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Recent Cases

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RECENT CASES

CONSTITUTIONAL LAW—MILITARY JUSTICE—CIVILIAN ARMY EMPLOYEE NOT SUBJECT TO JURISDICTION OF MILITARY COURT IN NON-CAPITAL CASE—Petitioner was a civilian. He was employed by the United States Army as an auditor in Berlin. While stationed there, he was convicted, after a plea of guilty, of three acts of sodomy, a non-capital offense. He was sentenced to serve a prison term of five years. While he was serving his term, he filed a petition for a writ of *habeas corpus* in the United States District Court for Colorado. When the petition was denied in the district court, he appealed to the Court of Appeals for the Tenth Circuit. Prior to argument the Supreme Court granted certiorari. The order of the district judge denying the writ of *habeas corpus* was reversed; *held*, the Constitution does not grant Congress the power to subject civilian employees of the government to military court martial jurisdiction for non-capital offenses. *Wilson v. Boblender*, 80 Sup. Ct. 305 (1960).

After World War II defense policies required the stationing of many servicemen and civilian employees overseas. Travel by dependents was encouraged as a morale factor and soon many military-civilian communities took form. The Uniform Code of Military Justice [ART. 2 (11), c. 169, 64 STAT. 109 (1950), 10 U.S.C. § 802 (11) (Supp. IV, 1957)] provides that civilians employed by the military services or accompanying them overseas can be tried by court-martial for offenses committed by them overseas. The power of Congress “. . . to make rules for the government and regulation of the land and naval forces”. [ART. I, § 8, c. 14] is the basis for this legislation. The crucial question in the principal case concerned the meaning of “land and naval forces”.

The United States Supreme Court first considered the question in *United States v. Quarles* [350 U. S. 11 (1955) popularly known as the *Toth* case]. *Toth* was a discharged airman who was arrested in Pittsburgh and flown to Korea to stand trial for the alleged murder of a Korean committed while *Toth* was stationed overseas. In sustaining the grant of a writ of *habeas corpus*, the Court held that a civilian was entitled to be tried by a constitutional court established under Article III with the added protection of the Bill of Rights. The “Necessary and Proper” clause [ART. I, § 8, c. 18] cannot be used to expand the meaning of “land and naval forces” to include civilians. Military tribunals must be restricted to the jurisdiction necessary for maintaining discipline.

The decision in *Toth* was limited in *Reid v. Covert*, [351 U. S. 487 (1956) and *Kinsella v. Krueger*, 351 U. S. 470 (1956)] where the Court upheld murder convictions of two dependents by a military court. Dependency was a prime factor in the Court's consideration. On rehearing in the 1956 Term these decisions were reversed in *Reid v. Covert* [354 U. S. 1 (1957)] when the Court concluded that dependents accompanying the armed forces could not be subjected constitutionally to court-martial jurisdiction for capital offenses. The criterion established was based on the nature of the offense rather than on the status of the offender, leaving open the question of non-capital offenses committed by dependents and all offenses by civilian employees. The principal case and the companion cases, *Grisham v. Hagan*, [80 Sup. Ct. 310 (1960)] *McElroy v. United States* [80 Sup.

Ct. 305 (1960)] dealing with civilian employees and *Kinsella v. United States* [80 Sup. Ct. 297 (1960)] dealing with a non-capital offense by a dependent, seemingly have closed the question. Mr. Justice Clark, speaking for the Court in all four cases, could find no constitutional power within the scope of Article I which would enable Congress to subject the aforementioned classes of civilians to trial by court-martial rather than by jury. Status of the offender was made the test.

Reassuring as these decisions are, it is still regrettable that the Court did not completely foreclose further consideration of the fundamental problem by considering the government's contention in the principal case that, since Berlin is "occupied territory", the petitioner was amenable to the jurisdiction of the military government. See Respondent's Brief, pp. 8-23. If Berlin is not "occupied territory" for all purposes, and this is arguable, status as a civilian should preclude military jurisdiction. Assuming that it is "occupied territory", the further consideration of unjust and illegal discriminations in the administration of the governing laws between persons in similar circumstances might well raise the problem of due process. See *Yick Wo v. Hopkins*, 118 U. S. 356 (1886). Any critical analysis of the government's arguments must necessarily leave one with the impression that the government exploited the fear that an offender would go unpunished. The decisions in the cases cited herein justify this fear. Nevertheless, the fear does not justify infringements of constitutional guaranties.

JOHN J. O'CONNELL

COPYRIGHT—LITERARY PROPERTY—GOVERNMENT OFFICIAL RETAINS LITERARY PROPERTY RIGHT IN SPEECHES DELIVERED WHILE IN GOVERNMENT EMPLOY—Defendant was a Vice Admiral of the United States Navy. He delivered certain speeches on matters of public interest. Some of them dealt with ideas which the Admiral developed in connection with his activities as a Naval Officer. The text of the speeches had been distributed to members of the press and virtually all of the speeches had been distributed as press release publications of the Defense Department. Most of the speeches bore the official imprimaturs of the Defense Department and the Atomic Energy Commission. The plaintiff, a publishing house, requested copies of the speeches, indicating their desire to quote from them in a forthcoming book. The defendant supplied the copies requested, but stated that permission to quote could not be granted because they were to be included in a book to be published in the near future. The plaintiff instituted an action for declaratory judgment. They claimed that since the speeches were made on topics which were the outgrowth of the defendant's government activities and since they were in part prepared with the aid of government facilities, the defendant had no literary property in these speeches and may not secure a copyright on them. *Held*, the speeches were not in the public domain, but remained the property of the author to the extent to which the common law and the law of copyright otherwise protected him. *Public Affairs Associates, Inc. v. Rickover*, 177 F.Supp. 601 (Dist.Ct.D.C. 1959).

In reaching this conclusion the court based its decision largely on the holdings in *United States v. Dubilier Condenser Corporation* [289 U.S. 178 (1933)] and *Sherrill v. Grieves* [LVII Washington Law Reporter 286 (1929)]. In the *Dubilier* case it was held that an inventor employed by the Bureau of Standards was able to secure a patent on his invention. The court so held in spite of the fact that government facilities and materials were used in developing the invention which was parallel to, although not actually a part of, his work for the government. In the *Sherrill* case it was held that an instructor at an Army school, who reduced his lectures to writing and arranged them for publication had a right to secure a copyright on the book and that the work was not a Government publication or in the public domain.

It should be noted that by the promulgation of Executive Order No. 10096 the federal government has prohibited a recurrence of the *Dubilier* situation. This order gives the government the entire right to all inventions made by government employees during working hours and with government facilities. However, it may be significant that no such official pronouncement has been made with respect to ownership of material written by government personnel. The absence of such may serve as an indication of the willingness of the government to abide by existing judicial precedents. It should also be noted that in both the *Dubilier* case and the *Sherrill* case the persons involved were public servants and not high ranking officials and as such may not owe the same measure of responsibility to the public as the defendant here involved. In the case of such high ranking officials it becomes more difficult to distinguish between acts performed within the capacity of employment and those performed beyond the scope of such employment.

The plaintiff contended that because the defendant had freely distributed copies of his speeches to the press and public he had lost his property right therein. The court considered this contention to be without merit. The court considered the defendants activity as constituting "limited publication" as contrasted to "general publication" and as such the works did not become dedicated to the public.

At common law the exclusive right to copy existed in the author until he permitted a general publication. *Caliga v. Inter Ocean Newspaper Company*, 215 U.S. 182 (1909). The regulations of the Copyright Office were promulgated under statutory authority. 17 U.S.C., § 8. Subsections (1) and (2) of section 202.2A of these regulations provide generally that a copyright is either secured, or the right to secure it is lost, at the date of publication. Under this regulation a work is considered "published" when it is "placed on sale, sold or publicly distributed". However the question of what actions are necessary to consider a work "publicly distributed" is one which has not been resolved by the courts. In *White v. Kimmel* [193 F.2d 744 (C.A. 9th, 1952)] it was held that putting 200 copies of a manuscript into circulation over a long period of time amounted to unlimited or general publication. However in a more recent case it was held that circulating 2000 printed copies of a song did not amount to the necessary general publication of the song as to dedicate it to the public. *Hirshon v. United Artists Corporation*, 100 App. D.C. 217, 243 F.2d 640 (1957).

The delivery of a speech, that is reading it to an audience in public, has been held not to amount to a publication of the speech in the copyright sense of

dedicating the material to the public domain. *Nutt v. National Institute, Incorporated*, 31 F.2d 236 (C.A.2d, 1929). In *American Tobacco v. Werckmeister* [207 U.S. 284 (1907)] the intention of the author in disseminating his work was held to govern in deciding whether or not the work has become common property.

It is submitted that the District Court was correct in allowing the defendant to retain his literary property right in his speeches. His intention, when he distributed his speeches to members of the press and public, was merely the performance of a courtesy, not a dedication to the public. Such circulation unless accompanied by the intent to abandon should not amount to a public dedication. The equities involved should be balanced. The public responsibilities of a high government official should be weighed against the benefits to be derived by the public by encouraging activities such as were illustrated here. It is submitted that the latter should prevail.

JOSEPH J. NOTARIANNI

TORTS—INDEPENDENT CONTRACTORS—PRINCIPAL PROPRIETOR RESPONSIBLE FOR TORT RISKS TO THIRD PERSONS WHEN HAZARDS ARE UNUSUAL—The Parking Authority hired an independent contractor to tear down two brick buildings on premises where the Authority planned to build a parking lot. The contractor used a 3500 pound swinging ball to knock down the last standing wall of a building next to the one occupied by the plaintiffs. The ball was swung so inexpertly by the contractor's workmen that bricks were knocked onto the roof of the plaintiffs' building and through the roof into the building itself. Much damage was done to the structure of the building and to a stock of goods stored inside. There were two plaintiffs, the owner of the building and the storekeeper whose goods were damaged. The plaintiffs joined the Parking Authority and the demolition contractor as defendants. The action against the Parking Authority was dismissed by the trial judge at the close of the plaintiffs' case. The judge ruled that the Authority had not exercised control over the work that was being done. The jury found for both plaintiffs against the contractor, and judgments were entered on the verdicts. The plaintiffs appealed from the dismissal. The Appellate Division ordered a new trial. On appeal from that judgment, *held*, judgment affirmed; if the nature of the work involves special risk of harm to others, the landowner cannot shift responsibility for the injuries through an independent contractor. *Majestic Rlty. Associates v. Toti Contracting Co.*, 30 N.J. 455, 153 A.2d 321 (1959).

It is hornbook law that a proprietor is not responsible for the torts of an independent contractor. The rule is old. *Blake v. Ferris*, 5 N.Y. 48, 55 Am. Dec. 304 (1804); *Maguire v. Grant*, 25 N.J. Law 356, 67 Am. Dec. 49 (1856); *Ellis v. Sheffield Gas Consumer Co.*, El. & Bl. 767, 118 Eng. Repr. 955 (1853). At the turn of the century and before the days of casualty insurance there was a trend in the case law against commercial proprietors who had contracted for repair jobs on premises where the proprietors were carrying on business as usual. See *Rait v.*

New England Furniture & Carpet Co., 66 Minn. 76, 68 N.W. 729 (1896); *Atlantic Transport Co. v. Coneys*, 82 Fed. 177 (C.A. 2d, 1897). Under the circumstances in these cases the courts agreed there was evidence to support findings that the proprietors could control the conduct of the contractors' workmen just as if the men were employees of the proprietors. When independent contractors are protected by adequate liability insurance, principal proprietors will not have to underwrite the tort costs of the contractors' employees. Nevertheless, some contractors still may be judgment proof. When that is so, there is vitality still to the power of control analogy, especially when proprietors do business as usual on the premises where repair jobs are in progress. See *Feast v. Andies Candies, Inc.*, 329 Ill. App. 535, 69 N.E. 2d 732 (1946); *Pitzer v. Sears Roebuck Co.*, 66 Ohio App. 35, 31 N.E. 2d 450 (1940).

Although courts have tightened the exceptions to the general rule, instances do arise where the insurance protection of the independent contractor is not adequate to cover the cost of the tort risks. The principal proprietor can be reached, it is said, when he employs an incompetent contractor. *Ozan Lumber Co. v. McNeely*, 214 Ark. 657, 217 S.W. 2d 341 (1949). Frequently courts labor to explain that there is something special in the nature of the project so that the doing of the work invites comparison with nuisances [*Terranella v. Union Building and Construction Co.*, 3 N.J. 443, 70 A. 2d 753 (1950)] or that the work is inherently dangerous. Demolition jobs like the one in the principal case are usually within that "inherently dangerous" category. *Whalen v. Shivek*, 326 Mass. 142, 93 N.E. 2d 393 (1950); *Stubblefield v. Federal Reserve Bank*, 356 Mo. 1018, 204 S.W. 2d 718 (1947). Highway excavation jobs may be dangerous like demolition work. *Cage v. Creed*, 308 S.W. 2d 78 (Tex. Civ. App. 1957); *Downey v. Union Paving Co.*, 184 F.2d 481 (C.A. 3d, 1949). The hauling of petroleum products is a dangerous business, and a refining company cannot escape responsibility for the torts of independent truckowners. *Montgomery v. Gulf Refining Co.*, 168 La. 73, 121 So. 578 (1929); *Gulf Refining Co. v. Huffman & Weakley*, 155 Tenn. 580, 297 S.W. 199 (1927). The proprietor of an amusement park must underwrite the tort risks of a concessionaire. *Wilson v. Norumbega Park Co.*, 275 Mass. 422, 176 N.E. 514 (1931). Sometimes the proprietor can be charged as an adjacent property owner who has not himself protected the public against the work that was progressing or against conditions which were still dangerous. *Lamb v. South Unit Jehovah's Witnesses*, 232 Minn. 259, 45 N.W. 2d 403 (1950); *Lipman v. Well-Mix Concrete*, 138 N.Y.S. 2d 316 (1950); cf. *Vale v. Bonnett*, 89 App. D.C. 116, 191 F. 2d 334 (1951).

That the principal proprietor should be charged with tort risks like these is not an unreasonable obligation. The event out of which the injuries were sustained are related to the proprietors' interests. The moral is that proprietors should not do business with independent contractors whose risk-bearing resources are inadequate.

G. EUGENE ANTONIACCI

TORTS—LANDLORD AND TENANT—LIABILITY OF LANDLORD TO TENANT'S FAMILY—BREACH OF WRITTEN COVENANT TO REPAIR—The lessee rented a one-family house for the summer season. The lease, to which the lessee's wife was not a party, provided that the lessor would present the house in good order and repair at the beginning of the term. The living quarters were on the first floor. The second story was an attic, the use of which was an incident of the lease. Prior to the letting, the lessor undertook to improve the attic as a "do it yourself project." A plaster board covered a portion of the stairwell at the attic floor level. The lessee's wife, during her initial use of the attic, stepped on the plaster board. It collapsed and she fell down to the living-room floor. In the action that followed, the trial judge dismissed the suit on the ground that the wife was not a party to the contract. On appeal, *held*, judgment reversed and case remanded; though the wife was not a party to the lease she could recover in a tort action for breach of a covenant to have the premises in good repair. The question whether the lessor was negligent in failing to warn of dangerous condition was left to the jury. *Faber v. Creswick*, 156 A.2d 252 (N.J. 1959).

Except for an occasional decision to the contrary, American courts followed the traditional common law rule that the lessor makes no implied warranty that leased premises are reasonably fit for occupation. *Coggins v. Gregorio*, 97 F.2d 948 (C.A. 10th, 1938); *Ingalls v. Hobbs*, 156 Mass. 348, 31 N.E. 286 (1892). This traditional doctrine, which is aptly termed *caveat lessee*, had given rise to the general rule that a landlord is not liable to his tenant for injuries resulting from defective conditions existing on the premises at the time the lease is executed, even though landlord agrees to repair specifically. *Valin v. Jewell*, 88 Conn. 151, 90 Atl. 36 (1940). However the rule has been greatly abrogated and subjected to an ever increasing number of exceptions.

The most significant of these exceptions subjects the lessor to tort liability for breach of a contract to repair. Damages are recoverable for the sustained injury. The obligation extends to third persons and members of the family as well as the tenant. *Scibek v. O'Connell*, 131 Conn. 557, 41 A. 2d 251 (1945); *Page v. Ginsberg*, 345 Ill. App. 68, 102 N.E. 2d 165 (1951); *Miles v. Boston, R.B.&L.R. Co.*, 274 Mass. 87, 174 N.E. 200, 202 (1931); *Alaimo v. Du Pont*, 4 Ill. App. 2d 85, 123 N.E.2d 583 (1955); *Mariotti v. Berns*, 14 Cal. App. 2d 666, 251 P. 2d 72 (1952). If the contract to repair is said to subject the landlord to tort liability, a third person lawfully on the premises is owed the same duty as the tenant. *Singer v. Eastern Columbia, Inc.*, 72 Cal. App. 2d 402, 164 P. 2d 531 (1945); 2 RESTATEMENT, TORTS § 357. Originally courts took no cognizance of the fact that injuries might result to the tenant or to the members of his family and recovery was confined to the cost of making the particular repairs. *Tuttle v. Gilbert Mfg. Co.*, 145 Mass. 168, 13 N.E. 465 (1887); *Caudill v. Gibson Fuel Co.*, 185 Va. 233, 38 S.E. 2d 465 (1946).

Courts justified the old common law rule because the landlord did not have access to the premises to make repairs. But, when there is a contract to repair courts recognize now that the landlord does have control over the premises to permit him to effect the repair. *Lommori v. Milner Hotels*, 63 N.M. 342, 319 P.2d 949 (1957); *Saturini v. Rosenblum*, 217 Minn. 147, 14 N.W. 2d 108 (1944); *Baun v. Bahn Frei Mutual Building and Loan Assn.*, 237 Wis. 117, 295 N.W. 14 (1940). Massachusetts and Illinois courts spell control from the obliga-

tion to maintain; the landlord subjects himself to liability when he violates his obligation to maintain the premises in safe condition and does a bad job or delays in making a specific repair. *Ciskoski v. Michalsen*, 18 Ill. 387, 152 N.E.2d 479 (1958); *Ryerson v. Fall River Philanthropic Burial Society*, 315 Mass. 244, 52 N.E.2d 688 (1943). Some states subject the landlord to tort liability without any consideration of the control element. Thus the Maryland courts hold that where there is a contract to repair and in the absence of contributory negligence on the part of the tenant, the landlord is liable in tort for injuries resulting from a negligent failure to repair a defective condition, if after a notice to the landlord of existing defect, he fails to repair or unreasonably delays in making the repair. *McKenzie v. Egge*, 207 Md. 1, 113 A. 2d 95 (1955); *Miller v. Howard*, 206 Md. 148, 110 A.2d 683 (1955); *Thomson v. Clements*, 96 Md. 196, 53 Atl. 919 (1903). Connecticut decisions show a similar view, *Papallo v. Meriden Savings Bank*, 128 Conn. 563, 24 A.2d 472 (1942); *Desmarchias v. Daly*, 135 Conn. 623, 67 A.2d 549 (1949), but they also hold that a specific covenant to repair places the lessor on constructive notice that the premises are in need of repair. *Scibek v. O'Connell*, *supra*. The New York courts hold that if the landlord acquires knowledge of a defective condition or is chargeable with such knowledge, he is subject to liability for injuries sustained because of his failure to correct that condition. *De Clara v. Barber Steamship Lines*, 309 N.Y. 620, 132 N.E.2d 871 (1956). In the District of Columbia the landlord can be committed to responsibility in tort by an express contract to repair, but only when the repair job is inadequate. *Bowles v. Mahoney*, 91 App. D.C. 155, 202 F.2d 320 (1951). So too the landlord can be committed in tort without an express contract when he undertakes to do a job, and the work is done carelessly. *Hanna v. Fletcher*, 97 App. D.C. 310, 231 F.2d 469 (1956). There are other jurisdictions in which the landlord, who may be liable in tort for breach of a covenant to repair, is responsible also for injuries resulting from negligent repairs even when there is no contract to repair. *Folley v. United Bldg. & Loan Assn.*, 117 N.J.L. 54, 186 Atl. 591 (1936); *Green v. Jefferson County Bldg. & Loan Assn.*, 241 Ala. 549, 3 So. 2d 415 (1941).

Another significant exception to the common law rule is one which subjects the landlord to tort liability for failure to reveal concealed dangerous conditions of which the lessor has actual knowledge [*Turner v. Lischner*, 52 Cal. App.2d 273, 126 P.2d 156 (1942); *Clark v. Sharpe*, 76 N.H. 446, 83 Atl. 1090 (1912)] or if he has knowledge of facts which would lead a reasonable man in his position to suspect that a danger exists. *Kossine v. Styliano*, 40 Ca. App. 2d 721, 105 P.2d 952 (1940); *Sarle v. Kuklo*, 98 A.2d 107 (N.J. 1953). At least one jurisdiction imposes a duty on the lessor to use reasonable care in inspecting the premises to locate concealed dangers. *Wilcox v. Himes*, 100 Tenn. 538, 46 S.W. 297 (1898). Most jurisdictions hold that if the tenant is aware of the dangerous condition there is no recovery. *Faucet v. Provident Mut. Life Ins. Co. of Philadelphia*, 244 Ala. 308, 13 So. 2d 182, 184 (1943); *Lowler v. Capitol City Life Ins. Co.*, 62 App. D.C. 391, 68 F.2d 438 (1933).

Many states are realizing that present day social and economic conditions demand a change of the substantive law in this field, and that changes in the common law rules would come too slowly by judicial decision. These states have enacted statutes which impose liability on the landlord for failing to keep the premises in repair. In such states, some courts hold that a violation of these

statutory enactments subject the lessor to tort liability. *Altz v. Leiberson*, 233 N.Y. 16, 134 N.E. 703 (1922); *Malosh v. Thompson*, 265 Mich. 320, 251 N.W. 346 (1933); *Delaney v. Supreme Inv. Co.*, 251 Wis. 374, 29 N.W. 2d 754 (1947). Michigan courts hold that failure to comply with such statutes is negligence *per se*. *Annis v. Britton*, 232 Mich. 291, 205 N.W. 128 (1925). Other statutes provide that the lessor keep the premises in repair, and expressly provide for recovery in tort by those persons injured on the leased premises. GA. CODE ANN. §§ 61-111, 61-112 (1937); LA. CIV. CODE ANN. ARTS. 2322, 2693 (1945).

STANLEY J. PURZYCKI

WILLS—UNDUE INFLUENCE—WIFE OF TESTATOR CAN BE PARTY IN INTEREST IF WILL AFFECTS HER STATUTORY SHARE—The widow of the testator, alleging fraud and undue influence, filed a *caveat* against his will, in which the deceased acknowledged an indebtedness in excess of \$30,000 to his son and daughter and directed that said sum be made a first charge upon his property. The defendants were a brother of the testator and the testator's son and daughter by a previous marriage. They moved to dismiss the *caveat* on the ground that the plaintiff was not "a party in interest" within the meaning of Section 19-307 of the District of Columbia Code. The District Court dismissed the *caveat* and the plaintiff appealed. On appeal, *held*, judgment reversed; the widow had a sufficient interest in the estate of the testator because the dollar value of her share would be substantially depreciated if the will were admitted to probate. *Rothenberg v. Rothenberg*, Court of Appeals, District of Columbia, No. 15098.

Although by express statutory enactment any party in interest can file a *caveat* to a will upon or prior to a hearing to admit the will to probate, the Code is silent as to who constitutes a party in interest. Nevertheless, courts have not experienced much difficulty when faced with the issue. In general the decisions simply restate the statute and hold that any interested person may file a *caveat* to a will. *Naylor v. Mealy*, 62 App. D. C. 321, 67 F. 2d 693 (1933). Heirs at law and next of kin, administrators of prior wills, and persons named as beneficiaries under a prior will all have been deemed to have a sufficient interest to file a *caveat*. *Werner v. Frederick*, 68 App. D. C. 158, 94 F. 2d 627 (1937). However, there are some limitations. One who accepts benefits under a will, in the absence of fraud, is estopped thereafter to file a *caveat*. *Utermehle v. Norment*, 197 U. S. 40 (1905). Similarly, the interest which a person must possess must be such that even had the testator died intestate, he would have been entitled to a distributive share in the estate. *Angell v. Groff*, 42 App. D. C. 198 (1914). This has been taken to mean that there must be a distributive share different from that to which he would be entitled if the will were held valid. Using such a test as its criterion, the District Court for the District of Columbia has held that a husband of a testatrix is not such an interested person as to entitle him to file a *caveat* since he was entitled to his statutory share of the estate even though he

has been disinherited by his wife under Section 18-211. *Kimberland v. Kimberland*, 92 App. D. C. 145, 204 F. 2d 38 (1953). In dismissing the *caveat* the court emphasized that the estate of the decedent should not be subject to unnecessary attack except by one who, if the attack is successful, would have some legal right upon the estate.

On the facts the *Kimberland* case closely resembles the present one. There, as in the instant case, children of the deceased offered a will for probate and the surviving spouse filed a *caveat*. In both cases the standing of the spouse to file a *caveat* was questioned. And both complainants argued that if their complaints were allowed, they would be entitled to a different share than allowed them in the wills. In the *Kimberland* case, however, the alleged different share was based on the possibility that the surviving spouse might be named administrator of the estate of the deceased. The court rejected the contingency as too remote to predicate standing. On the other hand, in the present case the court found that "a very different element" was presented on the record. The different element was the attempt of the executor to list among the debts of the testator two large amounts allegedly owed to his son and daughter, both of which might have been barred by the statute of limitations. If allowed, these debts would have reduced the value of the widow's share by as much as \$10,000. Hence, the court distinguished the two cases on their facts and found for the caveator.

In effect the court did more than to distinguish *Kimberland* from the present case. Sometimes, the court said, a surviving spouse can be a party in interest even though the statutory interest of the spouse must be protected under the Code. If that statutory interest can be affected by the dispositions in the will, the surviving spouse can protest against the validity of the document.

DONALD R. GREELEY