NOTES

MEASURE OF DAMAGES IN MARINE LIABILITY INSURANCE*

IT has long been established in fire insurance law that the insurer is responsible for all damage to the insured property caused by a fire starting within the term of the policy, even though the greater part of the damage occurs after the policy's expiration.[1] A similar rule has been applied in marine,[2] and workman's compensation insurance law;[3] but a recent decision in the Circuit Court of Appeals for the Second Circuit, in a case dealing with a liability insurance contract,[4] has cast doubt upon the breadth of application of the fire rule.

Export, owner of the steamship *Exmoor,* was insured against losses arising from liability for damage to cargo. In the middle of a voyage, the original insurance policy was replaced by a substantially similar policy with a second insurer. It was discovered on unloading that a cargo of tobacco, as a result of negligent stowage, had suffered great damage by gradual deterioration over the course of the voyage. When Export, having indemnified the shipper,

* Export Steamship Corp. v. American Insurance Co., 106 F. (2d) 9 (C. C. A. 2d, 1939).

1. Globe & Rutgers Fire Ins. Co. v. David Moffat Co., 154 Fed. 13 (C. C. A. 2d, 1907); Hartford Fire Ins. Co. v. Doll, 23 F. (2d) 443 (C. C. A. 7th, 1928); Davis v. Connecticut Fire Ins. Co., 158 Cal. 766, 112 Pac. 549 (1910); see Saul v. Northwestern Nat. Ins. Co., 79 Pa. Super. 322, 324 (1922); VANCE, LAW OF INSURANCE (1930) 699.

The earliest case reference to the fire rule is in Insurance Co. v. Crunk, 91 Tenn. 376 (1892), which bases the rule on 2 MAY, LAW OF INSURANCE (3d ed. 1891) § 401. May, then, cites 2 ALAUZET, DES ASSURANCES § 461. But in Rochester German Ins. Co. v. Peaslee-Gaulbert, 120 Ky. 752, 87 S. W. 1115 (1905) the court appears to base its decision on the marine "death blow" cases cited in the briefs of counsel in that case and cited *infra* note 2. (1905) 17 GREEN BAG 674.

2. Fireman's Ins. Co. v. Powell, 52 Ky. 250 (1852); Coit & Woolsey v. Smith, 3 Johns. Cas. 16 (N. Y. 1802) (horses injured during insured voyage and died after term of policy—full recovery); Duncan v. Great Western Ins. Co., 1 Abb. App. Dec. 562 (N. Y. 1867), *aff'g,* Crosby v. N. Y. Mutual Ins. Co., 5 Bos. 369 (N. Y. 1859); see 5 COUCH, CYCLOPEDIA OF INSURANCE LAW (1929) § 1213.

Uncertainty in this field of insurance was caused by *Meretony v. Dunlope,* allegedly decided by Lord Mansfield, cited in Lockyer v. Offley, 1 T. R. 252 (K. B. 1786), which was believed to hold that the insurer is liable for only those losses which are known at the expiration of a policy. In Knight v. Faith, 15 Q. B. 649 (1850) it was doubted that such a doctrine was ever laid down in *Meretony v. Dunlope,* and the holding in *Lockyer v. Offley, supra,* was capably distinguished. Howell v. Protection Ins. Co., 7 Ohio 284 (1835) is the only American case following that doctrine. One writer suggests that that case may have been so decided because of the belief that the loss was increased by a later intervening cause. 1 PHILLIPS, LAW OF INSURANCE (3d ed. 1853) 685.

3. Treadwell v. Columbia Casualty Co., 167 So. 103 (La. C. A. 2d, 1936) (complications developing after term from injury to eye during policy's coverage); Phillips v. Holmes Exp. Co., 190 App. Div. 336, 179 N. Y. Supp. 400 (3d Dep't 1919) (rebreaking of arm from old fracture).

4. Export S. S. Corp. v. American Ins. Co., 106 F. (2d) 9 (C. C. A. 2d, 1939).

sought reimbursement under its policies, the court was called upon to determine which of the two insurers should bear the loss. The district court held that the first insurer was liable for the full amount.[5] On appeal, the circuit court apportioned the loss on the basis of an estimate by one of the expert witnesses as to the amount of damage taking place during the coverage of each policy. Judge Clark, dissenting, approved the decision of the lower court.

In refusing to extend the fire rule to the instant case the majority was apparently partially motivated by a belief that the rule is a minority one confined to the fire cases. This belief seems to stem from a misreading of the cases in related fields of insurance law. The majority apparently deduced that in marine and workman's compensation insurance, the insurer is liable only for damage actually occurring during the term of the policy. It is true that the rule in these groups of cases is stated in less precise language than that employed in the fire cases; but the holdings in all lead no less definitely to the rule that "a damage begun is a damage done, where the culmination is the natural and unbroken sequence of the beginning."[6] It seems, therefore, that the fire cases, as Judge Clark remarked, are not an exception to the rule — they are simply the rule.

In its effort to demonstrate the peculiar and limited nature of a rule which gives coverage for damage occurring beyond the agreed term of the policy, the majority points out that in life insurance the insurer is not liable on a policy which has expired before the actual death of the insured — however imminent death may be at the time of expiration. This is certainly a correct statement of the law;[7] but it has no relevance to the fire rule.[8] In all insurance cases the first inquiry is aimed at determining the event insured against — the force which, under the contract, causes the risk to "fall in," and the insurer to assume the responsibilities of the insured with respect to the subject of the policy.[9] This force in life insurance cases is death; in fire cases, fire: and as the imminence of death does not mature the policy, neither does the imminence of fire, not yet in contact with the insured property, mature a fire policy.[10]

5. Export S. S. Corp. v. American Ins. Co., 26 F. Supp. 79 (S. D. N. Y. 1938).

6. Rochester German Ins. Co. v. Peaslee-Gaulbert Co., 120 Ky. 752, 767, 87 S. W. 1115, 1119 (1905). See cases cited notes 1 and 2, *supra*.

7. Howell v. Knickerbocker Life Ins. Co., 3 Robt. 232 (N. Y. 1865), *rev'd on other grounds*, 44 N. Y. 276 (1871); 4 JOYCE, LAW OF INSURANCE (1918) §2792; 2 MAY, LAW OF INSURANCE (3d ed. 1891) §401.

8. The court in Howell v. Knickerbocker Life Ins. Co., 3 Robt. 232 (N. Y. 1865), *supra* note 7, in refusing to follow cases cited by counsel, recognized that life insurance and property insurance cases are not analogous. See 1 PHILLIPS, LAW OF INSURANCE (3d ed. 1853) §1148; 5 COUCH, CYCLOPEDIA OF INSURANCE LAW (1929) §1213.

9. See Physicians Defense Co. v. Cooper, 199 Fed. 576, 579 (C. C. A. 9th, 1912); British & Foreign Marine Ins. Co. v. Gaunt, 2 A. C. 41, 47 (1921).

10. Rochester German Ins. Co. v. Peaslee-Gaulbert Co., 120 Ky. 752, 87 S. W. 1115 (1905). But *cf.* Home Ins. Co. v. Heck, 65 Ill. 111 (1872) (cancellation of policy by insurer, provided for in contract, not permitted when fire was imminent at time cancellation attempted).

There is, then, a parallel between life and fire cases as to the inception of liability; but there is none as to its extent. Life policies are primarily investment policies, with the amount of the insurance payment completely prearranged.[11] There can therefore be no question involved as to the degree of damage at death of the insured. A fire policy on the other hand is a policy of indemnity;[12] and after the attaching of the risk there remains the further question of determining the degree of damage covered by the policy. With the solution given by the fire cases to this second inquiry, the life cases are in no way in conflict: they do not deal with the problem.

The instant case falls within the indemnity, not the investment category.[13] But before applying to it the fire rule of damages, the initial question as to the time when the risk "falls in" must be answered. This inquiry is here unusually difficult, because the event is not, as in the cases just discussed, a physical one; it is the accruing of the insured's liability. The occurrence of a physical event presents merely a fact question, determinable by objective evidence; but "liability" is a complex legal concept,[14] and to determine the time of its accrual requires the application of legal rules. It is clear to begin with that there is no liability, and hence no maturing of the policy, until the first damage to the cargo.[15] The negligent quality of an act can be determined only by reference to a particular consequence; there is no legal liability for "abstract" negligence.[16] From the non-legal standpoint the same conclusion follows: the shipper will not call the carrier to account for negligent acts which fail to cause loss. The parties cannot have intended a policy against "liability" to mature before the first point at which loss to the shipper gave him both the motive and the legal right to claim indemnification from the insured carrier.

Conversely, it seems that the policy should mature at that point, and no later. It is at the moment that a cause of action accrues against the insured, that the risk has fallen in. But the connotations of the term "liability" lead to further logical objections to this position. The first insurer suggested, for example, that liability did not accrue until the time of discharge of the cargo in unsatisfactory condition, because that was the time on which the claim by the shipper against the carrier was based.[17] The court quite justly threw out

11. VANCE, *op. cit. supra* note 1, at 26, 27, 47, 80. But see 1 MAY, *op. cit. supra* note 1, § 7.

12. Cross v. Nat. Fire Ins. Co., 132 N. Y. 133, 30 N. E. 390 (1892); VANCE, *id.* at 75 (true of all property insurance); *cf.* 1 ARNOULD, MARINE INSURANCE (12th ed. 1939) § 3 (marine insurance).

13. Joyce v. Kennard, L. R. 7 Q. B. 78 (1871) (similar policy).

14. See Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913) 23 YALE L. J. 16, (1916) 26 YALE L. J. 710.

15. Majority and dissent agreed as to this, both citing Corporation of the Royal Exchange Assurance Co. v. United States, 75 F. (2d) 478 (C. C. A. 2d, 1935).

16. Palsgraf v. Long Island R. R., 248 N. Y. 339, 162 N. E. 99 (1928). But *cf.* Corbin, *Rights and Duties* (1924) 33 YALE L. J. 501, in which writer suggests that the breach of a duty consists in conduct and not its consequences and suggests that penalties be imposed for such breach. The article, however, is not built on case law, but is an elaboration of the Hohfeldian system. See note 14, *supra.*

17. Brief for Respondent-Appellant, pp. 20-25, Export S. S. Corp. v. American Ins. Co., 106 F. (2d) 9 (C. C. A. 2d, 1939).

this suggestion as laying the basis for collusive actions; for, under this rationale, the shipper, according to his choice between a suit in contract or in tort, could vary the time of liability so as to throw the loss at will on the first or second insurer.[18] The first insurer's claim is closely analogous to the basing of liability on the time of suit, the entering of judgment, or payment; the form of a suit, based on a single set of operative facts, is, like all these named events, concerned with the process of proof and extinguishment of liability, not with its inception.

A further doubt as to the justification of placing the inception of liability at the first moment of damage was raised by Judge Swan on the argument on appeal.[19] The Judge raised the question whether there would be any liability based on the negligent stowage, if, before unloading, the ship should be completely lost from a cause excepted in the bill of lading. The inference apparently is that such a catastrophe would eliminate all previous liability so that it cannot be said that liability accrues until, on unloading, it is certain no such total loss will occur.[20]

This, again, would seem to be without effect on the time of inception of liability: it is a problem of proximate cause. It might well be said that the intervening cause would be the cause only of the loss of the undamaged part of the cargo. But even were it assumed that this would wipe out previous liability, the reason it would do so is that the negligent stowage is no longer the cause of the loss.[21] This conclusion, even if adopted, does not make inapplicable the fire rule which holds the insurer liable from the attachment of the policy for all damage proximately resulting from the original force.[22] The later damage need not be absolutely inevitable; the problem is one of fact — to determine, whether, looking back at all the circumstances, the damage was the direct result of the cause in question.[23]

It now becomes apparent that the majority in apportioning the damage between the two insurers was acting under a misunderstanding of the applicable rules of law. Starting from a misreading of the damages rule in the marine insurance cases and further confused by a wrong analogy to life insurance, the court reached the conclusion that the fire rule was a mere exception. From this premise it was easy to be misled into confusing the two inquiries essential

18. See Lattin v. Gillette, 95 Cal. 317, 319, 30 Pac. 545, 546 (1892). Under modern code pleading the operative facts, and not the form of the pleadings, should fully determine the rights of all parties involved. See CLARK, CODE PLEADING (1928) §§ 46, 114, 116.

19. Private communication to YALE LAW JOURNAL, Oct. 6, 1939.

20. By analogy, perhaps, to the old marine rule that the breach of a warranty in a policy of insurance voids the contract *ab initio*. See Hibbert v. Pigou, 3 Doug. 224 (K. B. 1783); MARSHALL, LAW OF INSURANCE (1805) 250. But this rule does not apply today to losses occurring previous to the breach. 2 ARNOULD, MARINE INSURANCE (12th ed. 1939) § 634.

21. *Cf.* Matter of Anderson v. Babcock & Wilcox Co., 256 N. Y. 146, 149, 175 N. E. 654, 655 (1931) (where there were successive workman's compensation liability policies and second injury grew out of first with intervention of new cause, each insurer was liable for extent of injury attributed to cause effective during his term).

22. See VANCE, *op. cit. supra* note 1, at 699.

23. Schnell v. The Vallescura, 293 U. S. 296, 55 Sup. Ct. 194 (1934) *semble;* Lanasa Fruit Steamship & Importing Co. v. Universal Ins. Co., 302 U. S. 556 (1938).

to the case — falling in of the risk and the measure of damages — and to infer from the increasing physical damage that liability accrued gradually from the moment of first damage. It is at that moment, however, that the risk insured against matures, and it seems a confusing use of terminology to speak of the liability as increasing thereafter. The liability remains the same — only the amount of damage increases.[24] In this view liability is as truly a single event as a fire, and when it occurs the insurer assumes the responsibility of the insured. The form in which those responsibilities are discharged and the subsequent increase in their amount should make no difference to the time of falling in of the risk.[25]

When, therefore, a distinction is drawn, as in the fire cases, between the falling in of the risk and the later measure of damage, and the confusion created by the fact that the event in this case is "liability" is cleared away, it seems in accord with the intent of the parties that the first moment of liability causes the risk to fall in and makes the insurer liable, under the fire cases, for all later proximate damage. This is the only rule which truly relates the insurer's liability to the falling in of the risk insured against.[26] Further, despite the apparent practicality of apportioning the loss according to the amount of damage occurring within the coverage of the respective policies,[27] it is the only practical rule. Insurance companies, operating on the basis of actuarial calculations, require above all a rule which is certain in its application.[28] But certainty cannot be attained by apportionment, based on the

24. Judge Clark clearly points out that the only breach of duty by the carrier took place on stowage, that shipping practice does not permit continual reloading in search of defects of stowage. Export S. S. Corp. v. American Ins. Co., 106 F. (2d) 9, 13 (C. C. A. 2d, 1939). See BRIDGER & WATTS, THE STOWAGE OF CARGO (1927) 17-18.

25. Some policies are drawn to require the insured to take certain procedural steps, such as compel payment to the shipper as a condition precedent to collection from the insurer. Such requirements, however, do not affect the time of the accrual of the insurer's liability. Slavens v. Standard Accident Ins. Co., 27 F. (2d) 859 (C. C. A. 9th, 1928); Ocean Accident & Guarantee Corp. v. Southwestern Bell Telephone Co., 100 F. (2d) 441 (C. C. A. 8th, 1939); Ross v. American Express Employers' Liability Ins. Co., 56 N. J. Eq. 41, 38 Atl. 22 (1897).

26. This is clarified by the consideration of the cases where there is only one insurer. If the "risk falls in" during the term of the policy, all subsequent damage is covered. See note 1, *supra*. If the "risk falls in" before the issuance of the policy, damage taking place during its term is not covered. See Saul v. Northwestern Nat. Ins. Co., 79 Pa. Super. 322, 324 (1922).

27. Quite possibly the court was misled by the fairness and practicality of the divided damages rule in marine collision cases as compared with the common law contributory negligence rule. See The Catharine, 17 How. 170 (U. S. 1854); ROBINSON, ADMIRALTY LAW (1939) 856. It is apparent, however, that the basis of the divided damages rule is not applicable here. In the collision cases the damage to each vessel is easily determinable, and the rule is an equitable and practical division of the loss between cotortfeasors. In circumstances similar to those in the instant case, apportionment is extremely uncertain, and is at variance with the legal principles governing insurance contracts.

28. See Howell v. Protection Insurance Co., 7 Ohio 284, 287 (1835); Lockyer v. Offley, 99 Eng. Rep. 1079, 1083 (K. B. 1786) ("it is of more consequence that the rule be certain than whether it is established one way or the other"), both *supra* note 2. The

guesses of experts.[29] It would have been but a logical extension of settled doctrine to apply the fire rule in the present case. This extension the majority, through its misunderstanding of the nature and scope of the rule, and its failure to disperse the fog surrounding the slippery term "liability," regrettably failed to make. It is therefore unfortunate that a decision which can only have the effect of confusing the legal principles involved, should at the same time set up a rule so clearly impractical.[30]

SET-OFF OF CONTINGENT CLAIM IN BANKRUPTCY*

ONE consequence of the unusual contractual relationship existing between an insurance company and its so-called "loan correspondent"[1] is the unique problem of set-off sometimes presented upon the bankruptcy of the latter. In a recent case, under long-standing agreement between the parties,[2] Chick-

need for certainty still obtains, but it is now apparent that it cannot be provided by a rule involving apportionment.

29. In the instant case, the apportionment was based on an estimate of a single witness. The other witnesses with one exception disagreed with the figure supporting it and refused to make an estimate because of the uncertainty involved. Export S. S. Corp. v. American Ins. Co., 106 F. (2d) 9, 13 (C. C. A. 2d, 1939). See The Georgian, 76 F. (2d) 550, 551 (C. C. A. 5th, 1935) (recognition of necessarily haphazard nature of apportionment of marine damage).

30. See note 27, *supra*. Of course, the unfortunate effect of the decision could be avoided, by contract, through the insertion of a "continuation" clause. 1 ARNOULD, MARINE INSURANCE (12th ed. 1939) § 440. It would almost seem that the moral to be drawn from this case is contained in the adage "Never change horses in midstream."

*Prudential Insurance Co. of America v. Nelson, 101 F. (2d) 441 (C.C.A. 6th, 1939), *cert. denied*, U. S. Sup. Ct. No. 261, Oct. 9, 1939.

1. Customarily, the "loan correspondent" is given the exclusive right to submit to the insurance company applications for loans upon the security of real estate in a specified area. The loans usually take one of two forms. In one type of transaction, the loan is arranged by the loan correspondent without having previously procured the insurance company's approval of the application, but with a view to selling the loan to the insurance company. In such a case, the papers are drawn upon the forms of the loan correspondent and the loans are made payable to it, to be endorsed over to the insurance company should it purchase the loans. In the second type of transaction, the loan correspondent submits to the insurance company applications for loans drawn on the forms of the insurance company. If the loans are approved, the loan correspondent then draws and procures the execution of all loan papers, has titles examined and mortgages recorded in the name of the insurance company, and closes the loans by advancing its own money to the borrowers. The loan papers are then forwarded to the insurance company for final approval. The instant case arose out of a transaction of the second type.

For other legal problems arising out of the "loan correspondent" arrangement, see former case between the same parties, Prudential Insurance Co. of America v. Nelson, 96 F. (2d) 487 (C.C.A. 6th, 1938). For a complete description of this relationship, see Record on Appeal, p. 9 *et seq.*

2. Record on Appeal, p. 15 *et seq.*, where the agreement is set out in full.

amauga Trust Company, after receiving from the Prudential Insurance Company of America preliminary approval of several applications for loans which the Trust Company had submitted, disbursed its own funds to close the loans with the borrowers.[3] Chickamauga went bankrupt before sending to the Insurance Company the loan papers, which were all drawn in favor of Prudential.[4] According to the contract with Chickamauga, Prudential was to be "the sole judge . . . as to the legal sufficiency of the title to the security," before reimbursing Chickamauga. The trustee in the Chickamauga bankruptcy forwarded the papers to Prudential, which, upon examination, promptly found the title sufficient and closed the loans.[5]

Prudential then claimed the right to set off the $11,613.70 which it owed the bankrupt because of these loans against the indebtedness of $115,000 owed to it by the bankrupt.[6] The Circuit Court of Appeals for the Sixth Circuit, affirming the judgment of the district court,[7] decided that set-off, as provided by Section 68a of the Bankruptcy Act,[8] would not be allowed in this case, because the Insurance Company had "an option to accept or decline" the notes subsequently tendered it by the trustees, and therefore the debt due the trustee did not accrue until after bankruptcy.[9]

In view of the growing tendency of the courts not to give full effect to a clause in a contract making the purchaser's promise conditional upon his personal satisfaction,[10] it would seem that if the question of bankruptcy had

3. According to the agreement, upon Prudential's final approval of loans, Chickamauga became entitled to interest from the date of disbursement to the borrowers to the date of payment by Prudential. Record on Appeal, p. 10.

4. In each case the papers consisted of notes and a recorded mortgage or deed of trust. Record on Appeal, Exhibits 8–16.

5. Pursuant to an agreed order entered in the bankruptcy court, the loans were closed without prejudice to the rights of either party as to set-off. Record on Appeal, pp. 13, 14.

6. This sum represented collections made by Chickamauga for Prudential from various borrowers.

7. The memorandum opinion of the district court is set forth in the Record on Appeal at p. 75 *et seq.*

8. "In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set-off against the other, and the balance only shall be allowed or paid." 52 STAT. 878, 11 U. S. C. § 108a (Supp. 1938).

9. In the course of its decision, the court stated the problem as follows: "If the Insurance Company's debt to the trustee did not accrue until after bankruptcy, then equity does not permit the set-off because as the debt of the Insurance Company did not exist when the estate of the bankrupt passed into the hands of the trustee, the equities of the bankrupt's other creditors intervene to prevent the depletion of the assets in the hands of the trustee by extinguishing a good debt due the estate by a bad one due a creditor from the estate." Prudential Insurance Co. of America v. Nelson, 101 F. (2d) 441, 443 (C. C. A. 6th, 1939).

10. Jackson Lumber & Supply Co. v. Deaton, 209 Ky. 239, 272 S. W. 717 (1925); MacDonald v. Kavanaugh, 259 Mass. 439, 156 N. E. 740 (1927); Dillinger v. Ogden, 244 Pa. 20, 90 Atl. 446 (1914); Robeson & Weaver v. Ramsey, 147 Tenn. 25, 245 S. W. 413 (1922); see Duffy Bros. v. Bing & Bing, 217 App. Div. 10, 15, 215 N. Y. Supp. 755, 760 (1st Dep't 1926). *Contra:* Hollingsworth v. Colthurst, 78 Kan. 455, 96 Pac. 851 (1908) and cases cited therein. *Cf.* RESTATEMENT, CONTRACTS (1932) § 265.

not affected the present case, a court would not have held, despite the "sole judge" provision in question, that the Insurance Company had the absolute and unqualified right to reject the loans, after its preliminary approval of the applications and the disbursement to the borrowers by Chickamauga.[11] The better view of the transaction seems to be that the Insurance Company was under an obligation to reimburse Chickamauga, unless in fact the title to the security was not legally sufficient.[12] Under this interpretation, it would follow that the Insurance Company was under a definite obligation as soon as Chickamauga closed the loans with the borrowers, although whether this obligation remained binding could not be determined until examination of the papers, which in this case did not take place until after bankruptcy.

Although the court is obviously correct in its contention that the rights of the parties are adjusted as of the date of bankruptcy,[13] the fact that the amount which Prudential owed Chickamauga was unascertained at that time would not, of course, defeat the right of set-off.[14] The rule against allowing a preference in the settlement of a bankrupt's estate precludes the allowance of a set-off when a creditor, after the filing of the petition, purchases property belonging to the estate[15] or in some other way becomes its debtor.[16] But

11. See cases cited *supra* note 10. Dillinger v. Ogden, 244 Pa. 20, 90 Atl. 446 (1914), is clearly analagous to the instant case. According to the contract in that case, the defendants were to be bound "only on condition it [the title] should prove to be satisfactory to them. . . ." The court said: ". . . The vendees were not at liberty to refuse arbitrarily to accept. They could not reject the title capriciously. If it was good, they were bound to take it." 244 Pa. at 25, 90 Atl. at 448. Of course this rule would not apply to contracts involving the satisfaction of personal taste or whim. Schuyler v. Pantages, 54 Cal. App. 83, 201 Pac. 137 (1921); Schwartz v. Cohn, 129 N. Y. Supp. 464 (Sup. Ct. 1911).

12. But according to the court's reasoning, "It is a fair presumption from the record in this case that the purpose of the Insurance Company in accepting the notes tendered it by the trustee conditioned on it remitting cash was to use their purchase price as an offset." (p. 444). Prudential's contention, however, is that the notes in question are its property, as discussed *infra*. The court's presumption, which makes it hostile to the allowance of a set-off here, is that Prudential was eager to recoup some of its loss by exercising the right of set-off, but the same may be said of any creditor taking advantage of the provisions of § 68a. There is nothing in the record to show any defect in the title to the security of these loans. In fact, with each set of loan papers, the trustee in bankruptcy sent to the insurance company a title guaranty policy or certificate of title by an attorney. Record on Appeal, Exhibits 8-16.

13. "After the bankruptcy proceeding has commenced, the estate and its representatives . . . are in *custodia legis* for the purpose of preserving the estate on behalf of the creditors. Hence, debts accruing to the trustees are given a status different from those to the bankrupt and cannot be set-off against debts of the bankrupt." *In re* Schulte Retail Stores, C. C. H. Bankr. Serv. ¶4735 (S. D. N. Y. 1937); *In re* Montgomery Bros., 51 F. (2d) 284 (S. D. Miss. 1931); Chipley State Bank v. McNeill, 77 Fla. 827, 82 So. 292 (1919).

14. See note 19, *infra*.

15. Bramham v. Lanier Bros., 138 Tenn. 702, 200 S. W. 830 (1918). *Accord:* Otis v. Shants, 128 N. Y. 45, 27 N. E. 955 (1891) (action on a note for goods sold in liquidation proceedings). See Note (1931) 71 A. L. R. 804.

16. Deposits made by the trustee in bankruptcy cannot be set off against debts of the bankrupt. Gardner v. Chicago Title Co., 261 U. S. 453 (1923); *In re* Montgomery

the bankruptcy courts do not deny the right of set-off in cases of claims which are owing though not due[17] at the time of the filing of the petition;[18] and when there is a definite liability at that time, it is held to be no bar to the right of set-off that the claim is as yet unliquidated.[19] Even the right to set off contingent liabilities has been recognized in cases where there was a definite obligation at the time of the filing of the petition.[20] Thus the contingent liability of a creditor who had endorsed a note payable to the bankrupt but not yet due at the date of the petition may be used to set off a claim by the bankrupt's estate against him, if the maker defaults.[21]

If it is agreed that Prudential had a positive though undetermined obligation to Chickamauga at the time of the filing of the petition, then the only important remaining inquiry in a case of this kind should be the factual

Bros., 51 F. (2d) 284 (S. D. Miss. 1931); Hood v. Brownlee, 62 F. (2d) 675 (C. C. A. 4th, 1933).

17. N. Y. County Bank v. Massey, 192 U. S. 138 (1904); Kolkman v. Mfrs. Trust Co., 27 F. (2d) 659 (C. C. A. 2d, 1928); *In re* Sparks Co., 46 F. (2d) 497, (W. D. S. C. 1929); Doggett v. Chelsea Trust Co., 73 F. (2d) 614 (C. C. A. 1st, 1934). In Kolkman v. Mfrs. Trust Co., *supra,* at 662, it was said: ". . . The privilege of set-off is not confined to debts which were due, provided they are provable." Since under § 63a, debts of the bankrupt include "A fixed liability . . . absolutely owing at the time of the filing of the petition . . . whether then payable or not . . .," immature claims against the bankrupt may be set off, and do not come within the prohibition of § 68b disallowing counterclaims "not provable against the estate." In order for set-off to be allowed, the claim in the hands of the trustee need not be one of the type provable in bankruptcy in case the one liable thereon had been adjudicated a bankrupt. See *In re* Harper, 175 Fed. 412, 422 (N. D. N. Y. 1910). But *cf.* 6 WILLISTON, CONTRACTS (rev. ed. 1938) § 1998; 4 REMINGTON, BANKRUPTCY (1935 ed.) § 1459. However, the test of the provability of a claim in bankruptcy is applied as an analogy to determine whether there is a debt due to the trustee at the time of the filing of the petition. See *infra* note 18.

18. Formerly the courts recognized one exception to this well-established rule, and, largely for historical reasons, denied the right to set off a liability for unaccrued rent. Wasson v. White, 12 F. (2d) 809 (N. D. Okl. 1925); Standard Oil Co. of N. J. v. Elliott, 80 F. (2d) 158 (C. C. A. 4th, 1935). These cases are a result of the decisions declaring that unaccrued rent is not a provable claim in bankruptcy, on the theory that no debt is created until the time for payment has arrived. *In re* Roth & Appel, 181 Fed. 667 (C. C. A. 2d, 1910).

19. Clifford v. Oak Valley Mills Co., 229 Fed. 851 (D. Mass. 1916). In this case, the creditor, according to the agreement, had been paying only eight per cent of the manufacturing charge, twenty per cent being reserved by defendant against countercharges for imperfect work. The court held that the defendant was entitled to apply on its note such sums as might become due the bankrupt out of the reserve amounts, although the sum was not ascertained at the date of bankruptcy.

20. *In re* Farnsworth, 8 Fed. Cas. No. 4, 673 (N. D. Ill. 1873); Morgan v. Wordell, 178 Mass. 350, 59 N. E. 1037 (1901).

21. In Maynard v. Elliott, 283 U. S. 273 (1931) the court held that the bankrupt's liability as an endorser of negotiable paper was a provable claim in bankruptcy, despite its contingency, because of its certainty of accrual and susceptibility of liquidation. Since the analogy of whether a claim is provable in bankruptcy is used to decide whether there is a debt to be offset at the time of the filing of the petition, *Maynard v. Elliott, supra,* is determinative of the right to set off in claims by the bankrupt against creditors who are endorsers or sureties to him.

question of whether or not a preference has been created. In litigation concerning the right of set-off in bankruptcy, the controversy may center either on the availability of the claim sought to be established against the bankrupt or on the propriety of the claim said to be owing to the bankrupt. In the case in which a debtor of the bankrupt seeks to escape payment of his obligation by acquiring at a discount worthless claims against the insolvent's estate, the provisions of Section 68b[22] prevent the depletion of assets in the hands of the trustee. The right of the trustee to set aside voidable preferences[23] is ample protection[24] against the converse situation, in which a creditor of the future bankrupt, with his co-operation, designedly acquires valuable goods or property from the insolvent, but does not pay for them,[25] or borrows money or receives a deposit[26] from the insolvent, in order to claim the right, when sued after bankruptcy, to set off the amount owed to him by the bankrupt.

Clearly, if there is a bona fide sale or transfer of property, made in the usual course of business[27] and not done with intent to effect a preference, the purchaser or bank should be allowed to set off the amount which he owes by virtue of the transaction against the amount owed to him by the

22. "A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate and allowable under subdivision g of section 57 of this Act; or (2) was purchased by or transferred to him after the filing of the petition or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent or had committed an act of bankruptcy." 52 STAT. 878, 11 U. S. C. § 108b (Supp. 1938). Coyle v. Morrisdale Coal Co., 289 Fed. 429 (C. C. A. 2d, 1923).

23. 52 STAT. 869, 870, 11 U. S. C. § 96 (Supp. 1938).

24. There was a movement, however, culminating in the introduction of HOUSE RESOLUTION 12,889, 74th Cong., 2d Sess. (1936), to add a third subsection to 68 containing an express prohibition against the preferential acquisition of a set-off by means of a loan from the debtor to the creditor under such circumstances that the payment of the creditor's debt would constitute a voidable preference. In his article, *Aspects of the Chandler Bill to Amend the Bankruptcy Act* (1937) 4 U. OF CHI. L. REV. 369, 393, *et seq.*, McLaughlin admits that the Act has adequate provisions to cover such a contingency, but he would add a new section because he feels that the courts are not "sufficiently alert to observe how bank deposits have frequently partaken of the nature of such preferential transfers."

25. *In re* White, 177 Fed. 194 (C. C. A. 7th, 1910); Hackney v. Raymond Bros. Clarke Co., 68 Neb. 633, 99 N. W. 675 (1904). In the latter case recovery was allowed against a creditor in the amount which he received on a sale of accounts against the insolvent by a person whom he knew intended to use them as a set-off for purchases from the insolvent.

26. Mechanics' Nat. Bank v. Ernst, 231 U. S. 60 (1913); Elliotte v. American Sav. Bank & Trust Co., 18 F. (2d) 460 (C. C. A. 6th, 1927); Kolkman v. Mfrs. Trust Co., 27 F. (2d) 659 (C. C. A. 2d, 1928); *In re* Putterman, 46 F. (2d) 175 (S. D. N. Y. 1930); Bank of Commerce & Trusts v. Hatcher, 50 F. (2d) 719 (C. C. A. 4th, 1931).

27. See Citizens' Nat. Bank v. Lineberger, 45 F. (2d) 522, at 529, 530 (C. C. A. 4th, 1930), for an excellent summary of various cases in which the deposits were not made in the usual course of business and consequently were held to be preferential payments to the bank.

bankrupt.[28] The fact that the deposit or sale is made within four months of the filing of the petition will not defeat the right of set-off,[29] since the law provides for the operation of set-off in "all cases of mutual debts and credits" and since it is highly desirable for the incipient bankrupt to be able to transact business in a normal way up to the date of the filing of the petition.[30]

Deposits made even after the bank's officials knew of the depositor's financial difficulties have been held not to be transfers of property creating a preference, provided the deposit is made in the usual course of business to the open or general account of the depositor subject to check.[31] In the absence of a finding of fraud or collusion between the bankrupt and the bank, it is said that the deposit does not operate to diminish the estate of the depositor, because it creates at the same time an obligation on the part of the bank to pay the amount of the deposit as soon as the depositor sees fit to draw a check against it.[32]

In the instant case, when Chickamauga paid the borrowers, the notes were made over to Prudential and the mortgages were recorded in its name.[33] There was no preference, because the transaction was one of a long series of similar transactions made in the usual course of business,[34] and there was no diminution of the assets of the insolvent, because in place of the money Chickamauga had Prudential's obligation either to reimburse by payment in cash or to assign the papers to Chickamauga so that it could collect the loans from the borrowers.[35]

Even if one accepts the court's position that Prudential was free to reject the notes with impunity, the fact that Prudential exercised an option after bankruptcy should not defeat the right of set-off, since there was a subsisting

28. N. Y. County Nat. Bank v. Massey, 192 U. S. 138 (1904); Continental Trust Co. v. Chicago Title Co., 229 U. S. 435 (1913); Kane v. First Nat. Bank, 56 F. (2d) 534 (C. C. A. 5th, 1932).

29. See cases cited *infra* note 31.

30. In Studley v. Boylston Nat. Bank, 229 U. S. 523, 529 (1913), it was said: ". . . To deny the right of set-off, in cases like this, would in many cases make banks hesitate to honor checks given to third persons, would precipitate bankruptcy and so interfere with the course of business as to produce evils of serious and far-reaching consequence." Also, see statement of Livingston, *Hearing before House Judiciary Committee on H. R. 6439*, 75th Cong., 1st Sess. (1937) 152 *et seq.* But *cf.* McLaughlin, *loc. cit. supra* note 24.

31. N. Y. County Nat. Bank v. Massey, 192 U. S. 138 (1904); Continental Trust Co. v. Chicago Title Co., 229 U. S. 435 (1913); Citizens' Nat. Bank of Gastonia v. Lineberger, 45 F. (2d) 522 (C. C. A. 4th, 1930).

32. N. Y. County Nat. Bank v. Massey, 192 U. S. 138, 147 (1904), declaring a deposit is not a transfer within the meaning of the Bankruptcy Act as a "payment, pledge, mortgage, gift or security."

33. See note 4, *supra.*

34. There is no contention at all in the case that the transfer to the borrowers by Chickamauga on behalf of Prudential was done under any suspicious circumstances or with intent to prefer.

35. Following the analogy of the bank cases discussed above, a corresponding credit was created against Prudential when Chickamauga paid the notes. Consequently the transaction was not one which would fall within the prohibition of § 60.

obligation on its part before bankruptcy by virtue of the fact that the notes in question were made its property.[36] Although there is little authority in point, it seems consistent with the general rule, that the rights of creditors are fixed as of the date of bankruptcy, to hold that a contractual obligation incurred before the filing of the petition to pay money or to transfer a valuable property interest to a bankrupt may be used by way of set-off,[37] even though the creditor has the right, after bankruptcy, to determine the character of the obligation.[38] The transaction under consideration in the principal case is analagous to the case of merchandise purchased on "sale or return."[39] If such a sale had been made in the usual course of business by a seller who subsequently became bankrupt, it would seem contrary to the general principles of set-off to deny the buyer the right to set off his liability for the purchase price of the goods, on the ground that the time he was to be allowed for the return of the goods did not elapse until after bankruptcy.[40] In both the instant case and in the case of a "sale or return,"

36. Half Moon Fruit & Produce Co. v. Floyd, 60 F. (2d) 799 (C. C. A. 9th, 1932). See also Goodrich v. Dobson, 30 Fed. Cas. No. 18,297 (D. Conn. 1876), in which a consignor sold goods after bankruptcy, but was allowed a set-off because of his subsisting obligation before the petition to convert the goods into money for the account of the bankrupt. In the instant case, before bankruptcy, Prudential had an obligation either to reimburse Chickamauga or to endorse the notes over to Chickamauga. Of course, if Prudential had not been given title until after bankruptcy, then clearly a set-off would have violated the rule against allowing a preference in the settlement of a bankrupt's estate.

37. 'A surety's alternative duty to return the property of a bankrupt road contractor or to account for its value was held the proper subject of set-off. Hartford Acc. & Ind. Co. v. Coggin, 78 F. (2d) 471 (C. C. A. 4th, 1935).

38. *Ibid.* In Kane v. First Nat. Bank of El Paso, 56 F. (2d) 534 (C. C. A. 5th, 1932), a bank had accepted checks for collection before it knew that the depositor was insolvent, and upon learning this fact, claimed and was allowed the right of set-off against the uncollected drafts. In an early case, *In re* Farnsworth, 8 Fed. Cas. No. 4, 673 (N. D. Ill. 1873), set-off was allowed even though the drafts were not collected until after the filing of the petition. The best rationalization of these cases and those cited *supra* note 36 would seem to be that in all these instances, as in the principal case, legal title to some property or other was given to the creditor under such circumstances that the transaction was not a preference, because of the corresponding obligation created on the part of the creditor. In all those cases, as in the principal case, the creditor could have returned property instead of money to the debtor, but the existence of such an option does not mean that an enforceable liability is lacking at the time of bankruptcy.

39. In "sale or return" as distinguished from "delivery on approval," the ownership rests in the buyer. The title passes subject to a condition subsequent, allowing the buyer to revest title in the seller by returning the goods and thus to relieve himself of liability for the purchase price. Vold, *"Sale or Return" and "Delivery on Approval"* (1928) 2 DAK. L. REV. 280.

40. The purchaser would consider himself the owner of the property. He would bear the risks incident to ownership. Vold, *loc. cit. supra* note 39. According to business dealings, he would expect to be able to extinguish the seller's claim against him with his credit against the seller. Other creditors cannot expect to reach those assets which have been legally transferred during a mutual course of dealing. As was said, in Scott v. Armstrong, 146 U. S. 499, 510 (1892), in answer to the argument that to allow a

commercial expectancies would justify the set-off, and the person who had had mutual dealings over a period of time with the insolvent would be given the opportunity to salvage a portion of his loss.

LIFE INSURANCE GIFTS UNDER THE FEDERAL ESTATE TAX*

THE transfer inter vivos of life insurance policies has been a favorite pastime of ingenious taxpayers, for the belief has prevailed that when an insured irrevocably assigns all the incidents of ownership[1] in such policies, the proceeds at death will not be included in his taxable estate.[2] By this device alert taxpayers hope to save not only the substantial difference between the gift tax and estate tax,[3] but also the tax upon the difference between the proceeds of the policy taxable at death and the "reproduction" value placed upon the policy for purposes of the gift levy.[4] Recently the complacency of such taxpayers was disturbed for the first time by the decision of the Court of Claims in *Bailey v. United States*[5] which held that the proceeds of policies so assigned

set-off would constitute a preference: ". . . It is clear that it is only the balance, if any, after the set-off is deducted which can justly be held to form part of the assets of the insolvent." The idea which, it would seem, should prevail in this type of situation is that ". . . one ought not to be required to pay a debt to his creditor if he cannot ultimately compel the creditor to pay a debt due him." George D. Harter Bank v. Inglis, 6 F. (2d) 841, 843 (C. C. A. 6th, 1925).

*Bailey v. United States, 27 F. Supp. 617 (Ct. Cl. 1939).

1. Legal incidents of ownership in a policy include: The right of the insured or his estate to its economic benefits, the power to change the beneficiary, to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it for a loan, or to obtain from the insurer a loan against the surrender value of the policy. U. S. TREAS. REG. 80, Art. 25.

2. An assignment is not necessary. The result is the same if a policy is taken out irrevocably in the first instance in the name of a beneficiary and the insured reserves no incidents of ownership.

3. For a discussion of the tax savings to be effected by use of the gift device, see MONTGOMERY AND MAGILL, FEDERAL TAXES ON ESTATES, TRUSTS AND GIFTS, 1936-1937 (1936) 387 *et seq.* There are four major factors in such savings: (1) the gift tax rate is 75% of the estate tax rate; (2) the amount of the tax itself is not included as part of the sum taxed for gift tax purposes, although it is for estate tax purposes; (3) the taxpayer is able to use the lower brackets of both estate and gift taxes; and (4) the taxpayer under the gift tax gets additional exemptions.

4. U. S. TREAS. REG. 79, Art. 19(9). "The value of a life insurance contract . . . is established through the sale of the particular contract by the company, or through the sale by the company of comparable contracts." Gifts made prior to that regulation were valued at the cash surrender value instead of at cost. Guggenheim v. Rasquin, 28 F. Supp. 322 (E. D. N. Y. 1939). *Contra:* Ryerson v. United States, 28 F. Supp. 265 (N. D. Ill. 1939).

5. 27 F. Supp. 617 (Ct. Cl. 1939).

must be included in the gross estate.[6] The interval before a probable appeal[7] to the Supreme Court is an opportune time to examine the problems which the Court may be called upon to resolve.

Opposing contentions in the *Bailey* case were drawn along two not very clearly separated lines — statutory construction and constitutional interpretation. The Government, in construing the Estate Tax Law, relied on Section 302 under which

> "The value of the gross estate of the decedent shall be determined by including . . .
>
> "(g) . . . the amount receivable (in excess of $40,000) by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."[8]

By its terms, the Government contended, this section required the inclusion of all policies taken out by the decedent on his own life, irrespective of any subsequent assignment. The taxpayer maintained that subsection (g) must be construed in the light of subsection (a) under which there was to be included in the decedent's estate all property

> "(a) to the extent of the interest therein of the decedent at the time of his death,"

and of Section 301 which imposed a tax of ascending rates upon the *transfer* of the net estate.[9] Since the decedent had irrevocably assigned all the incidents of ownership, the taxpayer asserted, he had neither any interest in the policies at the time of his death (302a), nor anything to transfer (301).

In support of his case the taxpayer might have gone outside the four corners of the Statute. Since 1930, Treasury Regulations[10] have clearly indicated that the proceeds of irrevocable inter vivos transfers of insurance

6. Assignments of life insurance policies are subject to the gift tax. INT. REV. CODE, § 1000 (1939). In the event that inter vivos transfers of such policies are included in the gross estate for estate tax purposes, taxpayers who have paid the gift tax will be entitled to a credit therefor. INT. REV. CODE, § 813(a) (1939). It should be noted that in the *Bailey* case, the gift tax, although due, was never paid, and this fact—unmentioned in either the Government's brief or the Court of Claims opinion—may have had some weight in inducing the court to arrive at its conclusion. In the *Bailey* case, also, the court found that the decedent had continued to pay the premiums on the policies after assignment. However, each premium payment should be treated as a taxable inter vivos gift. U. S. TREAS. REG. 79, Art. 2(6); Walker v. United States, 83 F. (2d) 103 (C. C. A. 8th, 1936); Paul, *Life Insurance and the Federal Estate Tax* (1939) 52 HARV. L. REV. 1037, 1075, n. 117. Consequently the result should not differ from that reached in the instance of a gift of a paid-up policy. However, since a donor is exempt from the gift tax on gifts up to $4,000 per beneficiary per year, [INT. REV. CODE, § 1003(b) (1939)] he is able, unless the *Bailey* case is upheld, to escape all estate and gift taxes on insurance policies immediately irrevocably vested in the beneficiary when the annual premium is less than $4,000.

7. At present, plaintiff has pending in the Court of Claims a motion for a new trial. Communication to YALE LAW JOURNAL by counsel for plaintiff, Oct. 6, 1939.

8. INT. REV. CODE, § 811(g) (1939).

9. INT. REV. CODE, § 810 (1939).

10. U. S. TREAS. REG. 70, Art. 27, as amended by T. D. 4296, IX-2 CUM. BULL. 427 (1930); U. S. TREAS. REG. 80, Art. 27.

policies are not to be included in the gross estate. A fairly well-known canon of statutory construction, affirmed only recently by the Supreme Court,[11] holds that reenactment of a provision of the revenue law by Congress after it has been construed by the Treasury Department is an adoption of the Department's construction.[12] For a variety of reasons, however, it seems unlikely that the Supreme Court will apply this rule in the *Bailey* case. The Regulations had been in force for only two years[13] at the date of transfer. Furthermore, Section 302(g) was not expressly reenacted, unless reenactment can be inferred from a failure to alter that section while other sections of the Estate Tax Law were being amended.[14] The taxpayer would have fared better also, if he could have shown that the Regulations were affirmatively before Congress[15] when the Estate Tax Law was revised.[16]

Erudite arguments over statutory construction of Section 302, however, avoid the essential problem, for interpretation of the meaning of the various clauses of Section 302 has always been influenced[17] by the constitutional limitations which the Supreme Court has placed upon the scope of the estate tax.[18] Provisions of the estate tax have been sustained if they are directed at a transfer at death[19] or if they are reasonably designed to prevent the avoidance of the estate tax.[20] It has generally been supposed that if an inter vivos assignment of an insurance policy is properly executed by the immediate and unconditional divestment of all the incidents of ownership, there is no transfer at death.[21] It is true that a transfer sufficient to sustain the

11. Helvering v. R. J. Reynolds Tobacco Co., 59 Sup. Ct. 423 (U. S. 1939).

12. United States v. Dakota-Montana Oil Co., 288 U. S. 459, 466 (1933). But *cf.* Helvering v. New York Trust Co., 292 U. S. 455, 467 (1934).

13. Iselin v. United States, 270 U. S. 245 (1926) (long-continued uniformity of construction needed). In Helvering v. R. J. Reynolds Tobacco Co., 59 Sup. Ct. 423 (U. S. 1939), the Regulations had been in force for at least nine years.

14. 47 STAT. 278 (1932).

15. Massachusetts Mut. Life Ins. Co. v. United States, 288 U. S. 269 (1933).

16. A taxpayer who had completed a transfer after Feb. 10, 1939, the effective date of the Internal Revenue Code, might make a more persuasive argument. Not only could he point to an express reenactment [INT. REV. CODE, § 811(g) (1939)], but he could rely on uniform interpretation for nine years.

17. "Grave constitutional doubts" frequently constrain the Supreme Court to construe statutes narrowly so as to find no legislative sanction for a proposed levy.

18. The "due process" clause of the Fifth Amendment.

19. Y. M. C. A. v. Davis, 264 U. S. 47 (1924); Edwards v. Slocum, 264 U. S. 61 (1924); Nichols v. Coolidge, 274 U. S. 531 (1927); Chase National Bank v. United States, 278 U. S. 327 (1929). See Reinecke v. Northern Trust Co., 278 U. S. 339, 348 (1929).

20. Helvering v. City Bank Farmers Trust Co., 296 U. S. 85 (1935); HUGHES, FEDERAL DEATH TAX (1938) § 3.

21. The Supreme Court has not heretofore passed upon the taxability of irrevocable inter vivos gifts of insurance policies made subsequent to the enactment of § 302(g). In Chase National Bank v. United States, 278 U. S. 327 (1929), inclusion in the gross estate was based on the right to change the beneficiary until death. Lewellyn v. Frick, 268 U. S. 238 (1925); Bingham v. United States, 296 U. S. 211 (1935); and Industrial Trust Co. v. United States, 296 U. S. 220 (1935) all concerned policies which were transferred prior to the promulgation of § 302(g). Belief that the transaction is exempt

tax may be of an interest no greater than an "assurance passing from the dead to the living," as in *Porter v. Commissioner,* where the settlor of a trust reserved a power to change the beneficiary but expressly excepted any change in favor of himself or his estate.[22] The mere assurance at settlor's death to the beneficiary was held to be a taxable testamentary transfer. But where the beneficiary receives no such assurance, there is no passing of an interest, even though the full enjoyment of the gift does not pass until after death.[23]

In the *Bailey* case, as in the typical insurance assignment, the insured retained none of the legal incidents of ownership; the right of the beneficiary to immediate payment was merely dependent upon the occurrence of two conditions beyond the control of the decedent—the donee's survival and the death of the insured. Though the Court of Claims suggested that the death of the insured was a necessary event "giving rise to the full and complete possession and enjoyment of the face amount of the policies by the beneficiary," and that a taxable testamentary transfer had therefore occurred,[24] it is difficult to find any interest passing at death from the insured. While it is of course possible that the Supreme Court may adopt this Court of Claims theory, it has no foundation in existing Supreme Court case law which uniformly indicates that the *sine qua non* of a testamentary transfer is not the receipt at death of an interest by the beneficiary; it is instead, the passing at death of an interest from the decedent.[25]

Genuinely disconcerting to taxpayers, however, is the possibility that the Supreme Court might sustain Section 302(g) on the alternative ground that it is "reasonably calculated to prevent avoidance of a tax." The legislative history of that section could warrant such a construction of Congressional intent[26] and this doctrine has been employed by the Court at least three times previously to sustain the taxation at death of transfers apparently completely vested during life. Thus, in *Helvering v. Bullard* the taxation at death of inter vivos gifts wherein the donor had reserved a life estate was upheld.[27] Similarly sustained was the levy in *Helvering v. City Bank,* where the taxpayer had retained the power to revoke or modify, to be exercised jointly with a beneficiary, what otherwise would have been a completely vested

stems from lower court cases: Walker v. United States, 83 F. (2d) 103 (C. C. A. 8th, 1936); Helburn v. Ballard, 85 F. (2d) 613 (C. C. A. 6th, 1936); Guettel v. United States, 67 Ct. Cl. 613 (1929); Chase National Bank, Executor v. United States, 694 C. C. H. 1937 Inh., Est. & Gift Tax Serv., ¶ 8280 (Aug. 3, 1939); from U. S. TREAS. REG. 70, Art. 27, as amended by T. D. 4296, IX-2 CUM. BULL. 427 (1930); and from numerous B. T. A. decisions. See Bingham v. United States, 296 U. S. 211, 219 (1935).

22. 288 U. S. 436 (1933).

23. Reinecke v. Northern Trust Co., 278 U. S. 339, 347 (1929). *Cf.* Shukert v. Allen, 273 U. S. 545 (1927).

24. Bailey v. United States, 27 F. Supp. 617, 621 (Ct. Cl. 1939).

25. Knowlton v. Moore, 178 U. S. 41, 48, 49 (1900); Y.M.C.A. v. Davis, 264 U. S. 47, 50 (1924); Edwards v. Slocum, 264 U. S. 61, 63 (1924); Nichols v. Coolidge, 274 U. S. 531, 537 (1927).

26. H. R. REP. No. 767 on H. R. No. 12863, 65th Cong., 2d Sess. (1918) 22, cited in Marmaduke B. Morton, Administrator, 23 B. T. A. 236, 243 (1931).

27. 303 U. S. 297 (1938).

inter vivos gift.[28] Further, the Court perceives in cases involving gifts made in contemplation of death an omnipresent hint of avoidance.[29]

Every inter vivos gift avoids the exaction of the estate tax. But so long as Congress, by retaining on the statute books a less expensive gift tax structure, encourages taxpayers to save taxes, the conventional inter vivos gift cannot be regarded as opprobrious avoidance. The distinguishing element in "odious" avoidance cases appears to be that the taxpayer has succeeded in retaining, or has attempted to retain, as in *Helvering v. City Bank,* control until death over a seemingly vested inter vivos gift, or, as in those cases involving contemplation of death and reservation of a life estate, he has actually managed to retain the fruits of his gift virtually until death. Most like the *Bailey* case is *Helvering v. City Bank,* which rests upon the control theory. There the settlor of a trust had reserved a power of revocation jointly with a beneficiary.[30] In answer to the argument that the settlor had retained no control, since the beneficiary's interest was adverse,[31] the Supreme Court said that "Congress may well have thought that a beneficiary who was of the grantor's immediate family might be amenable to persuasion or be induced to consent to a revocation in consideration of other expected benefits from the grantor's estate."[32] The taxability of the transfer apparently rested on the possibility that the donor might persuade a solitary beneficiary to revoke and it might be said that the assignor of a life insurance policy would encounter no greater task in securing a reassignment.

Such a rationale, however, cannot withstand close scrutiny, for the donor of a simple cash gift might just as easily persuade the donee to return it. The foundations of *Helvering v. City Bank* are probably more deeply-rooted. More significant is the form of the alleged inter vivos gift. Thus the creation of a trust hedged in by involved legal relations, including a possibility of revocation, employed in *Helvering v. City Bank,* is not the usual and natural way to make an outright transfer. The indications are strong that the donor still hopes to work the strings of a puppet gift. From this point of view, it would follow that an insurance policy would normally not be the subject of a bona fide gift. By its very nature, insurance is associated with testamentary disposition,[33] not with lifetime bounty. An insurance policy yields no taxable income to the assignee. The unique value of insurance lies not in its surrender value, but in the full proceeds that become payable on death; the

28. 296 U. S. 85 (1935).

29. Milliken v. United States, 283 U. S. 15 (1931); United States v. Wells, 283 U. S. 102, 116 (1931); Helvering v. City Bank Farmers Trust Co., 296 U. S. 85, 91 (1935).

30. Although the power of revocation was to be exercised jointly with the beneficiary and a trustee, it was provided that in case of disagreement the beneficiary was to have the final decision. Helvering v. City Bank Farmers Trust Co., 296 U. S. 85, 87 (1935).

31. The argument that the beneficiary's interest was adverse carried weight in Reinecke v. Northern Trust Co., 278 U. S. 339, 346 (1929).

32. Helvering v. City Bank Farmers Trust Co., 296 U. S. 85, 90 (1935).

33. *Cf.* Paul, *Life Insurance and The Federal Estate Tax* (1939) 52 HARV. L. REV. 1037, 1053.

assignee's freedom to dispose of the policy is inhibited by the large sacrifice of value which surrender entails.[34]

While the way is thus open for the Supreme Court to sustain the levy to prevent an avoidance of the estate tax, conceivably the Court may reach the same result by treating the exaction as a gift tax. In *Helvering v. Bullard*, as an alternative basis for the decision, the Court argued that since Congress has the power to classify gifts, so long as the segregation is not unreasonable or arbitrary, and to tax the classes at different rates, it can use an estate tax to lay an excise tax on some sorts of gifts.[35] The Supreme Court may take this opportunity, therefore, to demolish the barrier separating gift and estate taxes.[36] Whether it does this or uses the avoidance theory, the Court appears to have ample leeway to sustain the Court of Claims.

On the other hand, the ultimate solution may not be a watchful and continual caulking of seams created in the Estate Tax Law by astute tax counsel. Such policing will never catch the major item of avoidance — the ability to get the estate into lower rate brackets by dividing it into two piles, one subject to the estate tax, another to the gift tax. At the present time, Congress obviously countenances such avoidance for the sake of a policy designed to encourage early distribution of wealth and quicker receipt of taxes.[37] The most effective plan to eliminate all avoidance seems to be either to substitute an inheritance tax[38] for the estate and gift taxes, with all gifts and bequests to each recipient cumulated, or to equalize the gift and estate tax rates while basing the levy upon the sum total of all gifts and bequests. However, adoption of either program entails an abandonment of the present early distribution policy.

In the absence of such a thoroughgoing shift of policy, the duty is upon the Treasury Department to preserve equality of burdens to taxpayers within any given bracket by attacking individual attempts to avoid taxes. In the eyes of the Department the device of assigning insurance assets inter vivos has the same decided testamentary flavor of avoidance[39] which led the Court in

34. For the taxpayer it might be said that a gift of an insurance policy, unlike gifts of stocks, does not have income tax reduction as a motive. There is no taxable income from insurance but there are dividends from stocks, which often is a primary motive for the gift.

35. Helvering v. Bullard, 303 U. S. 297, 301 (1938). But *cf.* Heiner v. Donnan, 285 U. S. 312, 330 (1932); Reinecke v. Northern Trust Co., 278 U. S. 339, 347 (1929).

36. The reasonableness of the classification might be more easily accepted by the Court in the guise of a gift than under the designation of avoidance.

37. Explanation of Representative Crisp, Acting Chairman of Committee on Ways and Means, 75 CONG. REC. 5691 (1932).

38. *Cf.* Altman, *Combining the Gift and Estate Taxes* (1938) 16 TAX MAG. 259; and the complex bill introduced in 1935 which would have created side by side an inheritance and an estate tax, with gift taxes complementing each. H. R. No. 8974, 79 CONG. REC. 12,301 *et seq.* (1935).

39. Another inequity, from the Department's point of view, is the taxing of the policy at its "reproduction" value [see note 4, *supra*], leaving untaxed the difference between the gift tax value and the ultimate proceeds of the policy. This inequality alone, however, does not warrant a decision which would divorce insurance assets from the gift tax statute; the unfair advantage over other gifts could be remedied by levying

Helvering v. City Bank and *Helvering v. Bullard* to include in the gross estate the assets there transferred.[40] The *Bailey* case, if upheld, would eliminate the potential unfair advantage of that class of taxpayers which possesses insurance assets. But it is ironic that within the large class owning such assets a Supreme Court decision which would imprison insurance policies inside the walls of the estate tax will not equalize tax opportunities. Instead, the decision would not be as likely to affect the healthier, wealthier taxpayer as the one less fortunately situated. The former can take advantage of the saving afforded by the present dual structure by transferring other available assets; the latter may not have wealth enough to transfer, or health enough to escape a somber contemplation of death.

"MEIN KAMPF" AND THE PROTECTION OF LITERARY PROPERTY OF STATELESS PERSONS*

THE phenomenon of statelessness, or lack of citizenship in any state or nation, while legally of little significance prior to 1920,[1] has been known to European law for at least a century.[2] Formerly, a loss of citizenship was inflicted as a penalty for engaging in the slave trade,[3] or for desertion from the armed forces;[4] now, however, it is imposed for such elastic reasons as "racial impurity" or any "conduct contrary to the duty of fidelity to the

an income tax on the increment in the hands of the beneficiary, or by valuing the transfer, under the gift tax statute, at its ultimate proceeds.

40. The assumption that the assignment of an insurance policy is in the nature of a testamentary transfer is at least debatable in the light of the decision in Shukert v. Allen, 273 U. S. 545 (1927). The postponement in that case of the enjoyment by the cestui of the proceeds of the trust until after the death of the settlor seems no less testamentary in nature than the delay of enjoyment under an assignment of a policy, the full proceeds of which are, of course, available only upon the death of the insured. If, as in *Shukert v. Allen*, the transfer in question is not a substitute for a testamentary transfer, then "the mere desire to equalize taxation cannot justify a burden on something not within congressional power." Nichols v. Coolidge, 274 U. S. 531, 540 (1927). The court might distinguish *Shukert v. Allen*, however, on the ground that although the enjoyment passed after the settlor's death, the trust was created without reference to the time of death. See Reinecke v. Northern Trust Co., 278 U. S. 339, 347 (1929). But the intention of the settlor that the enjoyment pass *after* his death might be inferred from the fact that such enjoyment would not pass until his hoped-for eighty-sixth year.

*Houghton Mifflin Co. v. Stackpole Sons, Inc., 104 F. (2d) 306 (C. C. A. 2d, 1939), *cert. denied*, N. Y. Times, Oct. 24, 1939, p. 44, col. 7.

1. Stoeck v. Public Trustee, [1921] 2 Ch. 67.

2. Preuss, *International Law and Deprivation of Nationality* (1935) 23 GEO. L. REV. 250, 257.

3. French decree of April 27, 1848. Preuss, *id.*, n. 28.

4. Such provisions are not uncommon in the penal codes of the principal nations. For the United States statute, see 8 U. S. C. §§ 11, 12 (1934), adopted in its original form March 3, 1865, 13 STAT. 490.

Reich and people."[5] As a result, many novel problems have been presented to the courts in the endeavor to determine the degree of legal protection afforded the lives and property of over two million persons who have suffered denaturalization since the World War.

One of these problems, that of what copyright protection, if any, is forthcoming under federal laws to the stateless individual not domiciled in the United States at the first publication of his works, was raised in a recent case arising over the copyright on Adolph Hitler's *Mein Kampf*.[6] The issue of statelessness was injected into the case because, although not generally realized, the Reichsfuehrer himself was without a country at the time his book was first published.[7]

The publishing firm of Houghton Mifflin purchased the American rights to Hitler's book in 1933 from the German publishers who had obtained a copyright for that work in this country in the years 1925–1927. The contract of assignment included provisions whereby royalty payments of 10 to 15 percent were to be made to the author.[8] While Houghton Mifflin's edition was in the process of preparation, the defendants, Stackpole Sons, Inc., announced their intention of issuing an unauthorized version of the same work, and publicly proclaimed that no royalties would be paid the author.[9] In the ensuing litigation, Stackpole Sons defended their position on the ground that Hitler was not within any of the classes for whose benefit the copyright laws were enacted.

The Copyright Act, in defining those persons who are entitled to its protection, lists "the author or proprietor of any work made the subject of copyright by this title."[10] The sentence immediately following provides that

5. German ordinance of July 26, 1933. Preuss, *supra* note 2, at 252.

6. Houghton Mifflin Co. v. Stackpole Sons, Inc., 104 F. (2d) 306 (C. C. A. 2d, 1939), *cert. denied*, N. Y. Times, Oct. 24, 1939, p. 44, col. 7.

7. Hitler, an Austrian, having enlisted in the German army in 1914, was unable to respond to the Austrian call to military service in 1917, and thereby lost his citizenship. At various times between 1918 and 1932, when he acquired German nationality, Hitler publicly and under oath declared himself to be stateless. Record on Appeal, pp. 60–85. The certificate of copyright on the first volume of *Mein Kampf*, issued in 1925, gave the author's nationality as that of "stateless German." Hitler's stateless condition was so notorious in Germany that he was used as the classic example of the man without a country. H. LESSING, 12 BIBLIOTHECA VISSERIANA DISSERTATIONUM IUS INTERNATIONALE ILLUSTRANTIUM (1937) 241.

8. Record on Appeal, pp. 10-15 where contract is set out in full.

9. This was an extremely popular feature of the infringing copy, which despite its lack of the annotation possessed by the authorized edition was accorded a 4 to 1 consumer preference. Record on Appeal, pp. 26-29, 42-3. The ratio is based on a survey conducted by Brentano's.

10. 35 STAT. 1077 (1909), 17 U. S. C. § 8 (1934). "The author or proprietor of any work made the subject of copyright by this title, or his executors, administrators, or assigns, shall have copyright for such work under the conditions and for the terms specified in this title: *Provided, however,* That the copyright secured by this title shall extend to the work of an author or proprietor who is a citizen or subject of a foreign state or nation only: (a) When an alien author or proprietor shall be domiciled within the United States at the time of the first publication of his work; or (b) When the foreign State or nation of which such author or proprietor is a citizen or subject grants, either by treaty,

copyright shall be extended "to the work of an author or proprietor who is a citizen or subject of a foreign state or nation only" when reciprocal privileges are extended to Americans by the state of which he is a citizen. The problem to be decided by the court was whether the definition of persons included within the scope of the Act was a comprehensive grant of protection limited only as to citizens of non-reciprocating nations, or whether the qualifying phrase was one of delimitation, excluding all aliens, except those who were citizens of reciprocating nations.[11] The circuit court, conceding Hitler to be stateless, held that Congress had extended the protection of the copyright laws to everyone except citizens of states failing to grant like privileges to Americans, and remanded the case to the district court with directions to issue the injunction as requested.[12]

In the United States, the exclusive right of an author to control the multiplication and sale of his literary works is dependent entirely upon statute.[13] This protection, known as copyright, is granted to American citizens, to those aliens who are resident within the United States at the time of the first publication of their work, and to citizens of foreign nations which grant equal privileges to American nationals.[14] Heretofore the non-resident alien's right was thought to be dependent upon the existence of a copyright treaty.[15] If copyright protection in America is extended to non-resident aliens only by treaty, then stateless persons, citizens or subjects of no state or nation, are without copyright protection.[16] However, if copyright protection is given to stateless persons by the municipal law of this country, their lack of rights created by international law is immaterial.

Although this case was the first to decide the exact point in issue, whether stateless aliens are entitled to copyright, a similar problem has previously been raised by that section of the Copyright Act which safeguards music mechanically reproduced. This section, slightly different in wording from the literary clause, provides that the protection granted "shall not extend to

convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection, substantially equal to the protection secured to such foreign author under this title or by treaty; or when such foreign State or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto. The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time, as the purpose of this title may require."

11. Houghton Mifflin Co. v. Stackpole Sons, Inc., 104 F. (2d) 306, 308 (C. C. A. 2d, 1939), *cert. denied,* N. Y. Times, Oct. 24, 1939, p. 44, col. 7.

12. The district court had previously refused a preliminary injunction to restrain the defendants upon the ground that such grave doubt had been cast on the validity of the plaintiff's copyright that a decision could not be reached on the basis of affidavits alone. Record on Appeal, p. 131.

13. Wheaton v. Peters, 8 Pet. 591, 662, 663 (U. S. 1834); Banks v. Manchester, 128 U. S. 244, 252 (1888); Thompson v. Hubbard, 131 U. S. 123, 151 (1889).

14. 35 STAT. 1077 (1909), 17 U. S. C. § 8 (1934).

15. See note 19, *infra.*

16. 1 OPPENHEIM, INTERNATIONAL LAW (Lauterpacht's ed. 1937) 508, 533, § 312.

the works of a foreign . . . composer unless the foreign state . . . of which such . . . composer is a citizen . . . grants . . . to the citizens of the United States similar rights."[17] It has been held that, under this section, citizenship in a state granting reciprocal privileges to Americans is a condition precedent to the existence of a right by an alien to enjoin the unlicensed mechanical reproduction of his musical compositions.[18] The difference in wording in the two sections seems unintentional, and it is probable that Congress, at the time of the Act's passage in 1909, was impelled by the same motives in both cases.

The interpretation of the Act adopted by the court in the *Mein Kampf* case, though syntactically sound, is unique and contrary to the leading treatises, both native and foreign, upon the subject of American copyright law.[19] The intent of Congress, as revealed in the *Congressional Record* and in the Committee Reports, was to afford copyright privileges to non-resident aliens in cases of reciprocity only.[20] Previous court decisions have clearly recognized that the motive for extending the privileges of copyright to aliens was that of inducing foreign countries to grant American citizens similar privileges.[21] Sheer altruism has played an astonishingly small part in the various amendments to copyright legislation. The rules of the Copyright Office, prepared by the Register of Copyrights with the approval of the Librarian of Congress as provided by law, likewise hold citizenship in a nation granting reciprocal rights to be a condition precedent to the issuance of a copyright certificate to an alien non-resident.[22]

17. 35 STAT. 1075, 1076 (1909), 17 U. S. C. § 1(e) (1934).

18. Portuondo v. Columbia Phonograph Co., 36 U. S. P. Q. 104 (S. D. N. Y. 1937). For domiciled aliens, the rule is otherwise. Ricordi & Co. v. Columbia Graphophone Co., 258 Fed. 72, 76 (S. D. N. Y. 1919).

19. 2 LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY (1938) 703, 840; WEIL, AMERICAN COPYRIGHT LAW (1917) 258-9, 260-1; COPINGER, THE LAW OF COPYRIGHT (7th ed. 1936) 323, 327; BOWKER, COPYRIGHT, ITS HISTORY AND ITS LAW (1912) 109-110; PUTNAM, THE QUESTION OF COPYRIGHT (2d ed. 1896) 162; AMDUR, COPYRIGHT LAW AND PRACTICE (1936) 575-6; DEWOLF, AN OUTLINE OF COPYRIGHT LAW (1925) 263.

20. REPORT OF THE HOUSE COMMITTEE ON PATENTS ON THE INTERNATIONAL COPYRIGHT BILL OF 1890-91 submitted by Hon. W. E. Simonds of Conn. to accompany H. R. 10881, set forth in PUTNAM, THE QUESTION OF COPYRIGHT (2d ed. 1896) 77-130, esp. 77-8. For the present act, see H. R. REP. No. 2222, 60th Cong., 2d Sess. (1909), adopted verbatim in SEN. REP. No. 1108, 60th Cong., 2d Sess. (1909). Little or no discussion was had on the floor, all differences having been threshed out in committee. This report, referring to the present Copyright Act, said "in section 8 of the bill we provide for reciprocity regarding copyright generally, excepting only, . . . an alien who is domiciled within the United States at the time of the first publication of his works." p. 9.

21. Bong v. Campbell Art Co., 214 U. S. 236, 248 (1909); Merriam Co. v. United Dictionary Co., 146 Fed. 354, 358 (C. C. A. 7th, 1906), *aff'd*, United Dictionary Co. v. Merriam Co., 208 U. S. 260 (1908). The principal case itself recognizes this motive. Houghton Mifflin Co. v. Stackpole Sons, Inc., 104 F. (2d) 306, 309 (C. C. A. 2d, 1939).

22. 17 U. S. C. A. § 53, and Rules and Regulations 2 (1), immediately following, which implement the statutory grant of power.

In discarding the interpretation of the Copyright Office[23] and the text writers, the court felt itself justified[24] by what it regarded as the historical course of federal copyright legislation in this country. A lengthy review was made by the court of the efforts during the last century to extend copyright to foreign authors, whose cause had been espoused as early as 1837 by Henry Clay and Daniel Webster. The interest of many prominent diplomats, statesmen and writers had been engaged and success finally achieved. A closer examination of this history reveals much, however, that might be urged as an argument for the opposite view. Copyright protection on a national scale was first afforded American citizens and aliens resident within this country in 1790.[25] During the ensuing century, a dozen changes were made, but none enlarged the class of persons entitled to protection so far as nationality or residence was concerned.[26] In fact, despite repeated urgings to protect non-resident aliens, a bill of this nature, though first accorded a vote in Congress in 1840, was not passed until 1891.[27] A *quid pro quo* was and always has been considered essential to the granting of protection to non-resident aliens.[28]

The sole exemption which Congress interposed to this insistence upon reciprocity was that of the alien resident in the United States at the first publication of his works.[29] Former acts extended copyright to aliens "resident" in the United States, for which the present act substituted the term "domiciled" in the United States.[30] Both words have been construed to mean permanent settlement in this country with intent to remain.[31] Until

23. The certificate of the Register is only *prima facie* evidence of the existence of copyright. Unlike the Patent Commissioner, the Register of Copyrights is a purely ministerial official who cannot undertake to adjudicate the rights of rival claimants. All questions of copyright validity must be left to the determination of the courts. Everson v. Young, 26 W. L. R. 546 (D. C. Sup. Ct., 1889); BOWKER, COPYRIGHT, ITS HISTORY AND ITS LAW (1912) 96; PUTNAM, THE QUESTION OF COPYRIGHT (2d ed. 1896) 31-2.

24. "Great weight will be given to contemporaneous construction of an act of Congress by department officials, who are called upon to act under and carry out its provisions, particularly if there be uncertainty or ambiguity." Brewster v. Gage, 30 F. (2d) 604, 606 (C. C. A. 2d, 1929).

25. 1 STAT. 124, c. 15 (1790).

26. REPORT ON COPYRIGHT LEGISLATION BY THE REGISTER OF COPYRIGHTS (1904) 11, 12-17; BOWKER, COPYRIGHT, ITS HISTORY AND ITS LAW (1912) 35-37.

27. Bentley v. Tibbals, 223 Fed. 247, 249 (C. C. A. 2d, 1915); PUTNAM, THE QUESTION OF COPYRIGHT (2d ed. 1896) 40 *et seq.*

28. Bong v. Campbell Art Co., 214 U. S. 236, 248 (1909); BOWKER, COPYRIGHT, ITS HISTORY AND ITS LAW (1912) 108; AMDUR, COPYRIGHT LAW AND PRACTICE (1936) 579.

29. 35 STAT. 1077 (1909), 17 U. S. C. § 8(a) (1934).

30. Copyright privileges were extended to any "citizen or citizens of these United States, or resident therein" by the original act of May 31, 1790. 1 STAT. 124, c. 15. The present statute extends copyright to "an alien author" when he "shall be domiciled within the United States." 35 STAT. 1077 (1909), 17 U. S. C. § 8(a) (1934).

31. "Residence ordinarily means domicil, or the continuance of a man in a place, having his home there . . . In order to constitute residence, it is necessary that a man should go to a place, and take up his abode there with the intention of remaining, making it his home." Boucicault v. Wood (C. C. Ill. 1867) Fed. Cas. No. 1, 693 at 991. For a like definition of "domiciled" under the present Act, see Ricordi & Co. v. Columbia Graphophone Co., 258 Fed. 72, 74 (S. D. N. Y. 1919).

recent years, most aliens making their permanent home in America planned to become citizens, so this exemption in favor of resident aliens, dating from 1790, is readily understandable;[32] but the same reasoning cannot be applied in the case of the stateless non-resident.

The court was able to cite but one legal precedent supporting its belief that the statutes afford copyright protection to everyone except the subjects of foreign states denying reciprocal privileges to American citizens.[33] In 1904 Attorney General Moody held that citizens of the Philippine Islands were not barred from obtaining copyright protection within the United States. In reaching this decision, he reasoned that the Filipino could not properly be considered "a citizen or subject of a foreign state or nation." This being the case, American copyright was available to him, Moody maintained, because it is forbidden only to aliens not the subject of a reciprocating foreign state.[34] Caution should be exerted in adopting Moody's conclusions to support a different factual situation, for it must be remembered that the Attorney General's opinion dealt with the inhabitants of the Philippine Islands, a "territory under our exclusive sovereignty."[35] Whatever the exact position of the thirteen million Filipinos in relation to the United States,[36] the term "stateless" can hardly be applied to them.[37]

However, if Moody's reasoning be taken as a precedent, Hitler may also be brought within the protection of the Copyright Act on the theory that, being the citizen of no state, he cannot be properly be considered the subject of a state denying Americans reciprocal privileges. In terms of the wording of the Act itself, considered apart from all history or policy, this view is quite proper. Throughout the Copyright Act the terms "alien" and "citizen or subject of a foreign state" are used interchangeably. This confusion is

32. See BOWKER, COPYRIGHT, ITS HISTORY AND ITS LAW (1912) 109 for an interesting if not thoroughly satisfactory explanation of this exception.

33. 25 OPS. ATTY. GEN. 179 (1904).

34. *Id.* at 181. In reaching his decision, the Attorney General expressly overruled two former opinions on the same point. 22 OPS. ATTY. GEN. 268 (1898), and 25 OPS. ATTY. GEN. 25 (1903).

35. "Internationally, they [the Philippines] are a part of the United States; that is to say, territory under our own exclusive sovereignty. But their relations with our own legal system are determined by other than international principles." 25 OPS. ATTY. GEN. 25, 26 (1903).

36. The status of the Filipino has been analogized to that of American citizens, and his country treated as American territory by one line of decisions and opinions: Dorr v. United States, 195 U. S. 138 (1904); 24 OPS. ATTY. GEN. 27 (1902); 24 OPS. ATTY. GEN. 120 (1902); 25 OPS. ATTY. GEN. 131 (1904); 25 OPS. ATTY. GEN. 179 (1904); 27 OPS. ATTY. GEN. 623 (1909); 28 OPS. ATTY. GEN. 422 (1910). Another line of opinions has treated the Philippine Islands as though a foreign land, or their inhabitants as aliens: 23 OPS. ATTY. GEN. 370 (1901); 25 OPS. ATTY. GEN. 25, 27 (1903), *re-aff'd, id.* 182 (1904); 25 OPS. ATTY. GEN. 127 (1904); 26 OPS. ATTY. GEN. 355 (1907). See also Hale, *Copyright in Porto Rico and the Philippines* (1916) 2 PHIL. L. J. 268. Great care must be exercised in extending precedents based on the unique status of Philippine citizens to situations involving stateless aliens.

37. McGovney, *Our Non-Citizen Nationals, Who are They?*, LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP MCMURRAY (Radin & Kidd ed. 1935) 323.

due to the fact that statelessness, as a world problem, dates from about 1920.[38] Prior thereto, all aliens, practically speaking, possessed citizenship in some foreign country. It is possible that Congress, had it encountered the problem of statelessness when the Act was drawn, might expressly have included the stateless alien within the Copyright Law. The fact remains that the issue was not raised, and it is highly improbable that Congress realized it was leaving a grammatical loophole. However, from the standpoint of strict logic the loophole was clearly there, and the court did not hesitate to avail itself of the fact.

In reaching its decision, the general position of the refugee was a factor of weight with the court, which apparently felt that should the decision be adverse to the Hitler copyright, "it would mean that stateless aliens cannot be secure in even their literary property."[39] This view may well be somewhat too pessimistic, for all stateless aliens either domiciled in the United States, or possessed of citizenship in some foreign nation granting reciprocal rights to Americans *at the time of the first publication* of their work were already fully protected.[40] It was only the relatively rare non-resident refugee who published a book *after* termination of his former citizenship and *before* becoming domiciled in the United States who was unprotected. To this individual, the instant case now affords a legal right to enjoin infringement.

Although the court's opinion is clearly contrary to the trend of authority,[41] it is difficult to see how the same result could have been reached by any other rationalization. Undeniably it would have been more convenient to reach the same end by treating Hitler as a citizen of the state in which he had last possessed membership, but to attempt to utilize such a concept would be to ignore the established tenets of international law.[42] By the terms of the Copyright Laws, protection is extended to a citizen of a foreign state only so long as that country reciprocates in kind. In actual fact, the present German Government does not grant full reciprocal privileges to the

38. For examples of this confusion see Ricordi & Co. v. Columbia Graphophone Co., 258 Fed. 72, 76 (S. D. N. Y. 1919), and 28 OPS. ATTY. GEN. 222 (1910) where a copyright question concerning "aliens" is answered in terms of "citizens or subjects of a foreign state or nation." For one of the few who grasped the real issue see WEIL, AMERICAN COPYRIGHT LAW (1917) 261–262.

39. Houghton Mifflin Co. v. Stackpole Sons, Inc., 104 F. (2d) 306, 309 (C. C. A. 2d, 1939).

40. DEWOLF, AN OUTLINE OF COPYRIGHT LAW (1925) 171.

41. "The very fact that each of these sections [35 STAT. 1077, 1080, 1080-81 (1909), 17 U. S. C. § 8, 23, 24 (1934)] enumerates with such particularity the persons who may exercise the privilege of securing copyrights and having them renewed and the order in which the right vests, and that in these particulars the sections materially differ from each other, shows that the persons enumerated are exclusive of all others and that it was not the purpose of Congress to confer the right upon any person or persons not therein specifically mentioned." 28 OPS. ATTY. GEN. 162, 165 (1910). See also note 19, *supra*.

42. Citizenship is the creature of municipal law of each state and must be determined by the laws of the land of origin. Stoeck v. Public Trustee, [1921] 2 Ch. 67, 82; HALL, INTERNATIONAL LAW (8th ed. 1924) 275; BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1916) § 4.

citizens of this country, for American authors and composers of Jewish faith are denied the protection of their literary and artistic property which is afforded other Americans in Germany.[43] The spirit of reciprocity, if not the printed terms of the copyright treaty, has been violated by the German Government. Fortunately, or unfortunately, the courts are precluded from examining into this point because the presidential finding that reciprocity does exist is conclusive evidence of that fact until withdrawn by superseding findings.[44]

Had the court wished to do so, it might have denied the validity of the Hitler copyright without passing at all upon the issue of statelessness. This could have been done by turning the case off on the grounds that no assignment of the rights by the author to the German publisher had been shown. Inasmuch as Houghton Mifflin failed to trace their claim of title back to the author, the decision below could have been affirmed and the question of statelessness wholly ignored. In this fashion, the position of the stateless author in general would not have been prejudiced in the slightest, the attention of Congress could have been called to the entire question of protecting the stateless aliens literary property, and Hitler's copyright monopoly would have been destroyed.

From the general tone of the opinion, and the failure to dismiss the appeal, upon the ground of faulty title, it might be deduced that the court was anxious to avoid offending the leader of a great and friendly power. But more probably, its primary concern was to discover a plausible ground for upholding the Hitler copyright, since it felt this case presented an ideal situation for establishing new protection for stateless refugees generally. Though the average author without a country seems in little danger of suffering from the infringement of his works in the United States, at the present time,[45] it cannot be denied that this buttressing of the protection already afforded the refugee was probably desirable.

43. *Hearings before Committee on Foreign Relations on S. 1928*, 73d Cong., 2d Sess. (1934) 94-95.

44. For a holding squarely in point, see Chappell & Co., Ltd. v. Fields, 210 Fed. 864, 866 (C. C. A. 2d, 1914).

45. The obscure stateless author is not endangered by the literary pirate because no market for his works exists. Even today 85 per cent of the books published in England are not copyrighted within the United States because a separate printing would not be justified on a purely cost basis. *Hearings before Committee on Foreign Relations on S. 1928*, 73d Cong., 2d Sess. (1934) 15-17. Toward the well known refugees whose works sell readily, the American public is sympathetic, and probably no important publisher would risk appearing before that public in the guise of one stealing from the homeless.

PEACEFUL PICKETING ON WORLD'S FAIR GROUNDS AS DISORDERLY CONDUCT*

PROMINENT among a series of judicial rebuffs to which peaceful picketing has lately been subjected[1] is a decision of the Magistrate's Court of Flushing, New York, finding thirteen strikers guilty of disorderly conduct for peacefully picketing a private restaurant concession on the World's Fair grounds.[2] The court's opinion illustrates an old judicial technique which achieves the desired result by assuming the chief issue in the case as its major premise. Magistrate Hockert first takes it for granted that the World's Fair grounds belong within an absolute category known as "private property." Then, on the strength of this assumption, the magistrate is able to show as if inevitable that admission to the Fair is a mere license revocable at the licensor's whim, and that the peaceable refusal of the pickets to obey the request of the Fair police to leave the grounds constitutes the criminal offense of disorderly conduct. That the result of the case depends upon this *a priori* assumption is shown by the magistrate's concession that no offense would be made out had the picketing not been on "private property."[3]

The few cases which relate to labor activities on private land treat the problem on the bases of the type of property, the manner of its use, and the nature of the labor pressure rather than on categorical grounds. Thus a violent incursion into a factory or onto mining property has been held a trespass.[4] Even peaceful picketing and persuasion have been forbidden where

*People on Complaint of Koester v. Rozensweig *et al.*, 13 N. Y. S. (2d) 795 (Mag. Ct. 1939).

1. Busch Jewelry Co., Inc. v. United Retail Employees' Union, 281 N. Y. 150, 22 N. E. (2d) 320 (1939) (violence in picketing held to forfeit right to picket at all; see criticism in (1939) 8 I. J. A. BULL. 12); American Federation of Labor v. Bain, (1939) 4 LAB. REL. REP. 824 (Oregon anti-picketing statute held constitutional; case now on appeal); Minnesota v. Cooper, 285 N. W. 903 (1939) (peaceful picketing of employer's home in protest of discharge of chauffeur held disorderly conduct); Fornili v. Auto Mechanics Union, (1939) 5 LAB. REL. REP. 61 (Wash. 1939) (temporary cessation of picketing held to have terminated "labor dispute" making subsequent picketing illegal); People v. Bellows *et al.*, 281 N. Y. 67, 22 N. E. (2d) 238 (1939) (peaceful picketing in furtherance of illegal secondary boycott held disorderly conduct). But see People v. Harris, 91 P. (2d) 989 (1939).

2. People on Complaint of Koester v. Rozensweig *et al.*, 13 N. Y. S. (2d) 795 (Mag. Ct. 1939). Defendants paraded before the Brass Rail Restaurant, a privately owned concession in the Metals Building at the New York World's Fair on Friday afternoon, May 19, 1939, wearing 3" x 3" cards in their lapels and white jerseys under their jackets on which were stencilled "Brass Rail on Strike." The Fair police ordered the defendants to leave, offering to refund the price of their tickets. On their refusal, the police arrested the defendants who, after a night in jail, were released in $500 bail each. N. Y. Times, May 20, 1939, p. 9, col. 5; N. Y. Times, May 21, 1939, p. 38, col. 8.

3. See People on Complaint of Koester v. Rozensweig *et al.*, 13 N. Y. S. (2d) 795, 796 (Mag. Ct. 1939).

4. See National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U. S. 240, 253 (1939) (violently seizing employer's buildings and ousting owner held unlawful); Rex. v. Reners [1926] Can. Sup. Ct. 499 (violent invasion of mining property by pickets held trespass).

the property is devoted to personal and exclusive uses, such as a private factory, store, hallway, ship, private dock, or an enclosed and restricted residential development.[5] But where the property is actually a place of public resort, courts have not been disturbed by difficulties as to who holds the title to the land. Where abutters own to the center of a street, injunctions against picketing on the sidewalk have been denied on the ground that the public easement of passage includes the right to picket peacefully.[6] The National Labor Relations Board has ordered an employer to desist from ejecting organizers from its company town, even though it owned the fee to the streets, on the ground that the town form of existence gave to the company's tenants and their visitors, including labor organizers, the privilege to use the streets free from that type of interference.[7] Similarly, anti-injunction statutes permit picketing "any place where any person or persons may lawfully be."[8]

The magistrate's absolutistic treatment of "private property" has failed to follow the factual approach of the cases in the field. The Fair grounds certainly cannot be regarded as a private close. The land upon which the Fair is situated is owned by New York City as a public park.[9] Built from the swamp and dump stage by municipal funds,[10] the park is leased rent free to New York World's Fair, 1939, Inc.,[11] a tax-exempt[12] educational institution whose profits go to the city and state of New York for public purposes.[13] The taxpayer's stake in the Fair is a large one: $26,700,000 of its

5. Webber v. Barry, 66 Mich. 127, 33 N. W. 289 (1887) (entering saw-mill to induce employees to join strike held trespass); Foster v. Retail Clerks International Prot. Ass'n, 39 Misc. 48, 78 N. Y. Supp. 860 (Sup. Ct. 1902) (pickets enjoined from entering store); McCusker v. Smith, [1918] 2 Ir. R. 432 (entering into a hallway to shop to dissuade customers held wrongful besetting); The Oakmar, 20 F. Supp. 650 (D. Md. 1937) (peaceful sit-down strike on ship held unauthorized withholding of possession); Larkin v. Belfast Harbour Comm'rs [1908] 2 Ir. R. 214 (speaking on private dock without permission held not justified by statute permitting peaceful picketing "at or near . . . a place where a person . . . carries on business . . ."); Sea Gate Association v. Sea Gate Tenants Ass'n, 168 Misc. 742, 6 N. Y. S. (2d) 387 (Sup. Ct. 1938) (injunction granted against residents of private development picketing in protest against beach charge on basis that landlord had right to forbid picketing on his property. See (1938) 7 I. J. A. BULL. 26 for severe criticism of this holding which represents the limit to which "private property" in picketing cases has been pushed).

6. Vonderschmitt v. McGuire, 100 Ind. App. 632, 195 N. E. 585 (1935); see Robison v. Hotel and Restaurant Employees Local No. 782, 35 Idaho 418, 432, 207 Pac. 132, 135 (1922).

7. Harlan Fuel Company and United Mine Workers of America, 8 NLRB 25 (1938).

8. N. Y. CIV. PRAC. ACT ¶ 876-a; see 38 STAT. 738 (1914), 29 U. S. C. ¶ 52 (1934); Trade Disputes Act, 1906, 6 Edw. 7, c. 47, § 2.

9. THE FLUSHING MEADOW IMPROVEMENT (New York City Department of Parks), May 15, 1939, p. 10.

10. THE FLUSHING MEADOW IMPROVEMENT (New York City Department of Parks), May 15, 1939, p. 6.

11. See Agreement of Lease between the City of New York and New York World's Fair 1939 Incorporated, June 29, 1936.

12. N. Y. Laws 1937, c. 727.

13. N. Y. Laws 1936, c. 544; N. Y. Times, Oct. 23, 1935, p. 10, col. 1; NEWSWEEK, June 19, 1939, p. 22.

funds come from New York City, together with $6,200,000 from the state and $3,000,000 from the Federal Government.[14] All New York motorists have without choice advertised the Fair on their license plates.[15] Instead of being restricted to the private pleasure of a few, the grounds have been frequented for five months by over 100,000 persons a day,[16] all cajoled to the Fair by intensive advertising and executive proclamation.[17] That a uniform admission fee is charged does not alter the Fair's public nature.[18]

The Fair functions as a municipal corporation.[19] By statute, lease, and charter, the state and city have delegated to it the power of governing an area of 1216 acres.[20] It maintains its own police force with power of arrest, operates its own fire department, and drafts its own health, building and sanitary codes which supersede the New York City regulations.[21] It is exempt from the payment of unemployment compensation and of property, income and sales taxes,[22] from the jurisdiction of National and State Labor Relations Boards,[23] and from state control over its acquisition and resale of water, gas, and electricity.[24] None of these privileges are granted to ordinary private enterprises; they are governmental functions delegated by the state only to its municipal agents.[25]

Since the Fair is an organization with functions municipal in nature, its attitude toward labor disputes within its jurisdiction to which it is not a party should be that of any municipality toward such disputes,[26] except

14. THE FLUSHING MEADOW IMPROVEMENT (New York City Department of Parks), May 15, 1939, p. 10.

15. N. Y. VEHICLE AND TRAFFIC LAW § 12.

16. TIME, Aug. 21, 1939, p. 30.

17. N. Y. Times, May 1, 1939, p. 1, col. 8. Proclamations of President Roosevelt, Governor Lehman and Mayor La Guardia are reprinted in THINK, June 1939, p. 4. For a collection of the Fair's publicity and propaganda, see New York World's Fair Collection, Yale University Library.

18. See Minneapolis v. Janney, 86 Minn. 111, 115, 90 N. W. 312, 314 (1902). The line of cases upon which the court relies for the statement that the Fair might eject any patron at pleasure specifically exempt an amusement franchised by the state. See Commercial Telegram Co. v. Smith, 47 Hun 494, 507 (N. Y. 1888); People *ex rel* Burnham v. Flynn, 189 N. Y. 180, 185, 82 N. E. 169, 171 (1907); Collister v. Hayman, 183 N. Y. 250, 255, 76 N. E. 20, 21 (1905); Woollcott v. Shubert, 217 N. Y. 212, 216, 111 N. E. 829, 830 (1916).

19. See 1 MCQUILLIN, MUNICIPAL CORPORATIONS (2d ed. 1928) 834.

20. N. Y. Laws 1936, c. 544; Agreement of Lease between the City of New York and New York World's Fair 1939, Inc., June 29, 1936; N. Y. Times, Oct. 23, 1935, p. 10, col. 1.

21. N. Y. Laws 1936, c. 544.

22. N. Y. Laws 1937, c. 727.

23. NEWSWEEK, June 19, 1939, p. 22. See Harding, *World's Fair, New York* (July 1939) 179 HARPERS 193, 198.

24. N. Y. Laws 1937, c. 727.

25. 1 MCQUILLIN, MUNICIPAL CORPORATIONS (2d ed. 1928) 421, 825, 828, 833; see also Stoutenburgh v. Hennick, 129 U. S. 141, 147 (1889); McMahon v. Savannah, 66 Ga. 217, 224 (1880).

26. See People v. Arko *et al.*, 40 N. Y. Crim. Rep. 149, 154, 199 N. Y. Supp. 402, 405 (Sp. Sess. 1922); WITTE, THE GOVERNMENT IN LABOR DISPUTES (1932) 305.

insofar as its functions *as a fair* set limitations on that attitude. Any determination, either by the Fair itself or by a court, as to whether given picketing were proper would require a balancing of interests: the interest of workers in peaceful picketing weighed against both the public's interest in forgetting workaday troubles in the escapist atmosphere of the World of Tomorrow and the Fair's interest, as a business enterprise, in the public's not being kept away by labor strife. Perhaps labor disputes are less welcome at a fair than on an ordinary business street; the public has come primarily to be entertained and educated by the passing show.[27] Moreover, bondholders of the Fair, far more than ordinary municipal bondholders, have an interest in avoiding disturbances which will deter paying customers from attending.

A frank recognition, however, of the interests of the public and of the Fair in preserving a carnival atmosphere on the grounds does not compel the non-recognition of another factor: that workers at the Fair, no less than their brothers outside, should have the right to strike,[28] and that picketing — which aims to discourage patrons,[29] to persuade other workers to join the strike,[30] and to ascertain what employees are still at work[31] — is a traditional weapon of strikers. To be successful it obviously must be carried on near the employer's premises. If strikers must picket outside the Fair's gates nearly a mile from the restaurant, as the court's decision requires, the right to strike is a toothless prerogative. Spiking labor's big guns of publicity and persuasion,[32] while leaving the employer free to use the lockout, strike breakers, and other weapons of industrial warfare, is playing heavy favorites in an economic struggle in which the courts are foresworn to impartiality.[33] The concessionaire deserves no immunity from the lawful manifestations of labor disputes merely because he locates within the Fair's gates. This has been recognized by New York courts in a number of cases which uphold the right to picket a private concession on park property despite anti-picketing regulations of the Parks Department.[34]

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27. However, it should be noted that at least a part of the public attending the Fair probably wish to be fully informed about labor conditions and controversies in places they patronize, and might find this interest paramount even to their desire for relaxation.

28. See Arthur v. Oakes, 63 Fed. 310, 317 (C. C. A. 7th, 1894); Birmingham Trust and Savings Co. v. Atlanta, B. and A. Ry., 271 Fed. 743, 745 (N. D. Ga. 1921); OAKES, ORGANIZED LABOR AND INDUSTRIAL CONFLICTS (1927) 419.

29. New Negro Alliance v. Sanitary Grocery Co., 303 U. S. 552 (1938); Goldfinger v. Feintuch, 276 N. Y. 281, 11 N. E. (2d) 910 (1937); Kirmse v. Adler, 311 Pa. 78, 166 Atl. 566 (1933).

30. American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184 (1921); Walter A. Wood Mowing & Reaping Machine Co. v. Toohey, 114 Misc. 185, 186 N. Y. Supp. 95 (Sup. Ct. 1921).

31. Iron Moulders' Union v. Allis-Chalmers Co., 166 Fed. 45 (C. C. A. 7th, 1908).

32. See TIPPETT, WHEN SOUTHERN LABOR STIRS (1931) 233, stating "the real contest of the strike takes place on the picket line."

33. See Stillwell Theatre, Inc. v. Kaplan, 259 N. Y. 405, 409, 182 N. E. 63, 65; Kirmse v. Adler, 311 Pa. 78, 84, 166 Atl. 566, 568 (1933).

34. People v. Ribinovich, 13 N. Y. S. (2d) 135 (Sp. Sess. 1939) (although a concession was located on a city-owned boardwalk it was given no immunity from picketing, despite regulations forbidding placards and signs, since the fact that the city is landlord

A sound policy for places of public amusement such as the Fair might be one which allowed no more obtrusion of mundane labor matters into the public's holiday mood than was necessary to protect strikers' interests: innocuous picketing by striking members of the Fair community should be permitted, but picketing connected but indirectly with local activities should not. There is not the same justification for unions carrying on jurisdictional battles or secondary boycotts on the Fair grounds that there is for picketing by local workers whose dispute arises wholly on Fair property. The use, for example, of a sound truck, bicycle or strong language in picketing, practices which have been permitted on public streets,[35] would interfere, no doubt, with patrons' enjoyment of the Fair.[36] But the conduct of the pickets in the principal case was not of such character. They walked quietly on a wide pedestrian avenue with the simple message "Brass Rail on Strike" printed on 3" x 3" cards worn in their lapels or stencilled on jerseys worn under their jackets. This does not seem too much out of keeping at a Fair which is spangled with barkers, weight guessers, penny stampers and similar attractions.

The inequity of the result reached in the principal case is emphasized by its employment of a criminal sanction. In skipping light-footedly over warning precepts which have grown up about New York's disorderly conduct statute[37] to find peaceful strikers guilty of the offense,[38] the magistrate is adding the

"may not be used as a shield by a private business man against a recognized and lawful industrial weapon."); People v. Mario Marletti, unreported, discussed in (1935) 3 I. J. A. BULL. 12, 2; People v. Fernandez, People v. Antolini, People v. Robert, People v. Rosado, unreported, discussed in Memorandum on Behalf of Defendants' Motion to Dismiss the Complaint, pp. 16-18, People on Complaint of Koester v. Rozensweig, 13 N. Y. S. (2d) 795 (1939); *cf.* Hague v. Committee for Industrial Organization, 59 Sup. Ct. 954, 964 (1939) (use of streets and parks for communication of views on national questions held privilege of citizen of the United States).

35. Kirmse v. Adler, 311 Pa. 78, 166 Atl. 566 (1933) (pickets have same right to use automobile with music-producing box as any merchant); Dehan v. Hotel & Restaurant Employees, 159 So. 637 (La. 1935) (picketing with tandem bicycle permitted); Walter A. Wood Mowing & Reaping Mach. Co. v. Toohey, 114 Misc. 185, 186 N. Y. Supp. 95 (Sup. Ct. 1921) (permitting pickets to use "common strong every day language of laboring men."). But see Goldfinger v. Feintuch, 276 N. Y. 281, 286, 11 N. E. (2d) 910, 912 (1937) (use of loudspeaker held illegal as intimidating).

36. Promulgation by the Fair of a formal set of regulations informing unions what activities are permissible would avoid the unpleasantly *ad hoc* procedure of the Fair police in the instant case.

37. N. Y. PENAL LAW § 722: "Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct . . . 2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others."

38. N. Y. PENAL LAW § 22, People v. Knapp, 206 N. Y. 373, 99 N. E. 841 (1912) (crimes and offenses limited to those named specifically in Penal Law; bare neglect of duty not a crime unless provided by statute); People v. Perry, 265 N. Y. 362, 193 N. E. 175 (1934) (criminal assault held not disorderly conduct since occurred in private place where no likelihood of breach of peace or public alarm); People v. Pieri, 269 N. Y. 315, 199 N. E. 495 (1936) (intent to breach peace essential to prove disorderly conduct

weapon of "private property" to the store of a developing anti-labor procedure: the evasion of anti-injunction statutes by use of minor criminal offenses.[39] Picket lines may be broken as effectively by mass arrests with a night in jail, high bail, and abuse of unlimited powers of police courts over petty offenses as by labor injunctions. The dangers in adding peaceful picketing, on what a magistrate chooses to call private property, to this class of offenses are clear. If the court's theories as to private property should be followed, businesses located in galleries, arcades, terminals, company towns and other places of public resort will be able to use police to break up strikes and lawful demonstrations. Expansion of this doctrine may lead to employers being able to build for themselves a Shangri-La free from labor troubles by locating within real estate developments, amusement parks or on private streets.

JUDICIAL CONSTRUCTION OF FAIR TRADE ACTS*

ANALYSIS of judicial efforts in interpretation of state Fair Trade Acts[1] reveals a trend toward the notion that these statutes were primarily designed for the protection of trade-mark owner's property rights in their trade-names. Adherence to this concept, established as authoritative by the Supreme Court in the celebrated *Seagram* case,[2] has been graphically illustrated by a recent New York decision.[3]

charge); People v. Wecker, 246 N. Y. Supp. 708 (Sp. Sess. 1930) (disorderly conduct must be proven beyond reasonable doubt by clear evidence.

Refusal of pickets to comply with an arbitrary order of police to move on is not disorderly conduct. Compare People v. Arko, 40 N. Y. Crim. Rep. 149, 199 N. Y. Supp. 402 (Sp. Sess. 1922) with People v. Galpern, 259 N. Y. 279, 181 N. E. 572 (1932) (refusal to obey policeman whose order is not arbitrary and is calculated to promote public order held disorderly conduct).

39. WITTE, THE GOVERNMENT IN LABOR DISPUTES (1932) 156; *Picketing As Disorderly Conduct in New York*, (1935) 4 I. J. A. BULL. 6, 1; Note (1930) 30 COL. L. REV. 153.

* Lentheric, Inc. v. W. T. Grant Co., 257 App. Div. 348, 13 N. Y. S. (2d) 169 (1st Dep't 1939).

1. Fair Trade Acts are in operation in forty-three states, and challenges of their validity have been resolved in their favor. Old Dearborn Co. v. Seagram Corp., 299 U. S. 183 (1936); The Pep Boys v. Pyroil Sales Co., 299 U. S. 198 (1936); Bourjois Sales Corp. v. Dorfman, 273 N. Y. 167, 7 N. E. (2d) 30 (1937) *overruling* Doubleday, Doran v. R. H. Macy, 269 N. Y. 272, 199 N. E. 409 (1936); Weco Products Co. v. Reed Drug Co., 225 Wisc. 474, 274 N. W. 426 (1937).

2. Old Dearborn Co. v. Seagram Corp., 299 U. S. 183 (1936).

3. Lentheric v. Grant, 257 App. Div. 348, 13 N. Y. S. (2d) 169 (1st Dep't 1939). Several other cases of substantially similar factual background have arisen. De Voin v. W. T. Grant Co., 13 CALIF. S. B. J. No. 3, 20 (Super. Ct. Cal. 1938); Guerlain v. Woolworth, 170 Misc. 150, 9 N. Y. S. (2d) 886 (Sup. Ct. 1939); Lentheric v. F. W. Woolworth Co., 35 Adv. Sheets, Pa. Dist. and Cty. Rep. 572 (Pa. C. P. 1939). In *Guerlain v. Woolworth* an injunction pendente lite was granted to the plaintiff, but at the subsequent

Lentheric, Incorporated, a distributor of luxury perfumes owning and having exclusive right to registered trade-marks used to identify its products, entered into contracts with numerous retail distributors pursuant to the provisions of the Feld-Crawford Act.[4] The agreements provided that the retailer would not sell within the state certain perfumes at prices lower than the minimum resale prices in effect at the time of such sale. Price schedules were drawn up by the plaintiff Lentheric to supplement these contracts and were issued to the trade. The four ounce container of a popular toilet water or eau de cologne was priced at $1; two ounces, at 75 cents; and one ounce, *or any quantity less than one ounce,* at 50 cents. The defendant W. T. Grant Company, a low-price chain emporium not party to any such contracts, but with full knowledge that these contracts had been made, thereafter acquired certain ampules of this eau de cologne containing less than one-fifth of an ounce of the liquid, which third persons had prepared by rebottling a supply obtained from sources unknown to Lentheric. Grant sold these small vials to the public at 10 cents each.[5] In a 3 to 2 decision, the Appellate Division granted Lentheric an injunction against further sale by Grant of products bearing the former's trademark at prices less than those already stipulated or to be stipulated in the future.

Citing the *Seagram* case, the court expressly based its decision on the premise therein developed, that the purpose of the Fair Trade Acts was protection of manufacturers' good will embodied in trade-marks.[6] That such a premise is highly questionable becomes obvious upon examination of the circumstances surrounding the passage of this legislation. The Fair Trade Acts were largely an outgrowth of agitation on the part of independent retailers, rather than of manufacturers,[7] and their enactment was made pos-

trial on the merits it was denied with a rather abrupt reversal of reasoning on the part of the court. Guerlain v. Woolworth, Prentice-Hall, 1939, Fed. Tr. and Ind. Serv., ¶ 97,024 (N. Y. Sup. Ct. 1939).

4. N. Y. Laws 1935, c. 976, p. 1902, as amended, Laws 1938, c. 14.

5. Section 2 of the Feld-Crawford Act provides: "Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section one of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

6. In the *Seagram* case Justice Sutherland made what is rapidly becoming a classic statement of the purpose of the Fair Trade Acts: "The primary aim of the law is to protect property—namely, the good will of the producer, which he still owns. . . . It proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand is an assault upon the good will, and constitutes what the statute denominates 'unfair competition.'"

7. Manufacturers supported the idea in the early part of the present century; but a general apathy replaced this interest, until the movement was revived by retailers and crowned with success in the depression years 1931-36. Surveys of producers' sentiments conducted at the time of passage of the acts revealed either lack of acquaintance with the scheme or general disinterest, except in the case of drug manufacturers, whose interest was probably dictated by strong organizations of their retail outlets rather than by spontaneous concern on their own part. See Grether, *Experience in California with Fair Trade Legislation Restricting Price-Cutting* (1936) 24 CALIF. L. REV. 640, 647; Grether,

sible, or at least accelerated, by the demoralization of prices during the depression and the attendant high mortality rates among independent enterprises.[8] They were primarily instigated as remedial measures for the elimination of predatory price-cutting and "loss-leader" practices, particularly prevalent among the relatively small, but well organized interests engaged in distributing drugs and cosmetics.[9] Proponents of the acts stressed the idea of protecting the manufacturer's trade name, partly because of the historical origin of the idea[10] and partly with an eye to its greater appeal to a sense of fairness as well as to judicial logic. The true purposes of guaranteeing dealer's margins and reducing the competitive advantages of chain and department stores were minimized and, if mentioned at all, were pointed out as tending to preserve the American ideal of liberty and individual enterprise.[11] Such concepts were essential to overcome judicial prejudice against price-fixing legislation.[12] So summary was the enactment of the statutes in most states that no positive

Solidarity in the Distributive Trades in Relation to the Control of Price Competition (1937), 4 LAW & CONTEMP. PROB. 375, 384; McLaughlin, *Fair Trade Acts* (1938) 86 U. OF PA. L. REV. 803, 815; Wolff, 4 TRADE REG. REV. (1937).

8. Considerable sympathy was felt for the "little fellow" in this period and motivated the passage of many other acts designed to benefit him. See McAllister, *Price Control by Law in the United States* (1937) 4 LAW & CONTEMP. PROB. 273, 296. This sympathy cleared the way for enactment; and, strangely enough, the property interest of the big business "ogre" was the basis for judicial endorsement.

9. The Feld-Crawford Act is a copy of the California statute, but many states accepted a revision of that act made by the National Association of Retail Druggists, perhaps the most powerful single element of the lobby which exerted pressure in favor of this legislation. See McLaughlin, *op. cit. supra* note 7, at 816–817. For a detailed comparison of these acts in the several states see Merrell and Kittelle, *Analysis of State Fair Trade Laws* (Oct. 1937) DUN'S REVIEW 8. In a survey made in 1929 by the Federal Trade Commission, 2,334 out of 3,000 replies to questionnaires sent to 36,000 retailers on the subject of resale price maintenance, were used in tabulating results in this field. Of these 1,385, or close to 60%, were from druggists, 96% registering replies favorable to such legislation. *Report of Federal Trade Commission on Resale Price Maintenance* (1929) pt. I, 77-78. A particularized discussion of druggists' tactics in California is to be found in GRETHER, PRICE CONTROL UNDER FAIR TRADE LEGISLATION (1939) 83-106. Of longest standing and greatest omnipresence as an opponent of the acts was R. H. Macy Company, now in close company with other department stores, the cut-rate independents and the chains. For an interesting line-up of lobbyists in the hearings on the Miller-Tydings Bill, see *Hearings before Subcommittee on the Judiciary on S. 100*, 75th Congress, 1st Session (1937), and *Hearings before Subcommittee on the Judiciary on H. R. 1611*, 75th Cong., 1st Session (1937).

10. See note 7, *supra*.

11. For such tactics in the advocacy of the Miller-Tydings Bill see *House Hearings*, note 9, at 3-4. An invective by R. H. Macy's economist during these hearings deplores the political activities of the drug interests. *House Hearings* 141-142. His somewhat biased tirade is not too much out of line with the facts, however. See Grether, *op. cit. supra* note 9, at 83-106.

12. Opinions striking down the Fair Trade Acts are primarily founded upon distaste for price-fixing laws, and those upholding their constitutionality find this question most troublesome. See cases cited in note 1, *supra*, and Comment (1937) 50 HARV. L. REV. 667.

indicia of legislative intent can be found other than the willingness of the lawmakers to endorse the acts in the form advanced by their proponents.[13]

Ignoring this background, the court in the instant case held that the emphasis of the acts was upon protection of the trade-mark owner's property right in his brand, and concluded that the "spirit of the law" required it to find for Lentheric. The basis for this determination was a lengthy citation from the authoritative source of the fallacy, the *Seagram* case.[14] Employing the majority's tenet of liberal construction, it is equally logical to reach the opposite result, on the sounder premise that the true purpose of the acts was to eliminate destructive price competition. The defendant was not cutting prices on a proportional unit basis; further, Lentheric was using the resale price maintenance device as a protection for its own trade name, rather than in the interests of its retailers. Hence it might be argued the New York Statute was not designed to protect the plaintiff in the instant situation at all.[15] On the other hand, results of using rigid statutory construction appear to be similarly flexible; and such treatment is, as could be effectively contended, more in keeping with the fundamental rule that an act which is in derogation of the common law should be strictly construed.[16] Taking this approach, the dissent emphasized the absence of any express provision in the Act authorizing a seller to limit the quantity in which his goods may be resold,[17] and therefore came to the conclusion that Lentheric could not expect protection from the practices complained of. This view loses sight of the fact that in any case Grant has the right either to strip the goods of the trade-mark and sell them in any amounts and at any prices desired[18] or to sell any

13. The speed with which the acts were railroaded through some state legislatures, including that of New York, is borne out by the fact that two serious typographical errors in the California Act, § 1, the word "content" and § 1 subsec. 2, the phrase "in delivery," were copied into subsequent legislation in 10 other states. For a complete collection of the texts of the statutes see WEIGEL, THE FAIR TRADE ACTS (1938) 89-160.

14. Old Dearborn Co. v. Seagram Corp., 299 U. S. 183, 193–195 (1936).

15. This argument was clearly expressed in Guerlain v. F. W. Woolworth reported in Prentice-Hall, 1939 Fed. Tr. & Ind. Serv., ¶ 97,024 (N. Y. Sup. Ct. 1939) although the reasoning of the principal case, decided after the writing of a portion of the Guerlain opinion but before the handing down of the decision, was held controlling. The injunction was nevertheless denied for failure of the plaintiff to show damage, which was held to be essential under the provisions of the act.

16. Resale price maintenance under Fair Trade Acts goes somewhat beyond that permitted by the common law, particularly as sanctioned by § 1½ of the California law, of which § 2 of the New York law is a copy and upon the basis of which the plaintiff in the principal case sought his remedy. See Elliott, *Fair Trade and Resale Price Maintenance* (1936) 10 So. CALIF. L. REV. 1, 11–13.

17. The dissent, making the erroneous assumption that Lentheric was attempting to prevent resale in small quantities at any price whatsoever, relied heavily on Prestonettes, Inc. v. Coty, 264 U. S. 359 (1924), in concluding that such a restriction was illegal. But even if this assumption had been correct, the case was not in point because the opinion expressly stated that it was "not a suit for unfair competition" and the basis for the action was the federal trade-mark laws, and not a fair trade statute.

18. The existence of this right has not only been recognized by the courts but has been a persuasive factor in moving the courts to sustain the validity of the acts and to grant relief under them. See Mr. Justice Sutherland's remarks in Old Dearborn Co. v. Seagram Corp., 299 U. S. 183, 195 (1936).

quantities it pleases *under* the trade-mark, provided it charges at least 50 cents therefor.

An equally plausible and apparently sounder view is that, in the absence of an express provision prohibiting the stipulation of *unreasonable* resale prices, the plaintiff was empowered to enforce a minimum price of 50 cents on all quantities of his product smaller than one ounce, if such was its wish.[19] Unless it be contended that the Act provided a standard of reasonableness to regulate the level of prices which might be maintained under its aegis, Lentheric cannot be said to be violating any of its terms. Where extrinsic evidence of legislative intent is inadequate to answer questions of statutory construction, even greater reliance than usual must be placed upon the literal terms of the act. In the phrasing of the Statute itself, it is clear that the legislature placed no limits upon the resale prices set and relied upon economic factors to keep prices in line.[20] There is no sign of legislative intent to prevent individual price policies from having their normal effect upon the market or to deny the individual any benefit of such consequences as may be expected from the operation of the Statute in conjunction with economic factors. The device here used by Lentheric is not revolutionary, but its specific application is almost unprecedented. High price policies to assure distribution of luxury products through high class retail outlets are not a new idea, though their effectiveness has been increased by the Fair Trade Acts.[21] There is no question but that commodities which are not susceptible

19. This view has been accepted in two lower court decisions squarely in point with the principal case. De Voin v. W. T. Grant Co., 13 CALIF. S. B. J. No. 3, 20 (Cal. Super. Ct. 1938); Lentheric, Inc. v. F. W. Woolworth Co., 35 Adv. Sheets, Pa. Dist. & Cty. Rep. 572 (Pa. C. P., 1939). In the *De Voin* case, at 21, Judge Wilson said: "The relation of the retail price to the actual value is of no consideration."

20. Section 1, subdiv. 1, of the Feld-Crawford Act reads: "No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand, or name of the producer or owner of such commodity and *which is in fair and open competition* (italics ours) with commodities of the same general class produced by others shall be deemed in violation of any law of the state of New York by reason of any of the following provisions which may be contained in such contract: (there follow certain provisions and exceptions thereto)." Since the word "price" is barren of descriptive adjectives throughout the remainder of the statute and the emphasis in the above section is upon the safeguard of competition, there is clearly nothing in the terms of the statute which justifies any inference that it regulates the level of prices which may be set. The legislature relied upon competition among manufacturers to provide a natural check upon price increases. See ZORN AND FELDMAN, BUSINESS UNDER THE PRICE LAWS (1937) 290-291.

It can hardly be maintained that the legislature intended to cast the courts in the role of rate-making bodies by this legislation. Of all the acts, only that of Wisconsin provides for hearings as to the reasonableness of the prices fixed, and there the hearings are conducted by an administrative body. Wis. Laws 1935, c. 52, § 7.

21. The applicability of the acts in this respect was not even questioned in such fact situations; litigation centered rather upon the validity of the acts. See cases cited in note 1, *supra*. However, in the exercise of equity discretion, a New York court has taken a different view where conditions of a business were deemed so chaotic that the enforcement of a contract against one retailer would have had only an infinitesimal effect in stabilizing the industry. Kline, Inc. v. Davega-City Radio, Inc., 168 Misc. 185, 4 N. Y. S.

to repackaging in smaller quantities can be protected by fixing the unit resale price.[22] On the other hand, an article such as perfume, being easily divisible and salable in small quantities, cannot be so protected unless the price scale set is high in reference to small amounts.[23] Any tendency which the Statute may have toward removing the inequalities arising from the natural differences between these two classes of products is not in itself undesirable, though it may possibly be open to criticism on other grounds.

Thus, even though the result reached by the court in the principal case appears to be a desirable one, its reasoning would have been more persuasive had it gone into the question whether or not the Act provided a standard of reasonableness for the resale prices set. So far, however, application of the reasoning evolved in the *Seagram* case does not appear to have led the courts to inequitable results.[24] This is due to the fact that ever acting as a limitation on the unreasonable extension of this concept is the common law doctrine against restraints on alienation of chattels, with its roots firmly embedded in the idea that the subjects of commerce should be freely transferable.[25] Even assuming that the courts adhere to their questionable derivation of legislative intent, it is probable that unusual and highly unreasonable restraints[26] will be struck down by common law concepts, and that such restraints as will inhere in everyday business transactions supplemented by the effects of the statutes[27] will be protected on the basis of the *Seagram* case.

(2d) 541 (1938). Denial of an injunction here would seem to be refusing to enforce where enforcement is the most necessary.

22. It is difficult to imagine how, for example, a retailer could successfully alter an automobile and sell it for a lower price than one set in a resale price maintenance contract.

23. Otherwise the product is susceptible to an attack such as took place in the principal case, whereby good will may suffer even in the absence of price-cutting in the sense of the word as ordinarily used.

24. See cases cited in note 3, *supra*. In addition, see Portchester Wine and Liquor Shop, Inc. v. Miller Bros. Fruiteries, Inc., 253 App. Div. 188 (2d Dep't 1938); Bristol-Myers Co. v. Lit Bros., Inc., 6 A. (2d) 843 (Pa. Sup. Ct. 1939). The dissent in the latter case reveals the danger of undue emphasis upon the property right of the producer.

25. See Chafee, *Equitable Servitudes on Chattels* (1928) 41 HARV. L. REV. 945, 981–987.

26. For example, in the case of automobile "trade-ins," abuse in granting exhorbitant allowances, in so far as they amount to indirect price concessions, would constitute valid grounds for an injunction, whereas efforts to enforce a rigid price scale for such allowances would fail, as being an attempt to fix the selling price of an article (the trade-in) in which the producer has no property right whatsoever.

27. Such could include requirements that a given article be resold at one price if sold in combination with another article and at a different price if sold alone; they could include requirements of fixed interest rates on time payment sales and fixed service guarantees on articles. Considerations which should move the courts to uphold or strike down such restrictions are whether or not the devices are simple, easy to enforce, or customary in the particular trade.

OBLIGATION OF DEVISEES AND HEIRS TO PAY RENT FOR USE OF DECEDENT'S REALTY*

THE feudalistic roots of real property law are visible in the zeal with which the common law has protected the interests of the landed aristocracy. During the administration of an estate, the decedent's heirs and devisees were surrounded until the nineteenth century by the same legal safeguards that kept his creditors away during his lifetime.[1] Even when the decedent's land was later made available to creditors,[2] it was still protected to the extent that personalty had to be exhausted before a forced sale would be permitted.[3] Since the common law vests title to a decedent's real property in his devisees or heirs at the moment of his death,[4] the latter have been regarded as exclusively entitled to all rents and profits pending settlement of the estate.[5] Where realty in the possession of a third person today is not specifically devised, the heirs, in the absence of statutory change, still collect the rents[6] and take equal shares.[7] If the personal representative has received the rents, he is liable to the heirs,[8] even though he has applied the proceeds to just claims against the estate.[9]

*Limberg v. Limberg, 11 N. Y. S. (2d) 690 (App. Div. 2d Dep't 1939); *In re* Limberg's Will, 11 N. Y. S. (2d) 897 (App. Div. 2d Dep't 1939).

1. Realty at common law could not be subjected to the payment of a decedent's debts, except where he by a contract under seal had expressly bound the realty for this purpose. 3 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1922) 575-576; 2 TIFFANY, REAL PROPERTY (2d ed. 1920) § 552.

2. Realty was first subjected to sale for payment of a decedent's debts by means of the creditors' bill and later by empowering the personal representative to make the sale. 2 TIFFANY, REAL PROPERTY (2d ed. 1920) § 552. The power of the personal representative to sell real estate for the benefit of creditors, when not given to him in a testator's will, is solely statutory; it can be exercised only on literal compliance with the terms of the statute and is generally conditioned on obtaining a court order of sale. 3 WOERNER, AMERICAN LAW OF ADMINISTRATION (3d ed. 1923) § 463.

3. Proceeds from realty may usually be applied to debts only after personalty has been exhausted. But some states authorize court orders applying the proceeds from realty before personalty where in the opinion of the court it is necessary to protect the value of the personalty. 3 WOERNER, AMERICAN LAW OF ADMINISTRATION (3d ed. 1923) § 489.

4. 2 BL. COMM. *201.

5. Head v. Sutton, 31 Kan. 616, 3 Pac. 280 (1884); Gibson's Adm'r v. Gibson, 241 Ky. 74, 43 S. W. (2d) 343 (1931); Lobdell v. Hayes, 78 Mass. 236 (1858); 2 WOERNER, AMERICAN LAW OF ADMINISTRATION (3d ed. 1923) § 276.

6. Nicely v. Howard, 195 Ky. 327, 242 S. W. 602 (1922).

7. Rents received by one heir from realty in possession of third persons were made apportionable among all the heirs by an early statute. 4 ANNE, c. 16, § 27 (1705). See note 24, *infra*.

8. The personal representative is universally held accountable for rents received by him. Where under the law of the state he has no authority to collect rents, courts are not agreed as to whether he is liable in his official capacity or as agent of the distributees. 3 WOERNER, AMERICAN LAW OF ADMINISTRATION (3d ed. 1923) § 513. Compare Conger v. Atwood, 28 Ohio St. 134 (1875), with Head v. Sutton, 31 Kan. 616, 3 Pac. 280 (1884).

9. McClead v. Davis, 83 Ind. 263 (1882).

Although the distinction between realty and personalty has been preserved by limiting the control of the personal representative over realty while allowing him virtually complete freedom in administering personalty,[10] the policy which fathered the distinction has now become extinct. New considerations have arisen, however, to justify a maintenance of the differentiation. In view of the losses inevitable in a forced sale of realty and of the greater marketability of personalty, an estate is managed more efficiently when the personal representative is required to exhaust the personalty before he turns to the realty. Furthermore, unlike realty, personalty is easily dissipated and needs a greater degree of protection.

There is one important situation, however, in which control over realty by the personal representative, broader than was permitted at common law, benefits both the estate and its creditors. Where the estate is insolvent, a power in the personal representative to collect rent from the realty and to use it in reducing estate debts may forestall an eventual sale of the realty and will in any event provide additional funds for the security of creditors. With this situation in mind, the legislatures of many states have discarded the common law rule in favor of placing these powers of rent collection and management in the hands of the personal representative.[11]

While this type of statute has been effectively utilized to preserve the estate's realty and to protect creditors, its application to situations where these objectives are non-existent has resulted in confusion. Two recent New York cases,[12] arising from the administration of the same estate and argued before the same court, have emphasized the problem of applying such statutes to the collection of rent from beneficiaries of solvent estates.

A, an heir of *T*, was appointed executor at the time *T*'s will was admitted to probate.[13] On appeal, the will was declared invalid,[14] *A*'s letters testamentary were revoked, and *B* was appointed administratrix in his stead. During the period of *A*'s service as executor and after the appointment of *B* as administratrix, *A* remained in possession of a part of the estate's real property. The Surrogate Court charged *A* on his account as executor with rent for use and occupancy of the real property while acting in his representa-

10. 2 TIFFANY, REAL PROPERTY (2d ed. 1920) § 487.

11. Section 123 of the New York Decedent Estate Law is typical of these statutes: "The administrator of a decedent . . . shall have power to take possession of the real property of such decedent, and any interest therein, and to manage the same and collect the rent thereof." Section 13 makes similar provision as to executors. States having statutes comparable to New York's are Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Idaho, Michigan, Minnesota, Montana, Nebraska, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Washington, Wisconsin and Wyoming. Missouri and Mississippi provide that the personal representative may obtain a court order for the collection of rent upon showing the insolvency of the estate.

12. Limberg v. Limberg, 11 N. Y. S. (2d) 690 (App. Div. 2d Dep't 1939); *In re* Limberg's Will, 11 N. Y. S. (2d) 897 (App. Div. 2d Dep't 1939).

13. The will was denied probate upon jury trial in the Surrogate's Court. The decision was reversed by the Appellate Division. Matter of Limberg, 252 App. Div. 779 (2d Dep't 1937). *A* was thereupon qualified as executor.

14. Matter of Limberg, 277 N. Y. 129, 13 N. E. (2d) 605 (1938), *rev'g*, 252 App. Div. 779 (2d Dep't 1937).

tive capacity.[15] The appellate division, however, unanimously reversed the surrogate's decree, stating as its only reason the following: "A distributee in possession may not be charged in this proceeding for use and occupancy of a portion of the common property."[16] Shortly thereafter, in a separate action before the same court *B* was permitted, as administratrix, to collect rent from *A* for his use and occupancy of the realty subsequent to her appointment;[17] and this notwithstanding a stipulation by both parties that the personal property was sufficient to meet all possible debts of the estate plus costs of administration. The court reasoned that since the language of the statute was unqualified,[18] the right which it vested in the administratrix was likewise unqualified, and hence she could collect rents even though the estate was solvent. Two of the five judges, however, dissented and construed the statute as in derogation of common law, vesting in the administratrix a contingent right only, conditioned on the need for funds to pay claims against the estate.

These separately considered decisions would seem to indicate this: while an ordinary heir in possession is now bound to pay rent to a personal representative regardless of the estate's financial condition, an heir who is himself a personal representative is under no obligation to pay rent to a solvent estate.

The position taken by the appellate division in the second case with respect to the personal representative's absolute right to collect rents from the beneficiaries of a solvent estate is not in accord with the usual interpretation of similar statutes by other courts.[19] The right conferred on the personal representative is commonly limited to situations in which he can show that rent is needed to satisfy debts of the estate,[20] although a minority of the states

15. The Surrogate's decree is not printed in any official report. See *In re* Limberg's Will, 11 N. Y. S. (2d) 897 (App. Div. 2d Dep't 1939).

16. *In re* Limberg's Will, 11 N. Y. S. (2d) 897 (App. Div. 2d Dep't 1939). It does not appear from the opinion on what grounds the court made its decision. The words "may not be charged in this proceeding" suggest that he might be liable in some other proceeding. It is difficult to imagine what proceeding this might be except an action on the theory of cotenancy.

17. Limberg v. Limberg, 11 N. Y. S. (2d) 690 (App. Div. 2d Dep't 1939). Note that pursuant to § 548 of the New York Civil Practice Act a controversy submitted to the Supreme Court on an agreed statement of facts is tried by the Appellate Division.

18. NEW YORK DEC. EST. LAW § 123, *supra* note 11.

19. But there are indications that Oklahoma, Connecticut and California would follow suit were the exact issue presented to them. Nolan v. Mathis, 147 Okl. 155, 295 Pac. 801 (1931), is distinguishable on the grounds that the distributee was also a lessee of the decedent. See Lockwood v. Tracy, 46 Conn. 447, 453 (1878); Washington v. Black, 83 Cal. 290, 293, 23 Pac. 300, 301 (1890). The Connecticut statute is unique in expressly providing that the income from real property shall vest in the personal representative as personal property. CONN. GEN. STAT. (1930) § 4956.

20. Palmer v. Steiner, 68 Ala. 400 (1880); Johnson v. Moxley, 22 Ala. App. 1, 113 So. 651 (1926); Mayo v. Bank of Marvel, 188 Ark. 330, 65 S. W. (2d) 549 (1933). Where the party sought to be charged with rent is an heir or devisee in possession, courts are even more emphatic in their requirement of showing insolvency. Stovall v. Clay, 108 Ala. 105, 20 So. 387 (1895); Howard v. Patrick, 38 Mich. 795 (1878); Tunnicliff v. Fox, 68 Neb. 811, 94 N. W. 1032 (1903); Russell v. Adams, 293 S. W. 264

do not require such a showing where persons other than heirs or devisees are in possession.[21] The requirement of a showing of insolvency is predicated on the assumption that the preservation of the realty for the protection of creditors is the sole purpose of the statute.[22] Since this consideration is non-existent where the estate is solvent, the fiduciary's employment of the statutory power in such a case would serve no useful function. He would merely collect rents from the heirs and devisees, extract additional commissions therefrom, and return the balance to them upon settlement of the estate.

The limitation on the personal representative's right to collect rents is opposed by an argument founded on a rule of cotenancy. As a practical matter the heirs are not likely to make joint use of all the common property during the administration of the estate. Inasmuch as they are in the legal position of cotenants,[23] they are not entitled to contribution from one of their number for his exclusive use and occupancy of common property.[24] They may obtain the cash value of their equal rights to possession, therefore, only if the personal representative has the power to collect rents and distribute them proportionately as assets of the estate.

This argument ignores, however, the fact that the cotenancy rule is outmoded. While the rule of non-contribution between tenants in common for use and occupancy may be justified where a cotenant has derived benefit from common property through his own labor and initiative,[25] obviously

(Tex. Civ. App. 1927); *cf.* Rough v. Womer, 76 Mich. 375, 43 N. W. 573 (1889); Holt v. Anderson, 98 Ga. 220, 25 S. E. 496 (1896). Georgia is the only state whose statute expressly differentiates between the obligations of third persons and distributees in possession. GA. CODE (1933) §§ 113-907, 113-908.

21. Washington v. Black, 83 Cal. 290, 23 Pac. 300 (1890); Nichols v. Dayton, 34 Conn. 65 (1867); Miller v. Hoburg, 22 Minn. 249 (1875). Arizona, California, Colorado, Nevada, South Dakota, Utah and Wyoming have mandatory statutes providing that the personal representative "must take" or "shall take" possession and/or collect rents from the decedent's realty. Under statutes which are not mandatory in form it may be the representative's duty to collect rent if the estate is insolvent. Clark v. Knox, 70 Ala. 607 (1881); see Matter of Baker's Estate, 164 Misc. 92, 94, 298 N. Y. Supp. 261, 265 (Surr. Ct. 1937).

22. Streeter v. Paton, 7 Mich. 341 (1859); Rough v. Womer, 76 Mich. 375, 43 N. W. 573 (1889).

23. Heirs at law are cotenants of the decedent's realty. Cruger v. McLaury, 41 N. Y. 219 (1869); Fenton v. Miller, 94 Mich. 204, 53 N. W. 957 (1892); 1 TIFFANY, REAL PROPERTY (2d ed. 1921) § 193. Devisees are made cotenants by statute. 1 *Id.* § 191; see, for example, NEW YORK REAL PROP. LAW § 66.

24. Woolever v. Knapp, 18 Barb. 265 (N. Y. Sup. Ct. 1854); LeBarron v. Babcock, 122 N. Y. 153, 25 N. E. 253 (1890). At common law cotenants were not liable to each other even for rents actually received. 2 Co. LITT. *200b. The Statute of Queen Anne adopted by many of the states and reenacted in others, made cotenants liable for "receiving" more than their "just proportion" from the cotenancy. 4 ANNE, c. 16, § 27 (1705). This language has been generally construed not to change the immunity of cotenants from liability for use and occupancy, but applies only where one cotenant has actually received rents. Note (1923) 27 A. L. R. 190.

25. It is significant that the first case to decide the effect of the Statute of Queen Anne on liability for use and occupancy was one in which the defendant had derived profit by virtue of his exclusive labor on the common property. Henderson v. Eason,

the justification disappears where the benefits represent merely a return on a capital investment made by the decedent. It is in the latter form that the problem most often arises today, for the common situation is that of an heir occupying land and buildings owned by the decedent. The indiscriminate application of the cotenancy rule to any heir in possession will generally result, then, in an unmerited enrichment of that heir at the expense of his fellows. Concededly, therefore, the effects of this anachronism should be avoided; but the method should not be mere circumvention by expanding the powers of the personal representative, for that cure may well be worse than the evil.[26] In the great majority of cases, the rental value of realty occupied by one heir or devisee could be shared amicably among the beneficiaries of the estate by some common agreement. The more direct method of repudiating the cotenancy rule would open the way to equitable distribution while avoiding the delay and expense of administration.

Where an heir or devisee acts as personal representative, there is no objection to securing an equitable distribution of the rental value by charging him on his account for use and occupancy of the estate's realty. It makes no difference whether the cotenancy rule is expressly changed or whether he is charged on his account, since the latter would not add to the expense of administration and is probably the easiest way of distributing the rent from the property which he occupies. Of course, the statutes do not specifically cover the obligations of a personal representative,[27] but New York might have followed the rule evolved by other states without the aid of statute: that precisely because of his fiduciary position, a personal representative, whether distributee or not, will be held strictly accountable for all benefits derived from the estate during its administration wholly aside from the question of solvency.[28]

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9 Eng. L. & Eq. R. 337 (1851). The same is true of the first case in New York. Woolever v. Knapp, 18 Barb. 265 (N. Y. Sup. Ct. 1854).

26. As previously indicated, the collection of rent by the personal representative from the distributees would only mean delay in their full enjoyment of the proceeds of the realty and additional expense to the estate in the form of the fiduciary's commissions.

27. An exception to this statutory silence is Maine, which requires a personal representative to pay rent for use and occupancy. ME. REV. STAT. (1930) c. 76, § 57.

28. Kennedy v. Parks, 217 Ala. 323, 116 So. 161 (1928); Adams v. Bishop, 169 Ga. 762, 151 S. E. 377 (1929); Crowley v. Nixon, 132 Kan. 552, 296 Pac. 376 (1931).