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Case Notes

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CASE NOTES

ADMINISTRATIVE LAW—JUSTICIABLE CONTROVERSY—RIGHTS TO INJUNCTIVE RELIEF FROM COMMUNISTIC LISTING BY ATTORNEY GENERAL

The Attorney General of the United States, claiming authority under Executive Order 9835, without a hearing listed plaintiffs who were ostensibly of a charitable nature, as subversive and communistic organizations. This information was handed over to the Loyalty Review Board, which disseminated it to all government departments and agencies for their use in discharge proceedings. Membership in a subversive organization was one of the factors considered in determining an employee's disloyalty. The three organizations brought actions for declaratory and injunctive relief against the Attorney General seeking to have their names deleted from the list. They alleged that their groups were organized for permissible purposes only and that this listing by the Attorney General was resulting in great harm to each of them. Sustaining the Government's motions to dismiss in each proceeding, the district court held in the first two actions that the complaint failed to state a cause of action and in the third that the plaintiff had no standing to sue. These dismissals were all affirmed by the court of appeals and the Supreme Court granted certiorari, consolidating the actions. *Held*: Reversed. Petitions seeking to review the determination, made without hearing by the Attorney General, that organizations on the face of the record engaged solely in charitable or insurance activities were communistic set out a good cause of action or justiciable controversy, and the plaintiffs had standing to sue for injunctive relief. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817 (1951).

The action of an officer of the sovereign can be regarded as so "illegal" as to permit a suit for specific relief against the officer as an individual if it is not within the officer's statutory powers, or, if within those powers, the powers are constitutionally void. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949). Equity jurisdiction may be invoked when it is essential to the protection of rights asserted, even though the complainant seeks to enjoin the bringing of criminal action. *Shields v. Utah Idaho Cent. R. Co.*, 305 U.S. 177, 59 S.Ct. 160, 83 L.Ed. 111 (1938). The ultimate test of reviewability is not to be found in an over-refined technique, but in the need of the review to protect the parties from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control. *Columbia Broadcasting System v. United States*, 316 U.S. 407, 62 S.Ct. 1194, 86 L.Ed. 1563 (1942). The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L. Ed. 617 (1937). The term "direct injury" is used in its legal sense as meaning a wrong which results in the violation of a legal right. *Alabama Power Co. v. Ickes*, 302 U.S. 464, 58 S.Ct. 300, 82 L. Ed. 374 (1938). A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. RESTATEMENT, TORTS § 559 (1938).

The decision in the instant case was complicated in that each of the five-man majority wrote his own opinion, reducing the opinon of the court to a mere judgment of reversal. In each opinion there was agreement that the complaining organizatons had standing to sue, though on different grounds. Although not expressly mentioned by

each of them, it is also presumed that in voting for reversal they all recognized that the plaintiffs set out a cause of action.

Briefly the opinions were as follows: Mr. Justice Burton announced the judgment of the court and an opinion in which Mr. Justice Douglas concurred. He decided the case without determining the constitutional issues, saying the Government's motion to dismiss admitted the allegations in the petitions that the organizations were not communistic and therefore the Attorney General's actions were patently arbitrary and did not follow the Executive Order's instructions concerning appropriate investigation and determination. Mr. Justice Black held that the dismissal should be reversed primarily because the acts authorized by the Executive Order in question violated the constitutional prohibition against a bill of attainder and constitutional rights guaranteed by the First Amendment, and that lack of notice and a fair hearing also violated the due process clause of the Fifth Amendment. Directing his opinion primarily toward the question of standing to sue, Mr. Justice Frankfurter found that the injury complained of by the plaintiffs was one which, apart from governmental immunity, would clearly be actionable at common law. His opinion also recognized a violation of due process. Basing his decision on a lack of due process in denying a hearing at any time, Mr. Justice Jackson voted for reversal since the organizations had in his opinion a standing to sue to vindicate the constitutional rights of their members. In an additional opinion, Mr. Justice Douglas expressed his views concerning the constitutional questions raised by the other members of the court. Pointing out the lack of procedural due process, he held that the system of administrative loyalty trial as a whole was unconstitutional.

The net effect of this case was to decide a very narrow issue. That question was whether the motions to dismiss the plaintiffs' complaints should be sustained. The Supreme Court answered in the negative and held that the petitioners were entitled to an opportunity to substantiate the allegations stated in their complaints. The court ruled that the cases should be sent back to be tried on their facts. The holding can stand for nothing more; it does not purport to abolish the program of the Loyalty Review Board or even to change the procedures followed by the Attorney General. Such a ruling would have to come at a later stage in the judicial process, after the issue had been joined in the district court. But it should be considered that the case does put the Attorney General on notice that he must be prepared to prove in court that he has acted, in the language of the Executive Order, "after appropriate investigation and determination." Although the court definitely held that a listing by the Attorney General could be challenged as constituting a defamatory statement, it must determine the constitutionality of the Attorney General's action and of the Executive Order itself at a later date, after the facts which led to the listing have been introduced in a trial in the district court.

CUBBEDGE SNOW, JR.

INSURANCE—EXCLUSIONARY CLAUSE—CONSTRUCTION OF TERM "POSSESSION"

An automobile dealer by its sales manager delivered an automobile covered by dealer's theft policy to a prospective purchaser, giving him permission to drive it to a certain apartment for his wife's inspection and approval. Neither he nor the car returned. The dealer sued on the policy. Defendant insurer denied liability for the theft of the automobile because of a clause in the policy excluding liability for loss suffered by an insured who voluntarily parts with possession of, or title to, any insured automobile, whether or not induced to do so by any fraudulent scheme, trick, device, or false pretense or otherwise. Defendant's motion for a nonsuit was allowed, and plaintiff appealed; *Held*: Affirmed. The insured voluntarily parted with possession of the insured automobile within the meaning of the exclusion clause contained in the policy. *McDowell Motor Co. v. New York Underwriters Ins. Co.*, 233 N.C. 251, 63 S.E.2d 538 (1951).

Policies of insurance are liberally construed in favor of the object to be accomplished, and strictly against the insurer, as they are issued upon printed forms prepared by experts at the insurer's instance. *Johnson v. Mutual Ins. Co.*, 154 Ga. 653, 115 S.E. 14 (1922). Where terms are open to more than one construction, the one more favorable to the insured must prevail. *Tripp v. United States Insurance Co.*, 141 Kan. 897, 44 P.2d 236 (1935). The insurer knows or is presumed to be acquainted with the practices of the trade he insures. *Globe & Rutgers Fire Ins. Co. v. Winter Garden Co.*, 9 F.2d 227 (2nd Cir. 1925). The exclusion clause contained in the principal case is contained in most automobile theft policies, and many of the cases have been decided on the construction of the term "possession." "There is no word more ambiguous in meaning than possession." *National Safe Deposit Co. v. Stead*, 232 U.S. 58, 67, 34 S.Ct. 209, 212, 58 L. Ed. 504, 509 (1914). Courts have advanced two theories of possession, a non-legal construction which means any surrendering of the physical control of a thing to another, and a more strictly legal construction which limits "possession" to cases where the parties intend for the transferee to have a right to exercise the control given for his purpose. *Bennett Chevrolet Co. v. Bankers & Shippers Ins. Co.*, 58 R.I. 16, 190 Atl. 863, 109 A.L.R. 1077 (1937). Courts applying strict construction hold that a prospective purchaser takes only temporary custody and constructive possession remains in the insured. *McConnell v. Fireman's Fund Ins. Co.*, 178 F.2d 76 (5th Cir. 1949). A "constructive possession" is defined to be a possession in law without one in fact. *Hodges v. Eddy*, 38 Vt. 327, 344 (1865). A prospective purchaser has been held to be a naked bailee, and as such takes only bare custody of the automobile for a limited time and special purpose. *Allen v. Berkshire Mut. Fire Ins. Co.*, 105 Vt. 471, 168 Atl. 698, 89 A.L.R. 465 (1933). The authorities agree that one having mere custody of another's property may commit a larceny of it so as to allow recovery under a similar clause. *Miller v. Newark Fire Ins. Co.*, 12 La. App. 315, 125 So. 150 (1929); 6 BLASHFIELD'S CYCLOPEDIA OF AUTOMOBILE LAW & PRACTICE, § 3717 (1945).

The rule requiring a liberal construction for the insured of ambiguous language however is one of selectivity of meaning and not one of obliteration of all meaning. *Cement, Sand & Gravel Co. v. Agricultural Ins. Co.*, 225 Minn. 211, 30 N.W.2d 341 (1947). In a factual situation similar to that in the instant case the exclusion clause was construed to deny insurer's liability for losses resulting from an intended temporary parting with possession. *Stuart Motor Co. v. General Exchange Ins. Corp.*, 43 S.W.2d 647 (Tex. Civ. App. 1931). The court there held that that was what the clause contemplated since it would be a rare case where the owner intended to part with the permanent possession and not also the title upon a false pretext. There is nothing in the clause to indicate that the term was used in a restrictive or technical sense and thus it should be given its commonly understood meaning, which is that a person has possession when he has physical control. *Boyd v. Travelers Fire Ins. Co.*, 147 Neb. 237,

22 N.W.2d 700 (1946). The basic question seems to depend upon for whose direct and immediate purpose the physical possession is surrendered. *Jacobson v. Aetna Casualty & Surety Co.*, 46 N.W.2d 868 (Minn. 1951). Thus it would seem that a voluntary parting of possession is effected when the surrender is accompanied by an intent that the control so surrendered shall be exclusively vested in the recipient, to be exercised by him for his immediate and direct purpose or use.

WILLIAM K. BUFFINGTON.

MUNICIPAL CORPORATIONS—LIABILITY FOR NEGLIGENCE—INJURY TO PRISONER ON STREET PROJECT

Plaintiff was a prisoner of the City of Atlanta and was assigned to work on a street project. He was ordered by the city's "work gang boss" to enter an excavation to shovel out dirt and rocks, and was injured when a cave-in occurred. Plaintiff brought this action against the city for his injuries, alleging negligence in not providing a safe place to work. The defendant city demurred. The demurrer was overruled and the city appealed. *Held*: Reversed. The city was not liable for injuries sustained by prisoner working on a street project since it was engaged in the performance of a governmental function. *City of Atlanta v. Hurley*, 83 Ga. App. 879, 65 S.E.2d 44 (1951).

The question of liability of the municipality depends on whether at the time of the injury the municipality is engaged in a governmental or ministerial duty. It is the character of the work which determines the liability of a city for a negligent performance thereof. *Mayor of Savannah v. Jones*, 149 Ga. 139, 99 S.E. 294 (1919). The authorities make a clear distinction between cases where injuries are occasioned by the agents of municipalities while engaged in the performance of governmental functions, or in private enterprises. This latter class of activities is not discretionary, but ministerial and absolute, and, for an injury resulting from negligence in a ministerial function, the municipality is liable in a civil action for damages, in the same manner as an individual or private corporation. *Mayor of Savannah v. Jordon*, 142 Ga. 403, 83 S.E. 109 (1915). The court there held that it is immaterial under what department of a municipality the work is done, as it is the character of the work which determines whether it is a governmental or ministerial service. A policeman, while on duty is not by reason of his position as an employee of the city precluded from recovering damages from the city for personal injuries caused by the city's neglect to keep the highway in proper repair. *Kennedy v. City of Savannah*, 9 Ga. App. 760, 72 S.E. 160 (1911). Officers of a municipality, who in one capacity are charged with the exercise of its governmental functions, may be its ministerial agents when acting in its corporate or private enterprises, and in the latter the municipality will be civilly liable for their negligent and wrongful acts. *Birmingham v. McKinnon*, 200 Ala. 111, 75 So. 487 (1917). The general rule of non-liability has no application where the duties, under proper charter authority, relate to branches of municipal endeavor which are private or ministerial in their nature. *Mayor of Savannah v. Cullens*, 38 Ga. 334 (1868).

The court in the instant case cited *Nisbet v. City of Atlanta*, 97 Ga. 650, 25 S.E. 173 (1896), as controlling. That case held that a municipal corporation is not liable in damages for the death of a city prisoner while working on the public streets, although his death resulted from negligence on the part of the city's foreman, and from the failure of the foreman to provide medical attention and treatment. The *Nisbet* case fails to recognize the dual function of the city at the time of the accident and was decided on cases which had no relation to ministerial functions, and were in fact clearly governmental functions; these cases were *Wilson v. Mayor of Macon*, 88 Ga. 445, 14 S.E. 710 (1891), and *Love v. City of Atlanta*, 95 Ga. 129, 22 S.E. 29 (1894).

It appears that the court failed to recognize the combination of the two functions of the city at the time of the accident. Had this dual question been considered, it is probable that the court would have followed the modern tendency to restrict rather than extend the doctrine of municipal immunity.

WILLIAM WISSE.

PARTNERSHIPS—JOINT ADVENTURES—INTENT NECESSARY TO CONSTITUTE JOINT ADVENTURE

Plaintiff sought to enforce mechanic's lien against land of defendant whereon plaintiff did grading for construction of a race track pursuant to contract entered into with lessee from year to year of the land. Defendant-lessor had reserved right to operate on the leased premises concessions, such as restaurants and soft drink stands; also, as further consideration, the lessee was to pay lessor ten percent of gross income from race track after specified deductions. Any expenses in excess of fifty dollars to restore land to its former condition upon expiration of lease to be borne by lessee. From a judgment that the lien would attach, defendant appealed. *Held*: Reversed. The lease did not render the parties joint adventurers in carrying out the terms of the lease so as to subject the land to mechanic's lien for work performed under contract with lessee. *Lilly v. Munsey*, 63 S.E.2d 519 (W.Va. 1951).

The joint adventure has been defined as a special combination of two or more persons who, in some specific venture, seek a profit jointly without any actual partnership or corporation. *Aiken Mills v. United States*, 144 F.2d 23 (4th Cir. 1944). It has also been defined as a partnership limited to one transaction or to several transactions. In re *Gotfried*, 45 F. Supp. 939 (D.C. Cal. 1942). In order to constitute a joint adventure there must be an agreement to enter into an undertaking in which the parties to the agreement have a community of interest and a common purpose in its performance. *Eagle Star Ins. Co. v. Bean*, 134 F.2d 755 (9th Cir. 1943). Persons engaging in a joint adventure must combine their property, money, efforts, skill or knowledge in a common undertaking. *Alexander v. Turner*, 139 Neb. 364, 297 N.W. 589 (1940). And most jurisdictions, in determining whether a joint venture exists in a particular transaction, insist that some element of joint participation in the management or conduct of the enterprise, or right of mutual control, be present. *Balestrieri & Co. v. Commissioner*, 177 F.2d 867 (9th Cir. 1949). Such element may be expressed, or may be implied from the conduct of the parties. *Hoge v. George*, 27 Wyo. 423, 200 Pac. 96 (1921). Agency principles have been utilized in holding joint adventurers liable to third parties, and as a general rule each of several joint adventurers has power to bind the others and to subject them to liability to third parties in those matters which fall within the scope of the general enterprise. *Goerig v. Continental Casualty Co.*, 167 F.2d 930 (9th Cir. 1948).

In determining whether a joint adventure exists in the relationship of parties to an enterprise or undertaking, the intention of the parties, expressed or implied, is of prime importance. *Gliechman v. Famous Players-Lasky Corp.*, 241 Mich. 266, 217 N.W. 43 (1928). If the intent to act as joint adventurers exists, the parties will be joint adventurers, although they also intended to avoid the personal liability of that relationship. *Bryce v. Bull*, 106 Fla. 336, 143 So. 409 (1932). This intent is to be determined in accordance with the ordinary rules governing the interpretation and construction of contracts; but as to third persons, the legal, and not the acutal, intention controls. *Rae v. Cameron*, 112 Mont. 159, 114 P.2d 1060 (1941). Seemingly the holding in the instant case follows the majority rule and it seems to be based upon sound logic and reason. As a legal concept, a joint adventure is not a status created or imposed by law, but is a relationship voluntarily assumed and arising wholly *ex contractu*, and in the instant case no evidence was presented to show that a joint adventure was intended.

S. DANIEL PACK.

PRACTICE AND PROCEDURE—DECLARATORY JUDGMENTS—SUPREME COURT JURISDICTION IN CASES NOT INVOLVING TITLE TO LAND OR EQUITABLE RELIEF

Plaintiff, grantee in possession, brought action under the Declaratory Judgment Act, Ga. Laws 1945, p. 137, GA. CODE ANN. § 110-1101 *et seq.*, (Supp. 1947), to determine rights of the parties to land defendant now claims on ground of incompetency at time of conveyance. The land had been granted to plaintiff by defendant during interval she was out of the state hospital for the mentally ill. Plaintiff's petition concluded with a specific prayer for the rights of the parties under the deed to be declared and a general prayer for any and all further relief he is entitled to under the Declaratory Judgment Act. The Constitution of Georgia expressly gives the Supreme Court jurisdiction of all appellate cases involving title to land and those in equity. GA. CONST. Art. 6, § 2, ¶ 4, GA. CODE ANN. § 2-3704 (1948 Rev.). Appellate jurisdiction of all cases not expressly given to the Supreme Court is lodged in the Court of Appeals. GA. CONST. Art. 6, § 2, ¶ 8, GA. CODE ANN. § 2-3708 (1948 Rev.) From an adverse ruling on general demurrer the defendant appealed to the Supreme Court. *Held*: As this case does not involve title to land, and a proceeding under the Declaratory Judgment Act is not an equitable action per se, the Court of Appeals and not the Supreme Court has appellate jurisdiction. *Bond v. Ray*, 207 Ga. 559, 63 S.E.2d 399 (1951).

A constitutional amendment of 1916 conferred jurisdiction on the Supreme Court to hear all appellate cases involving title to land. Ga. Laws 1916, p. 19. The courts have had many occasions to construe this provision which was carried over into the 1945 Constitution, *supra*. "Cases involving title to land" has consistently been held to mean those cases wherein plaintiff asserts legal title to the land in question and depends upon the outcome of his action to recover possession. *Brumfield v. Home Owners Loan Corp.*, 196 Ga. 821, 27 S.E.2d 678 (1947); *Radcliffe v. Jones*, 174 Ga. 324, 162 S.E. 679 (1931).

The purpose of the Declaratory Judgment Act is to settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and not to impair equity jurisdiction as it previously existed. GA. CODE ANN. § 110-1110 *et seq.* (Supp. 1947). An action under the Declaratory Judgment Act is not equitable per se, *Humbler v. Garrard*, 205 Ga. 357, 53 S.E.2d 748 (1949), but the nature of the allegations and prayers determine whether the action is at law or in equity. *Griffin v. Securities Investment Co.*, 181 Ga. 455, 182 S.E. 594 (1935); *Taylor Lumber Co. v. Clark Lumber Co.*, 159 Ga. 393, 125 S.E. 844 (1924). To make a case in equity, the allegations of the petition must be applicable to the equitable relief prayed, and there must be a prayer either for the specific relief asked or for general relief. *Cooper v. Coral Gables, Inc.*, 45 Ga. App. 290, 164 S.E. 227 (1932). A prayer for general relief is sufficient to grant a complainant such relief as is consistent with and entirely within the scope of the pleadings, provided the nature of the case is such that under such prayer some character of relief may be granted which is consistent not only with the case made by the petition, but also with some specific prayer therein. *Matson v. Crowe*, 193 Ga. 578, 19 S.E.2d 288 (1942); *Monroe v. Diamond Match Co.*, 182 Ga. 438, 185 S.E. 814 (1938).

Apparently this action is in the nature of a hybrid proceeding. Though brought under the Declaratory Judgment Act, plaintiff specifically prayed for a declaration of rights under a deed and concluded with a general equitable prayer. The ruling that the instant case did not involve title to land was consistent with prior holdings, as a plaintiff can never maintain an action to recover land already in his possession. Nevertheless, it would seem that an action in the nature of a suit to remove a cloud on title to real property would be of such equitable character that the Supreme Court would take direct appellate jurisdiction.

ANDREW J. AULTMAN.

TORTS--LEGISLATIVE IMMUNITY—INVESTIGATING COMMITTEES

Under Civil Rights statute, 16 STAT. 144 (1870), 8 U.S.C. §§ 43, 47(3) (1946), plaintiff sued the chairman of the Senate Fact-Finding Committee because plaintiff was ordered to appear before the committee for hearing on petition he had circulated among members of the state legislature and was prosecuted for contempt upon refusal to testify. Plaintiff alleged that this hearing was held to, and did, deprive him of his constitutional rights of free speech, to petition legislature for redress of grievances, equal protection, due process, and constitutional privileges and immunities. Federal district court dismissed complaint. Plaintiff appealed and the court of appeals reversed, holding that the complaint stated a cause of action (183 F.2d 121 (9th Cir. 1950)), and defendant brought certiorari. *Held*: Reversed. Where plaintiff had circulated petition among legislators charging legislative committee with unfair political activities, and indicating that plaintiff had previously given the committee false information, committee was acting wthin sphere of legislative activity in calling plaintiff before it for examination, and its members were not civilly liable under Civil Rights statute. *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L. Ed. 1019 (1951).

The United States Constitution and practically all of the state constitutions in this country have followed the early English Parliaments in granting immunity from arrest and civil process to legislators and members of Congress while attending, and going to and from, sessions. 4 AM. JUR., *Arrest* § 95 (1936), and cases cited therein. Members of Congress are expressly granted exemption from arrest during these times, and the same section of the Constitution prevents their being questioned in any other place for speeches and debates in either house. U. S. CONST. Art. I, § 6. These provisions have been liberally construed to protect legislators from civil liability for acts done in their official capacities. *Coffin v. Coffin*, 4 Mass. 1 (1808). Legislators acting for the effective exercise of the state's legislative powers are serving in their official capacities as members of the state legislature and are protected by legislative immunities. *Terrell v. King*, 118 Tex. 237, 14 S.W.2d 786 (1929). The legislature has the authority, as an essential auxiliary to the legislative functions, to ascertain by inquiry facts which affect public welfare and the affairs of government. In re, *Joint Legislative Committee to Investigate Educational Systems of N. Y.*, 285 N.Y. 1, 32 N.E.2d 769 (1941); Ex parte *Battelle*, 207 Cal. 227, 277 Pac. 725, 65 A.L.R. 1497 (1929). Congress and state legislatures have the power to conduct investigations in aid of legislative functions and to compel the attendance of witnesses. *McGrain v. Daugherty*, 273 U.S. 135, 47 S.Ct. 319, 71 L. Ed. 580, 50 A.L.R. 1 (1926); *Greenfield v. Russell*, 292 Ill. 392, 127 N.E. 102, 9 A.L.R. 1334 (1920).

Where a congressional committee has been constitutionally created, a court may not pass upon the wisdom of its creation, the character of the members of the committee, or the method of its procedure, unless it transgresses authority committed to it by the Congress under the Constitution. *Dennis v. United States*, 171 F.2d 986 (1948); *State v. Terre Haute & I. R. Co.*, 166 Ind. 580, 77 N.E. 1077 (1906). The courts have no power to inquire into the motives of legislators nor to declare their enactments void, however unnecessary or unwise they are, nor are the courts a haven against unjust, unwise, and oppressive laws unless they transgress against either the State or the Federal Constitution. *Kittinger v. Buffalo Traction Co.*, 160 N.Y. 377, 54 N.E. 1081 (1899); *Peay v. Nolan*, 157 Tenn. 222, 7 S.W.2d 815, 60 A.L.R. 408 (1928). The principal case follows a long line of decisions based on the theory that the public interest outweighs individual rights and privileges, and legislators acting in their official capacities are not civilly liable for infringing on these individual rights.

C. WALLACE WHITE.

TRADE REGULATION—PRICE FIXING—NON-SIGNER PROVISION IN STATE FAIR TRADE ACT

Respondent foreign corporations sold their products, gin and whiskey, to wholesalers in Louisiana, who in turn sold to retailers. These corporations attempted to maintain uniform retail prices for their products by entering into minimum price-fixing contracts with retailers. Over one hundred Louisiana retailers signed these agreements. Schwegmann Brothers, a retailer, refused to sign and sold the distributors' products at cut-rate retail prices, having full knowledge of the terms of the price-fixing contracts. The Sherman Act declares that every contract, combination, or conspiracy in restraint of interstate trade or commerce is illegal. 26 STAT. 209 (1890), 15 U.S.C. § 1 (1946). The Miller-Tydings Amendment to the Sherman Act provides that the federal law shall not render illegal contracts or agreements prescribing minimum prices for the resale of a commodity which bears the trade-mark or brand of the producer or distributor and which is in free competition with commodities of the same general class produced or distributed by others, provided such contracts are made lawful as applied to intrastate transactions by the states. 50 STAT. 693 (1937), 15 U.S.C. § 1 (1946). The Louisiana Fair Trade Act of 1936, providing for resale price maintenance, contains a non-signer provision binding all retainers to comply with price maintenance contracts between retailers and producers of trade-marked or branded goods, if the retailers have knowledge of such contracts, regardless of whether or not they sign. LA. R. S. § 51:391 *et seq.* (1950). Relying upon this Louisiana act, the distributors sued in the United States District court to enjoin Schwegmann Brothers and others from selling at less than the minimum prices stipulated in the contracts. The district court granted preliminary injunctions, which judgment was affirmed by the court of appeals. The United States Supreme Court granted certiorari to Schwegmann Brothers. *Held*: Reversed. The Miller-Tydings Amendment to the Sherman Act sanctions only contracts and agreements, and since it contains no non-signer provision, such a provision in the Louisiana Fair Trade Act is unenforceable and illegal as a price-fixing scheme when applied in interstate commerce. *Dissent*: Both the words of the statute and its legislative history indicate that the purpose of the Miller-Tydings Amendment was to place Congress' approval upon state fair trade acts, each of which contains a non-signer provision, and therefore such a provision should be valid and enforceable. *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 71 S.Ct. 745, 95 L. Ed. 1035 (1951).

Price-fixing agreements are illegal per se under the Sherman Act, and no showing of competitive evils eliminated by the agreements may be interposed as a defense. *United States v. Socony-Vacuum* Oil Co., 310 U.S. 150, 60 S.Ct. 811, 84 L. Ed. 1129 (1940). A state does not give immunity to violators of the Sherman Act by authorizing the violation; a state enactment must yield to the supremacy of the Constitution of the United States and the acts of Congress enacted in pursuance of its provisions. *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L. Ed. 315 (1943). The Illinois Fair Trade Act was held constitutional, the United States Supreme Court deciding that neither due process nor equal protection was denied by the act; and that the primary object of the act was to protect the good-will, considered as property, of producers of identified goods. *Old Dearborn Dist. Co. v. Seagram Distillers Corp.*, 299 U.S. 183, 57 S.Ct. 139, 81 L. Ed. 109 (1936). By the Miller-Tydings Act of 1937, Congress recognized the right of the states, under the police power, to enact statutes making lawful minimum price-fixing contracts for commodities bearing trade-marks. *Pepsodent Co. v. Krauss Co.*, 200 La. 959, 9 So. 2d 303 (1942). A New York decision holds that a dealer who does not sign a price maintenance agreement is just as amenable to the provisions of a fair trade act as one who does sign, but relief cannot be obtained against him unless it appears that he had notice of the terms of the price-fixing agreement. *Calvert Distillers Corp. v. Nussbaum Liquor Store*, 166 Misc. 342, 2 N.Y.S. 2d 320 (Sup. Ct. 1938). Still another view of the problem was taken in the decision that if a retailer buys a com-

modity with knowledge of the terms of an existing price maintenance agreement, there is an implied agreement that he assents to the restrictions already imposed, since he was not obliged to purchase. *Old Dearborn Dist. Co. v. Seagram Distillers Corp., supra.* A non-signing retailer having knowledge of price maintenance contracts will be restrained from selling below fixed prices. *Eric Calamia v. Goldsmith Bros.*, 299 N.Y. 636, 87 N.E. 2d 50 (1949).

Whether a statute is to be given strict or liberal interpretation depends on several factors, among which are reference to former law, reference to persons and rights affected, reference to the letter or language of the statute, and reference to the purposes and objects of the statute. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §§ 5501-5505 (3d ed., Horack, 1943). The majority opinion in the principal case is a strict interpretation of the Miller-Tydings Amendment and seems proper, for it proceeds along the line that if Congress had intended to insert a non-signer provision into the Miller-Tydings Amendment, it would have done so. It is not too late to have the Sherman Act further amended in that manner. If forty-five states have fair trade acts containing non-signer provisions, Congress should enact legislation making the non-signer provision valid and enforceable in interstate commerce.

MAX R. MCGLAMRY.

WILLS—ADOPTIONS—REVOCATION OF PREVIOUSLY MADE WILL BY ADOPTION OF CHILD

The testatrix executed her will in 1938, making no reference to or provision for any child or children. In 1949, she and her husband adopted a minor child. Testatrix died in 1950 without changing her will, and the will was filed by the executrix for probate. The husband of testatrix, individually and as next friend of their adopted child, filed a caveat alleging that the will was impliedly revoked by the subsequent adoption of the child. The superior court sustained a motion to strike the caveat, and the husband appealed. *Held*: Reversed. An antecedent will, which makes no provision in contemplation of an adoption, is revoked by implication or inference of law by the testatrix' legal adoption of a minor child. *Thornton v. Anderson*, 207 Ga. 714, 64 S.E.2d 186 (1951).

The Georgia statute revoking a previously executed will upon the marriage of, or birth of a child to, a testator was enacted in 1834, and appears in GA. CODE § 113-408 (1933). See *Holloman v. Copeland*, 10 Ga. 79 (1851) (birth); *Ellis v. Darden*, 86 Ga. 368, 12 S.E. 652, 11 L.R.A. 51 (1890) (marriage). In 1949, the Georgia legislature amended the state's adoption statute (GA. CODE ANN. § 74-144 (Supp. 1949)) by providing that an adopted child shall be considered in all respects as if it were a child of bodily issue of its adoptive parents, and entitled to all rights and privileges of such issue. Ga. Laws 1949, p. 1157. In the principal case, the Supreme Court of Georgia was forced to go outside the state for decisions on whether, under the 1949 act, an adoption revoked an antecedent will. In a case which arose before the 1949 act became effective, the court had decided that the word "children" in a will included only natural, legitimate children, and not adopted children. *Wilson v. Ingram*, 207 Ga. 271, 61 S.E.2d 126 (1950). See also *Comer v. Comer*, 195 Ga. 79, 23 S.E.2d 420, 144 A.L.R. 664 (1942). In most jurisdictions, where the birth of a child to a testator revokes a previously executed will, adoption has been held to have the same effect. 1 AM. JUR., *Adoption of Children* §61 (1936). One court applied the common law rule of revocation by subsequent marriage and birth of a child in holding that a marriage and an adoption revoked an antecedent will *Glascott v. Bragg*, 111 Wis. 605, 87 N.W. 853 (1901). Others have held that statutes giving an adopted child the rights of born children were enough to cause a revocation upon adoption. *Alexander v. Samuels*, 177 Okla. 323, 58 P.2d 878

(1936); In re *Rendell's Estate*, 244 Mich. 197, 221 N.W. 116 (1928). There is, however, authority to support the contrary view, and some courts strictly construe revocation statutes to give effect to the will of a testator who has subsequently adopted a child. *Davis v. Fogle*, 124 Ind. 41, 23 N.E. 860 (1890); *Sorrell v. Sorrell* 193, N.C. 439, 137 S.E. 306 (1927). In re *Commassi's Estate*, 107 Cal. 1, 40 Pac. 15 (1895), appears to fall in this class, but that case did not cite a statute which gave adopted children the rights of born children.

In a well-reasoned dissenting opinion, Chief Justice Duckworth stated in the instant case that the 1949 act amended only the adoption statute, and not the statute providing for revocaion of wills. However, the majority was not without precedent in arriving at its decision. Three cases reaching that result were in line with the principal case in that separate statutes provided (1) that the birth of a child to a testator revoked a previously executed will, and (2) that an adopted child had the same legal rights of inheritance as a child of bodily issue. They were *Hilpire v. Claude*, 109 Iowa 159, 80 N.W. 332 (1899); *Flannigan v. Howard*, 200 Ill. 396, 65 N.E. 782 (1902); and In re *Guilmartin's Estate*, 156 Misc. 699, 282 N.Y.S. 525 (Surr. Ct. 1935), *aff'd*, 277 N.Y. 689, 14 N.E.2d 627 (1938). The Georgia Supreme Court, in its first decision on this point, followed the majority of jurisdictions in reaching its conclusion.

M. CLARENCE STREETMAN.

WILLS—CONSTRUCTION—INCOME TAX LIABILITY ON BEQUESTS

A will provided for several small bequests, then provided that the rest of the estate be placed in trust from which claimant was to be paid $7,000 monthly for life, "free and clear of any and all her debts, contracts or engagements. . . . " Thereafter, the will named the executors and trustees, and then provided as follows: "All the bequests, legacies and devises herein contained are to be free from any and all taxes lawfully imposed by the United States Government or any state government or any municipal authority thereof, which taxes are to be paid by my (testator's) estate." The claimant contends that the $7,000 per month was to be free of annual income taxes for the rest of her life, as well as the estate and transfer inheritance taxes. The court rejected this claim and claimant appealed. *Held*: Affirmed. The provisions of the will covered only the usual type of taxes due and payable out of the estate at the time of decedent's death and not income taxes thereafter payable by the beneficiary. In re *Nevil's Estate*, 367 Pa. 30, 79 A.2d 415 (1951).

Courts should not remake a will to provide by conjecture what the testator might have said if he had foreseen events occurring subsequent to his death, or to escape what seems to be an undesirable result. In re *Cosgrave's Will*, 225 Minn. 443, 31 N.W.2d 20, 1 A.L.R.2d 175 (1948). In respect to the payment of taxes, as in other provisions, the controlling consideration should be the intention of the testator. *Banker's Trust C. v. Hess*, 2 N.J. Super. 308, 63 A.2d 712 (1949); *National State Bank of Newark v. Morrison*, 7 N.J. Super. 333, 70 A.2d 888 (1949). The intent of the testator to make a legacy free of taxes must clearly appear, but a few simple words will suffice to indicate such intent. *Starr v. Watrous*, 116 Conn. 448, 165 Atl. 459 (1933). New York seems to be the only jurisdiction which has previously litigated the precise issue involved, and it was there decided that in the construction of a will the words "any and all taxes" does include the payment of subsequent income taxes. In re *Ball's Will*, 24 N.Y.S.2d 432 (Surr. Ct. 1940). Where the income tax is to be paid by the estate, such payment is income to the beneficiary in the amount that his tax liability is discharged thereby. *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716, 49 S.Ct. 499, 73 L. Ed. 918 (1929). Where the income tax due from the beneficiary of a trust is paid by the trustee out of income and only the remainder of the income is paid over to the beneficiary, the beneficiary is required to include in gross income the amount of

income tax thus paid by the trustee. *Bergan v. Commissioner*, 80 F.2d 89 (2nd Cir. 1939).

Some problems in the computation of the beneficiary's income tax by a trustee are foreseeable. However, there is no fundamental difference, in a broad sense, between the income tax problem involved in the case being noted and that of cases dealing with covenants and agreements by lessees to pay all taxes normally required to be paid by the lessor, which have been held to include income taxes. *Philadelphia, Germantown & Norristown R. v. Philadelphia & Reading Ry. Co.*, 265 Pa. 325, 108 Atl. 528 (1919); In re *Central of Ga. Ry Co.*, 47 F. Supp. 786, (S.D. Ga. 1942). Under the decision in the principal case the $7,000 the beneficiary is to receive monthly is not free and clear of any and all her debts, contracts and engagements, nor free from any and all taxes, and this is contrary to what the plain meaning of the words of the testator would indicate he intended. The general principle in the construction of wills is to lend efficacy to the intent of the testator, within lawful limitations, regardless of their difficulty of application. A disregard of the apparent intention of the testator is not justified merely because of the difficulty of application of those intentions.

SANFORD M. FITZSIMMONS.

WILLS—DISPOSITION OF PROPERTY BY LIFE TENANT UNDER POWER OF APPOINTMENT

Grantor and his wife, joint owners of land, executed a joint will under which the survivor took a life estate in all their property, with complete power of disposition, and with the remainder going to their issue upon death of the survivor. The wife died, leaving one son, the appellant, and the grantor subsequently executed another will, leaving his entire estate to appellant. In 1948, appellant killed his father and later confessed that he committed the act for the purpose of inheriting the property. A commissioner in chancery denied the son's claim to the property on the basis of a statute prohibiting a devisee from acquiring property from a testator whom he had killed (VA. CODE § 64-18 (1950)), holding that the father had exercised a valid power of appointment given to him under the joint will in disposing of the property by his own will. The son appealed. *Held*: Reversed. The father's power to dispose was wholly *inter vivos*, and the son took the remainder in fee in his mother's interest, which had vested in him under his mother's will upon the termination of the father's life estate. *Blanks v. Jiggetts*, 64 S.E.2d 809 (Va. 1951).

In Virginia, proof that one kills a testator with the intent to obtain his estate is sufficient to cause a forfeiture. *Ward v. Ward*, 174 Va. 331, 6 S.E.2d 664 (1940). Thus the question in this case turned upon whether grantee took from his father or from his mother. No special mode is necessary to execute a power of appointment unless there is a provision in regard thereto in the instrument creating the power; and in the absence of such provisions the power may be executed by deed, will, or other simple writing, sufficient as regards the subject matter. *Goodloe v. Woods*, 115 Va. 540, 80 S.E. 108, 20 A.L.R. 390 (1913). It is not necessary for a donee given such a power to expressly say that his will is made in pursuance of the power vested by the power of appointment. *Thorndike v. Reynolds*, 22 Gratt. (Va.) 21 (1872). See also *Mutual Life Ins. Co. v. Shipman*, 119 N.Y. 324, 24 N.E. 177 (1890). A general power of appointment usually enables the donee of the power to appoint to anyone he pleases, including himself. *Morgan v. Cimmissioner*, 309 U.S. 78, 60 S.Ct. 424, 84 L. Ed. 585 (1940). A special power is one which the donee may exercise in favor of certain specified persons or classes. *Greenway v. White*, 196 Ky. 745, 246 S.W. 137 (1922). However, the majority rule is that a life estate with a remainder over will not be enlarged to a fee, nothwithstanding the life tenant's power to dispose of the fee. *Carroll v. Herring*, 180

N.C. 369, 104 S.E. 892 (1920). See also *Downey v. Borden*, 36 N.J.L. 460 (1872). The minority view is that where an absolute power of disposition is added to a life estate, it becomes a fee. Bradley v. Carnes, 94 Tenn. 27, 27 S.W. 1007, 45 Am. St. Rep. 696 (1894); *Randall v. Harrison*, 109 Va. 686, 64 S.E. 992 (1909). The minority rule seems to prevail in Virginia, although there are cases which seem to conflict. *Miller v. Potterfield*, 86 Va. 876, 11 S.E. 486, 19 Am. St. Rep. 919 (1890); *Davis v. Kendall*, 130 Va. 175, 107 S.E. 751 (1921).

In the instant case the Virginia court apparently overlooked the fact that the grantor had a general power of appointment under his wife's will, and his power of disposal was not limited. By executing his second will, grantor exercised the power to dispose of his interest in his wife's estate by granting the whole to the appellant in fee simple. This act followed the provisions of his wife's will, and did not conflict with VA. CODE § 55-7 (1950), which provides that where one holds a life estate with express or implied power to dispose of the land by deed or by will, the remainder interest shall be defeated only to the exent that the life tenant exercises that power. It is submitted that the grantor, by his subsequent will, disposed of all the property held jointly by him and his wife, under the power granted in their joint will, and that the appellant was not entitled to the property.

RICHARD S. HOOVER.