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FEDERAL REGULATION OF HOURS AND WAGES
Herbert Burstein*

THE EXPANDING frontier of governmental participation in economic affairs is marked most clearly by the presence of social welfare legislation. A growing recognition that the economy is not self-regulating, an acknowledgment of public responsibility for the economic security of its citizens, is reflected in the increasing number of laws governing the terms and conditions of employment. In this area, indeed, government stands as a third party to practically every employment agreement, whether individual or collective in character. Illustrations of the role played by the government appear through a series of statutes, of which the wage and hour provisions of the Fair Labor Standards Act represent a most significant milestone in the history of progressive legislation. In the interest of providing a complete picture of federal regulation, however, it is proposed to bring together all of the statutes enacted to date which bear on the subject.

* Member, New York and Federal Bars; Member, Department of Economics, Long Island University; Lecturer, City College of New York and Practicing Law Institute.
I. The Fair Labor Standards Act

The Fair Labor Standards Act\(^1\) is essentially social welfare, rather than economic, legislation. It is, as the United States Supreme Court has said, primarily "humanitarian and remedial" in character, being designed "to extend the frontiers of social progress."\(^2\) While conceived as a governmental weapon for the combatting of unemployment during a depression, its limited coverage,\(^3\) and Congressional reliance upon minimum hourly wage rates to insure "all able-bodied workmen and women a fair day's pay for a fair day's work,"\(^4\) operated to impair its effectiveness as a method of spreading employment and assuring stable and adequate earnings. But the achievements under the statute must not be obscured. To a considerable extent, the elimination of sub-standard wages and of artificially created geographic differentials represents a substantial contribution made by law to a stable economy. With the addition of certain wages and hours provisions, a framework for comprehensive legislation not only in the field of wages and hours but also in that of employer-employee relations has now been established.

Basically, the statute now operates by fixing a floor on wages and a ceiling on hours, but it is important to observe that the law does not apply to industries, as such. On the contrary, it regulates only the wages and hours of employees engaged in interstate or foreign commerce or in the production of goods for

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\(^3\) Approximately 1,700,000 workers are said to have received wage increases between 1938 and 1948, but it cannot be established that these upward adjustments would not have occurred despite the presence of the statute. See Monthly Labor Review, Sept., 1948, p. 272.

commerce.\textsuperscript{5} Determination as to whether or not the Act applies, that is whether a given employee is covered thereby, requires that inquiry be directed to the activities of the employee rather than to the nature of the business of the employer.\textsuperscript{6} That point being settled, the impact of the statute may be studied more closely.

The law originally provided for a minimum hourly wage of 25¢ for all employees in interstate commerce or engaged in the production of goods for interstate commerce, and fixed the maximum work week at forty-four hours.\textsuperscript{7} Beginning in 1940 and up until January 25, 1950, the minimum wage was set at 40¢ and the weekly maximum was fixed at forty hours.\textsuperscript{8} At the present time, no covered employee may be paid less than 75¢ per hour nor may he be employed in excess of forty hours a week unless he receives one and one-half times his regular rate of pay for all hours worked in excess thereof. Overtime compensation, \textit{i. e.}, time and one-half the regular rate of pay, must be paid in each week that it is earned as the employer is denied the right to average the hours over two or more weeks.\textsuperscript{9} Stated differently, an employee who works forty-two hours in any one week and only thirty-eight in the next, must be paid overtime compensation for the two additional hours of the first week although the total


\textsuperscript{7} The Act of June 25, 1938, 52 Stat. 1062-3, 29 U. S. C. A. §§ 206(a) and 207(a), provided for an automatic increase in minimum wages from the prior schedule as well as for automatic reduction in the number of hours at the expiration of the periods enumerated therein.

\textsuperscript{8} See 29 U. S. C. A. §§ 206(a)(3) and 207(a)(3).

laboring time for the entire period does not exceed the statutory count.

Again, the regular rate of pay is not necessarily the minimum 75¢ per hour prescribed in the Act. It is arrived at, generally, by dividing total weekly earnings by the number of hours worked. Thus, an employee receiving $40 a week for a regular forty-hour week has a regular pay rate of $1.00 per hour, so that his overtime rate is $1.50 for each overtime hour. If such an employee were to work forty-two hours, his total compensation would be $43, from which fact suggested formulae for the purpose of computing pay may be stated as follows:

\[
\begin{align*}
(1) \text{ Regular rate of pay} & = \frac{\text{wages}}{\text{hours}} \quad \text{or } r = \frac{w}{h} \\
(2) \text{ Total pay} & = 40r + \frac{r}{2} [H-40]
\end{align*}
\]

In the application thereof, however, it should be remembered that certain payments made to employees, such as gifts or irrevocable contributions to "welfare" programs, are to be excluded from the computation of the regular rate of pay.¹⁰

The federal law does not purport to limit the number of hours during which an employee may work so, assuming no prohibitory state legislation on the subject, he could work seven days a week and twenty-four hours a day so long as he receives the stipulated overtime compensation rate of one and one-half times the regular rate of pay for all hours over forty. Similarly, the law does not place a rigid limit on the benefits which the employee may receive for his overtime work. If, for example, a union contract or some other state or federal law should provide him with greater benefits, these beneficial provisions control the situation, the extra compensation afforded thereby being offset against the overtime compensation due under the wage and hour provisions.¹¹

¹⁰ 29 U. S. C. A. § 207(d).
¹¹ Ibid., § 207(d) and § 218.
done on a Saturday, Sunday, holiday, or on the sixth and seventh days of a work week, so long as the premium rate is not less than one and one-half times the regular rate of pay, with a like premium rate of pay for work outside the basic, normal or regular work day of not exceeding eight hours, or a work week of not exceeding forty hours, paid pursuant to an employment or collective labor contract, may be credited against the overtime compensation due.12

Not all employees engaged in commerce or the production of goods for commerce are covered by the Act, for specific exemptions as to certain workers have been written into the law. Accordingly, government workers,13 executive, professional, and administrative employees, being those who qualify under regulations promulgated by the Administrator of the Wage and Hour Division,14 and employees engaged in retail or service establishments where more than fifty per cent of the annual dollar volume of sales of goods or services is made within the state in which the establishment is located, are entirely removed from under the statute.15 Seamen16 and employees in defined fishing activities,17 agricultural and horticultural workers,18 as well as those employed in the operation and maintenance of ditches, canals, and the like, provided the latter are not owned or operated for profit,19 are excluded. Apprentices and learners, to an extent prescribed by the Administrator,20 employees of a weekly, semi-weekly or daily newspaper of limited circulation,21 and employees

12 Ibid., § 207(d)(6) and (d)(7).
13 Ibid., § 202(d).
14 Ibid., § 213(a)(1).
15 Ibid., § 213(a)(2).
16 Ibid., § 213(a)(14).
17 Ibid., § 213(a)(5).
18 Ibid., § 213(a)(10). As to the power of the Administrator to define an "area of production" in connection with the agricultural exemption, see Addison v. Holly Hill Fruit Products, 322 U. S. 607, 64 S. Ct. 1215, 88 L. Ed. 1488 (1944).
19 Ibid., § 213(a)(6).
20 Ibid., § 214.
of street, suburban and interurban electric railways, or the like,\textsuperscript{22} are wholly exempt, both as to hours and wages. Certain employees whose hourly service is regulated by other statutes are exempt from the hour provisions only,\textsuperscript{23} while still others, being those who are employed in seasonal work\textsuperscript{24} or who work under labor contracts which guarantee a minimum number of weeks of employment within a prescribed period,\textsuperscript{25} are partially exempted from the overtime compensation provisions.

Obviously, then, an employee working for a telegraph, telephone or interstate transportation company would be engaged directly in interstate commerce\textsuperscript{26} and, absent any specific exclusion from the coverage of the Act, would be entitled to full benefit of the minimum wage and maximum hour provisions.\textsuperscript{27} Workers employed in manufacturing, processing and distributing the goods which move in interstate commerce are likewise covered and, in this latter category, fall not only those who participate in the actual physical work on the product itself but also those employees who work “in any closely related process or occupation directly essential” to the production of goods for interstate commerce, i.e., clerks, messengers, maintenance and custodial employees and the like.\textsuperscript{28} A freight elevator operator, for example, who serves to carry raw material up to a manufacturing plant in the building for processing into finished goods, which goods are then

\textsuperscript{22}Ibid., \S 213(a)(9).
\textsuperscript{23}Ibid., \S 213(b). See, for example, 49 U. S. C. A. \S 304(a)(2), as to employees of motor carriers coming under the jurisdiction of the Interstate Commerce Commission, and 49 U. S. C. A. \S 151 et seq., as to employees of air carriers.
\textsuperscript{24}Ibid., \S 207(b)(3).
\textsuperscript{25}Ibid., \S 207(b)(1) and (b)(2).
\textsuperscript{28}Before 1949, the words “necessary to production” had been employed. Coverage thereunder was extended to a wide variety of occupations, of which Martino v. Michigan Window Cleaning Co., 327 U. S. 173, 66 S. Ct. 379, 90 L. Ed. 603 (1946); Armour & Co. v. Wantock, 323 U. S. 126, 65 S. Ct. 165, 89 L. Ed. 118 (1945); and Roland Electric Co. v. Walling, 326 U. S. 657, 66 S. Ct. 413, 90 L. Ed. 383 (1946), are but illustrations. The present statute reflects an attempt to limit coverage, according to Statement of House Conferees, H. R. 1453, 81st Congress, pp. 14-5.
to move in interstate commerce, has been said to be covered on the theory that his work is "directly essential" to the production of such goods.\textsuperscript{29}

A simple test of coverage has been said to lie in the question: Does the employer intend, hope or have reason to believe that his goods will move in interstate commerce? If the answer is in the affirmative, then coverage is present. To illustrate: If a man be employed in drilling a well in an effort to discover oil, he is covered even though, as is true in most cases, the well turns out to be dry and the employee actually lacks a direct connection with the production, sale or distribution of oil. The theory supporting that view rests on the idea that the employer knew, or should have known, that if oil had been extracted from the well it would have been shipped in interstate commerce.\textsuperscript{30} Upon such reasoning, few except those specifically exempt are excluded from coverage if they engage in work of productive character. On the other hand, those whose work is remote from the processes of production will, in all probability, not be entitled to the benefits here provided.

Numerous devices have been developed by employers with a view to evade statutory requirements or to minimize their impact. Of these, only one arrangement, the so-called "Belo Plan,"\textsuperscript{31} received any sanction at the hands of the courts and it has been expressly included in the Fair Labor Standards Act as presently constituted.\textsuperscript{32} Under this program, where, in fact,


an employee's hours of work fluctuate and are irregular, an individual or collective labor contract may be entered into to limit overtime earnings and to stabilize weekly compensation if the agreement specifies a regular rate of pay of not less than 75¢ an hour, provides compensation at not less than one and one-half times such rate for all hours worked in excess of forty in any work week, and provides a weekly guarantee of pay for not more than sixty hours based on the specified rates. In the absence of such an agreement, an employee who works a fluctuating number of hours in the work week is entitled to time and one-half the regular rate of pay, computed on the basis of hours actually worked and the weekly salary actually received in each and every week.

For example, if an employee earns $42 a week, and in one week works forty-two hours, but in the second works forty-eight, he would have a regular rate of pay which would vary from $1.00 in the first week to 87½¢ per hour in the second. In the absence of agreement, such an employee would be legally entitled to a payment of $43 for the first week and $45.496 for the second. However, if the Belo contract had been entered into, the employer could provide a regular rate of pay of 80¢ an hour, with a guarantee of $44 per week. Under such circumstances, the employees might work up to fifty hours without receiving total compensation in excess of the guaranteed pay, and he would have to exceed fifty hours before he would be entitled to higher compensation. Decisions rendered prior to the 1949 amendment, would seem to indicate that the regular rate of pay fixed by such an agreement would have to be realistic in character. If, for example, a covered employee were to receive $150 a week and work a fluctuating number of hours ranging up to sixty per week, it would be un-

33 That computation is based on 42 times the regular rate of $1.00 per hour, plus two hours of premium pay calling for an additional fifty cents per hour.

34 Calculation is based on 48 times the net rate of $.875 per hour, plus eight hours of premium pay involving the additional compensation of $.437 per hour.

35 The statutory formula for computing the weekly wage would be [50 x $.80] plus [10 x $.40], or $44.00.

36 See cases cited, note 31 ante.
realistic, arbitrary and unreasonable to provide for a regular hourly rate of pay of 80¢ per hour. 37

Of special significance are the child labor provisions of the law, albeit they do not deal directly with questions concerning either hours or wages. No producer, manufacturer or dealer, says the statute, shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which, within thirty days prior to removal of such goods therefrom, any "oppressive child labor has been employed." 38 The Secretary of Labor, or a representative designated by him, is allowed to make all investigations and inspections concerning the employment of minors and, subject to the direction and control of the Attorney General, may bring actions to enjoin the shipment or delivery of goods in commerce whenever oppressive child labor has been employed. 39

The determination as to what shall constitute "oppressive" child labor has been left to the Secretary of Labor for promulgation by regulation. With limited exceptions, he may prohibit absolutely the employment of minors under the age of fourteen, may limit the nature of employment for those between fourteen and sixteen, and proscribe the employment of minors between sixteen and eighteen in certain occupations. 40 The curtailment of oppressive child labor extends to parental employment of children under sixteen in an occupation found by the Secretary of Labor to be hazardous for children between the ages of sixteen and eighteen. 41

Fortunately for commerce generally, an exemption from prosecution under the child labor provisions is granted whenever

39 Ibid., § 212(b).
a shipment or delivery for shipment of goods is made by a purchaser who has acquired them in good faith reliance upon written assurance from the producer, manufacturer or dealer that the goods were produced in compliance with the law. The exemption is granted only to one who has paid value for the goods without notice of the violation.\(^4\)

Except as to the child labor provisions, all matters relating to the administration and enforcement of the statute are vested in the Administrator of the Wage and Hour Division of the Department of Labor, an official appointed by the President, by and with the advice and consent of the Senate.\(^4\) He is empowered to enforce the law through investigatory procedures,\(^4\) by criminal prosecutions instituted by the Department of Justice,\(^4\) and by civil suits which he is authorized to bring to restrain violations of those provisions falling under his jurisdiction.\(^4\) While employees may bring their own suits to recover unpaid minimum wages, overtime compensation, and additional amounts for liquidated damages,\(^4\) claims which the Administrator may not include as parts of an injunction proceedings, he may sue for unpaid minimum or overtime compensation upon the written request of an employee.\(^4\) Nothing, therefore, touching on enforcement, has been left to chance.

Prior to the passage of the portal to portal pay sections,\(^4\)

\(^4\) Ibid., § 204.
\(^4\) Ibid., § 211(a) and § 212(b).
\(^4\) Ibid., § 216(a).
\(^4\) Ibid., § 217.
\(^4\) 29 U. S. C. A. § 216(c).
various employees had instituted law suits to recover compensation for preliminary and postliminary work, that is for certain productive activities which began before the actual work of the employee was entered upon, including walking time and dressing time, and for post-productive activities engaged in subsequent to the time such regular work ceased. All such suits were based on the theory that, if the regular shift of an employee began at eight in the morning and terminated at five in the afternoon, an employee who spent from five to ten minutes walking to his job site or preparing his machine prior to eight o'clock or who spent time after five in clean-up activities, was entitled to be paid for such work. Suits totalling several billions of dollars, based upon this theory, had been instituted.\textsuperscript{50}

The object of the portal to portal sections was to bar recovery therein unless the activities were compensable by contract, custom or practice in effect at the time the activity occurred and then only provided the activity was engaged in during the time "with respect to which it was so made compensable."\textsuperscript{51} In addition to creating new defenses for employers in actions to recover liquidated damages,\textsuperscript{52} the statute established a uniform statute of limitations for the bringing of suits,\textsuperscript{53} authorized certain types of releases by employees of their claims for liquidated damages,\textsuperscript{54} permitted the compromise of employees’ claims for overtime compensation,\textsuperscript{55} and generally broadened the authority of the Administrator.

\textsuperscript{50} See Bay Ridge Operating Co. v. Aaron, 334 U. S. 446, 68 S. Ct. 1186, 92 L. Ed. 1502 (1948), particularly note 7. The principle of pay for preliminary and postliminary work had been established in Anderson v. Mt. Clemens Pottery Co., 328 U. S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946). The enactment of the new statute put an end to many of the pending actions, but the constitutionality of this retroactive ban on wage claims has not been passed upon by the United States Supreme Court. Constitutionality has been found present in Battaglia v. General Motors Corporation, 169 F. (2d) 254 (2d Cir. 1948), and in Rogers Cartage Co. v. Reynolds, 166 F. (2d) 317 (6th Cir. 1948).

\textsuperscript{51} 29 U. S. C. A. § 252, subsections (a) and (b).
\textsuperscript{52} Ibid., §§ 259-60.
\textsuperscript{53} Ibid., § 256.
\textsuperscript{54} Ibid., § 253(b) and § 253(c).
\textsuperscript{55} Ibid., § 253(a). The state of the law on this point, prior to the addition to the statute, is illustrated by Brooklyn Savings Bank v. O’Neil, 324 U. S. 697, 65 S. Ct. 895, 89 L. Ed. 1296 (1945).
Because the original act contained no definition of the term "regular rate of pay," a considerable amount of litigation was generated by varying constructions of that term. Efforts at clarification produced the "Overtime on Overtime" Act,\(^{56}\) directly responsive to the acute situation created by the decision in the so-called Longshoremen's Cases, official entitled *Bay Ridge Operating Company v. Aaron*,\(^{57}\) wherein the Supreme Court held, in substance, that a premium paid for work performed after five o'clock in the afternoon or done on Saturdays, Sundays and holidays, was required to be included in computing the regular rate of pay. While that statute has since been repealed, its provisions have been incorporated in the 1949 amendments to the Fair Labor Standards Act,\(^{58}\) so that the law, as presently constituted, forbids the imposition of any liability for failure to pay for overtime work if the compensation actually paid is at least equal to that payable according to the statute.

Some miscellaneous provisions of the statute possess special interest. The law provides for the appointment of special industry committees to recommend minimum rates of wages for employees in Puerto Rico and the Virgin Islands;\(^{59}\) it establishes rules respecting piece-rate compensation;\(^{60}\) it authorizes investigations into conditions of employment of persons in home work;\(^{61}\) and it requires the maintenance of records, by the employer, covering wages and hours as well as conditions and practices of employment.\(^{62}\) The Administrator, in addition to his broad investigatory powers, has the right to utilize the services of state and local agencies, in order to assist him in carrying out his functions and duties.\(^{63}\)

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56 Pub. Law 177, c. 352, 81st Congress, 1st sess.
59 Ibid., §§ 205(a) and 206(a) (2) and 206(c).
60 Ibid., § 207(f).
61 Ibid., § 211. See also § 211(d). The power of the Administrator to establish regulations on homework is discussed in Gemsco, Inc. v. Walling, 324 U. S. 244, 65 S. Ct. 605, 89 L. Ed. 921 (1945).
62 Ibid., § 211(c).
63 Ibid., § 211(b).
This, then, comprehends the principal and most far-reaching statute enacted to date, but it does not cover all situations, nor is it designed to apply in the area of the relationship between the government and its own employees, much less those who indirectly work for it. Such persons have not been left without protection, however, for another group of statutes apply to them.

II. **Wages and Hours Under Government Contracts.**

Early efforts by government, both federal and state, to establish minimum standards for employment had consisted almost exclusively in legislative reductions in the hours of employment. The wage implications of such statutes were to be found, first, in provisions requiring the maintenance of wages notwithstanding a reduction in the hours of employment, and second, in the imposition of a requirement for payment of extra compensation for overtime work. Historically, the establishment of scales for minimum wages and for maximum hours dates back to 1840 when, by executive order, President Van Buren fixed a ten-hour day for workers in the federal navy yards.\(^{64}\) The next attempted step forward came, in 1868, when Congress enacted an eight-hour law for all laborers, workmen and mechanics employed by the federal government.\(^{65}\) This major piece of legislation was vitiated by a decision of the United States Supreme Court which upheld individual contracts calling for a longer work day,\(^{66}\) and by an interpretation of the statute by the Attorney General which sapped the remaining vitality of the law.\(^{67}\)

While progress in this direction was delayed thereby, employees in the Government Printing Office as well as letter carriers were granted an eight-hour day by 1888 and, four years...

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\(^{65}\) See Act of June 25, 1868, c. 72, 15 Stat. 77; R. S. § 3738.

\(^{66}\) United States v. Martin, 94 U. S. 400, 24 L. Ed. 128 (1877). See also United States v. Martin, 10 Ct. Cl. 276 (1874).

later, the same work day limitation was extended to all workers
and mechanics employed by contractors and sub-contractors en-
gaged on federal projects.\textsuperscript{68} An Hours of Service Act,\textsuperscript{69} pro-
hibiting the employment of trainmen for longer than sixteen
consecutive hours, was passed by Congress in 1907, to be fol-
lowed, in 1916, by the Adamson Act which fixed the working
period for interstate train service employees at eight hours per
day.\textsuperscript{70}

In the meantime, Congress had prescribed, subject to broad
exceptions, that an eight-hour provision should be incorporated
in all contracts made by, for or on behalf of the federal govern-
ment, including its territories, possessions and the District of
Columbia, whenever such contracts called for the employment of
laborers and mechanics. The overwhelming depression provided
impetus for an Emergency Relief and Construction Act, en-
acted in 1932, under which a thirty-hour week was prescribed
"so far as practicable and feasible,"\textsuperscript{71} and that requirement was
carried forward in Title II of the ill-starred National Industry
Recovery Act.\textsuperscript{72}

Congress was still of the opinion that regulation on the
subject had not proceeded far enough so, in 1935, it empowered
the President, by the Emergency Relief Appropriation Act,\textsuperscript{73}
to fix maximum hours on work relief and other comparable work
projects and, in that year, it authorized the Interstate Commerce
Commission to promulgate regulations establishing maximum
hours of service for employees of interstate motor carriers whose
activities directly affected the safety of their operations.\textsuperscript{74}

The capstone of all this federal legislation on the subject of
wages and hours was provided by the Walsh-Healey Public Con-

\textsuperscript{68} See Act of August 1, 1892, 27 Stat. 340, which, as amended, is now included
\textsuperscript{69} March 4, 1907, c. 2939, 34 Stat. 1415; 45 U. S. C. A. § 61 et seq.
\textsuperscript{71} July 21, 1932, c. 520, 47 Stat. 709.
\textsuperscript{72} June 16, 1933, c. 90, 48 Stat. 195.
\textsuperscript{73} April 8, 1935, c. 48, 49 Stat. 115.
\textsuperscript{74} August 9, 1935, c. 498, 49 Stat. 543; 49 U. S. C. A. § 301 et seq.
tracts Act of 1936. While that statute is administered by the Wage and Hour Division and Public Contracts Division, the Secretary of Labor is the administrative officer who is authorized, after public hearing, to issue minimum wage determinations. He is also the person authorized to grant exceptions when "justice and proper interest will be served thereby."

The object of the act, briefly stated, is the elimination of the purchase of sweat-shop goods by the government as well as the elimination of the evils of bid brokerage and bid peddling. By establishing decent conditions of employment in its own projects, the government becomes the model for private employers, for the law specifically prohibits industrial homework on all government contracts.

The act is designed to apply (a) to specific classes of workers, and (b) to contracts for the manufacture or furnishing of materials, supplies, articles or equipment, in any amount exceeding $10,000, made by any executive department of the United States, by any independent establishment or agency thereof, by the District of Columbia, and by any corporation whose stock is beneficially owned by the United States. All contracts entered into by suppliers and manufacturers calling for payments in excess of the minimum figure must contain certain specified provisions, among which the most important is an undertaking that all persons employed by the contractor to manufacture or furnish such materials will be paid not less than the minimum wage which the Secretary of Labor determines is the prevailing wage for persons employed in the particular or similar industry or group of industries operating in the locality in which materials are to be manufactured or furnished. In addition, no part of the contract may be performed, and none of the materials manufactured or furnished may be produced, in any plant or factory or under

77 Ibid., § 40.
working conditions which are unsanitary or hazardous or dangerous.

Under regulations promulgated by the Secretary, no person may be employed for more than eight hours in one day or more than forty hours in one week unless such person receives compensation at the rate of time and one-half the regular rate of pay for all hours in excess of the daily figure or in excess of the weekly total, whichever is greater. In this connection, it may be noted that the overtime provisions are more favorable to the employee than those contained in the Fair Labor Standards Act as it affects private work. If, for example, an employee works three days of ten hours each in a single week, he will have no claim for overtime compensation under the latter statute, but would be entitled to six hours of overtime under the Walsh-Healey Act as that law requires that he be paid at overtime rates for all hours in excess of eight per working day.

Of further significance is the absolute prohibition contained therein against the employment, by a contractor, of males under the age of sixteen and females under the age of eighteen, together with a similar prohibition against the use of convict labor. For minor males over sixteen and females over eighteen, the Secretary of Labor is empowered to issue regulations governing the conditions of their employment.

Again, when it comes to computing the regular rate of pay, the provisions of the Portal to Portal Pay Act, noted above, are made applicable to cases falling under this statute. It has been suggested that the defenses therein provided, i.e., good faith reliance upon an administrative ruling, which may save the employer from a violation of the Portal to Portal Pay Act, are likewise available to contractors charged with violations of the Walsh-Healey Public Contracts Act. Not so certain is the applicability of a two-year statute of limitations found in the Portal Act, for it does not appear that an employee may institute a civil suit against the contractor in the same manner as is applicable to violations of the minimum wage and overtime provisions of the Fair Labor Standards Act.
Violations of the statute are made subject to severe penalties. Not only are damages recoverable by the United States Government, but the Secretary of Labor may order the payment to the employee of any deductions, rebates, refunds or underpayments of wages due him, provided the employee makes a claim within the time prescribed by the statute. The government may also cancel any contract because of such violations and place the violator on a blacklist which will exclude him from obtaining other government contracts for a period of three years from the date when the Secretary of Labor determines that a violation has occurred.

The authority vested in the Secretary of Labor, under this act, to establish minimum wages for work performed in connection with government contracts is not only unique but is also of considerable economic significance. When, in 1949, the Secretary of Labor established minimum wages for employees in the iron and steel industries which ranged from $1.04 to $1.25 per hour, the industry criticized the move as setting a pattern for collective bargaining as to non-governmental work. In 1950, following the pattern laid out by the 1949 amendment to the Fair Labor Standards Act, the Secretary of Labor prescribed that no wage rate lower than 75¢ an hour could be paid to any covered employee engaged in performance of work on a government contract. These moves have tended to generate pressure for an overall minimum pay rate and it may not be long before the lever of governmental standards will operate to raise the compensation of all wage earners.

The Walsh-Healey Act does not purport to cover all employees, nor does it apply to all governmental purchases. Thus, it is not applicable to purchases of materials that are

78 Ibid., § 36. The section provides for the recovery of liquidated damages in addition to all other damages arising from a breach.

79 Ibid., § 37. Distribution of the blacklist so prepared is handled by the Comptroller-General.


81 Ibid., § 43.
usually bought in the open market or to perishables, including dairy, livestock and nursery products, or to the carriage of freight or personnel by vessel, airplane or other media of transportation where tariff rates are on file. Speaking generally, the act applies only to those employees who are engaged in or connected with the manufacture, fabrication, assembling, handling, supervision, or shipment of materials, supplies, articles, or equipment required under contract. It does not, therefore, apply to such persons as office or custodian workers, electricians, engineers, firemen, maintenance men, telephone operators, among others. These exemptions have been specifically set forth in the regulations, rulings and interpretations issued by the Secretary of Labor, by the Administrator of the Public Contracts Division, and in the opinions of the Solicitor.

Perhaps the most important exemption arises out of the recognition it affords to specific types of collective bargaining agreements. Under an amendment to the Walsh-Healey Act, the overtime requirement need not be met where the employer has entered into a collective bargaining agreement which has been certified to be bona fide by the National Labor Relations Board, if such agreement provides that the employees shall not be employed more than 1,000 hours, during any twenty-six consecutive weeks or, if on an annual basis, for not more than 2,080 hours in any period of fifty-two consecutive weeks. Where such contracts are effective, overtime compensation need be paid only on work done in excess of twelve hours a day or fifty-six hours in any given week.\(^2\)

Although the primary statute on wages and hours for persons engaged in federal projects, or for those whose products are consumed by the federal government, is the Walsh-Healey Public Contracts Act, Congress has, from time to time, enacted other laws bearing on the general subject, some of which are designed to operate in specific areas while others apply only to particular occupations. The Davis-Bacon Act,\(^3\) for example, requires that

\(^2\) Ibid., § 35. The statute now makes cross-reference to 29 U. S. C. A. § 207.

\(^3\) 40 U. S. C. A. § 276a to § 276a-5.
contractors and sub-contractors shall pay prevailing wage rates to laborers and mechanics working on public buildings or engaged in public works undertaken for the government of the United States, whether in the continental United States or in the Territories of Alaska and Hawaii. While that law does not regulate hours, nor provide for overtime pay, the contractor or sub-contractor is required to make payment in full of wages based on the rates prescribed in its contract, at least once a week, without deduction or rebate, regardless of any waiver agreed to by an employee. To assure compliance, the act requires that the scale of wages must be posted at the site of the work.

In structure, the Davis-Bacon Act is like those already examined in that its provisions apply not to all contracts but only to those in excess of $2,000, except that, irrespective of the size of the contract, prevailing wages are to be paid on all defense housing contracts. Administration of the statute is also vested in the Secretary of Labor, who, at the request of the contracting officer or agency, is authorized to determine and fix the prevailing wage, for each class of labor involved, in the locality of the work performance. Once that rate has been established, the contracting agency must include the wage scale in the contract and supervise the enforcement thereof. The Comptroller General may withhold funds from the contractor found guilty of a violation and may pay the unpaid wages directly to workers. The violating employer may also be black-listed in the fashion previously noted. Defenses and limitations upon liability established by the Portal to Portal Pay Act are likewise made expressly applicable to the Davis-Bacon Act.

An even more extensive coverage for workers engaged in the construction, repair and alteration of public buildings and works is to be found in the Copeland Act, the so-called "Anti-Kick-Back" law, which operates without regard to any $2,000 limitation, so long as federal funds are involved. It does not apply to work done on contracts to furnish supplies for a similar

84 Ibid., § 276b.
protection has already been afforded under the Walsh-Healey Act. It does, however, operate to penalize any person who, by force, intimidation, threat of dismissal, or by any other means, induces any person employed on a public construction work, or on work financed in whole or in part by federal funds, to give back any part of his compensation. Enforced by the Secretary of Labor, the statute applies to all employees, not just to laborers and mechanics, assuring protection not only to persons employed directly by the government but to the working forces of contractors and sub-contractors.

The so-called "Eight Hour" law, first enacted in 1892 and amended in 1912, prescribed a ceiling of eight hours for the daily work of laborers and mechanics employed upon public works of the United States, its territories, the District of Columbia, or of any of the agencies thereof. Covered employment, in general, includes the construction, alteration, or repair of buildings and the construction of canals, docks, roads, water works, irrigation works, dams and similar projects. During World War II and for some time thereafter, the limitation on the hours of employment was waived upon condition that the contractor or sub-contractor would pay time and a half for all hours worked in excess of eight. While no special enforcing agency is provided, each contracting agency being left responsible to see to it that compliance is obtained, the law is not without teeth. Violations are punishable, at the instance of the contracting governmental agency, at the rate of $5.00 per day per employee for each day of violation, and this amount may be withheld. In addition, intentional violations are punishable by fine and imprisonment. Again, there is no conflict of coverage between this statute and the Walsh-Healey Act, for supply contracts are exempted. Those supply contracts which do not involve more than $10,000 are excluded while those in excess of that figure come within the

85 Ibid., § 276c, as amended May 24, 1949, by 63 Stat. 108.
87 Ibid., § 326.
88 Ibid., § 324.
provisions of the last mentioned statute. If, in the case of contracts other than those for the supplying of materials, there should be conflict between the two laws, the Walsh-Healey Act is to prevail.

Mention has been made of the fact that, under the Motor Carrier Act, the Interstate Commerce Commission has been authorized to establish qualifications and maximum hours of service for all employees whose work is directly connected with safety of operations. Acting pursuant to such authority, the Commission, by regulation, has prescribed a maximum of sixty hours in one week, which week shall consist of one hundred sixty-eight consecutive hours commencing from the time the driver reports for duty in interstate commerce other than in certain specifically exempted operations. The rules allow a carrier who operates vehicles seven days a week to permit his drivers to remain on duty for a total of not more than seventy hours in any period of one hundred ninety-two consecutive hours. To ensure compliance, special driver's reports as well as monthly reports of driving time must be maintained and filed.

To this already wide category of statutory regulation must be added other fragmentary legislation on the subject. The Mineral Land Lease Act, for example, requires that every lease of mineral and oil lands given by the United States shall contain a provision limiting the work day to eight hours for underground workers while at the same time prohibiting the employment of males under the age of sixteen, and the employment of females without regard to age, in any underground mine. The Federal Airport Act, applicable to all contracts in excess of

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$2,000 on projects approved by the Civil Aeronautics Administration, calls for the insertion in such contracts of a schedule of minimum rates of wages to be paid to skilled and unskilled labor. Authority is vested in the Secretary of Labor to determine the minimum level of wages, an authority comparable to that given him under the Walsh-Healey Act. Contracts granting financial aid to the several states for the construction of low-cost housing projects must, according to the Housing Act of 1949, contain provisions assuring the payment of prevailing wages and salaries in the locality in which the project is to be developed. The power to establish the level of prevailing salaries to be paid to architects, technicians, engineers and draftsmen so employed is given to the Housing and Home Financing Administration, but the level of prevailing wages as to other workers is to be determined by the Secretary of Labor pursuant to his powers under the Davis-Bacon Act.

Legislation calling for the payment of minimum wages might still be defeated by the financial inability of the employer to provide funds sufficient for the purpose. Evils which developed in connection with the performance of public contracts, growing out of the failure of contractors to pay wages, led to the enactment of the Heard Act. That statute requires that, in every contract exceeding $2,000 for the construction, alteration or repair of any public building or public work of the United States, the contracting party must furnish a performance bond designed to benefit the government and a payment bond for the protection of persons furnishing material and labor. Extension of that statute into other areas where government contracts are concerned would serve to round out the protection offered to workers by law.

Land workers are not the only ones protected, for merchant seamen are also covered by an eight-hour law, and only an

93 42 U. S. C. A. § 1401 et seq., particularly § 1416.
emergency can serve to excuse non-compliance therewith. Violation on the part of the master of the vessel is punishable by a penalty not to exceed $500 and the seaman is entitled to his discharge and all wages earned.

It may be seen, from this synopsis of legislation, that the pattern of regulation of wages and hours, established by the government, has developed empirically and has taken a dual form. It has been built up along the line of general legislation with a limited economic perspective on the one hand while also establishing delegated authority to administrative agencies in fields affected with a national or a public interest on the other. If, indeed, wages and hours are the core of industrial relations and the mainspring of labor economic processes, the whole course of legislation in this field points out new areas in which even more democratic and economic progress can yet be made.
APPORTIONMENT OF TAX EXEMPTIONS
GRANTED CHARITABLE CORPORATIONS

Franklin M. Crouch*

INCREASES in the burdens of taxation, together with decreases in income from endowments and the like, have apparently driven charitable, educational, and other nonprofit corporations to seek every advantage from tax exemption laws while, at the same time, causing them to press for added sources of income. Without attempting to discuss the situation which has arisen in the field of federal income taxation growing out of the acquisition of business enterprises by organizations formed on a not for profit basis, there is evidence of a similar development in the field of state taxation, particularly as it concerns the imposition of property taxes on realty owned by such eleemosynary bodies when used in part for charitable or public purposes but devoted, at least in part, to the production of revenue. Noteworthy in that direction is a series of recent cases originating in Ohio together with one decision to be found in Minnesota, the import of which prompts an inquiry into the possibility of securing either a total exemption from taxation or, if that proves impossible, then the obtaining of at least an apportionment of the exemption pro-rata according to the extent to which some charitable use is made of the premises.

Three recent Ohio cases serve to highlight the problem, for the highest court of that state appears to be sharply divided over the right to an exemption unless the property is used totally and exclusively for charitable purposes. In the case of City of Cleveland v. Board of Tax Appeals,¹ for example, a municipal stadium, located on land owned by the city, together with four adjacent parking areas, was held to be subject to tax, for the reason that

* LL.B., Chicago-Kent College of Law; Member, Illinois Bar.

¹—Ohio St. —, 91 N. E. (2d) 480 (1950). Zimmerman, J., wrote a dissenting opinion, as did also Taft, J. The dissenting opinion of the latter was concurred in by Stewart, J.
the same was not operated exclusively for public purposes, even though the properties had been acquired with the proceeds of bonds charged against the general tax revenues supplied by the inhabitants of the city. Although a majority of the judges concerned agreed that the derivation of an incidental revenue from the publicly owned property would not be sufficient to alter its public character, the record indicated that only one use had been made of the stadium in question during the taxable year without the making of an admission charge, in contrast to some one hundred other uses at a fee which had netted the municipality a substantial profit before allowances had been made for depreciation and debt retirement.

Of comparable character is the case of Cleveland Osteopathic Hospital v. Zangerle\(^2\) in which tax exemption of the corporate realty was denied when it appeared that the hospital operated at a profit from fees and other charges for professional services rendered by staff osteopathic physicians and surgeons who were its regular employees, albeit all such profits were allocated to the purpose of retiring mortgage indebtedness and the enlargement of the hospital facilities. The majority of the court, again, were of the opinion that the exclusive operation of the property for charitable purposes necessary to secure tax exemption did not require that the hospital be entirely devoted to the admission of patients without charge, yet such care for the poor, needy and distressed had to be an important objective and could not be overshadowed by a design to make a substantial profit. That design, the majority said, would tend to negative the idea that the hospital was a benevolent institution. The minority judges, recognizing that not even a charity could operate indefinitely at a loss, were of the opinion that the hospital was a charitable corporation so long as it did not operate simply as a device to channel profits to its stockholders or promoters.\(^3\)

\(^2\)- Ohio St. —, 91 N. E. (2d) 261 (1950). Taft, J., wrote a dissenting opinion, concurred in by Hart and Stewart, JJ.

\(^3\)An exemption from personal property taxation was sought in the case of American Jersey Cattle Club v. Glander, 152 Ohio St. 506, 90 N. E. (2d) 433 (1950), wherein an association formed as a nonprofit corporation for the purpose of "im-
In the third case, that of Western Reserve Academy v. Board of Tax Appeals, a nonprofit corporation operating a college preparatory school had erected homes on land owned by the corporation, adjacent to the campus, to be occupied by certain of its faculty members rent free. In return for such use and occupation, the faculty members were expected to render supervisory, tutoring and coaching services, of benefit to the academy students, within the premises so furnished. A denial of tax exemption was upheld on the theory that the buildings were not used exclusively for charitable purposes, since the thought of private residence was incompatible with the idea of public benefit.

The chance of presently sustaining a tax exemption in Ohio, then, unless the charitable use is not only clear but is also virtually exclusive, is extremely slender.

Contrast to these Ohio cases is provided by the decision of the Minnesota Supreme Court in the case of Christian Business Men's Committee of Minneapolis, Inc. v. State. The charity proving the breeding of Jersey cattle in the United States, had a net income after operational expenses had been paid, which net had been taxed on the basis that the club was "engaged in business" as that term was defined in Ohio Gen. Code 1946, § 5325-1. The tax commissioner had proceeded on the theory that as certain of the club's activities brought it into competition with recognized commercial enterprises it was not operated or organized exclusively for charitable, scientific, educational or public purposes within the meaning of Ohio Gen. Code 1946, § 5329-1a. The Ohio Supreme Court so held and denied the claimed tax exemption.

4 Ohio St. —, 91 N. E. (2d) 497 (1950). Justices Stewart and Taft each wrote dissenting opinions.

5 The fact that faculty salaries would have been increased had not such residential quarters been provided may have had some bearing on the decision of the majority.

6 The split in the Ohio Supreme Court is further illustrated by the decision in Applications of University of Cincinnati, — Ohio St. —, 91 N. E. (2d) 502 (1950), wherein a tax exemption was granted as to certain improved parcels of realty, held in trust for the benefit of the university, the rental income from which was applied exclusively to its use, endowment and support, whereas certain vacant lots, not then used by the university, were held taxable for the reason that they were not then contributing in any way to the support of the institution. Considerable doubt was there expressed as to the validity of Ohio Gen. Code 1946, § 4003-15, creating a special exemption in favor of educational institutions, but inasmuch as the concurrence of a sufficient number of the judges to a declaration of invalidity, made necessary by Ohio Const., Art. IV, § 2, could not be obtained, the statute was held valid.

7 228 Minn. 549, 38 N. W. (2d) 803 (1949). The court was obliged to interpret a statute which declared: "All property described in this section to the extent herein limited shall be exempt from taxation: (1) All public burying grounds; (2) All public school houses; (3) All public hospitals; (4) All academies, colleges and universities, and all seminaries of learning; (5) All churches, church property and houses of worship; (6) Institutions of purely public charity; (7) All public property exclusively used for any public purpose. . . ." See Minn. Stats. Ann. 1947, § 272.02, which codifies the language found in Minn. Const. 1857, Art. IX, § 1.
there concerned, after acquisition of ownership of certain real property, sought to have the property declared exempt from real estate taxation. The property in question consisted of a three-story building, a connected two-story garage, and an adjoining one-story structure located in a downtown business district. The street floors and the basement area of one of the buildings were leased to commercial tenants but the remaining portions were used for such activities as a service men's hospitality center, for youth activities, for religious broadcasts conducted under the auspices of the petitioner, and to provide meeting places for other organizations interested in promoting the Christian way of life. The portions under lease to commercial tenants were eventually to be converted to the corporate charitable and religious uses when the existing leases expired. A denial of an exemption, based on the theory that the property in question had not been used exclusively for purely public charitable purposes, was reversed on the ground that it was not necessary to treat the buildings as a single unit but that the same could be assessed and taxed on that portion of the total assessed valuation allocated to the taxable use, after deduction of the value of the portion thereof properly allocated to the tax exempt use. The divergent views so noted add point to an investigation into the possibilities for the apportionment of the tax exemption which may be granted to a charitable corporation.

It can be said, at the outset, that every jurisdiction in the United States has, to some degree, made provision by law for the granting of a tax exemption to benevolent, charitable or religious organizations. The fundamental ground of all such tax exemptions, where allowed, is said to be the reciprocal of the benefit conferred upon the community by such charitable and benevolent institutions in relieving the state, at least to some extent, of the burden which rests upon it to care for, and to advance the interests of, its citizenry. On this foundation are

8 See 61 C. J., Taxation, § 499.
predicated both constitutional\(^9\) and statutory\(^{10}\) authority for tax exemption in the various jurisdictions. In the absence thereof, the property of a charitable institution, like any other property, would be subject to taxation. But these provisions vary widely, not only in the matter of their language but also in the construction placed thereon as the result of judicial interpretation.

In the main, like the basis to be found in Minnesota,\(^{11}\) these exemption provisions require that there be a concurrence of (1) ownership of the property by the charitable institution or benevolent organization and (2) the use thereof for the proper purposes of the organization. There are thirty-six states\(^{12}\) together with the District of Columbia in this category. The remaining twelve states\(^{13}\) make charitable use the only test, disregarding


\(^{13}\) Ala., Colo., Conn., Iowa, Kan., Ky., Md., Mont., N. Mex., R. I., W. Va., Wyo.
questions of ownership, for not a single state regards ownership alone as sufficient ground on which to base the privilege of tax exemption.

Clearly, therefore, little attention need be given to questions of ownership, for these questions may be easily resolved, in any specific instance, by an inspection of title records, for instruments such as deeds, trust agreements, and the like, vesting title in the charitable corporation, are usually recorded. The real issue in any particular case will usually turn on whether or not the use or uses to which the property in question is put can be said to serve a charitable or benevolent purpose. Where the property is used wholly for charitable purposes there will, usually, be no difficulty in fitting it into the tax exemption frame. With equal facility, it can be determined that property used entirely for other than a charitable purpose is not entitled to exemption from taxation. Difficulty is manifested, however, when a particular parcel of real estate is put, in part, to a charitable use while other parts thereof are used for non-charitable purposes.

Three possibilities of solution may be offered to the last-mentioned problem. The first of them is to grant, on the basis of the partial charitable use, a total exemption from taxation. At the other extreme lies the second possible solution, that is to tax the whole of the property as if it were entirely commercially owned and used. The third possibility, occupying a middle ground between these two extremes, would apportion the property, for tax purposes, according to the degree of the charitable and non-charitable uses to which it is put and make an allocation of the exemption accordingly. Legislative recognition of the problem seems to exist in only twenty-four of the states and the District of Columbia. In thirteen of these jurisdictions, there is no provision for apportionment. In the remaining twelve, the

14 Ark., Cal., Fla., Id., Ind., La., Md., Mass., Mich., Minn., Miss., Neb., N. Y., Ohio, Pa., S. D., Tenn, Utah, Vt., Va., Wash., Wis., Wyo. References concerning these states may be found in notes 17, 19 and 20, post.

15 Ala., Cal., Del., Ill., Iowa, Ky., Mo., N. J., N. M., N. C., N. D., Okla., and Tex. See notes 9, 10, 17, 25, 29, and 30 through 38, inclusive.

question apparently has not arisen directly, for no cases bearing directly on the point may be noted.

A study of the law of these jurisdictions wherein a pro-rata apportionment is made according to use reveals that this result obtains from either of two sources. The first of these sources lies in the statutory exemption provision itself. Twelve jurisdictions, including the District of Columbia,¹⁷ may be grouped under this heading. Typically, these statutes first declare that property belonging to charities and used for the purposes for which such charities were organized is to be exempt from taxation, except that, if the property belonging to the charitable institution is used for business purposes from which a revenue is derived, it shall then be taxed as is true of any other property. Succeeding the last-mentioned proviso is a clause which grants the right of apportionment.¹⁸ It logically follows, therefore, that such statutory provisions leave almost nothing for the courts to do so far as the law is concerned.¹⁹ What little work there is would seem to consist solely of the determination as to whether or not the particular use is or is not a charitable or a benevolent one.²⁰

The second source is to be found in judicial interpretations given to statutory exemption provisions which are, of themselves,


¹⁸ By way of example, Williams Tenn. Code Ann. 1934, Tit. V, Art. IV, § 1085, declares that the exemption shall extend to: “The real estate owned by any religious, charitable... institution and occupied by such institution... exclusively for carrying out thereupon one or more of the purposes for which the institution was created or exists... The real property of any such institution not so used... shall not be exempt; but if a portion only of any lot or building of any such institution is used exclusively for... such purposes, then such lot or building shall be so exempt only to the extent of the value of the portion so used.”

¹⁹ Of the states possessing such provisions, New York spells the text out in the greatest detail. See McKinney’s N. Y. Consol. Laws Ann. 1943, Tax Law, Art. 1, § 4. The language there used would appear to be a codification of the early decisions of that state. No cases in point involving the present provision have been noted.

²⁰ The exemption provisions in California and Virginia declare that the legislatures thereof may, by special act, provide for total or partial tax exemption. The Vermont statute is unique in that the town in which the property is situated may vote for an exemption thereof, either in whole or in part.
silent as to apportionment. Under this heading may be found some twelve states, including Minnesota, and the case noted above from that jurisdiction may be said to be representative of the decisions to be found in the other jurisdictions falling in this category. These courts have concerned themselves primarily with the question as to whether or not the property has been devoted to a proper use and have reached the obvious conclusion that, at least in part, it was so exclusively used for purposes within the statutory provision, albeit in part it was not. In each instance, both parts have comprised substantial portions of the real estate although none have involved the peculiar part-time commercial use, developed for the municipal stadium, that is observable in the Ohio case of City of Cleveland v. Board of Tax Appeals, for the business use has been based on a reasonably permanent basis. Where that exclusive use of a substantial portion of the real estate for benevolent or charitable purposes has been found to exist, such portion of the real estate has been held to be pro-rata exempt from taxation while the remainder of the property, being that portion used primarily for revenue purposes, has been declared pro-rata taxable.

The reason underlying decisions of that character is best expressed in the words used by the Minnesota court in the case mentioned. It said that although

it is a general rule that constitutional provisions exempting property from taxation are to be strictly construed, such provisions, though not subject to extension by construction or implication, are to be given a reasonable, natural and practical interpretation in the light of modern conditions to effectuate the purpose for which the exemption is granted.23


22 See note 1, ante.

23 228 Minn. 549 at 559, 38 N. W. (2d) 803 at 811.
To the extent that the community receives a direct benefit flowing from that part of the property which is used exclusively by the charitable organization, relieving the state of its burden to that extent, such part should be exempt from the burden of taxation. Where part of the property is devoted to the derivation of revenue, however, any benefit which flows to the community is, at best, indirect and remote and the purposes underlying the exemption are served, if at all, in a second-hand fashion. Denial of an exemption in such cases, at least to the extent the property is held for revenue production, is warranted.

Other jurisdictions have refused to recognize apportionment as a solution to the problem of whether or not to tax the properties of charitable or benevolent institutions. They have, therefore, adopted one or the other of the remaining possible solutions, that is total exemption or total non-exemption. Thirteen states\(^\text{24}\) fall in this category and the decisions therein range from the most strict to the most liberal of statutory interpretations.

Of all the cases noted, those from New Jersey appear to demonstrate the least liberal attitude. The statute of that state requires that, in order to qualify for tax exemption, the property must be both owned and used exclusively for charitable purposes.\(^\text{25}\) The language thereof is not much different from that of the Minnesota statute, but the New Jersey courts have repeatedly emphasized that the use must be exclusive and nothing else will suffice. Illustrative thereof is the holding in the case of Trustees of the Young Men's and Young Women's Hebrew Association of Newark v. State Board of Tax Appeals.\(^\text{26}\) The building there concerned was used almost entirely for charitable or religious purposes by the Hebrew Association, but another organization was permitted to maintain its offices therein. The court held that there was no entitlement to tax exemption since the building was not used exclusively for purposes calculated to im-

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\(^{24}\) Ala., Colo., Del., Iowa, Ky., Mo., N. J., N. Mex., N. C., N. D., Okla., and Tex. Cases from these jurisdictions are cited in the succeeding footnotes.

\(^{25}\) N. J. Stats. Ann. 1949, Ch. 54.4-3.6.

\(^{26}\) 119 N. J. L. 504, 197 A. 372 (1938), affirmed in 121 N. J. L. 65, 1 A. (2d) 367 (1938).
prove the moral or mental outlook of the members of the association which owned the premises or of those who attended its functions.\textsuperscript{27} While not quite so intolerant of non-exclusive uses for charitable purposes as is New Jersey, some seven other states must be listed along with it, in addition to the view now being followed in Ohio as illustrated by the cases mentioned above.\textsuperscript{28}

Slightly more liberal is the view to be found in Illinois, which state uses what some courts have termed the primary use test. That test was defined, in the Minnesota case above referred to, as being one in which the primary use to which property is put determines the question as to whether it is or is not exempt from taxation. As the court there noted, if the property is devoted primarily to a religious or charitable purpose, an incidental use for another purpose would not destroy the exemption, but an incidental use for religious or charitable purposes, of property primarily used for other purposes would not warrant exemption.\textsuperscript{29} Application of such a test necessarily depends on the facts presented in any particular situation which may be under consideration. Obviously, both the result of total exemption or that of total taxation can be reached by its application, and this is demonstrated by Illinois decisions on the subject.\textsuperscript{30} Other states have reached the same end without spe-

\textsuperscript{27}See also Haven of Grace v. Lakewood, 19 N. J. Misc. 414, 20 A. (2d) 518 (1941).

\textsuperscript{28}State v. Bridges, 246 Ala. 486, 21 So. (2d) 316 (1945); Creel v. Pueblo Masonic Bldg. Ass'n, 104 Colo. 231, 68 P. (2d) 23 (1937); Readlyn Hospital v. Hoth, 223 Iowa 341, 272 N. W. 90 (1937); Fitterer v. Crawford, 157 Mo. 41, 57 S. W. 1134 (1900); Sir Walter Lodge v. Swain, 217 N. C. 632, 9 S. E. (2d) 365 (1940); Markham Hospital v. City of Longview, 191 S. W. (2d) 695 (Tex. Civ. App., 1945). Citation to the Illinois cases is given in note 30, post.

\textsuperscript{29}See Business Men's Christian Ass'n v. State, 228 Minn. 549 at 559, 38 N. W. (2d) 803 at 812 (1949). That test had been used in the earlier Minnesota cases of State v. Second Church, 185 Minn. 242, 240 N. W. 532 (1932); State v. Union Congregational Church, 173 Minn. 40, 216 N. W. 326 (1927); County of Ramsey v. Church of the Good Shepard, 45 Minn. 229, 47 N. W. 783, 11 L. R. A. 175 (1891).

\textsuperscript{30}Illustrations of the application of the primary use test in Illinois may be found in People v. Y. M. C. A. of Peoria, 157 Ill. 403, 41 N. E. 557 (1895), and in Congregational Sunday School and Publishing Soc. v. Board of Review, 290 Ill. 108, 125 N. E. 7 (1919). In the first, a factual situation similar to that under consideration in the principal Minnesota case led the court to hold the property was not exempt from taxation even though the rents received were used for religious purposes. In the second, the court held the properties of the Publishing Society were exempt from taxation where the profits, if any, derived from its activities went to aid indigent Sunday schools, since its properties were put to a charitable use. See also Krause v. Peoria Housing Authority, 370 Ill. 356, 19 N. E. (2d) 138 (1938);
cifically naming the means leading thereto as being the primary use test.\textsuperscript{31}

Left for consideration are those jurisdictions which manifest a most liberal attitude when it comes to granting tax exemptions for the properties of charities. Five states appear in this group\textsuperscript{32} and they hold that, provided there is the requisite ownership, a partial use for proper purposes is sufficient to exempt the entire parcel of real estate from taxation. Only Delaware and North Dakota have expressed that view in the form of exemption statutes,\textsuperscript{33} but the attitude has been fostered in New Mexico both by an opinion of its Attorney General\textsuperscript{34} and by judicial decision.\textsuperscript{35} Similar decisions are to be found in Kentucky\textsuperscript{36} and Oklahoma.\textsuperscript{37}

It is in the latter jurisdiction that the case of \textit{State v. Bartlesville Lodge No. 284, A. F. & A. M.},\textsuperscript{38} one which appears to be best representative of the lenient view, was decided. The property there concerned consisted of a building owned and occupied by a fraternal order as its home office, but the greater part of the building was rented to others. The rental income was used to further the purposes of the fraternal order except that a part thereof went to maintain the building and to dis-

\textsuperscript{31} See, for example, Sir Walter Lodge v. Swain, 217 N. C. 632, 9 S. E. (2d) 365 (1940).
\textsuperscript{32} Del., Ky., N. D., N. Mex., Okla. See notes 33 to 38, post.
\textsuperscript{35} Albuquerque Lodge No. 461, B. P. O. E. v. Tierney, 39 N. Mex. 135, 42 P. (2d) 206 (1935).
\textsuperscript{36} Church of the Good Shepard v. Comm., 180 Ky. 465, 202 S. W. 894 (1918); Comm. v. Bd. of Ed. of M. E. Church, 166 Ky. 610, 179 S. W. 596 (1915).
\textsuperscript{37} Bd. of Equalization v. Tulsa Pythian Ben. Ass'n, 195 Okla. 458, 158 P. (2d) 904 (1945); Okla. County v. Queen City Lodge, 195 Okla. 131, 156 P. (2d) 340 (1945).
\textsuperscript{38} 168 Okla. 416, 33 P. (2d) 507 (1934).
charge obligations which had been incurred in the construction thereof. The Oklahoma Supreme Court, unlike the one in Ohio which decided the case of Cleveland Osteopathic Hospital v. Zangerle,\(^9\) held the property to be entirely exempt from taxation.

If there can be said to be any majority view on the subject of tax exemption for the properties of charitable or religious organizations, when any parts thereof are used for revenue production, that view is the one adopted in the Minnesota case above referred to, one which grants a pro-rata apportionment of the assessment between the charitable and the non-charitable uses. While it may be granted that tax exemption is not a matter to be dealt with lightly, nor to be expanded beyond reasonable and proper limits, the result there attained is not only a practical one but one which leads to an equitable conclusion. It is much to be preferred over the view now adopted in Ohio, for it at least offers the non-profit organization a chance to survive, and thereby to perpetuate its good offices, in a period of declining revenues and in the face of a drying up of the sources of great wealth which formerly served to replenish its funds in times of need.

\(^{9}\) See note 2, ante. A prior Ohio case, granting exemption even though the premises were only partly used for charitable purposes, may be observed in the decision in Cleveland Library Ass'n v. Pelton, 36 Ohio St. 253 (1880).
DISCUSSION OF RECENT DECISIONS

EXECUTORS AND ADMINISTRATORS—APPOINTMENT, QUALIFICATION AND TENURE—WHETHER OR NOT A TESTATOR MAY, BY WILL, DELEGATE TO ANOTHER THE POWER AND AUTHORITY OF NOMINATING HIS EXECUTOR—The Supreme Court of Montana recently had occasion to decide a relatively rare question when it considered the appeal taken in the case of In re Effertz' Estate.\(^1\) The testatrix there concerned had, by her will, directed that the judge of probate should appoint the nominee of the Roman

\(^1\) — Mont. —, 207 P. (2d) 1151 (1949).
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Catholic Bishop of the Diocese of Great Falls, Montana, to act as executor of her last will and testament. In accordance therewith, the Bishop nominated the appellant to act as executor. The nominee duly and regularly filed his petition for probate and requested that letters testamentary be issued to him. The trial court ordered that the documents which purported to be the last will and testament should be admitted to probate as such but, instead of appointing the appellant as the sole executor, it appointed the appellant and another as joint administrators with the will annexed and issued letters of administration accordingly. The nominee appealed, contending that the trial court had erred in its ruling that administration with the will annexed was proper because of the failure of the testatrix to name an executor in the will. When reversing that decision, the Montana Supreme Court, after a thorough discussion of the law, by holding that the appellant should have been appointed sole executor of the estate, followed what appears to be a well-settled common law doctrine on the subject.

The issue involved presents a problem of historical as well as legal significance. At least one authority considers that the issue arose for the first time during the reign of Henry VI, when wills as such were not permitted but were accepted as testaments dealing with goods and other chattel property. In his treatise on the general subject of executors and administrators, Sir Edward Vaughn Williams notes that Katherine, Queen Dowager of England, mother of Henry VI, made a last will and testament wherein she constituted the King as her sole executor. His Majesty, possibly concerned with affairs of state, thereupon appointed three noblemen to act in that capacity. His right so to do, of course, would hardly be questioned by a court during that period of monarchical supremacy.

Insofar as ordinary persons are concerned, the English ecclesiastical courts have adhered to a doctrine, possibly stemming from that precedent, which permits the delegation of authority over the decedent's estate. Evidence thereof may be found in the case of In the Goods of Crigan, a case which has been noted by some legal scholars as being the earliest authority on the present issue. The testator there concerned had directed that the legatees should mutually appoint two intelligent and trustworthy persons to execute his testamentary plan. The legatees did so nominate two persons to serve as executors and, when affirming the ap-

pointment, the judge said: "The provision in this will, as to the appoint-
ment of executors, I am informed, is not very unusual in Scotland . . .
However, understanding from the deputy registrar that instances have
frequently occurred of granting probate to persons nominated by those
authorized by the testator so to nominate, I shall allow this decree to
pass as prayed." Since then, the rule that a testator may delegate to
a person or persons named in his will the power and authority of nomi-
nating his executor for him has been uniformly followed in England.6

In 1875, the English rule appears to have been introduced into this
country through the medium of the decision in the New York case of
Hartnett v. Wandell. In that case, the testator had nominated and ap-
pointed his wife as the executrix of his estate but had requested that
such male friend as she might desire should be appointed with her, to act
as co-executor. Upon proper compliance with this provision, the court,
in a most scholarly and elaborate consideration and discussion of the
law, held that the issuance of letters testamentary to the widow and her
nominee was valid and proper. The doctrine thus applied has been uni-
formly followed whenever the question has arisen, so it may be said that
the issue seems to be unanimously settled in the United States, as well.8

Courts have primarily based these decisions on the well-established
principle that the intention of the testator should prevail unless it should
be contrary to some law or public policy. For that reason, they have

6 Farnum v. Administrator General, 14 App. Cas. 651 (1889); In the Matter of
Ryder, 2 Sw. & Tr. 127, 164 Eng. Rep. 941 (1861); Jackson v. Paulet, 2 Rob. Ecc.
944, 163 Eng. Rep. 1340 (1851); In the Goods of Delchman, 3 Curt. 125, 162 Eng.
Rep. 676 (1842). That view has also been followed in Canada: Wright v. Stack-
house, 10 N. B. R. 450 (1863).
8 Thomas v. Field, 210 Ala. 502, 98 So. 474 (1923); Tuckerman v. Currier, 54 Colo.
25, 129 P. 210 (1912); Bishop v. Bishop, 56 Conn. 208, 14 A. 808 (1888); Kinney v.
Keplenger, 172 Ill. 449, 50 N. E. 131 (1898); Wilson v. Curtis, 151 Ind. 471, 51 N. E.
913 (1898); In re Stahl’s Estate, 113 Ind. App. 29, 44 N. E. (2d) 529 (1942);
Brown v. Just, 118 Mich. 678, 77 N. W. 263 (1898); In re Crosby’s Estate, 218
Minn. 149, 15 N. W. (2d) 501 (1944); Landon v. Huitfeldt, 41 N. J. Eq. 267, 3 A.
882 (1886); Mulford v. Mulford, 42 N. J. Eq. 68, 6 A. 609 (1886); In re Bergdorff’s
Will, 206 N. Y. 309, 99 N. E. 714 (1912); Hartnett v. Wandell, 60 N. Y. 346, 19 Am.
Rep. 194 (1875); In re Griffin’s Estate, 135 Misc. 419, 83 N. Y. S. (2d) 579 (1948);
In re Walsh’s Will, 147 Misc. 281, 264 N. Y. S. 72 (1933); In re Brocato’s Estate,
143 Misc. 664, 258 N. Y. S. 111 (1931); State v. Superior Court, 179 Wash. 198, 37
P. (2d) 209 (1934); Cole v. City of Watertown, 119 Wis. 133, 96 N. W. 538 (1903).
Textual material on the subject may be found in Alexander, Commentaries on the
Law of Wills, Vol. 3, § 1221; Schouler, Wills, Executors and Administrators, 6th
Ed., Vol. 3, § 1515; Williams, Executors, 12th Ed., Vol. 1, p. 132; Woerner, Adminis-
trators, 3rd Ed., § 229. Encyclopedic treatment is provided by 33 C. J. S., Executors
and Administrators, § 22c; 21 Am. Jur., Executors and Administrators, § 57, and 11
R. C. L. § 18. See also 60 Alb. L. J. 141.
9 Thomas v. Field, 210 Ala. 502, 98 So. 474 (1923); Tuckerman v. Currier, 54
Colo. 25, 129 P. 210 (1912); Bishop v. Bishop, 56 Conn. 208, 14 A. 808 (1888);
shown great liberality in the exercise of committing the execution of a will to the party therein intended by the testator to act as executor.\textsuperscript{10} It cannot be contradicted that the testator is in the most advantageous position to know how, when and by whom his estate should be administered. To disregard the intention of the testator would, without doubt, lead to violence and disharmony with respect to the interpretation of the scheme employed by the testator, for a well-considered method of distribution could easily fail if executed by a total stranger.

Similarly, it can only be supposed that good reason would exist in the mind of a testator who makes no present designation of his executor. The person whom he might have appointed may refuse or be unable to act, or may die before the purposes set forth in the will have been properly effectuated. If he chooses to trust to the judgment of one whom he has authorized to make the selection for him, the confidence that he has reposed in such other person should not be disturbed by the courts.

In recognition of this fact, courts have consistently allowed the delegation of authority to appoint an executor even where statutory material is present which might easily have been interpreted to prohibit it. In \textit{Thomas v. Field},\textsuperscript{11} for example, the testatrix empowered her two daughters to appoint her executor and, in compliance with such authority, the daughters nominated another person to act as such. It was urged, by those opposing the appointment, that the statutory provision which empowered the court to appoint a "named" executor\textsuperscript{12} prevented the designation of anyone not specifically referred to by name in the will. A unanimous decision of the Supreme Court of Alabama, validating the right to such a delegated appointment, held that the common law power to delegate

\textsuperscript{10} Kinney v. Keplinger, 172 Ill. 449, 50 N. E. 131 (1898); In re Crosby's Estate, 218 Minn. 149, 15 N. W. (2d) 501 (1944); In re Bergdorf's Will, 206 N. Y. 309, 99 N. E. 714 (1912). That view is also iterated in the earlier New York cases cited in note 8, ante.

\textsuperscript{11} 210 Ala. 502, 58 So. 474 (1923). See also Kinney v. Keplinger, 172 Ill. 449, 50 N. E. 131 (1898); In re Crosby's Estate, 218 Minn. 149, 15 N. W. (2d) 501 (1944); Hartnett v. Wandell, 60 N. Y. 346, 19 Am. Rep. 194 (1875); State v. Superior Court, 179 Wash. 198, 37 P. (2d) 209 (1934).

\textsuperscript{12} Ala. Code, 1907, § 2507, then in force, declared: "Whenever a will has been admitted to probate in this state, the judge of the court in which the will was probated may issue letters testamentary, according to the provisions of this chapter, to the persons named as the executors in such will, if they are fit persons to serve as such." See also III. Rev. Stat. 1949, Vol. 1, Ch. 3, § 227.
had not been abrogated by the statute in the absence of an express provision so declaring.

After it has been determined that such a power of appointment does exist, two questions will immediately arise, to-wit: (1) to whom may this power of appointment be given, and (2) what restrictions, if any, are placed upon the person exercising the power? As to the first, courts have been extremely liberal with respect to the person who may be given such a power of appointment. They have allowed the power to rest in disinterested third persons, such as the judge of probate, as well as in persons directly interested in the estate, such as the legatees.

Research has failed to uncover any decision which points specifically to qualifications which may be required either of the person making the appointment or of the appointee. Naturally, the power might be circumscribed by the testator, who might limit the authority to a selection between members of a designated class. If unlimited authority is conferred, it must be remembered that specific statutory provisions exist which impose qualifications on the person to be appointed as executor.

Obviously, the estate should always be administered by a trustworthy and competent individual, so it would be safe to say that no nominee would secure appointment if he lacked the qualifications required by law, despite the fact that he might be the designate of the person possessing the power of appointment. Conversely, as public policy has found it necessary to enact statutes denying to certain individuals the right to act as executors, it would seem to follow therefrom that much the same restrictions might be applicable to the one empowered to appoint as apply to the appointee. Logically, a party who is personally qualified to act as an executor would, without doubt, choose a more competent person to execute the will than would a person not possessed of such acceptable moral and mental capabilities. Up to the present, however, that question has apparently never arisen. Generally, the person given the power to appoint may exercise it quite freely, subject to the only requirement that the person nominated to act as executor be a suitable person.

14 Thomas v. Field, 210 Ala. 502, 98 So. 474 (1923); Wilson v. Curtis, 151 Ind. 471, 51 N. E. 913 (1898).
15 Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, § 229, for illustration, specifies that a person is not qualified to act as executor of any will who is "of unsound mind or an adjudged incompetent under this Act or has been convicted of a crime rendering him infamous or is a non-resident of this State or, if a male, is less than eighteen years of age."
16 Brown v. Just, 118 Mich. 678, 77 N. W. 263 (1898). The will there in question placed a specific limitation to that effect.
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of course, allows great leeway in the making of a choice, so it is not surprising to learn that there is one decision which holds that the appointer may even exercise the authority in favor of himself.\textsuperscript{17}

It would appear, then, that the instant case has not only been correctly decided but is sustained by such an overwhelming weight of authority, supported by such satisfactory and logical reasoning, that a contrary decision would not only have been a surprising one but would have been both unjust and impracticable.

W. E. Kaske

INFANTS—Actions—Whether or Not a Cause of Action Exists in Favor of a Child for Prenatal Injuries Inflicted upon It—Two decisions, recently handed down by the highest courts of Ohio and Minnesota, revive interest in the question of the right of an infant to maintain an action for prenatal injuries. In the first, that of \textit{Williams v. Marion Rapid Transit, Inc.},\textsuperscript{1} a complaint filed by the infant's next friend charged that the child's mother, then seven months pregnant, had been injured through the negligence of the transportation company at a time when she alighted from one of its vehicles, which injury induced a premature birth and permanent damage to the minor plaintiff. The trial court sustained a general demurrer to the complaint but, upon appeal, the intermediate appellate court reversed the judgment,\textsuperscript{2} after which the record was certified to the Supreme Court of Ohio.\textsuperscript{3} That tribunal held that a viable child, injured while still in the mother's womb, could maintain a subsequent action against the wrongdoer. In the second case, that of \textit{Verkennes v. Corniea},\textsuperscript{4} a father brought an action for an alleged wrongful death of his unborn child. It appeared that the wife had entered a hospital for purpose of confinement and delivery but, due to the alleged negligence of the attending physician, both she and the child died. A demurrer based on the ground that no cause of action had accrued, since the child had, in fact, never existed as a person in being, was sustained by the trial court. Again, on appeal, the decision was reversed, the Supreme Court of Minnesota deciding that an infant which was capable of independent

\textsuperscript{17} In the Matter of Ryder, 2 Sw. & Tr. 127, 164 Eng. Rep. 941 (1861).
\textsuperscript{1} 152 Ohio St. 114, 87 N. E. (2d) 334 (1949).
\textsuperscript{2} 82 Ohio App. 445, 82 N. E. (2d) 423 (1948).
\textsuperscript{3} Certification occurred because the judges of the Court of Appeals, although unanimous in their opinion, noted a conflict with a judgment pronounced, on the same question, in the case of Mays v. Weingarten, 82 N. E. (2d) 421 (Ohio App., 1943).
\textsuperscript{4} — Minn. —, 38 N. W. (2d) 838 (1949).
existence, even though as yet unborn, was to be deemed a living being in contemplation of law. 

In both the cases cited, the defendant had rested on the theory generally relied upon by the majority of courts which deny a recovery, viz., that an unborn child is not a person in being and therefore no cause of action can accrue to it for injuries occasioned during the period when it is still being carried by its mother. This proposition appears to have stemmed from the case of Dietrich, Administrator v. Inhabitants of North Hampton, the initial decision in this country. In that case, a premature birth was induced when the mother slipped upon a defect in the highway of the defendant town. The child was not directly injured but, due to the fact that it was not in an advanced stage of development, the mother being only five months pregnant, it did not survive. An action for wrongful death was instituted by the administrator but the court denied recovery. Thereafter, a majority of the American jurisdictions took the position that, so long as the injury occurred at any time before the birth of the infant, no subsequent suit could be maintained, either by the child or in its behalf.

It has been urged from several quarters, however, that later courts have failed to evaluate the decision in the Dietrich case properly. The court there specifically pointed out that the child involved was, at the time of the accident, incapable of independent existence outside the body of the mother and was, therefore, not viable. It might logically be argued that the decision therein stands for no more than the proposition that a foetus which is not advanced to the stage where it can survive outside the mother is not a person in being. As such, it could not claim legal rights which belong to persons nor recover for injuries suffered while

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5 Right to maintain a wrongful death action, stemming from the determination that the child itself could have sued had it lived, rested upon Minn. Stat. Ann. 1947, § 573.02. That statute provides that "when death is caused by the wrongful act or omission of any person or corporation, the personal representative of the decedent may maintain an action therefor if he might have maintained an action, had he lived, for an injury caused by the same act or omission."


10 As to the medical basis for a distinction between an "embryo" and a "viable foetus," see Am. Illus. Med. Dict., 19th Ed., pp. 483 and 1605. An embryo is a foetus in its earliest stage of development, typically during the first three months of pregnancy; a viable foetus is one that can live outside the utera.
en ventre sa mere. Courts which have relied upon that case for support in denying recovery for all prenatal injuries, regardless of the stage of the foetal development, may well have strayed from the actual rule of the decision therein.

Despite this, a majority of jurisdictions continue to deny to the infant any right of recovery under the stated circumstances, and so great is this weight of precedent that courts have accepted it as a strict rule of the common law to be followed without deviation. A refusal to adopt any other position, regardless of the obvious harshness of the rule, is generally attributed to a reluctance to engage in judicial legislation. One court, at least, has stated that it is the duty of the legislature to create the right and, until such is an accomplished fact, it will not permit recovery for a prenatal injury. In that regard, it is interesting to note that judicial interpretation of a California statute, not too specific in character, has cleared the way for the maintenance of the action in that state, which holding may be indicative of the eagerness with which courts may be likely to accept such legislation and do their utmost to construe it favorably.

Without waiting for legislation on the subject, a minority view has been developing, to which the two cases mentioned above must now be added, a view which would allow a child to recover for injuries inflicted on it while en ventre sa mere. It is the theory of these cases that a


child which is capable of independent existence, although still within the body of the mother, should be considered as a person in being, hence entitled to recover for injuries which may be suffered by it at that time. These opinions are quick to point out the status the unborn infant enjoys in the fields of property law and criminal law. As to the former, a child still carried by its mother, provided it is later born alive, is considered as in esse for every purpose which will benefit it. In the contemplation of the latter, for purpose of punishing the destruction of a child, a foetus is recognized as a living being after it has quickened or stirred in the womb. There then follows the logical query, "why a part of the mother under the law of negligence and a separate entity and person in that of property and crime?" It has, if viable, its own bodily form and members, manifests all of the anatomical characteristics of individuality, possesses its own circulatory, vascular and excretory systems and is capable now of being ushered into the visible world. Why not, then, its own separate legal personality as well?

These courts, using an approach to tort law similar to that used in the branches of property and criminal law, would supply the final arc to round out the legal circle of logic. They deny that there is any common-law rule which bars recovery for prenatal injuries and, when confronted with the Dietrich decision, point to the fact that the child there concerned was not viable at the time of the accident. This emphasis on viability is strengthened by the fact that, in all of the prior minority cases, the child was eventually born alive, while three of the decisions make specific reference to this fact. Only in the Minnesota case noted above has recognition been accorded to the possibility of recovery despite the fact that the child was not born alive.

To that extent, the Minnesota case pushes the limits of the minority

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17 Lamont, J., in Montreal Tramway v. Le Veille, 4 D. L. R. 337 at 344 (1933), expressed the belief that it was "but natural justice that a child, if born alive and viable, should be allowed to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother." In Kine v. Zuckerman, 4 Pa. Dist. & Co. Rep. 229, 97 A. L. R. 1525 (1924), the court proceeded on the novel approach that the tortfeasor had set a harmful force in motion which did not mature or have its effect until the infant was born. The time elapsing in the interim between the infliction of the harm and birth was said to have no effect on the cause of the injury, except as it might have evidential value in terms of cause and effect.


19 State v. Cooper, 2 Zabriskie 52 (N. J., 1849).


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rule beyond the bounds of any prior decision and tends to unsettle the whole movement for it neglects the one fundamental requirement of the law of property on which the argument depends for its validity. It also poses another objection in that new and confusing problems of damage law are projected. Except as to identifiable costs of interment,\textsuperscript{2} by what measuring rod may the jury determine damage in the case of a child never actually born as a person? A jury can determine the degree of injury to a living child and can project that degree of injury into the future to ascertain the present worth of the future harm growing from defendant's neglect. To attempt the same thing with respect that that which never existed, borders on speculation so gross as to be apt to produce an unfavorable reaction toward a developing minority view, one more in need of encouragement than discouragement.

M. J. Baraz

LANDLORD AND TENANT—RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD—WHETHER OWNER OF A PROPRIETARY LEASE TO APARTMENT IN A CO-OPERATIVE APARTMENT BUILDING IS TO BE DEEMED A LANDLORD UNDER THE FEDERAL HOUSING AND RENT ACT OF 1947—An Illinois reviewing court has now, for the first time, been called upon to determine whether a purchaser of stock and of a proprietary lease, issued by a co-operative housing corporation, is to be deemed to be a "landlord" within the meaning and intent of the federal Housing and Rent Act of 1947.\textsuperscript{1} That issue, presented in the case of Kenny v. Thompson,\textsuperscript{2} grew out of a record which disclosed that one Dr. Bokman had originally owned shares of stock in a certain building corporation and occupied an apartment in the building under a proprietary lease from the corporation. He later subleased the apartment to the defendant who rented on a month to month basis. Some years later, and at a time when the federal statute aforementioned was in effect, Dr. Bokman sold his stock and assigned his proprietary lease to the plaintiff. Desiring the apartment for his personal occupancy, the plaintiff gave proper notice and brought a forcible detainer action when the defendant refused to vacate. The statute in question prohibited eviction by a landlord, even though the tenant's lease had expired, so long as the tenant continued to meet certain of the obligations of his tenancy,\textsuperscript{3} but an exception therein authorized eviction where

\textsuperscript{2} The Illinois Injuries Act, Ill. Rev. Stat. 1947, Vol. 1, Ch. 70, § 2, now permits the recovery of certain itemized expenses, including funeral bills, where the decedent leaves no widow or next of kin.

\textsuperscript{1} 50 U. S. C. A. Appendix § 1881 et seq.

\textsuperscript{2} 338 Ill. App. 403, 87 N. E. (2d) 229 (1949).

\textsuperscript{3} 50 U. S. C. A. Appendix § 1899(a).
the landlord sought, in good faith, to recover possession for his immediate and personal use and occupancy. The trial court, apparently believing that the plaintiff did not qualify as a landlord within the exception noted, gave judgment for the defendant but that judgment was reversed on appeal to the Appellate Court for the First District of Illinois.

It is clear that, were it not for the prohibitions of the federal Housing and Rent Act of 1947, the plaintiff in the instant case would be entitled to judgment for a local statute merely requires that the plaintiff in a forcible entry and detainer proceeding be a person entitled to possession.5 The first question, then, is to determine what additional requirements, if any, are imposed by the federal act. It should be noted that Section 1899(a) thereof prohibits eviction by a “landlord,” although creating an exception in his favor where he seeks possession for his personal occupancy.6 If the plaintiff is deemed not to be a landlord within the meaning of the federal statute, as the trial court held, then it would seem to follow that the statute would not apply to him at all, thereby leaving him free to exercise the rights he always enjoyed under state statute or by common law. Clearly, if the plaintiff did not qualify under the exception to the prohibition, then he could not come under the prohibition itself for, by sheer logical construction, the word “landlord” should be given the same meaning in one part of the section as it possesses in another.

The upper court, therefore, was faced with two alternatives. It could either rule that the plaintiff was not a landlord, that the federal act was inapplicable, and that he was free to maintain his action under the state statute; or it could hold that he was a landlord, that the act did apply, but that he was entitled to possession under the exception. In either event, the plaintiff would have to prevail, but a reversal based on the first alternative would lay down the undesirable precedent that none of the restrictive provisions of the Housing and Rent Act apply to tenants holding proprietary leases in co-operative units. The court did, in fact, follow the second course by endeavoring to show that a co-operative participant was in effect the “owner” of the apartment he occupied, hence could easily qualify as a landlord. For the purpose of this discussion, then, it is necessary to determine whether the Appellate Court was correct in holding that a co-operative member is such an owner.

4 Ibid., § 1899(a)(2).
5 Ill. Rev. Stat. 1949, Vol. 1, Ch. 57, § 2, permits “the person entitled to possession of lands or tenements” to be restored thereto, “when any lessee of the lands or tenements, or any person holding under him, holds possession without right after the determination of the lease or tenancy by its own limitation, condition, or terms, or by notice to quit or otherwise.”
6 It should be noted that the term “landlord” is nowhere defined in the federal statute.
A knowledge of the basic elements of the co-operative scheme is, of course, essential to a general understanding of the problem. According to the usual plan, a corporation is formed to purchase or construct an apartment building in which each member selects an apartment which he may occupy exclusively as a home. For convenience, the fee title to the property is placed in the corporation, while the corporate management is controlled by the stockholders through a board of directors. The two important instruments in the organization are the stock certificate and the proprietary lease, which are inseparable at all times. A prospective member must purchase a certificate for a specified number of shares roughly equivalent to the value of his apartment. This certificate entitles him to a proprietary lease, ordinarily of the long term or perpetual type, which is evidence of his right to occupy and control a particular apartment and sets out the respective rights and duties of lessor and lessee. Monthly assessments are paid by each member in proportion to his stock holdings. The corporation reserves the right to terminate the lease for any default or violation of any covenant by the lessee. Assignment of stock and lease may be made only with consent of the directors or by majority vote of the stockholders.

Before examining these elements in further detail, an inquiry into the real purpose behind the co-operative plan should furnish the best clue to the problem of ownership. The rapid growth of co-operative apartments in recent years must be attributed primarily to the fact that they provide an opportunity for one to own his apartment. It cannot be emphasized too strongly that the very essence of the co-operative plan lies in its design to appeal to those who desire to own, rather than merely rent, living space. It has been repeatedly held that tenant stockholders are concerned primarily in the purchase of a home, and that the permanency of the individual occupants as tenant owners is an essential element in the general plan. Further advantages lie in the fact that each tenant owner has a voice in the selection of other tenants and in the management of the property so that, through the principle of cooperation, the common expenses of operation and maintenance of the property as a whole may be shared by the owners. These factors, however, are but the practical machinery for carrying on the main purpose of ownership and are designed to operate for the protection of the purchaser's investment.


Perhaps most often cited as being inconsistent with the thought of ownership is the fact that legal title to the premises rests in the corporation. A realistic approach should reveal that this seeming inconsistency is a matter of form rather than one of substance. Such an approach requires first a consideration of the alternatives that might have been adopted. If separate deeds to each apartment were used, the objectives of co-operation would be almost impossible to attain, evils of speculation would be apt to arise, and there would be practical difficulties of separate insurance and tax assessment. If, on the other hand, the entire building were to be held by the owners as joint tenants, the four unities of time, title, interest, and possession would be impossible of achievement, and the operation of the principle of survivorship would lead to undesirable results. Tenancy in common would be open to even more objections. Therefore, as a California case once stated, "in order to effect a co-operative plan whereby each member might in effect own his own apartment, and yet be subject to such rules and regulations as a majority should deem wise and expedient, and also be subject to a sale of the property when two-thirds of the members should so vote, it was apparently deemed necessary to lodge title in an artificial person, the corporation." That court concluded that, while the corporation held legal title, yet to all intents and purposes, the entire equitable estate was distributed proportionately among the owner-tenants. Thus it is apparent that the corporation, serving as a convenient repository agency in this respect, is merely the best available means of accomplishing desired objectives and is not truly inconsistent with the prime object of tenant ownership.

In addition, the large initial outlay made by each member for his stock has been properly termed the "capital investment" of an amount which is the ordinary equivalent of the market value of the apartment. Use of that term is hardly to be explained unless the purchaser is to gain "ownership" of an apartment thereby, particularly when it is recalled that co-operative apartment corporations are essentially non-profit in character so the stockholder cannot expect that any dividends would be paid on his investment.

It has been urged that the proprietary lease is similar to an ordinary lease, one which creates a relationship of landlord and tenant in no way different from that created by any standard lease for a residential apartment. The advocates for this position point out first that the monthly

9 In re Estate of Pitts, 218 Cal. 185 at 188, 22 P. (2d) 694 at 696 (1933).
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assessments paid by each member are actually a form of "rent." In the ordinary and legal sense of the word, "rent" signifies a profit or reasonable return to the landlord for the use of property. Assessments under a proprietary lease, however, are made for the sole purpose of covering the operating expenses, maintenance, taxes, insurance, and payments on corporate indebtedness, without thought of any general profit to the corporation. It has also been urged, as an indication that the holder of the proprietary lease is nothing more than a tenant, that certain house rules which govern his conduct and the cleanliness, safety, and care of the apartment are appended to his lease with attendant penalties for the violation thereof. Such rules simply round out the principle of co-operation and cannot seriously be said to conflict with ownership. A large residential building is plainly not adaptable to the unrestricted use of each apartment for, without some type of regulation, few would care to live therein. To the same end are limitations against structural change, against transfer of the tenant's interest and against sub-letting; all of which usually require the securing of approval from the board of directors or at least from a majority of the stockholders. These provisions, while restrictive in a sense, really serve to increase the value of the tenant's connection with the corporation by giving him a voice in matters of vital interest, particularly when the failure of any tenant to sustain his share of the common burden would increase the burden of the others. The option given to the corporation to terminate the tenancy upon default or for other violation of the lease is the only logical and practical method for enforcing its terms.

Aside from the foregoing restraints, the co-operative participant is accorded privileges which place the proprietary lease beyond the scope of an ordinary lease. Some of these were pointed out in Hicks v. Bigelow, one of the few leading cases in this field. That opinion stated, in definite terms, that the purchaser of a co-operative apartment is more than a mere tenant or lessee for he enjoys certain proprietary rights which a mere tenant lacks, rights which have most of the attributes of ownership. These rights include a voice in the management and operation of the building, in the selection or approval of other tenants, in the vital matter of any proposed sale or mortgage of the property, but above all in the exclusive, personal right to occupy a particular apartment. The


13 The co-operative principle, treating the shareholder as the essential owner, is recognized by 26 U. S. C. A. § 23(x), which permits the tenant to deduct his proportionate share of the real estate taxes and interest on indebtedness, chargeable to the corporation, from his personal income tax return.

court might well have added that these rights normally extend over a period of time far longer than that of the usual apartment lease, often for the life of the corporation itself. Conversely, even in a long-term lease of standard character, the lessor grants few covenants beyond the one of quiet enjoyment whereas the corporation, under the proprietary lease, in addition to the matters already mentioned, customarily covenants to maintain a first class apartment building, to furnish services, to execute all repairs with diligence, to keep books of account, to render annual statements to the tenant, and to keep the building properly insured. Finally, in the event of a sale of the property or of a termination of an individual lease, the corporate lessor is obliged to account to the lessee for his proportionate share of the proceeds in the first instance, or the full proceeds upon resale of his apartment in the second instance.\(^{15}\)

Clearly, then, these features distinguish the proprietary lease from the standard arrangement between the average landlord and tenant.

In surveying all these incidents, not only of the proprietary lease, but of the co-operative organization as a whole, two thoughts suggest themselves. First, those incidents which do restrict the tenant’s rights of ownership were placed there by the tenant owners themselves, who control the government of the enterprise. Secondly, while there may be seeming inconsistencies in the matter of tenant ownership, they are not truly inconsistent when focused in the light of the overall plan, a plan that is not perfectly adapted to its ends but is none the less a remarkable combination of available legal devices. The conclusion to be drawn from this analysis of the problem seems to be a fairly justifiable one that a purchaser of stock and of a proprietary lease from a co-operative housing corporation should be treated as a landlord within the meaning of the federal Housing and Rent Act of 1947, so as to be able to evict a holdover tenant. The ruling in the instant case, then, appears to be in line with what small weight of authority there is on the subject.

H. M. Ross, JR.

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\(^{15}\) The by-laws of the corporation may provide for the deduction of expenses involved in reselling the apartment and of any indebtedness owed by the lessee to the corporation. See McCullough, "Co-operative Apartments in Illinois," 26 Chicago-Kent Law Review 303 (1948), particularly pp. 313-4.

1 403 Ill. 523, 87 N. E. (2d) 610 (1949).
DISCUSSION OF RECENT DECISIONS

Supreme Court of Illinois, under a set of facts novel to this state, has clarified the rights of employees to unemployment compensation when they become unemployed because of a labor dispute. The claimants in that case were members of an office workers' union which was an affiliate of a union of factory workers in the same plant. The affiliation agreement provided that the office union could not enter into contract negotiations without the approval of the factory union and required the former union to contribute one-fourth of its dues to the latter. Both groups of workers entered into contract negotiations with the employer, the office employees being represented therein by officers of the factory union, and a satisfactory agreement was reached as to the office workers. The employer failed to come to terms as to the factory employees and a strike of the latter followed, resulting in a picket line through which only a few maintenance men were permitted to pass. There was testimony that the employer, desiring to avoid violence, kept the plant gates locked thereby preventing the office workers from entering or attempting to enter the premises had they so desired. Claims advanced by the office workers for unemployment compensation benefits during the period of the strike were denied by a deputy examiner on the theory that such workers were participating in or at least were interested in the strike, but the claims were granted on appeal to the Director. The allowance of compensation was affirmed by both the circuit court and by the Illinois Supreme Court.

Legislation calling for unemployment compensation originated in England, but the first English statute provided that all employees whose unemployment was the product of a labor dispute were to be disqualified from receiving unemployment benefits.\(^2\) The unfairness of this disqualification, at least as it bore on those who had no interest in the dispute and had not participated therein, became soon apparent and, four years later, the English statute was amended.\(^3\) As amended, it permitted those who became unemployed as a result of a labor dispute to draw unemployment compensation benefits provided they neither participated in, were directly interested in, nor financed the dispute and were not of the same grade or class of workers as those who were directly concerned.

Following congressional enactment of the Social Security Act,\(^4\) all of the American states, as well as the territories, adopted unemployment compensation laws.\(^5\) Nine states have enacted blanket disqualification

\(^2\) 10-11 Geo. V, c. 30, § 8(1).
\(^5\) The state acts have followed, to a great extent, a bill drawn by the Social Security Board.
clauses similar to the original English statute but the remaining forty-two states and territories imposed disqualification clauses substantially similar to the amended English provision. Typical of the latter is the Illinois enactment which, in substance, requires the claimant to show absence of participation, of financing, of direct interest in the labor dispute as well as membership in a different grade or class in order to be eligible for benefits. As the claimants in the instant case admittedly were unemployed because of a labor dispute, it became necessary for them to show that they came within the noted exception to the disqualification clause in order to receive payment of the benefit provided by law.

The issue of participation was decided on the basis that since the claimants were prevented from obtaining entrance to the plant by virtue of the locked gates, their failure to work did not constitute a participation in the strike. This reasoning may be said to be in line with holdings from the majority of jurisdictions which have passed on the question. Whether the particular act could be said to be voluntary or in-


10 Where blanket disqualification does not exist, proof of absence of participation is necessary: see statutes cited in note 7, ante.
DISCUSSION OF RECENT DECISIONS

voluntary has, in general, been made the criterion of determining whether the employees participated in the dispute. An outright refusal to work would obviously constitute participation. Similarly, a sympathy strike, wherein one union refuses to work in order to support another striking union, produces voluntary unemployment.\textsuperscript{11} A failure to cross a picket line established by the striking employees has been productive of much dispute but has generally led to the result that a voluntary failure to cross has been held to constitute participation in the dispute.\textsuperscript{12} Where "fear of physical violence" has been found present, however, the failure to cross the picket line has been deemed to be involuntary in character with the result that such employees have been classed as non-participants in the strike.\textsuperscript{13} There must be more than a mere "theatrical threat" of violence so the fear of "being photographed,"\textsuperscript{14} and the fear of "union consequences"\textsuperscript{15} have been held insufficient to render the refusal to cross involuntary.

The issue of participation because of affiliation has also arisen prior to the present case but, unlike the holding therein, it has been held, on slightly different circumstances, that the close relationship between the two groups was sufficient to make the one a participant in the labor dispute of the other. In the case of \textit{Burns v. Unemployment Compensation Board of Review},\textsuperscript{16} two local unions, whose members worked in the same establishment, were affiliates of the same national union but only one of the locals had called the strike. The members of the other local were


\textsuperscript{13} Steamship Trade Assoc. of Baltimore, Inc. v. Davis, — Md. —, 57 A. (2d) 818 (1948).

\textsuperscript{14} Appeal of Employees of Pac. Tel. & Tel. Co., 31 Wash. (2d) 659, 198 P. (2d) 675 (1948).


denied benefits on the basis of the reasoning that the suspension was voluntary in that (1) the national union had approved the strike, and (2) there was some basis for inferring that the action of the national was assented to by the non-striking local. Such reasoning would appear to be an extension of the sphere of voluntary action beyond its natural orbit, so it is not surprising that it was not followed by the Illinois court in the instant case. Absence of participation, however, would not be enough to escape disqualification for other requirements must also be met.

When faced with the problem of determining whether the office workers' union in the instant case was disqualified because it had financed the factory union, the Illinois court declared that the fact that a portion of the dues collected had reached the treasury of the factory union was, in itself, insufficient to constitute financing. The office union received supplies and stationery in return for the small amount of money so paid and no additional or special assistance was rendered to the striking union. Again, most jurisdictions which have passed upon the question have reached the conclusion that the payment of dues alone does not amount to a financing of the labor dispute. Three state legislatures have specifically so provided, and at least one court has required other active financial aid in addition to the payment of dues before disqualification may be found present. The membership of a local in a national organization has, however, been held sufficient in and of itself to constitute a financing of any striking local within the national organization on the theory that the non-striking local may be said to have a proprietary interest in the dues which it has contributed to the national, particularly if those funds have been used to aid the striking local. Reasoning of that type is not generally followed, was not discussed by the Illinois Supreme Court in the instant case, and would appear to be contrary to the present trend on the point. The presence of a combination of statutes providing that the payment of dues is not to be considered financing, together with ten other statutes which have eliminated the necessity of proving an absence of financing to support a claim of eligibility for benefits, indicates a trend away from that view.

20 See the statutes of Alaska, Dist. of Columbia, Hawaii, Louisiana, Mississippi, New Mexico, North Dakota, Oklahoma, and Pennsylvania. References thereto are set forth in note 7, ante.
21 See note in 49 Col. L. Rev. 550.
DISCUSSION OF RECENT DECISIONS

In passing upon the issue of direct interest,22 the Illinois court decided that the members of the office union were not directly interested in the dispute as no wage increase or other benefit could accrue to them, regardless of the result of the dispute between the factory workers and the company, for their contract had already been negotiated. That conclusion is also in conformity with the view followed in a majority of the other jurisdictions for they require that the working conditions of the employee must be subject to an adverse or favorable outcome before he can be said to be directly interested in the dispute.23 Thus it has been held that interest is present where the employee’s wages,24 his hours,25 the steward or the seniority system26 will be affected by the result of the strike, even though the employee may be personally opposed to the strike and may have voted against it.27 Following this reasoning, at least two jurisdictions have held that where a single union is the bargaining agency which represents all employees, all are disqualified if the union calls a strike despite the fact that the claimants themselves are not union members.28 An implied assent to the strike on behalf of the non-union minority has been found present on the theory that, as the union is the

22 Each of the forty-two states and territories which provide any exception to the principle of disqualification require proof of the absence of direct interest: note 7, ante.


27 The recent case of Local No. 658 v. Brown Shoe Co., 403 Ill. 484, 87 N. E. (2d) 625 (1949), seems to have adopted this line of reasoning. Eighteen key workers there went on a “wildcat” strike against the wishes of their union which had been made the certified bargaining agent for all of the employees. Eventually, all workers were laid off when the entire plant had to be closed down because of the resulting bottleneck. All employees, except the striking eighteen, filed claims for unemployment compensation but were denied benefits. The court held that as the employer was subjected to economic pressure from the entire group, without being able to negotiate with the few who were dissatisfied and who constituted an essential link in the whole operation, all were ineligible even though they may personally have opposed the strike. The logic dictating such a decision is obvious. If the result were otherwise, it would be possible for a union to pull out a key group of employees and tie up the plant yet have the remaining employees draw unemployment compensation and relieve the union of the considerable financial strain of a strike. The enhancement thus afforded to its bargaining position would be obvious.

sole bargaining agency for all employees, all will benefit if the strike should be successful. Narrow interpretation of the phrase "directly interested" has been given in three jurisdictions which would limit disqualification only to those "creating the dispute or participating therein in order to enforce their demands." So narrow an interpretation is obviously open to criticism on the ground of a confusion between the phrase "directly interested" on the one hand and the phrase "participating in" on the other. They are not synonymous and the legislature, by enacting two different requirements for exemption, obviously intended they should be different and mutually exclusive.

On the last point, the Illinois Supreme Court decided that the office workers were of a different grade or class than the factory workers not only because of the difference in their duties but also because of the fact that each group had a separate union contract with the employer. The phrase "grade or class" has been made the subject of widely conflicting interpretations. At one extreme, may be found cases which have held that all workers in the plant are of the same group or class, either because one bargaining agency represented all or because all were engaged in a "continuous integrated process, as semi-skilled workers with similar wages." Other cases divide workers into "cohesive groups acting in concert," thereby serving to place all non-union workers into one group and union workers in a different class. Perhaps the most logical division is one which distinguishes production workers from maintenance workers or permits of separation by departments. Under this view, the type of work done becomes the determining factor, so the separation of office workers from factory workers affords a sound foundation for the Illinois holding.

While it may be said that the case under discussion presents nothing

29 Dept. of Indus. Relations v. Drummond, 30 Ala. App. 78, 1 So. (2d) 395 (1941); Kieckhefer Container Co. v. Unemployment Comp. Comm'n, 125 N. J. L. 155, 13 A. (2d) 648 (1940); Wickland v. Commissioners, 18 Wash. (2d) 206, 138 P. (2d) 876 (1943).

30 Only three states possessing an exceptions clause do not require the petitioning workers to prove that they are not of the same grade or class as those who have participated in the labor dispute. They are Louisiana, Rhode Island and Vermont.


34 See Nordling v. Ford Motors Co., __ Minn. __, 42 N. W. (2d) 576 (1950), as to what constitutes a "department" of the employer for this purpose.

of novel significance when it is evaluated in the light of decisions from other jurisdictions, and has not resulted in any new or different interpretation of a commonly found statute, yet the decision possesses noteworthy interest because of the way in which it does pin-point the features which should control the right to unemployment compensation benefits.

K. J. Douglas

Obscenity — Obscene Publications, Pictures, and Articles — Whether or Not a Phonograph Record, Containing Obscene, Lewd, and Lascivious Words, Songs, or Other Matter is an Article or Instrument of Indecent or Immoral Use or Purpose Within the Prohibition of Obscenity Statutes — In People v. Strassner,¹ the Court of Appeals of New York was called upon to deal with a problem of statutory construction which, as yet, has been undetermined by the highest court of any other state having analogous statutory provisions. The problem presented was whether or not a phonograph record came within a statutory prohibition against the sale or possession of obscene, lewd, lascivious, filthy or indecent matter. The defendant was convicted on an information which charged a violation of a state statute² in that he possessed a filthy, indecent and disgusting phonograph record. His conviction was reversed by the Court of Appeals on the ground that the specific enumeration of obscene articles in the first clause of the statute,³ articles whose obscenity could be communicated by visual representation, as well as any general phraseology therein,⁴ was inadequate to condemn the instrumentality which formed the basis of defendant's prosecution since his material called for auditory representation accomplished by mechanical means.

The case under discussion accurately points up a problem dealing with the interpretation to be given to various state statutes relating to obscenity, which interpretation may determine whether or not said statutes are sufficient to embody phonograph records as articles or instruments of indecent or immoral use or purpose, so as to punish the possession thereof. The magnitude of the problem is made the more evident by the fact that only two states have, by express provision, made the trafficking

¹ 299 N. Y. 325, 87 N. E. (2d) 280 (1949).
³ See note 2, ante. Specific reference is there made to "any obscene, lewd, lascivious, filthy, indecent, or disgusting book, magazine, pamphlet, newspaper, story paper, writing, paper, picture, drawing, photograph, figure or image."
⁴ The statute concluded with the words "... or any written or printed matter of an indecent character."
in obscene phonograph records specifically punishable.\(^5\) A number of other statutes, by confining their language to specific enumerations of species,\(^6\) none of which can be said to include phonograph records, will obviously require legislative amendment before the ills of obscene phonograph records can be adequately coped with. The balance, because they contain general phrases of ambiguous terminology, will require judicial interpretation as a preface to any determination of whether or not they possess the means of inhibiting the exploitation of smut accomplished by the production and sale of obscene phonograph records. A reading thereof discloses certain common similarities which will admit them to categorical analysis. For the purpose of this study, such method will be employed.

First, a majority of these states possess statutes which, after specifically enumerating certain species of obscene articles, follow such specific enumeration with a general phrase.\(^7\) Although the wording of the general phrases found in this group of statutes does differ, they do possess similarity in that each is introduced by words such as "or any," "or other," or "or any other," and then follows some generic term which might be claimed to be sufficiently broad to include a phonograph record within its definition. No fair and reasonable meaning given to the items in the specifically enumerated species could include a phonograph record therein. If such records are to be classified as punishable obscenity thereunder it must be because such objects are found to lie within the generic terms contained in the general clauses. The issue, then, becomes one as to just how far a court may go, when subjecting these general phrases to interpretation.


DISCUSSION OF RECENT DECISIONS

The production of obscene phonograph records being a matter of rather recent innovation in the field of lewd practices, it is not surprising that there exists a minimum of judicial decisions dealing with the point. Two cases do serve to underscore the basic problem. In the reported case, the New York Court of Appeals, faced with interpreting the general phrase "or any written or printed matter," was not content to rest its decision solely upon the obvious ground that the adjectives "printed" and "written," by themselves, operated to exclude from the general phrase an instrumentality which could hardly be contended to be either a "writing" or a "printing" as those terms are currently understood. Instead, the court also pointed out that the several items in the specifically enumerated species all served to address their obscenity to the mind through the sense of sight. It is this latter observation which indicates the feature which is common to all the varied items specifically enumerated in the statutes here under consideration. This common characteristic should be kept in mind, as attention shifts from one category of statutes to another, in order that the resultant effect thereof upon the general phrases therein contained may be best appreciated.

Citing as authority for the position taken by them, the New York Court of Appeals referred to the holding in *Alpers v. United States.* That case concerned an appeal taken from a conviction on two counts of an information charging the appellant with knowingly depositing with a carrier, for transportation in interstate commerce, certain lewd and indecent phonograph records. It was the theory of the government's case that such acts constituted a violation of a federal code provision on the subject. Judge Orr, writing an opinion which reversed the conviction, there stated that, as penal statutes must be strictly construed, the rule *ejusdem generis* became particularly applicable when the phrase presented was a general one which followed a specifically enumerated class of persons or things. He was of the opinion that a search of the legislative history of the code provision justified the restriction of the general phrase "or other matter of an indecent character," as found therein, to species of articles like those enumerated and whose obscenity is communicated to the mind by the sense of sight. This decision serves to supply another observation which will be particularly pertinent to those concerned with the problem of interpretation and that is the rule *ejusdem generis* may prove helpful.

That rule, although variously defined, is generally accepted to be that where, in a statute, general words follow a particular designation of

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8 175 F. (2d) 137 (1949).
9 18 U. S. C. A. § 396. The section is now numbered § 1462.
persons or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designation and as including only persons or things of the same kind, class, character or nature as those specifically designated. It is said to be based upon the obvious reason that if the legislature had intended the general words to be used in an unrestricted sense, no mention would have been made of the particular classes. Under that rule, as applied to statutes falling in the first class, obscene phonograph records could not be found to lie within the general phrases because not within the genus whose enumerated species have the common characteristic of communicating their obscenity by the sense of sight alone.

At this point, it is significant to note that the decision in the case of Alpers v. United States, cited as authoritative basis for the decision in the instant case, was later reversed by the Supreme Court of the United States in an opinion rendered subsequent to that filed in the New York case. The majority of that court arrived at a different conclusion both as to the application of the rule ejusdem generis and also as to the legislative intention which might be gathered from the context of the act. Justice Minton, writing the majority decision which reinstated the conviction of the defendant, declared that the obvious purpose of the legislation under consideration was "to prevent the channels of interstate commerce from being used to disseminate any matter that, in its essential nature, communicates obscene, lewd, lascivious, or filthy ideas." He noted that Congress had legislated "with respect to a number of evils in addition to those

10 The widespread acceptance of that definition may be noted in such holdings as Goode v. Tylor, 237 Ala. 106, 186 So. 129 (1939); Bell v. Vaughn, 46 Ariz. 515, 53 P. (2d) 61 (1938); People v. Thomas, 25 Cal. (2d) 880, 156 P. (2d) 7 (1945); Martinez v. People, 111 Colo. 52, 157 P. (2d) 690 (1943); State v. Certain Contraceptive Materials, 126 Conn. 428, 11 A. (2d) 863 (1940); Dunham v. State, 140 Fla. 754, 192 So. 324 (1940); Beavers v. LeSeuer, 188 Ga. 395, 3 S. E. (2d) 667 (1939); State v. Gardner, 174 Iowa 745, 156 N. W. 747 (1919); Bullman v. City of Chicago, 367 Ill. 217, 10 N. E. (2d) 961 (1919); Dowd v. Sullivan, 217 Ind. 196, 27 N. E. (2d) 82 (1940); State v. Miller, 90 Kans. 230, 133 P. (2d) 878 (1913); Federal Chemical Co. v. Paddock, 244 Ky. 338, 94 S. W. (2d) 645 (1916); State v. Texas Co., 205 La. 217, 17 So. (2d) 569 (1944); American Ice Co. v. Fitzhugh, 128 Md. 382, 97 A. 999 (1916); People v. Powell, 280 Mich. 699, 274 N. W. 372 (1937); School Dist. No. 30 v. Consol. School Dist. No. 30, 151 Minn. 52, 185 N. W. 961 (1921); State v. Russell, 185 Miss. 13, 187 So. 540 (1939); Zinn v. City of Steelville, 351 Mo. 413, 173 S. W. (2d) 398 (1943); Mancuso v. State, 123 Neb. 204, 242 N. W. 430 (1932); State v. Craig, 176 N. C. 740, 97 S. E. 400 (1918); Ganstad v. Nygaard, Sheriff, 64 N. D. 755, 256 N. W. 230 (1934); In re Frietag's Estate, 165 Ore. 427, 107 P. (2d) 978 (1941); In re Fredrick's Estate, 333 Pa. 327, 5 A. (2d) 31 (1939); State v. Hollock, 114 Vt. 292, 44 A. (2d) 326 (1945); State v. Ebeler, 106 Wash. 222, 179 P. 883 (1919). These cases do not necessarily deal with the subject of obscenity.

11 See State v. Campbell, 76 Iowa 122, 40 N. W. 100 (1888).

12 175 F. (2d) 137 (1949).

prescribed by the portion of the statute under which respondent was charged." As statutes were to be construed with their entire context in mind, he believed that a comprehensive statute should not be "constricted by a mechanical rule of construction."14

What then is the conclusion to be drawn from the reviewed decisions? It is believed by this writer that the general phrases in the first category of statutes will be subjected to interpretation pursuant to the rule of ejusdem generis, and the general words "or any," "or other," or "or any other," will be read as if stated in the form of "other such like."15 The reasons for this conclusion are several. First, the rule has been universally employed in ascertaining legislative intention where general words follow the specific enumeration of classes of persons or things. Second, almost all of the states here concerned recognize and admit the existence of the rule, either applying or denying it application as the facts of each case dictate.16 Third, the rule is the most consistent one which might be applied when the statute is one requiring strict construction.17 Finally, the United States Supreme Court decision in the Alpers case, although stating a limitation often expressed to exist,18 is distinguishable from the situation presented by statutes in this first category for the federal code provision, unlike the state provisions, enumerate articles whose obscenity is not confined to communication or transmission by the sense of sight. As it enumerates other articles whose obscenity comes into existence only when employed for a particular use or purpose, not being obscene per se merely by presentation to one's sight, the problems are not identical. The conclusion, therefore, most consistent with well established principles of statutory construction when bearing in mind the strict interpretation usually given to penal statutes, is that phonograph records of the type in

15 Hodgson v. Mountain & Gulf Oil Co., 297 F. 269 (1924); State v. Campbell, 76 Iowa 122, 40 N. W. 100 (1888); Commonwealth v. Dejardin, 126 Mass. 46, 30 Am. Rep. 652 (1878); Rhone v. Loomis, 74 Minn. 200, 77 N. W. 31 (1898).
16 See cases cited in note 10, ante.
17 First National Bank v. United States, 206 F. 374 (1913); People v. Thomas, 25 Cal. (2d) 880, 156 P. (2d) 7 (1945); Martinez v. People, 111 Colo. 52, 137 P. (2d) 690 (1943); Ex parte Muckenfuss, 52 Tex. Cr. 467, 107 S. W. 1131 (1908); State v. Goodrich, 84 Wis. 359, 54 N. W. 577 (1893).
18 Helvering v. Stockholme Enskilda Bank, 293 U. S. 84, 55 S. Ct. 50, 79 L. Ed. 211 (1934); Martin v. State, 150 Ala. 89, 47 So. 104 (1908); State v. Gallagher, 101 Ark. 593, 143 S. W. 98 (1912); Gibson v. People, 44 Colo. 600, 99 P. 333 (1900); City of Chicago v. N. & M. Hotel Co., 248 Ill. 264, 93 N. E. 753 (1910); State v. Miller, 90 Kan. 290, 133 P. 878 (1913); Brown v. Corbin, 40 Minn. 508, 42 N. W. 481 (1889); State v. Smith, 233 Mo. 242, 135 S. W. 465 (1911); Burk v. Montana Power Co., 73 Mont. 52, 255 P. 337 (1927); Dillard v. State, 104 Neb. 209, 175 N. W. 668 (1920); People v. Kaye, 212 N. Y. 407, 106 N. E. 122 (1914); Klingensmith v. Siegal, 57 N. D. 768, 224 N. W. 680 (1929); Vasse v. Spak, 83 S. C. 566, 65 S. E. 825 (1900); State v. Bridges, 19 Wash. 431, 53 P. 545 (1898).
question are to be excluded from things regarded as punishable obscenity, at least until statutory modification occurs.

Passing now to a consideration of those statutes which fall within the second category, it will be noticed that these statutes similarly contain a specific enumeration of obscene articles which address their obscenity to the mind through the sense of sight but, following this specific enumeration, are two general phrases. The first is similar to that involved in the reported New York case. It is followed by another which describes "or any article or instrument of indecent or immoral use or purpose." Too close identity between the last mentioned phrase and that frequently appearing in the first category of statutes might erroneously lead a court to apply the decision of the New York case. If this second phrase were missing, statutes in this category would be directly analogous to the one treated there and it would be proper to assume that the general phrase "or other engraved, printed, or written matter" would exhaust all other species not specifically enumerated and falling within the genus of engraved, printed, or written matter.

But, with the exhaustion of that genus, i.e. things appealing to sight, the second phrase, found in this group of statutes, would be rendered useless if it were afforded the same interpretation. To obviate this undesirable result, it is believed the courts would clothe the second phrase with a general meaning different from that attaching to the specifically enumerated articles. In Mason v. United States, the court stated that the rule of *ejusdem generis* would not be employed to "render general words meaningless, since that would be to disregard the primary rule that effect should be given to every part of a statute, if legitimately possible, and that the words of a statute or other document are to be taken according to their natural meaning." If then, the specific words are sufficiently comprehensive to exhaust the genus and leave nothing essentially similar upon which the general words may operate, there would be no room for application of the doctrine.

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21 260 U. S. 545 at 554, 43 S. Ct. 200 at 202, 67 L. Ed. 396 at 399.

DISCUSSION OF RECENT DECISIONS

Does it follow, however, that under statutes in this category obscene phonograph records can be said to lie within the broad generic terms of "article" or "instrument." The New York court, in the instant case, disposing of a contention by the state that the information had been drawn under a second clause in the New York statute identical to the phrase hereunder consideration, indicated that a phonograph record could become an "article of indecent or immoral use" when it served to reproduce an indecent song or conversation. It did, however, properly refuse to rule on the point after it reached the conclusion that the information had not been framed under this clause of the statute. The dictum displays a judicial attitude favorable toward the inclusion of phonograph records within the term "article," and there is a magistrate's decision in New York which does so hold.23 A similar holding would seem proper under the sectional provision of the Kentucky statute,24 where reference is specifically made to articles and instruments of indecent or immoral use or purpose, as well as to such generic terms as "article" and "instrument."

In the final category of statutes,25 while there is a specific enumeration given to articles falling within the genus of obscene articles which serve to communicate their obscenity to the mind by the sense of sight, reference is also made to an "instrument or article of immoral use or purpose," but the connecting phrase such as "any," "or any," or "or any other" is conspicuous by its absence. As the presence of such linking terms appears to be a condition precedent to the operation of the rule ejusdem generis, it may be argued that the general phrase so found therein could be construed to include articles whose obscenity exists more in their use than in the presentation of the offensive matter to one's sight. It is believed that the absence of the general words reflects an intention on the part of the legislature to make this phrase refer to one of an enumerated class of obscene articles but to leave its meaning unencumbered, that is to possess a general meaning not to be drawn into assimilation with the other specifically enumerated species. Only the Illinois statute, one of this class, appears to have been subjected to an interpretative decision. In Lanteen Laboratories, Inc. v. Clark,26 the Illinois Appellate Court of its own motion took notice that the contract submitted to it for specific performance was tainted with illegality in that it called for the indiscriminate sale of contraceptives through drug stores, thereby involving the

26 294 Ill. App. 81, 13 N. E. (2d) 678 (1938).
sale of an "article of indecent or immoral use." It can hardly be con-
tended that contraceptives are articles wherein the obscenity is communi-
cated to the mind merely by the presentation of the article to sight. Rather, it is the use thereof which becomes offensive to public morality. While interpretation of statutes in this category remains a matter of question because of lack of sufficient judicial construction on which to base an adequate opinion, it is believed that such interpretation should include articles which are not of the same kind as those specifically enumerated. Decisions of that character would attribute sense and mean-
ing to the added language. While judicial legislation should always be guarded against, judicial throttling of legislative intention is equally undesirable.

It would appear, then, that many states, because of narrow statutory language, are ill-equipped to punish persons who mock at public morality by the production and sale of obscene phonograph records. Others, by sufficiently comprehensive statutory terminology, at least when aided by proper judicial interpretation, have made it possible to punish those who would produce and traffic in illicit instrumentalities of the type here considered. Against the possibility of doubt arising in such cases, close scrutiny of existing legislation would seem desirable and some revision appears essential.

F. L. Johnson
ATTORNEY AND CLIENT—THE OFFICE OF ATTORNEY—WHETHER OR NOT ACTIVITIES ENGAGED IN BY PERSONS NOT ADMITTED NOR LICENSED CONSTITUTE THE PRACTICE OF LAW—Although no exact definition of what constitutes the practice of law has ever been spelled out by the Supreme Court of Illinois, or by any other high court for that matter, the two recent decisions in Peoples v. Schafer¹ and in Chicago Bar Association v. Kellogg² tend to throw more light on the subject. In the first, a licensed real estate broker was charged with contempt on an information before the Supreme Court for having practiced law without a license in that he had customarily engaged in the preparation of deeds, contracts and mortgages in real estate transactions in which he was the procuring agent and also advised a customer, for a fee, on matters concerning the disposition of her estate. The court conceded that the mere act of filling out blanks in prepared forms might not amount to practicing law but that, as legal practice involves more than appearance in court in connection with litigation,⁴ a person who elicits information and advises thereon in conjunction with the process of completing such forms could well be guilty of contempt for performing the functions of an attorney at law.

In the second, a licensed practitioner before the United States Patent Office was named as defendant in a suit to enjoin him from engaging in the general practice of law⁵ albeit such practice was related to patent matters. It appeared that he had rendered legal opinions relating to the infringement and enforcement of patents and trademarks, had prepared and filed pleadings and other legal documents, had construed contracts, had prepared and served notice of and had asserted an attorney’s lien under an appropriate statute relating to attorneys,⁶ and in general had engaged in quite diversified business transactions of the type customarily handled by general attorneys. On appeal from a decree granting an injunction, transferred to the Appellate Court because no constitutional

¹ 404 Ill. 45, 87 N. E. (2d) 773 (1949).
³ Original jurisdiction to punish one for practicing law without a license exists in the Supreme Court which has inherent power to regulate the practice of law: People v. Peoples’ Stock Yards Bank, 344 Ill. 462, 176 N. E. 901 (1931).
⁴ People v. Tinkoff, 399 Ill. 282, 77 N. E. (2d) 693 (1948).
⁵ For the right to seek an injunction rather than to punish for contempt, see Smith v. Illinois Adjustment Finance Co., 326 Ill. App. 654, 63 N. E. (2d) 264 (1945).
question was involved, that court enlarged the decree on all points, except as to advising and assisting applicants for patents in the presentation and prosecution of their applications before the Patent Office, on the ground the acts enumerated constituted a type of legal practice forbidden to all except duly admitted attorneys at law.

While a precise definition of what constitutes the practice of law may be lacking because of the practical impossibility of making one definition sufficiently broad to encompass the entire field, the details of that definition begin to take shape through the medium of a series of cases in which isolated acts have been held to amount to the practice of law. To those cases already decided, must now be added the two here noted.

MASTER AND SERVANT—SERVICES AND COMPENSATION—WHETHER OR NOT EMPLOYEE IS ENTITLED TO UNEMPLOYMENT COMPENSATION BENEFITS FOR PERIOD BETWEEN TERMINATION OF STRIKE AND TIME WHEN RECALLED TO WORK—By a per curiam opinion in the case of American Steel Foundries v. Gordon, the Illinois Supreme Court has held that employees are not eligible to draw unemployment compensation benefits for the period, following the termination of a strike, during which they are prevented from returning to work by the necessity of bringing the plant into operating condition and the making of repairs occasioned by the strike. The facts were such in the case in question that it was physically impossible to put the plant into normal operating condition for at least fifteen days after the strike had been settled. Claims for unemployment compensation benefits made by the employees who were unable to work during this period had been allowed by the Director of Labor and had been affirmed by the circuit court, but the holding therein was reversed by the Supreme Court on further review.

The court was called upon to interpret that section of the statute which provides that workmen shall be ineligible for benefits for any week with respect to which it is found that their "unemployment is due to a stoppage of work which exists because of a labor dispute." It reasoned that, while the act required that the stoppage of

8 People v. Tinkoff, 399 Ill. 282, 77 N. E. (2d) 683 (1948); People v. Goodman, 366 Ill. 346, 8 N. E. (2d) 941 (1937); People v. Securities Discount Corp., 361 Ill. 551, 188 N. E. 681 (1935); People v. Real Estate Tax Payers Ass'n, 354 Ill. 102, 187 N. E. 823 (1933); People v. Peoples' Stock Yards Bank, 344 Ill. 462, 176 N. E. 901 (1931); People v. Munson, 319 Ill. 596, 150 N. E. 280 (1925); People v. Hubbard, 313 Ill. 346, 145 N. E. 93 (1924); People v. Schreiber, 250 Ill. 345, 95 N. E. 189 (1911); People v. Barasch, 338 Ill. App. 169, 86 N. E. (2d) 568 (1949); Smith v. Illinois Adjustment Finance Co., 326 Ill. App. 654, 63 N. E. (2d) 264 (1945).
1 404 Ill. 174, 88 N. E. (2d) 465 (1949).
3 Ibid., Ch. 48, § 223(d).
work exist because of a labor dispute, it did not require that the labor dispute should still exist or be in active progress and it was sufficient that the unemployment in question stemmed therefrom. Neither the stoppage of work nor the resulting ineligibility is, therefore, limited in its duration by the period of duration of the labor dispute itself. The court appears to have followed what would seem to be a slender majority rule on the subject, the existence of which has heretofore been noted.\(^4\)

Municipal Corporations—Governmental Powers and Functions in General—Whether or Not a Municipal Corporation May Exercise Extra-Territorial Jurisdiction When Regulating the Sale and Distribution of Milk Within the Municipality—Two decisions by the Illinois Supreme Court, in *Dean Milk Company v. City of Waukegan*\(^1\) and in *Dean Milk Company v. City of Aurora*,\(^2\) form the most recent enunciation in this state of a limitation which has been recognized to exist and which binds municipal corporations in the exercise of their delegated powers. In each case, the company filed a complaint seeking a declaration of invalidity of such portions of the milk ordinances of the two cities concerned as purported to regulate the production and pasteurization of milk outside the corporate boundaries. In the first case, the milk ordinance provided that no milk or milk product could be sold within the city unless produced and pasteurized in Lake County, wherein the city was located. In the second, the ordinance operated to exclude from sale or distribution within the city, unless labelled "not graded and not inspected" by the health officer of the municipality, of all milk produced and pasteurized in plant areas not located within a twenty-five mile radius of the city limits. Decisions in both cases favoring the plaintiff were certified to the Supreme Court because of the public interest involved.\(^3\) In the disposition of both cases, the Supreme Court stated that municipal corporations do not possess any extra-territorial jurisdiction beyond that which is expressly or impliedly granted to them by statute.\(^4\)


\(^{1}\) 403 Ill. 597, 87 N. E. (2d) 751 (1949).

\(^{2}\) 404 Ill. 331, 88 N. E. (2d) 827 (1949).


\(^{4}\) The one-half mile limit on extra-territorial jurisdiction, conferred by Ill. Rev. Stat. 1949, Vol. 1, Ch. 24, § 8—1, had been held insufficient to support the milk ordinance involved in Higgins v. City of Galesburg, 401 Ill. 87, 81 N. E. (2d) 820 (1948).
While the court expressed the belief that the ordinance provisions might well facilitate and economize the procedure for exercising regulatory power over the sale and distribution of milk, it felt constrained to hold that the ordinance provisions were predicated upon an unlawful assumption of power.

The legal basis for implied limitation upon municipal exercise of extra-territorial jurisdiction may be found in two early cases which cases received amplification in the foundational case of City of Rockford v. Hey. The doctrine therein became more firmly entrenched by the addition of the decisions in Dean Milk Company v. City of Chicago and in Higgins v. City of Galesburg, which added support to the limitation by sporadic decisions construing and applying it to differing instances. The present cases add still more evidence that municipalities possess only a local right of regulation which cannot traverse the fixed boundaries of municipal areas. It is evident, however, that there is need for a more extended jurisdiction if the number of such milk ordinances, as well as the attacks being made thereon, are any indication on the subject. The matter rapidly approaches the point where legislative attention to the question seems desirable.

Taxation—Legacy, Inheritance, and Transfer Taxes—Whether a Deviser Adopted After Reaching Majority Is Entitled to Benefit of Highest Exemption and Lowest Rate of Inheritance Tax—In the case of McLaughlin v. People, the Illinois Supreme Court was asked to construe a provision of the Illinois Inheritance Tax Act which declares that the class of persons to whom the highest exemption and the lowest tax rate shall apply comprises “any child or children legally adopted.” The county court had there entered a final order and judgment assessing the inheritance tax on the basis that the devisee was a stranger, unrelated to the decedent, thus making applicable the lowest possible exemption and the highest possible rate of tax. It appeared that the decedent had, some six months prior to death, legally adopted the devisee, then forty-eight years old, by a valid decree of a Connecticut court. On appeal from that

5 Straus v. Town of Pontiac, 40 Ill. 301 (1866); Kiel v. City of Chicago, 176 Ill. 137, 52 N. E. 29 (1898).
7 385 Ill. 565, 53 N. E. (2d) 612 (1944).
8 401 Ill. 87, 81 N. E. (2d) 520 (1948).
1 403 Ill. 433, 87 N. E. (2d) 637 (1949).
decision, the legal question presented was one as to whether or not a person adopted by a valid decree of a state other than Illinois was to be deemed a "child . . . legally adopted" within the purview of the Illinois statute even though such person could not have been validly adopted in this state because he had attained his majority at the time of the adoption.\textsuperscript{3} It was held that the action of the state legislature, when it had amended the language of the Inheritance Tax Act by striking from it the words "any child or children adopted as such in conformity with the laws of the State of Illinois" and substituting the present phrase,\textsuperscript{4} had evidenced a deliberate design to bring about a change in the law so as to make available to all persons legally adopted under the laws of any jurisdiction, whether such laws were similar to those of Illinois or not, the benefits of the lowest tax rate and the highest exemption. The decision clearly conforms to the mandate of the case of \textit{People v. Snyder},\textsuperscript{5} wherein it was stated that, if there is doubt as to the meaning of statutory language used in delineating classes of persons and applicable tax rates, the construction should be in favor of the taxpayer. It should be noted, however, that a mere colorable compliance with the adoption laws of another state will probably prove insufficient to secure the benefits of the tax reduction.

\textbf{WILLS—CONSTRUCTION—WHETHER OR NOT BEQUEST OF MONEY ON DEPOSIT INCLUDES MONEY CONTAINED IN TESTATOR’S SAFETY DEPOSIT BOX LOCATED IN THE VAULT OF A BANKING INSTITUTION—The facts in the case of \textit{Lavin v. Banks}\textsuperscript{4} disclose that the testator bequeathed to his wife, among other things, all "monies on deposit in my name in any bank or banking institution." Testator had deposit accounts in two banks but also had a safety deposit box, containing a substantial sum in cash, located in a vault operated by a safe deposit company which was a wholly-owned subsidiary of still another banking institution. The widow’s claim that such cash in the safety deposit box passed to her by reason of the bequest aforesaid was contested by the testator’s heirs at law who filed a suit to construe the will. A trial court decree against the widow was reversed by the Appellate Court for the First District when that court concluded that a

\textsuperscript{3} Ibid., Vol. 1, Ch. 4, § 1—1. The present statute makes reference to a petition for leave to adopt a “minor” child but does not specifically forbid the adoption of adults. In Bartholow v. Davies, 276 Ill. 505, 114 N. E. 1017 (1917), the court, construing an earlier statute, held that the legislature intended the words “child” and “children” as used therein, to mean “minor child” and “minor children” respectively.

\textsuperscript{4} Laws 1919, p. 757.

\textsuperscript{5} 353 Ill. 184, 187 N. E. 158, 88 A. L. R. 1012 (1933).

1 338 Ill. App. 612, 88 N. E. (2d) 512 (1949). Leave to appeal has been granted.
liberal construction of the will, made necessary because the legatee was the testator’s widow,2 led to the belief that it was the testator’s intention to pass all money to the legatee since the average testator would not discriminate between a banking institution and a wholly-owned subsidiary operating a vault in the basement of the banking premises.3

Ordinarily, a testator’s reasonable conclusion as to the meaning of the words he has used in his will would not serve to influence a court called on to construe such will. Even if the testator has made a mistake, so long as he knows and approves the contents of his will, such mistake will be immaterial as would also be the case if he mistook the legal effect of the language used or had acted upon mistaken advice of counsel.4 In the absence of any controlling special statute, the safe deposit business is deemed to be governed by statutes relating to warehousing rather than those relating to banking operations, for the operators thereof are regarded as warehousemen and not as bankers.5 The typical arrangement between the proprietor of the safety deposit vault and the box renter is that of bailee and bailor.6 If such is the case, the contents of the box could not be said to be “on deposit” in the ordinary sense of the term, unless the court herein is willing to grant that there is a difference in the relationship which arises between the customer and a non-banking safety deposit vault, on the one hand, and that which exists between the customer and his bank, or its wholly-owned subsidiary, on the other, when he utilizes vault facilities for the protection of his cash or other valuables. It is doubted that there is any such difference, hence the construction placed on the words used in the will in question does not appear to be warranted.

2 See 69 C. J., Wills, § 1151.

3 As further evidence for that belief, the court pointed out that Ill. Rev. Stat. 1949, Vol. 2, Ch. 114, § 334 et seq., which regulates the keeping and letting of safety deposit vaults, is expressly declared inapplicable to state and national banks, whose vaults are deemed an integral part of the business of banking.

4 Elam v. Phariss, 289 Mo. 209, 232 S. W. 693 (1921); Leonard v. Stanton, 93 N. H. 112, 36 A. (2d) 271 (1944); In re Gluckman’s Will, 87 N. J. Eq. 638, 101 A. 295 (1917). In McKee v. Collinson, 292 Ill. 458 at 461, 127 N. E. 92 at 93 (1920), the court quoted from the decision in Decker v. Decker, 121 Ill. 341, 12 N. E. 750 (1887), to the effect that, as the statute requires a will to be in writing, courts of chancery have no power to add to or reform a will on grounds of mistake.

5 State v. Kelsey, 53 N. J. L. 590, 22 A. 342 (1891); Guarantee & Trust Co. v. Rector, 76 N. J. L. 87, 75 A. 931 (1910). See also National Safe Deposit Co. v. Stead, 250 Ill. 584, 95 N. E. 973 (1911).

6 Shoeman v. Temple Safety Deposit Vaults, 189 Ill. App. 316 (1914). Such is also the case where the box is in a bank, the latter being a bailee for hire, according to Framheim v. Miller, 241 Ill. App. 328 (1926).
WILLS—PROBATE, ESTABLISHMENT, AND ANNULMENT—WHETHER A PERSONAL REPRESENTATIVE, SUBSEQUENTLY APPOINTED, MAY INSTITUTE A WILL CONTEST PROCEEDING IN PLACE OF THE DECEASED HEIR AFTER THE PERIOD OF LIMITATION FIXED BY STATUTE FOR SUCH ACTIONS HAS PASSED—

In Kessler v. Martinson, the administratrix of an heir at law attempted to contest the will of the testatrix some fourteen months after that will had been admitted to probate. It appeared that the heir had died approximately seven months after probate had been granted but administration on the heir's estate had not been authorized until shortly before the will contest action was filed. The defendant moved to dismiss the complaint because it had not been filed within the nine-month period after probate fixed by statute. That motion having been sustained, the plaintiff appealed contending that the limitation period of said statute had to be construed with Section 20 of the Limitations Act which allows the legal representative an additional year in which to bring an action belonging to a person who dies before the expiration of the time within which he might have brought suit. The Appellate Court, however, affirmed the order of dismissal.

As the power of a court of equity to set aside a will is purely statutory, being unknown to the common law, it has been said that such power can be exercised only in the manner and within the limitations prescribed by the statute which creates the right. There being no vested right to bring a will contest, the time limit set by the statute becomes an element of jurisdiction, which cannot be waived for it forms an inherent part of the substantive right and is not merely a period of limitation. Such being the case, the statute cannot be enlarged by a saving clause in a general limitation statute. In the somewhat analogous case of Masin v. Bassford, the Illinois Supreme Court had held that a conservator of an incompetent heir was barred from maintaining a will contest proceeding on behalf of the incompetent after the expiration of the nine-month

1 339 Ill. App. 207, 89 N. E. (2d) 735 (1949).
3 Ibid., Vol. 2, Ch. 83, § 20. The additional one-year period is measured from the date of death and not from the date of the appointment of the legal representative.
5 Sharp v. Sharp, 213 Ill. 332, 72 N. E. 1058 (1905).
7 Waters v. Waters, 225 Ill. 559, 50 N. E. 337 (1907).
8 For a discussion of statutes which create rights not existing at common law in which time has been made an inherent element to the exercise of the right, see Smith v. Toman, 368 Ill. 414, 14 N. E. (2d) 478, 118 A. L. R. 924 (1938).
9 381 Ill. 569, 46 N. E. (2d) 366 (1943).
The present case goes one step farther in this strict construction for the administratrix in the instant case had no power to act until some months after the right of contest had been lost whereas the conservator in the case mentioned had had ample time in which to sue. Despite this, it seems safe to conclude that will contests constitute one area in which no delay will be tolerated.

Workmen's Compensation—Payment of Compensation and Compliance with Award—Whether or Not Voluntary Payments Made by Employer to Employee May be Treated as Payment of Compensation Due Employee under Workmen's Compensation Act—In the case of Olney Seed Company, Inc. v. Industrial Commission,\(^1\) the Illinois Supreme Court had to decide whether voluntary payments made by an employer to an employee, under a general policy of paying all help for time lost due to illness or accident, could be considered as compensation payments so as to allow the employer to deduct the amount thereof from a subsequent award of workmen's compensation. The employee had strained himself while lifting some bulky machinery, had been referred to the company doctor, and had been given treatment for a hernia over a period of weeks. During this time, the employee was absent from work but was paid his full weekly salary. Upon his return to work, the employee was obliged to perform lighter duties but continued to draw the same salary. He subsequently filed an application for adjustment of his claim, maintaining that the payment of wages during his absence was a voluntary and a gratuitous act on the part of the employer, performed without reference to any liability arising under the workmen's compensation statute. The employer contended that, as the wages were paid with knowledge of the accident and without denial of liability, they constituted payment on account of the compensation. An award of compensation made by the arbitrator and sustained by the commission was confirmed by the circuit court.

On proceedings in error, the Supreme Court, relying on Marshall Field & Co. v. Industrial Commission,\(^2\) ruled that where payments are made within six months after the last payment of wages but beyond the ordinary period allowed for the filing of claims. Inasmuch as the wage payments had been made with knowledge of the injury and without denial of liability, the court held

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10 Prior to the present statute, incompetents and infants had until one year after the removal of their respective disabilities in which to contest a will: Ill. Rev. Stat. 1935, Ch. 148, § 7. See also James, Ill. Probate Act. Anno., § 90, p. 93 et seq.

11 Horner, Probate Practice and Estates, § 90, p. 109 et seq.

1 403 Ill. 587, 88 N. E. (2d) 24 (1949).

2 305 Ill. 134, 137 N. E. 121 (1922). The claim for compensation there involved was filed within six months after the last payment of wages but beyond the ordinary period allowed for the filing of claims. Inasmuch as the wage payments had been made with knowledge of the injury and without denial of liability, the court held
made by an employer to his employee with full knowledge of the employee's accidental injury and without denial of liability under the act, such wage payments are to be considered as payments upon any compensation which may subsequently be awarded. While the Marshall Field case had merely decided that voluntary wage payments made by the employer could serve to toll the limitation period prescribed by Section 24 of the act, the court in the instant case stated that the act of the employer in paying wages should be uniformly construed for all purposes. As a consequence, the order for the award was reversed. This extension of the doctrine of the Marshall Field case, which had served to aid the employee, now operates to accord equal treatment to the employer. If, by making payments, he is to be held to have waived the limitation period, he should, by the same token, receive credit for the payments so made.

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that the claim was filed in apt time. It was said, in United Air Lines, Inc. v. Industrial Commission, 364 Ill. 346 at 349, 4 N. E. (2d) 487 at 488 (1936), by way of further explanation, that the "rule is based upon the doctrine that when the employer has knowledge of the injury and does not deny liability, the employee has a right to regard the payments as having been made under the act and is not bound to make demand for further compensation as long as the payments are continued." See also Tyler v. Industrial Commission, 364 Ill. 381, 4 N. E. (2d) 637 (1936).


4 The voluntary character of the payment was evidenced by the testimony of the employer's manager who, when asked why the wages had been paid, answered: "We have a policy down there . . . that we pay everybody, no matter if they are sick they get straight time. If they are hurt they get straight time . . . and we take what the insurance company pays them. They don't lose a cent." See 403 Ill. 587 at 592, 88 N. E. (2d) 24 at 26.
BOOK REVIEWS


These two reprints, the original of the first having appeared in 1938, the second in 1943, have been issued by the same publisher to overcome a scarcity brought about by limited printing and steady demand. The occasion for bracketing the two together, however, lies not so much in the identity of the publisher of these reprints as the similarity of the message delivered by each, to wit: the asserted power of the United States Supreme Court to serve as final arbiter of constitutional doctrines is neither a claim to be justified nor a performance to be applauded.

Professor Corwin’s thesis, advanced more than once and in a variety of forms, contrasts the juristic doctrine of constitutionality of law, leading to supremacy of the judicial department, with the political or departmental one under which each of the co-ordinate branches of the government is to determine for itself the constitutionality of its own acts with ultimate resort, if required, to the forum of public opinion. Put more briefly, it is a developed contrast between Jefferson’s and Marshall’s ideas of the nature of the federal government with emphasis on the former’s concepts. An appendix, containing certain of the “Letters of Brutus” which were published in 1788 by way of exposition of parts of the proposed constitution, offers a welcome antithesis to such of the Federalist papers bearing on the topic as came from Hamilton’s pen.

Much the same critical argument has been advanced by Professor Commager, but his thesis is built around an expression of Mr. Justice Frankfurter in the Flag Salute cases, one to the effect that personal freedom is best maintained by ingrained habits rather than by the coercion of adjudicated law. That thesis is developed, after a fairly extended but similar contrast between the Jefferson and Marshall concepts of court

supremacy, through a consideration of the judicial decisions bearing on minority rights. As interpreted by the author, these decisions would reveal that the United States Supreme Court has done little to advance minority interests, except in favor of a privileged few, until the court was forced so to do by the pressure of public opinion reflected through the electorate. Even then, according to the author, the court has been slow to react.

Retreat from the concept of judicial supremacy is not likely at this late date, hence Professor Corwin tends to whistle in the teeth of the wind. For that matter, Professor Commager is not likely to make any converts. Is it not possible that the mere existence of so immobile a tribunal, now that it is vested with acknowledged power, has, in itself, been a saving feature? Acting as a potential and impending brake, may its presence not have operated to save the democratic form of government from even worse excesses which might have been perpetrated by majority on minority groups? Self-education in the "abandonment of foolish legislation," as worked out between the Eighteenth and the Twenty-first Amendments, may well serve to train a majority in the real meaning of liberty. Yet there is occasion for a stern schoolmaster to prompt an unwilling pupil to recognize the need for that education. Few Americans, considering the current level of worship for the Constitution, would have it otherwise.


Professor Goodhart's ability as a lecturer is a commonplace matter of fact open to any one who may have heard, or ever read, his discourse entitled "English Contributions to the Philosophy of Law." Added evidence of his skill may be found in the printed record of still another lecture, one delivered in 1947 in honor of the late Lucien Wolf, founder and long-time president of the Jewish Historical Society of England, but which speech has now, for the first time, been revised, documented and placed in permanent format. Reflecting, as it does, the interests with which Lucien Wolf was associated, the lecture speaks, without chauvinism, of five leaders of the Anglo-American bar and judiciary who attained a fitting eminence in the field of law, two as advocates and three as judges.

The clarity of these five biographical profiles, for each is necessarily but a brief sketch, admirably provides the reader with the essence of each

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1 A review thereof appears in 27 Chicago-Kent Law Review 342-3.
subject skilfully distilled from more voluminous materials. The fundamental liberalism displayed by these men, the depth of their scholarship, their courage, their indefatigable industry, mark them not so much as prominent Jews but as honorable men of law. Is there need to guess at their names? Five such as Judah P. Benjamin, Sir George Jessel, Louis D. Brandeis, Rufus Isaacs, and Benjamin N. Cardozo would grace any country or ennoble any profession.


A practicing lawyer, unless in need of a hasty refresher as to the law, would pass these slim volumes by as being scarcely worthy of his attention despite their claim to broad examination into the common law principles underlying the subjects covered, as supplemented by reference to applicable statutory law. Certainly, what takes up volumes in monumental works in the field, as for example Fletcher on Corporations, cannot be compressed into a handful of pages no matter how skillful the author. As simple texts of the more obvious phases of the law, suitable for student use, these works might pass muster, but even then they possess deficiencies. It is true that most of the important phases of the two subjects are touched upon, but little is said, in the book on corporations, as to the rights of corporate creditors in case of insolvency and there is no treatment of issues growing out of attempts at reorganization. The twelve pages devoted to contrasting other forms of business organization, not with the corporate set-up but with each other, might well have been omitted as irrelevant and instead pieced out with a discussion of the operation of Chapter X of the Chandler Act. The partnership volume, like any other condensation, is little more than a stepping stone to what could be a much more thorough study of the subject. Both books possess the merit of logical organization, but to the extent that such organization parallels that already adopted by standard casebooks on the subject there is some occasion to believe that the preparation of these books was dictated more by a desire to provide a set of "canned" briefs for student use than to compile workable texts for the practitioner. The presence of a set of simple questions and answers in the partnership book, based on material outlined in the text, tends to confirm that belief.

If, as Webster suggests, a manual is a “small book, such as may be carried in the hand,” the title to this work is slightly on the side of misnomer. If, however, the word has acquired a secondary meaning, for example a book which may be “handled conveniently,” then the title for this publication is highly appropriate. It is, note the word, for “lawyers,” not tax experts; it deals with federal taxation; but, above all, it provides convenient access to the manifold tax problems which surround every legal transaction of consequence. Substantive tax aspects affecting wills, trusts, estates, gifts, insurance, partnerships, corporations, real estate transfers, installment sales, as well as alimony and separate maintenance payments, are considered. Tax procedures, whether before the Collector, the Department, the Commissioner, or the courts, are explained. The work-day job of draftsmanship is made easy by specimen forms, forms which range from the simple power of attorney to the complicated trust agreement. Added features, such as a table of common abbreviations, an appendix setting forth the Rules of Practice before the Tax Court, and detailed indices, supply further aids to convenient handling. It is a “desk book” which should be in every lawyer’s office.


Strange books pass, at times, across the reviewer’s desk. This one, however, may be said to be the strangest, the most incomprehensible one produced in many years. The book was intended to convey a message, for the author’s preface states: “I have tried in this small book to make a contribution to legal philosophy.” The author is capable of making such a contribution, for he has long been a distinguished professor of law, a prolific writer on legal topics, and a member of many learned organizations. But the performance, when measured in terms of the impression created in the mind of the reader, is worse than negative.

The author must have anticipated that these lectures, given at Pacific University in 1947 and since revised, would be made the subject of adverse criticism, for he wrote that the book would probably invite “attack from certain specialists on the ground that what I have written is ideology, not science.” The book may so be vulnerable, but if it is,
the attack must come from others. This reviewer merely states that what has been written by the author is not English but some form of scientific jargon. One sentence will serve to support that indictment. On page 144, for example, appears this gem of expression: "The current epistemologic scene ranges from the total idealism of phenomenology to the complete externalism of operationalism." Other, and equally abstruse statements could be quoted, if necessity arose, but there is no occasion to belabor the point.

When Professor Hall condescends to put his thoughts into readable Anglo-American prose, he may find converts for his ideas. Until then, most persons will believe he has, in fact, dealt not with ideology but with some form of gibberish, a species of unmeaningful double-talk linked to a pseudo-science.


The rudiments underlying a system of bookkeeping are something easily acquired, for no student in a law school, much less a practicing lawyer, has been able to avoid contact with mathematics in some form, even if that contact has provided no more than a knowledge of simple arithmetic. Both student and lawyer, therefore, possess the beginning skills necessary to understand the technique of accounting practices. But, as the author of this book on materials on accounting wisely notes, if the work of the accountant was limited to assembling and arranging figures and no more, his services would be skilled in character but hardly approximating the level of professional art. When the accountant goes beyond bookkeeping mechanics and deals with policy and judgment questions, however, he ceases to be a technician and becomes the valued professional adviser of business. It is then that he comes into contact with law and the courts, for no business concern accepting his guidance in this regulated and tax-ridden era can hope to operate for long without one eye on production and the other on the legal consequences of its activity. Here, then, is where the lawyer needs true accounting training for he must, to serve his clients well, be able to understand as well as to appreciate what the accounting adviser is offering by way of answer to such policy and judgment questions. The instant work, unlike most books on so-called "legal accounting," tackles the problem of providing a solid theoretical grounding in accounting principles, as well as practices, so that the lawyer may understand the only universal language utilized in an industrial society. It would be erroneous to sup-
pose a course based on this book would make a law student into a person prepared to practice accountancy. It would, however, prepare him for effective collaboration with those who do practice that profession whenever their interests should chance to meet. Nor would that student feel at sea in a strange world, for the book contains a fairly wide range of cases, many taken from the records of the Tax Court, showing the legal, and hence to him the practical, application given to the accounting materials. He would, to say the least, be a wiser person for his study of its contents.


The co-operative efforts of a host of judges, lawyers, and law professors throughout the country, working under the guiding genius of an able editor who prepared a masterly sixteen-page introduction, have resulted in the formulation of a yardstick by which it is now possible to measure the adequacy of judicial performance in any of the American jurisdictions. Through text, maps and statistics, the attitude of both bench and bar toward the minimum standards of judicial administration recommended by the American Bar Association stands revealed as, by and large, a deplorable record of inattentiveness. Progress, or lack of progress, achieved in gaining acceptance for and application of these recommendations, first made in 1937-8, is charted in black and white. There is no need, any longer, to guess at the response the bar is making to turn acknowledged need for reform into accomplished fact. The record now stands starkly revealed upon the pages of this book. It should serve to bring the blush of shame to the cheeks of all who serve the law for their compounding with the unnecessary delays, the needless technicalities, and the lack of business system which have made the courts, rather than the law, a matter of reproach, even though that criticism be oft expressed in humorous vein.

If the average lawyer has endured incompetent judges, unfit jurors, needlessly complicated practice and inexcusable delays in trial and appeal as being inescapable vices in the administration of justice, he need only read this book to realize that forward-looking jurisdictions have begun the work of reform. If he will not then press for correction of abuses in his own state, as they are here shown to exist, he must expect that others will take the work from his hands. The damage which could come from that action should alone be enough to cause him to want to undertake the task of moving his own state into the ranks of the enlightened ones.

Professor MacIver, writing about a recent book intended as a scientific study but which attained a considerable notoriety of the scatological type, said: "We should not be afraid of the truth about human behavior . . . We all agree that unenlightened guidance is bad where physical health is concerned. We must learn that it is no less bad when moral health is the issue." Knowledge concerning the sex impulse and of its more antisocial deviations, whether those who deviate be called sexual psychopaths or not, is now available, through this excellent work, to all who have proper use for such information. Two collaborating psychiatrists have here brought together a comprehensive reference book, based upon clinical research into actual case histories, depicting the part psychoanalysis and other psychiatric devices can play in revealing the motivating forces which produce sexual deviations as well as the techniques which are available to restore these pathetic victims to socially acceptable norms. The reports prepared by the authors clearly indicate that, while the problems of sexual aberration present a serious challenge, the unconscious forces responsible are within the reach of science.

Lawmakers, long bogged down with the tragedy of trying to deal with sexual offenders as criminals, involving only the process of incarceration without cure, may here learn that adequate psychiatric treatment can provide the only satisfactory remedy. Lawyers concerned over rising divorce rates may here find solution for much of the seeming mis-mating which leads to marital disharmony. Penologists, faced with the incidence of homosexual practices among inmates of prisons, may also discover, with profit, the modern answer to an ancient problem. Against the possibility that technical writing may confuse the uninitiated reader, an excellent glossary as well as an extended bibliography accompanies the volume. Its message is one that should not be neglected.


It has been suggested that not the least difficult problem in estate planning is that of surmounting the incipient inertia of testators. By writing this slender volume, Professor Bowe has done yeoman service in making readily available a number of the convincing reasons for the taking of immediate action. In a lucid and stimulating fashion, the author discusses the significant impact of taxation on each phase of estate planning. To be sure, one must not lose sight of all else in the effort to avoid
taxation, but without doubt taxation is now, and increasingly will be, a substantial consideration in any estate plan.

The book is not intended as a comprehensive treatment of the technical aspects of this field. It is, rather, a provocative discussion of the sundry problems one must consider in preparation for any estate analysis. Numerous examples of useful devices are suggested by which one may avoid expensive pitfalls while, at the same time, one makes available to succeeding generations the greatest amount of property possible. It is submitted that, on occasion, the author may have sacrificed accuracy in his examples for the purpose of simplification, but unquestionably each example provides dramatic emphasis to the main theme. Attorneys, accountants, trust men, as well as others interested in estate planning, owe it to themselves to read Chapter VIII, entitled "Necessity for Competent Advice," for here in a nutshell are illustrations of the financial havoc which can beset those who are uninitiated in this esoteric area of the law. The book, happily, is written in a most readable and engaging style. This fact, as well as the importance of its content, ought to make the publication a best seller in its class.


If the quality of readableness be the sign of a good book and the quality of scholarliness the test of a great one, then it may be said that this short text on the law of trusts falls somewhere between goodness on the one hand and greatness on the other. Not a little of its value lies in the fact that it is brief. Despite its apparent size, the extreme width of page margins, the presence of bibliographical tables and indices totalling roughly one-seventh of the whole book, and the large size of the type used therein, all go to reduce the actual compass of the text. But brevity never bothered law students, for whom such books as these are written, hence it remains a worth-while addition to the field. Were this no more than a mere condensation of larger and more standard texts, those for example prepared by Bogert and Scott, there would be occasion to say little more than has been said. It is, however, an original work, the author having sought to inject reason into a context which has, to some extent, lacked the clarification which may be found in other property subjects. Sharp scrutiny of the common-law restrictions which have been imposed on other property doctrines has resulted, as the author states, in bringing them into sharp focus. By attempting to do much the same thing for the primary doctrines of trust law, the author has earned deserved praise for his efforts and commendation for his results.

1 For a full discussion of all of the problems, see Shattuck, An Estate Planner's Handbook (Little, Brown & Co., Boston, 1948).

This book, prepared by a professor of industrial relations at the University of Ottawa, in Canada, states that the "work is dedicated to the attainment of industrial peace." The author expresses the feeling that the book "can make a direct contribution towards better understanding between labor and management by defining terms and delineating fields of discord." It is difficult to see how controversies between management and labor will be wiped out in this fashion when it is well known that such disputes are not based on any misunderstanding of terms but rather by a conflict of economic interests. It is, therefore, suspected that the high-sounding phrases of the dedication were chosen to furnish an excuse for a rather trivial work which is neither an indispensable guide, as the imprint would proclaim, nor of particular usefulness to those interested in and concerned with labor relations.

Employers and union representatives, when dealing with each other, are quite well aware of, and in agreement with each other, as to the terms they may use in the give-and-take of collective bargaining. A labor dictionary will not solve their problems nor smooth the road to an easier understanding. With this large segment of potential users eliminated, there remains a group of lawyers, teachers, and students who might be interested in the field of labor relations and labor law. It is doubtful whether definitions of the type compiled in this dictionary will materially aid them, for there is no short-cut possible to the intricate web of labor law. The value of this book, then, seems to be reduced to an absolute minimum.