, Inc., 53 Cal. App. 2d 207, 127 P.2d 577 (1942) ("Does the law refuse all redress to one who has been thus grievously imposed upon and subjected to embarrassment, humiliation and scorn. . .?" Also dicta that elements of libel were present in the case and that recovery could have been granted on that ground alone, but for certain technieal deficiencies in pleading).

cannot exist where the legal and beneficial interests are in the same person does not apply where the several beneficiaries of a trust, whose interests therein are not common to each other, are also the trustees. *Fry v. McCormick*, 228 P.2d 727 (Kan. 1951).

Generally it is regarded as a fundamental essential to the existence of any trust that legal ownership be separated from beneficial enjoyment.[1] The doctrine of merger has been advanced for the proposition that a trust should fail of creation if there is a union of interests in the same person.[2] This doctrine is based upon two general considerations: (1) the impossibility of securing an impartial administration of the trust; and (2) the necessity for two separate persons in order that an obligation, legal or equitable, may exist. The situation where these basic considerations may be most logically advanced in favor of the merger doctrine is where the sole trustee is also the sole beneficiary.[3] There the authorities agree that he holds the property free of trust.[4] A trust necessarily implies an equitable obligation as to the use of property; hence the trustee (obligor) must be a different person from the cestui (obligee). An individual, of course, cannot maintain a bill in equity against himself to compel his carrying out the terms of a trust. However, in various fact situations and without reference to the above basic considerations, many courts have declared that both the legal and the beneficial interests cannot exist and be maintained separately in the same person.[5]

When the attempted trust relationship involves more than one person and each person is both a trustee and a beneficiary, the argument that this duality of interest prevents the successful creation of a trust is weak,[6] for

1. Morsman v. Commissioner of Internal Revenue, 90 F.2d 18, 113 A.L.R. 441 (8th Cir. 1937), *cert. denied*, 302 U.S. 701 (1937); Julian v. Northwestern Trust Co., 192 Minn. 136, 255 N.W. 622 (1934); Blades v. Norfolk Southern Ry., 224 N.C. 32, 29 S.E.2d 148, 151 A.L.R. 1278 (1944); see 1 PERRY, TRUSTS AND TRUSTEES § 347 (7th ed. 1929).

2. Odom v. Morgan, 177 N.C. 367, 99 S.E. 195 (1919); 1 RESTATEMENT, TRUSTS § 99, comment *a* (1935); 1 BOGERT, TRUSTS AND TRUSTEES § 129 (2d ed. 1951).

3. *Compare* Butler v. Godley, 12 N.C. 94 (1826), *with* Blades v. Norfolk Southern Ry., 224 N.C. 32, 29 S.E.2d 148, 151 A.L.R. 1278 (1944). See 1 BOGERT, TRUSTS AND TRUSTEES § 129 (2d ed. 1951); 1 SCOTT, TRUSTS §§ 99-100 (1939); Note, 151 A.L.R. 1287 (1944).

4. Morsman v. Commissioner of Internal Revenue, 90 F.2d 18, 113 A.L.R. 441 (8th Cir. 1937), *cert. denied*, 302 U.S. 701 (1937); Des Moines Terminal Co. v. Des Moines Union Ry., 52 F.2d 616 (8th Cir. 1931), *cert. denied*, 285 U.S. 537 (1932); Butler v. Godley, 12 N.C. 94 (1826); 1 RESTATEMENT, TRUSTS § 99(5) (1935).

5. See Greene v. Greene, 125 N.Y. 506, 26 N.E. 739 (1891) (the several beneficiaries were also the trustees, *cf.* note 15 *infra*); *In re* Hitchins, 39 Misc. 767, 80 N.Y. Supp. 1125, 1128 (Surr. Ct. 1903) (the sole trustee was the sole beneficiary); *In re* Marshall's Will, 36 N.Y.S.2d 571 (Surr. Ct. 1942) (the several beneficiaries were also the trustees, but the decision was never appealed). *But cf.* Reed v. Browne, 295 N. Y. 184, 66 N.E.2d 47, 165 A.L.R. 1061 (1946); Bacorn v. People, 195 Misc. 917, 88 N.Y.S.2d 628 (Ct. Cl. 1949) (tacitly distinguishing the prior cases on the point suggested by the text writers). See Note, 151 A.L.R. 1287 (1944).

6. Flagg v. Walker, 113 U.S. 659, 5 Sup. Ct. 697, 28 L. Ed. 1072 (1885); Nellis v. Rickard, 133 Cal. 617, 66 Pac. 32 (1901); Sherlock v. Thompson, 167 Iowa 1, 148 N.W. 1035 (1914). See 1 BOGERT, TRUSTS AND TRUSTEES § 129 (2d ed. 1951).

each trustee-beneficiary owes to the others equitable obligations as to the use of the trust corpus. So long as either the legal or equitable interest is in more than one person, the obligor-obligee relationship can exist. No court has held that such a duality of interest is so serious as to make the intended trust void merely because of the difficulty of unbiased administration, although the court may think it proper to appoint new trustees.[7]

Some courts, nevertheless, have extended the doctrine of merger to the situation where the group of beneficiaries are also the trustees, and they have held that in such a situation there is no trust.[8] It would seem, however, as in the principal case, that there is no good reason for thus defeating the intention of the settlor.[9] These trustee-beneficiaries hold the equitable interest as tenants in common and the legal interest as joint tenants.[10] In England, where the rule is clearly contrary to that of the principal case,[11] the intention of the testator is not so important in controlling the disposition of his estate.[12] Several jurisdictions in this country have announced a general doctrine of merger in such a way as to appear to favor the English rule on merger of the trust interest,[13] yet Alabama is apparently the only jurisdiction which would reach a result opposite to that of the principal case.[14] The other courts that originally followed the English rule have decided later cases tacitly overruling their previous decisions, or the rule as originally laid down can be disregarded as dictum.[15]

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7. See, *e.g.*, Farmers' Loan & Trust Co. v. Chicago & Alton Ry., 27 Fed. 146 (C.C.D. Ind. 1886); Walker v. Walker, 25 Ga. 420 (1858); Olson v. Larson, 320 Ill. 50, 150 N.E. 337 (1925); Mettler v. Warner, 243 Ill. 600, 90 N.E. 1099, 134 Am. St. Rep. 388 (1910). See also 1 SCOTT, TRUSTS § 33 (1939).

8. See, *e.g.*, Dunn v. Ponceler, 230 Ala. 375, 161 So. 450 (1935); *accord*, Greene v. Greene, 125 N.Y. 506, 26 N.E. 739 (1891). See also Note, 29 YALE L.J. 97 (1919).

9. "Equity controls the application of the doctrine of merger to the given case and equity will prevent a merger in order to effectuate the manifest intent of the testator where the interest and purposes of justice are thereby promoted. Merger is disfavored. The trust is the special child of equity. In the circumstances of this case, the clear and carefully premeditated intent of the testator is the persuasive equitable consideration. No harm visits the defendants in now recognizing the desired trust." Morgan v. Murton, 131 N.J. Eq. 481, 26 A.2d 45, 53 (Ch. 1942), 27 MINN. L. REV. 100.

10. Noyes v. Noyes, 110 Vt. 511, 9 A.2d 123 (1939). *But cf. In re* Selous, [1901] 1 Ch. 921, 922 (court said difference in interest between these two estates is so small and shadowy that there is no presumption against merger).

11. *In re* Selous, [1901] 1 Ch. 921.

12. The beneficiaries, in England, can sometimes terminate the trust despite the explicit words of the trust instrument and despite the fact that material purposes of the trust have not been fulfilled. These views may account for the English theory, but the attitude of the United States courts is contra in both respects. See 3 SCOTT, TRUSTS §§ 337, 340 (1939).

13. Dunn v. Ponceler, 230 Ala. 375, 161 So. 450 (1935); Tilton v. Davidson, 98 Me. 55, 56 Atl. 215 (1903); Neville v. Gifford, 242 Mass. 124, 136 N.E. 160 (1922); Enochs & Flowers v. Roell, 170 Miss. 44, 154 So. 299 (1934); Cooper v. Cooper, 5 N.J. Eq. 9 (Ch. 1845); Greene v. Greene, 125 N.Y. 506, 26 N.E. 739 (1891).

14. See Sisson v. Swift, 243 Ala. 289, 9 So.2d 891, 898 (1942) (expressing an attitude contra to the view prevailing in the Dunn case, *supra*, note 13).

15. *New York.*—The text writers have distinguished Greene v. Greene, 124 N.Y. 506, 26 N.E. 739 (1891), by reference to legislation upon the subject which permits

UNAUTHORIZED PRACTICE OF LAW—ATTORNEY-ACCOUNTANT CONTROVERSY—PREPARATION BY "TAX EXPERT" OF INCOME TAX RETURN INVOLVING LEGAL QUESTIONS

Defendant, a former deputy collector for the Internal Revenue Department but not a member of the bar, advertised himself as an "income tax expert" and carried on a business of preparing tax returns for a fee. An investigator from a county bar association came to defendant with a fictitious set of facts and asked him to prepare his tax return. Defendant accepted a fee for his services in preparing the return for his supposed client, in the process of which he resolved questions as to his client's martial and partnership status and deductible business losses. Plaintiff bar association brought an action to enjoin defendant from the unauthorized practice of law and to have him adjudged in contempt of court. A perpetual injunction was granted by the lower court. *Held,* affirmed. The resolving of difficult questions of law, even if incidental to defendant's lawful business, is the practice of law and should be enjoined to protect the public interest. *Gardner v. Conway,* 48 N.W.2d 788 (Minn. 1951).

Since the practice of law often involves substantial and permanent changes in the legal rights of persons, it is restricted by law to licensed attorneys as a matter of public protection. Licensing requires not only tests of legal competence and ability but professional responsibility as well; and persons not so authorized are prohibited by statute from practicing law.[1] But in deciding whether specific acts by a layman constitute the unauthorized practice of law, the courts have indicated that an exact definition of the phrase "practice of law" is impossible, it being necessary to decide each case on its own particular facts.[2] It is clear, however, that the practice of

trusts only for the purposes stated in the statute. Bacorn v. People, 195 Misc. 917, 88 N.Y.S.2d 628 (Ct. Cl. 1949) (accepted the distinction by stating that the trust involved was within the purposes stated by statute and upheld the trust in a situation analogous to that of the *Greene* case). *New Jersey.*—The earlier cases have been in effect overruled. Mesce v. Gradone, 1 N.J. 159, 62 A.2d 394 (1948). *Maine.*—The same result would have been reached in Tilton v. Davidson, 98 Me. 55, 56 Atl. 215 (1903), whether the trustees had a double interest or not, according to the opinion of the case. *Massachusetts.*—The court based the decision in Neville v. Gifford, 242 Mass. 124, 136 N.E. 160 (1922), on the ground that by the terms of the trust a partnership rather than a trust was created. *Mississippi*—In Enochs & Flowers v. Roell, 170 Miss. 44, 154 So. 299 (1934), the English rule, as announced was dictum, the court basing its decision upon the ground that the beneficiaries had complete control of a business trust.

1. For a collection of the statutes of each state prohibiting the practice of law by laymen see Otterbourg, *A Study of Unauthorized Practice of Law,* UNAUTHORIZED PRACTICE NEWS (sp. issue, Sept. 1951). Even in the absence of statute the courts may enjoin its practice in a criminal contempt action. See Sanders, *Procedure for the Punishment or Suppression of Unauthorized Practice of Law,* 5 LAW & CONTEMP. PROB. 135 (1938).

2. See *In re* Shoe Manufacturers Protective Ass'n, Inc., 295 Mass. 369, 3 N.E.2d 746 (1936). For a general discussion of what constitutes the practice of law, see Notes, 151 A.L.R. 781 (1914), 125 A.L.R. 1173 (1940), 111 A.L.R. 19 (1937).

law is not confined to appearances in court proceedings[3] but includes ". . . legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured."[4] In the absence of an exact definition, the courts have had difficulty in drawing a line between permissible business activities which might involve legal questions on the one hand, and the unauthorized practice of law on the other.[5] This is especially true in the tax field where there is an overlapping of law and accounting.[6]

By the traditional test, presenting elementary legal advice is not the practice of law when such services are reasonably incidental to the conduct of a person's authorized business.[7] For example, it has been held that a trust company may give its customers pamphlets describing tax liability and the method of making a tax return[8] and may even advise on the necessity of making a return.[9] But any legal advice given for a consideration and not in connection with a layman's regular business is considered as unauthorized practice.[10] For instance, solicitation to collect tax refunds[11] or advice on collecting refunds by a layman is prohibited.[12]

3. Childs v. Smeltzer, 315 Pa. 9, 171 Atl. 883 (1934); People v. Alfani, 227 N.Y. 334, 125 N.E. 671 (1919).

4. Eley v. Miller, 7 Ind. App. 529, 34 N.E. 836, 837 (1893).

5. For general information on unauthorized practice and the efforts to suppress it see *Symposium: The "Unauthorized Practice of Law" Controversy,* 5 LAW & CONTEMP. PROB. 1-170 (1938); Hicks and Katz, *The Practice of Law by Laymen and Lay Agencies,* 41 YALE L.J. 69 (1931). For a collection of cases on unauthorized practice see Brand, UNAUTHORIZED PRACTICE DECISIONS (1937). For current information on unauthorized practice consult the *Unauthorized Practice News,* published quarterly by the American Bar Association Committee on Unauthorized Practice. For the techniques and procedures available in suppressing unauthorized practice, see Sanders, *Procedure for the Punishment or Suppression of Unauthorized Practice of Law,* 5 LAW & CONTEMP. PROB. 135 (1938).

6. Maxwell and Charles, *Joint Statement as to Tax Accountancy and Law Practice,* 32 A.B.A.J. 5, 6 (1946). The unauthorized practice problem exists in other fields as well, such as insurance adjusting, real estate business, collection agencies and publishing of law books. For a statement of the problem in these fields, see Otterbourg, *A Study of Unauthorized Practice of Law,* UNAUTHORIZED PRACTICE NEWS (sp. issue, Sept, 1951); Note 151 A.L.R. 781, 783 (1944).

7. Merrick v. American Security & Trust Co., 107 F.2d 271 (D.C. Cir. 1939), *cert. denied,* 308 U.S. 625 (1940); Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 52 N.E.2d 27 (1943), 42 MICH. L. REV. 1122 (1944).

8. Groninger v. Fletcher Trust Co., 220 Ind. 202, 41 N.E.2d 140 (1942).

9. *See* Girard Investment Co. v. Collector of Int. Rev., 122 F.2d 843, 848 (3d Cir. 1941) (by implication), *cert. denied,* 314 U.S. 699 (1942).

10. *In re* Bercu, 188 Misc. 406, 69 N.Y.S.2d 730, 9 A.L.R. 787 (Sup. Ct. 1947), *rev'd,* 273 App. Div. 524, 78 N.Y.S.2d 209 (2d Dep't 1948), *aff'd,* 299 N.Y. 728, 87 N.E.2d 451 (1949), 33 MINN. L. REV. 445 (1949), 23 TULANE L. REV. 294 (1948), 56 YALE L.J. 1438 (1947). In this widely discussed case an accountant was held to be engaged in the unlawful practice of law when, as an independent matter not in connection with preparing a tax return or in auditing books, he advised a corporation on the legality of taking certain income tax deductions, the court basing its decisions on the ground that the advice given was not incidental to his regular accounting business. This "incidental" test has been criticized in that it permits the giving of any legal advice, regardless of its difficulty or consequences, as long as it is rendered incidentally to the accountant's business. *See* Merrick v. American Security and Trust Co., 107 F.2d 271, 284 (D.C. Cir. 1939) (criticized in dissenting opinion); Austin, *Relations Between Lawyers and Certified Public Accountants,* 36 IOWA L. REV. 227, 235 (1951).

11. Bump v. District Court of Polk County, 232 Iowa 623, 5 N.W.2d 914 (1942).

12. Mandelbaum v. Gilbert & Barker Mfg. Co., 160 Misc. 656, 290 N.Y. Supp. 462 (N.Y. City Ct. 1936).

In dealing with the preparation by nonlawyers of income tax returns, the courts in the past have held that passing on a question of law incidental to preparing the returns is not the practice of law.[13] Some decisions on this point are restricted to returns of the "least difficult" kind and indicate that a different result might be reached if the return were more complicated.[14] Other courts take the position that regardless of the risks involved to the taxpayer any legal questions may be properly disposed of by a layman if incidental to preparing a tax return.[15] In the instant case the court has rejected the "incidental test" as the sole criterion and has taken the view that an accountant should not resolve difficult questions of law, even if such service is incidental to filling out a tax return.

Any distinction between law practice and accounting should be determined by a consideration of the nature of the services rendered in each case. There can be little doubt that only a lawyer would be qualified to handle the matter where possible charges of fraud or questions of nontax law are involved[16] or where the preparation of the return would require the construction of a deed of trust or a will.[17] On the other hand, only a trained accountant could determine income for a client where matters such as inventory pricing methods or accrual and installment accounting are concerned. It is also true that there is a great area in tax practice within the professional competence of both lawyer and accountant,[18] but the fact that there is common ground between them does not eradicate the line. Tax law is more than accounting, however, for it requires a knowledge of rules of statutory construction of *stare decisis,* of evidence and of general substantive law in interpreting the statutes and decisions on tax law.[19] Therefore, one trained only in accounting regardless of his knowledge of tax law, would not have the orientation necessary to qualify as a tax lawyer. In the instant case the court has taken the position that if there is a danger in allowing persons not qualified as lawyers to give legal advice as a primary business then the same danger exists if the legal advice is incidental to preparing a tax return and therefore should be prohibited as a protection of the public.

13. Blair v. Motor Carriers Service Bureau, Inc., 40 Pa. D. & C. 413 (1939); *see* Merrick v. American Security & Trust Co., 107 F.2d 271, 278 (D.C. Cir. 1939).

14. Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 52 N.E.2d 27 (1943); *see* Blair v. Motor Carriers Service Bureau, Inc., 40 Pa. D. & C. 413, 429 (1939).

15. *In re* Bercu, 188 Misc. 406, 69 N.Y.S.2d 730 (Sup. Ct. 1947), discussed *supra* note 10. This is based on the convenience of the public in not having to stand the added expense of having to also consult an attorney.

16. Austin, *Relations Between Lawyers and Certified Public Accountants in Income Tax Practice,* 36 IOWA L. REV. 227, 228 (1951).

17. *In re* Bercu, 188 Misc. 406, 69 N.Y.S.2d 730 (Sup. Ct. 1947); see note 10, *supra.*

18. For instance both lawyers and Certified Public Accountants are allowed to practice before the Treasury Department and the Tax Court. D.C. 230 (rev.) § 10.3, 1947-2 CUM. BULL. 288, 293.

19. Bowe, *Cash and Accrual Methods of Income Tax Accounting,* 2 VAND. L. REV. 60 (1949).

That the unwary taxpayer can be damaged by those giving legal advice who are not qualified as lawyers is a fact which is, unfortunately, seldom realized by the public.[20] Lawyers and certified public accountants have through their national organizations agreed that when issues are presented in a tax return which only a member of the other profession is competent to handle, then they should be consulted.[21] However, since the majority of so called "tax experts" are not certified public accountants,[22] both groups owe a duty to the public to see that persons practicing in the tax field do not advise a client as to matters beyond their competency. The "difficult question of law" test in this case in an extension of the present trend toward restricting the activities of laymen in the tax field, and its application by other courts will considerably extend the range of the concept of what constitutes unauthorized practice.

WILLS—ADEMPTION—BEQUEST OF PROCEEDS OF SPECIFIC PROPERTY

In her will testatrix directed that a certain piece of real property be sold and the proceeds distributed among eight legatees. She subsequently sold the property in question, invested the proceeds in securities, sold these and purchased other securities. She also used part of the proceeds for her own purposes. *Held,* the gifts of the proceeds were specific legacies and were adeemed by the subsequent sale of the property and receipt of the proceeds by the testatrix. In re *McCray's Estate,* 96 F. Supp. 254 (D.D.C. 1951).

If a testator in his will has given a particular thing and this property is not contained in his estate at his death, the gift is said to be adeemed and the legatee takes nothing.[1] The rule of ademption applies only in cases of specific legacies or devises.[2] While the intention of the testator is controlling

20. One example of where a taxpayer relied on the wrong person's advice is the case where he was advised by an accountant as to whether he should file a Personal Holding Company Tax return, and was fined for his failure to do so, the court pointing out that reliance on his accountant's advice did not excuse him on the grounds of reasonable delay. Hermax Co., 11 T.C. 442 (1948).

21. Noteworthy progress has been made in settling the dispute between these groups by the National Conference of Lawyers and Certified Public Accountants. This group was formed in 1944 for the purpose of considering their mutual problems and attempting to take the dispute out of the field of public combat. One significant result of this conference is the agreement that neither lawyers nor certified public accountants will designate themselves as "tax experts" or "tax consultants." The text of a statement of principles defining the proper areas of federal tax practice for members of both professions is set out in 91 J. ACCOUNTANCY 869 (1951); UNAUTHORIZED PRACTICE NEWS 82 (sp. issue, Sept. 1951).

22. Note, 2 ARK. L. REV. 432, 438 (1949).

1. ATKINSON, WILLS 690 (1937); Page, *Ademption by Extinction: Its Practical Effects,* 1943 WIS. L. REV. 11, 19. For present purposes the definition of ademption includes only what is more specifically referred to as "ademption by extinction."

2. ATKINSON, WILLS 690 (1937); 4 PAGE, WILLS § 1515 (3d ed. 1941).

in determination of the type of legacy or devise,[3] by the great weight of authority such intention is immaterial to the question of whether or not a gift of specific property is adeemed.[4] Almost all courts inquire only as to the existence of the specific property as a part of the testator's estate.

However, when the bequest is of the proceeds of specific property and the testator receives the proceeds during his lifetime, the question becomes more difficult, and the courts are not in agreement. Many courts have recognized a distinction between such bequests and gifts of specific property,[5] and some have given weight to the testator's intention in deciding the question of ademption of such proceeds.[6] Considerations of factual differences in the individual cases, as well as confiicting rules and policies of the courts, have contributed to the split of authority.[7]

Perhaps a majority of the courts have taken the position that receipt of such proceeds by the testator and subsequent dealings therewith by him do not work an ademption of the gift, where the proceeds can be traced and identified.[8] Some of these courts stress the distinction between a gift of

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3. ATKINSON, WILLS 703 (1937); 4 PAGE, WILLS § 1392 (3d ed. 1941). To avoid ademption by extinction, courts incline to consider legacies as demonstrative rather than specific. See, *e.g.*, Willis v. Barrow, 218 Ala. 549, 119 So. 678, 680 (1929); Maxim v. Maxim, 129 Me. 349, 152 Atl. 268, 270, 73 A.L.R. 12 (1930); 4 PAGE, WILLS § 1399 (3d ed. 1941).

4. *E.g.*, Elwyn v. DeGarmendia, 148 Md. 109, 128 Atl. 913 (1925); *In re* Rubenstein's Estate, 169 Misc. 273, 7 N.Y.S.2d 311 (Surr. Ct. 1938); Humphreys v. Humphreys, 2 Cox Ch. 184, 30 Eng. Rep. 85 (Ch. 1789); ATKINSON, WILLS 691 (1937). For an excellent treatment of the historical background and development of the doctrine of ademption, see Page, *Ademption by Extinction: Its Practical Effects*, 1943 WIS. L. REV. 11.

5. American Bible Soc. v. Holman, 1 Fed. Cas. 621, No. 291 (D. Minn. 1878); Miller's Ex'r v. Melone, 109 Ky. 133, 58 S.W. 708, 95 Am. St. Rep. 338 (1900); Merrill v. Winchester, 120 Me. 203, 113 Atl. 261 (1921); *In re* Manshaem's Estate, 207 Mich. 1, 173 N.W. 483 (1919); Prendergast v. Walsh, 58 N.J. Eq. 149, 42 Atl. 1049 (Ch. 1899); *In re* Roth's Will, 183 Misc. 834, 51 N.Y.S.2d 617 (Surr. Ct. 1944), *modified*, 271 App. Div. 972, 67 N.Y.S.2d 815 (2nd Dep't 1947), *aff'd as modified*, 297 N.Y. 757, 77 N.E. 520 (1948); Nooe v. Vannoy, 59 N.C. (6 Jones Eq.) 185 (1861); *In re* Frost's Estate, 354 Pa. 223, 47 A.2d 219, 165 A.L.R. 1030 (1946); *In re* Black's Estate, 223 Pa. 382, 72 Atl. 631 (1909); Gist v. Craig, 142 S.C. 407, 141 S.E. 26 (1927); *In re* Barrow's Estate, 103 Vt. 501, 156 Atl. 408 (1931). See Note, 165 A.L.R. 1032 (1946).

6. See *e.g.*, American Bible Soc. v. Holman, 1 Fed. Cas. 621, No. 291 (D. Minn. 1878); *In re* Dwyer's Estate, 159 Cal. 664, 115 Pac. 235, 239 (1911) (holding legacy adeemed); Reed v. Reed, 68 Ga. 589, 590 (1882); Meilly v. Knox, 269 Ill. 463, 110 N.E. 56, 58 (1915) (holding legacy adeemed). *Contra: In re* Farber's Will, 53 N.Y.S.2d 886, 889 (Surr. Ct. 1945); *In re* Barrow's Estate, 103 Vt. 501, 156 Atl. 408, 413 (1931).

7. See Note, 165 A.L.R. 1032, 1033 (1946), containing an exhaustive review of the cases on the question of ademption of bequests of proceeds of property.

8. *E.g.*, American Bible Society v. Holman, 1 Fed. Cas. 621, No. 291 (D. Minn. 1878); Connecticut Trust Co. v. Chase, 75 Conn. 683, 55 Atl. 171 (1903); Reed v. Reed, 68 Ga. 589 (1882); Merrill v. Winchester, 120 Me. 203, 113 Atl. 261 (1921); *In re* Manshaem's Estate, 207 Mich. 1, 173 N.W. 483 (1919); Nooe v. Vannoy, 59 N.C. (6 Jones Eq.) 185 (1861); *In re* Frost's Estate, 354 Pa. 223, 47 A.2d 219, 165 A.L.R. 1030 (1946); Gist v. Craig, 142 S.C. 407, 141 S.E. 26 (1927); *In re* Barrow's Estate, 103 Vt. 501, 156 Atl. 408 (1931); *In re* Kamba's Estate, 230 Wis. 246, 282 N.W. 570, 119 A.L.R. 1383 (1938); 4 PAGE, WILLS § 1528 (3d ed. 1941). Also, some cases

specific property and a gift of the proceeds of such property;[9] other courts point out that the disposition of the property and collection of the proceeds by the testator merely facilitate the payment of the legacy.[10] On the other hand, a substantial number of courts have held that a bequest of the proceeds of specific property is adeemed by the receipt of the proceeds by the testator and his subsequent dealings therewith.[11] Some of these courts have recognized no difference in a bequest of the proceeds of specific property and a bequest or devise of the specific property itself, and have held that the disposition of the property worked an ademption of the bequest.[12] While some cases have merely stated the rule that the testator's intention is immaterial,[13] others have found in such disposition an intent to adeem.[14] Also, where the will directed the sale of the property after the death of the testator, and gave the proceeds, it has been reasoned that if the property was no longer a part of the estate there was nothing on which the clause could operate.[15] Other reasons suggested were the difficulty of tracing the proceeds in complex property holdings,[16] the delay in settling estates and the encouragement of vexatious litigation.[17]

The court in the instant case refused to find any difference between a bequest of proceeds of specific property and a bequest of the property itself,

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which have held legacies adeemed have reached the decision on the ground that the proceeds cannot be traced and distinguished from the rest of the estate. *Cf.* Durham's Adm'r v. Clay, 142 Ky. 96, 134 S.W. 153 (1911); *In re* Bouk's Estate, 80 Misc. 196, 141 N.Y.S. 922 (Surr. Ct. 1913); King v. Sellers, 194 N.C. 533, 140 S.E. 91 (1927).

9. See note 5, *supra.*

10. Connecticut Trust Co. v. Chase, 75 Conn. 683, 55 Atl. 171 (1903); Miller's Ex'r v. Melone, 109 Ky. 133, 58 S.W. 708, 95 Am. St. Rep. 338 (1900); Merrill v. Winchester, 120 Me. 203, 113 Atl. 261 (1921). *See In re* Dwyer's Estate, 159 Cal. 664, 115 Pac. 235, 239 (1911); *In re* Sorenson's Estate, 46 Cal. App. 2d 35, 115 P.2d 241, 242 (1941).

11. *E.g.,* Plant v. Donaldson, 39 App. D.C. 162 (1912); Meilly v. Knox, 191 Ill. App. 126 (1915), *aff'd,* 269 Ill. 463, 110 N.E. 56 (1915); *In re* Miller's Will, 128 Iowa 612, 105 N.W. 105 (1905); Moffatt v. Heon, 242 Mass. 201, 136 N.E. 123 (1922); *In re* Farber's Will, 53 N.Y.S.2d 886 (Surr. Ct. 1945); May v. Sherrard's Legatees, 115 Va. 617, 79 S.E. 1026 (1913); Arnald v. Arnald, 1 Bro. C.C. 401, 28 Eng. Rep. 1203 (Ch. 1784); *accord,* Ford v. Cottrell, 141 Tenn. 169, 207 S.W. 734 (1918).

12. *E.g.,* Plant v. Donaldson, 39 App. D.C. 162 (1912); May v. Sherrard's Legatees, 115 Va. 617, 79 S.E. 1026 (1913); *accord,* Ford v. Cottrell, 141 Tenn. 169, 207 S.W. 734 (1918). But the view taken as to whether intention should be given weight does not appear to have affected the view followed as to whether bequests of proceeds are adeemed by disposition of the property by the testator or someone in his behalf. See Note, 165 A.L.R. 1032, 1033 (1946).

13. *In re* Farber's Will, 53 N.Y.S.2d 886 (Surr. Ct. 1945); May v. Sherrard's Legatees, 115 Va. 617, 79 S.E. 1026 (1913).

14. Besides the instant case, see Plant v. Donaldson, 39 App. D.C. 162 (1912); Meilly v. Knox, 191 Ill. App. 126 (1915), *aff'd,* 269 Ill. 463, 110 N.E. 56, 58 (1915) (lack of intent to make gift in any case found); *In re* Kulp's Estate, 122 Neb. 157, 239 N.W. 636, 638 (1931).

15. See *In re* Miller's Will, 128 Iowa 612, 105 N.W. 105, 107 (1905) (proceeds of general property); *In re* Kulp's Estate, 122 Neb. 157, 239 N.W. 636, 638 (1931); Ford v. Cottrell, 141 Tenn. 169, 207 S.W. 734, 737 (1918). *Compare* Ford v. Cottrell, *supra,* with Clark v. Packard, 9 Gray 417 (Mass. 1857).

16. *In re* Kulp's Estate, 122 Neb. 157, 239 N.W. 636 (1931).

17. *In re* Miller's Will, 128 Iowa 612, 105 N.W. 105, 107 (1905).

and applied the doctrine of ademption accordingly. As a result, the portion of the estate which would have been the subject of the bequest passed by intestacy.

The paramount aim in the construction of a will is to determine and give effect to the testator's intention.[18] It has been recognized that the doctrine of ademption operates to defeat this intention,[19] as well as to overcome the well-established presumption against intestacy.[20] The rationale of this harsh rule is that attempting to ascertain the testator's intention leads to "endless uncertainty and confusion."[21] The courts should be reluctant to extend the doctrine, and in cases of bequests of proceeds of specific property it is of doubtful application. The distinction between a gift of the proceeds and a gift of specific property itself appears a valid one, and the better view would appear to be that which sustains the legacy where the fund can be traced and identified. Such a result seems more likely to effectuate the testator's intention.

WILLS—IMPLIED REVOCATION—EFFECT OF ADOPTION OF CHILD SUBSEQUENT TO EXECUTION

Testatrix adopted a minor child subsequent to the execution of a will in which she had made no mention of or provision for a child. Testatrix' husband, as next friend of the adopted child, opposed probation of the will on the ground that it had been revoked by the adoption of the child subsequent to its execution. The lower court admitted the will to probate and the husband appealed. *Held,* reversed. The legal adoption by testatrix of a minor child revoked the antecedent will by implication or inference of law. *Thornton v. Anderson,* 64 S.E.2d 186 (Ga. 1951).

Statutes delimiting the power to devise property by will are generally broad enough to allow the testator to exercise this power in favor of whomever he wishes.[1] But a testator's actual intent may be defeated by the doctrine of "implied revocation."[2] It was a general rule of the common law that

18. ATKINSON, WILLS 755 (1937); 2 PAGE, WILLS §§ 913 *et seq.* (3d ed. 1941).

19. See, *e.g.,* Jessel, M.R., in Harrison v. Jackson, 7 Ch. D. 339, 341 (1877): "If I were allowed to guess what was the intention of the testator in this case and in others where specific bequests have been held to be adeemed, I should say that the doctrine of ademption very often defeats that intention." *Accord,* Trustees Unitarian Society v. Tufts, 151 Mass. 76, 23 N.E. 1006 (1890) (Holmes, J.); Nooe v. Vannoy, 59 N.C. (6 Jones Eq.) 185 (1861); Page, *Ademption by Extinction: Its Practical Effects,* 1943 WIS. L. REV. 11, 26. For a critical treatment of specific legacies and problems arising therefrom, see Mechem, *Specific Legacies of Unspecific Things—Ashburner v. McGuire Reconsidered,* 87 U. OF PA. L. REV. 546 (1939).

20. *See, e.g.,* the opinion in the instant case, 96 F. Supp. at 257.

21. "[T]he idea of discussing what were the particular motives and intention of the testator in each case, in destroying the subject of the bequest, would be productive of endless uncertainty and confusion. . . ." Humphreys v. Humphreys, 2 Cox Ch. 184, 30 Eng. Rep. 85 (Ch. 1789).

1. 1 PAGE, WILLIS § 196 (3d ed. 1941).

2. ATKINSON, WILLS 396 (1937).

neither marriage of the testator[3] nor birth of a child[4] subsequent to execution of a will would alone effect a revocation of the will. However, if both marriage and birth of a child occurred subsequent to the execution of a will, it was revoked, provided the testator had made no provision for the wife and child.[5] This rule is founded on a presumption of an alteration of the testator's mind arising from circumstances occurring since the making of the will and producing a change in his previous obligations and duties.[6]

These common law rules have generally become obsolete by the enactment of legislation designed to protect after-born children.[7] The statute in the instant case,[8] providing for the revocation of a will by the subsequent birth of a child, exists in some form in practically all states.[9] The adoption statutes[10] present a more difficult problem in whether the adoption of a

3. Herzog v. Trust Co. of Easton, 67 Fla. 54, 64 So. 426, Ann. Cas. 1917A, 201 (1914); Roane v. Hollingshead, 76 Md. 369, 25 Atl. 307, 17 L.R.A. 592, 35 Am. St. Rep. 438 (1892); ATKINSON, WILLS 398 (1937); BIGELOW, WILLS 114 (1898); 1 SCHOULER, LAW OF WILLS, EXECUTORS, AND ADMINISTRATORS § 640 (6th ed. 1923). Marriage of a woman at common law did revoke her will since on acquiring her common law disability, she could not revoke the will and it lost its ambulatory character. ROOD, WILLS § 372 (2d ed. 1926).

4. *In re* Allen's Estate, 64 F. Supp. 107 (D.D.C. 1946); Easterlin v. Easterlin, 62 Fla. 468, 56 So. 688 (1911); ATKINSON, WILLS 401 (1937); ROOD, WILLS 381 (2d ed. 1926); 1 SCHOULER, *op. cit. supra* note 3, § 642.

5. See, *e.g.*, Shorten v. Judd, 60 Kan. 73, 55 Pac. 286 (1898); Baldwin v. Spriggs, 65 Md. 373, 5 Atl. 295 (1886); ATKINSON, WILLS 403 (1937); BIGELOW, WILLS 114 (1898); ROOD, WILLS § 375 (2d ed. 1926); 1 SCHOULER, *op. cit. supra* note 3, § 642.

6. ATKINSON, WILLS 403 (1937); 4 KENT, COMMENTARIES 521 (1896); ROOD, WILLS 377 (2d ed. 1926).

7. Statutes of various forms providing for after-born children exist in every state except Florida, Maryland and Wyoming. ATKINSON, WILLS 402 n.22 (1937). See generally, Bordwell, *Statute Law of Wills*, 14 IOWA L. REV. 283, 290-300 (1929). An after-born child may be excluded if there is an intent to disinherit. King v. King, 166 Tenn. 115, 59 S.W.2d 510 (1933) (will made 8 months before birth of child and testator lived 8 years after making will; intent to disinherit is apparent).

8. GA. CODE ANN. §§ 113-408 (1937). "In all cases, the marriage of the testator or the birth of a child to him, subsequently to the making of a will in which no provision is made in contemplation of such an event, shall be a revocation of the will."

9. See, *e.g.*, Toomer v. Van Antwerp Realty Corp., 238 Ala. 87, 189 So. 549, 123 A.L.R. 1063 (1939); Strong v. Strong, 106 Conn. 76, 137 Atl. 17 (1927); Ash v. Ash, 9 Ohio St. 383 (1859); *In re* Patterson's Estate, 282 Pa. 396, 128 Atl. 100 (1925) (illegitimate child). Generally these statutes provide that after-born children shall take as though the testator had died intestate, but another class of statutes found in a few of the states provides that the birth of a child revokes the will. 1 PAGE, WILLS 525-26 (3d ed. 1941); ROOD, WILLS §§ 382-83 (2d ed. 1926). In Tennessee when the common law rule would apply (marriage and birth of child subsequent to execution), the will is completely revoked even though the statute as to pretermitted heirs, which would only allow the child to take an intestate share, was in effect. Hailey v. Hailey, 27 Tenn. App. 496, 182 S.W.2d 127 (W.S. 1943). In another case the court held that a will was not revoked by a subsequent marriage and birth of a child since the widow and child would take the same share regardless of whether will was revoked. Frank v. Frank, 170 Tenn. 112, 92 S.W.2d 409 (1936).

10. The 1949 amendment to the Georgia adoption statute which is applied in the instant case provides that, "Said adopted child shall be considered in all respects as if it were a child of natural bodily issue of petitioner or petitioners, and shall enjoy every right and privilege of a natural child of petitioner or petitioners; and shall be deemed a natural child of petitioner or petitioners to inherit under the laws of descent and distribution in the absence of a will and to take under the provisions of any instruments of testamentary gift, bequest, devise, or legacy, unless expressly excluded therefrom." GA. CODE ANN. § 74-414 (Supp. 1949).

child has the same effect as the birth of a child. This depends to some extent on the language used respecting the revocation of wills and the adoption of children.[11] Adoption statutes may be divided into two general classes. One class expressly provides for revocation of a will by the subsequent adoption of a child,[12] while the other merely provides that an adopted child shall have the same rights as a natural born child.[13]

The great majority of courts that have dealt with the problem of interpreting these statutes have held that the adoption of a child alters an antecedent will in the same manner as the birth of a child.[14] This result is reached by the tendency of the courts to look to the purpose of the legislature in enacting the adoption statutes. These statutes are generally designed to encourage adoption and protect the welfare of the child, and the theory is that such welfare is best promoted by giving an adopted child the same status as a natural born child.[15]

Those states which have refused to take this position have done so by strictly interpreting the adoption statutes. They have argued that if the legislature intended to give adopted children the same benefit enjoyed by natural born children with respect to antecedent wills, it would have done so, and to give any other effect to these statutes would be to amend them by implication.[16] This view, which is taken by the dissenting opinion in the instant case, is a decided minority. Certainly the policy reasons for providing for natural born children should be equally applicable to adopted children. In the majority of states the legislatures have clearly expressed their intentions by providing in effect that the adopted child shall be considered in all respects as if it were a child of natural bodily issue of the adopting parents and that it shall enjoy every right and privilege of a natural born child.[17] The court in the instant case accepted this rationale, which is the basis for the majority view that a will is altered by the subsequent adoption of a child.

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11. ATKINSON, WILLS 404 (1937); 1 PAGE, WILLS § 527 (3d ed. 1941).

12. CONN. REV. GEN. STAT. § 6956 (1949); PA. STAT. ANN. tit. 20, § 273 (1930).

13. *E.g.*, ALA. CODE ANN. tit. 27, § 5 (1940); ARK. STAT. ANN. tit. 56, § 109 (1947); KY. REV. STAT. ANN. § 405.200 (Baldwin 1943); MISS. CODE ANN. § 1269 (1942); MO. REV. STAT. ANN. § 9614 (1939); TENN. CODE ANN. § 9572.37 (Williams Supp. 1951); TEX. STAT. REV. CIV. art. 46a, § 9 (1948). TENN. CODE ANN. §§ 8131-32 (Williams 1934) relating to pretermitted children and the statute on adoption are related and should be interpreted as part of the same act. Marshall v. Marshall, 25 Tenn. App. 309, 156 S.W.2d 449 (M.S. 1941).

14. Fulton Trust Co. v. Trowbridge, 126 Conn. 369, 11 A.2d 393 (1940); Woolford v. Woolford, 76 A.2d 5 (Del. Orphans' Ct. 1950); Flannigan v. Howard, 200 Ill. 396, 65 N.E. 782 (1902); Hilpire v. Claude, 109 Iowa 159, 80 N.W. 332, 46 L.R.A. 171, 77 Am. St. Rep. 524 (1899); *In re* Rendell's Estate, 244 Mich. 197, 221 N.W. 116 (1928); Glascott v. Bragg, 111 Wis. 605, 87 N.W. 853 (1901).

15. Bilderback v. Clark, 106 Kan. 737, 189 Pac. 977 (1920).

16. Davis v. Fogle, 124 Ind. 41, 23 N.E. 860 (1890); Succession of Carre, 212 La. 839, 33 So.2d 655 (1948); Note, 22 KY. L.J. 600.

17. This is a paraphrase of the adoption statute involved in the instant case. GA. CODE ANN. § 74-414 (Supp. 1949). See note 13, *supra*.